

**New Jersey
N2K Hour:
Power of Attorney
Reliance in NJ**

Webex Presentation,
November 14, 2023
11:00am EST

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Why do we care about Powers of Attorney?



NJRB 1-17 ALTA OWNER'S POLICY OF TITLE INSURANCE (07-01-2021) NEW JERSEY VARIATION

ISSUED BY
STEWART TITLE GUARANTY COMPANY

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 17.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, STEWART TITLE GUARANTY COMPANY, a Texas corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.

Why do we care about Powers of Attorney?

- Transactions involving instruments executed under a power of attorney are far more likely to result in a title insurance claim than transactions in which no powers of attorney are relied upon.
- POAs are more and more frequently being used. This was especially true during the recent COVID pandemic.
- Therefore, strict care must be used when reviewing the validity and appropriateness of a power of attorney.

Types of Powers of Attorney

- Three types of Powers of Attorney:
 - **General** – confers power to execute certain transactions but does not specify real property covered
 - **Special** – confers power to execute certain transactions and specifies real property covered
 - **Durable or Continuing** – power of attorney which continues to be valid despite the principal becoming incompetent or deceased if relying party has no notice of the principal's death

Revised Durable Power of Attorney Act

- N.J.S.A. § 46:2B-8.2. Powers of attorney; durable powers of attorney; disability defined
 - a. A **power of attorney** is a written instrument by which an individual known as the principal authorizes another individual or individuals known as the attorney-in-fact to perform specified acts on behalf of the principal as the principal's agent.

Revised Durable Power of Attorney Act

- § 46:2B-8.2. b. A **durable power of attorney** is a power of attorney which contains the words "this power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "this power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and unless it states a time of termination, notwithstanding the principal's subsequent disability or incapacity, and unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

Revised Durable Power of Attorney Act

- § 46:2B-8.2. c. Unless otherwise defined, a principal shall be **under a disability** if the principal is unable to manage his property and affairs effectively; and an attorney-in-fact shall be under a disability if the attorney-in-fact is unable to exercise the authority conferred by the power of attorney effectively.

Revised Durable Power of Attorney Act

- § 46:2B-8.3 Durable Power of Attorney Not Affected By Lapse of Time; Disability or Incapacity.
 - All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period when the power of attorney is effective in accordance with its terms, including any period when the principal is under a disability, have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest **as if the principal were competent and not disabled**. Unless the instrument states a time of termination, the power is **exercisable notwithstanding the lapse of time** since the execution of the instrument.

Springing Durable Power Sample Language

- **AUTHORITY TO ACT.** If I become disabled, this Durable Power of Attorney shall **become effective**, and Agent is then authorized to act for me until my death or recovery from the disability. I shall be considered to be disabled if a Court determines that I am disabled or if two licensed physicians certify in writing, that in their opinion I am unable to attend to financial matters due to either physical or mental disability. Recovery from disability shall be established in the same manner.

Good Faith Reliance of POA (§ 46:2B-8.6)

- a. Any third party may rely upon the authority granted in a durable power of attorney until the third party has received **actual notice** of the revocation of the power of attorney, the termination or suspension of the authority of the attorney-in-fact, or the death of the principal.
- b. A third party who has not received such actual notice under paragraph a. of this section may, but need not, require that the attorney-in-fact execute an affidavit stating that the attorney-in-fact did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation, the termination or suspension of the authority of the attorney-in-fact, or the principal's death, disability, or incapacity. Such affidavit is conclusive proof of the nonrevocation or nontermination of the power at that time.

Power of Attorney Affidavit

AFFIDAVIT

STATE OF NEW JERSEY:

ss:

COUNTY OF _____:

_____, being of full age, and duly

sworn according to law, deposes and says:

1. I am the Attorney-in-Fact for _____, hereinafter referred to as "Principal", by virtue of a certain Power of Attorney, dated _____, 20__, which Power of Attorney was/is about to be recorded in the Office of the Clerk/Register of _____ County on _____, 20__, in _____ Book _____, Page _____, and which Power of attorney vested me with authority to act on behalf of the Principal for all purposes set forth in said instrument.
2. To the best of my knowledge and information, the said Power of Attorney has not been altered, revoked, or terminated, and the Principal is neither incompetent, disabled nor dead.
3. This affidavit is made pursuant to the provisions of N.J.S.A. 46:2B-8.5.

Sworn and subscribed before
me this ____ day of _____, 20__.

(LS)

§ 46:2B-8.7 Multiple attorneys-in-fact.

- a. Unless the power of attorney expressly provides otherwise, all authority granted to multiple attorneys-in-fact may be exercised by the one or more who remain after the death, resignation or disability of one or more of the attorneys-in-fact.
- b. The power of attorney may provide that the attorneys-in-fact may act severally or separately. If so provided, any one of the appointed attorneys-in-fact may exercise all powers granted.
- c. The power of attorney may provide that the attorneys-in-fact shall act jointly. If so provided then, subject to subsection a., the concurrence of all appointed attorneys-in-fact is required to exercise any power.

§ 46:2B-8.7 Multiple attorneys-in-fact.

