

POWER OF ATTORNEY 2021 STATUTORY CHANGES & POTENTIAL FOR ABUSE

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Powers of Attorney and Guardianships

Power of Attorney

- **An instrument which delegates to another person authority to make financial decisions to another**
- **Now includes both a statutory short form power of attorney and a non-statutory power of attorney.**

Guardianship

- **A court order granting powers to a family member, other individual, governmental agency, or institution to control the affairs of another person**

Power of Attorney Amendments

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Effective June 13, 2021, substantial amendments have been made to the General Obligations Law related to power of attorney. A POA validly executed prior to June 13, 2021, will remain valid.

GOL §5-1513. STATUTORY SHORT FORM POWER OF ATTORNEY

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The use of the following form, or one which substantially conforms to the following form, in the creation of a power of attorney is lawful, and, when used, and executed in accordance with subdivision one of section 5-1501B of this title, it shall be construed as a statutory short form power of attorney in accordance with the provisions of this title;

GOL §5-1513. STATUTORY SHORT FORM POWER OF ATTORNEY

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Any section indicated as “Optional” which is not used may be omitted and replaced by the words “Intentionally Omitted”

Included to help reduce the length of the document

GIFT TRANSACTIONS

In order to authorize your agent to make gifts in excess of an annual total of \$5,000 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), and/or to make changes to interest in your property, you must expressly grant that authorization in the Modifications section below. If you wish to authorize your agent to make gifts to himself or herself, you must expressly grant such authorization in the Modifications section below. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. Your choice to grant such authority should be discussed with a lawyer.

GOL §5-1513. Statutory short form power of attorney(g) CERTAIN GIFT TRANSACTIONS: (OPTIONAL)

STATUTORY GIFT RIDER

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GOL §5-1514. Certain gift transactions; formal requirements; statutory form

Repealed

SIGNING THE POA

§ 5-1501B subd. 1(b):

Be signed, initialed and dated by a principal with capacity, or in the name of such principal by another person, other than a person designated as the principal's agent or successor agent, in the principal's presence and at the principal's direction, in either case with *the signature of the person signing duly acknowledged* in the manner prescribed for the acknowledgment of a conveyance of real property and witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts, in the manner described in subparagraph two of paragraph (a) of section 3-2.1 of the estate, powers and trusts law in the presence of the principal.

When a person signs at the direction of a principal he or she shall sign by writing or printing the principal's name, and printing and signing his or her own name.

SIGNING THE POA

§ 5-1501 subd. 2 (m) “Sign” means to place any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise upon an instrument or writing, or to use an electronic signature as that term is defined in subdivision three of section three hundred two of the state technology law, with the intent to execute the instrument, writing or electronic record. In accordance with the requirements of section three hundred seven of the state technology law, a power of attorney or any other instrument executed by the principal or agent that is recordable under the real property law shall not be executed with an electronic signature.

WITNESS REQUIREMENT

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§ 5-1501B subd. 1(b):

witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts, in the manner described in subparagraph two of paragraph (a) of section 3-2.1 of the EPTL in the presence of the principal.

Acceptance

- **§ 5-1504 3. (a) Not later than the tenth business day after presentation of an original or attorney certified copy of a statutory short form power of attorney properly executed in accordance with [section 5-1501B](#) of this title or in accordance with the laws in effect at the time of its execution to a third party for acceptance, such third party shall either (a) honor the statutory short form power of attorney, or (b) reject the statutory short form power of attorney in a writing that sets forth the reasons for such rejection**

Acceptance

- **§ 5-1504 4. (b) If a special proceeding as authorized by [section 5-1510](#) of this title is brought to compel the third party to honor the statutory short form power of attorney, the court may award damages, including reasonable attorney's fees and costs, if the court finds that the third party acted unreasonably in refusing to honor the agent's authority under the statutory short form power of attorney. Such special proceeding shall be the exclusive remedy for a violation of this section.**

CAPACITY

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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. 5-1501 2.(c)

AUTHORITY – REVOKE

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You do not give up your independent authority to continue to act or your ability to revoke the power of attorney

REVOCATION

General Obligations Law Section 5-1511

A Principal may revoke a power of attorney by by delivering a revocation of the power of attorney to the agent in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent's last known address. If recorded the revocation shall also be recorded.

