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First American Title
National Commercial Services

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New York's Statutory Short Form Power of Attorney ("SSF")

As previously reported in Current Developments, Title 15 ("Statutory short form and other powers of attorney for financial and estate planning") of Article 5 of New York's General Obligations Law ("GOL"), governing the form and acceptance of statutory and non-statutory forms of powers of attorney, has been amended effective June 13, 2021.

A power of attorney ("POA") under Title 15 is a POA that has been executed in New York by a "principal," defined in GOL Section 5-1501 as "an individual who is eighteen years of age or older," to one or more agents who are authorized to act on his or her behalf.

The form of SSF in Chapter 644 of the Laws of 2008, effective September 1, 2009, as amended by Chapter 340 of the Laws of 2010, may continue to be used if it was fully executed and acknowledged, as required, no later than June 12, 2021. Title 15 was recently amended by Chapter 323 of the Laws of 2020 and Chapter 84 of the Laws of 2021, both of which are effective June 13, 2021. Chapter 323 identifies the statutory short form as "Power of Attorney-New York Statutory Short Form."

Chapter 323 eliminates the Statutory Major Gifts Rider introduced by Chapter 644 to allow for an agent to gift assets owned by a principal. The new SSF allows a principal to authorize his or her agent to make gifts in its optional section for "Modifications," without executing a separate form.

ACCEPTANCE OF PRIOR STATUTORY SHORT FORMS

Chapter 644, which replaced a prior statutory short form, provides that a POA validly executed before the Chapter's effective date remains effective. Under Section 19 of Chapter 323, "any statutory short form power of attorney and any statutory gifts rider executed by a principal and valid at the time executed by such principal shall remain valid, as will any revocation of a prior power of attorney that was delivered to an agent prior to the effective date of this act." The validity of a power executed under prior law may turn on when it was executed by the appointed agent(s).

Under GOL Section 5-1501B.3(a), as it was amended by Chapter 644, "[t]he date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent; provided, however, that if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed the power of attorney with their signatures acknowledged."

STATUTORY POWER TO SUBSTANTIALLY CONFORM

Chapter 644 requires that a SSF “contain the exact wording of the form set forth in Section 5-1513...” This was changed by Chapter 323; under GOL Section 5-1501(n) in Chapter 323, to be an SSF, the POA must “substantially conform to the wording of the form set forth in section 5-1513.” A POA substantially conforms notwithstanding an “**insignificant** mistake in wording, spelling, punctuation or formatting, or the use of bold or italic type.” (Emphasis added). A POA will also substantially conform if the POA “uses language that is essentially the same as, but is not identical to, the statutory short form, including utilizing language from a previous statute.” The Section adds that “[f]ailing to include clauses that are not relevant to a given power of attorney shall not in itself cause such power of attorney to be found to not substantially conform with the requirements of such form.”

WITNESSES REQUIRED

For both a statutory and a non-statutory short form of power, Section 5-1501B.1(b), in Chapter 84, requires, for a POA executed on or after June 13, 2021, that the signatures of the principal or, when applicable, his or her designee (see below), in addition to being acknowledged, must be witnessed “by two persons who are not named in the instrument as agents or as permissible recipients of gifts, in the manner described in [EPTL Section 3-2.1(a)(2)] , in the presence of the principal. The person who takes the acknowledgment...may also serve as one of the witnesses.”

INITIALED BY THE PRINCIPAL

GOL Section 5-1501-B.1(b) now requires that SSF and non-statutory POAs be also “initialed” by the principal.

SIGNATURE BY A DESIGNATED PERSON

GOL Section 5-1501B.1(B) now allows a POA to be “signed, initialed and dated” by another person in the name of the principal when directed to do so by the principal. A designated person “shall sign by writing or printing the principal’s name, and printing or signing his or her own name.” The signature of a designated person must be witnessed and acknowledged.

REVIEW/REJECTION

GOL Section 5-1504.4(b), as amended by Chapter 323, authorizes a court, in an action brought to compel a third party to honor a SSF, to award damages, including reasonable attorney’s fees and costs, if the court finds that the third party “unreasonably refused to honor the agent’s authority ...” A POA which is not a SSF need not be accepted and can be rejected (GOL Section 5-1504.8).

“Reasonable cause” for a third party to refuse to honor an SSF, as set forth in GOL Section 5-1504.2(a), includes, and is not limited to:

1. an agent's refusal to provide an original POA or a copy certified by an attorney;
2. the third party's good faith referral of the principal and the agent or a person acting for or with the agent to the local adult protective services unit, or actual knowledge that such report has been made;
3. actual knowledge or a reasonable basis to believe that the principal has died;
4. actual knowledge or a reasonable basis to believe that the principal was incapacitated when the power was executed or, if the power is non-durable, when the power is presented;
5. actual knowledge or a reasonable basis to believe that the POA was procured through fraud, duress or undue influence;
6. actual notice of the termination or revocation of the POA;
7. a title insurance company refusing to write title insurance for a gift of real property made pursuant to a SSF or a non-statutory power of attorney "that does not contain express instructions or purposes of the principal with respect to gifts..."; and
8. the refusal to provide an agent's certification or an opinion of counsel when requested.

The lapse of time (a) from the date on which a POA was executed or (b) between the dates on which the signatures of the principal and his or her agents are acknowledged is not, alone, a reasonable cause to refuse to honor a SSF.

Under GOL Section 5-1504.1(d) and (e), a third party may request and rely on, without further investigation, (a) an agent's certification, made under penalty of perjury, as to any factual matter, and/or (b) an opinion of counsel as to any matter of law concerning the power when requested in a writing setting forth the reason(s) for the request. An opinion of counsel is provided at the expense of the principal unless the request for the opinion is "made more than ten business days after the power of attorney is presented for acceptance."

GOL Section 5-1504.3 sets forth procedures for a third party to follow when there is an issue with a SSF.

1. No later than 10 days "after presentation" of either an original or an "attorney certified copy" of a SSF "properly executed", a third party may either:
 - A. rely on ("honor") the POA;
 - B. reject the SSF in a writing sent to the principal and to the agent(s) setting forth the reasons for the rejection, at the addresses indicated on the power of attorney, and to such other addresses as provided by the principal and/or the agent(s); or
 - C. "request the agent to execute an acknowledged affidavit ...stating that the power of attorney is in full force and effect if the [SSF] was not submitted for acceptance together with such an acknowledged affidavit."

Under GOL Section 5-1504.3(a), if an affidavit is requested of an agent, "the third party shall honor such [SSF] within seven business days" after receipt of the affidavit.

2. Within seven business days after receiving a response to the written notice, the third party may either (a) "honor" the SSF or (b) "finally reject the [SSF] in a writing that sets forth the reasons for such rejection." The writing is to be "sent to the address provided on the [POA] [for the principal], to the address of the agent, if any, and [it] may also be sent to such other address as shall be provided on the account documents, or to the address of the attorney as provided in an opinion of counsel..."

The notices identified in paragraphs "1" and "2" are considered delivered when mailed.

Notice to an agent is not to be sent if the third party has referred the SSF to a local adult protective services unit, until a determination is made by adult protective services.

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