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Power-of-Attorney Changes Scramble Property Transfers

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As of Sept. 1, New York has abolished its old easy single-sheet statutory power of attorney form (POA) and replaced it with a tremendously complicated new law1 describing a highly complex new document with a misleadingly named optional rider.2

The 1948 original form and its successors were designed to be general-purpose forms consumers with nothing but access to a stationery store and a notary could use with ease. The new form, designed specifically for estate planning, is so complicated that those who use it without attorney guidance do so at their peril and few attorneys will fully understand the pitfalls the new form presents. Attorneys working with them do so at their peril as well.

Among the most common uses of POAs is in real estate transactions, especially purchases and sales of land. However, the new law and form create so many problems for such transactions that until either the Legislature restores the old law or heavily repairs the new one, many of these transactions will prove impossible.

Perhaps even more important than this new form POA, is the new law's insistence that all POAs must be in 12-point type and contain the statute's verbatim explanations to the power-giver3 and the agent.4 These, at about 650 words, remove any incentive to use anything but the full statutory form.

Amending the Law

Various attorneys' Internet chat spaces have been abuzz with conversations about this new law, most notably those dealing with Elder Law, Trusts and Estates, and Real Property. They report that many banks are refusing to accept the new form, this in spite of a provision making it mandatory that they do so, creating a new species of lawsuit to compel it.5

Banks, title companies, and law firms are scrambling to issue internal memoranda to explain what to do and some institutions are refusing to recognize any POA, new or old, executed since the change in law, or before. Bar associations and industry groups

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are scrambling to propose amendments to it to clear up "technical" problems with it and many are calling for its repeal and restoration of the old statute.6

Clearly, no number of purely technical amendments will change the underlying philosophy of this law that providing the power-giver with a great mass of reading to do when signing this instrument somehow empowers the power-giver to decide whether signing it is really a good idea. Ideally, a power-giver would read not only the warnings, but the entire document. However, we believe in actual practice, few power-givers will actually read anything but the signature line. A bold print warning of a dozen words or so might have alerted a power-giver to the magnitude of the power conveyed, but not the current form that so over-informs as to prevent informing at all.

Which Form When?

Under the new statute, the old forms are still valid if they were signed on or before Aug. 31. The new forms are only valid if signed on or after Sept. 1. So, the old forms are rendered invalid if signed too late and the new forms invalid if signed too soon.7 Nobody is in a position to know how many people knowing that the form had changed, jumped the gun in using it too early. While the statute as it currently stands obliges us to look at whether a power-giver signed the POA before or after Sept. 1, 2009, further tinkering with the statute could create a situation where there are three or more possible periods and wordings attached to them—requiring one not only to examine the wording, but what that wording meant under the statute in effect at the moment of signature. Therefore any action the Legislature takes to repair this mess will require even more heightened caution than the usual. Before enacting any technical corrections, the Legislature should consult with a far broader base of practicing attorneys than it used in creating the new POA.

Instability and Unreliability

The new POA has enormous potential for mischief in real estate law where the two most important principles are stability in the meanings of documents8 and reliability in their authenticity.9

This new POA appears to violate both of those principles. As a result, numerous real estate transactions are simply not taking place or are taking place in exactly the manner the parties sought to avoid —requiring the physical presence of the very people who gave POA's because it was a hardship for them to be physically present.

For example, the execution of a new POA revokes all previous ones unless otherwise specified.10 Some proposed amendments would change that so that a POA would revoke its predecessors only when it specifically says so. In the mean time, so as to prevent confusion in the meaning of any form a practitioner prepares, the preparer should expressly both override the provision revoking previous POAs and insert a provision specifically reaffirming them.

Along with the new POA is a so-called "Statutory Major Gifts Rider" (SMGR). However, while the check boxes on the new form cover real property transactions, some analysts are finding that the SMGR is required not only when the attorney-in-fact is making a gift on behalf of the power-giver, but also when there is an ordinary transfer of a real property interest. It therefore appears that so long as this new statute is around, prudent practitioners should require an SMGR with every single POA.

A solution one title company has implemented to limit exposure to a claim that the new POA is invalid for the lack of an SMGR is to call the power-giver on the telephone in all instances and have

him or her confirm the authority of the agent. The problem with that procedure is that the new POA is now, unless otherwise specified, still in effect when the power-giver is no longer of sufficiently sound mind to answer such a question.11 The person making the telephone call therefore has no way of knowing whether the person receiving the telephone call is sufficiently mentally acute to answer the question, given the fact that such acuity has no effect on the value of the POA itself.

