



# The Polner Abrahams REPORT

Insights for Intelligent Estate, Special Needs & Elder Law Planning

585 Stewart Avenue – Suite 790  
Garden City, New York 11530

Telephone (516) 741-9175  
Fax (516) 741-9444

Websites [www.bpaElderLaw.com](http://www.bpaElderLaw.com)  
[www.bpaSNTLaw.com](http://www.bpaSNTLaw.com)

Email [Info@BPAbrahamsLaw.com](mailto:Info@BPAbrahamsLaw.com)

Courtesy of The Law Office of Beth Polner Abrahams

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## Legislation Update Issue

### Elder Law & Estate Planning

As of September 1, 2009, New York State will amend its **Power of Attorney law**, changing virtually everything:

- Agents will be required to sign the power of attorney document.
- The power of attorney cannot be used until the agent or co-agents sign it before a notary public.
- Agents do not have to sign at the same time as the principal, to preserve privacy of the document until incapacity of the principal.
- The new law describes and informs the agent of his or her responsibilities, called fiduciary duties.

#### **Monitors and oversight of appointed agent:**

The law allows the principal to appoint a Monitor to review and oversee the financial actions of the agent. For example, the principal can appoint a trusted accountant or financial manager.

**Acceptance of the power of attorney:** Once in use, many agents have difficulty with banks and other financial institutions when acting under a power of attorney. Often, agents are told the document is 'stale,' 'too old,' or 'not our form.' The new law makes it unlawful to refuse to accept a valid and lawful power of attorney. *Continued on page 2*

### Special Needs Planning

When your child or other developmentally disabled family member legally becomes an 'adult' at age 18, New York law invalidates the designation of their guardian in your will or other written document. This can pose a serious risk to your family: being cut-off from their health care decision-making or communication with physicians who uphold HIPAA privacy rules.

While most families petition to be appointed as the 17A guardian shortly after the child's 18th birthday, we strongly advise starting the paperwork process at least 6 months prior to that birthdate.

One physician or psychiatrist and one licensed psychologist must complete the certifications based upon an examination within one year of submitting forms to the court. Where the doctor or psychologist tested the child several years earlier, the court should accept those test results as long as the 17A certification indicates their review of the earlier tests along with a more recent examination (even without testing).

Note that if you are obtaining updated testing to meet OMRDD's increasingly strict standards, you can use those tests to support the certifications for the 17A guardianship. *Continued on page 2*

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## Elder Law & Estate Planning...Continued

A new legal proceeding is created that can be brought to compel the financial institution to accept the power of attorney.

**Gifts and asset transfers:** To protect against potential fraud or theft, the new law requires a separate document that describes the gift-giving authority by the principal to the agent called a **statutory major gifts rider**. This document must be notarized and witnessed.

## Special Needs Planning...Continued

Your family's goal for being appointed as 17A guardian is to keep you and/or close friends involved in the care and treatment of your developmentally disabled loved one. To this point, many families tell me that they want their guardians and successors to continue to make health care decisions for their child based upon family values, religious beliefs, the best interests of their child, and where possible, to reflect the child's own wishes and preferences.

## Other Important Updates

- Since February 2006, the Federal Deficit Reduction Act has imposed strict **transfer of asset rules**. The law also promised to increase the **look back period** for documentation from 36 to 60 months. As of March 1, 2009, the look back for nursing home applications began its increase, month by month. For example, a May 2009 application will require a 38-month look back (36 + 2 since March).

- On February 26, 2009, the New York State Assembly and Senate referred proposed changes to the **Health Care Proxy law** to the Health Committee. The proposed change would reduce the witness requirement from two witnesses to one. This change reflects concerns about homebound, hospitalized and other consumers who are unable to arrange for two witnesses.

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Email: [Info@BPAbrahamsLaw.com](mailto:Info@BPAbrahamsLaw.com)

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