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## **SIGNIFICANT CHANGES ENACTED TO NEW YORK STATE'S POWER OF ATTORNEY LAW.**

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Over the past two years, while the hot-button issues of TARP, healthcare and financial reform dominated our news, a less publicized debate was going on within our own New York State legislature, which twice enacted significant changes to New York's Power of Attorney Law. The first of these took effect on September 1, 2009 (the "2009 Changes"), and the second took effect on September 12, 2010 (the "2010 Changes"). These changes affect both the statutory short form and non-statutory power of attorney. The 2009 Changes completely overhauled many of the Power of Attorney regulations then in effect. However, after careful scrutiny by attorneys around the state and various bar associations, the 2009 Changes were assailed for the significant, adverse consequences they would have on commercial and government transactions not meant to fall under the purview of the new law. The New York State legislature was also faulted for enacting a provision that required any powers of attorney in effect upon the execution of a new or subsequent power of attorney to automatically terminate, even where the subsequent power of attorney conveyed separate powers.

Following complaints from attorneys and the various bar associations, a second round of changes (the 2010 Changes) were made and took effect this past September; they are effective retroactively for all powers of attorney given on or after September 1, 2009. Because of the extent of the 2009 Changes and the modifications enacted by the 2010 Changes, this article summarizes changes effectuated by both laws and clarifies the current requirements for a valid power of attorney.

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## **I. WHO IS EXCLUDED FROM THIS LAW?**

Unlike the law then in effect, the 2009 Changes applied to all powers of attorney granted, even those powers of attorney generally given through means other than a power of attorney form. As a result, no person or entity could legally act as an agent for anyone else in any commercial or real estate transaction unless the principal signed an actual power of attorney form in the form required by the new law. To rectify this egregious and unintended consequence, the 2010 Changes exclude the following powers of attorney from the current Power of Attorney Law<sup>ii</sup>:

1. a power of attorney given primarily for a business or commercial purpose, including without limitation:
  - (a) a power to the extent it is coupled with an interest in the subject of the power;
  - (b) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction;
  - (c) a power given to facilitate transfer or disposition of one or more specific stocks, bonds or other assets, whether real, personal, tangible or intangible;
2. a proxy or other delegation to exercise voting rights or management rights with respect to an entity;
3. a power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose;
4. a power authorizing a third party to prepare, execute, deliver, submit and/or file a document or instrument with a government or governmental subdivision, agency or instrumentality or other third party;
5. a power authorizing a financial institution or employee of a financial institution to take action relating to an account in which the financial institution holds cash, securities, commodities or other financial assets on behalf of the person giving the power;
6. a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity in his or her capacity as such;
7. a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, declaration of condominium, condominium bylaws, condominium offering plan or other agreement or instrument governing the internal

affairs of an entity authorizing a director, officer, shareholder, employee, partner, limited partner, member, unit owner, manager or other person to take lawful action relating to such entity;

8. a power given to a condominium managing agent to take action in connection with the use, management and operation of a condominium unit;
9. a power given to a licensed real estate broker to take action in connection with a listing of real property, mortgage loan, lease or management agreement;
10. a power authorizing acceptance of service of process on behalf of the principal; and
11. a power created pursuant to authorization provided by a federal or state statute, other than this title, that specifically contemplates creation of the power, including without limitation a power to make health care decisions or decisions involving the disposition of remains.

## II. VALIDITY AND ACCEPTANCE.

In order to be valid, a statutory short form or a non-statutory form of a power of attorney must meet the execution requirements of both the 2009 Changes and the 2010 Changes and must contain certain required warnings. Specifically:

1. **Execution**<sup>iii</sup> - The power of attorney form must be (a) signed by the principal and acknowledged in the same manner as a conveyance of real property, and (b) signed and dated by any agent who will be acting on behalf of the principal, with the signature of such agent also duly acknowledged in the manner required for conveyance of real property. While it is not necessary for all agents to sign the power of attorney form in order for the form to be valid, the power of attorney form will not be valid as to any agent who has not signed the form.