The title company taking that approach is also advising that it will require an SMGR on a conveyance for consideration where there is an obvious disparity between the price being paid and the property's value, such that the transfer may be deemed to be, in part, a gift. It also advises that whenever a property interest is being transferred by a power of attorney, if there is no POA validly executed under the prior law and a new POA must be signed, it is prudent to also execute an SMGR. Another title insurer requires an SMGR to insure any transfer pursuant to a new POA.

Authenticity an Issue

Authenticity is a major issue with the new POA. First, since the POA now survives the power-giver's dementia, there is no way to check with a demented power-giver whether the agent is really doing the power-giver's will or whether there is fraud happening, potentially even involving forging the power-giver's signature. Absent court intervention, rather than the old law which automatically revoked a demented person's POA, this new law makes it effectively irrevocable.

If the power-giver is demented, it is difficult to prove that the power-giver was not demented at the time of the execution of the POA also.

Secondly, the law allows the creation of a power which can only be exercised by two agents acting simultaneously, but creates an exception to this for when two factors are present: "absence, illness or other temporary incapacity" of one of the agents and potential "irreparable injury" to the power-giver. If both of those factors are present, the remaining able bodied agent may act alone.12

How shall one prove the missing agent is really absent, ill, or incapacitated? How to prove that delaying this closing would inflict irreparable injury on the power-giver? The title company's representative might well refuse to recognize the validity of the present agent's authority to act alone. Perhaps some kind of affidavit procedure will evolve to deal with this issue as well. However, some analysts have concluded that giving a POA to two agents who can only exercise it jointly is asking for too much trouble.

New Suits

The statute purports to create a special judicial proceeding when there is a dispute about whether to recognize the sufficiency of the POA.13 The statute authorizes making a bank a respondent, if the bank cannot show good cause why it refuses to recognize the effectiveness of the POA. Of course, the bank will have good cause if the title company deems the presence of the POA an obstacle to the title being insurable. Thus, while the bank might have problems with refusing to recognize a POA from its own customer, from across the table, it has little to fear.

Under the new law, as a practical matter, anybody can refuse to honor a POA at any time. The burden to bring suit is on the one who wants to insist that the POA is honored. The one who wants to refuse to honor it can also sue, but has no such motivation.

Note, we have been discussing the emergency scenario. Few law firms and few impecunious consumers have the resources to put together an emergency court application or appeal. Finding affiants with personal knowledge can prove challenging and may, if the real estate contract is "of the essence," be too late.

However, when valuable commercial interests are at stake, courts have the power to stop the calendar.14 Therefore, perhaps a special proceeding under the new statute brought just inside an "of the essence" deadline could take as much time as it needs to resolve the issue without the time ever expiring. But, in order to bind everyone, it would be necessary to name as parties respondent everyone who has touched the deal: grantor, grantee, bank, and even the title company.

If that is indeed to be the procedure, then the new POA once again appears to be a tool exclusively for those wealthy enough both to use it and to enforce it. Those who most need a POA, the less wealthy, cannot reliably use one.

Unintended Consequences

Those of us who use word processors are well aware of the dangerous power of the command "change all." When one uses that feature, often one finds truly nonsensical results. This metaphor finds expression in many fields of human endeavor. It should therefore be with only extreme caution that a legislature passes a law that changes a large variety of activities. There is little evidence to suggest that the Legislature here exercised such caution.

For example, ever since the very first condominium came into existence in New York, the scheme has included unit owners issuing so-called "unit POAs" to the board of managers. These powers enable the board to carry on various relatively ministerial functions without having to get the unanimous consent of the unit owners. While unit POAs are valid so long as they were executed prior to Sept. 1, it appears under the new law any new ones will not be valid unless they are in 12-point type and include the 650 word warnings. While amendments to the new law might remove these condominium POAs from the scope of the new statute, who is to say what other POAs are equally quietly being rendered void?

As another example, it is very common in various kinds of contracts to imbed POAs in them. It appears that under the new law, such imbedded POAs are of doubtful validity. While the drafter of such contracts could redraft the document in 12-point type and incorporate the 650-word warnings to meet the two statutory criteria for validity, or move the POA to a rider, schedule, or exhibit, it would appear better to keep the POA a separate document and in the original contract insert a clause which says, "Party A has executed the Power of Attorney of even date herewith."

Powers With an Interest

Previous POA law had it that a POA died with the power-giver unless it was a so-called "power coupled with an interest."15

While the entire scope of a "power coupled with an interest" is beyond the embrace of this article, suffice it to say that we are referring to powers of attorney granted to persons who are supposed to benefit from or are supposed to be protecting their own interests with the receipt of this power.

Consider this simple example of a "power coupled with an interest." D borrows from C $5,000 and signs a promissory note promising to repay the $5,000 on a schedule of payments, further providing that if D defaults, C has a POA to sell the shares of stock that D has put up as collateral. This POA is not for D's convenience, but is to secure C's interest in D's property. Thus this power (the POA) is "coupled" with the interest C has in D's property.

