

Spring 2008

## Power of Attorney - Power to Abuse? The Need For Reform

Elizabeth Marcuccio  
*Siena College*, emarcuccio@siena.edu

John W. Arpey

Krystle G. Chalich

Follow this and additional works at: <https://digitalcommons.fairfield.edu/nealsb>

---

### Recommended Citation

Marcuccio, Elizabeth; Arpey, John W.; and Chalich, Krystle G. (2008) "Power of Attorney - Power to Abuse? The Need For Reform," *North East Journal of Legal Studies*: Vol. 15 , Article 3.  
Available at: <https://digitalcommons.fairfield.edu/nealsb/vol15/iss1/3>

This item has been accepted for inclusion in DigitalCommons@Fairfield by an authorized administrator of DigitalCommons@Fairfield. It is brought to you by DigitalCommons@Fairfield with permission from the rights-holder(s) and is protected by copyright and/or related rights. **You are free to use this item in any way that is permitted by the copyright and related rights legislation that applies to your use. For other uses, you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself.** For more information, please contact [digitalcommons@fairfield.edu](mailto:digitalcommons@fairfield.edu).

## POWER OF ATTORNEY—POWER TO ABUSE? THE NEED FOR REFORM

by  
Elizabeth A Marcuccio\*  
John W. Arpey\*\*  
Krystle G. Chalich\*\*\*

### I. INTRODUCTION

New York State's durable power of attorney is a commonly used legal device. It allows an individual, the "principal", to designate an "agent", also known as an "attorney-in-fact", to act on the principal's behalf. The General Obligations Law (GOL) sets forth the statutory short form power of attorney.<sup>1</sup> This form enumerates various broadly defined specific categories of authority that can be given to an agent. At the time of execution each broadly defined category that the principal intends to vest authority in the agent must be initialed by the principal. The power of attorney form is simple to execute and use, but these very features are what render it susceptible to abuse.<sup>2</sup>

### II. AGENT'S DUTY TO PRINCIPAL

New York's power of attorney statute does not specifically state that the agent owes a fiduciary duty to the principal.<sup>3</sup> At first glance, this does not appear to be a problem.

\*Assistant Professor of Business Law, Siena College, New York.

\*\*Partner in the firm of King, Adang & Arpey, Saratoga Springs, New York

\*\*\* Student at Siena College, New York.

Logic dictates that the attorney-in-fact is a fiduciary, and is accountable to the principal under the general rules of agency law. In fact, numerous courts have reached this conclusion.<sup>4</sup> However only the gift-giving powers contained in GOL §5-1501 (1) (M) unambiguously impose a duty on the agent to exercise authority in the best interest of the principal.

GOL §5-1501 (1) (M) authorizes an agent to make gifts to the principal's "spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$10,000.00 to each of such persons in any year." GOL §5-1502M construes this gift-giving authority to mean that the principal authorizes the agent to make gifts "only for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes."<sup>5</sup> The statutory short form power of attorney may contain additional language, pursuant to GOL §5-1503, authorizing gifts in excess of \$10,000.00 or gifts to other beneficiaries.<sup>6</sup> GOL §5-1503 does not include a "best interest" standard. Is the agent required to act in the principal's best interest when the agent's gift-giving authority is augmented by GOL §5-1503? This is the issue that the New York State Court of Appeals addressed *In the Matter of Ferrara*.<sup>7</sup>

In *Ferrara* the decedent, George Ferrara, a Florida resident, executed a will on June 10, 1999, leaving his entire estate to the Salvation Army. His will specifically made "no provision...for any family member...or any individual person" because it was his "intention to leave (his) entire residuary estate to charity."<sup>8</sup> Decedent was single and had no children. His closest relatives were his brother, John, a sister, and their respective children. On August 16, 1999, decedent executed a codicil naming his attorney as his executor, and "ratif(ied), confirm(ed) and republish(ed) (his) said Will of June 10,

1999.”<sup>9</sup> Decedent was hospitalized in December 1999, and his brother’s son, Dominick Ferrara, traveled from New York to Florida to visit him.<sup>10</sup>

According to Dominick Ferrara the decedent “told (him) he wanted to move to New York to be near his family.”<sup>11</sup>

