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A Look at the Implications of the New Power of Attorney Legislation

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A durable power of attorney ("POA") is an important tool in an estate planner's arsenal. It is frequently used to appoint an agent to act on a client's behalf for various legal and financial issues, particularly in the event of incapacity. Typically, the powers conferred are extremely broad, allowing the holder to act in the place and stead of the principal (the person who grants the power to the agent). Properly drafted, it frequently can be used to avoid costly and time consuming guardianship proceedings. Each state has its own requirements for a POA instrument.

New York's New Form of Power of Attorney

Amid concern that some individuals were misusing POAs, New York recently amended the statutory structure for POAs, effective for POAs executed on or after September 1, 2009. The changes are substantial. The new legislation leaves certain open questions that may be addressed in the future.

The statute provides, unlike prior law, that, unless it specifically states otherwise, a POA is presumed to be "durable." That is, it will remain valid after the incapacity of the principal, even if a guardian is later appointed by a court. It terminates if the principal, while competent, revokes it, or upon the principal's death. Under prior law, the principal had to designate specifically that the power would not terminate in the event of incapacity. There are also short term, temporary powers of attorney which are often used for certain designated transactions, such as to convey real estate, enforce contractual rights and the like.

A major change in the new legislation is that the POA must now be signed, dated and acknowledged (i.e., notarized) not just by the principal, but by the agent as well. Other states, such as Pennsylvania, have had this requirement as part of their law for many years. Previously, in New York, the agent was not required to sign the POA and was often unaware of its existence, and thus did not know that he or she could act, or, when the need arose, sometimes declined to accept this responsibility. The new law seeks to avoid these problems.

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If the agent is authorized to make "major gifts" (defined in the new statute as gifts totaling more than $500 per recipient), which may be advantageous for estate planning purposes, the POA must now also be accompanied by a special Statutory Major Gifts Rider ("SMGR"). Under prior law, one could incorporate this power into the regular POA instrument. The SMGR must now be signed and acknowledged by the principal, and the principal's signature must be witnessed by two witnesses, akin to the execution of a will.

A POA under the new regime is not effective until the agent has executed the document. At that point, unless it is a "springing" power, the agent has full rights and responsibilities. As before, the agent usually is given full financial authority over the principal's assets. An unscrupulous agent could immediately and improperly transfer or otherwise misuse the assets.

A springing power of attorney is a POA that takes effect at a future time. The practical difficulty with this form of a POA is the determination of the grantor's incapacity, because frequently

who's who

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health care providers do not wish to participate in making that determination. Having the agent make this determination defeats its purpose as there is a risk of abuse. An alternative is to have a third party make this determination in his or her sole and un-reviewable discretion, akin to a "protector" in European trusts. The new statute also introduces the concept of a monitor, who is empowered to act as a watchdog over the transactions made by the agent.

The new law authorizes the inclusion of provisions relating to health care billing and payment matters, but there is still some uncertainty as to whether this permits access to the necessary health care records. A separate form of authorization to release medical information solves that dilemma. POAs prepared under the new law do not grant the same authority as a health care proxy. Accordingly, if one wishes to appoint an agent to make health care decisions in the event of incapacity, a separate New York health care proxy (and, generally, a living will) are still required. This is true in many other states as well.

While the holder of a POA has always been deemed to be a fiduciary, New York's new law now provides for mandatory record keeping, the right of inspection, and provisions relating to judicial enforcement. The latter is similar to procedures set up in other states, such as Pennsylvania, except that in New York, the matter would be litigated in the general trial court (Supreme) and not in the Surrogate's Court, while in Pennsylvania exclusive jurisdiction over POAs is vested in the Orphan's Court. There are presently discussions in New Jersey about evaluating its statutory scheme in light of the changes in its neighboring states.

Selection of Agent is Key

These changes should be workable. As in the past, the critical determination is the selection of the proper agent—one the principal can truly trust, as the powers granted are typically quite broad and the consequences of misuse substantial.

Helpful Tip: *The new law seeks to strengthen the existing provisions requiring financial institutions (which now include not only banks, but securities firms and insurance companies as well) to accept the statutory short form POA, and prohibiting them from insisting on their own forms. The statute authorizes a special proceeding to compel the institutions to accept the statutory short form POA.*