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POWER OF ATTORNEY IN REAL ESTATE TRANSACTIONS – SPECIAL CASES

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It is not unusual for a real estate transaction to involve the use of a power of attorney. However, even the most experienced real estate attorney may not be aware of all of the ramifications. This article is intended to enumerate the permissible uses and possible pitfalls for powers of attorney in some special situations in Illinois real estate transactions.

There are three parties involved in any use of a power of attorney – the principal, the attorney-in-fact (sometimes referred to herein as the “agent”), and the party relying on the acts of the agent (referred to herein as the “third party”). The primary point of view in this article is that of the relying third party. The third party may be a buyer, lender, title company, or other person. A power of attorney is sometimes referred to herein as a “power” or an “agency.”

The use of a power of attorney should be limited to necessitous circumstances. At times, use of a power of attorney is a reasonable choice for closing a transaction, but the risks involved do not justify its use for mere convenience. Prior to the enactment of the Illinois Power of Attorney Act in 1987, these risks were much greater. They included the risks that the power

was forged, that the principal was under a legal disability at the time of execution, that the power was revoked or amended prior to its exercise, that the principal had died prior to the exercise of the power, that the principal had been declared a disabled person and was under guardianship, and that the act being performed by the agent was outside the scope of the authority granted in the power. Because of these risks, third parties were frequently reluctant to rely on a power of attorney. Other than requiring that the principal confirm the validity of the power at the time of closing there was no way to safely rely on the power. The result was that the intent of the principal was often frustrated by the refusal of third parties to accept the acts of the agent.

In 1987, the Illinois General Assembly enacted the Illinois Power of Attorney Act to give the principal the assurance “that third parties will honor the agent's authority at all times.”¹ The Act applies to all agencies exercised in Illinois and to all other agencies if the principal is a resident of Illinois at the time the agency is signed or at the time the agency is exercised or if the agency indicates that Illinois law is to apply.²

¹ 755 ILCS 45/2-1.

² 755 ILCS 45/2-4.



To accomplish its purpose, the Act establishes certain presumptions which reduce the risks incurred by third parties relying upon a power. Section 2-8 of the Act provides in part that:

Any person who acts in good faith reliance on . . . an agency will be fully protected and released to the same extent as though the reliant had dealt directly with the named principal as a fully-competent person. . . . Any person dealing with an agent named in . . . an agency may presume, in the absence of actual knowledge to the contrary, that the . . . agency was validly executed, that the agency was validly established, that the named principal was competent at the time of execution, and that, at the time of reliance, the named principal is alive, the agency was validly established and has not terminated or been amended, the relevant powers of the named agent were properly and validly granted and have not terminated or been amended, and the acts of the named agent conform to the standards of this Act.³

This statutory provision eliminates many of the third party risks of relying on a power.⁴

³ 755 ILCS 45/2-8.

⁴ In the 94th General Assembly, HB927 would repeal the section of the Act quoted above and remove the ability of a third party to safely rely on a power of attorney. If enacted, the legislation would severely curtail the use of powers of attorney in real estate transactions. However, the bill remains in the House Rules

The other major difficulty third parties faced prior to the Act was determining whether the specific language of the power authorized the act the agent was attempting to perform. The third party took the risk that if the power of attorney did not clearly authorize the agent to perform the act in question, the principal could disclaim responsibility for the act. The Act addresses this problem by creating a form⁵ which requires the principal to enumerate the powers granted to the agent, using standardized language defined in the Act. The full benefit of the Act is available only if -

The Power is in the Statutory Form. The salient aspects of the statutory form are the grant of authority, including a list of authorized transactions; duration of, limitations on, and augmentations to normal authority; the admonitions, explanations, and instructions to the principal; and the form of the notary clause. In 2000 the form was amended to include witnesses'

testament to the principal's competence, and to amend the form of the notarial acknowledgment to also make reference to the witnesses' signatures. The form lists 15 types of transactions and invites the principal to cross off those types of transactions for which the agent shall have no authority. The Act defines the scope of the agent's powers with respect to each type of transaction listed on the form.⁶ For instance, the power to represent the

Committee and is unlikely to garner enough support for passage.

⁵ 755 ILCS 45/3-3.

