

MAJOR CHANGES TO NEW YORK'S STATUTORY SHORT FORM POWER OF ATTORNEY

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MAJOR CHANGES TO NEW YORK'S STATUTORY SHORT FORM POWER OF ATTORNEY

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PART I:

WHAT IS A POWER OF ATTORNEY?

▫ **Purpose:**

Allows you, as principal, to appoint an agent to handle your financial affairs. Generally used when one is unable to do so (e.g., accident, illness, etc.).

▫ **Note:**

- If you do not have a valid POA, your family may not be able to access your assets, pay your bills, etc.
- If you do not have a valid POA, an Article 81 Guardianship proceeding may need to be commenced.
- May be utilized upon signing of POA, or at such time that you become incapable of doing such things for yourself (springing POAs are not recommended).

▫ Make Sure That Your POA...

...is validly executed, as per the current requirements:

- Legible, clear type, size 12 font or higher
- Signed and dated by principal with capacity, with signature of principal duly acknowledged in manner prescribed for acknowledgement of conveyance of real property
- Contains exact wording of “Caution to Principal” and “Important Information for Agent” language as per §§ 5-1513(a) and (n)

(See GOL § 5-1501B for **full** current execution requirements)

...includes a Statutory Gifts Rider (SGR), as per the current requirements:

- Allows for broad gifting power (to transfer assets and engage in asset preservation (e.g., for estate tax planning or Medicaid planning purposes))



VIP! (But via Modifications Section **after** June 13, 2021)

...appoint reliable well-organized agent(s) you trust, as well as at least one successor agent.

PART II:

OVERVIEW OF THE MAJOR CHANGES TO THE POWER OF ATTORNEY

• The New POA Legislation:

- Last revision to New York Statutory Short Form POA was approximately 10 years ago.
- Current form is regarded as unduly complicated and overly burdensome to prepare and execute.
- New POA is meant to simplify the current POA, as it has been deemed “prone to improper execution.”

- **The New POA Legislation:**

- **Chapter 323 of the Laws of 2020**

- **When Passed:**

- **Signed by Governor Cuomo 12/15/20**

- **When Effective:**

- **Effective 6/13/21 (180 days after signed into law)**

- **Chapter Amendment S 888**

- **When Passed:**

- **Governor Cuomo negotiated the agreement with lawmakers when signing the original POA legislation on 12/15/20**

- **Passed the Senate on 1/20/21**

- **Signed by Governor Cuomo 3/25/21**

- **List of Major Changes:**

- 1. Elimination of Statutory Gifts Rider (SGR)
- 2. “Substantially Conforms to Wording” Replaces Previous “Exact Wording” Requirement
- 3. Signing Requirements: Can Now Be Signed At Principal’s Direction
- 4. Changes to Construction Sections
- 5. Timeline For Acceptance & Reliance
- 6. Safe Harbor Provisions & Sanctions

- **1. Elimination of SGR:**

- **The SGR with its separate execution requirement was the most common problem with POAs.**
- **Now, § 5-1514 has been repealed in its entirety, as have all references to the SGR.**

(See, e.g., §§ 5-1502A, 5-1502(B), 5-1502(C), 5-1502(D), 5-1502(F), 5-1502(I), 5-1503, 5-1505, 5-1514)

- **Per § 5-1503, gifting provisions can now be included within the Modifications Section**

(More on this later, in Part III...)

- **2. “Substantially Conforms to Wording” Replaces Previous “Exact Wording” Requirement**
 - § 5-1501(o) (now § 5-1501(n)) changes the requirement of “exact wording” to “substantially conforms” and provides that substantial conformity can occur despite insignificant mistakes in wording, spelling, punctuation, formatting, or the use of bold or italic type.
 - § 5-1501(d) changes the requirement of “exact wording” within the “Caution to the Principal” in § 5-1513(a) and “Important Information for the Agent” in § 5-1513(n) to “substantially conforms” and allows for “insubstantial variation in the wording of those sections.”
 - Now, the determination of whether there is substantial conformity does not depend upon the presence / absence of any particular clause
 - Now, any Section indicated as “Optional” may be omitted and replaced by the words “Intentionally Omitted” (e.g., Designation of Monitors, Compensation of Agent)

• 3. Signing Requirements: Can Now Be Signed At Principal's Direction


- § 5-1501(b) allows POA to be signed, initialed and dated by:
 - a principal with mental capacity to do so, or
 - in the name of a principal who has the mental capacity to do so by another person in the presence of and at the direction of the principal
 - Acknowledges that principal who is mentally competent but not physically able to sign should not be deprived of having POA b/c of physical infirmities.
 - When a person signs at the direction of the principal he/she must sign by writing or printing the principal's name and printing or signing his/her name.
 - Signatures of all persons signing (the principal, the person signing on the principal's behalf, and the agent) must be duly acknowledged in the manner prescribed for the acknowledgement of real property.



