

95 INF-37

Protective Services for Adults:
Changes to the Power of Attorney
Forms

INFORMATIONAL LETTER

TRANSMITTAL: 95 INF-37

TO: Commissioners of
 Social Services

DIVISION: Office of
 Housing and
 Adult Services

DATE: October 25, 1995

SUBJECT: Protective Services for Adults: Changes to the Power
 of Attorney Forms

SUGGESTED

DISTRIBUTION: Directors of Services
 Adult Services Supervisors
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 Staff Development Coordinators

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ATTACHMENTS: Power of Attorney Form (not available on-line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
83 ADM-15		457	Article 9-B		
94 INF-14			Article 5, General Obligations Law Chapter 694 Laws of 1994		

The purpose of this release is to inform local social services districts of changes to the power of attorney forms used in New York State. A "power of attorney" is a document by which an individual gives legal authority to another person(s) to handle a variety of financial transactions and other matters. Protective Services for Adults (PSA) staff frequently encounter situations in which an elderly or impaired adult has given power of attorney to a family member or other individual. It is important that PSA staff be aware of the revisions to the forms and the effect these changes have on the management of the person's financial and/or other affairs. Following is a summary of the revisions.

On October 1, 1994, new power of attorney forms went into effect in New York state, in accordance with Chapter 694 of the Laws of 1994. The statutory short form general power of attorney has been revised, and a new statutory form for the springing power of attorney has been enacted. Powers of attorney can be limited to specific powers or can be comprehensive, according to the wishes of the person signing the power of attorney. Only the person who wants to give the legal authority to manage his or her financial and/or other affairs (called the principal) to another person (called the agent) can sign the power of attorney form. The principal must have the mental capacity to fully understand the scope of the authority being given to the agent.

1. Extent of Powers Granted under Power of Attorney

The revised form clarifies that while the Power of Attorney form may be used to grant the designated agent broad powers to handle real or personal property, it may not be used to authorize anyone to make medical or other health care decisions on behalf of the principal. Descriptions of the specific powers listed on the form are explained more fully in New York General Obligations Law, Article 5, Title 15, Sections 5-1501 through 5-1503.

2. Requirement to Initial Specific Powers Granted

The statutory short form for general powers of attorney lists eleven types of transactions, a power to delegate any or all of the eleven specific transactions, and an inclusive power for "all other matters" which a principal can authorize an agent to perform. Prior to October 1, 1994, principals had to strike out and initial each of the listed transactions they did not wish the agent to perform. This requirement was often confusing to the general public and caused misunderstandings between principals and agents. The form has now been revised to require the principal to initial those powers they wish their agents to have. If a specific transaction listed in the form is not initialed, no authority will be granted for matters that are included in that listing.

3. Durability of Power of Attorney Designation

A durable power of attorney means that the principal intends that the power continue in effect after the principal becomes disabled or incompetent. It allows the agent to manage financial transactions even when the principal has become cognitively impaired and unable to direct the agent. Prior to October 1994, New York State law provided that a durability clause, also known as a "disability clause" could be added to any power of attorney

form. Printed power of attorney forms were available with and without the durability clause. This sometimes led to the inadvertent use of a nondurable form when durability was intended. The revised statute now requires that the durability clause be placed on all statutory short form general powers of attorney with a separate box to be initialed by the principal if durability is desired. (Durability does not extend beyond the death of the principal. The authority granted under a POA is automatically revoked upon the death of the principal.)

As of October 1, 1994, a principal who wishes to make the powers granted durable has to initial a separate box which states: "this power of attorney shall not be affected by the subsequent disability or incompetence of the principal."

4. Springing Powers of Attorney

A "springing power of attorney" goes into effect at some future point in time, determined by the principal. The principal can give the agent legal authority to manage their financial affairs, but delay the effective date of that authority. The principal has to determine ahead of time when or what specific circumstance would cause the springing power of attorney to go into effect. Previously, no statutory form existed, although such powers were permitted. A separate statutory springing power of attorney form is now available which provides space for the principal to indicate when and why the springing power will become effective. An automatic durability clause is included in the new statutory short form springing power of attorney form. (General Obligations Law, Section 5-1506, as amended by Chapter 419 of the Laws of 1994.)

5. Implications

Local district PSA staff should be aware of the new provisions concerning the power of attorney forms, so they can advise their clients who are considering this option for managing their financial affairs. All statutory forms are now required to carry a warning about the benefits as well as the limitations of powers of attorney. Since there is no reporting obligation on the part of the agent to account for the assets of the principal, powers of attorney can be abused by agents. Individuals need to be aware of the importance of naming someone trustworthy as their agent, or this procedure, which was intended as a preventive measure, could lead to financial abuse and exploitation. PSA staff should advise clients with capacity that a principal can revoke the POA at any time.

It is also important for local staff to make sure that PSA clients who are considering naming someone as their power of attorney have the mental capacity to execute this transaction. In cases in which it is determined that a power of attorney is not acting in the best interests of a mentally incapacitated adult, a social services district, as part of its PSA responsibilities, must pursue the appropriate legal action to remove the agent, unless someone else is willing and able to assume this responsibility. An attorney in fact designated under a POA has a fiduciary duty toward the principal. Therefore, a civil action under common law grounds alleging breach of fiduciary responsibility can be initiated. Additional case law information on this topic is contained in 94 INF-14, "Article 81 MHL: Training Approval and Other Implementation Issues".

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As indicated previously in 83 ADM-15, "Financial Management Procedures for PSA", we do not recommend that local district staff accept a designation as a power of attorney agent for an individual.

Power of attorney forms executed before October 1, 1994 remain in effect. Power of attorney designations after this date require the new forms.

Stuart Feuerstein
Associate Commissioner
Office of Housing & Adult Services