

Guidelines for Allowing Use of Powers of Attorney and Dealing with Decedent's Estates

From honoring payment drawn on a deposit account to closing and disbursing a secured loan, an individual account holder, borrower, or accommodation party's unavailability – either an actual, physical absence or one due to incapacitation – gives rise to issues of authority which lenders and financial institutions must be prepared to address and resolve before consummating a transaction. While powers of attorney provide the mechanism by which the financial affairs of an unavailable party may be handled by proxy, financial exploitation by agents purporting to act pursuant to valid powers of attorney has become a major concern – and for very good reason. In accepting and relying upon powers of attorney, financial institutions often face fraud and risk that the agent is exceeding his or her grant of authority or, even more, that the principal has revoked an agent's authority altogether. Compounding this is the dearth of protection given against such fraud and over-reaching. Conversely, lenders and institutions face exposure for refusing to accept powers of attorney, which may result in liability for money damages if such refusal is deemed to be unreasonable. Even so, institutions can seek to minimize exploitation and greatly reduce their exposure to liability by understanding the fundamental principles of powers of attorney.

Powers of Attorney, Generally

A general power of attorney grants an agent – also known as an “attorney-in-fact” – broad, generalized legal authority over the business and financial affairs of the principal. For example, an agent may be granted generalized authority by his or her principal to sell, rent, and mortgage real estate and personal properties, execute and deliver promissory notes, security deeds, security agreements and financing statements, generally pay creditors, issue, cash and deposit checks, and buy, sell and exchange stock, bonds and other investments. Alternatively, a special or limited power of attorney provides an agent with authority to undertake a specific act or make a specific decision for the principal, limited to only a singular or a few situations. For example, an agent may be specifically authorized to execute a promissory note, security deed and related closing documents on behalf of his or her principal for a single real estate transaction. Georgia law has historically construed powers of attorney strictly and in light of the four corners of the authorizing instrument, but the agent's authority is construed to include “all necessary and usual means for effectually executing it.”

Whether general or special, a power of attorney may also be “durable,” so long as the instrument granting the authority to the agent clearly and unequivocally specifies the power of attorney's durability. A durable power of attorney specifically provides that the authority granted to the agent survives the principal's incapacity; however, even a durable power of attorney ceases to be effective upon the principal's death or revocation, in the event a court of competent jurisdiction deems the authorizing instrument invalid for the principal's lack of mental competency, or upon a showing of fraud or undue influence over the principal. Generally, all powers of attorney are freely revocable by the principal at any time for any reason.

Creation and Enforcement of Powers of Attorney

During the 1995 legislative session, the General Assembly enacted sections 10-6-140 *et seq.*, Official Code of Georgia Annotated, codifying the common law principal-agent relationship with respect to financial powers of attorney. Indeed, O.C.G.A. § 10-6-142 provides the Georgia Statutory Form for Financial Power of Attorney, (*see* Appendix A), which may be used to create a power of attorney. The form provided pursuant to section 10-6-142 is not the exclusive method for creating a power of attorney; indeed, many institutions now require that powers of attorney be granted only pursuant to their own internal instruments. Other institutions, while recognizing authorizing instruments not executed on their

own internal forms, require an agent to execute a separate affidavit concerning his or her authority, attesting that the principal is not deceased and that the agent's authority remains valid. Regardless, institutions which mandate that authorizing instruments substantially comply with the statutory form approved by the legislature can be more assured as to the validity of the power of attorney.

In Georgia, to be valid and enforceable, instruments granting powers of attorney must be written and must be executed by the principal in the presence of two (2) witnesses who must also execute the authorizing instrument. Moreover, one of the signing witnesses must be someone other than the principal's spouse or relative by consanguinity. The Georgia Statutory Form for Financial Power of Attorney also provides for execution by the agent of an acceptance of the authority granted him or her. While authorizing instruments do not need to be notarized unless there is a grant of authority concerning real and/or personal property transactions, as a matter of best policy and practice, it is always preferable that the instrument granting the power of attorney be notarized.

Unless the authorizing instrument provides otherwise, a power of attorney is effective immediately upon proper execution. That said, an instrument may provide for the occurrence of a specific event or future date on which the power of attorney becomes effective. An authorizing instrument may provide that the principal's incapacity is the specific triggering event which grants the agent power of attorney, in which event the power of attorney is denominated a "springing" power of attorney.

Cessation of Powers of Attorney

A power of attorney is not an absolute grant of authority to the agent; meaning the authority granted is concomitant with that of the principal who may still exercise all rights relative to the handling of his or her own financial affairs so long as the principal is able. The corollary being that a power of attorney only allows the agent to act if the principal is also able to act in that regard at that time. (Of course, this does not include durable powers of attorney, as they specifically provide that the authority granted to the agent survives the principal's incapacity). Consequently, the power of attorney ceases to be effective when the principal no longer has the capacity to competently act on his or her own behalf.

Understanding this general premise, powers of attorney terminate upon the appointment of a conservator of the principal's property and upon the death of the principal. Similarly, powers of attorney terminate upon the death of the agent, so long as the power of attorney does not specify one or more alternate, contingent or successor agents.

As mentioned above, generally speaking, powers of attorney may be freely revoked. Revocation may be made by the principal orally or by signed and dated writing transmitted to the agent. Of course, any revocation should also be transmitted to all third-parties, including all lenders and financial institutions which are relying or have relied on the power of attorney or which are dealing or have dealt with the principal's agent. Unless and until a lender or institution receives notice of revocation of a power of attorney, they may continue to rely upon the agent's authority.

Additionally, much like with the creation of powers of attorney, an authorizing instrument may provide for the occurrence of a specific event (for example, the incapacity of the principal) or future date on which the power of attorney ceases to be effective.

In the event of a divorce filing involving the principal under an instrument granting power of attorney, and where the principal has appointed his or her spouse as agent, the power of attorney is not automatically terminated.

Recordation of Powers of Attorney in Real Estate Transactions

Recall that instruments which grant powers of attorney with respect to real estate transactions must be notarized to be valid and enforceable. And in practice and from the perspective of insurability of title, powers of attorney are often recorded along with the instrument of conveyance. Note, however, that while a power of attorney for real estate transactions may be recorded along with the deed, recordation is not required to give validity to the recorded deed. In other words, the power of attorney is the authority for making the conveyance, but it is not the conveyance itself or even a part of the conveyance.

Conclusion

Lenders and institutions are called upon to use discretion in accepting (or rejecting) an instrument which purports to grant power of attorney to an agent. When a lender or institution is presented with such an instrument, the instrument should be carefully reviewed for substantial compliance with the Georgia Statutory Form for Financial Power of Attorney. The lender or institution should ensure the instrument is properly executed, witnessed and, if the particular circumstances dictate, notarized, and should confirm that the purported authority has not been terminated and that the instrument has not been revoked; doing so will minimize exploitation of the lender or institution and greatly reduce their exposure to liability.