

Power of Attorney

Washington Land Title Association
2014 Educational Seminar

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Where was the POA executed?
What laws were intended to apply?
Understanding the differences:

Washington's RCW vs.
Other states' statutes vs.
Uniform Power of Attorney Act
(UPOAA)

KEY QUESTION: DURABLE OR NOT?

"Durable": not terminated by the principal's disability.

RCW 11.94.010: Durable if it states "This POA shall not be affected by disability of the principal," or "This POA shall become effective upon the disability of the principal."

UPOAA: *durable unless stated otherwise, if intended to be interpreted under UPOAA.*

UNDERSTANDING DISABILITY AND DETERMINATION OF DISABILITY

Alzheimer's: It's often not possible to determine the extent of disability at the time it is suspected or diagnosed.

They might still be "competent".

Someone suffering from Alzheimer's may execute a "durable" POA, often upon the advice of a lawyer.

QUERY: Is it safe to rely on it?

KEY QUESTION: EFFECTIVE IMMEDIATELY OR UPON DISABILITY?

Effective immediately unless stated otherwise.

- RCW 11.94.010: Persons shall place reasonable reliance on any determination of disability or incompetence as provided in the instrument that specifies the time and the circumstances under which the power of attorney document becomes effective.
- Disability is a medical and legal determination. Be cautious when non-professionals give an opinion.



KEY QUESTION: DOES IT GRANT SUFFICIENT POWERS?

Washington RCW: We prefer explicit powers.

UPOAA and many other states' statutes provide that "real estate" powers include purchase, sale, encumbrance.

RCW 11.94.060: Conveyance or encumbrance of homestead.

- Granting “all the principal's powers of absolute ownership” or “all the powers the principal would have if alive and competent” include the right to convey or encumber the principal's homestead.
- But doesn't include the power to make a gift or change estate planning

RCW 11.94.050: Certain powers must be expressly granted

- ❑ make a gift;
- ❑ change estate planning;
- ❑ distribute trust property even though consistent with the trust agreement;
- ❑ transfer property to a trust unless the trust benefits the principal alone and doesn't have dispositive provisions different from those if it hadn't been transferred into trust;
- ❑ disclaim property.

RCW 11.94.050: Exception to the rule

- Allows making a transfer of resources not prohibited under RCW 74.09 when for the purpose of qualifying the principal for medical assistance or the limited casualty program for the medically needy.
- BUT Underwriting approval is needed since it may also be self serving or contrary to existing estate planning.

AGENT'S "DUTIES" TO THE PRINCIPAL

An agent shall always act:

- ❑ Within principal's reasonable expectations, if known, or in principal's best interest
- ❑ In good faith
- ❑ Only within scope of authority granted in POA

Except as provided in the POA, an agent shall:

- ❑ Act loyally for the principal's benefit;
- ❑ Not create a conflict of interest that impairs impartiality
- ❑ Act with the care, competence, and diligence
- ❑ Preserve the principal's estate plan, if consistent with principal's best interest

UPOAA - AGENT'S POWERS:

Similar to Washington, but "general" gift authority is very limited:

- Amount not to exceed the annual dollar limits of the federal gift tax exclusion under IRC 26 U.S.C. 2503(b). *[NOTE: Only \$14,000 in 2014]*
- Gift must be consistent with the principal's objectives if known, or with the principal's best interest.



AGENT'S POWERS - OTHER STATES:

Itemized special powers should be strictly construed - granting only powers clearly and plainly expressed in the POA or in applicable state statutes.

ALWAYS REVIEW FOR CONFLICTING PROVISIONS!

TERMINATION - WHEN?

- Principal dies;
- Principal becomes disabled, if the POA is not durable;
- Principal formally revokes the POA;

NOTE: Some POA's contain provisions that it can be relied upon if (1) no known events of termination have occurred and (2) a revocation has not been recorded in the same county in which the original POA was recorded or within a particular county the POA identifies.

TERMINATION - WHEN?

- ❑ The date the POA states it terminates;
- ❑ The POA purpose is fully accomplished;
- ❑ A newer POA is executed containing a provision revoking all prior POA's;
- ❑ Principal revokes one agent's authority and no alternate agent is named or is able to act;
- ❑ Agent dies, becomes incapacitated, or resigns and no alternate agent is named or is able to act;

TERMINATION - WHEN?

- RCW 11.94.080: upon entry of a decree of dissolution, legal separation, annulment, or termination of the state registered domestic partnership.
- *(CAUTION: Under UPOAA it terminates upon filing the court action, not entry of the decree)*
- Other states' laws can be different, too.

TERMINATION - WHEN?

BANKRUPTCY OF THE PRINCIPAL:

Bankruptcy court has jurisdiction over the real property of the principal.

A POA is not terminated but can't be relied upon unless used to comply with an order of the court.

APPOINTMENT OF GUARDIAN:

A POA is not terminated unless terminated, suspended, or limited by the court, or the POA contains a provision saying termination occurs.

TERMINATION - WHEN?

- RCW 11.94.020: Termination of an agent's authority or of a POA is not effective as to the agent or another person that, without actual knowledge of the death, disability or incompetence, acts in good faith under the POA.

WHEN MORE THAN ONE ATTORNEY-IN-FACT IS NAMED

Can one act alone? Usual interpretation:

- *Stating "and" = requires joint execution*
- *Stating "and/or" or simply "or" = independent authority.*

Out of State POA? Depends on laws of the state under which the POA is interpreted.