- d. If the power of attorney does not expressly provide whether the attorneys-in-fact are to act severally or separately, or are to act jointly, such attorneys-in-fact must act jointly.
- e. The power of attorney may provide that the attorneys-in-fact act successively. Unless the power of attorney otherwise provides for the conditions under which a successor is qualified to act, the successor may act only upon the death, the written resignation, or the disability of the predecessor named attorney-in-fact.

§ 46:2B-8.8 Delegation by attorney-in-fact.

- If the power of attorney shall specifically provide, the attorney-in-fact, in the exercise of reasonable care, skill and caution, may delegate to other agents such one, more, or all of the specific powers which have been conferred on the attorney-in-fact by the power of attorney.

§ 46:2B-8.10 Revocation.

- A power of attorney is revoked when the principal has caused all executed originals of the power of attorney to be physically destroyed; or when the principal has signed and caused to be acknowledged in the manner set forth in R.S.46:14-2.1 a written instrument of revocation; or when the principal has delivered to the attorney-in-fact a written revocation. Unless expressly so provided, the subsequent execution of another power of attorney does not revoke a power of attorney.

Revocation Sample

- I, John Smith, **revoke any previous powers of attorney that I may have given to deal with my property and affairs as stated in this document**, and designate my son William Smith, as attorney-in-Fact (my “agent”) to act on my behalf as follows:

§ 46:2B-8.13 Fiduciary status

- a. An attorney-in-fact has a fiduciary duty to the principal, and to the guardian of the property of the principal if the principal has been adjudicated an incapacitated person, to act within the powers delegated by the power of attorney and solely for the benefit of the principal.
- b. The attorney-in-fact shall maintain accurate books and records of all financial transactions. The principal, a guardian or conservator appointed for the principal, and the personal representative of the principal's estate may require the attorney-in-fact to render an accounting. The Superior Court may, upon application of any heir or other next friend of the principal, require the attorney-in-fact to render an accounting if satisfied that the principal is incapacitated and there is doubt or concern whether the attorney-in-fact is acting within the powers delegated by the power-of-attorney, or is acting solely for the benefit of the principal.

§ 46:2B-8.13a Gift of Principal's Property Prohibited

- A power of attorney shall not be construed to authorize the attorney-in-fact to gratuitously transfer property of the principal to the attorney-in-fact or to others except to the extent that the power of attorney expressly and specifically so authorizes. An authorization in a power of attorney to generally perform all acts which the principal could perform if personally present and capable of acting, or words of like effect or meaning, is not an express or specific authorization to make gifts.

§46:6-3. Conveyances under powers of attorney not recorded

- Whenever any deed to or conveyance of real estate in this state shall purport to have been executed by virtue of any letter of attorney, and such deed or conveyance shall have been properly acknowledged and recorded, the recital of the letter of attorney in such deed or conveyance shall be prima facie proof of the existence thereof, notwithstanding the same may not be recorded, but only when such deed or conveyance **shall have been recorded at least ten years**, and the person claiming thereunder shall take and subscribe an oath that he has seen such letter of attorney so recited, which oath shall be recorded in the office of the county recording officer of the county wherein such real estate is situate, in the book therein provided for the recording of powers of attorney.

§46:6-6. Letters of attorney considered unrevoked until revoked by recorded instrument or death of principal

- All letters of attorney for any sale, conveyance, assurance, lease, acquittance or release hereafter duly executed and recorded in accordance with the provisions of section 46:16-1 of the Revised Statutes shall be considered as unrevoked and as remaining in full force and effect in accordance with the terms thereof unless and until the letters of attorney are revoked by the principal by an instrument duly executed and recorded in accordance with the provisions of section 46:16-2 of the Revised Statutes, except that nothing herein contained shall continue in effect any letters of attorney revoked by the death of the principal.

Powers of Attorney – What to look for

- Examine the exact wording of the Power to determine if a particular act by the Attorney in Fact is authorized:
 - Power to sell is not power to encumber
 - Power to transfer is not power to mortgage
 - Power “to attend to all business affairs appertaining to real or personal estate” could be too vague
- Review language in POA. What is authorized?
 - Strictly construed.
 - Can not exceed powers granted.

Powers of Attorney – What to look for

- Power of Attorney must be acknowledged, not just witnessed and notarized
 - Must have original signatures
 - Power of Attorney must be in recordable form, and be recorded prior to the documents being executed by the holder of the Power

Power of Attorney Questions/Issues

- Why is the power of attorney being used?
- Where is the principal residing?
- Why can't the principal execute the documents personally?
- What is the relationship between the principal and attorney in fact?
- Has a determination been made as to the death, incompetence or mental capacity of the principal?
- Is the power sought to be exercised by the attorney-in-fact specifically authorized in the power of attorney? Is there any ambiguity as to the powers given?

Power of Attorney Questions/Issues

- Has the power of attorney been acknowledged or proved?
- Has the power of attorney been recorded? Is it recordable?
- Has any revocation been filed?
- Is the attorney in fact exceeding any limitation imposed on him/her by the power of attorney, rules of agency or local statutes?
- Does the transaction benefit the principal?
- Are there any circumstances, evidence or information making it necessary to raise any question as to the bona fide nature of the transaction or the good faith of the parties?

