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MARYLAND ESTATE PLANNING BOOK
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Chapter 30A

2010 Maryland General and Limited Power of Attorney Act

30A.1 GENERAL

On May 20, 2010, Governor Martin O'Malley signed into law the Maryland General and Limited Power of Attorney Act (sometimes referred to as "2010 POA Act" or the "Act"). The new law became effective October 1, 2010 and applies to every power of attorney executed on or after that date. It repeals certain provisions of law relating to durable powers of attorney. In addition, while the new law adds new language modeled after the Uniform Power of Attorney Act, the new law contains provisions unique to Maryland law. Indeed, the new law makes significant changes in how financial powers of attorney are drafted and used in Maryland. The centerpiece of the new law is the new statutory forms for both General Powers of Attorney and Limited Powers. The 2010 POA Act is found in ET §§17-101 through 204.

30A.2 BACKDROP OF NEW LAW

Built upon great efforts and skill on the part of legislators and dedicated members of the Maryland Estates and Trusts Bar, the 2010 POA Act attempts to solve two major problems.

30A.2.1 Refusal to Accept Valid Power

There were problems with banks, financial institutions, insurance companies and other third parties refusing to accept or honor a valid power of attorney. In Maryland, there was no statutory or clear common law basis for requiring a third party to recognize a properly drafted power of attorney. In those situations where the bank refused to honor the document, the agent was left with no choice but to incur significant expense and lost time in enlisting his or her attorney to resolve the matter, or establishing a guardianship to accomplish what should have been covered by the power of attorney. Banks were of course trying to protect themselves from unauthorized use by unscrupulous agents.

30A.2.2 Abuse by Agents

There were also problems with people acting under powers of attorney doing inappropriate things, some even to the extent of stealing money. Indeed the 2010 POA Act was designed in part to enhance protection for the elderly from unscrupulous agents. A groundswell for the 2010 POA Act started after Loretta Soustek, an 87 year old women suffering with dementia, gave her niece a financial power of attorney (back in 2001). Rather than exercising the power of attorney for the benefit of her aunt, Ms. Soustek's niece used it to buy herself a new home and pay off her own credit card bills. The end result was that the niece wiped out nearly

half a million dollars of her aunt's assets. This situation only came to light when Ms. Soustek's two great-nieces were appointed guardian for Ms. Soustek. This was one of the cases that prompted the legislators to change the system and afford some protection to the principal.

30A.3 "STATUTORY FORMS" UNDER THE 2010 POA ACT AND THEIR ADVANTAGES

30A.3.1 The "Substantially in the Same Form As" Test

The 2010 POA Act provides two statutory power of attorney forms, the "Personal Financial Power of Attorney" form, and the "Limited Power of Attorney" form. These forms are summarized in Section 30A.4 below. Importantly, the 2010 POA Act defines a "statutory form power of attorney" as a power of attorney that is **"substantially in the same form as"** (emphasis added) one of the 2 statutory forms provided in the Act. ET §17-101(f).

30A.3.2 Remedies for Refusing to Honor a Statutory Power

30A.3.2.1 Mandatory Acceptance

The 2010 POA Act provides that a power of attorney is valid and enforceable as to all persons dealing with the agent. ET §17-108(a). This applies to all powers of attorney (statutory and non-statutory). However, the Act provides more "teeth" for statutory form powers of attorney. The Act provides that "a person may not require an additional or different form of a power of attorney for any authority granted in a statutory form power of attorney." ET §17-104(a). In other words, starting on October 1, 2010, a validly-executed Maryland statutory form cannot be rejected by banks, hospitals, doctors, insurance companies, brokerage firms, etc.

30A.3.2.2 Remedies for Refusal to Accept

If a person refuses to accept a statutory form power of attorney (*i.e.,* a power of attorney in "substantially the same form as" one of the statutory forms), such person may be ordered by a court to accept such form. Additionally, that person may be held liable for the reasonable attorneys' fees and costs incurred in an action or proceeding that either confirms the validity of such statutory form or mandates its acceptance. §17-104(b)

Comment: Banks and other financial institutions will now have a financial incentive to accept the Statutory Power because the expenses of obtaining the court order will fall to the bank. This remedy is a key advantage of a statutory form over a non-statutory form.

30A.3.2.3 Not Using Statutory Powers

The Act does not mandate that either of the two statutory forms be used. Indeed, as noted above, the new law applies to all powers of attorney, ET §17-108(a). However, any non-statutory forms executed after October 1, 2010, must conform to the same execution,

acknowledgment and witness requirements as statutory forms, as discussed below.

