FIDELITY TITLEUPDATES

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2009 POWER OF ATTORNEY

GOL Amended, New Forms & Law

Effective September 1, 2009, (Chap. 4 Laws of 2009), the sections of the General Obligations Law dealing with powers of attorney (§ 5-1501 et seq.) has been extensively recodified (See Chap. 644 Laws of 2008), creating a new body of statutory law governing powers of attorney. This edition of Fidelity's **TitleUpdates** is intended to summarize the changes in the law.

The most obvious change is the adoption of a wholly new form of Statutory Short Form Power of Attorney ("SSFPOA-09"), the text of which is set forth in new § 5-1513.

Powers of attorney executed prior to September 1, 2009 conforming to the law then in effect remain valid and the powers granted will be governed by the old law. Practitioners should note, however, that to be an SSFPOA-09 after September 1, 2009, the form must conform to the statutory form contained in the new law (§ 5-1513) and comply with the execution requirements of § 5-1501B.

§ 5-1501B. [Eff Sept 1, 2009] Creation of a valid power of attorney; when effective

1. To be valid, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by an individual, must:

(a) Be typed or printed using letters which are legible or of clear type, no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.

(b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.

(c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. A power of attorney executed pursuant to this section is not invalid solely 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 the agent acting on behalf of the principal or because the principal became incapacitated during any such lapse of time.

(d) Contain the exact wording of the:

(1) "Caution to the Principal" in paragraph (a) of subdivision one of section 5-1513 of this title; and

(2) "Important Information for the Agent" in paragraph (n) of subdivision one of section 5-1513 of this title.

2. In addition to the requirements of subdivision one of this section, to be valid for the purpose of authorizing the agent to make any gift or other transfer described in section 5-1514 of this title:

(a) a statutory short form power of attorney must contain the authority (SMGR)[sic] initialed by the principal and be accompanied by a valid statutory major gifts rider; and

(b) a non-statutory power of attorney must be executed pursuant to the requirements of paragraph (b) of subdivision nine of section 5-1514 of this title.

3. (a) The date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent; provided, however, that if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed the power of attorney with their signatures acknowledged.

(b) If the power of attorney states that it takes effect upon the occurrence of a date or a contingency specified in the document, then the power of attorney takes effect only when the date or contingency identified in the document has occurred, and the signature of the agent acting on behalf of the principal has been acknowledged. If the document requires that a person or persons named or otherwise identified therein declare, in writing, that the identified contingency has occurred, such a declaration satisfies the requirement of this paragraph without regard to whether the specified contingency has occurred.

4. Nothing in this title shall be construed to bar the use of any other or different form of power of attorney desired by a person other than an individual as the term person is defined in section 5-1501 of this title.

An SSFPOA-09 validly created automatically revokes any previously executed power unless it is stated otherwise in section (e) entitled "modifications". When using an SSFPOA-09 in a real estate transaction, if the SSFPOA-09 power does

not revoke prior powers, the identity of all other attorney(s)-in-fact or Agents will need to be disclosed to the title insurance company and most likely will be required to join in the execution of the current transaction documents and certify that they have not acted under their respective power or powers with respect to the subject property.

A significant feature of the SSFPOA-09 is that it is by default a Durable Power of Attorney, see § 5-1501A. Under the prior law there were two forms of power, one durable and the other non-durable. Under the new law, an affirmative act is required to make a power non-durable. It should be noted that making a power non-durable severely limits its usefulness for estate planning purposes and for general real estate transactions. Third parties and title insurers will be reluctant to rely on a power that does not survive the disability of the principal. If the principal becomes disabled and a guardian is subsequently appointed, the authority of the Agent continues, however, the Agent must account to the guardian instead of to the Principal (see § 5-1501A(2)).

The use of valid statutory form of power of attorney from a state other than New York, is a valid form of power of attorney in New York, even if the Principal is a New York resident or domiciliary; see § 5-1512. When such forms are used, it is advisable that such non New York statutory form also contain an express direction, authorizing the agent to conduct the specific transaction or transactions and grant the Agent the express authority to sign any and all documents required to complete the transaction. A non New York statutory power of attorney will probably not be acceptable for the execution of New York state transfer tax returns. Therefore, where a power of attorney is to be used for a real estate transaction in New York, it is highly advisable that an SSFPOA-09 be used. Otherwise, the special forms of power of attorney required by the state and/or local tax authorities should also be executed by the principal.

A non-statutory form of power of attorney executed by a governmental or business entity does not seem to need to meet all the statutory requirements of an SSFPOA-09 under § 5-1501B and § 5-1513 or be signed and acknowledged by the Agent. Section 5-1501B(4) provides that *"[n]othing in this title shall be construed to bar the use of any other or different form of power of attorney desired by a person* ***other than an individual*** *as the term person is defined in section 5-1501 of this title."* ***(Emphasis added)*** Curiously, however, the term individual is not defined; however, the term *"Principal"* is defined in § 5-1501(11) as an individual over the age of 18 years. Perhaps the intention was to define the term *"individual*" rather than the term *"Principal."* Does this mean that only an individual can be a Principal?

