

## **Statutory Short Form Power of Attorney Revised New Statutory Major Gifts Rider<sup>±</sup>**

By Michael J. Berey

On January 27, 2009, Governor Paterson signed into law an extensive revision of Title 15 of Article 5 of New York's General Obligations Law ("GOL"), which sets forth a new Statutory Short Form Power of Attorney ("SSF Power").<sup>1</sup> Chapter 644 of the Laws of 2008 also introduces the concept of the Statutory Major Gifts Rider ("SMGR").<sup>2</sup> Accordingly, the heading of Title 15 has been changed from "Statutory Short Form Power of Attorney" to "Statutory Short Form and Other Powers of Attorney for Financial Estate Planning." Chapter 644's effective date of March 1, 2009 was changed to September 1, 2009 by Chapter 4 of the Laws of 2009.<sup>3</sup>

Amended Sections 5-1502J ("Construction—benefits from military service"), 5-1502K (newly named "Construction – health care billing and payment matters"), and 5-1504 ("Acceptance of statutory SSF Power power of attorney"), and new Sections 5-1505 ("Standard of care; fiduciary duty; compelling disclosure of record") and 5-1510 ("Special proceedings") will also apply to powers-of-attorney ("Powers") executed prior to September 1.<sup>4</sup> Powers validly executed prior to the effective date may continue to be used.

A "Person" may execute a SSF Power and be the "Principal" under the Power (what has been referred to as the "donor" of a power-of-attorney).<sup>5</sup> A "Person" is defined in new Section 5-1501 to include, among others, an individual "acting for himself or herself", a fiduciary, corporation, estate, trust, partnership, limited liability company, governmental entity or instrumentality, or "any other legal or commercial entity."<sup>6</sup> An individual executing a SSF Power or a SMGR, discussed below, must be eighteen years of age or older.<sup>7</sup>

A non-statutory Power executed in New York can be used. It appears, however, that a natural person can only execute a non-statutory form of power of attorney meeting the requirements of new Section 5-1501B ("Creation of a valid power of attorney; when effective").<sup>8</sup> While new subsection 4 of Section 5-1501B states that "[n]othing in this title shall be construed to bar the use of any other or different form of power of attorney

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<sup>1</sup> N.Y. GEN. OBLIG. LAW § 5-1501 (effective Sept. 1, 2009).

<sup>2</sup> Chapter 644 of the NY Laws of 2008 is available at <http://www.titlelaw-newyork.com/Chapter644.pdf>. In connection with the SMGR, reference should be made to Sections 5-1501.14, 5-1501B.2 and 5-1514.

<sup>3</sup> Chapter 644 of the NY Laws of 2008 is available at <http://www.titlelaw-newyork.com/Chapter644.pdf>.

<sup>4</sup> §§ 5-1502J, 5-1502K, 5-1504, 5-1505 and 5-1510 (effective Sept. 1, 2009).

<sup>5</sup> § 5-1501(9), (11) (effective Sept 1, 2009).

<sup>6</sup> *Id.* at (9).

<sup>7</sup> *Id.* at (11).

<sup>8</sup> § 5-1501B (effective Sept. 1, 2009).

[not meeting the requirements of Section 5-1501B] desired by a person other than an individual...,<sup>9</sup> subsection 1 of new Section 5-1501B provides that "[t]o be valid, a statutory SSF Power power of attorney, or a non-statutory power of attorney, executed in this state by an individual, must" meet the requirements set forth in that Section.<sup>10</sup>

The form of the new SSF Power is set forth in new Section 5-1513 ("Statutory short form power of attorney").<sup>11</sup> While former Section 5-1501 included a separate form of durable power, new Section 5-1501A ("Power of attorney not affected by incapacity") provides that a SSF Power is durable unless it expressly states that the Principal's incapacity terminates the Power, and, unless the Power so states, "[t]he subsequent incapacity of a principal shall not revoke or terminate the authority of an agent..."<sup>12</sup>

A SSF Power, and a non-statutory Power, executed in New York, by an individual, are required to be typed, in no less than 12-point type (or legibly printed with letters the equivalent of such type), dated and signed by a Principal with capacity and by the agent(s) appointed in the Power (the attorney(s)-in-fact).<sup>13</sup> An SSF Power and a non-statutory Power must contain the text of the sections in the SSF Power captioned "Caution to the Principal" and "Important Information for the Agent."<sup>14</sup>

A Power executed in another state or in a jurisdiction outside of New York which complies with the law of that state or the law of New York is valid in New York, regardless of whether the Principal is a domiciliary of New York.<sup>15</sup>