30A.4 THE STATUTORY FORMS

As described above, the 2010 POA Act provides two statutory power of attorney forms, the "Personal Financial Power of Attorney" form, and the "Limited Power of Attorney" form.

30A.4.1 The Personal Financial Power of Attorney

The Personal Financial Power of Attorney confers broad authority in financial and business matters to the agent, and is in essence what most of us think of as a "general" power of attorney. This form grants broad general powers to the agent without the need to specify each power to be granted. This power is approximately seven pages long, and it provides a section for special instructions.

Comment: As will be noted below, this "broad" form may not be adequate to cover all necessary or desired powers conferred upon an agent.

The Statutory Personal Financial Power of Attorney is set forth in ET §17-102 and reproduced in Form 30A-1.

30A.4.2 The Limited Power of Attorney

The Limited Power of Attorney is a "check the box" style document, approximately 20 pages long and also contains a special instructions section. If all of the powers contained in the Limited Power of Attorney are given, it grants more comprehensive powers than the Personal Financial Power of Attorney. The Limited Power of Attorney requires an individual to review a detailed list of powers and initial next to each power he or she wishes to grant to the agent. The powers not initialed must be lined out.

The Statutory Limited Power of Attorney is set forth in ET §17-203 and reproduced in Form 30A-2.

30A.4.3 Choice Between the Statutory Forms

The decision as to which Statutory Power of Attorney is best will depend on each individual's circumstance and personal preference. Attorneys and other advisors should be able to advise clients as to which power of attorney is best suited for the client's particular needs.

Comment: The Limited Power of Attorney has the option of providing more authority than the Personal Financial Power of Attorney. However, it is a highly cumbersome document and requires the principal to initial the document countless times. This statutory form will probably tend to confuse, rather than clarify, matters for clients. And, it may well necessitate substantial changes that take it out of the realm of a protected "statutory form." (See discussion in Section 30A.8

below with respect to the "substantially in the same form as" requirement.) In addition, as will be discussed below, the decision is not only which statutory form to use, but whether it is advisable to create an additional or supplemental power of attorney that includes important powers not provided by the statutory forms.

30A.5 DURABILITY

Under the Act, powers of attorney are presumed to be "durable" unless otherwise expressly provided. Such presumption means that the power of attorney will remain in full force and effect following the subsequent disability of the principal. ET §17-111(a)

30A.6 STANDING

The 2010 POA Act affords certain enumerated people with the right to petition the court to construe the power of attorney and to have the court review the agent's conduct and grant appropriate relief. The enumerated people include the principal or the agent, a guardian or other fiduciary acting for the agent, an authorized health care agent, the principal's spouse, parent or descendant, an heir, a person named as a beneficiary to receive property of the principal, a government agency acting to protect the principal, the principal's care giver or another person who demonstrates sufficient interest in the principal's welfare, or a person asked to accept the power of attorney. ET §17-103(a)

Comment: Broadening the class of persons who have standing is a clear legislative response to the Loretta Soustek matter and to other situations where agents have abused powers of attorney.

30A.7 NEW EXECUTION REQUIREMENTS

The 2010 POA Act, which applies to every power of attorney executed on or after October 1, 2010, requires that, in addition to being signed before a notary public, every power of attorney be "attested and signed by two or more adult witnesses who sign in the presence of the principal and in the presence of each other." The notary public may serve as one of the required adult witnesses. ET §17-110

Comment: These execution formalities are arguably more stringent than presently required for the execution of a Will.

30A.8 "SUBSTANTIALLY IN THE SAME FORM AS" TEST

30A.8.1 "Special Instructions"

The 2010 POA Act allows for a principal to "deviate" from the default provisions and to provide additional powers or instructions to agents in both statutory forms under the "Special Instructions" sections. The statutory forms have 7 lines under the "Special Instructions"

heading. The question is how much can be added in the Special Instructions section without violating the "substantially in the same form as" requirement to be considered a "statutory form?" Does adding more lines to accommodate more special instructions violate the "substantially in the same form as" requirement?

> *Comment*: It is clear that the Statutory Powers of Attorney, particularly the Personal Financial Power, will become quite common in the future, and bank personnel will be comfortable recognizing and accepting them. This may be overly simplistic but to increase the chances of acceptance by a bank official, the power should look as much like the statutory form as possible. Too much modification or deviation should be avoided. For instance, the addition of an entire extra page or two of added powers in the "Special Instructions" section should probably be avoided. As discussed below, a second, supplemental non-statutory power (see below) may be a better option.