⁶ 755 ILCS 45/3-4.

principal in real estate transactions includes, *inter alia*, the power to buy, sell, exchange, rent and lease real estate (including real estate in land trusts), collect rent and proceeds of sale, grant easements, release rights of homestead, and protest real estate taxes.⁷ It apparently does not include the power to mortgage the property, which is included in the transaction category “borrowing”⁸.

The Act accomplishes its purpose of facilitating the use of powers of attorney and protecting third parties who rely upon the authority of the agent when the statutory form is utilized and when the agency is used for purposes clearly within the scope of the power as defined in the statute. But, what if –

The Power of Attorney Is Not in the Statutory Form. While the use of the statutory form is not mandatory, there are consequences to the use of a non-statutory form. The use of a form other than the statutory form makes the definitions and assumptions in the Act inapplicable. Prior case law and common law rules of construction would be used to construe the scope of a non-statutory power. Since third parties cannot rely on the definitions and assumptions in the Act when a non-statutory form is used, the third parties (and the agent) are at risk if the power does not clearly grant the powers sought to be exercised by the agent. This, alone, justifies use of the statutory form.

The power need not be in exactly the same form and format as presented in the statute to be considered a statutory

⁷ 755 ILCS 45/3-4(a).

⁸ See paragraph 1, item (m) of the statutory form, 755 ILCS 45/3-3.

form. It must be in substantially the same form, must contain the beginning notice provision in capital letters, and must be notarized.⁹ Whether other variations are permitted and the effect of certain defects remain subject to judicial interpretation.¹⁰ For instance, the effect of omitting the witness is unclear. Third parties may not be entitled to rely upon a presumption of competence of the principal, but if the power were otherwise in the statutory form, there is no reason that the statutory definitions should not apply.

While the definitions in the Act do not apply to a non-statutory form, Section 3-3 states that the inclusion of the statutory form in the statute is not intended to invalidate the use of a non-statutory form. Further, Section 2-4 provides that the provisions relating to third parties’ reliance on the validity of the power do apply to powers of attorney in the non-statutory form.¹¹ The distinction here is between the validity of the power, which does not depend upon the use of the statutory form, and the scope of the power, which does. Therefore, it appears that if a valid non-statutory power clearly grants the authority exercised by the agent, third parties may safely rely upon it.

Notwithstanding the reliance provision in section 2-4, a third party

⁹ 755 ILCS 45/3-3.

¹⁰ See, for instance, *Fort Dearborn Life Insurance Co. v. Holcomb*, 249 Ill.Dec. 384, 316 Ill.App.3d 485, 736 N.E.2d 578 (1st Dist.2000), appeal denied 252 Ill.Dec.77, 192 ILL.2d 742. 742 N.E.2d 327, holding that the presence or absence of any particular clause is not determinative so long as the legislative purpose of the Act is satisfied.

¹¹ 755 ILCS 45/2-4.

should not be entitled to rely upon any instrument just because the instrument is entitled "power of attorney." Some deviations from the statutory form may be so significant as to affect third parties' ability to rely on the instrument as a valid power of attorney. Obviously, a "power of attorney" which does not have any language actually appointing the agent or which does not use the word agent, agency, attorney-in fact or some equivalent should not be relied upon as a valid power of attorney. It might also be argued that the statute does not require or permit third parties to presume valid execution of the power when the principal's signature is not notarized. Clearly, if the power is being utilized to execute a recordable real estate related instrument, a title company will insist that it be notarized. It may also be argued that the logical result of the addition in 2000 of the witness to attest to the mental capacity of the principal is that the witness is necessary for third parties to rely on the competence of the principal at the time of execution. It seems reasonable to insist on proof of competence if the power was executed in Illinois after the effective date of the amendment and did not include the witness clause.

In spite of such questions, third parties cannot arbitrarily refuse to accept powers of attorney, statutory or non-statutory.¹² The Act itself provides that:

Each person to whom a direction by the named agent in accordance with the terms of the . . . agency is communicated shall comply with that direction, and any

¹² Zartman, "The New Illinois Power of Attorney Act", June 1988 Illinois Bar Journal 548

person who fails to comply arbitrarily or without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance.¹³

Nevertheless, certain variations from the statutory form, such as those discussed above, raise legitimate questions about the creation of the power so that a title company and other third parties are entitled to require adequate answers before they rely on the power. Why wasn't the statutory form used? Was the principal competent and if so why don't we have a witness to that fact? Is this the principal's signature, and how can we be certain if it is not notarized? If the answers are not satisfactory, a refusal to rely on the power should not be deemed arbitrary or without reasonable cause. Any professional preparing or providing powers of attorney in Illinois should by now be aware of the existence of the statutory form and the witness requirement.¹⁴

