

5 Reasons Why We fell in Love
With the Durable Statutory Short Form Power of Attorney
and
Statutory Major Gifts Rider Form

By Gary E. Bashian, Esq., Michele J. Zerafa, Esq., and Alessia P. Mariani, Esq.

In the words of Elizabeth Barrett Browning, “How do I love thee? Let me count the ways.”

Effective September 1, 2009, the General Obligations Law (hereinafter “GOL”) has been amended, updated and refined to provide significant reforms to the use of Powers of Attorney in New York and to reflect the complexities that surround the use of Powers of Attorney in financial and estate planning matters.

The new Durable Statutory Short Form Power of Attorney appears to be a simple document. This simplicity, however, belies the extraordinary power that the instrument has for its popularity has led to its use for transactions far more complex than were originally contemplated by the law, particularly in the areas of estate and Medicaid planning. The instrument’s power is also demonstrated by the potential authority the agent can hold. This can include the power to transfer assets that would pass by will as well as those that usually pass outside a will, such as joint bank accounts, life insurance proceeds, and retirement benefits. The principal can delegate these sweeping powers to the agent now more fully recognizing their scope.

Despite the broad authority associated with this important and popular tool for financial management, the GOL which governs powers of attorney has been, up to now, silent as to a number of matters. These omissions include descriptions of the agent’s fiduciary obligations and accountability, the manner in which the agent should sign documents n behalf of the principal, the limits of the agents authority to make gifts to third parties and to himself or herself, the manner in which the principal can revoke the document, and the circumstances under which a third party may reasonably refuse to accept a power of attorney.

As a result of its study, the Law Revision Commission concluded that while a Power of Attorney should remain an instrument flexible enough to allow an agent to carry out the principal’s reasonable intentions, the combined effect of its potency and easy creation, and ambiguities about the authority to transfer assets, have frustrated the proper use of the power of attorney, particularly when the principal is somewhat incapacitated, elderly or fragile, and, can no longer take steps to ensure its proper use. Chapter 644 addresses these statutory gaps and clarifies the ambiguities to assist parties creating Powers of Attorney and third parties asked to accept them.

The following are 5 major reasons why the new Durable Statutory Short Form Power of Attorney and Statutory Major Gifts Rider are significantly better than their predecessor. The Five Loving Reasons Are:

1. **New Execution Requirements Clearly Show The Importance Of Powers Given To Agent By Principal**

- To qualify as a statutory short form POA, an instrument must meet the requirements of GOL §5-1513. The principal and agent's signature must be acknowledged.
- The statutory short form is not valid until it is signed by both the principal and agent, whose signatures are duly acknowledged in the manner prescribed for the acknowledgement of a conveyance of real property.
- These heightened execution requirements for both the Statutory Short Form Power of Attorney and the Statutory Major Gifts Rider reflect the fact that the Power of Attorney is potentially as powerful, if not more so, than a Will as a means for transferring assets since a Will transfers only probate assets, while use of the Power of Attorney may also result in a change of beneficiary on non-probate assets, i.e., life insurance, retirement plans and joint accounts.

2. **New Special Form for Major Gifts**

- Chapter 644 requires that a grant of authority to make major gifts (being those in excess of \$500.00) must be set out in a Statutory Major Gifts Rider to a Statutory Short Form Power of Attorney. The Statutory Major Gifts Rider requires the signature of the principal to be duly acknowledged and witnessed by two persons who are not potential donees. (In the alternative, the principal may grant such authority to the agent in a Non-Statutory Power of Attorney and Non-Statutory Major Gifts Rider executed in the same manner as a Statutory Major Gifts Rider which must comply with new statutory typesize, warnings and execution requirements.)
- The creation of a Statutory Major Gifts Rider or its alternative Non-Statutory Power of Attorney allows the principal to make an informed decision as to whether the agent has the authority to make gifts or other transfers of the principal's property to third parties as well as to the agent. The execution requirements alert the principal to the gravity of granting the agent this type of authority. An agent acting pursuant to authority granted in a Statutory Major Gifts Rider or a Non-Statutory Short Form Power of Attorney and Non Statutory Major Gifts Rider must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests as that term has been defined in the Ferrara case decided on June 29, 2007.