2. **Agents**<sup>iv</sup> - Where two or more agents must act together, the power of attorney will not be effective until both agents have signed the form and their signatures have been acknowledged in the manner required for conveyance of real property. In the event that an alternate agent is designated, there is no need for the alternate agent to sign the form unless and until there is a need for the alternate agent to become the agent of the principal.

3. **Foreign Jurisdiction**<sup>v</sup> - The 2009 Changes included a new provision regarding the execution of power of attorney forms in foreign jurisdictions such that a power of attorney executed in *another state or jurisdiction* in compliance with (a) the law of that state or jurisdiction or (b) the laws of the State of New York, will be valid in New York regardless of

whether the principal is a domiciliary of New York. The 2010 Changes expanded this provision to include that a power of attorney executed in *New York by a domiciliary of another state or jurisdiction* in compliance with either the law of that state or jurisdiction or with the law of the State of New York is also valid in New York.

4. **Acceptance by Third Parties**<sup>vi</sup> - Prior to the 2009 Changes, agents had numerous problems with third parties (and in particular, financial institutions) refusing or showing reluctance to accept the statutory short form powers of attorney, even though such refusal was legally prohibited. The 2009 Changes clarify when a third party can refuse to accept a power of attorney and provide the agent with a simple mechanism for compelling acceptance.

Under the 2009 Changes, a statutory short form power of attorney properly executed in accordance with the requirements of the revised statute or in accordance with the laws in effect at the time of its execution must be honored and cannot be refused by a third-party, except for reasonable cause. The statute lays out nine (9) situations that may be considered reasonable cause, including (a) the refusal by the agent to provide an original power of attorney or a copy certified by an attorney, (b) the third party having knowledge or a reasonable basis for believing that the principal has died, (c) the third party having actual notice that the power of attorney has been terminated or revoked, and (d) the third party having actual knowledge that a report was made to adult protective services alleging physical or financial abuse, neglect, exploitation, or abandonment of the principal by the agent.

Under this new law, it is specifically deemed unreasonable for a third party to refuse to honor the form if, for example, the power of attorney is not on a form prescribed by the third party to whom the power of attorney is presented. However, the third party may require the agent to execute an acknowledged affidavit stating that the power of attorney is in full force and effect, that the agent doesn't have actual notice that the power of attorney has been modified in any way affecting the authorization of the agent and the agent doesn't have actual notice, or notice of any facts indicating, that the power of attorney has been terminated or revoked. The 2010 Changes expanded this provision to include that, if the agent has been the principal's spouse, the affidavit may include a statement that either (x) the agent does not have actual notice that the marriage has been terminated by divorce or annulment or (y) that the power of attorney expressly provides that divorce and annulment will not terminate the agent's authority.

5. **Automatic Termination of Power of Attorney and/or Agency Authority**<sup>vii</sup> - As a result of the 2009 Changes, a power of attorney now automatically terminates in certain situations, including upon the death of the principal, and upon the death of an agent where there is no co-agent or successor agent willing or able to serve. Additionally, unless the power of attorney specifically provides otherwise, if the agent and principal are married, the agent's authority terminates upon the termination, by divorce or annulment, of the agent's marriage to the principal.

6. **Revocation**<sup>viii</sup> - Prior to the 2009 Changes, the statute did not provide any guidance on how to revoke a power of attorney or under what circumstances it would be deemed to be revoked. The 2009 Changes clarified this ambiguity, specifying that a power of attorney can be revoked by the principal by delivering a written, signed and dated revocation to the agent and to any third party whom the principal has reason to believe has received, retained or acted upon the power of attorney. The 2010 Changes further modified this requirement so that, in order to be effective, the revocation only has to be delivered, either in person to the agent or by sending the revocation by mail, courier, electronic transmission or fax to the agent's last known address; it does not have to actually be *received* by the agent. Additionally, the revocation is effective even if it is not delivered to a third party; however, the revocation will not be effective as against such third party unless that third party has received actual notice.

While the 2009 Changes required that all powers of attorney executed after September 1, 2009 would automatically revoke all prior powers of attorney, the 2010 Changes removed this controversial provision such that a principal may now sign more than one power of attorney without worrying that it will result in the automatic revocation of a prior power of attorney.

