GRAY & FELDMAN LLP

625 Panorama Trail Suite 1240 Rochester, NY 14625
tel. 585.218.8620 fax 585.218.8600 e-mail ggray@gfrllp.com website www.gfrllp.com

DURABLE POWER OF ATTORNEY AND STATUTORY GIFTS RIDER

In New York, a person (known as the "principal") may make a Power of Attorney (a "POA") to authorize another person (known as an "agent") to act on his/her behalf in financial matters. Any adult (*i.e.,* a person over the age of 18) with "capacity" may execute a POA. "Capacity" is defined as the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a POA, any provision in a POA, or the authority of any person to act as agent under a POA. The POA is widely used for financial and estate planning purposes and for avoiding the expense of guardianship in the event of the principal's incapacity. A properly drafted and executed Power of Attorney is a powerful tool to allow an agent to assist the principal to manage his/her *financial* affairs. It is used in the context of *financial* affairs, it can not be used in the context of *health and medical* affairs. Only a Health Care Proxy can be used for medical and health care decisions.

The State of New York has drafted a Power of Attorney for all its citizens; and it is this form that is most often used by attorneys. The New York General Obligations Law ("GOL") contains the language of the "Statutory Short Form Power of Attorney." The statutory form of POA contains a number phrases which are each defined by several paragraphs of explanatory language contained in the GOL. This allows the Power of Attorney to be a "short form"; in that it can be interpreted by reference to the GOL and a detailed description of each power granted in the form itself is unnecessary.

The GOL expressly provides that no third party located or doing business in New York may refuse, without "reasonable cause," to honor: (i) a statutory short form POA properly executed in accordance with the GOL; including a POA which is supplemented by a statutory gifts rider; or (ii) a POA properly executed in accordance with the laws in effect at the time of its execution. As a side note, this provision "grandfathers-in" the "old" form of POA's which were validly executed prior to 2010.

"Reasonable cause includes: (i) actual knowledge or reasonable belief that the principal has died; (ii) actual knowledge or reasonable belief that the principal is the subject of an adult protective services investigation into physical or financial abuse, neglect, exploitation or abandonment; (iii) the refusal of the agent to deliver the original or "attorney certified" copy of the POA; (iv) actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the POA was executed; (v) actual knowledge or a reasonable basis for believing that the power of attorney was procured through fraud, duress or undue influence; (vi) actual notice of the termination or revocation of the POA; or (vii) the refusal by a title insurance company to underwrite title insurance for a gift of real property made pursuant to a statutory gifts rider or non-statutory power of attorney that does not contain express instructions or purposes of the principal.

It is significant that "reasonable cause' *does not* include refusal to use the power of attorney form produced by the financial institution. In other words, financial institutions must accept the Statutory Short Form POA, and they cannot insist that you use their unique form. This greatly increases the usefulness of the POA you execute in your attorney's office. As a matter of general practice, the agent will produce a copy of the original POA and have his/her attorney stamp and sign the copy indicating that the "copy" is identical to the original. The GOL defines a "financial institution" as any of the following: a brokerage house, a bank, trust company, savings bank, savings and loan association, credit union, branch of a foreign banking corporation, public pension fund, retirement system and insurance companies.

The POA must be signed by the principal (*i.e.,*you) and your signature must be acknowledged in the same way a deed is acknowledged before recording in the County Clerks Office. The POA must also be signed by the agent (*i.e.,* your spouse or child), and the POA is not effective until it is signed by the agent. A validly executed POA is not rendered invalid solely: (i) because there has been a lapse of time between the date of acknowledgment of the signature of the principal and the date of acknowledgment of the signature of an agent or (ii) because the principal became incapacitated during any such lapse of time

The GOL does not bar the use of any other or different form of powers of attorney, but if a different form is used it need not be honored by a "financial institution". Every Statutory Short Form Durable Power of Attorney, to be valid, must be written, typed or printed using letters which are in clear type of no less than twelve-point in size.