30A.8.2 Adequacy of Personal Financial Power of Attorney/Use of Supplemental Power

As with all forms written for a wide audience, the Statutory Personal Financial Power of Attorney may not include all of the powers required in one's specific situation. Indeed many powers that are useful in many cases are missing (see Section 30A.3.7.2 below for a sampling of those powers).

What is the solution? Putting aside the Statutory Limited Power of Attorney, which is probably too cumbersome and clumsy for many, if one wants to use the Statutory Personal Financial Power of Attorney (the general one), there are two choices: (1) use the Statutory Personal Financial Power of Attorney and add the additional desired powers and instructions to the "Special Instructions" portion without too running afoul of the "substantially in the same form as" test, or (2) use the Statutory Personal Financial Power of Attorney (with limited special instructions- perhaps just filling in up to the 7 lines) and create an additional or supplemental power of attorney that includes important powers not provided by the statutory form. See Form 30A-3 for a template of a "supplemental (non-statutory) power". It is important that the supplemental power (a) does not revoke the statutory power, (b) is not inconsistent with the statutory power, (C) provides that any inconsistency is resolved in favor of the supplemental power and (d) is executed with the required formalities of a post- October 1, 2010 power of attorney.(See in particular Section II.3 of Form 30A-3).

30A.8.3 Sample Powers to Add to Statutory Personal Financial Power of Attorney

Here are sample powers that may be added to the Statutory Personal Financial Power– whether in the Special Instructions or in a Supplemental Power. Some of these powers/authorities are basic; others are more advanced and need to be carefully considered:

- Powers regarding governmental programs, medicaid and long-term care planning, and dealing with

continuing-care facilities and power to make gifts/spend-down in this context (see for example, Forms 30-13, 30-14 and 30-15).

- Power and authority to make gifts for tax planning (see Section 30.3.3, Form 30-14 and the samples provided in the gift-giving power forms in Chapter 30).
- Power regarding mail (open, read and redirect) and representation before the U.S. postal service in all matters relating to mail service (see for example, Form 30-16).
- Power to deal with tangible personal property (see for example, Power B from Form 30A-2, Statutory Limited Power of Attorney which is fairly comprehensive).
- Authority to operate a business (see for example power included in Section I.6 of Form 30-1).
- Power to disclaim assets (see for example, Form 30-10A- last power of form).
- Authority to obtain medical information under HIPAA provisions (see for example, Form 30-17).
- Powers to provide for care and control of principal, principal's spouse and dependents (see for example, Form 30-18).

Note that some of these sample powers may be adapted for use from the Statutory Form Limited Power of Attorney, or from other sample powers referenced in this book or elsewhere. (Some of the forms were adapted from provisions drafted for particular situations by the author or from other practitioners and organizations such as Wealth Counsel, LLC.) The specific powers in this book may not be comprehensive for all situations. Powers of attorney should always be focused on the needs of a client.

30A.9 NEW AGENT RESPONSIBILITIES AND DUTIES

The 2010 POA Act contains detailed duties for agents, as delineated in ET §17-113. Once an agent has accepted appointment, the Act requires that he/she act loyally for the principal's benefit, not create a conflict of interest, keep a record of all receipts, disbursements and transactions made on behalf of the principal, cooperate with a person that has authority to make health care decisions for the principal and attempt to preserve the principal's estate plan, if known and if such preservation is consistent with the principal's best interest.

30A.10 REIMBURSEMENT OF EXPENSES AND COMPENSATION

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal but the agent is not entitled to compensation. If compensation is expressly authorized in the power of attorney document, it must be reasonable under the circumstances. ET §17-114.

30A.11 SPECIAL TERMINATION RULE UPON DIVORCE

There is one additional change regarding termination of an agent's authority. In addition to the traditional means or grounds for termination of a power of attorney, the new law also specifies that an agent's authority terminates "if an action is filed for the dissolution or annulment of the agent's marriage to the principal, or their legal separation, unless the power of attorney otherwise provides." ET §17-112(b)(3). Consequently, if an action for divorce, annulment of marital separation is filed in court, the power of attorney is no longer valid.

30A.12AGENT'S CERTIFICATION FORM

The 2010 POA Act adds a new statutory form, "Agent's Certification As To The Validity of Power of Attorney and Agent's Authority." This form, provided in ET §17-204 and reproduced as Form 30A-4, may be used by an agent to certify facts concerning a power of attorney.