7. **Special Proceedings to Determine the Validity of a Power of Attorney, et al.** - The 2009 Changes included a new provision allowing special proceedings to be commenced for the following purposes:<sup>ix</sup>

- a. To determine the validity of the power of attorney;
- b. To determine whether the agent was entitled to receive compensation and if so, whether the compensation received was reasonable;
- c. to approve the record of all receipts, disbursements and transactions entered into by the agent;

- d. to remove the agent if the agent is unfit or has violated his or her duties;
- e. to construe any provision of the power of attorney granted; and
- f. to compel a third party to accept the power of attorney.

The new provision also identifies those persons or entities who or which may commence such proceedings and the powers of the court with respect to such proceedings.

### **III. POWERS OF THE AGENT.**

In order to rein in the powers of an agent and to hold the agent more accountable, the state legislature enacted the following changes:

1. **Fiduciary Duty; Obligations<sup>x</sup>** - The 2009 Changes repealed a provision that allowed an agent to continue to have powers of attorney where the principal became disabled or incompetent and replaced it with a provision (a) setting the standard of care of an agent and the fiduciary duty of the agent to act according to the principal's instructions, (b) requiring the agent to keep the principal's property separate and distinct from other property owned or controlled by the agent, (c) prohibiting the transfer of any of the principal's property to the agent without specific authorization, and (d) requiring the agent to keep a record of all receipts, disbursements and transactions. This new provision also requires the agent to make available a copy of the power of attorney and all records maintained by the agent within 15 days of a written request by certain persons including, without limitation, a monitor appointed by the principal, a co-agent, a Guardian ad Litem and the personal representative of the estate of a deceased principal.

2. **Appointment of Monitor<sup>xi</sup>** - In order to give the principal more control over the agent's actions, the 2009 Changes include a new provision allowing the principal to designate one or more monitors in the power of attorney to whom the agent must account. The monitor(s) have authority to, inter alia, request, receive and compel an agent to provide a record of all receipts, disbursements and transactions entered into on behalf of the principal and to receive a copy of the power of attorney.

3. **Resignation of Agent<sup>xii</sup>** - Prior to the 2009 Changes, an agent had no statutory guidance as to how to resign. To rectify this, the 2009 Changes include a provision specifying the manner by which an agent may resign, which is by simply giving written notice to the principal and to the agent's co-agent or successor agent, if there is one, or by applying to the court for court approval.

4. **Bank Accounts<sup>xiii</sup>** - The 2009 Changes restricted the agent's authority with respect to controlling bank accounts and banking transactions. As of September 1, 2009, an agent cannot add or remove a joint tenant from a bank account, and cannot add, delete or change the designation of beneficiary of a totten trust, unless such authority is specifically permitted in a statutory gifts rider (to be discussed further below). Additionally, if the agent opens a deposit account, it cannot be in the name of the agent and must be in the name of the principal.

5. **Life Insurance; Retirement Benefits** - Similar to the restrictions on banking authority, the 2009 Changes resulted in the agent being prohibited from adding, deleting or changing the designation of a beneficiary of a life insurance policy<sup>xiv</sup> or of any retirement benefits and plans<sup>xv</sup> in effect at the creation of the agency unless such authority is specifically given to the agent in a statutory gifts rider.

6. **Assignment of Authority<sup>xvi</sup>** - Pursuant to the 2009 Changes, an agent cannot, in his/her fiduciary capacity, give a power of attorney to anyone else with respect to the powers and authority of the agent under the power of attorney given to him/her by the principal.

7. **Medical Decisions<sup>xvii</sup>** - Pursuant to the 2009 Changes, an agent does not have any authority to make medical or other healthcare decisions for the principal but does have authority to access the principal's health care records in order to review, pay or contest medical bills for health care consented to by or on behalf of the principal or the principal's health care agent authorized under state law. This allows the agent to access such records without having to worry about complying with specific HIPAA Privacy Rules.