#### WHEN A STATUTORY POWER IS EFFECTIVE

Although the Principal and the agent need not execute the Power at the same time, the Power is not effective until the agent's signature is acknowledged.<sup>16</sup> If more than one agent is appointed, the Power is effective when the signatures of all of the agents are acknowledged.<sup>17</sup> The signatures of the Principal and of the agent(s) must be acknowledged "in the manner prescribed for the acknowledgment of a conveyance of real property."<sup>18</sup>

Section 5-1501(13) provides that a signature can be made by even a mark, a stamp or by an electronic signature.<sup>19</sup> However, referencing Section 307 ("Exceptions") of the State's Electronic Signatures and Records Act, which excludes from the scope of that Act "any conveyance or other instrument recordable under article nine of the real

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<sup>9</sup> *Id.* at (4).

<sup>10</sup> *Id.* at (1).

<sup>11</sup> § 5-1513 (effective Sept. 1, 2009).

<sup>12</sup> § 5-1501(1) (effective until Sept. 1, 2009); § 5-1501A(2) (effective Sept. 1, 2009).

<sup>13</sup> § 5-1501B (effective Sept. 1, 2009).

<sup>14</sup> *Id.*

<sup>15</sup> § 5-1512 (effective Sept. 1, 2009) ("Powers of attorney executed in other jurisdictions").

<sup>16</sup> § 5-1501B(3)(a) (effective Sept. 1, 2009).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at (1)(c).

<sup>19</sup> § 5-1501(13) (effective Sept. 1, 2009).

property law,"<sup>20</sup> Section 5-1501(13) states that a power of attorney "that is recordable under the real property law shall not be executed with an electronic signature."<sup>21</sup>

Section 5-1506 ("Powers of attorney effective at a future time or upon the occurrence of a contingency") has been repealed.<sup>22</sup> (New Section 5-1506 is captioned "Compensation").<sup>23</sup> Instead, under new Section 5-1501B(3)(b), a Power may provide that it takes effect on a certain date or on the occurrence of a specified contingency.<sup>24</sup> The power may also require that a person or persons named or otherwise identified declare in writing that the contingency has occurred, and such a declaration is effective "without regard to whether the contingency has [actually] occurred."<sup>25</sup>

## MULTIPLE AGENTS

Under new Section 5-1508 ("Co-agents and successor agents"), multiple agents act jointly unless the Power states otherwise.<sup>26</sup> However, if prompt action is required to accomplish a purpose of a Power and to avoid irreparable injury to the Principal's interest when the co-agent is unavailable because of absence, illness, or other temporary incapacity, the other agent may act alone.<sup>27</sup> In addition, the Principal may appoint one or more successor agents to serve "if every initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve."<sup>28</sup>

## TERMINATION OF THE AGENT'S AUTHORITY

An agent may resign on written notice to the Principal and also to any co-agent or successor agent, a "Monitor" if one was named, or to the Principal's guardian, if one was appointed.<sup>29</sup> If the Principal is incapacitated and there is no other such person to whom notice may be given, notice of resignation may be given to a government agency with the authority to protect the Principal, or the agent may petition a court to approve his or her resignation.<sup>30</sup> The Power can set forth other ways for an agent to resign.<sup>31</sup>

A "Monitor" is a person appointed to receive from the agent a record of all receipts, disbursements and transactions entered into by the agent under the Power.<sup>32</sup>

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<sup>20</sup> N.Y. Tech. Law § 307 (2009).

<sup>21</sup> § 5-1501(13) (effective Sept. 1, 2009).

<sup>22</sup> § 5-1506 (effective until Sept. 1, 2009).

<sup>23</sup> § 5-1506 (effective Sept. 1, 2009).

<sup>24</sup> § 5-1501B(3)(b) (effective Sept. 1, 2009).

<sup>25</sup> *Id.*

<sup>26</sup> § 5-1508(1) (effective Sept. 1, 2009).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at (2).

<sup>29</sup> § 5-1505(3)(a) (effective Sept. 1, 2009).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at (3)(b).

<sup>32</sup> § 5-1501(6) (effective Sept. 1, 2009).

