

# POWER OF ATTORNEY & LIMITATIONS ON USE



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# Power of Attorney - Basics

- A power of attorney is a written instrument whereby one person, the Principal, appoints another person to be his or her Agent or attorney-in-fact for some particular purpose, and further provides for the Agent's powers and duties.
- The general rule is that the authority of the Agent may never be extended by mere construction beyond that which is expressly stated or which is necessary and proper to carry out the authority given.

*Reese vs. Medlock*, 27 Tex. 120, 123 (1863), *Gouldy v. Metcalf*, 7512 S.W. 830, 831 (Tex. 1889).

# Power of Attorney - Basics

- There are 3 basic types of Power of Attorney:
  1. General – Gives general authority, and is often too vague for Title Company purposes.
  2. Special – Authorizes very narrow authority to do a specific act. Sometimes called a “specific power of attorney”. It must give the exact description of the act. E.g., sell real property.
  3. Durable – Specifically states that it is not effected by the Principal’s subsequent disability or incapacity.
- Most Title Insurance Underwriters Prefer a Specific Durable Power of Attorney.

## Statutory Durable Power of Attorney Form

- Effective 1/1/2014, a revised Statutory Durable Power of Attorney form, was set forth in Section 752.051 of the newly created Texas Estate Code.
- Use of the statutory form, with language referencing the statute, expands the authority of the power of attorney to include the expanded descriptions of authority set forth in Chapter 752 of the Estate Code.

# Statutory Durable Power of Attorney Form

- Form requires initialing the sections chosen to be used in order to be effective.
- Section (N) if initialed provides for all of (A) through (M) to be effective, therefore, not requiring initialing the individual sections above.
- This is the only form of Statutory Durable Power of Attorney in Texas, effective 1/1/2014.

## Former Statutory Power of Attorney Being Offered

- As any Statutory Power of Attorney previously executed can still be used, if still effective, title companies have to review the date of the POA, and accept the former form of Statutory POA, only if executed before 1/1/2014.
- As the Probate Code was changed over to an Estate on Code 1/1/2014, references to the Probate Code in the heading must be only on POAs executed before 1/1/2014.

# Powers of Attorney – When You **Cannot** Use Them

- Death of the Principal
- Expired under its terms. Some POAs have a fixed term.
- Actual revocation by the Principal
- If the Spouse is the Agent, by divorce or annulment of the marriage.
- Appointment of a Guardian or Temporary Guardian by a court.



# Powers of Attorney – When You **Cannot** Use Them

- Self Dealing by the Agent
- When the Agent:
  - Deals with the Principal's property for his own benefit.
  - Conveys the Principal's property to themselves.
  - Releases a mortgage made by the Agent in favor of the principal.
  - Executes a gift deed, unless specifically allowed by the POA.
  - Executes a mortgage for the Principal or releases a mortgage owned by the Principal without consideration.
  - Mortgages Principal's property to him or herself.
  - Delegates Agent's authority to someone else, unless specifically allowed by the POA.

# Powers of Attorney – When You **Cannot** Use Them

- When the Principal is a Fiduciary without Authority to Delegate –
  - An Independent Administrator or Executor of an estate cannot delegate authority through a POA.
  - A guardian of a person or estate may not give a POA for a person to act for them. The Court can appoint a new guardian.
  - A trustee of a trust cannot delegate authority unless the trust agreement reviewed by underwriting specifically authorizes the trustee to do so. A successor trustee can act instead as authorized in the trust.

# Oral Ratification

- In order to avoid fraud, and ensure that the Principal is alive on the day of closing, our underwriters require us to confirm via telephone that the Principal is both alive and is aware of the transaction the POA is being used on the day of closing.
- The Principal can expect a call the day of closing.
- We try to ratify via e-mail for soldiers who are overseas in a combat zone, as close to the closing time as possible.

# Military Power of Attorney

- Military POA is executed under federal law and can be notarized by a JAG Notary.
- In order to accept a JAG notary, the person must either be enlisted in the military or be able to prove they are a bona fide contractor for the military, employed outside the United States or its territories.
- Texas has a specific law allowing ANY commissioned officer of superior rank to notarize if the Principal is enlisted, without a notary seal of any type. Underwriters typically require a military or dependent ID to validate this type of notary.