8. **Authority under Short Form Clarified<sup>xviii</sup>** - The short form power of attorney includes a section allowing a principal to check the general subject matter over which authority is being given to the agent. Pursuant to the 2009 Changes, the specific powers conveyed to agents in each such subject matter are now specifically identified in NY General Obligations Law Sections 5-1502A -1502O. For example, if authority is given by a principal to

his/her agent with respect to “real estate transactions”, under the new NY GOL § 5-1502A, the agent has those powers specifically enunciated in that provision.

9. **Compensation of Agent<sup>xix</sup>** - Pursuant to the 2009 Changes, an agent is not entitled to receive compensation from the assets of the principal for responsibilities performed under the power of attorney unless such compensation is specifically permitted in the power of attorney, but is entitled to reimbursement for reasonable expenses incurred in connection with the agent’s performance of such responsibilities.

10. **Co-Agency: Authority to Act without Co-Agent/Enforcement of Co-Agent’s Responsibilities** - With the 2009 Changes, co-agents must act together unless otherwise provided in the power of attorney, but if prompt action is required and a co-agent is unavailable due to absence, illness or temporary incapacity, the other co-agent may act alone. The remaining agent may also act alone if a co-agent dies, resigns or is incapacitated, unless otherwise provided in the power of attorney.<sup>xx</sup> Additionally, in keeping with the need for transparency, a new provision was added allowing a co-agent or successor agent acting under the power of attorney to compel a co-agent or the initial agent to provide records of all receipts, disbursements and transactions.<sup>xxi</sup>

11. **Execution of Documents by Agent<sup>xxii</sup>** - The 2009 Changes require an agent to disclose the agency relationship whenever the agent is acting pursuant to a power of attorney by indicating in the signature that all documents are being signed by the agent “as an agent” for the principal.

#### **IV. STATUTORY GIFTS RIDER**

One of the most significant changes to the power of attorney law comes in the form of the statutory gifts rider. Previously, by simply initialing a line item on the short form power of attorney, a principal could authorize his/her agent to transfer gifts to others. With the 2009 Changes (as modified by the 2010 Changes), safeguards were put in place to make sure that the principal fully intends to give the agent authority to make gifts and to give the principal an opportunity to limit such authority. Now, if a principal desires to allow his/her agent to make any gifts from the principal’s assets, the following provisions will apply:

1. **Generally<sup>xxiii</sup>** - Pursuant to the 2009 Changes, as modified by the 2010 Changes, a separate statutory gifts rider is now required for ALL gift-giving authority except for

authority to continue to give gifts that were customarily made to individuals and charity organizations prior to the creation of the agency so long as such gifts do not, in the aggregate, exceed \$500 in any calendar year. (Under the 2009 Changes, an agent was permitted to continue to give such gifts in an amount up to \$500 per year *per* person or organization, but that power was further restricted to its current limitation by the 2010 Changes).

2. **Execution; Contents<sup>xxiv</sup>** - In order for an agent's gifting authority to be valid, the principal must (a) initial the gifts provision on the short form power of attorney and (b) simultaneously execute both the power of attorney and a separate statutory gifts rider. The statutory gifts rider must be worded exactly as required by statute (with exceptions only for typographical errors and the like), and must be signed and acknowledged by the principal and witnessed by two persons who are not named as permissible recipients of gifts; the notary who takes the acknowledgment may be one of the witnesses. The statutory gifts rider is then to be attached to the power of attorney and the two documents are to be read together as a single instrument. The power of attorney cannot be modified to contain any authorization or requirement that is statutorily required to be provided in the statutory gifts rider.

3. **Gift-related provisions<sup>xxv</sup>** - While authority to make outright gifts is clearly required to be provided for in the statutory gifts rider, other possible manner of gift-giving has also been covered by the 2009 Changes. As previously stated, an agent is not permitted to delete or change the designation of a beneficiary of a totten trust unless it is specifically authorized in the statutory gifts rider and can't add, delete or change the designation of beneficiary of a life insurance policy in effect at the creation of the agency or any retirement benefits and plans unless authorized in the statutory gifts rider.

