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TRUSTS & ESTATES  
LAW ALERT

**POWERS OF ATTORNEY**

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# POWER OF ATTORNEY OVERVIEW

On September 1, 2009, new laws governing New York State Powers of Attorney are slated to take effect. The new legislation extensively overhauls the form and procedures relating to statutory Powers of Attorney. It will apply to all Powers of Attorney executed on or after September 1, 2009 but will not affect the validity of statutory powers of attorney executed prior to that date if valid at the time of execution.

A Power of Attorney is a written instrument by which one person (the Principal) confers upon another (the Agent or Attorney-in-Fact) authority to act in financial and personal matters specified by the Principal. The Power of Attorney is useful in any number of circumstances and transactions in which an individual may be unable to act in person.



Responding to a need for standardization and consistency, the State of New York passed its first general statutory power of attorney statute in 1948.

Although not originally intended as such, the Power of Attorney gradually developed into an important estate planning instrument, and several legislative changes have over the years been enacted to modernize the statute and address estate planning needs. Importantly, a 1975 amendment to the law authorized the use of "Durable" Powers of Attorney -- those which remain effective in the event of the Principal's incapacity.

## NEW YORK STATUTORY POWERS OF ATTORNEY

## DURABLE POWERS OF ATTORNEY IN THE ESTATE PLAN

manage personal affairs and finances in the event of incapacity. The Durable Power of Attorney avoids the time, expense and distress that may be involved in obtaining a court appointed guardian. However, this very advantage means that the Power of Attorney relationship lacks court oversight, which in some instances has resulted in financial exploitation of the Principal by the Agent. The new law, titled "Statutory Short Form and other Powers of Attorney for Financial Estate Planning," is intended in large part to address such concerns. The new law recognizes the critical role that the Durable Power of Attorney can play in the estate planning process, adding additional formalities and safeguards at several levels and calling specific attention to the fiduciary relationship established under a Power of Attorney and the duties of the Agent arising under that relationship.

All of us face a risk that we may at some point become unable to manage our personal and financial affairs. The Durable Power of Attorney's function in the estate plan is to provide a practical and cost effective means to designate, in advance, a trusted individual to

The new law establishes a new form Power of Attorney, referred to as a statutory short form Power of Attorney. After September 1, 2009, to qualify as a statutory short form Power of Attorney, the power must meet the requirements set forth in the new law. Some of the important changes that will be implemented under the new law are described below.

## SUMMARY OF MAJOR CHANGES

**Execution** The present statutory short form Power of Attorney requires only the Principal's signature, acknowledged by a notary public. The new statutory short form Power of Attorney must be signed by both the Principal *and all Agents*, and all signatures must be acknowledged by a notary public. The Principal and Agents need not all sign at the same time, but the Power of Attorney will not be effective until the Agent's signature has been acknowledged by a notary public.



**Gifts and Property Transfers** To provide gift making authority, the new law requires the Principal to complete and sign a "Statutory Major Gifts Rider." This additional Rider must detail the Agent's gifting authority and not only requires acknowledgement by a notary public, but must also be witnessed in the same manner required for execution of a Will, by two persons who are not potential gift recipients. In addition, a grant of authority to create and fund trusts, to create joint accounts, and to change beneficiaries on retirement plans and life insurance policies must be included within the Statutory Major Gifts Rider. To authorize the Agent to make gifts to himself or herself, the Statutory Major Gifts Rider must specifically so provide. Without a Statutory Major Gifts Rider, the Agent's gifting authority will be nominal, limited to gifts not exceeding \$500 annually to any individual or charity, and only if the gifts continue a previous gifting custom of the Principal.

**Fiduciary Responsibilities** The new statutory short form Power of Attorney mandates that the Agent (i) act according to the Principal's instructions or, if none, in the best interest of the Principal, (ii) keep the Principal's property separate from the Agent's property and (iii) keep a record of all transactions entered into on behalf of the Principal.



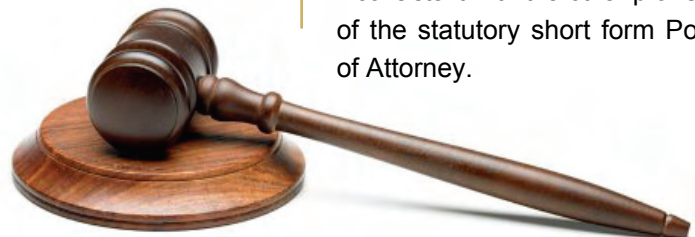
**Designation of Monitor** The statute provides for a new concept. The Principal may appoint a "Monitor" -- an individual with authority to demand that the Agent furnish to the Monitor a copy of the Power of Attorney and a record of all transactions made on behalf of the Principal.

**Acceptance of Power** As under present law, a financial institution or other third party may not refuse to accept a statutory short form Power of Attorney executed in accordance with the statute. The new law adds teeth to this mandate, providing that an Agent may commence a proceeding in court for an order compelling the third party to accept the Power of Attorney. A third party may, however, refuse to accept a statutory short form Power of Attorney for "reasonable cause" which includes, among other things, actual knowledge or a reasonable basis for believing that the Principal executed the Power of Attorney when incapacitated, or that the Power of Attorney was procured by fraud, undue influence or under duress.

**Compensation of Agents** A new provision has been added pursuant to which the Principal can, by initialing a specific box on the statutory short form, provide that the Agent shall be entitled to reasonable compensation.

**Modifications** Modifications to the statutory short form Power of Attorney are permitted to eliminate or supplement a power granted under the statutory form, and may add powers that are not inconsistent with the other provisions of the statutory short form Power of Attorney.

**Certification** Under the present statute, a Power of Attorney must be recorded with the County Clerk if used in connection with a real estate transaction. The new law allows an attorney to certify the Power rather than having to submit it for recording.



**Springing Powers of Attorney** The separate statutory form for Springing Powers of Attorney (a power that becomes effective only upon the happening of a specified event -- usually the written certification by a physician of the Principal's incapacity) which exists under the present statute is to be eliminated. Instead, a Principal wishing to have a "springing" power of attorney must set forth the contingency under the "Modifications" section.



**Revocation** Execution of a new statutory short form Power of Attorney will automatically revoke all of the Principal's previously executed Powers of Attorney unless otherwise stated under the "Modifications" section. A word of caution is in order concerning this provision. Many individuals have separate specialized powers of attorney which they have executed for a specific and limited purpose or for a particular financial institution which will be revoked upon execution of a new statutory short form Power of Attorney unless otherwise specifically provided.

## RETROACTIVITY

The new statute retroactively expands the authority of agents under existing statutory short form Powers of Attorney to deal with government benefits and with health care records and payments. Also, the provisions detailing an Agent's fiduciary duties as well as the new procedures regarding commencement of court proceedings to compel a third party to accept a Power of Attorney will apply to existing statutory short form Powers of Attorney.

The new statutory short form should be used for all powers executed on or after September 1, 2009. As for statutory short form Powers of Attorney executed before September 1, 2009, the statute specifically provides for their continued validity. However, as experience has shown that financial institutions at times balk at the attempted use of a power on an old form following a major statutory overhaul, replacement of an existing power with a new statutory short form would be prudent as part of your periodic estate plan update.

## CONCLUSION



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