On January 15, 2000, Dominick accompanied the decedent on a flight from Florida to New York, where decedent was immediately admitted to an assisted living facility. Ten days later, on January 25, decedent signed, and initialed where required, multiple originals of a New York statutory short form durable power of attorney. Decedent appointed John and Dominick Ferrara as his attorneys-in-fact, and allowed either of them to act separately.<sup>12</sup> Decedent not only authorized his agents to make gifts in accordance with GOL §5-1501(1)(M), but also initialed a typewritten addition to the form, stating that “this Power of Attorney shall enable the Attorneys in Fact to make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara.”<sup>13</sup>

Decedent was admitted to the hospital on January 29, 2000, and died on February 12, 2000, less than a month after moving to New York, and approximately three weeks after executing the durable power of attorney. During those three weeks, Dominick Ferrara transferred all of the decedent’s assets, valued at approximately \$820,000.00, to himself.<sup>14</sup> The Salvation Army subsequently commenced a discovery proceeding in the Surrogate’s Court against Dominick Ferrara and others, requesting turnover of the decedent’s assets.<sup>15</sup>

The Surrogate dismissed the petition, noting that while the law requires an agent to demonstrate that gifts of \$10,000.00 or less to specified individuals were made in the principal’s best interest, no such requirement exists for gifts in excess of \$10,000.00 or for gifts made to other individuals.

The Court invited the Legislature to amend the law “to provide for the same (best interest) limitation when there is express language in the power of attorney for gifts to an agent in excess of \$10,000.00 per year.”<sup>16</sup> The Appellate Division affirmed, and the Court of Appeals granted the Salvation Army permission to appeal.<sup>17</sup>

The Court of Appeals reversed the order of the Appellate Division, and found that in all cases the attorney-in-fact must act in the principal’s best interest when making gifts. This is true regardless of whether the gift-giving power is limited to the authority spelled out in GOL §5-1501 (1) (M), or whether it is augmented by additional language pursuant to GOL §5-1503.<sup>18</sup> Nothing in GOL §5-1502M indicates that the best interest requirement is waived when additional language increases the gift amount or expands the individuals to whom gifts can be made. The Legislature intended GOL §5-1503 to function as a means to customize the statutory short form power of attorney, not as an escape hatch from the statute’s protections.<sup>19</sup> That so much effort was required to deliver such a common-sense verdict testifies to the potential for abuse of New York principals by their attorneys-in-fact.<sup>20</sup>

### III. SELF DEALING

A separate issue addressed by the Surrogate’s Court in *Ferrara* is whether a “presumption of impropriety” exists when an attorney-in-fact makes gifts to himself. The Surrogate noted that at one time there was “a presumption of impropriety due to the appearance of impropriety and self-dealing” when an attorney-in-fact made self-gifts.<sup>21</sup> The Surrogate held, however, that amendments to the General Obligations Law, enacted in 1996 and effective January 1, 1997, eliminated this presumption. “When a post-January 1, 1997 power of attorney specifically and expressly authorizes gifting by the agent to

himself, the presumption of impropriety no longer applies and the burden of proving the validity of the gift is no longer on the agent." Instead, the opposing party has the burden of proving the invalidity of the gift.<sup>22</sup>

Even though the Appellate Division affirmed the Surrogate Court's decision in the *Ferrara* case, it reached a different conclusion on this issue.

The Appellate Division clearly held that the presumption of impropriety still exists when an agent is involved in self-dealing. This presumption, however, can be rebutted and overcome. An agent can rebut the presumption by submitting evidence of a valid power of attorney in which the principal gives the agent express written authority to make gifts to himself.<sup>23</sup> Courts also allow extrinsic evidence to establish the donative intent of the principal to rebut the presumption.<sup>24</sup> The Court of Appeals did not disturb this ruling of the Appellate Division when reaching its determination in *Ferrara*.

#### IV. AGENT'S AUTHORITY SUBSEQUENT TO DISABILITY

Scrutiny of the agent's actions often intensifies following a disability that renders the principal incompetent to act on his own. Assuming that the durable statutory form provided for in GOL §5-1501 has been used, the agent has continuing authority to act. The agent is only relieved of that authority by an appointed committee or guardian under GOL §5-1505(2), or by death of the principal. The courts have had to reconcile the provisions of Mental Hygiene Law (MHL) article 81, which addresses the appointment of a guardian for an incapacitated person, with the principal's wishes and statutory right to have his appointed agent continue to act in his behalf following disability. The Appellate Division has ruled

on these issues in the *In re Nellie G.*<sup>25</sup> and in the *Matter of Daniel TT.*<sup>26</sup>