Even having determined that the power is in the statutory form (or an acceptable non-statutory form), is properly executed, witnessed, and notarized, and offers no reasons to suspect that it is defective, a relying third party must confirm that the act taken by the agent is within the scope of the

¹³ 755 ILCS 45/2-8

¹⁴ Note that the reliance provisions of Section 2-8 relate to action in good faith reliance "on a copy of a document purporting to establish an agency." This language should not, however, excuse "due diligence" on the part of third parties. The document, whether in its original form or as a copy, should be carefully scrutinized to confirm that it does, in fact, establish an agency relationship.

power.¹⁵ As discussed above, the Act has solved part of that problem for the statutory form by providing a checklist and definitions. However, the Act also has provisions which attempt to clarify the law in some special situations, such as -

The Agent Benefits from the Transaction. The Act appears to permit a third party to rely on the action of an agent, even if the agent benefits from the transaction.¹⁶ Nevertheless, it is probably safest to decline to rely upon the validity of any transaction in which the agent benefits. Again to arbitrarily refuse to acknowledge a power of attorney raises the possibility of liability, but there is enough statutory ambiguity and case law to justify such refusal. See, for instance, *Pottinger v. Pottinger*,¹⁷ decided after the effective date of the Act but not referring to it. The court held that any transaction benefiting the agent is presumed fraudulent.¹⁸ In

¹⁵ Notwithstanding the reliance provisions of Section 2-8, a third party is not entitled to rely on a power of attorney as to the exercise of powers not granted in the instrument. *Amcore Bank, N.A. v Hahnman-Albrecht, Inc.*, 326 Ill.App.3d 126, 259 Ill.Dec. 694, 759 N.E.2d 174 (2d Dist. 2001), appeal denied, 198 Ill.2d 611, 264 Ill.Dec. 323, 770 N.E.2d 217 (2002).

¹⁶ Section 2-7 of the Act provides that "An agent who acts with due care for the benefit of the principal shall not be liable [to the principal] or limited merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal . . ." 755 ILCS 45/2-7. Section 2-8 provides that "No person relying on . . . an agency shall be required to see to the application of property delivered to or controlled by the agent or to question the authority of the agent." 755 ILCS 45/2-8.

¹⁷ 238 Ill.App3d 908, 605 N.E.2d 1130, 179 Ill.Dec. 116 (2d Dist. 1992).

¹⁸ See also *Miller v. Ford (In re Estate of Miller)*, 334 Ill.App.3d 692, 778 N.E.2d 262, 268 Ill.Dec. 276 (5th Dist. 2002)

Simon v. Wilson, the court held that when a husband, as attorney-in-fact, conveyed his wife's interest in real estate into a trust of which he was the sole beneficiary, there was a presumption of fraud, even though the husband had been the joint tenant and would have succeeded to her interest as surviving joint tenant.¹⁹ Of course, the presumption of fraud can be overcome and, given adequate assurances and compelling reasons, a title company may decide to insure the resulting title. For instance, the property is in foreclosure, there is no equity in the property, and the redemption period is expiring; the owner's son has arranged a mortgage in his own name, but the night before the closing, the owner has a stroke and cannot sign the quit claim deed to the son; but the son has a general durable power of attorney from the father. It seems right to accept the deed to the son signed by the son as agent for the father and to insure the son's mortgage. The title company might, however, decline to give the son an owner's policy unless the father ratifies the transaction.

To survive subsequent challenge, any transaction benefiting the agent should be for full value. If the agent will benefit, he should be prepared to demonstrate that the principal is adequately compensated.²⁰ Of course, even without verification of fairness, the power of attorney may be specific enough to authorize the transaction, assuming it is clear that the principal was aware of the agent's conflicting interest, but what if -

¹⁹ 291 Ill.App.3d 495, 503, 684 N.E. 2d 791, 797 (1st Dist. 1997)

