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Executing instruments under a power of attorney; principal gives agent authority to do certain acts

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Although there is considerable flexibility in the form of the exercise of (signing a document under) a power of attorney, it seems that the power of attorney itself must be executed and given by the principal, who must be named as the principal. That is, the power, once given, must be exercised as the act of the principal and not that of the agent. For example, principal gives agent authority to do certain acts. In exercising the power the agent gives the following document:

"I, agent, attorney for principal, sell the property . . ."

The above form is defective. But the following form would be acceptable:

"I, principal, acting through agent, sell the property . . ."

There is flexibility regarding the signature used on the instrument purporting to exercise the power.

Crocker's Notes on Common Forms (7th Edition): Section 351 says:

Though "Principal by Agent" is the proper form of signature, other forms may not be invalid, the material points being that the deed should be the deed of the principal and not of the agent, and that the name of the principal should in some way appear in the signature. Thus a deed purporting to be the deed of A.B., and signed "C.D. for A.B.," was held to be well executed as the deed of A.B. Mussey v. Scott, 7 Cush. 215. But a deed beginning "I, C.D.," or I, C.D. as attorney for A.B.," or "I, C.D. by virtue of a power of attorney from A.B.," and signed "C.D." or "C.D., attorney for A.B.," will not be good as the deed of A.B

A proper execution would be as follows:

Principal's name

by: Attorney in fact

Whenever a power of attorney is used it should be accompanied by an affidavit under G.L. c. 201B, Â§5 where the agent states that he/she has no actual knowledge of the death or incapacity of the principal or of the revocation of the power. Although the affidavit provided for under Â§5 of the statute is conclusive, the statute, under Â§4, also contains self-executing:

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, shall not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under such power. Any such action so taken, unless otherwise invalid or unenforceable, shall bind a successor in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power of attorney shall not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under such power. Any such action taken, unless otherwise invalid or unenforceable, shall bind the principal and his successor in interest.

Note, prior situations involving powers of attorney may not have an accompanying affidavit because prior to 1978 neither G.L. c. 201B, Â§5 (effective September 20, 1981) nor its predecessor, G.L. c. 201, Â§50 (effective January 1, 1978) requiring such an affidavit was law.

It is also important to note that the acknowledgment of an instrument signed under a power must be in the proper form. That is, the form of acknowledgment should be of the principal by way of the agent, as follows:

Then appeared (the agent) and acknowledged the instrument to be the free act and deed of (principal).

Powers of attorney should be used with caution. When the principal is not available inquiry should be made as to why the principal is absent before proceeding.

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