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**REPORT ON LEGISLATION BY THE
LEGAL PROBLEMS OF THE AGING COMMITTEE AND
THE TRUSTS, ESTATES AND SURROGATE'S COURTS COMMITTEE**

**A.5630-A
S.3923-A**

**M. of A. Weinstein
Sen. Hoylman**

AN ACT to amend the general obligations law, in relation to reforming the statutory short form and other powers of attorney for purposes of financial and estate planning; and to repeal certain provisions of such law relating to statutory gift riders.

THIS BILL IS APPROVED

I. BACKGROUND

The New York State Bar Association, with the approval of the NYSBA House of Delegates (“NYSBA”), proposed legislation which aims to amend the NYS General Obligations Law (“GOL”) as it relates to powers of attorney and statutory gifts riders (“POA Law”). The proposed bills – introduced as A.5630/S.3923 and later amended as A.5630-A/S.3923-A (collectively, “Proposed Legislation”) – seek to implement recommendations of the New York State Law Revision Commission (“Commission”) Report on Powers of Attorney dated January 1, 2012 (“Report”), together with certain modifications.

In 2012, the Commission, based on its analysis of the implementation of the current POA Law since 2009, when the new law and form were made effective, and 2010, when the law and form were refined, as well as feedback from practitioners, recommended further changes to the law and forms. Such recommended changes are contained in the Commission’s Report.¹ Using these recommendations as a starting point, NYSBA drafted the Proposed Legislation designed to implement substantive changes to the POA Law and the form of the Statutory Short Form Power of Attorney and Statutory Gifts Rider (“POA Form and SGR”) and address dissatisfaction of the bar with the 2009 and 2010 amendments to the POA Law and POA Form and SGR.

The City Bar supports the Proposed Legislation and provides its observations regarding two aspects of the bill.

¹ The New York State Law Revision Commission Report on Powers of Attorney, Jan. 1, 2012, available at <https://nyslawrevision.files.wordpress.com/2014/07/powersofattorneyfinalreportjanuary12012.pdf> (last visited on Sept. 30, 2020).

II. REASONS FOR SUPPORT

a. The POA Form and SGR Should Not Require “Strict Adherence”

Currently, in order to qualify as a Statutory Short Form Power of Attorney or Statutory Gifts Rider, the POA Form and SGR must be written exactly as required in the statute (i.e., strict adherence to the statutory forms). GOL § 5-1501(n) and (o). In practice, inadvertent and unimportant minor errors have caused forms to be either not Statutory Short Form Powers of Attorney (or SGRs) or not valid at all. The Proposed Legislation changes the standard from strict adherence to one of “substantial” conformity.

Under the law as it presently exists, the POA Form and SGR are full of traps for the unwary. Errors in the drafting of the POA Form and SGR have significant and severe repercussions. These errors are made even worse if not discovered until after the principal suffers an incapacity. In that case, it will be too late to create a correct POA Form and/or SGR. If the standard for drafting is substantial conformity, then unimportant errors and/or mistakes will not invalidate the POA Form or SGR, provided that the forms substantially comply with the forms in the statute.

Moreover, third parties do not have the staff or the time for a word-by-word review of what is often a multi-page form with more than 21 places to be initialed. Rather than do this review, many institutions have reinstated their policy of refusing to accept any form except their own. By changing the standard to substantial conformity, third parties would be permitted to engage in a more effective and meaningful review of the POA Form and SGR to ensure it complies with the statute and/or a certification from the attorney.

b. The POA Form and SGR are Overly Complex and Result in Execution Errors

The POA Form and SGR must be executed simultaneously to be effective. Yet, the two documents require two different forms of execution. The POA Form requires the signature of the principal and an acknowledgment in the form required to record a deed. The SGR requires the signature of the principal, an acknowledgment in the form required to record a deed, and two witnesses.

The combined statutory form has 21 places where it may be initialed including one place in the POA Form which must be initialed for the SGR to be effective. The Proposed Legislation merges the POA Form and SGR into one cohesive, manageable, and understandable form.

The NYSBA recognized the Commission’s concern in 2008 and 2010 for heightened awareness by the principal for the significance of the gifting provision and the dangers in not understanding the nature and consequences of the gifting provisions. However, it has been the experience of an overwhelming number of practitioners that the goal of such heightened awareness has not been achieved by the new forms, the increased verbosity of which only creates confusion for the principal, and which has led to forms that are continuously improperly executed and forms so complex they are extremely difficult to execute properly within the requirements of the current law.

The Proposed Legislation provides that the gifting provisions of the SGR will be inserted in the Modifications Section of the POA Form requiring only one procedure for acknowledging the signature of the principal. The City Bar supports this change.

c. Financial Institutions or Others Who Act Unreasonably in Refusing to Accept a Valid POA Form Should Face Some Form of Penalty

Presently, the exclusive remedy for failure to accept a valid POA Form is a special proceeding under GOL § 5-1510, in which case the relief to be granted is limited to an order compelling acceptance. There is no provision for damages or attorney fees.

The law must include sanctions for third parties which unreasonably refuse to accept a properly executed POA Form or SGR, making them liable for the consequences suffered by the POA principal. The current remedy of a special proceeding under GOL § 5-1510 is inadequate without the ability of the court to impose sanctions against the third party.

The Proposed Legislation includes an additional provision that allows a court to award damages, including reasonable attorney's fees and costs if the court finds that a third party acted unreasonably in refusing to honor the agent's authority under the Statutory Short Form Power of Attorney. The revisions in 2008 and 2010 were intended to address the problem of banks and other third parties refusing to honor a statutory form and/or requiring their own forms be executed. Many banks and other third parties still require that their own forms be used, presumably because there are no sanctions for failing to honor a valid POA Form and/or SGR. In other words, there is no incentive for a bank or third party to accept a valid POA Form or SGR since there is no repercussion for refusing to do so. As such, practitioners report that these unreasonable refusals to accept valid POA Forms and/or SGRs continue unabated. Moreover, there appears to be no uniform policy even within a particular institution as to whether a POA Form or SGR will be accepted.