# Power of Attorney –Use for Home Equity Loans Restricted

- Home Equity Loans - The Texas Constitution provides the loan must be closed in a title company, attorney's office or lender's office.
- In a decision issued by the Supreme Court, *ACORN:Finance Comm'n of Tex. v. Norwood*, it was held the POA must have been executed at the same location required for the loan itself.
- Therefore, title companies are limited in use of POA on Home Equity loans by this decision, and by our TDI Procedural Rules for Endorsement T-42 and T- 42.1.

## Power of Attorney –Use for Home Equity Loans Restricted

- Home Equity Loans require we issue a T-42 endorsement. However subparagraph (f) cannot be given unless the loan is closed at the office of the title company, per P-44 C.
- Therefore, to use a POA for an HEL, the execution of the POA to be done at the office of the title company.
- This is required because of the Texas Supreme Court decision in Acorn above.

# Power of Attorney –Use for Home Equity Loans Restricted

- If a title company cannot issue with T-42 (f), the title company must eliminate all of T-42.1 sub-paragraphs (a)-(h) and (l) in order to insure.
- This requires the lender change their closing instructions to allow the limited T-42 and the elimination of the sections of T-42.1.
- Any POA must be executed at the office of the lender or the title company and we must obtain proof of the place of execution.

# POA for Mechanics Lien Contracts on Homestead Property

- The Texas Constitution requires for the execution of a Mechanics Lien Contract by owners on their homestead the Contract must be executed at the office of a title company, an attorney's office, or the lender.
- Underwriters, therefore, must require that any POA must also be executed at the same location, and our underwriters must have evidence of the place of execution to insure the loan.



## POA for Reverse Mortgage – Limitations

- The Texas Department of Insurance Procedural Rules only allow T-43 endorsement section (ii)-(iv) to be given if the closing takes place in the office of the title company. This is set out in P-45 E.
- Therefore, if a POA is used for a reverse mortgage we require that the POA must have also been executed at the office of the title company, and must be specific to the closing.

# Power of Attorney – Specific Problems

- No Original Power of Attorney
  - No closing, as no presumption exists that a person has given anyone authority to convey.
  - It is a requirement that the Power of Attorney be filed in the Real Property Records of the County of the land, with the sale or loan instruments.
  - Once filed of record, a certified copy is considered the same as an original for all legal purposes.

# Power of Attorney – Specific Problems

- Improper Acknowledgment
- Expired Notary Stamp
- Notary signs in the Principal's place.
- Military officer notarizes without stamp and fails to designate location or rank.
- JAG Notary stamps a civilian POA and does not designate location.

## Power of Attorney – Specific Problems

- Lack of a Heading on a Statutory Power of Attorney
  - Unless the Statutory Power of Attorney contains the heading that references the Texas Power of Attorney Act, it does not incorporate the language in the act, therefore, none of the terms are defined.
  - This applies to both the new Estate Code Statutory Durable POA, and the former Statutory POA under the Probate Code.

# Power of Attorney – Specific Problems – Initials

- From 1993 to 1997, the Texas statutory power of attorney form needed each category of authority initialed. We still see this form floating around, and often people do not initial the correct parts of it, making it void. If you have blanks next to the individual sections, make sure the right ones were initialed.
- The Statutory Durable POA form adopted in 1997 provides that the Agent has the authority unless a provision is marked out, so underwriters rarely have issues with the form.
- The new Statutory Durable POA, effective 1/1/2014, requires again the use of initials, and will be void unless initialed. Care in review must be made, for initials in the correct paragraphs for your transaction.

# Power of Attorney-Specific Problems Provision for Only Effective if Disabled

- The new Statutory Power of Attorney, as well as the former form, had a place to select whether the POA was effective immediately, or would only be effective if the party later became disabled.
- Most underwriters do not insure based on any future disability POA, and require legal action be taken for a guardian to be appointed instead.

# The End!

Please call and/or email us if you ever have any questions. We would love to help!