G W & T Garfunkel, Wild & Travis, P.C.
New York New Jersey Connecticut

Trusts & Estates Update

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New York's Overhaul of Power of Attorney Law Produces Significant Changes

Due to reports that misuse of powers of attorney has caused financial abuse of the elderly, New York dramatically altered its Power of Attorney law, Title 15 of the New York General Obligations Law. The new law was originally scheduled to take effect on March 1, 2009, but that has been delayed to September 1, 2009 in light of the drastic modifications contained in the law and the need for the general public and attorneys to comprehend its sweeping implications. Fortunately, the new law is not retroactive and powers of attorney signed prior to the effective date remain valid.

The new law provides that the features of a valid power of attorney include the following:

- The power of attorney must be signed and dated by an individual (the "principal") who has capacity to sign it (defined by the statute as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney").
- The principal must acknowledge his or her signature to a notary.
- The person appointed under the power of attorney (the "agent" or "attorney in fact") must also sign the power of attorney (it is not required that the agent sign at the same time as the principal) and acknowledge his or her signature to a notary.
- Specific warnings titled "Caution to the Principal" and "Important Information for the Agent" must be included. These warnings emphasize to the principal the significance of executing a power of attorney and explain to the agent his or her fiduciary obligations and duties.
- Two or more agents appointed together will be required to act together (except in case of emergencies) unless the principal states they can act separately.
- If the principal wishes to compensate the agent, the principal must initial a specific authorization allowing this.

All powers of attorney are now considered "durable." Thus, they remain valid even if the agent becomes incapacitated unless the power of attorney expressly states otherwise.

If the principal wants to appoint a watchdog over his or her agent, the new form allows the principal to appoint a "Monitor," who can force the agent to produce statements, records, receipts, and other proof of actions taken. If the agent does not comply with the request or other questions concerning the agent's actions arise, the Monitor or other interested parties can institute a court proceeding.

The most significant change in the law for estate planning is the establishment of the "Statutory Major Gifts Rider ("SMGR"), a supplemental document in which the principal may "authorize major gift transactions and other transfers." The principal must sign this separate rider and acknowledge his or her signature to a notary on the rider, and two disinterested witnesses must sign the rider as well. Prior to the new law, gift-giving power could be included within the body of the power of attorney itself along with the other stated powers.

Without an SMGR, an agent can continue to make only those gifts that the principal had customarily made to individuals and charities, which may not exceed $500 per beneficiary, per year. Failure to execute an SMGR will prevent the agent from carrying out an estate and gift plan involving $13,000 annual gifts, larger charitable gifts, use of the $1,000,000 Federal gift tax shelter, trusts, IRA and insurance beneficiary designations, and Medicaid planning. Further, even with a SMGR, gifts to the agent must be explicitly authorized in a separate section.

It is also important to note that all prior powers of attorney will be revoked upon the execution of a new power of attorney, unless the principal affirmatively states to the contrary. Care must be taken to ensure that a principal does not unintentionally revoke a comprehensive power of attorney when later granting limited powers to another individual for a specific purpose, such as a real estate transaction.

The new law also seeks to address the common problem of the refusal of a financial institution to accept anything other than its own power of attorney form or powers of attorney that are, in its opinion, "stale." Under the new law, an institution or individual may not refuse to honor the new form power of attorney "without reasonable cause." The statute states that is "unreasonable" to refuse to accept a power of attorney for such reasons.

When individuals seek to execute a power of attorney after the effective date of the new statute, it will now be necessary to engage in a more comprehensive discussion with their attorney to understand the effect of the power of attorney and to determine the choices to be made in the new form. Now more than ever it is not advisable for an individual to pick up a power of attorney form from a stationary store or find one on the internet and sign it without the advice of an attorney. The form, while enacted with the commendable goal of seeking to prevent elder abuse, has added layers of complexity that make it difficult to navigate without such help.

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If you have any questions, please contact Doris L. Martin at (516) 393-2205 or at dmartin@gwtlaw.com or the GWT attorney with whom you regularly consult.

Doris L. Martin is a partner at Garfunkel, Wild & Travis, P.C., where she heads the Personal Services and Estate Planning Practice Group and the Tax Group and is a member of the Discharge Planning - Patient Rights and Elder Law Group. Ms. Martin advises clients on estate planning, administration, and litigation, charitable giving, elder law, tax-exempt organizations, and qualified retirement plans.

About Garfunkel, Wild & Travis, P.C.

Garfunkel, Wild & Travis, P.C. was founded in 1980 with a single purpose in mind: to become a pre-eminent healthcare law firm attending to the unique business and legal needs of its clients. Since then, the firm has grown to over 80 attorneys devoted to addressing the complex legal, regulatory, business and financial needs of its diverse clients.

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