In order to balance the equities and reduce the burden on the third-party institution presented with a Statutory Short Form Power of Attorney, the Proposed Legislation contains provisions setting forth procedures whereby a third party can reject such a power of attorney. For example, the Proposed Legislation includes the Uniform Power of Attorney Law provisions whereby a third party can be held harmless if it, in good faith, accepts an acknowledged POA Form and/or SGR without actual knowledge that the signature(s) is(are) not genuine and may rely upon the presumption that the acknowledged signature(s) is(are) genuine. Additionally, the third party can set forth its reasons for rejecting the POA Form or SGR and allow the proponent to respond to the reasons for such rejection. Additionally, the third party may also ask the agent for his or her certification of any factual matter concerning the principal, agent, or Statutory Short Form Power of Attorney and an opinion of counsel as to any matter of law concerning the power of attorney.

These protections for third parties and the availability of remedies such as damages and attorney fees have been adopted by numerous states as part of the Uniform Power of Attorney Law. Banks and financial institutions operate profitably in those states under those laws. We see no reason why the same institutions cannot function under the same provisions in New York State.

NYSBA recommended that the Proposed Legislation include an additional provision that allows a court to award damages, including reasonable attorney's fees and costs if the court finds that a third party acted unreasonably in refusing to honor the agent's authority under the Statutory Short Form Power of Attorney. The City Bar concurs with NYSBA's assessment and supports the Proposed Legislation.

III. OBSERVATIONS CONCERNING TWO PROVISIONS OF THE BILL: SUBSTANTIAL CONFORMITY AND OPINION OF COUNSEL

It is no secret that some in the banking community oppose the sanctions provision of the Proposed Legislation. Specifically, they argue that the ability of a party to recover attorneys' fees as part of damages is in derogation of the American Rule that each party to a litigation must bear its own costs and will increase frivolous litigation. Moreover, banks argue that imposing such a sanction on banks is premature before a record has developed of banks' performances under the new, more flexible regime of "substantial conformity" provided by the Proposed Legislation.

However, an incorrect and unreasonable refusal by a bank to honor a POA can cause enormous difficulty to individuals or families, particularly if the sponsor of the POA has become incompetent by the time the bank refuses to honor the POA. And, the Proposed Legislation provides significant safety valves and safe harbors to banks, including the entitlement to require legal opinions from counsel (at the principal's expense) on legal issues or certifications by agents on issues of fact (which the statute empowers the banks to accept without further investigation), the entitlement to reject POAs that reasonably appear unsatisfactory or for which the requested legal opinion or factual certification are not provided, and indemnification of the bank against liability for accepting apparently proper POAs without actual knowledge that they are improper. In these circumstances, if a bank unreasonably refuses to honor a POA and forces the agent to spend money obtaining court orders that it be honored, it is fairer to have the bank pay for the costs of these steps necessitated by the bank's unreasonable refusals than to have the victim of the bank's unreasonableness pay them.

Courts should have little difficulty in most cases in determining whether the POA is valid and whether a refusal to validate it was unreasonable, particularly given the statutory requirement that the banks state their reasons for denial in writing and given the detailed statutory description of what grounds for denial will and will not be deemed reasonable. It is also reasonable to assume that agents will not undertake efforts to bring these actions unless they feel genuinely aggrieved by failures to honor a POA that should appropriately be honored; this does not seem like a fertile area for litigation by people who are just looking to collect attorneys' fees.

In light of these conflicting concerns, the City Bar offers two observations² as part of its overall support for passage of the Proposed Legislation. First, regarding the meaning of "substantial" conformity, it is widely understood that the plain and ordinary meaning of "substantially" is "in the main," "essentially," "practically," or "nearly"; the term "substantially" in the context of the Proposed Legislation should not require the power of attorney to be identical to the form in GOL § 5-1513. To determine whether there is "substantial conformity," the power

² These observations are based upon the views expressed by the City Bar's Banking Law Committee.

of attorney at issue should be considered in its entirety to determine whether the legislative purpose of the Power of Attorney statute has been satisfied. This determination does not turn on the presence or absence of a particular clause, and failing to include clauses that are not relevant to a given power of attorney should not in itself cause such power of attorney to fail the “substantial conformity” test. The language of the Proposed Legislation properly conveys these concepts.

Second, regarding the proper utilization of the ability to request an opinion of counsel, we have the following observation: Legal opinions may only be given as to matters of law, and not as to matters of fact. Legal opinions as to legal competency, for example, are highly fact-specific. Accordingly, a legal opinion on this topic can be given only if the counsel from whom such an opinion is requested has verified each factual predicate upon which a determination of legal competence relies. Moreover, a legal opinion should state whether the opinion is based on counsel’s reasonable conclusion based on the law as it exists or on the judicial or legislative precedent on “substantial conformity” existing at the time, if any.

Thank you for your consideration. We hope this report is helpful to policymakers, lawyers and members of the public.

Legal Problems of the Aging Committee*

Britt Burner, Chair

Jeffrey A. Asher, Subcommittee Chair

Trusts, Estates & Surrogate’s Courts Committee*

Andrew S. Auchincloss, Chair

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* This report was reviewed and approved by the Legal Problems of the Aging Committee and the Trusts, Estates & Surrogate’s Courts Committee of the New York City Bar Association. Mr. Asher and Ms. Burner participated in the drafting of this report and Mr. Asher participated in the drafting of the New York State Bar Association report initially proposing the legislation.