VIP! The Chapter Amendment now requires two disinterested witnesses (one of whom can be the Notary Public) for all POAs.

• 4. Changes to Construction Sections

▫ Financial Matters Related to Health Care:

 **VIP!** § 5-1502K – Grants authority to agent to deal with financial matters relating to principal’s health care (e.g., benefit entitlements, payment obligations, receipt of “protected health information”).

- Does **NOT** grant agent authority to make medical and/or health care decisions for principal.

▫ Certain Items Must Be Expressly Stated In Modifications Section:

• § 5-1502(D) – Banking

- Changes to joint bank accounts (e.g., adding / deleting a new joint owner) and changes to beneficiary designations in Totten trusts are **NOT** authorized by POA unless expressly stated
- If agents are required to act together, one agent may delegate to co-agent authority to conduct banking transactions if principal initialed (o) in grant of authority provisions of paragraph (f)

• §§ 5-1502(I), – Personal & Family Maintenance

- Now allows gifts up to \$5,000 in the aggregate (up from \$500) per calendar year, however, all gifting in excess of \$5,000 must be delineated in Modifications Section (**NOT** SGR!)

• 5-1502L – Retirement Benefit Transactions

- Changes to designation of beneficiaries are **NOT** authorized by POA unless expressly stated

• 5. Timeline for Acceptance & Reliance

- **§ 5-1504(1) allows a party to rely in good faith upon an acknowledged and properly witnessed POA, and to request:**
 - (i) an agent's certification under penalty of perjury of any factual matter concerning the agent, principal, or POA
 - (ii) an opinion of counsel as to any matter of law concerning the POA, provided that the party makes said request in writing **and** provides reason for request
- **§ 5-1504(2) allows as reasonable cause for refusing to honor a POA the agent's refusal of request for agent's certification or opinion of counsel**
 - Definition of "reasonable cause" remains basically the same as in the current statute

 **VIP! § 5-1504(3)(a) allows third party to reject POA in a writing that sets forth the reason for rejection, allows for proponent of the POA to respond, and allows for the third party to either honor the POA or provide a written rejection stating the reason therefore:**

- 10 days to honor or reject (rejection must be in writing sent to principal and agent at addresses on the POA and such other addresses as provided by principal or agent)
- No specific time for proponent to respond
- Following response, 7 days to honor or finally reject

• 5. Timeline for Acceptance & Reliance (Exceptions)

▫ When does notice NOT need to be sent?

- **§5-1504(3)(b)**: Notice to the agent as required by paragraph (a) of this subdivision shall not be sent until after a determination is made by Adult Protective Services if the reason for rejection is a reason set forth in subdivision two of this section and is otherwise prohibited by law or regulation.

▫ When is the Acceptance & Reliance timeline NOT applicable?

- Department of Audit and Control
- A public retirement system of the state as defined in Subdivision 6 of Section 152 of the Retirement and Social Securities Law
- The Department of Health, including Social Services Districts in the administration of the Medical Assistance “Medicaid” Program pursuant to Title XIX of the federal Social Security Act or other public health insurance programs

• 6. Safe Harbor Provision & Sanctions

▫ **Safe Harbor: § 5-1504(4)(a)**

Provides a third party that reasonably accepted / relied upon a properly executed Statutory Short Form POA in good faith a safe harbor from any claims that could ensue against that third party as a result

HOWEVER

▫ **Sanctions: § 5-1504(4)(b)**

If a third party refuses to accept / honor a Statutory Short Form POA, a Special Proceeding authorized by § 5-1510 shall be the exclusive remedy for a violation of this section.

If the court finds that the third party acted unreasonably in refusing to honor the agent's authority thereunder, the court may award damages, including reasonable attorney's fees and costs.

• 6. Safe Harbor Provisions & Sanctions

▫ So When Is the POA Enforceable?

- §§ 5-1504(2) and 4(b) provide that it shall be deemed unlawful for a third party to unreasonably refuse to honor a properly executed short form POA executed in accordance with § 5-1501(B) of this title or a Statutory Short Form POA **properly executed in accordance with the laws in effect at the time of its execution.**

▫ What to Expect Going Forward?