You should always use a "durable" POA. If the words "this power of attorney shall not be affected by my subsequent disability or incompetence;" then your subsequent disability or incompetence will not revoke or terminate the authority of the agent to act on your behalf of the principal. A Durable Power of Attorney allows the agent to act in the event of any disability or incompetence with the same force and effect as are present when the principal is healthy and competent.

Without specifically providing for major gifts in the POA and the due execution of a Statutory Gifts Rider ("SGR"), the agent is limited to only continuing the pattern of gift giving established by the principal prior to the signing of the POA. If the principal had no such pattern of gift giving, the agent cannot make gifts. Even if there was a pattern of gift giving, the agent is limited to making gifts of less than $500 per donee in any calendar year.

The SGR provides general authority to the agent to make gifts to the principal's children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount (currently $14,000). This authority must be exercised pursuant to the instructions of the principal, or otherwise for purposes which the agent reasonably deems to be in the principal's best interest. Under this general grant of gift giving authority, the agent can satisfy pledges to charitable and other organizations.

In the SGR, the principal may grant specific authority to the agent to: (i) make gifts up to a specified amount or an unlimited amount; (ii) make gifts to any person or persons; (iii) open, modify or terminate a deposit account in the name of the principal and any other joint tenant; (iv) open, modify or terminate transfer on death ("TOD") accounts and designate or change beneficiaries on the account; (vii) change the beneficiaries of any life insurance or annuity contracts; (viii) procure new, different or additional life insurance or annuity contracts for the benefit of the principal and designate the beneficiaries of those contracts; (ix) designate or change the beneficiaries of a retirement benefit or plan; (x) create, amend, revoke or terminate an *inter vivos* trust (*e.g.,*revocable lifetime trusts); or (xi) create, change or terminate other property interests or rights of survivorship and designate or change the beneficiaries therein.

By negative implication, the agent can not engage in any of these enumerated transactions unless he/she is expressly granted the authority in a SGR. In order for an agent to have authority to make gifts to him/herself, the principal must expressly grant that authority in the SGR. Said another way, neither the general authority to make gifts up to the annual gift tax exclusion nor the specific grant of authority to make gifts to "any person" will allow the agent to make gifts to him/herself. Only by authority granted expressly in the POA can an agent make gifts to him/herself.

The authority to make gifts or affect an interest in the principal's property must be exercised by the agent according to the instructions provided by the principal or otherwise for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including financial, estate, or tax planning, including minimization of income, estate and inheritance taxes.

In dealing with property of the principal, the agent must observe the standard of care that would be observed by a "prudent person" dealing with property of another. The agent may be subject to liability for conduct or omissions which violate his/her fiduciary duty. The agent is in a fiduciary relationship with the principal and has the duty to act according to any instructions from the principal or, where there are no instructions, in the "best interest" of the principal. The agent has the duty to avoid conflicts of interest and to keep the principal's property separate and distinct. An agent has the duty to keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal; and to make such record and POA available to the principal or to third parties at the request of the principal

An agent may resign by giving written notice to the principal and co-agent, successor agent or the monitor, if one has been named, or the principal's guardian if one has been appointed. A POA terminates when: (i) the principal dies; (ii) the principal becomes incapacitated, if the POA is not durable; (iii) the principal revokes the power of attorney; (iv) the principal revokes the agent's authority and there is no co-agent or successor agent, or no co-agent or successor agent who is willing or able to serve; (v) the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve; (vi) the authority of the agent terminates and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve; (vii) the purpose of the power of attorney is accomplished; or (viii) a court order revokes the POA.

In any transaction where the agent is acting pursuant to a POA and where the hand-written signature of the agent or principal is required, the agent must disclose the principal and agent relationship by: (i) signing "(name of agent) as agent for (name of principal); " or (ii) signing "(name of principal) by (name of agent), as agent;" or (iii) any similar written disclosure of the principal and agent relationship.

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