Problems may arise where a New York power of attorney was executed on the SSFPOA-09 form prior to September 1, 2009, as the 2009 form was not then a statutory form. However, if the power of attorney contains a statement expressly authorizing the specific transaction it should be acceptable as a non statutory form under the then existing law. It is always advisable to contact the provider of the title insurance well in advance of closing to make sure the form to be used is acceptable. The same is especially true when using an out of state statutory or non-statutory form of power.

While the basic method of designating the powers granted remains the same, that is, the Principal initialing in the space next to the powers he or she wishes to grant, some of the enumerated powers have been changed or have been eliminated. Powers enumerated (A) through (H) remain the same; however, (I) has been changed to "personal and family maintenance." The text of § 5-1502(I)(14) has also been renumbered subparagraph 15. In its place there is a provision authorizing the Agent to continue gifts that the principal had customarily made to individuals and organizations prior to the creation of the power of attorney, "provided that no person or charitable organization may be the recipient of gifts in any one calendar year which, in the aggregate, exceed five hundred dollars[.]" The authority of the Agent to make gifts has been severely curtailed and gifts in excess of $500 must now be specially authorized under a new form, a "Statutory Major Gifts Rider" ("SMGR"). Moreover, an agent can no longer create trusts or modify trusts, make beneficiary changes, change any rights in property or tenancy or execute "other transfers." Other transfers might include transfers for Medicaid or estate planning purposes or conversions of ownership from one form to another. As these are no consideration transfers, the execution of a valid SMGR would be required. Section 5-1502A, while somewhat modified, continues to authorize an Agent to "[t]o sell, to exchange, to convey either with or without covenants, to quit-claim, to release, to surrender, to mortgage, to encumber, to partition or to consent to the partitioning, to grant options concerning, to lease or to sublet, or otherwise to dispose of, any estate or interest in land;" among other powers.

If a principal desires the Agent to make gifts in excess of $500, create or modify trusts, change beneficiaries or change how an asset is held or make other transfers other than a transaction authorized under § 5-1502A, the principal must place his or her initials in the space provided in paragraph (h) of the SSFPOA-09 form and also execute and attach an SMGR. More on the SMGR further on in this article.

Section 5-1502I(15), Personal and Family Maintenance, authorizes the Agent "[i]n general, and in addition to all the specific acts in this section enumerated, to do any other act or acts, which the principal can do through an agent, for the welfare of the spouse, children or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents[.]" Deleted is the authority to provide for relatives, friends and organizations. Support for such persons and organizations will now require the creation of an SMGR.

The form and requisites for the SMGR for powers of attorney that are executed within New York are set forth in § 5-1514. Again, strict compliance with both the form and formalities of execution are required. In addition, the appropriate box at paragraph (h) of the SSFPOA-09 form must be initialed.

To be valid, the SMGR like the SSFPOA-09 must contain the exact language as provided in the statute and must be printed in at least 12 point type or its equivalent. The SMGR must be executed contemporaneously with the SSFPOA-09 and signed by two disinterested witnesses ***(the Agent may not be a witness),*** who's signatures do no need to be acknowledged (GOL 5-1514(9)). The SMGR must also be annexed to the SSFPOA-09 or to a non-statutory power of attorney that conforms to the requirements of § 5-1513.

It should be assumed that a gift or other transfer of an interest in real property (for which there is no cash consideration received by the Agent for the benefit of the Principal) is to be deemed a major gift and an SMGR is required. The gift or intended transfer must be described in detail in the SMGR. It should be noted that authority to make gifts to a spouse under the SMGR is deemed revoked upon the divorce, annulment, invalidity or other circumstance terminating the marriage. When preparing an SMGR the statute should be consulted.

A Principal may authorize an Agent to make gifts to family members by initialing where indicated under paragraph (a) on the SMGR. In respect to a non-statutory power of attorney, the SMGR must conform to the following requirements;

- A Principal may authorize the Agent to make major gifts using a non-statutory power of attorney.
  - If major gifts may be made by the Agent under a non-statutory power of attorney executed within this state, the non-statutory power of attorney must be signed and acknowledged by both the Principal and the Agent(s), and
  - the non-statutory power of attorney must also be witnessed by two disinterested individuals.
- The Agent may not create a trust for the Principal, or amend, revoke or terminate an *inter vivos* trust created by the Principal unless expressly authorized in the SMGR or in a non-statutory power of attorney.
- The law permits the Agent to transfer property of the Principal to the Agent. Such authority must be expressly authorized in the SMGR or in the non-statutory power of attorney which, if executed in this state, must fully comply with the New York statute including the presence of an SMGR. If title has passed or will pass from the Principal to the Agent, which transfer was or is to be made using a power of attorney, you must call Company underwriting counsel to approve the transaction.

