New York State Bar Association

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NYSBA

Supplemental Memorandum Urging Approval

Reforming the New York Power of Attorney While Maintaining Protections from Fraud and Abuse

NYSBA #18-C Supplemental Memo — August 24, 2020

A. 5630-A	By:	M. of A. Weinstein
S. 3923-A	By:	Senator Hoylman
	Assembly Committee:	Rules
	Senate Committee:	Rules
	Effective Date:	180th day after it shall have become a law

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.

The New York State Bar Association has long championed important reforms to the power of attorney statute. To that end, we have already issued a full-throated memorandum in support of A.5630-A/S.3923-A, wherein we respectfully urge the Governor to approve this legislation. It has since come to the Bar Association's attention that detractors who opted not to raise any concerns with the legislation in the four years since it was introduced, but rather waited until after the bill passed both houses, are now questioning whether the legislation sufficiently protects New York consumers. The objections raised to the version of the bill that passed both houses are simply unfounded. In fact, the current bill, if chaptered, will maintain and enhance the measures which prevent fraud and abuse. For all of the reasons stated in our original memo, and those detailed below, the Bar Association continues to support swift approval of A.5630-A/S.3923-A.

In 2008 (Ch. 644, L. 2008) and 2010 (Ch. 340, L. 2010) the New York Power of Attorney law was substantially revised. One goal was to try to prevent the use of the power of attorney as a tool for fraud or abuse. The goal was laudable, but the design was flawed. It came at the suggestion of groups that dealt with the issues of fraud and abuse in the abstract. However, over the past ten plus years persons who actually use the power of attorney -- both those that draft them for their clients and those that must accept or reject them -- have come to realize that consumers often suffer major problems because of the complexity of the form that was created and the rigid "exact-wording" standard for the form. And it is often difficult for consumers to get a bank or other financial institution to accept a power of attorney, because the bank faces no penalties for refusing to honor the document, thus causing major problems for persons who are incapacitated when an agent must take over and pay utility bills, rent, mortgage payments, hospital and doctor bills, or apply for Medicaid and other public benefits.

In order to address the current problems with the form, this new bill (A 5630-A/ S 3923-A) would simplify the current power of attorney form; prevent third parties from improperly refusing to accept a consumer's valid power of attorney; provide protection for third parties who follow the process for accepting a power of attorney; and, authorize language in the power of attorney form that substantially conforms with the statutory language, in order to prevent the harsh consequence of the form being invalidated because of harmless error in the form.

The bill also responds to concerns of the disability community that physically disabled persons who were unable to sign be permitted to direct another to sign on their behalf. The bill protects against abuse by not allowing the proposed agent or successor agent to be the person who signs at the direction of the principal. Unlike a will or a health care proxy which have witnesses but are not notarized, the provision in the new power of attorney law requires, that the signature of the person signing be "duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property in the presence of the principal." Notarization is the standard for protection against fraud and abuse used under New York law for signing deeds, trusts and various other instruments.

Rather than prevent fraud and abuse the 2008 and 2010 form became so long and complicated that few people using the form bothered to read it when signing. Because of the "exact-wording" requirement the form often contained sections that were not relevant to the principal. Often the form with the Statutory Gifts Rider (SGR) extended to 15 or more pages. It often required choosing to initial or not initial in 15 or more places and it required two different signing, acknowledging and witnessing requirements for the form and the SGR.

Over the last ten years it was widely agreed by both people preparing powers of attorney and those who had to accept them, that having the separate SGR did little or nothing to prevent fraud or abuse. The bill would put gifting provisions back where they belong – in the modification section of the power of attorney.

Those who claim the cautionary language for making gifts is no longer there, ***are simply wrong***. The bill would still clearly explain the significance and limits of an Agent's gifting authority. It emphasizes the importance of granting this authority. The new form has the same cautionary language that was previously in the SGR (it has just been moved): "CERTAIN GIFT TRANSACTIONS:(OPTIONAL) In order to authorize your agent to make gifts in excess of an annual total of $5,000 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), and/or to make changes to interest in your property, you must expressly grant that authorization in the Modifications section below. If you wish to authorize your agent to make gifts to himself or herself, you must expressly grant such authorization in the Modifications section below. *Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. Your choice to grant such authority should be discussed with a lawyer.*" [emphasis added].

And the form still requires initialing that you want to grant such authority as well as requiring that you put the authority in the modifications section. It couldn't be more precise or protective. And now it is concise enough that it will actually be read.

Not only must the modification section contain the gifting authority, but a number of provisions regarding the construction of provisions in the Short Form Power of Attorney have been tightened by requiring for banking and insurance transactions that certain changes to accounts and policies cannot be made unless "expressly stated otherwise in the 'Modifications' section." See §§ 8-a and 9 of the bill modifying §§5-1502D and 5-1502F.

