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Elder Law

# **Ubiquitous but Complicated, Power of Attorney Needs Fixing**

Daniel G. Fish, New York Law Journal

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There has been recent criticism of the statutory power of attorney as unduly complex and a trap for the unwary. A sensible comparison can be made with the health care proxy. It is one page long and gives the agent power over the life and death of the principal. The power of attorney can be 12 pages long. The health care proxy is a model for encouraging its use. The power of attorney is a model for discouraging its use.

The issue is important because the power of attorney is one of the most ubiquitous legal documents. It permits the naming of an alter ego to manage financial affairs. It is commonly used in the elder law context when there is the threat of an illness that may result in the inability to handle financial affairs in the future. Properly used it can avoid the need for a public, time-consuming, and expensive guardianship proceeding. It is also used in almost every other practice area of the law where it may be a matter of convenience.

Prior to 2009 the power of attorney was not complicated to execute. Concerns were raised that the simplicity made it a tool for elder financial abuse. In response, legislation was enacted that resulted in a much more complicated form. Those revisions are now themselves the subject of concern.

A report from The New York State Bar Association Working Group on the Power of Attorney has made three major recommendations: (1) simplify the gifting process; (2) accept forms that are substantially similar to the statutory form; and (3) provide penalties for third parties who unreasonably refuse to honor the power of attorney.<sup>1</sup>

## **Simplify Form**

Before 2009 the power of attorney form was two pages in length. It only required the notarized signature of the principal. The agent was not required to sign the form. The form has now been bifurcated into two forms; a general power of attorney and a separate gift rider. The current form requires the principal to name agents, initial to allow them to act separately, name successor agents, initial to allow them to act separately, initial to grant the agents the enumerated powers, initial to authorize the gift rider, designate a monitor, initial to permit the agent to receive compensation, sign and date the power of attorney. The agents and successor agents are required to sign before a notary.

For the gift rider, the principal must initial to allow gifts to family members up to the federal exclusion amount; initial if there are to be modification such as amounts less than the annual exclusion amount, greater than the annual exclusion amount or to individuals other than family members; initial if the agent is to be permitted to make gifts to himself or herself; sign before a notary and two witnesses. The gift rider must be signed at the same time as the general power of attorney. Given all of the options, it is possible for there to be more than 30 separate places where a signature or initial is required.

The recommendation to simplify the power of attorney form is best captured in the quotation from the chair of the state bar working group, Ellen Makofsky, "I have clients whose modified power of attorney is longer than the wills that I have prepared for them."<sup>2</sup>

## Failure to Recognize POA

The task force also has recommended that third parties who improperly fail to recognize the authority of the agent be subject to penalties. This was identified as perhaps the task force's most important recommendation. The resistance of financial institutions to accept the power of attorney is a significant impediment to the use of the power of attorney.

It is common for a financial institution to deny acceptance to the statutory form and to require that the institution's own form be used. This may be at a time when the principal is no longer able to sign the financial institution's own form.

GOL §5-1510 established a special proceeding if acceptance were denied, but the only remedy is an order compelling acceptance. Since there is no financial penalty for a financial institution that improperly refuses to recognize a power of attorney they have little incentive to change their policies. The recommendation would permit an award of damages, including attorney fees and costs. The report acknowledges that financial institutions are likely to oppose this provision.

## Exact Language

General Obligations Law §5-1501B defines a valid statutory short form power of attorney as one that contains the exact wording of the form in the statute. The task force has also recommended that forms that substantially follow the statutory form be recognized citing Berrian v. Siena Coll., 129 A.D.3d 1004, 12 N.Y.S.3d 240 (2d Dept.

2015). In that case, a student at Siena College allegedly sustained injuries. Her mother, under a power of attorney, filed suit against the school. The power of attorney did not contain the exact language of the statute. The defendant moved for summary judgment arguing that the plaintiff lacked authority to initiate the action. The appellate division opinion agreed with the defendant. The task force recommendation would permit the recognition of a form that "conforms substantially" to the statutory language.

## Conclusion

While there are certainly reported cases of abuse of the power of attorney, it is not clear that this increased complexity has resulted in a diminution of elder financial abuse. The complexity may have resulted in a diminution of the number of people who have been able to avail themselves of the power of attorney.

The pre-2009 power of attorney was widely available to the public at large and often completed without the assistance of legal counsel. The current form is so complicated that it is hard to imagine its use without the intervention of an attorney. In fact the current form contains a statement that the preparation of the statutory gifts rider should be supervised by an attorney. As laudable as it may be for an attorney to explain this document, the result has been to deny the document to the large number of individuals who do not have access to an attorney.

The power of attorney is an opportunity for good and has a risk of harm. The decision to execute the power of attorney must include a balancing of the positive and negative aspects. It will be left to the Legislature to weigh the competing interests and strike a balance.

### Endnotes:

1. New York State Bar Association, Report and Recommendations of the Working Group on Power of Attorney—Approved by the House of Delegates on Jan. 29, 2016—[www.nysba.org/POARreport](http://www.nysba.org/POARreport).

2. New York State Bar Association, State Bar News, March/April 2016, Vol. 58, No. 2, page 1.

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