- Banks and financial institutions will have checklists where they will indicate problems with the POA that require a response
- Attorneys should prepare an opinion of counsel as to matters of law concerning the POA
- The default in order to avoid damages and attorneys fees will be to accept a properly executed POA (i.e., just say yes, rather than just say no)



PART III:

HOW TO DEAL WITH GIFTING PROVISIONS (NO MORE “SGR”)

- **6. How to Deal With Gifting Provisions
(No More “SGR”)**

Remember to Expressly State Within The Modifications Section:

- **(g) Certain Gifts Transactions**

- You must expressly grant that authorization in the Modifications section below
- Initialing of (g) still required

- **(h) Modifications**

- In this section, you may make additional provision, including, but not limited to, language to limit or supplement authority granted to your agent, language to grant your agent the specific authority to make gifts to himself or herself, and/or language to grant your agent the specific authority to make other gift transactions and/or changes to interests in your property

• 6. How to Deal With Gifting Provisions (No More “SGR”)

▫ The principal may authorize the agent to:

- (a) Make gifts up to a specified dollar amount, or unlimited amount
- (b) Make gifts to any person or persons
 - but make sure to exclude the witnesses!
- (c) Make gifts to him or herself, or create in him or herself an interest in the principal’s property
 - State whether any authority granted to an agent must be exercised according to any instructions in the POA or any other writing provided by the principal regarding the exercise of any authority, or otherwise for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including financial, estate, or tax planning, including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes.

- **6. How to Deal With Gifting Provisions (No More “SGR”)**

- **Items That Should Be Included In Modification Section for Gifting (From Current § 5-1514):**

- **A gift to an individual authorized by this subdivision may be made:**

- outright
- by exercise or release of a presently exercisable general or special power of appointment held by the principal
- to a trust established or created for such individual
- to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian)
- to a tuition savings account or prepaid tuition plan as defined under Section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account)

• **6. How to Deal With Gifting Provisions (No More “SGR”)**

▫ **Items That Should Be Included In Modification Section for Gifting (From Current § 5-1514):**

- (1) opening, modifying, or terminating a deposit account in the name of the principal and other joint tenants
- (2) opening, modifying, or terminating any other joint account in the name of the principal and other joint tenants
- (3) opening, modifying, or terminating a bank account in trust form as described in Section 7-5.1 of the EPTL, and designate or change the beneficiary or beneficiaries of such account
- (4) opening, modifying, or terminating a transfer on death account as described in Part 4 of Article 13 of the EPTL, and designate or change the beneficiary or beneficiaries of such account
- (5) changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal
- (6) procuring new, different, or additional contracts of insurance on the life of the principal or annuity contract for the benefit of the principal
- (7) designating or changing the beneficiary or beneficiaries of any type of retirement benefit or plan
- (8) creating, amending, revoking or terminating an inter vivos trust
- (9) opening, modifying, or terminating other property interests or rights of survivorship, and designate or change the beneficiaries therein



PART IV:

**DRAFTING
CONSIDERATIONS**

▫ Remember to Expressly State Within Modifications Section:

- **§ 5-1502(D) – Banking Transactions**

- Authority to make changes to joint bank accounts (e.g., adding / deleting a new joint owner) and changes to beneficiary designations in Totten trusts
- If agents are required to act together, authority for one agent to delegate to co-agent authority to conduct banking transactions by initialing (o) in grant of authority provisions of paragraph (f)

- **§§ 5-1502(I) – Personal & Family Maintenance**

- Authority to make gifts in excess of \$5,000

- **5-1502L – Retirement Benefit Transactions**

- Authority to change designation of beneficiaries

- **Other Things To Possibly Include Within The Modifications Section:**

- Eliminate one or more of the powers enumerated in one or more of the construction sections
- Supplement one or more of the powers enumerated in one or more of the construction sections by specifically listing additional powers of the agent
- Make additional provisions which are not inconsistent with other provisions
- Include a provision revoking one or more POAs previously executed by the principal

- **Remember to Delete Optional Sections That Are Not Used:**
 - Delete and Replace with “Intentionally Omitted”
- **Remember to Prepare the Following to Have On Hand:**
 - Agent’s Certification Upon Penalty of Perjury
 - Opinion of Counsel

- **Remember to Include Witness Acknowledgement Language:**

“I acknowledge that the principal signed the Power of attorney in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal’s signature was affixed by him or her at his or her direction.”

“I also acknowledge that the principal has stated that this Power of Attorney reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of gifts.”

• Other Resources

- **NYS Statutory Short Form Power of Attorney (2010)**
 - <https://nysba.org/products/power-of-attorney-forms-word-version/>
 - <https://www1.nyc.gov/assets/hra/downloads/pdf/services/homeless-sness-prevention/poa.pdf>
- **Senate Bill Section 3923, Passed 12/15/20 (POA Legislation)**
 - <https://www.nysenate.gov/legislation/bills/2019/s3923>
- **Senate Bill S888, Passed 3/25/21 (Chapter Amendment)**
 - <https://www.nysenate.gov/legislation/bills/2021/s888>
- **The Long-Awaited Modifications to the Statutory Short Form Power of Attorney Have Been Enacted**
By Anthony J. Enea, Esq.
 - https://nysba.org/the-long-awaited-modifications-to-the-statutory-short-form-power-of-attorney-have-been-enacted/#_edn24

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