The form of SSFPOA-09 allows for only one Principal but there can be any number of Agents who must act jointly, unless the box allowing them to act separately is initialed.

AN SSFPOA-09 or other form of power of attorney executed in this state is effective only when both the Principal and Agent have signed and their signatures are acknowledged. If more than one Agent is appointed and they are to act jointly, the power is effective only when the Principal and all the Agents have signed and all signatures are acknowledged.

The former "Springing Form" of power of attorney set forth in § 5-1506 which was repealed, has been withdrawn and is no longer a statutory form. Springing powers of attorney, that is, powers of attorney effective at a future date or upon the occurrence of a future event, may still be created. The statute is unclear as to how or where this is to be stated in the an SSFPOA-09 accordingly, the entire SSFPOA-09 must be reviewed to determine if the SSFPOA-09 is currently effective or whether it is intended to become effective at some future time or upon some specified event or condition.

The SSFPOA-09 introduces a new concept to the use of the powers of attorney. The Agent has the option to appoint a "monitor" whom the statute defines as "a person appointed in the power of attorney that has the authority to request, receive, and seek to compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the Agent on behalf of the principal."

Another first is that the standard of care which the Agent must exercise is now statutorily described. The statute provides that "an Agent acting under a power of attorney has a fiduciary duty to the principal." (See § 5-1505) These duties include i) following the express instruction of the Principal ii) otherwise acting in his, her or its best interests iii) keeping separate the Principal's property and iv) to keep a record of all transactions, receipts, disbursements and to make these records and the SSFPOA-09 available at the request of the Principal or those designated in the statute within fifteen days.

A power of attorney may be executed by an individual in his or her individual capacity, or in his or her capacity as a fiduciary or as an official or officer of any governmental or commercial entity. If executed in his or her capacity as an official or officer of a governmental or commercial entity, the insurer will need statutory authority and a resolution of the governing body authorizing the appointment of the Agent.

A corporation, partnership, LLC or other business entity may be a Principal and appoint an Agent under a power of attorney. When appointed by a corporation, the certificate of incorporation, and any amendments should be consulted for any possible limitations. When appointed by a business entity, a corporate resolution appointing the Agent and in the case of other business entities, the consent of partners or members or managing partner or member as required by the articles of partnership or operating agreement should be obtained.

Section 5-1507 sets forth the correct methods for the Agent's execution of documents.

a. Signing "(name of Agent) as Agent for (name of Principal)"; or

b. Signing "(name of Principal) by (name of Agent), as Agent"; or

c. Any similar written disclosure of the Principal and agent relationship.

Other forms of power of attorney may still be used in New York. They fall into two broad categories:

- A power of attorney executed prior to September 1, 2009, which at the time of execution was not in the statutory form (such as an SSFPOA-09 or any form that did not conform to the law in effect prior to September 1, 2009 or a non statutory form executed outside of New York that is not a statutory form in the state where executed) in which case the specific powers granted to the attorney-in-fact must be described in detail in order for an insurer to rely upon and accept the form.

- A power of attorney executed outside of New York that is a statutory short form power of attorney conforming to the laws of that jurisdiction at the time of execution.

When a form that falls into either of the foregoing categories is to be used in a real estate transaction it is imperative that underwriting counsel for the insurer be consulted and the form submitted for approval in advance of closing.

In the category of unintended consequences, the law will require the form of SSFPOA-09 or a form confirming to § 5-1501B and § 5-1513 for powers of attorney executed by condominium unit owners, which will require the power to be signed and acknowledged by the Agent, who presumably is the condominium board. As the grant of the power is not being made for transactions for which the Principal will receive consideration, additionally an SMGR should be completed. It would make sense for the legislature to either dispense with the Agent signature and the requirement of an SMGR for such powers or draft a special form of condominium power of attorney or amend § 5-1501B(4) to include condominium powers of attorney made by unit owners.

The State Assembly has passed and the Senate is considering a bill to make technical and other corrections to the Chap. 644 Laws of 2008. The text of this Bill as written, does not correct the problem with condominium powers of attorney which can and should be addressed in an amendment.

If adopted as drafted, and signed into law, there will be changes to both the text of the law for example, modifying the provision revoking prior powers and correcting an existing grammatical error. The statute also appears to have an incomplete thought in § 5-1501B(2)(a) as noted earlier. The form of SSFPOA-09 in the current iteration of the law has a grammatical error in paragraph (e) of the form relating to the revocation of powers. The SSFPOA-09 form reads ***"If your are . . ."*** Because strict adherence to the form of SSFPOA-09 is required, we have not the text of the form, but our form has a footnote that it is the *"Text as enacted."*

Practitioners should read the Law and any subsequent amendments carefully to ensure that powers created under it are in compliance and are therefore fully effective for the purposes intended. We have identified a number of difficulties in the new Law, and expect that there were be more legislative corrections which this publication will monitor and report on.

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