



NEW POWERS OF ATTORNEY LEGISLATION

New York has recently made sweeping changes to the New York General Obligations Law that governs the making of Powers of Attorney in the State of New York. The new changes take effect September 1, 2009. Although the new law will not effect the validity of prior executed Powers of Attorney, clients may want to discuss how the new rules effect their existing Powers of Attorney and whether creating a new one would better comport with their current estate planning goals.

Summary of Major Changes:

Major Gifts Rider

The new law requires that a grant of authority to an Attorney-in-Fact to make gifts and "other asset transfers" must be set out in a separate document called a Major Gifts Rider, which is witnessed in the same manner as a Will ("other asset transfers" includes any addition, deletion or changing the designation of beneficiaries in any agreement, contract, trust or insurance policy). The purpose of the Major Gifts Rider is to alert the creator of the Power of Attorney (the "Principal") to the gravity of granting an Attorney-in-Fact the authority to make gifts.

The Major Gifts Rider incorporates a specific provision for the Principal to initial that permits the Attorney-in-Fact to make gifts of the annual exclusion amount defined in the Internal Revenue Code. The new law also allows the Principal to authorize the Attorney-in-Fact to make gifts to a defined list of relatives from the Principal's assets up to twice the amount of the annual gift tax exclusions with the consent of the Principal's spouse (i.e. gift-splitting, and permits the Attorney-in-Fact to consent to gift-splitting with his or her spouse).

The new law also makes it harder for an Attorney-in-Fact to make gifts of the Principal's property to himself by requiring the Principal to affirmatively provide for such power in the Major Gifts Rider.

Duty of Care and Fiduciary Duty of Attorney-in-Fact

The new law imposes certain duties on an Attorney-in-Fact and mandates the inclusion of a statutory explanation of such duties in the Power of Attorney document itself. Such duties include: (a) a duty to observe a standard of care when dealing with the property of the Principal; (b) a duty to act in the best interests of the Principal; (c) a duty to avoid conflicts of interest with the Principal; (d) a duty to keep the property of the Principal separate from the property of the Attorney-in-Fact (i.e. no co-mingling of assets); and (e) a duty to keep a record of all receipts, disbursements and transactions that the Attorney-in-Fact entered into on behalf of the Principal. Notwithstanding the added duties of an Attorney-In-Fact, unless the Principal provides otherwise in the Power of Attorney document, an Attorney-in-Fact serves without compensation.

New Power to Appoint a "Monitor"

The new law permits the Principal to appoint someone called a "Monitor" to supervise and review the actions of the Attorney-in-Fact on behalf of the Principal. The Monitor is given the authority to request that the Attorney-in-Fact provide the Monitor with a record of all receipts, disbursements and transactions entered into on behalf of the Principal. The Monitor may also initiate a court proceeding to compel the Attorney-in-Fact to turn over such records.

Refusal to Accept a Power of Attorney for Reasonable Cause

The new law also provides that third parties have the ability to refuse to accept Powers of Attorney based on "reasonable cause." Reasonable cause includes, but is not limited to, the refusal of the Attorney-in-Fact to provide an original or certified copy of the Power of Attorney, actual knowledge of the Principal's death or the incapacity of the Principal if the Power of Attorney is nondurable.



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Health Care Billing and Payment Matters

The new law allows the Attorney-in-Fact access to health care records in accordance with HIPPA requirements and to make decisions relating to the payment for healthcare consented to by the Principal or the Principal's healthcare agent.

Administrative Changes

The new law requires the Attorney-in-Fact to sign and accept appointment as the Attorney-in-Fact and acknowledge acceptance of certain fiduciary obligations before the Power of Attorney is effective. The new law also provides how the Attorney-in-Fact may resign, how the Principal may revoke the Power of Attorney and when the Power of Attorney is automatically revoked (i.e. death of the Principal, revoked by a Court, the purpose of the Power of Attorney has been accomplished...).

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