

Memorandum Urging Approval

NYSBA Memorandum #26-GOV

July 30, 2020

S. 3923-A
A. 5630-A

By: Senate Hoylman
By: M. of A. Weinstein
Senate Committee: Rules
Assembly 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 SUPPORTS THIS LEGISLATION AND URGES ITS APPROVAL

The Power of Attorney law and form was last revised in 2008 and 2010. Since then, the new form has created confusion for the principal, proven difficult to use, is too complex, prone to improper execution, and has been widely rejected by third parties. Although it was intended to reduce fraud and abuse, it has been the experience of an overwhelming number of practitioners and their clients that these goals have not been achieved by the current statutory form.

This new legislation would: 1) simplify the current power of attorney form; 2) allow for substantially conforming language, 3) provide safe-harbor provisions for those who, in good faith, accept an acknowledged power of attorney; 4) allow sanctions for those who unreasonably refuse to accept a valid power of attorney; and 5) make a number of technical amendments.

The bill addresses these issues by eliminating the complicated current Power of Attorney (POA) and Statutory Gifts Rider (SGR) and reverts to one simpler document that requires only one procedure for acknowledging the signature of the principal. The bill accomplishes the elimination of the [gift rider]SGR by providing that the gifting provisions can be inserted in the modification section of the POA.

This bill would amend the law to provide that the standard for a valid statutory power of attorney would be "Substantial Conformity" with the statutory form rather than "Exact Wording." Third parties don't have the staff or the time for a word by word review of what is now often a multi-page form with 20 plus places to be initialed. Instead, third parties have often simply refused to accept any POA form except their own. The new law would define substantial conformity so as to eliminate rejection for the most common mistakes, providing that a given power of attorney "substantially conforms" to the form required notwithstanding that the form contains (i) an insignificant mistake in wording or punctuation, (ii) uses language that is essentially the same as, but is not identical to, the statutory form, including utilizing language from a previous statute, or (iii) contains clauses, or fails to include clauses, that are not relevant to a given power of attorney.

One of the biggest problems with the previous law was that there was no practical way to compel a third party to accept a valid POA. This legislation would allow sanctions against third parties who unreasonably refuse to accept a properly executed statutory POA. In order to balance the equities and reduce the burden on the third-party institution presented with a POA, however, this bill includes several safe harbor provisions. The legislation establishes a procedure whereby a third party having reasonable objections, can reject a power of attorney and set forth the reasons for such rejection and allow the proponent to respond to the reasons for such rejection. The third party may also ask the agent for his or her certification of any factual matter concerning the principal, agent, or power of attorney and an opinion of counsel as to any matter of law concerning the power of attorney.

The bill also includes some built in protections for certain third parties such as continuing as a reasonable cause to reject a POA the refusal by a title insurance company to underwrite title insurance for a gift of real property in certain instances; and that the time requirements in which to honor or reject the statutory short form POA shall not apply to the Department of Audit and Control or a public retirement system of the state.

The legislation also makes several technical amendments. Principal among them is one requested by the disability community to allow a person to sign at the direction of a principal who is physically unable. The principal must be competent and to prevent fraud and abuse the law does not allow the person so signing to be the proposed agent.

Reform of the power of attorney law is even more urgent considering the COVID-19 Pandemic and its potential aftermath. The situation in nursing homes and assisted living facilities has illustrated the difficulty our most vulnerable have in executing documents. While remote notarization utilizing audio-video technology is possible by Executive Order 202.7, the current complex power of attorney form, requiring initialing in multiple places, has proven difficult when the attorney/notary is remote. In addition, the requirement of two witnesses for the SGR, although possible, makes remote audio-video execution requiring the principal and two or three other people very difficult. The reforms in this legislation simplifying the form, eliminating two witnesses for the SGR, and allowing substantial conformity rather than exact wording will greatly improve the situation.

Once the restrictions of the pandemic are over, many elderly and disabled persons will have past due bills, back rent and mortgage payments to deal with. Enabling them to execute the simplified power of attorney authorized under this bill and have an agent deal with creditors, utilities, banks and landlords will be of utmost importance. This new law would essentially make accepting (rather than rejecting) the power of attorney the default which would substantially alleviate the frustrating burdens of the current law in many situations.

Based on the foregoing, the New York State Bar Association **SUPPORTS** this legislation, which is based on NYSBA's proposal, and **URGES ITS APPROVAL** by the Governor.