The Powerful Power of Attorney

by Regina M. Spielberg

The troubling case of Brooke Astor—the New York socialite and philanthropist whose son, Anthony Marshall, was convicted last year of defrauding and stealing millions of dollars from his mother—placed national media attention on the power of a power of attorney. A written instrument by which an individual, known as the principal, authorizes another individual, known as the agent, to perform specified acts on his or her behalf,[1] the power of attorney is an effective planning tool for those who anticipate needing assistance with financial matters.

Ideally, a client executing a power of attorney chooses a trustworthy agent who acts for the client's benefit, avoiding the need for a guardian, the associated court costs and a public determination of incapacity. By giving another person authority to manage one's financial affairs, however, the client may risk misuse of the power of attorney by the agent. Adding to the possible risk, power of attorney forms are widely available on the Internet, allowing a principal to sign a simple document that conveys extraordinary powers without the benefit of counsel.

The popularity of the power of attorney has contributed to its use in transactions more complex than originally intended by the law.[2] An unscrupulous agent acting under a broad power of attorney may have authority to conduct transactions that are not in the principal's best interest, such as transferring property without notifying the principal. In an effort to curtail abuses of powers of attorney, states have adopted statutes that address execution requirements, fiduciary obligations, limitations of the agent's authority and the standard of care required of the agent.

Background

At common law, powers of attorney terminated upon the incapacity of the principal. A durable power of attorney is created by statute to either survive the incapacity of the principal or become effective upon the incapacity of the principal, permitting the extended management of the principal's assets. In 1954, Virginia enacted the first durable power of attorney statute that allowed agents to act for an incapacitated principal.[3]

The National Conference of Commissioners on Uniform State Laws (NCCUSL) made statutory durable powers of attorney part of the Uniform Probate Code (UPC)[4] in 1969, to provide an alternative to court-oriented protective procedures. The durable powers of attorney provisions of the UPC were amended, and a separate Uniform Durable Power of Attorney Act was adopted in 1979.[5] At one time followed by most states, it was last amended in 1987.

The current Uniform Power of Attorney Act (UPOAA)[6] was adopted by NCCUSL in 2006 in response to a national review of state power of attorney legislation. This review determined that many states had enacted provisions with respect to areas where the original Uniform Durable Power of Attorney Act was silent, including:

1. authority of multiple agents;
2. authority of a guardian appointed after the execution of the power of attorney;
3. impact of the dissolution of a marriage where the spouse is the agent;
4. portability;
5. authority to make gifts; and
6. standards of agent conduct and liability.[7]

The presumption of the UPOAA is that a power of attorney is durable unless otherwise expressed. It provides a default standard for agent conduct and liability. The UPOAA provides for third-party reliance on the power of attorney and liability for unreasonable refusal to accept the power of attorney. The agent may file for a court order to enforce acceptance of the power of attorney.

An optional statutory form for creating a power of attorney is included in the UPOAA.[8]

The UPOAA addresses legislative trends and best practices, and balances the need for acceptance of an agent's authority against the need to prevent and redress financial abuse.[9] While all 50 states have power of attorney statutes, only

four—Colorado, Idaho, Nevada and New Mexico—have adopted the UPOAA.

The 'New' New York Power of Attorney

Effective Sept. 1, 2009, the New York General Obligations Law governing the power of attorney statute was significantly amended.[10] The changes resulted from eight years of study by the New York State Law Revision Commission. The commission concluded that the potency and easy creation of a power of attorney, when combined with existing statutory gaps and ambiguities, can result in its misuse. These concerns are intensified when the principal is incapacitated and unable to monitor the agent's actions.[11]

Like the UPOAA, the new New York law provides: 1) a new statutory short form of power of attorney; 2) the form is durable unless it provides otherwise; 3) a third party cannot unreasonably refuse to honor the power of attorney; 4) a third party cannot require an additional form of power of attorney for authority granted in the power of attorney presented; and 5) portability, in that other forms of power attorney may be used in New York,[12] specifically, a power of attorney executed outside of New York that appears to be a statutory form of power of attorney of another jurisdiction that complies with the laws of that jurisdiction at the time of execution.

The statutory power of attorney must be signed, dated and acknowledged by both the principal and the agent. The effective date of the power of attorney regarding an agent is the date when the agent's signature is acknowledged. As a result, if more than one agent is designated, the power of attorney is effective when all agents have signed the power of attorney and their signatures have been acknowledged. A valid power of attorney executed prior to Sept. 1, 2009, remains valid.[13]

An important change that has received much attention is the statutory major gifts rider (SMGR).[14] Intended to help curb financial abuse, the SMGR governs the agent's authority to make gifts exceeding $500 per person (or charity) each calendar year. The SMGR governs the agent's authority to create and fund trusts, designate beneficiaries on retirement accounts and insurance policies, and create joint accounts.

