



A well respected Winter Park attorney, Frank Pohl practices in the area of real estate law. His column covers a wide range of topics that can help you better understand and avoid potential legal issues related to buying, selling, and owning a home.

If you have questions or topics pertaining to the legal aspects of residential real estate that you would like to see addressed in this column, send them to Frank c/o:

winterparkhome@aol.com

This Article is not a substitute for hiring an independent attorney to prepare and review your real estate contract.

POWER OF ATTORNEY II-the sequel

In the previous issue, I covered the use of a Power of Attorney in real estate transactions for those situations in which a party is not available to sign documents at a closing and appoints a third person to sign on his or her behalf. This column continues that discussion, addresses the proper format for the execution of a document by the Attorney-in-fact, and introduces the use of a statutory form of Power of Attorney known as a Durable Power of Attorney.

A Power of Attorney is a written instrument in which one person, known as the "Principal," delegates authority to another person, known as the "Attorney-in-fact," to act as an agent of the Principal to sign specific documents on behalf of the Principal. The Attorney-in-fact is only authorized to sign documents in his/her representative capacity, and should never sign the documents in his/her own name. If, for example, Michael Smith gives a Power of Attorney to David Jones to sign a warranty deed on his behalf, then structurally the grantor of the deed is still Michael Smith. The signature block should state "Michael Smith, by David Jones, his Attorney-in-fact," and David Jones should sign the deed in the same manner as recited in the signature block. If the deed fails to recite that David Jones is signing the deed in his representative capacity as an Attorney-in-fact, then the deed will fail for lack of proper execution. Additionally, the original Power of Attorney must be recorded with the transaction to establish on the public record the authority of the Attorney-in-fact to sign on behalf of his Principal.

Conceptually, the Attorney-in-fact is given full authority to bind the Principal, but only to the extent that the Principal could bind himself and execute those same documents. Since a Principal can sign a deed or a mortgage only if the Principal himself is both alive and competent, then the Attorney-in-fact likewise can only execute those same documents if the Principal is alive and competent. As part of the execution of documents by the Attorney-in-fact (the "AIF"), and under the provisions of Chapter 709 of the Florida Statutes, the AIF must sign an affidavit to verify that to the best of the agent's knowledge the Principal is still alive and mentally competent. Provided this affidavit is recorded in conjunction with the documents that are signed by the AIF, a good faith purchaser or Lender will be able to rely on the documents executed by the AIF on behalf of his Principal. If the AIF knows that the Principal is alive, but cannot verify that the Principal is competent, then the AIF no longer has authority to sign documents on his Principal's behalf.

The Durable Power of Attorney created under F.S. 709.08 addresses those situations where the Principal was clearly competent at the time of the execution of the Power of Attorney, but subsequently may no longer be competent, and where there has never been an adjudication of incompetency. This situation frequently occurs when the Principal is appointed as an Attorney-in-fact for an aging or sick relative or spouse. To create a valid Durable Power of Attorney, words identical to, or similar to, the following must be incorporated into the Durable POA: "This Durable Power of Attorney is not affected by a subsequent

REAL ESTATE LAW

incapacity of the principal except as provided in F.S. 709.08, Florida Statutes." These words express the Principal's intent that the authority conferred on the Principal is exercisable notwithstanding the principal's subsequent non-adjudicated incapacity. This statute provides that the Power of Attorney may be used by the AIF as long as the Principal has not been adjudicated as incompetent, and as long as no petition or court proceeding has been filed to determine the competency of the Principal. Under these guidelines, the Durable POA may be used even if the Principal clearly is no longer lucid.

The advantage of the Durable Power of Attorney is clear. In relying on the powers recited in a general or specific POA, the Attorney-in-fact may not execute documents if he has any reason to believe that the Principal is now mentally incompetent. The Durable Power of Attorney statute provides that this incompetency standard is not one that needs to be decided by the Principal. The AIF of a Durable POA must only verify that the Principal is alive, that the Principal is not currently adjudicated as mentally incapacitated, and that no proceeding has been

initiated to determine the mental capacity of the Principal. The use of the Durable Power of Attorney has become much more commonplace, especially for those individuals assisting elderly and sick parents and spouses in this world of Alzheimer's and related illnesses. It is, as always, critical that the person granting the Power of Attorney truly trusts the person to whom the authority is granted.

A general or specific Power of Attorney normally must be executed with the same formalities as the document that is to be signed by the Attorney-in-fact. An exception to this rule applies to homestead property. Any POA involving homestead property must be executed with the formalities of a deed, i.e. two witnesses and a formal notarized acknowledgment. Durable Powers of Attorney, on the other hand, must always be executed with the formalities of a deed.

You should always contact your attorney to prepare the appropriate Power of Attorney for a real estate transaction, and to provide the necessary empowerment language and execution formalities, to ensure that the requested Power of Attorney is properly prepared, executed, and utilized for its intended purposes. ▲