An agent's authority may be terminated by the Principal affirmatively revoking the authority of the agent and by the death or incapacity of an agent<sup>33</sup>. If the agent is the spouse of the Principal, then on their divorce, or on the annulment or the issuance of a declaration of the nullity of their marriage, the agent's authority ceases.<sup>34</sup> However, the termination of an agent's authority is not effective as to third parties who act in good faith without actual notice.<sup>35</sup> Even when a notice of the revocation of an agent's authority is recorded, the third party must have actual notice: "A financial institution is deemed to have actual notice after it has had a reasonable opportunity to act on a written notice of the revocation or termination following receipt at its office where an account [of the principal] is located."<sup>36</sup>

An agent is not entitled to be compensated unless specifically provided for in the Power, except that an agent may be reimbursed for reasonable expenses actually incurred.<sup>37</sup>

#### AGENT IS A FIDUCIARY

Under new Section 5-1505, an agent is a fiduciary and may be subject to liability for his or her conduct or omissions.<sup>38</sup> For example, absent being specifically authorized in the Power, an agent may not transfer the Principal's property to himself or herself.<sup>39</sup> The agent must also keep a record of all receipts, disbursements and transactions entered into and make them available within fifteen days on request of a "Monitor", a co-agent or a successor agent, a government entity, a court evaluator appointed under the Mental Hygiene Law Section 81.09 ("Proceedings for Appointment of a Guardian for Personal Needs or Property Management. Appointment of court evaluator")<sup>40</sup>, a guardian ad litem appointed under Surrogate's Court Procedures Act Section 1754 ("Guardians of Mentally Retarded and Developmentally Disabled Persons. Hearing and Trial")<sup>41</sup>, a guardian or conservator of the estate of the Principal, or the personal representative of the estate of a deceased Principal.<sup>42</sup>

A Special Proceeding can be commenced by any of the parties noted in the immediately preceding paragraph to compel the agent to provide the records.<sup>43</sup> A Special Proceeding can also be commenced by the agent, the Principal's spouse, child or parent, the Principal's successor in interest, and by any third party "who may be required to accept" a Power, to determine, among other things, whether the Power is valid, to

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<sup>33</sup> § 5-1511(2)(a)-(b) (effective Sept. 1, 2009).

<sup>34</sup> *Id.* at (2)(c).

<sup>35</sup> *Id.* at (5).

<sup>36</sup> *Id.*

<sup>37</sup> § 5-1506(1) (effective Sept. 1, 2009).

<sup>38</sup> § 5-1505(2)(b) (effective Sept. 1, 2009).

<sup>39</sup> *Id.* at (2)(a)(2).

<sup>40</sup> N.Y. MEN. HYG. LAW § 81.09 (2009).

<sup>41</sup> N.Y. SURR. CT. PROC. ACT § 1754 (2009).

<sup>42</sup> § 5-1505(3) (effective Sept. 1, 2009).

<sup>43</sup> § 5-1510(1) (effective Sept. 1, 2009).

remove the agent or to approve the resignation of an agent, to construe any provision of the Power, or to compel its acceptance.<sup>44</sup>

## THE STATUTORY FORM

The statutory form of the new SSF Power in Section 5-1513 includes the following:<sup>45</sup>

1. A section captioned "Caution To The Principal";<sup>46</sup>
2. The designation of an agent or agents and a statement that they act jointly, with an option to direct that they are to act separately;<sup>47</sup>
3. A statement that the power is not affected by the Principal's subsequent incapacity, unless otherwise indicated in the section of the Power captioned "Modifications";<sup>48</sup>
4. A statement that all prior powers of attorney executed by the Principal are revoked, unless stated otherwise in the section of the Power captioned "Modifications", in which case it must be indicated whether the agents under all of the Powers are to act jointly or separately;<sup>49</sup>
5. A list of "subjects" corresponding to the categories of powers set forth in Sections 5-1502A–5-1502N, similar to the list in the now effective form of SSF Power. Authority is granted as to a particular subject by the Principal's initialling the corresponding bracket or by listing the letters for the subjects selected on line "P" ("Each of the matters identified by the following letters \_\_\_\_\_") and by initialling line "P", as has been done under the prior statutory form of Power, "P" having been letter "Q" in the prior form.<sup>50</sup>

Deleted from the new SSF Power is the subject "making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$10,000 to each of such persons in any year."<sup>51</sup> However, new subdivision 14 of amended Section 5-1502I ("Construction—personal and family maintenance") authorizes the agent "[t]o continue to make gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency" to \$500 in the aggregate

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<sup>44</sup> § 5-1510(3) (effective Sept. 1, 2009).

<sup>45</sup> § 5-1513 (effective Sept. 1, 2009).

<sup>46</sup> *Id.* at (1)(a).

<sup>47</sup> *Id.* at (1)(b).