In order to stop the unreasonable rejection of the power of attorney, the bill would provide for potential damages for unreasonably rejecting a valid power of attorney. However to balance the equities and in fairness to those who must accept a power of attorney, the bill would give banks, financial institutions and others an opportunity to question the validity of a power of attorney and get a response from its proponents. These procedures track the language in the Uniform Power of Attorney law now adopted by a majority of the states and now followed by banks and financial institutions in most jurisdictions. It is certainly not the goal of the bill to have all Power of Attorney forms automatically accepted by third parties and these procedures from the Uniform Power of Attorney law would not have been added if it were.

As an added protection against fraud and abuse, the bill would provide specific reasons why a POA can be rejected in §5-1504 subd 2 (a) ***including all of the reasons currently in the statute*** which include, "actual knowledge or a reasonable basis for believing that the power of attorney was procured through fraud, duress or undue influence."

All the fraud and abuse provisions for rejecting a POA in the current law remain intact. Specifically, in GOL §5-1504 subd. 2(a) reasonable cause for rejecting a Power of Attorney remain intact. They continue to include (but not be limited to):

"…(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; (3) actual knowledge of a report having been made by any person to the local adult protective services unit alleging physical or financial abuse, neglect, exploitation or abandonment of the principal by the agent or a person acting for or with the agent; … (5) actual knowledge of the incapacity of the principal or a reasonable basis for believing that the principal is incapacitated where the power of attorney tendered is a nondurable power of attorney; (6) actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed; (7) actual knowledge or a reasonable basis for believing that the power of attorney was procured through fraud, duress or undue influence;…."

And as an added protection when a power of attorney is rejected because of a referral to adult protective services, the bill would provide "Notice to the agent … shall not be sent until after a determination is made by adult protective services …."

The Caution to the Principal remains at the beginning of the Power of Attorney form warning, "Your Power of Attorney is an important document. As the 'principal,' you give the person whom you choose (your 'agent') authority to spend your money and sell or dispose of your property during your lifetime without telling you."

The substantial-conformity requirement of the bill is not vague and would not lead to abuse. The statutory form has not been abandoned. The substantial-conformity standard is in the Uniform Power of Attorney Law which provides "A document-substantially in the following form may be used to create a statutory form power of aorney that has the meaning and effect prescribed by this [act]." Additionally, the substantial conformity standard appears in a number of other New York statutes.[*] At the request of the New York Bankers Association (NYBA) the parameters of substantial conformity are set forth in the statute itself: "A given power of attorney substantially conforms to the form required pursuant to section 5-1513 of this title notwithstanding that the form contains (i) an insignificant mistake in wording, spelling, punctuation or formatting, or the use of bold or italic type; or (ii) uses language that is essentially the same as, but is not identical to, the statutory form, including utilizing language from a previous statute. The determination of whether there is substantial conformity with the form set forth in section 5-1513 of this title shall not depend on the presence or absence of a particular clause. Failing 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."

The bill would protect from having powers of attorney rejected because of common insignificant errors that have been seen over the last ten years. It is hard to imagine a more specific definition of "substantial conformity." Leaving out the *Caution to the Principal* language would certainly not be allowed under this standard of language which is "essentially the same as, but is not identical to the statutory form." Draftsmen using the *almost* exact same language from the 2008 statute after 2010 was one of the most common mistakes that made use of the form invalid, thus the definition of substantial conformity includes "uses language that is essentially the same as, but is not identical to, the statutory form, including utilizing language from a previous statute."

The decision in *Berrian v. Siena College*, 129 A.D.3d 1004 (2015) does not state what power of attorney form was used nor does it reach that issue. The Court granted summary judgment that a statute of limitations was missed because of the harsh standard that "powers of attorney must contain certain 'exact wording' in order 'to be valid.'" The new statute would allow a court to look at the particular facts and see if a substantial-

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[*] For example, Real Property Law §309-a, Election Law §6-132, Alcohol Beverage Control Law §110-a, Public Authorities Law §1045-I, Public Health Law §4201, Domestic Relations Law §14, and Estate Powers and Trust Law §4-1.3 and §7-6.9.

conformity standard was met. The Power of Attorney form used in *Berrian* may or may not have passed this test, but certainly this would have led to a much fairer result.

The work that was done by the New York State Bar Association in drafting this bill took into consideration the experience of not only attorneys who work with the elderly and disabled, trusts and estates practitioners, those that represent banks and commercial establishments, hospitals and care facilities, but also law enforcement and social services agencies (both private and governmental) concerned with protecting the vulnerable from abuse. Those that feel that this bill would lessen the protections against fraud and abuse are simply wrong or misguided. They have not carefully read A.5630-A to see which provisions have been retained and even enhanced.

The revisions to New York's power of attorney law made by this bill would continue and enhance protections against fraud and abuse in the power of attorney law and eliminate the provisions that led to confusion and the rejection of so many powers of attorney. The New York State Bar Association **SUPPORTS THIS LEGISLATION AND URGES ITS APPROVAL** by the Governor.