(UPOAA: authorizes co-agents to act independently unless otherwise stated.)

NOTE: An agent cannot appoint a successor unless the POA expressly grants that power.

RECORDING POA'S

There are differing opinions on whether or not recording is required. Underwriting should be consulted if requested to not record a POA.

- A POA need not be of record before the power is exercised, provided it is established that the POA, under which the attorney-in-fact was acting, was executed and effective prior to the date the power was exercised.
- If a POA is of record in another county, a certified copy can easily be obtained and recorded at any time.

MILITARY POA: AN EXCEPTION TO SOME RULES

10 U.S. Code § 1044b

POA exempt from any requirement of form, substance, formality, or recording provided under the laws of a State.

- *But read it to be sure what powers are granted! There are multiple forms!!*
- A report of "missing in action" or "missing" shall NOT constitute actual knowledge or actual notice of the death nor shall it revoke the powers.

COPING WITH A LOST ORIGINAL POA

LOST POA:

- Copies of the signed POA are often available.
- Unsigned copy - often available from the records of the attorney who prepared it and was present when it was executed.
- UPOAA, if applicable: Except as otherwise provided by statute, a photocopy or electronically transmitted copy of original POA has the same effect as the original.

COPING WITH A LOST ORIGINAL POA

- ❑ Can you rely on a copy of an executed POA?
- ❑ Can you rely on an affidavit from an attorney or other party with an attached copy of an unsigned POA?

Was the POA intentionally destroyed to terminate it?

OPTIONS(?): Obtain written verification of existence of the POA and consent to use of the POA in the current transaction from those parties who would inherit the property if the principal died while still in ownership. Seek Underwriting approval.

USE OF POA'S IN FIDUCIARY & ENTITY SITUATIONS:

POA is normally only a personal grant of authorization to act for the principal, individually, not a grant on behalf of other parties the principal might represent as fiduciary.

Use by a fiduciary is rarely allowed unless the governing document appointing the fiduciary expressly authorizes POA use.

USE OF POA'S IN FIDUCIARY & ENTITY SITUATIONS:

TRUSTS: Sometimes. Provisions must be contained in the trust agreement, and preferably also in the POA.

PROBATES: NO!

PARTNERSHIPS AND LLC'S: No, unless partner or member signing only on their own behalf, and not as a representative of any non-signing partners or members.

CORPORATIONS: Board of Directors can appoint an authorized signer by corporate resolution or direct an officer to appoint by POA.

NOTE: POA's are commonly contained in loan servicing agreements.

SPECIAL RISKS - OLDER POA

- ❑ Was it terminated by provision in a newer POA automatically revoking all prior POA's?
- ❑ Is the transaction in accordance with the wishes of the principal or best interest of the principal?
- ❑ Does the agent benefit?

* Risk can be reduced by contacting the principal.

Is another document signed by the principal, such as a purchase & sale agreement or loan application?

UPOAA does not allow rejection of a POA based only on age!

CLAIMS: FRAUD, FORGERY AND EXCEEDING GRANTED AUTHORITY

BEWARE of Fraudulent POA's or Fraudulent Use:

- ❑ Forgery by outsiders as part of criminal activity or fraudulent mortgage release schemes.
- ❑ Family member forging a POA.
- ❑ Agent exceeding the granted powers.
- ❑ Agent exploiting for personal benefit.

CLAIMS: FRAUD, FORGERY AND EXCEEDING GRANTED AUTHORITY

- Consider when and how the POA was executed.
- Obtain consent from the principal.
- Ask questions about the principal, the reason the POA is being used, the principal's awareness of the transaction, and how the transaction benefits the principal or any other parties.
- **Option(?)**: Require new documents executed in a controlled setting with a trusted notary public.

CLAIMS: FRAUD, FORGERY AND EXCEEDING GRANTED AUTHORITY

Inquiry about the principal's capacity is required if the POA is *not durable* or *only becomes effective upon incapacity*.

Review signatures!

- Shaky or uncontrolled signature might be evidence of potential incapacity.

Your Underwriter should be consulted for any suspicious situation in which the principal cannot be contacted or the validity of the POA is questionable!

RELIANCE ON A POA?

DON'T BE FOOLED:

RCW 11.94.040 appears to allow reliance on an executed and acknowledged POA:

- That section is meant to protect against personal liability for relying in good faith on a void, invalid, or terminated POA.
- But it does not protect us or our Insured against the failure of the agent's signature to be binding.

RCW 11.94.040 - We are entitled to request an affidavit stating:

- (a) The person claiming to be the attorney-in-fact is the person so named in the POA;
- (b) If the person is a successor attorney-in-fact, the circumstances or conditions stated in the POA that would cause that person to become the acting attorney-in-fact have occurred;
- (c) To the best of the attorney-in-fact's knowledge, the principal is still alive;
- (d) To the best of the attorney-in-fact's knowledge, at the time the POA was signed, the principal was competent to execute the document and was not under undue influence to sign the document;

RCW 11.94.040 - We are entitled to request an affidavit: (continued)

(e) All events necessary to making the POA effective have occurred;

(f) The attorney-in-fact does not have actual knowledge of the revocation, termination, limitation, or modification of the POA or of the attorney-in-fact's authority;

(g) The attorney-in-fact does not have actual knowledge of the existence of other circumstances that would limit, modify, revoke, or terminate the POA or the attorney-in-fact's authority to take the proposed action.