New York State Bar Association
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Memorandum

NYSBA #18-D

September 10, 2020

A. 5630-A
S. 3923-A

By: M. of A. Weinstein
By: Senator Hoylman
Assembly Committee: Rules
Senate Committee: Judiciary
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 gifts riders.

Response to the August 25, 2020 letter of Sandra Doorley, President of the District Attorneys Association of the State of New York.

After approximately four years of public discourse regarding the proposal to reform the power of attorney statute, during which the topic was repeatedly publicly and privately debated with no concerns raised by the District Attorneys Association of the State of New York (DAASNY) DAASNY has now expressed objections to A.5630-A/S.3923-A, that appear to be based on a misreading of the bill. Moreover, the DAASNY letter ignores the important benefits and protections that will result from the approval of this legislation.

Over the last decade it has become clear to individuals who regularly draft powers of attorney ("POAs") for clients, as well as entities that must evaluate POAs and accept or reject them, that consumers regularly suffer major problems because of the complexity of the Power of Attorney form created in 2008 and 2010. This is primarily due to the Statutory Gifts Rider and the rigid "exact-wording" standard for the form. This legislation is a consensus document that reflects the input of experienced attorneys, representatives from the banking community and other third parties that regularly receive POAs, and representatives of organizations representing the disabled community. To address the repeated, real world problems that consumers face, the bill eliminates the complicating and confounding provisions of the existing law, while incorporating and even enhancing the provisions that prevent fraud and abuse. The approval of this legislation will result in a true "short form" that can and will be read and understood by persons who need to use the Power of Attorney, while continuing to protect those who rely on these important legal documents. Accordingly, the State Bar Association continues to strongly support these important changes to the General Obligations Law:

1. Improving the POA by Establishing a Substantial-Conformity Standard.

DAASNY argues that changing from a requirement of "exact wording" to "substantially conforms to," or "uses language that is essentially the same as" is abandoning the statutory form Power of Attorney (POA) that has been the standard since 1948. This is just incorrect. The law prior to 2008 did not make a POA form invalid if it did not use exact wording, it only made it not a "statutory short form." It was in 2008 that the provisions for failure to have "exact wording" of the "Caution to Principal" and "Important Information for the Agent" would cause a form to be invalid. The result of this well-intentioned change was the creation of such a rigid standard that minor changes in those provisions resulted in the invalidation of a numerous forms, to the detriment of the principals who the forms were intended to protect. The substantial-conformity standard addresses this issue.

To avoid confusion and ensure that the substantial-conformity standard does not create an opportunity to avoid important protections, the bill expressly provides that a POA would be found consubstantially- conform" to the statutory requirements even where de minimis common mistakes are made. For example, this change would ensure that "insignificant . . . wording, spelling, punctuation or formatting" inconsistencies would not void the form; nor would "us[ing] language that is essentially the same . . . but not identical to, the statutory form." Moreover, the POA would NOT be valid if there was a wholesale removal of the "Caution to the Principal," but would allow for an "insubstantial variation in the wording."

The "exact-wording" requirement also meant that the form frequently contained sections that were not relevant to the principal, but were required to be included to meet the exact-wording standard. As a result, the form with the Statutory Gifts Rider (SGR) extended to 15 or more pages. Principals often are forced to determine whether to initial or not initial in 15 or more places. **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.**

2. Aiding the Disabled Consumers by Allowing a Principal to Direct Another to Sign a POA in Certain Circumstances.

DAASNY opposes permitting someone to sign the POA at the direction of a Principal who is unable to sign, alleging that this will result in increased fraud. This provision was added to respond to the concerns of the disability community that physically disabled persons who were unable to sign (such as quadriplegics and persons suffering from ALS) be permitted to direct another to sign on their behalf as they can with respect to wills and trust documents. The bill is modeled after other existing sections of law and adopted the protections used for wills and trusts, requiring the acknowledgment and notarization of the person doing the signing. This is the standard for ***protection against fraud and abuse***.

DAASNY also objects that eliminating the requirement for a second witness will somehow lead to increased fraud. But again, requiring the acknowledgment and notarization of the Principal is the standard for protection against fraud and abuse used under New York law for signing deeds, trusts and various other instruments. It is hard to fathom an increase in fraud when the law already allows signing a trust or a deed in the same manner.

3. Protecting the Statutory Gifts Rider Language.

DAASNY opposes repealing the SGR section, claiming that it heightens the Principal's awareness of the to the dangers of the gifting provision. However, this objection fails to acknowledge that ***the legislation includes the same cautionary language in the POA form that was previously in the SGR***. The cautionary language has just been moved to the preamble to the Modifications section. Over the last ten years it was widely agreed by professionals 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. Nevertheless, the bill still requires initialing that the Principal intends to grant such authority, as well as inclusion of that authority in the Modifications section. With this reform, the language is concise enough that it will actually be read.

4. Financial institutions will face penalties for failure to accept a Power of Attorney.

It is unclear why DAASNY is raising this objection when the banking industry, which provided significant input into the amended version of the legislation, has not. This bill balances the need for acceptance of valid forms while maintaining the ability of third parties to object to forms where abuse or incapacity are reasonably suspected. Unwarranted objections to forms under the current law results in 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.

The new procedures for the acceptance or rejection of a Power of Attorney track the language in the Uniform Power of Attorney Law already used in a majority of states. It allows banks and financial institutions with a reasonable basis to question a Power of Attorney and allows the proponents of the Power of Attorney to respond. **All the fraud and abuse provisions for rejecting a POA in the current law remain intact.** The bill provides that reasonable grounds to reject a Power of Attorney still includes actual knowledge or a reasonable basis for believing that the Principal was incapacitated at the time the Power of Attorney was executed or actual knowledge or a reasonable basis for believing that the POA 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 provides "Notice to the agent … shall not be sent until after a determination is made by adult protective services …."

CONCLUSION

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