## V. SPECIAL SPOUSAL PROVISIONS

In order to address particular issues that arise in relation to married couples, the 2010 Changes include the following new special provisions:

1. **Statutory Gifts Rider** - If the statutory gifts rider names a spouse as a permissible recipient of gifts and the principal's marriage is terminated by divorce or annulment, then the agent's authority to give any gifts to the former spouse is automatically revoked by the termination of the marriage unless the statutory gifts rider expressly provides otherwise.<sup>xxvi</sup>

2. **Acceptance by Third-Party** - Additionally, if the agent is or has been the principal's spouse, a third party who is presented with a power of attorney may require an affidavit from the agent that includes an affirmation that (a) the agent does not have actual notice that the marriage has been terminated by divorce or annulment or (b) the power of attorney expressly provides that divorce or annulment does not terminate the agent's authority.<sup>xxvii</sup>

Despite the numerous changes to the Power of Attorney Law, any power of attorney form executed in compliance with the law at the time of execution will remain valid and effective without requiring anything further.<sup>xxviii</sup> However, certain provisions will apply to all powers of attorney irrespective of when executed, to wit, the sections on acceptance of powers of attorney (NY GOL § 5-1504), an agent's standard of care, fiduciary duties and disclosure of records (NY GOL § 5-1501), special proceedings that may be commenced (NY GOL § 5-1510), and an agent's access to medical records for bill payment purposes (NY GOL § 5-1505K(1)).<sup>xxix</sup>

*If you have any questions about the new Power of Attorney Law or any other matter raised in this Law Update, please contact ROBERT S. OCKO, ESQ. or KIMBERLY A. PONDOFF, ESQ. as follows:*

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- <sup>i</sup> This article does not summarize every change made to New York's Power of Attorney Law. For specific provisions, please review the Power of Attorney Law contained in the NY General Obligations Law § 1501, *et al.*
- <sup>ii</sup> NY GOL § 5-1501C
- <sup>iii</sup> NY GOL § 5-1501B
- <sup>iv</sup> Id.
- <sup>v</sup> NY GOL § 5-1512
- <sup>vi</sup> NY GOL § 5-1504
- <sup>vii</sup> NY GOL § 5-1511
- <sup>viii</sup> Id.
- <sup>ix</sup> NY GOL § 5-1510
- <sup>x</sup> NY GOL § 5-1505
- <sup>xi</sup> NY GOL § 5-1509

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- xii NY GOL § 5-1505
- xiii NY GOL § 5-1502D and 5-1502L
- xiv NY GOL § 5-1502F
- xv NY GOL § 5-1502G
- xvi NY GOL § 5-1502N
- xvii NY GOL §§ 5-1502N and 5-1502K(1)
- xviii NY GOL § 5-1502
- xix NY GOL § 5-1606
- xx NY GOL § 5-1508
- xxi Id.
- xxii NY GOL § 5-1507
- xxiii NY GOL §§ 5-1514 and 5-1502I(14)
- xxiv Id.
- xxv NY GOL §§ 5-1502D, 5-1502F, 5-1502G, and 5-1502L
- xxvi NY GOL § 5-1514(8)
- xxvii NY GOL § 5-1504(5)(d)
- xxviii L.2008, c. 644, § 21, amended by L.2009, c. 4, § 1, eff. Feb. 25, 2009, provides: “This act shall take effect on the first of September next succeeding the date on which it shall have become a law; provided that the provisions of this act shall apply to all powers of attorney executed on or after the effective date of this act and the provisions of this act shall not affect the validity of any power of attorney or the conveyance of authority to an attorney-in-fact or agent contained in a power of attorney executed prior to the effective date of this act if such power of attorney was valid at the time of its execution; except that sections eleven, twelve and eighteen of this act, and sections 5-1505 and 5-1510 of the general obligations law, as added by section nineteen of this act, shall also apply to all powers of attorney executed prior to the effective date of this act.” L.2010, c. 340, § 31, provides: “This act shall take effect on the thirtieth day [Sept. 12, 2010] after it shall have become a law and shall be deemed to have been in full force and effect on and after September 1, 2009. Provided, that any statutory short form power of attorney and any statutory gifts rider executed after August 31, 2009 shall remain valid as will any revocation of a prior power of attorney that was delivered to the agent before the effective date of this act.”
- xxix Id.