Termination of an agent's authority or of the power of attorney is not effective as to any third party who has not received actual notice of the termination and acts in good faith under the power of attorney

COMPLICATED

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The implementation of it has become more involved. The reason for this is that was major changes to the power of attorney legislation in 2009.

Is it less complicated with the new revisions?

LICENSE TO STEAL

Powers of attorney have often been called a license to steal - The reason being that you have given someone authority to manage your assets. What happens thereafter the loved one, family member, friend or professional you have appointed to act on your behalf takes advantage of that authority and accesses your assets for their benefit often to your detriment and because they had the authority to do so law enforcement would not view these actions as a criminal matter.

CIVIL MATTER

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It was a civil matter with often little recourse against the individual.

STANDARD OF CARE

In dealing with property of the principal, an agent shall observe the standard of care that would be observed by a prudent person dealing with property of another.

FIDUCIARY DUTIES

To act according to any instructions from the principal or, where there are no instructions, in the best interest of the principal.

To avoid conflicts of interest.

The agent may not make gifts to the principal's property to himself or herself without specific authorization in a power of attorney.

FIDUCIARY DUTIES

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To keep the principal's property separate and distinct from any other property owned or controlled by the agent, except for property that is properly jointly owned by the principal and agent

FIDUCIARY DUTIES

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Keep a record of all receipts and disbursements

Make such record and power of attorney available to the principal or to third parties at the request of the principal.

RECORD

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Means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

RECORD

The agent shall make such record and a copy of the power of attorney available within 15 days of a written request by any of the following:

- 1) a monitor;**
- 2) a co-agent or successor agent acting under the power of attorney;**
- 3) a government entity, or official thereof;**
- 4) a court evaluator;**
- 5) a guardian ad litem;**
- 6) the guardian or conservator of the estate of the principal;**
- 7) the personal representative of the estate of a deceased principal.**

SPECIAL PROCEEDING

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If the Agent fails to provide the power of attorney or the accounting within 15 days, a special proceeding can be commenced

SPECIAL PROCEEDING - REMEDIES

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To determine whether the power of attorney is valid

SPECIAL PROCEEDING - REMEDIES

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To determine whether the principal had capacity at the time the power of attorney was executed

SPECIAL PROCEEDING - REMEDIES

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To determine whether the power of attorney was procured through duress, fraud or undue influence

SPECIAL PROCEEDING - REMEDIES

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To determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed

SPECIAL PROCEEDING - REMEDIES

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To approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal

SPECIAL PROCEEDING - REMEDIES

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To remove the agent upon the grounds that the agent has violated, or is unfit, unable, or unwilling to perform, the fiduciary duties under the power of attorney

SPECIAL PROCEEDING - REMEDIES

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To determine how multiple agents must act

SPECIAL PROCEEDING - REMEDIES

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To construe any provision of a power of attorney

SPECIAL PROCEEDING - REMEDIES

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To compel acceptance of the power of attorney

SPECIAL PROCEEDING – COMMENCEMENT

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- 1) The agent;**
- 2) The spouse, child or parent of the principal;**
- 3) The principal's successor in interest, or any third party who may be required to accept a power of attorney;**
- 4) Those listed before that may request an accounting. (Slide 24)**

SPECIAL PROCEEDING

If a power of attorney is suspended or revoked or the agent is removed by the court, the court may require the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal and to deliver any property belonging to the principal and copies of records concerning the principal's property and affairs to a successor agent, a government entity or the principal's legal representative

McGregor v. McGregor, 191 A.D.3d 974,
(Sup. Ct. App. 2nd Dept. 2021)

The Supreme Court erred in determining that the plaintiff lacked standing to bring this action pursuant to [General Obligations Law § 5-1510 \(3\)](#) because that ground was never raised by the parties and the parties had no opportunity to address this issue. This lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process. The only issue raised regarding standing was that the plaintiff lacked standing based upon a lack of a blood relationship with the decedent. Upon the record before us, the defendant failed to meet his burden of proof on that affirmative defense.

