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It Is Time to Simplify the Power of Attorney

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By **Daniel G. Fish** | August 13, 2020 at 11:28 AM



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The authority of the agent to make gifts of the principal's assets is the issue that has caused the document to become so confusing. Traditionally the principal could monitor the actions of the agent and would be aware of any improper actions. The advent of the "durable" power of attorney, where the agent could continue to act even if the principal lost capacity, led to concerns that the agent could act improperly and the principal would not be aware or could not object.

Agents under the current statutory power of attorney (GOL §5-1501 et seq.) are precluded from making cumulative annual gifts in excess of \$500 unless a separate document, the statutory gifts rider, is simultaneously executed. While the intent was the avoidance of financial elder abuse by unscrupulous agents, the result has been to make the power of attorney unavailable to the many individuals who cannot afford legal counsel. It has prevented agents from taking needed estate planning or tax driven actions that required gifting.

There is pending legislation in New York state (A. 5630, introduced by member of the Assembly Helene E. Weinstein and S.3923, introduced by Sen. Brad Hoylman) to reform the power of attorney statute. It would eliminate the statutory gifts rider and gifts over \$5,000 per year could be authorized in the modifications section. The legislation addresses the complexity of the form, the exact wording requirement and penalties for those who improperly refuse to honor the document.

Complexity

The most serious problem with the current power of attorney statute derives from

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the fact that where there was one form prior to 2009, now there are two disparate forms. The first form is the statutory short form power of attorney and the agent is precluded from making gifts over \$500 per year. The second form is the statutory gifts rider which authorizes the agent to make annual gifts in excess of \$500. The two forms are so dissimilar that their joinder is like Frankenstein's monster. They must be executed at the same time, but their execution requirements are dissimilar. The statutory short form must be signed before a notary by the principal and the agent. The statutory gifts rider must be signed by the principal before a notary and two witnesses. In the COVID-19 situation, execution requiring the presence of the principal, the agent, the notary, and two witnesses is unduly burdensome and even more so if it is done by remote notarization and witnessing.

It is a misnomer to call the power of attorney the statutory short form. Before 2009 the form was three pages long and could be purchased from a stationery store. The current form is 12 pages long. Besides the notarized signatures and witnessing, there are 23 places on the forms for initialing by the principal.

A comparison with the health care proxy is instructive. The health care proxy allows the principal to name an agent to act in the event the principal has lost the ability to make medical decisions. The agent is given life and death power over the principal. Yet, despite this enormous and irreversible authority, the health care proxy can be one page in length. The form is available at no cost from the New York State Department of Health website (<https://health.ny.gov/publications/1430.pdf> (<https://health.ny.gov/publications/1430.pdf>)). It does not require a notary, only two disinterested witnesses. The agent is not required to sign the health care proxy. The only limitation is that the agent cannot make decisions about artificial nutrition and hydration but even that restriction can be overcome if the principal expressly gives the agent that authority. The goal is to make the health care proxy easy to execute and to be widely available. The power of attorney should have the same goal.

The pending legislative proposal would dispense with the statutory gifts rider and revert to a single document without the witnessing requirement. To protect against financial exploitation, the grant of authority to the agent to make gifts would be included within the modifications section of the document.

Exact Wording

The second area of legislative reform relates to the "exact wording" requirement of General Obligations Law § 5-1501 (0):

"Statutory short form power of attorney" means a power of attorney that meets the requirements of paragraphs (a), (b) and (c) of subdivision one of section 5-1501B of this title, and that contains the exact wording of the form set forth in section 5-1513 of this title."

This has led some financial institutions to reject powers of attorney for minor or inconsequential alterations of the statutory form. The current legislation would eliminate the words "exact wording" and substitute the phrase "substantially conforms."

Damages for Unreasonable Refusal to Accept Power of Attorney

General Obligation Law § 5-1510 currently permits a special proceeding to be brought if acceptance of the power of attorney is unreasonably denied. However, the only remedy is an order compelling acceptance. The third area of legislative reform would allow the court to award damages, including legal fees and costs. Safe harbor provisions would be included.

Increase in Amount of Annual Gifts

The pending legislation would dispense with the statutory gifts rider but would require the principal to specifically authorize the agent to make annual gifts above \$5,000 per year in the modifications section of the power of attorney. The increase (from \$500) of the amount that an agent could gift each year without special

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authorization is a recognition of the need for people of limited means to have access to the power of attorney. This proposal is a major improvement in the practical application of this estate planning document.

Conclusion

The power of attorney is misunderstood and underappreciated and pejoratively considered "boilerplate." In fact, it should be considered the most valuable advance directive for the protection of a person's independence and dignity. Without proper planning, accounts may be frozen upon disability and require a guardianship to unravel them. With a proper power of attorney financial affairs can seamlessly transition to an agent to manage.

At common law, an individual could draft an agreement authorizing another to act on his or her behalf in specifically enumerated financial matters described in the document. In 1948 the statutory short form was enacted which shortened the power of attorney by simply listing the powers of the agent and then defining them in the statute rather than in the document itself. The next major revision was in 1975 with the advent of the durable power of attorney where the principal was permitted to authorize the agent to act even if the principal were to become incapacitated at a later date.

The next major legislative revision occurred in 2009 (and the technical revisions in 2010) resulting in the current statutory scheme. The pendulum has swung way too far in the direction of preventing elder financial abuse at the expense of the many agents (usually close family members) who are trying to be of assistance but do not have the means to pay for legal advice. It is time to simplify the power of attorney.

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