In the *Nellie G.*, the principal executed a springing durable power of attorney in favor of her daughter.<sup>27</sup> This power of attorney became effective when the principal became disabled and further provided that the designation of her daughter as attorney-in-fact would not become ineffective upon the principal's subsequent incapacity. When Nellie G. suffered a series of strokes, and became uncommunicative as a result, she was ultimately admitted to a nursing home.<sup>28</sup> The hospital commenced a proceeding under article 81 of the MHL to have an independent guardian appointed. At the conclusion of the hearing, the Supreme Court ruled that Nellie G. was incapacitated.<sup>29</sup> They also determined that her daughter had misused the power of attorney and that there were no available resources, such as powers of attorney, health care proxies and trusts, to act as alternatives to guardianship.<sup>30</sup> The court appointed an independent guardian and revoked the power of attorney given by Nellie G. to her daughter.<sup>31</sup>

Upon appeal the Appellate Division disagreed. The Supreme Court was concerned about the daughter's fitness to manage Nellie G.'s property due to certain real estate transactions she had entered into on her mother's behalf. The Appellate Division stated that these real estate transfers made by the daughter did not financially benefit her as agent, and as a result did not harm Nellie G.'s interests in any way.<sup>32</sup> They further stated that the appointment of an independent guardian should only be done as a last resort. The daughter's right to act as attorney-in-fact for her mother was reinstated.<sup>33</sup>

In the *Matter of Daniel TT.*<sup>34</sup>, a case also dealing with an application under MHL article 81, the power-of-attorney's execution was challenged by the daughter of the principal. The

principal appointed his only other child, Diane, as his attorney-in-fact. It was specifically alleged that Diane exerted coercion upon her father, that he was under duress, and that he had diminished capacity due to Alzheimer's disease at the time he executed the power of attorney in question.<sup>35</sup> The father resided with Diane for some time prior to appointing her as his attorney-in-fact. At the time of the execution of the power of attorney he also established a trust, modified his will, and executed a health care proxy all in favor of Diane. The trust established an unequal distribution between the two siblings and utilized a different estate planning attorney than the attorney used by the principal over the past 30 years.<sup>36</sup> It was further alleged that Diane was violating her fiduciary duties post appointment and was not taking proper care of her father. At the hearing the appointed court evaluator indicated he had spoken to the principal, and that the principal was opposed to the petition; he wanted Diane to continue as his attorney-in-fact.<sup>37</sup> The Supreme Court dismissed the petition for appointment of a guardian, notwithstanding the request by the court evaluator for authorization to inspect the medical records of the principal under MHL §81.09 and request for retention of an expert to evaluate the principal's alleged diminished capacity.

Upon appeal the Appellate Division reversed and remitted the matter to the Supreme Court for further proceedings.<sup>39</sup> It was determined that MHL article 81 requires a two pronged analysis. First, it must be determined whether the appointment of a guardian is necessary to provide for the personal needs of the incapacitated person, including food, clothing, shelter, health care or safety, or management of financial affairs. Second, it must be determined whether the person agrees to the appointment, or in the alternative, is incapacitated.<sup>40</sup> With regard to the first prong the court must consider the report of the court evaluator as well as the

sufficiency and reliability of the individual's "available resources". Here the principal's available resources consisted of the power of attorney, health care proxy and trust, all of whose validity were in question.<sup>41</sup>

Upon review of the record the Appellate Division cited the affidavit of the principal's long term attorney and the affidavit of the court evaluator in creating a question of fact to overcome the presumptive validity of the principal's estate planning documents and raise a genuine question regarding the sufficiency and reliability of his available resources.<sup>42</sup> Prior to rendering its decision the court cautioned that a guardian is to be appointed only as a last resort, and if done, must be in a manner which is least restrictive.<sup>43</sup> It also noted that, when necessary, the court had previously utilized its authority to modify, amend, or revoke any previously executed estate planning documents by virtue of the provisions of MHL §81.29[d].<sup>44</sup>

*In re Nellie G.* and in the *Matter of Daniel TT.* highlight the additional difficulties that can occur when challenges to the use of a durable power of attorney are scrutinized by the courts once the principal is incapacitated or has diminished capacity.

## V. PROPOSALS FOR REFORM

The New York State Law Revision Commission has made various proposals to modify the power of attorney statute. The Commission contends that the effectiveness of the power of attorney is often frustrated by the lack of sufficient statutory direction. Powers of attorney are broadly used in estate planning, and the absence of statutory guidance generates the potential for financial exploitation. A four year study conducted by the Commission found that the power of attorney is, without question, an effective tool for attorneys and

the public at large for estate planning and to avoid the expense of guardianship. This popularity, however, has led to its use for transactions far more complex than were originally contemplated by the law, particularly in the area of gift giving.