Moreover, the Supreme Court erred in dismissing the second cause of action to set aside the transfer of the subject property as a fraudulent conveyance. The plaintiff submitted evidence that the power of attorney did not grant the defendant gift-making authority, and that the defendant improperly used the power of attorney to gift the subject property to himself.

***In the Matter of S.M.*, 68 Misc.3d 392, 126 N.Y.S.3d 890
(Sup. Ct. Tompkins County 2020)**

Services rendered by attorney as mentally-incapacitated client's agent under power of attorney (POA) were more mechanical and administrative rather than legal in nature, and thus reasonable compensation for attorney's services under POA was 75% of attorney's standard hourly rate of \$350 per hour.

**Rabasco v. Levine & Htoo PC; Case Number:
53572/18 (Dutchess Cty Sup. Ct. 6/25/2020)**

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Legal malpractice action. Defendant attorney's summary judgment motion is denied. The court found defendants offered no competent evidence or explanation to draft an irrevocable trust in 2015 at the sole request of decedent's niece naming her the sole trustee and beneficiary at the niece's, not decedent's (their client) request. The mere fact that the power of attorney permitted the agent to create an irrevocable trust was not controlling and dismissal of the legal malpractice claim was denied.

**TOP v. GLICKLICH, 68 Misc.3d 1224(A),
(Sup. Ct., New York County 9/18/2020)**

An Agent sued the estate of a longtime companion seeking the return of \$730,000 allegedly stolen by the companion and others. The defendant's moved to dismiss on the grounds that Agent lacked standing as the POA had been revoked. The defendants produced a writing to that effect but could not prove that it had been properly delivered to the agent as required by statute. The defendants also allege that the Agent had been told about the revocation by an email from a 3rd party. Neither of these were deemed sufficient notice to the agent by the court. The motion to dismiss was denied.

Onondaga County Recent Case

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POA Special Proceedings for production of POA and account of records.

Daughter named individual Attorney in Fact for elderly mother who resided in her home.

Reluctance receiving documents from daughter, depositions to be scheduled. Daughter claims caregiver exploited the mother

CRIMINAL PROSECUTION

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POA is no longer a license to steal

Variety of Different Potential Charges

Financial Exploitation

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Illegal or improper use of an older adult's funds, property or assets.

Because not all older adults use the banking system, consider cash, gold, jewelry, antiques, and homes as assets.

Methods of Financial Exploitation

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Abuse of legal authority (i.e., Power of Attorney)

Interviewing

5.45

Who should you interview?

Who to Interview

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- **Victim**
- **Suspect**
- **Family members**
- **Neighbors**
- **Victim's health care providers**
- **Victim's pharmacist**
- **Victim's lawyer**
- **Bank employees**
- **APS**

Evidence Collection

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- **Checkbooks and registers**
- **Overdue or unpaid bills**
- **Bank statements of victim and suspect**
- **Tax records**
- **Receipts for purchases**
- **ATM transactions**
- **Surveillance footage at bank, ATMs**
- **Credit card statements**
- **Credit reports**
- **Data off home or work computers**
- **Power of Attorney and other legal documents**

Evidence Collection

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- ❑ **Medical records of victim**
- ❑ **Capacity evaluation of victim**
- ❑ **Mental health and substance abuse treatment records of suspect**
- ❑ **Employment records for suspect**
- ❑ **Toxicology screen for victim**
- ❑ **Prescription records of suspect and victim**

Collaboration:

Financial Exploitation Cases

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- ❑ **State Attorney General Offices**
- ❑ **Onondaga County District Attorney's Office – Economic Fraud and Rackets Bureau**
- ❑ **Adult Protective Services**
- ❑ **Vera House Inc**
- ❑ **For internet crimes – report on IC3.gov**
- ❑ **Banks – Suspicious Activity Reports (SARs)**
- ❑ **FBI**

Potential Interdisciplinary Responses

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- ❑ **Elder Justice Committee of the Syracuse Area Domestic & Sexual Violence Coalition**
- ❑ **Enhanced Multidisciplinary Team (E-MDT)**
- ❑ **Access to Forensic Accountant through E-MDT resource**

QUESTIONS