Such a power coupled with an interest does not die when D dies.

However, under the new law,16 all POAs die with the power-giver, without exception. Having to guess whether the courts will take the Legislature at its word leaves the current status of powers coupled with interests unknown and unknowable.

As a further example of an issue relating to a

power coupled with an interest, two property owners establish a single zoning lot with the developer-owner having the right to further expand the zoning lot. The other party agrees to execute any further documents that are required to do so, but, if it does not execute the documents necessary to expand the zoning lot, the developer-owner is granted a power of attorney coupled with an interest to execute them on its behalf. Such a power granted in a document executed on or after Sept. 1 may no longer be effective after its signatory's death.

On a related note, however, it should be noted that the new law makes no exceptions for people in genuinely desperate straits without access to a computer or stationer to get the exact wording required for an effective power of attorney. For such people, it is just plain too bad; their transactions cannot go forward.

Governments and Businesses

It should be noted that although fairly obtusely worded, the statute has no application to POAs executed by or on behalf of governments and business entities. However, although the ability to transfer property frequently comes from the operating agreement, in some instances the ability to transfer property will flow from one individual to another by power of attorney. These powers, as non-statutory powers, may need to comply with the provisions of the new statute applicable to non-statutory powers.

Consider a small corporation, for example five friends who get together with each other, one of whom actually has money, another who is the monied one's brother, and three of whom are friends, working the business. The monied brother could issue a POA to his brother to sign all the forms the business has to sign through the year. This would be a POA for a business purpose where the power-giver wants to be a non-participating shareholder, leaving the actual participation to his brother. This could be incorporated in a shareholder agreement.

If so, any POAs executed in such contexts are invalid if they lack the 650-word warning and 12-point type the statute requires for all individuals' POAs executed on or after Sept.17

Well Meaning, but...

There can be little doubt that the intent of this statute is benign and principally aimed at giving the old and infirm a cheap simple procedure to have their affairs taken care of by a trusted friend or relative while ensuring that the helper does not become an oppressor.18

Perhaps a much simpler overhaul of the old statute is all that is necessary: requiring that a POA be accompanied by a contemporary photograph of the power-giver or valid identification; requiring that the power-giver incorporate a current address and telephone number.

However, as currently crafted, the statute is so riddled with problems, both substantive and procedural, that it has injected into the entire legal system huge instabilities, particularly those endangering the orderly secure transfer of real property.19 Until the Legislature finishes the job of amending out its kinks and the courts have had a chance to construe what all that language means, it's going to be a real mess. While they are at it, the Legislature should give serious thought to a more terse warning to the power-giver, something like the kind of text that would fit on a pack of cigarettes.

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Endnotes:

1. The session law version of this enactment is roughly 50 percent larger than the U.S. Constitution.

2. Chapter 644 of the Laws of 2008, as amended.

3 We say "power-giver" here so as to speak to the title of the document, "Power of Attorney." The statute itself says "principal" and "agent," avoiding the common, "attorney in fact." One should not say "signatory" because under this new law, there are a minimum of three signatures: principal, agent, and notary and the rider requires two witnesses. GOL §5-1514(9).

4. GOL § 5-1501B.

5. GOL §5-1510, discussed infra.

6. Bill A8392/S5910 in the State Legislature specifically proposes "technical" amendments to the new law.

7. Chapter 644 of the Laws of 2008, as amended by Chapter 4 of the Laws of 2009.

8. Holy Properties Ltd., L.P. v. Kenneth Cole Productions Inc., 87 NY2d 130 (1995).

9. Adam Leitman Bailey & Carly Greenberg, "Growing Fraud," NYLJ, 1/31/07; Adam Leitman Bailey, "Expense of Theft Prevention Dwarfed by Cost of Fraud," NYLJ, 4/8/09.

10. GOL §5-1513.

11. GOL §5-1501A.

12. GOL §5-1508.

13. GOL §5-1510.

14. First National Stores Inc. v. Yellowstone Shopping Center Inc., 21 NY2d 630 (1968).

15. Weber v. Bridgman, 113 N.Y.600 (1889).

16. GOL §5-1511(a).

17. GOL §5-1501B(1) Preamble; §5-1501B(4). Some of the provisions of the revised article may actually apply to business entities and governments, but the extent of that problem is beyond the scope of this article.

18. NYS Law Revision Commission Report on Powers of Attorney (2007), pp. 5, 13-17, 19-22.

19. The Law Revision Commission Report which was the genesis of the new POA did not consider that the proposed changes could affect real property law.