<sup>48</sup> *Id.* at (1)(d).

<sup>49</sup> *Id.* at (1)(e).

<sup>50</sup> *Id.* at (1)(f).

<sup>51</sup> § 5-1505I (effective until Sept. 1, 2009).

to any one recipient in a single calendar year, and gifts can also be made as authorized under a duly executed SMGR.<sup>52</sup>

In addition to Section 5-1502I, other Sections, corresponding to the subjects listed on the Power, have been amended. The subjects "personal relationships and affairs", "benefits from military service," and "records, reports and statements" in the former statutory form are now captioned, respectively, "personal and family maintenance," "benefits from governmental programs or civil or military service" and "health care billing and payment matters; records, reports and statements."<sup>53</sup> Substantive changes have also been made to certain Sections. In particular, Section 5-1502A ("Construction—real estate transactions") has been amended to remove the authority of an agent to "revoke, create or modify a trust."<sup>54</sup>

6. An optional "Modifications" section. Section 5-1503, as amended by Chapter 644 and now captioned "Modifications of the statutory short form power of attorney and of the statutory major gifts rider", governs this section of the Power;<sup>55</sup>

7. A section providing that if the agent is to make major gifts and other transfers of the Principal's property, the Principal must initial a statement in the Power to that effect and annex a SMGR.<sup>56</sup> It cautions that an SMGR "should be prepared by a lawyer";<sup>57</sup>

8. The optional designation of a "Monitor";<sup>58</sup>

9. An optional section of "Compensation of Agents";<sup>59</sup>

10. "Acceptance By Third Parties", under which the Principal agrees to indemnify third parties relying on the Power and confirms that a termination of the Power is not effective as to a third party until that party has actual notice or knowledge that the Power has been terminated;<sup>60</sup>

11. "Termination", stating that the power continues until it is revoked or terminated by the death of the Principal or otherwise by an event listed in Section 5-1511;<sup>61</sup>

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<sup>52</sup> § 5-1502I(14) (effective Sept. 1, 2009).

<sup>53</sup> § 5-1502I, J, K (effective Sept. 1, 2009).

<sup>54</sup> § 5-1502A(2) (effective until Sept. 1, 2009).

<sup>55</sup> § 5-1503 (effective Sept. 1, 2009).

<sup>56</sup> § 5-1514(9)(c)–(d) (effective Sept. 1, 2009).

<sup>57</sup> § 5-1514 (effective Sept. 1, 2009).

<sup>58</sup> § 5-1513(i) (effective Sept. 1, 2009).

<sup>59</sup> *Id.* at (j).

<sup>60</sup> *Id.* at (k).

<sup>61</sup> *Id.* at (l).

Under Section 5-1511 ("Termination or revocation of a power of attorney; notice"), a Power terminates when the principal dies, the principal becomes incapacitated (if the power is not durable), the authority of the agent terminates without there being a co-agent or a successor agent appointed or willing or able to serve, when the purpose of the power is accomplished, or if a court appoints a guardian for the principal and revokes the Power under Mental Hygiene Law Section 1.29 ("Effect of the appointment on the incapacitated person") or as provided in Section 5-1511.<sup>62</sup>

12. The acknowledged signature of the Principal;<sup>63</sup>

13. "Important Information For The Agent";<sup>64</sup>

14. The acknowledged signature(s) of the agent(s);<sup>65</sup>

The agent executes an instrument pursuant to a Power by signing either his or her name as agent for the Principal, the name of the Principal by the agent as agent, or by "any similar written disclosure of the principal and agency relationship." **Section 5-1507 ("Signature of agent").**

#### RELYING ON THE POWER

No third party located in New York State "shall refuse without reasonable cause" to honor a properly executed SSF Power, a SSF Power supplemented by a SMGR, or a SSF Power "executed in accordance with the laws in effect at the time of its execution."<sup>66</sup> "Reasonable cause" to refuse to accept a Power exists when, for example, an agent refuses to provide the original power of attorney, the third party has actual knowledge of or a reasonable basis for believing that (i) the principal has died, (ii) is incapacitated (when the power is non-durable), (iii) was incapacitated when the power was executed, or (iv) the power was procured by fraud, duress or undue influence, when the agent has actual notice of the termination or revocation of the Power, or "the refusal of a title insurance company to underwrite title insurance for a transfer of real property made pursuant to a major gifts rider or a non-statutory power of attorney that does not contain express instructions or purposes of the principal."<sup>67</sup>

Grounds for refusing to honor a Power do not include the lapse of time since execution of the Power or that there has been a lapse of time between the dates on which the signatures of the Principal and any agent were acknowledged.<sup>68</sup> Except as provided in Section 5-1504, it is "unlawful for a third party to unreasonably refuse to honor a properly executed statutory short form power of attorney, including a statutory short form power of attorney which is supplemented by a statutory major gifts rider, or a statutory

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<sup>62</sup> *Id.* at (1); N.Y. MEN. HYG. LAW § 1.29 (2009).

