

Elder Law and Special Needs Section

ELDER # 8

May 17, 2017

The purpose of this Memorandum is to contrast treatment by the courts of differing statutory forms which require either “exact wording” or “substantial compliance” with a statutory form.

The General Obligations Law requires “exact wording” of a power of attorney in order for a form to be considered a statutory form. It further requires exact wording of certain parts of the form in order for the power of attorney to be valid. In contrast Real Property Law requires an acknowledgement required to record a deed to be in substantial compliance with the statute.

In *Berrian v Siena Coll.*, 129 A.D.3d 1004, 12 N.Y.S.3d 240 (2d Dep't 2015), an action for damages commenced by use of a power of attorney, the court considered whether the power of attorney complied with the requirements of General Obligations Law § 5-1501B (1) (d). The Appellate Division Second Department upheld summary judgement dismissing the complaint because statutory short form powers of attorney and non-statutory powers of attorney must contain certain exact wording in order to be valid. The power of attorney in *Berrian* signed by the plaintiff and her daughter omitted language mandated by the statute and therefor was not valid. The court did not, of course, reach the issue of whether the power of attorney in this case would have been valid under a substantial compliance test.

Contrast *Weinstein v. Weinstein*, 36 A.D.3d 797, 830 N.Y.S.2d 179 (2d Dep't 2007), an action for a divorce, in which the court considered the validity of a prenuptial agreement that would be valid under Domestic Relations Law § 236(B)(3) only if it was "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." In *Weinstein* the acknowledgment attached to the agreement was not in the form then currently specified by RPL § 309-a to record a deed, but rather in the form as prescribed by the statute prior to its amendment in 1997. In reversing the lower court, the Appellate Division Second Department found that there was no requirement that a certificate of acknowledgment contain the precise language set forth in the Real Property Law. RPL § 309-a provides, “The certificate of an acknowledgment, . . . , must conform substantially with the following form,” Therefore, the Court held an acknowledgment is sufficient if it is in substantial compliance with the statute and upheld the validity of the prenuptial agreement.

Under the current law, a Statutory Power of Attorney requires the form to contain the exact wording provided in the statute. The New York State Bar Association believes that the standard for a valid statutory power of attorney should be that it “substantially conforms” to the wording of the statutory form rather than has the “exact wording.”

While the current law allows only “a mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type,” our proposed amendments would allow for a form to be a valid Statutory Short Form if it “conforms substantially” to the form in GOL § 5-1513. We believe that this would allow courts such as the Appellate Division in *Weinstein*, the lee-way to allow a form that inadvertently used language that had been amended, or any other insubstantial variation from the statutory form. It is important to note that our proposed amendment would continue to have in the definition of a Statutory Short Form Power of Attorney the provision that “the wording of the form set forth in section 5-1513 of this title shall govern.” Therefore the power of attorney would continue to be construed in accordance with the statutory language.

In order to comply with the exact wording standard, many banks and financial institutions have resorted to requiring use of their own forms, since they have neither the staff nor the time to perform a line by line comparison on every form they review. This proposed statutory change would allow institutions to accept a consumer’s form if it is substantially in the statutory form, knowing that it will be construed in accordance with the statute and §§5-1501A through 5-1501N.