The Law Revision Commission in 2006 proposed extensive modifications to the General Obligations Law as it relates to powers of attorney.<sup>45</sup> The proposed changes are based upon input from various groups, including representatives from the Trusts and Estates and Elder Law sections of the New York State Bar and the banking community. The Commission believes that powers of attorney should remain flexible enough to allow agents to fulfill their principal's reasonable intentions, but expressed concern about the statute's silence and ambiguity regarding the agent's authority to transfer assets. The Commission has also recommended that the statute offer guidance to third parties asked to accept powers of attorney, as well as those asked to investigate financial exploitation. The objective of the Commission's proposal for modification is to provide clarity and direction and to deter and curb financial exploitation without unduly burdening the utility and simplicity of the power of attorney.

Specifically, the Commission's 2006 proposal adds definitions and general requirements to the statute. To clarify the statute's ambiguity of language on fiduciary duty, the proposal states that "(a)n agent acting under a power of attorney has a fiduciary relationship with the principal".<sup>46</sup> It also defines "best interest" to mean that an agent must act "solely for the principal's benefit".<sup>47</sup>

The Commission expressed concern that the General Obligations Law does not require agents to keep records of financial transactions or to produce existing records if

investigated for impropriety. The proposed statutory form will allow the principal the option to appoint a "monitor". A monitor is defined as "...a person appointed in the power of attorney who has the authority to request, receive, and compel the agent to provide a complete record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal."<sup>48</sup>

Perhaps the most significant proposed change is the addition of a "Statutory Major Gifts Rider". The purpose of this rider is similar to that of current GOL §5-1503: to augment the gift-giving authority of the agent. But that is where the similarity ends. The proposed statute clearly states that gifts authorized by the statutory major gifts rider may be made only for purposes which the agent reasonably deems to be in the best interests of the principal.<sup>49</sup> It also states that the agent may not transfer the principal's property to himself without specific authorization in the major gifts rider.<sup>50</sup> The rider must be signed at the end and dated by the principal in the presence of two witnesses who are not named as permissible recipients of gifts or other transfers.

In order to implement the above changes, the proposed statutory form contains a "Notice to the Agent" that describes the agent's responsibilities. This notice states, in part:

You have a duty (called a "fiduciary duty") to the principal. Your fiduciary duty requires you to:

- (1) act solely in the best interest of the principal and avoid conflicts of interest between the principal and you or any other person;
- (2) keep the principal's property separate and distinct from any assets you own or control;

(3) keep a complete record of transactions entered into by you or your authorized delegate on the principal's behalf and make the record available.....<sup>51</sup>

The Notice to the Agent also states "...you are not entitled to use the principal's assets to benefit yourself or to give gifts to yourself or anyone else unless this document specifically gives you that authority."<sup>52</sup> Finally, the statutory form notifies the agent that if he violates his duty, he may be liable for damages and subject to criminal prosecution.<sup>53</sup>

These proposed modifications are currently in the hands of the Senate Judiciary Committee for further review. Several disagreements exist over the exact language, and concerns that the bill may initiate more frustrations due to its complexity are hindering the ratification of the bill. Some concern has been expressed that the proposed modifications encourage the use of a lawyer to prepare the power of attorney form. Some also argue that a specific provision should be added regarding advanced planning and Medicaid eligibility, although the Law Revision Commission believes that no specific provision is needed.

As the population ages, the use of the power of attorney is likely to become more widespread. The Legislature has begun to recognize the problem of financial exploitation of elderly citizens. Amendment of the power of attorney statute will bring additional accountability into the monitoring system and help to lessen the potential for abuse. On the other hand, durable powers of attorney may lose their appeal if they become too complex in form and execution. The goal is to achieve a balance between the simplicity of the current power of attorney law and the need for adequate protection of the unaware or incompetent principal from an unscrupulous agent.

The vast majority of agents holding power of attorney discharge their duties honestly and competently. Yet problems can arise, even when agents act in what they believe to be the principal's best interest. The proposed changes to the General Obligations Law seek to clarify and simplify the present law, thereby ending the confusion that currently exists.

---

#### ENDNOTES

<sup>1</sup> N.Y. General Obligations Law §5-1501(1) (McKinney 2001).