3. **New Clarity of Statutory Provisions Relating to Major Gifts**

- All statutory provisions relating to major gifts and property transfers have been consolidated in a new GOL §5-1514 rather than spread throughout the statute and some case law.
- Powers of Attorney often serve two different purposes: 1) management of the principal's everyday financial affairs, and 2) reorganization or distribution of the principal's assets in connection with financial and estate planning. The GOL has allowed the use of the Statutory Short Form Power of Attorney and the Statutory Major Gifts Rider for both purposes.

(The former statutory language and statutory form made it difficult for a principal to make an informed decision about what, if any, authority he or she wants to give the agent with respect to making gifts and transferring property interests in connection with financial and estate planning.)

4. **New Signature Acceptance by Third Parties**

- One of the goals of the original creation of a Statutory Short Form was to encourage financial institutions to accept such documents. Some institutions instead required that the principal execute a document prepared by the institution. The use of the Durable Power of Attorney actually exacerbated the situation. If the financial institution would not accept a Statutory Short form Durable Power of Attorney and the principal had already lost capacity, serious difficulties could ensue because the principal could not legally execute another document.
- With the enactment of Chapter 644, no third party can refuse to honor a Power of Attorney or Statutory Major Gifts Rider without “reasonable cause.” Reasonable cause is now clearly defined in GOL §5-1504(1)(a) as:
 1. Refusal by agent to provide original/certified copy by an attorney or other governmental entity
 2. Referral in good faith of the principal to adult protective services
 3. Actual knowledge of a report to adult protective services alleging certain behavior by agent
 4. Actual knowledge of or reasonable basis to believe of the death of the principal
 5. Actual knowledge of or reasonable basis to believe that the principal is incapacitated in a non durable power
 6. Actual knowledge of or reasonable basis to believe principal was incapacitated when power was executed
 7. Actual knowledge of or reasonable basis to believe power was procured by fraud, duress or undue influence
 8. Actual notice of termination or revocation of power
 9. Refusal of title company to underwrite title insurance for a transfer of real property made pursuant to SMGR

5. **New Codification of Agent Responsibilities**

- Chapter 644 includes a statutory explanation of the agent’s fiduciary duties, codifying the common law recognition of an agent as a fiduciary. A notice to the agent is added to the statutory form explaining the agent’s role, the agent’s fiduciary obligations and the legal limitations on the agent’s authority. If the agent accepts the appointment, the agent must sign the power of attorney as an acknowledgement of the agent’s fiduciary obligations.
- Chapter 644 also permits the principal to appoint someone to monitor the agent’s actions on behalf of the principal and gives the monitor the authority to request that the agent provide the monitor with a copy of the

power of attorney and copy of the documents that record the transactions the agent has carried out for the principal. The monitor has statutory authority to bring on a special proceeding to compel the agent to comply.

PLEASE NOTE: IMPORTANT MODIFICATIONS TO CONSIDER ADDING WHEN EXECUTING A STATUTORY SHORT FORM POWER OF ATTORNEY UNTIL TECHNICAL CORRECTIONS BILL PASSES REGARDING REVOCATION

- It would be wise to add the following language under section (g) Modifications of the New York Power of Attorney Statutory Short Form
“Although this document revokes all powers of attorney I have previously executed, this document shall not revoke any powers of attorney previously executed by me for a specific or limited purpose, unless I have specified otherwise herein. It shall not revoke any IRS Form 2848 Power of Attorney, New York Form ET-14, and New York State POA-1-IND.”

Stay tuned, as next month we will discuss some of the ambiguities, where one needs to be wary, and additional modification options with the new Statutory Short Form Power of Attorney and Statutory Major Gifts Rider.