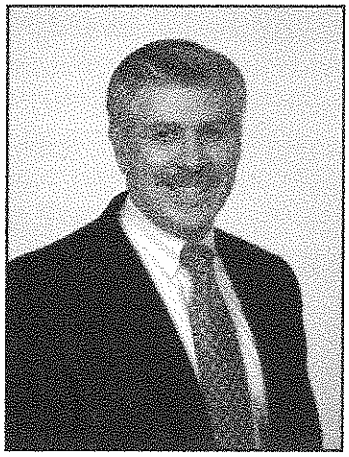
A STEP AHEAD

NEW LAW CHANGES NEW YORK POWER OF ATTORNEY



On January 29, 2009, Governor Patterson signed into law amendments to Title 15 of Article 5 of the General Obligations Law which significantly changes the Power of Attorney form ("POA") in New York, effective March 1, 2009. Some of the differences are as follows:

- The "old" POA required only the signature, and notarization, of the principal, the one creating the form. The new POA must now be signed, dated and acknowledged by both the principal and the agent.

- The old POA contained a provision that permitted gifts of up to $10,000.00 to certain designated family members. This provision was frequently supplemented with language that increased the amount and expanded to whom gifts could be made. Under the new law, if the principal intends to authorize gifts, the gift-giving authority must be initialed by the principal and, for gifts in excess of $500 per calendar year, a separate form, the Statutory Major Gifts Rider ("SMGR"), is also required.

- The SMGR is an important new document. Among other things, it may authorize the agent to create and fund trusts, to create joint accounts or modify "totten trust" beneficiaries, and to change beneficiaries on retirement benefit plans.

- The new law defines the responsibilities of the agent, which include record-keeping with receipts, and provides that, upon the written request of a co agent, governmental entity, court evaluator, guardian, or representative of the principal's estate, the agent must make the records available. The form contains an optional provision authorizing the principal to appoint a "monitor" who is also entitled to request and receive records of transactions by the agent and can compel the agent to produce records by a special proceeding. The provisions regarding the agent's responsibilities and special proceedings apply to all POAs, including those executed before the effective date of the new law.

- Acceptance of the new POA is mandated. The former statute only required acceptance by financial institutions which, by definition, omitted brokerage firms, securities firms and others who manage stock accounts. Now, on a going forward

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basis, no third party can refuse to honor a POA or SMGR, or even an old POA that was properly executed, without reasonable cause. Banks and brokerage firms will no longer be able to require their own forms.

Powers of attorney created prior to the effective date of the new law are still valid. However, if it has been more than three (3) years since your estate plan was reviewed, or if there have been changes in your family, finances or life, the enactment of the new statute is an excellent reason to have your power of attorney, as well as the balance of your estate plan, reviewed now. We therefore strongly recommend that you contact us to discuss whether updating or creating a new power of attorney is warranted.

ESTATE TAX PLANNING, UNINTENDED CONSEQUENCES

Since the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the amount that an individual can protect from federal estate taxes (the "unified credit") has steadily increased. In 2008, the unified credit was $2,000,000 per individual. As of January 1, 2009, the unified credit has increased to $3,500,000. Under the current law, beginning on January 1, 2010, the federal estate tax is suspended for one year. Then, on January 1, 2011, the unified credit is scheduled to return to $1,000,000.

Because property left to a surviving spouse is not subject to estate taxation at the death of the first spouse, some individuals have implemented an estate plan leaving an amount equal to the unified credit to beneficiaries other than their spouse and leaving the balance of their estate to the spouse, or in a trust for the benefit of the spouse. This plan enables non-spouse beneficiaries to enjoy the benefit of a portion of their inheritance at the death of the first spouse rather than having to wait until both spouses have died. Provided that the trust for the surviving spouse meets certain statutory requirements, this planning may also eliminate federal estate tax liability at the first death.

With the most recent increase in the unified credit, and the suspension currently scheduled to be implemented in 2010, there may be unintended consequences to such an arrangement.

For example, John and Mary are each married for the second time. They have no children together but

each has children from their first marriage. Each wants to provide for the other should he/she pass away first. However, if they are the first to die, they also do not want their own children to have to wait until their spouse's death to receive an inheritance. Their plans provide that, at the first death, an amount equal to the federal unified credit of that spouse's estate is to be distributed to that spouse's children. The balance of his/her estate will fund a trust for the benefit of the surviving spouse for life, after which, whatever remains in the trust will be distributed to the children of the first to die.

When John and Mary's plan was created in 2002, they each separately owned property with a total value of $2,000,000. At that time, the unified credit was $1,000,000. At the death of the first of them, they each intended that $1,000,000 of that person's assets would be distributed to that spouse's children. Their expectation was, and is, that the remaining $1,000,000 would fund a trust for the survivor until his or her death, when the balance remaining would be distributed to the children of the first to die. Because the amount to be distributed to the children, at the first death, is defined by the federal unified credit, now $3,500,000, if either John or Mary die this year or next, his/her entire estate will be distributed to his or her children, leaving no property remaining to fund the trust for the survivor.

Any estate plan which uses the federal unified credit as a measuring stick for the distribution of property to beneficiaries will suffer similar consequences.

Fortunately, if this situation sounds like yours, or you are not sure, you can take steps to avoid this unintended consequence of the increase to the unified credit. It starts with having your estate plan reviewed immediately. Even if you do not believe that you are affected by the increase in the unified credit, we at Berwitz & DiTata LLP strongly encourage our clients to review their estate plans regularly, at least every three years. This way, you can be sure that changes that may have occurred in the law, or in your life, will not unintentionally affect your estate plan.

WOULD YOU LIKE TO READ ABOUT IT HERE?

We at Berwitz & DiTata LLP are proud of our newsletter and hope that each issue brings our clients and friends insightful and timely information. We endeavor to write articles geared to your interests and concerns. We would be happy to receive your feedback. More importantly, if you have a question or would like us to address a particular topic, please let us know. We will try to include it in one of our next issues. Just call or drop us a line.

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MISTAKES AND MISCONCEPTIONS

Estate planning, whether simple or complex, requires careful attention to details which, if overlooked or misunderstood, can undermine the plan's effectiveness. We will devote space in each issue to highlight common estate planning mistakes and misconceptions.

Don't be fooled into thinking that, if you create and implement a Living Trust, you will not need a Last Will and Testament. While a Living Trust is considered a "testamentary substitute," a way of transferring assets while avoiding the probate process, a Will is still an important part of your estate plan.

If you have minor children, the Will names the person whom you wish to be appointed as their guardian in the event of your death. Even if you have no children - or they have already grown - no estate plan is complete without a Will.

A Trust will avoid probate only as to the assets that have been transferred to it before your death. Sometimes, we forget to transfer all of our assets. Sometimes, assets become part of our estate after we die. For instance, a rebate check, health insurance reimbursement, or repayment of a debt after death is not part of the Trust. If we die as the result of an accident or malpractice, and a lawsuit results, the recovery against the responsible party is outside of the Trust. The Will appoints an executor who will collect the assets, or commence the suit, and directs the disposition of the "new" assets. The Will may simply direct that the assets "pour-over" to the Trust, so that they are distributed in accordance with your plan, but it is still an integral part of your estate plan.

We Practice Preventative Law!™