<sup>2</sup> Hilliard, Thomas. *Power Failures*, Schuyler Center for Analysis and Advocacy (December, 2006).

<sup>3</sup> See N.Y. General Obligations Law §5-1501 (McKinney 2001).

<sup>4</sup> *Mantella v. Mantella*, 268 A.D.2d 852 (3d Dept 2000), 701 N.Y.S. 2d 715; *Ferrentino v. Dime Sav. Bank*, 159 Misc.2d. 690 (1993), 606 N.Y.S.2d. 554, stating that the attorney-in-fact is merely a special kind of agent, whose authority differs little, if at all, from other agents; *Moglia v. Moglia*, 144 A.D.2d 347 (2d Dept 1988), 533 N.Y.S.2d 959, stating that the power of attorney proffered by the principal is given with the intent that the attorney-in-fact will utilize the power for the benefit of the principal.

<sup>5</sup> N.Y. General Obligations Law §5-1502M(1) (McKinney 2001).

<sup>6</sup> *Id.*

<sup>7</sup> *In re Estate of Ferrara*, 7 N.Y.3d 244 (2006), 819 N.Y.S.2d 215, 852 N.E.2d 138, 2006.

<sup>8</sup> *Id.* at 248.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 249.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 250.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 251.

<sup>16</sup> *Id.* at 252.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 253.

<sup>19</sup> *Id.* at 254.

<sup>20</sup> Hilliard, Thomas. *Power Failures*, Schuyler Center for Analysis and Advocacy (December, 2006).

<sup>21</sup> *In the Matter of the Salvation Army v. Ferrara*, 3 Misc.3d 944 (2004), 775 N.Y.S.2d 470, affirmed 22 A.D.3d 578 (2d Dept 2005), 802 N.Y.S.2d 471, 2005, leave to appeal granted 6 N.Y.3d 704 (2006), 811 N.Y.S.2d 337, 844 N.E.2d 792 (Sur Ct, Rockland County 2004).

<sup>22</sup> *Id.*

<sup>23</sup> *In re Estate of Ferrara*, 7 N.Y.3d 244 (2006), 819 N.Y.S.2d 215, 852 N.E.2d 138, 2006. It should be noted that the Court of Appeals did not address this issue in the *Ferrara* case.

<sup>24</sup> *In the Matter of Estate of Maikowski*, 24 A.D.3d 258 (1<sup>st</sup> Dept 2005), 808 N.Y.S.2d 174.

<sup>25</sup> *In re Nellie G.*, 38 A.D.3d 547 (2d Dept 2007), 831 N.Y.S.2d 473.

<sup>26</sup> *Matter of Daniel TT.*, 39 A.D. 3d 94 (3d Dept 2007), 830 N.Y.S.2d 827.

<sup>27</sup> *In re Nellie G.*, 38 A.D.3d 547 (2d Dept 2007), 831 N.Y.S.2d 473.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Matter of Daniel TT.*, 39 A.D. 3d 94 (3d Dept 2007), 830 N.Y.S.2d 827.

<sup>35</sup> *Id.* at 95.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 96.

<sup>39</sup> *Id.* at 99.

<sup>40</sup> *Id.* at 97.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 2006 NYS Law Revision Commission, *Report on Proposed Revisions to the General Obligations Law in Relation to Powers of Attorney* (Revised June, 2006).

<sup>46</sup> *Id.* at 1.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 19.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

AN UNSETTLED QUESTION: THE EMERGENCE OF  
SEXUAL ORIENTATION DISCRIMINATION UNDER  
TITLE VII

by  
David S. Kistler\*

I. INTRODUCTION

Within the last few years, harassment based on gender identity (sometimes referred to as sexual orientation or sexual preference) has been accepted by some courts as a form of sexual discrimination. This is a new development in the law and clearly favors those in the transgender community who wish to describe themselves as members of the opposite sex. The basic issue presented in this paper is whether sexual orientation discrimination is included within the boundaries of sexual discrimination under Title VII. Title VII of the 1964 Civil Rights Act states that it is illegal for any employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex.”<sup>1</sup>

Serious problems exist since discrimination against transgendered individuals appears to be widespread. Mara Keisling, the executive director for the National Center for Transgender Equality in Washington, D.C. stated, “ ‘We get calls virtually every day from somebody who has been fired from his or her job’ “<sup>2</sup> for having a different sexual orientation

---

\*Assistant Professor of Accounting and Law at the State University of New York at Potsdam.