To be valid, the rider must be accompanied by a power of attorney in which the authority (SMGR) is initialed by the principal, and must be executed simultaneously with a properly executed power of attorney. The SMGR itself must be signed in the same manner as a will (*i.e.*, the signature of the principal must be witnessed by two people not named in the SMGR as permissible recipients of gifts). An alternative to the rider is permitted if the non-statutory grant of authority is executed in the same manner as the SMGR.[15]

While there has been some grumbling about the new execution requirements, the purpose is to alert the principal to the significance of granting the agent this type of authority.[16]

Proposed Revisions to the New Jersey Power of Attorney Statute

The New Jersey Law Revision Commission proposed revisions to the New Jersey Revised Durable Power of Attorney Act[17] in December 2009, and solicited public comments until March 12, 2010. The proposed revisions and related tentative report, prepared by Marna L. Brown, counsel to the commission, can be found online at www.njlrc.state.nj.org.

Like the new New York statute, the proposed revisions are intended to clarify ambiguities and address gaps in the existing statute. For example, proposed Section N.J.S. 46:2B-20.2 adds a definitions section and replaces the term "attorney-in-fact" with "agent." The term "financial institution" expands the application of the proposed statute to include not only banks but securities brokers and dealers, insurance companies, trust companies and other entities.

Under proposed Section N.J.S. 46:2B-20.11, no third party, including financial institutions, may refuse a power of attorney because it is not on a form prescribed by the third party. Consistent with existing law, the proposed section also provides that no third party, including financial institutions, may refuse a power of attorney due to a lapse of time since the document's execution. Third parties who violate the statute will be subject to action by the principal, agent, guardian or conservator of the principal, spouse, domestic or civil union partner, child or parent of the principal under proposed Section N.J.S. 46:2B-20.13.

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durable unless the document expressly provides otherwise under the proposed revision. Co-agents shall act jointly unless the document expressly provides otherwise under the proposed revision.

Consistent with existing law, the agent under a power of attorney does not have authority to make gifts or transfers unless that authority is expressly granted. The same express authority is required for an agent to: 1) designate, change or revoke beneficiaries under insurance policies, annuities, employment benefits and retirement plans; 2) create, amend, revoke or terminate *inter vivos* trusts; 3) modify, terminate, or change beneficiaries of a transfer on death account.

The commission initially considered including a statutory form power of attorney, similar to the New York statute, in the proposed revision, but ultimately did not due to the unfavorable response from the New Jersey legal community. Instead, the proposed revisions provide drafting guidelines at N.J.S. 46-2B-20.6; Section (a) provides required guidelines and Section (b) provides illustrative guidelines.

The power to "conduct health care billing, recordkeeping and payment," as described in N.J.S. 46:2B-20.35, will authorize the agent to act as a representative under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[18] to access protected health information and to communicate with healthcare providers, but not to make healthcare decisions under proposed Section N.J.S. 46-2B-20.5f.

A power of attorney must be signed by the principal and witnessed and acknowledged by two individuals, neither of whom may be the agent, and a notary public or other officer authorized to take acknowledgments, in order to be valid under the proposed statute. The document is effective when signed by the principal. The agent's signature is not required.

Conclusion

Under the proposed revisions of the power of attorney statute, New Jersey will join the trend toward more detailed, complex powers of attorney statutes. Some attorneys feel such statutes unnecessarily complicate a simple, useful planning tool. But the availability of power of attorney forms on the Internet allows people to sign this incredibly powerful document without the benefit of counsel, thereby increasing the potential for misuse. Strict statutory standards for document execution, agent authority and fiduciary obligations are intended to help the principal understand the effect of the power of attorney. ⚖

Endnotes

1. N.J.S.A. § 46:2B-8.2.
2. Changes for Powers of Attorney in New York, Rose Mary Bailly and Barbara S. Hancock. *NYSBA Journal*, March/April 2009, p. 41.
3. Va. Code §11-9.1 (2009); Nina A. Kohn, Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney, 59 *Rutgers L. Rev.* 1, 7.
4. Unif. Probate Code §5-501 (1979) (prefatory note) www.law.upenn.edu/bll/ archives/ulc/dpoaa/1979 UPC_V.htm
5. Unif. Durable Power of Attorney Act, Section 5 (1979) (prefatory note). www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm
6. Unif. Durable Power of Attorney Act, Section 5 (1979) (prefatory note). www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm
7. *Id.*
8. *Id.* at §301.
9. Andrew H. Hook, vol. 859 T.M., *Durable Powers of Attorney*, Tax Management Inc. (2008).
10. N.Y. Gen. Oblig. Law §5-1501 *et seq.* (Consol. 2009).
11. The New York State Law Revision Commission 2008 Recommendation on the Proposed Revision to the General Obligations Law Power of Attorney.
12. N.Y. Gen. Oblig. Law §5-1501 *et seq.* (Consol. 2009).
13. N.Y. Gen. Oblig. Law §5-1501B(3) (Consol. 2009).
14. N.Y. Gen. Oblig. Law §5-1514 (Consol. 2009).
15. N.Y. Gen. Oblig. Law §5-1501(2)(b) (Consol. 2009).
16. Changes for Powers of Attorney in New York, Rose Mary Bailly and Barbara S. Hancock, *NYSBA Journal*, March/April 2009, p. 42.
17. N.J.S.A. 46:2B-8.1 *et seq.*
18. Health Insurance Portability and Accountability Act (HIPAA) of 1996 (P.L. 104-191).

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