Client Advisory



Trusts and Estates

July 28, 2009

Changes to New York Powers of Attorney Effective September 1

New York State has made broad sweeping changes to its laws governing powers of attorney—instruments by which a principal can appoint an agent to conduct financial transactions on his or her behalf. These changes are set to take effect on September 1, with respect to powers of attorney executed on or after that date. Powers of attorney executed before that date will remain valid, but will become subject to certain of the provisions in the new law expanding their use for benefits and health care purposes, providing enforcement procedures and establishing standards of care. Because of the unprecedented scope of this new legislation, it affects not only those who live in New York, but also anyone who executes a New York power of attorney in connection with the conduct of business in New York.

The law prescribes an entirely new statutory short form power of attorney, which presumptively survives the principal's incapacity and which can be either currently effective or effective upon the occurrence of a future event. Unlike current law, it must be signed by both the principal and the agent, although not necessarily at the same time. Also unlike current law, the execution of a power of attorney will revoke all powers of attorney previously executed by the principal, unless he or she specifically provides otherwise.

Powers of attorney may be used to make gifts, in accordance with a preexisting pattern of gifting, of up to \$500 per year in the aggregate. All other gift-giving authority of any kind, including merely to change joint tenants or beneficiary designations, must be made in a separately executed "statutory major gifts rider." Powers of attorney may no longer be used to create, amend or revoke trusts. The statutory major gifts rider must be executed simultaneously with the execution of the short form power of attorney and must be both acknowledged in the same manner as a deed conveying real property and executed in the presence of two witnesses who are not potential gift recipients.

Third parties must honor statutory short form powers of attorney and statutory major gift riders unless they have reasonable cause not to, and the fact that the form does not accord with the third party's form is presumptively unreasonable. The exclusive remedy for failure to do so is a special proceeding under General Obligations Law section 5-1510. Other forms of powers of attorney may be utilized under certain circumstances, but this new law will not require compliance with such powers by third parties.

Agents will be uncompensated for their services unless otherwise provided by the principal. The principal may appoint a "monitor" to oversee the actions of the agent.

Katten's Trusts and Estates Practice provides the full panoply of trusts and estates-related services to both domestic and international clients. Our attorneys perform sophisticated estate, tax, business, charitable and personal planning for high net worth individuals, entrepreneurs and others with complex assets or affairs. We represent both fiduciaries and beneficiaries in connection with ongoing estate and trust administration on a multigenerational basis. We are also experienced in handling contested proceedings involving estates and trusts in the courts, before taxing authorities, and before governmental and regulatory authorities.

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Remedial legislation is currently pending to address some of the more problematic aspects of this new legislation, especially to avoid the inadvertent and potentially problematic revocation of previous powers of attorney given by the principal for limited business purposes, even in other states or countries. It is unknown at the time of this advisory whether such remedial legislation will be enacted at all, let alone by the legislation's September 1 effective date.

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