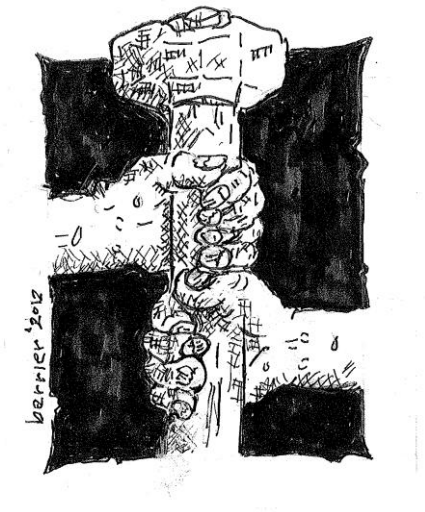
Dirt Law at Ground Level



THE POWERS THAT BE

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Almost all real estate professionals---lawyers, title insurers, brokers---as well as many buyers and sellers have encountered powers of attorney ("POA"s). In some instances, as when a seller is out of the country, an effective power of attorney may be essential to closing a deal. We are a highly mobile society. But, what are 'durable" powers of attorney?

Durable powers of attorney were created to fill a gap in the common law. Traditional powers of attorney terminated on the incapacity of the principal. But allowing a power of attorney to be "durable"—to continue on after incapacity—created a flexible tool that in some instances could serve as a less troublesome substitute for a guardianship.

In 2006, the Uniform Law Commission adopted a new power of attorney act to replace the old one (which was law in Arkansas). The new act, the Uniform Power of Attorney Act ("UPOAA"), went into effect in Arkansas as of January 1, 2012 for powers created after that date. The new law will be most useful in the estate planning context, but as its scope is broad, it

has the potential to affect other types of POAs as well, such as those used in real estate transactions.

How much power?

Most powers of attorney executed in a real estate sales or lending context are crafted for a single transaction or for a limited time so, durability is typically not an issue or concern, but it can be---for example, when a long series of transactions is contemplated, and the principal's health and physical capacity are uncertain.

However, only individual principals are covered by the UPOAA (non-individuals just do not become incapacitated.). Principals and their appointed agents are simply not otherwise entitled to the clarification and protections which are inherent in the new UPOAA, such as that provided to agents who act in good faith when unaware the principal has died.

In the loan documents context, a borrower may grant the lender certain authority, either to correct errors or realize on its collateral. Such powers coupled with an interest are likewise not covered by the UPOAA.

In the context of loan documents, and corporate principals, such things as durability will have to be addressed by contract, not UPOAA.

To each its own…

Health care POA's have their own statute, regarding health care decisions and directives from the principal.

You will occasionally see an LLC member, general partner or corporate officer attempt to assign their position to someone else by means of a POA. In most cases, that would violate the organizational documents, but at the very least that would mean that that POA would not be entitled to the benefits of the UPOAA.

Three big changes…

The UPOAA makes three important changes in the law governing individual POA's. First, unless the document says it is not durable, it is---so careful drafting is called for to accurately reflect intentions, now and in the future.

Second, if a guardian is appointed for an individual principal, the POA remains in effect unless the presiding probate judge limits, suspends or terminates the power. In other words, the guardian does not have the power that the principal would have to revoke the power. On the other hand, in such instances, the attorney-in-fact is responsible to the guardian as well as the principal.

Third, the UPOAA treats willful refusal by a third party to give effect to a POA somewhat like a wrongful dishonor of a check. Refusal to honor an acknowledged POA "substantially in the form" set out in the UPOAA itself, absent a reasonable, good faith question as to its propriety, can result in litigation and sanctions, although that really seems an unlikely situation.

In real estate transactions, the basic requirements have not changed. A deed or mortgage executed by an attorney-in-fact must still be accompanied by and recorded with an acknowledged POA describing the property and parties, even if other POA's do not necessarily require acknowledgments.

Assigned reading…

The UPOAA does provide a list of acceptable grounds and steps for seeking assurances of authenticity, as well as detailing specific limits on the powers of the attorney-in-fact, absent express authorization in the POA. It also deals with situations where two attorneys-in-fact have been named; with formalities; standing to sue, and also liability.

So…if you do indeed have to deal with POA's as a regular part of your practice or business, get a copy of the UPOAA. Read it carefully along with the comments. Familiarize yourself with the new statutory form and instructions. You will also need to get accustomed to an unfamiliar usage. Instead of "attorney-in-fact" which some lay persons may confuse with "attorney at law," the UPOAA substitutes "Agent" which may more clearly denote the nature of the relationship.

Ask the Pros…

Most important, get a copy of "The New Uniform Power of Attorney Act: What You Need to Know," by Professor Lynn Foster and lawyer Dan Young (The Arkansas Lawyer, Vol. 47, No. 1, Winter 2012 (www.ARKBAR.com)), for a clear, comprehensive and useful summary of the UPOAA. You will be glad you did.

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