²⁰ *Miller v. Ford, supra*, at 698

The Transaction Involves a Gift of the Principal's Property. The Illinois Act provides that any gift of the principal's property is beyond the scope of a statutory power of attorney unless the power specifically authorizes the gift.²¹ This is consistent with common law. As a fiduciary, the agent must act in the best interest of the principal, and it is difficult to imagine how giving away the principal's property is in the principal's best interest.²² The gift problem might arise in a refinance where the property is owned by husband and wife, and the lender insists that the husband be the sole borrower and sole mortgagor. The wife is unavailable but there is a general power of attorney from the wife by which the property will be conveyed to the husband alone. Obviously, if the husband is the agent under the power, a title company would object on the basis of self-dealing; but what if the wife's sister or father was the agent? It is a gift and therefore beyond the scope of a statutory power unless the power specifically authorizes the gift. If the gift is beyond the scope of the power, the deed executed by the agent is void, and therefore the mortgage signed by the husband alone may not be insurable.

²¹ See paragraph 3 of the statutory form that states, "In addition to the powers granted above, I grant my agent the following powers (here you may add any other delegable powers including, without limitation, power to make gifts . . .)" 755 ILCS 45/3-3.

²² The Internal Revenue Service has taken the position that any gift effectuated by a power of attorney is ineffective for tax purposes unless the power specifically authorizes gifts or applicable state law provides that the power includes the authority to make gifts. This position has been upheld by the courts. *Estate of Casey*, 948 F.2d 895 (4th Cir.1991).

In another case, property is owned jointly by husband and wife, but the husband is out of the country at the time of an arms length sale to a third party. The deed is executed in advance by the husband, but now the wife has the problem of negotiating the check for the proceeds. She proffers a power of attorney from the husband and asks to have the proceeds check drawn to her alone. Assuming that the power of attorney does not authorize the agent to make this gift, the check should be made payable to the husband and the wife jointly.

In addition to gifts, there are other powers that must be specifically granted in the statutory form – the authority to exercise powers of appointment, name or change beneficiaries or joint tenants, or revoke or amend any trust.²³ These acts have a testamentary element and under the statute are not included in a general power of attorney. The principal must specifically grant the authority to perform such acts. Care should be taken whenever an agent attempts to perform any of these acts on behalf of the principal, whether directly or indirectly, intentionally or inadvertently. For instance, it might seem reasonable for an agent to convey property into the principal's revocable trust where the principal is the beneficiary, but if the trust names contingent beneficiaries, the conveyance would constitute a gift to those contingent beneficiaries and might be outside the scope of the agency. There should be specific authority in the power, but sometimes even a specific

²³ 755 ILCS 45/3-3. *In re Estate of Romanowski*, 316 Ill.App.3d 769, 265 Ill.Dec. 7, 771 N.E.2d 966 (1st Dist. 2000)

grant of authority may be insufficient. Consider the case where -

The Principal Owns the Property as Trustee. The revocable trust is a popular estate planning vehicle and frequently includes title to real property. The settlor may have also executed a general durable power of attorney as part of the estate planning exercise. The settlor/beneficiary of the trust is usually the trustee but may be unavailable at a real estate closing. If the seller's attorney presents the general durable power of attorney appointing a spouse or other person as attorney-in-fact and proposes to have the deed executed by the attorney-in-fact, a title company may refuse to insure the transaction. There are two problems with such a deed.

First, the power must be executed by the trustee-principal *as trustee*, a requirement frequently overlooked. Second, even if the trustee executed the power as trustee, the trust must specifically authorize delegation of discretionary authority.²⁴ The Illinois Trusts and Trustees Act clearly states that "[t]he trustee has a duty not to delegate to others the performance of any acts involving the exercise of judgment."²⁵ The seller's attorney might point to provisions in the trust that authorize delegation of duties, but the intent of these provisions may only be the delegation of ministerial duties, not fiduciary duties. Compare paragraph 4

²⁴ Restatement of Agency Second, Section 18. The Restatement argues that this rule may not apply when the trustee is the settlor and sole beneficiary because the trustee does not have a fiduciary duty to himself. Usually, however, there are other persons with contingent interests under the trust.

²⁵ 760 ILCS 5/5.1.

of the Illinois Statutory Short Form which specifically authorizes the agent-fiduciary to delegate "powers involving discretionary decision making." Absent such clearly stated authority in the trust instrument for the trustee to delegate, there can be no valid power of attorney by the trustee. There may be an exception to the above rule for cases in which the trustee is also the settlor and has retained the power to amend the trust. Since the trustee had the power, as settlor, to amend the trust to permit the delegation, a power of attorney by the trustee, as trustee, might be deemed an indirect amendment of the trust.

