

Article 15: Short Form Power of Attorney- A Valuable Tool

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Our firm recently argues before the Appellate Division, Second Department and was affirmed on the conflicting burdens of proof on a fiduciary when a gift is made pursuant to a short form Power of Attorney, modified in accordance with 1997 amendments to the General Obligations Law. Such was the case in *Matter of Salvation Army v. Ferrara*, 2005 NY Slip Op 07531 (October 11, 2005). The Appellate Division, Second Department, affirmed the decision and order of the Rockland County Surrogate's Court. Both courts held that a Power of Attorney, which was modified to allow the respondents to make gifts to themselves "without limitation," was valid in accordance with General Obligations Law §5-1503. The Appellate Court then went one step further and held that "evidence was adduced at the hearing to support the respondents' contention that the decedent specifically authorized the distribution of his funds to the respondent Dominick Ferrara." The Court then dismissed the action which sought the return of the gifts to the Estate.

In 1999, the decedent, while residing in Florida, had executed a Will leaving the entirety of his Estate to the Salvation Army, thereby disinheriting respondents, his brother and nephew. Ten days later, the decedent executed a short form Power of Attorney that granted powers to the respondents and allowed them to act separately as to all of the decedent's affairs as enumerated on the form. The Power of Attorney contained additional and express language, initialed by the decedent that...

"This Power of Attorney shall enable the Attorneys in Fact to make gifts without limitation in amount to [the brother and nephew]."

The decedent unexpectedly passed away less than one month later from complications from elective surgery, by which time his brother and nephew had gifted themselves more than \$800,000 leaving the estate beneficiary, the Salvation Army with less than that sum.

The Salvation Army received Temporary Letters of Administration, then had the Will admitted to Probate and subsequently, filed a petition for a Turnover and return of the monies gifted before death by the respondents. The Turnover Hearing ensued.

The Salvation Army contended that the burden of proof rested with the respondents to demonstrate that the Power of Attorney was not valid. The Salvation Army asked the court to apply the same burden of proof to gifts made pursuant to the short form Power of Attorney as applies to inter vivos gifts, where the burden of proof rests with the gift recipient.

In stark contrast, the respondents contended that the purpose for authorizing gifts under a short form Power of Attorney was to remove those transactions from the purview of the common law. Thus, according to respondents, the sole issue was whether the power was valid, and if so, all the gifts made pursuant thereto were valid without a showing that the decedent intended to make each gift. The lower court, and the Appellate Division, agreed.

The Appellate Division held that the General Obligations Law, and the 1997 amendments thereto, authorized the execution of the power of attorney to allow attorneys in-fact to make gifts

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themselves “without limitation.” The Appellate Division held that the power of attorney was valid because New York General Obligations Law Section 5-1503(2) permits a principal to grant supplemental powers to an attorney-in-fact without any limitations thereon, and the additional language in Decedent’s Power of Attorney was based on this provision.

Readers can also look to G.O.L. §5-1502M(1) for support as that section permits a principal to grant supplemental gift-giving powers in a Power of Attorney “unless the statutory short form power of attorney contains additional language pursuant to section 5-1503 of the general obligations law authorizing gifts in excess of said amount or gifts to other beneficiaries...” (emphasis added). Section 5-1503, allows a principal to either “supplement[] one or more of the powers enumerated in the statutory short form Power of Attorney”, or “[M]akes some additional provision which is not inconsistent with the other provisions of the statutory short form Power of Attorney...”

Recent legislative activity indicates that the Legislature did not intend that the Short Form Power of Attorney, require the attorney-in-fact to prove that the transactions undertaken were not improper. The Legislature is in the process of repealing Section 5-1501 and amending Section 5-1502M to curtail the limitless authority it presently provides. These amendments underscore the Legislature’s intention to curb the agent’s authority as provided for under current law unless a separate gifting authority document signed by two witnesses is used. As the lower court ruled, however, legislative action not judicial action, was the proper vehicle to address the Salvation Army’s concerns.

In short, the Salvation Army decision confirms that individuals should be permitted to use the Power of Attorney to share their largesse with their loved ones, just as George Ferrara shared with his brother and nephew, without exposing them to substantial litigation costs with other beneficiaries.