<sup>63</sup> § 5-1513(m) (effective Sept. 1, 2009).

<sup>64</sup> *Id.* at (n).

<sup>65</sup> *Id.* at (o).

<sup>66</sup> § 5-1504(1) (effective Sept. 1, 2009).

<sup>67</sup> *Id.* at (1)(a).

<sup>68</sup> *Id.* at (1)(b)(3).

short form power of attorney executed in accordance with the laws in effect at the time of its execution."<sup>69</sup> However, a third party is not required to accept a Power other than a SSF Power.<sup>70</sup>

A third party to whom a Power is presented may require the agent to execute an acknowledged affidavit which states that the Power is in full force and effect. More particularly, the affidavit may also state that the agent has no actual notice or notice of any facts indicating that the Power was terminated or revoked or otherwise modified in a way that would impact the immediate transaction. If the agent is a successor agent, the affidavit may also state that the prior agent is no longer able or willing to serve.

According to Section 5-1504.5, "[s]uch an affidavit is conclusive proof to the third party relying on the power of attorney that the power is valid and effective, and has not been terminated or revoked, except as to any third party who had actual notice that the power of attorney had terminated or been revoked prior to execution of the affidavit."<sup>71</sup>

## STATUTORY MAJOR GIFTS RIDER

The statutory form of the new SMGR is in Section 5-1514 ("Major gifts and other transfers; formal requirements; statutory form").<sup>72</sup> The Section authorizes an agent to make gifts and transfers of the Principal's property. It must be executed simultaneously with and supplement a SSF Power or be executed simultaneously with a non-statutory form of Power.<sup>73</sup>

The SMGR and, if executed in connection with a non-statutory form of Power, the Power itself, must be witnessed "by two persons not named in the instrument as recipients of other gifts or other transfers, in the manner described at" Estates, Powers and Trusts Law Section 3-2.1(a)(2) ("Execution and authorization of wills; formal requirements").<sup>74</sup> EPTL Section 3-2.1(a)(2) requires the testator to sign in the presence of, or acknowledge his signature to, the attesting witnesses.<sup>75</sup>

The types of gifts that can be made under an SMGR and the limitations on the powers of the agent under an SMGR are set forth in Section 5-1514.<sup>76</sup> Note is made of the following provisions of the Section insofar as they may affect real property:

1. The SMGR must expressly authorize the agent to make any gifts or transfer of a kind not set forth in subdivision 14 of Section 5-1502I, noted above. In

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<sup>69</sup> *Id.* at (2).

<sup>70</sup> *Id.* at (6).

<sup>71</sup> *Id.* at (5).

<sup>72</sup> § 5-1514 (effective Sept. 1, 2009).

<sup>73</sup> *Id.* at (1).

<sup>74</sup> *Id.* at (9)(b).

<sup>75</sup> N.Y. EST. POWERS & TRUSTS § 3-2.1(a)(2) (2009).

<sup>76</sup> § 5-1514 (effective Sept 1, 2009).

particular, an agent may not gift to himself or herself an interest in the Principal's property unless the authority to do so is expressly set forth;<sup>77</sup>

2. The agent is authorized "to execute, acknowledge, seal and deliver any deed, assignment, agreement, trust agreement, authorization, check or other instrument which the agent deems useful for the accomplishment of any of the purposes enumerated in" Section 5-1514;<sup>78</sup>

3. The authority of the agent to make a gift of property is exercisable in connection with property in which the Principal obtains an interest after the Power is executed. Such property may be situated within or outside of New York;<sup>79</sup>

4. The authority for the agent to make a gift or a transfer to the Principal's spouse is revoked on the divorce of the Principal and his or her spouse, the annulment of their marriage, or the issuance of a declaration of the nullity of their marriage, unless the SMGR expressly provides otherwise;<sup>80</sup>

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<sup>77</sup> *Id.* at (4)(b).

<sup>78</sup> *Id.* at (6)(b)(2).

<sup>79</sup> *Id.* at (7).

<sup>80</sup> *Id.* at (8).