Even in circumstances in which the trustee had the authority to delegate and does so by a power executed as trustee, a third party should inquire why the trustee is not available to execute the deed. If the answer brings into doubt the current competence of the trustee, and even if the power is a durable one, the successor trustee provisions in the trust, not the power of attorney, should govern the succession of authority.²⁶ These

²⁶ Another interesting situation of competing fiduciaries exists when the principal is an adjudicated incompetent. If there is a durable power, the guardian has no authority respecting any property subject to the power, unless the court specifically directs the guardian to exercise the powers of the principal with respect to such property. This cannot be done unless the court finds that the attorney-in-fact has neglected his duties. 755 ILCS 45/2-10. But see *In re Estate of Doyle*, 362 Ill. App.3d 293, 838 N.E.2d 355 (4th Dist. 2005) in which the principal signed a letter purporting to revoke an otherwise valid power of attorney *after* she had been adjudicated a disabled person. The agent under the power argued that an incompetent person cannot revoke a power of attorney. The guardian argued that an incompetent person may revoke. The appellate court sidestepped the issue and affirmed the trial court's appointment of the guardian and order that the guardian revoke the power. In a

same or similar problems exist in any case in which the principal would be acting in some sort of fiduciary capacity, such as guardian, executor, or custodian under gifts to minors acts, or -

The Principal is an Officer of a Corporation. A similar situation exists when the property is owned by a corporation or a limited liability company. Such entities act only through their officers and agents. An officer of a corporation cannot delegate his fiduciary duties to another unless authorized to do so by the By-Laws or the Board of Directors.²⁷ Whether an officer can delegate a ministerial duty by means of a power of attorney is also problematic. Any delegation of authority to bind the corporation granted to an agent other than an officer should be made by directors' resolution naming the person or entity who will act on behalf of the corporation as agent for the purpose of that contemplated transaction. Similarly, if the principal is a manager of a limited liability company and is unavailable to perform the functions as manager, an amendment of the operating agreement or direct action by the members would be necessary.

concurring opinion, Justice Turner wrote that the court should have squarely decided that an incompetent may not revoke. In a dissenting opinion, Presiding Justice Cook argued that a valid power cannot be overcome merely by the appointment of a guardian. The trial court may, he argued, only set aside a valid power after strict compliance with Section 2-10—which was not done in this case, according to the dissent. At this writing, there is a pending petition for leave to appeal to the Illinois Supreme Court. See also discussion of this case at 94 Ill. B.J 170 (April 2006).

²⁷ *Evanston Bank v. Conticommodity Services, Inc.*, 623 F.Supp. 1014 (N.D.Ill, 1985)

In these cases, if authority is unclear, there is significant risk to the agent in addition to the risk to third parties. Common law makes the agent liable to third parties for any purported exercise of non-existent agency authority.²⁸ If the agent executes a warranty deed without having requisite authority, and the principal refuses to ratify the deed, the agent may be held personally liable to the buyer on the basis of the warranties in the deed, even though he executed the deed as a purported agent. This is true regardless of -

Form of Execution by the Agent. Some lawyers insist on the agent signing the principal's name, instead of his or her own name. The statutory form has an optional section that enables the agent to give a sample of his or her signature; the principal may then authenticate the signature. This suggests that the legislature expected the agent to sign his or her own name when acting for the principal. Research in the common law has not yielded a definitive answer. But, is an agent under a power any different from other fiduciaries, such as corporate officers and court appointed guardians, executors, and receivers – all of whom sign their own names with printed explanation of their capacity or authority? There is no value in having the principal's signature signed by the agent, but there is no harm so long as the agent also signs his or her own name. In circumstances where the agent refuses to sign his or her own name, the problem is cured by -

The Form of the Notary Clause. The notarial acknowledgment

²⁸ *Welker v. Hinze*, 299 Ill. 326 (1885).

on the instrument executed by the agent should state the name of the agent and the capacity in which the agent executed the document, e.g. "I, the undersigned notary, do hereby certify that [agent] personally known to me . . . acknowledged that she signed the above instrument in her capacity as attorney-in-fact for [principal]" or "This instrument was acknowledged before me on January

1, 2005 by [agent] as attorney-in-fact for [principal]."

Conclusion. Third parties should exercise care when relying on a power of attorney used in an Illinois real estate transaction, particularly in any of the special cases discussed above.

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