Power of Attorney Questions/Issues

- Is the principal affected by bankruptcy proceedings?
- Is there any possibility of the power of attorney being a forged instrument?
- How long ago was the power of attorney executed?
- Can you confirm with the principal that the power of attorney has not been revoked and that the principal wants to complete the transaction?
- How much notice did you have that the power of attorney would be used at closing?
- Is the transaction a cash out on a refi?

Power of Attorney Questions/Issues

- Is the Principal incompetent now; and if so, was the Principal mentally competent at the time of execution of the Power of Attorney?
- Has the Power of Attorney been reviewed and approved for use by the lender? Approved by your Stewart Title underwriter?
- Can we have the Principal execute the insured document, and use the Power of Attorney for ancillary documents?

A word on Acknowledgments in NJ

- **NJSA§ 46:14-2.1. Acknowledgment and proof** a. To acknowledge a deed or other instrument the maker of the instrument shall appear before an officer specified in R.S. 46:14-6.1 and acknowledge that it was executed as the maker's own act.
 - The officers of this State authorized to take acknowledgments or proofs in this State, or in any other United States or foreign jurisdiction, are: (1) an attorney-at-law; (2) a notary public; (3) a county clerk or deputy county clerk; (4) a register of deeds and mortgages or a deputy register; (5) a surrogate or deputy surrogate.
- Any NJ officer can take an acknowledgment outside NJ.

A word on Acknowledgments in NJ

- What about acknowledgements outside the United States?
 - Any officer of the United States
 - Any foreign service or consular officer or other representative of the United States to a foreign nation within the territory of that nation
 - Any officer of a foreign nation authorized at the time and place of the acknowledgement by the laws of that jurisdiction to take proofs and acknowledgements
- If the acknowledgment does not designate the officer as a justice, judge or notary, the acknowledgment or an affidavit appended must contain a statement of the officer's authority to take acknowledgments or proofs.

Questions about Identification

- **Acceptable Identification**
 - •Picture Driver's license
 - •Passport
 - •Naturalization Papers
- **Un-Acceptable Identification**
 - •Club Membership (BJ's, Sam's etc.)
 - •Credit Cards
 - •Invoices or bills
 - •Anything else

When In Doubt, Ask Questions!

Military Powers of Attorney

- **10 U.S.C. §1044b. Military powers of attorney: requirement for recognition by States**
 - (a) Instruments To Be Given Legal Effect Without Regard to State Law. A military power of attorney:
 - (1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and
 - (2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.
 - (b) Military Power of Attorney.—For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law.

Military Powers of Attorney

- **10 U.S.C. §1044a Authority To Act As A Notary**

(a)The persons named in subsection (b) have the general powers of a notary public and of a consul of the United States in the performance of all notarial acts to be executed by any of the following:

- Members of any of the armed forces
- Persons serving with, employed by, or accompanying the armed forces.

Military Powers of Attorney

- **10 U.S.C. §1044a Authority To Act As A Notary**

(b) Persons with the powers described in subsection (a) are:

- (1) All judge advocates.
- (2) All civilian attorneys serving as legal assistance attorneys.
- (3) All adjutants, assistant adjutants, and personnel adjutants

(d) The signature of any such person acting as notary, together with the title of that person's offices, is prima facie evidence that the signature is genuine

Military Powers of Attorney Sample

MILITARY GENERAL POWER OF ATTORNEY

THIS IS A MILITARY POWER OF ATTORNEY PREPARED AND EXECUTED PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 1044B, BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS A MILITARY POWER OF ATTORNEY FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY OR RECORDING THAT IS PRESCRIBED FOR POWERS OF ATTORNEY BY THE LAWS OF ANY STATE, COMMONWEALTH, TERRITORY, DISTRICT, OR POSSESSION OF THE UNITED STATES. FEDERAL LAW SPECIFIES THAT A MILITARY POWER OF ATTORNEY SHALL BE GIVEN THE SAME LEGAL EFFECT AS A POWER OF ATTORNEY PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

KNOW ALL PERSONS, that I, _____,
_____, a legal resident of _____,
and presently deployed to _____,
desiring to execute a GENERAL POWER OF ATTORNEY, do hereby appoint
_____, who currently resides at _____
_____ my Attorney-in-Fact to act as
follows, granting unto my said Attorney full power to:

1. Disposition of Property. To sell, assign, transfer, convey, exchange, deed, mortgage, pledge, lease, let, license, demise, remise, quitclaim, bargain or otherwise dispose of any or all of my real estate, stocks, bonds, evidences of indebtedness and other securities and other personal tangible and intangible or mixed property, or any custody, possession, interest or right therein at public or private sale, upon such terms, consideration, and conditions as my said attorney shall deem advisable and to execute, acknowledge and deliver such instruments and writings of whatsoever kind and nature as may be necessary, convenient or proper in the premises.

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THANK YOU FOR JOINING US

Please mark your calendars for our:

December N2K HOUR

Tuesday

December 12th

11:00AM