

POWERS OF ATTORNEY and Other Useful Documents

George Barnett

Stewart Title Guaranty Company

Gulf Coast District Manager

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POWERS OF ATTORNEY: **Ten Questions and Answers**

- I. **WHEN A POWER OF ATTORNEY WILL BE USED IN A REAL ESTATE TRANSACTION, WHAT DOES A TITLE COMPANY LOOK FOR:** In general, most title companies will look for four things. The Power of Attorney should:
- a) be in writing and properly acknowledged by the principal (person giving the Power of Attorney) for recording purposes under Texas law;
 - b) be specific to the property involved in the pending transaction, by including a substantially correct legal description and street address;
 - c) contain a clearly-expressed power on the part of the attorney-in-fact (person to whom the Power of Attorney is given) to sell and convey real estate or otherwise to execute a Deed on behalf of the principal; and,
 - d) be irrevocable, or if revocable, only by a means that the title company can easily verify has not been done.

POWERS OF ATTORNEY, CONTINUED

- II. **ARE POWER OF ATTORNEY STANDARDS DIFFERENT FOR SELLERS VERSUS BUYERS?** Yes, they are. Typically, title companies will be more rigorous with Powers of Attorney given by sellers, since the validity of all or a significant part of the title covered by the Owner Policy of Title Insurance will usually be at stake. In terms of recorded documents, a buyer's Power of Attorney supports execution of the Deed of Trust being insured under the Mortgagee Policy of Title Insurance, and there is usually also a separately-granted Vendor's Lien in the Warranty Deed available for judicial foreclosure if the Deed of Trust were to fail. This does not mean you can ignore the requirements set out herein as to the Buyers, however.
- III. **DO TITLE COMPANIES AUTOMATICALLY REJECT A "GENERAL" OR "UNIVERSAL" POWER OF ATTORNEY IN ALL CASES?** No, most companies will allow some leeway for special circumstances. For example, a durable Power of Attorney could be given by an elderly person who has then become incompetent, creating a choice for the title company between accepting the Power of Attorney or forcing the principal's family to carry out some form of guardianship or other court proceeding. Under circumstances such as these, most title insurers will relax their normal requirements and accept an unspecific Power of Attorney, so long as it does contain at least a general power to sell and convey real estate (or to execute Deeds or Mortgages, as the case may be). It may make a great deal of difference as to the relationship of the principal and agent (husband/wife) (parent/child), etc.

POWERS OF ATTORNEY, CONTINUED

- IV. WHEN A SELLER GIVES A POWER OF ATTORNEY TO BE USED IN A REAL ESTATE TRANSACTION, IS IT SUFFICIENT TO AUTHORIZE THE ATTORNEY-IN-FACT SIMPLY TO “SELL” THE PROPERTY? No, it is not. The term “sell” can be construed as merely entering into an agreement of sale, such as an Earnest Money Contract, and not as extending to the execution of a Deed conveying title. For this reason, the terms “sell and convey” are always linked. If the Power of Attorney specifically authorizes the attorney-in-fact to execute Contracts and Deeds on behalf of the principal, then there is an implied power to both sell and convey the principal’s real estate.**

POWERS OF ATTORNEY, CONTINUED

- V. **WHAT IS A “DURABLE” POWER OF ATTORNEY? A Durable Power of Attorney is one expressly stating that the powers given to the attorney-in-fact will not terminate if the principal becomes mentally disabled or incapacitated. In the absence of express durability, such disability or incapacity (coma, mental illness, dementia, etc.) on the part of the principal will automatically revoke the Power of Attorney as a matter of law.**
- VI. **WHEN A POWER OF ATTORNEY IS USED IN CLOSING, WHY DOES THE TITLE COMPANY REQUIRE DIRECT LAST-MINUTE CONTACT WITH THE PRINCIPAL PRIOR TO DISBURSING FUNDS? Death of the principal terminates his/her Power of Attorney instantly. The primary purpose of the direct-contact procedure is to confirm that the principal is still living. The title company may also take the opportunity to confirm that the principal is competent and has not revoked the Power of Attorney.**

Be aware, however, that there is case law that stands for the authority of an agent to act and that act to be relied upon, if the agent is unaware of the death of the principal, and was not negligent in determining if the principal was alive (take the active military as an example).

POWERS OF ATTORNEY, CONTINUED

- VII. CAN THE REVOCATION PROVISIONS OF A POWER OF ATTORNEY CREATE PROBLEMS? Yes, they can. If the Power of Attorney stipulates that it can be revoked only by the filing of an instrument of revocation in the office of the Recorder in Dade County, Florida, then, even though the property may be in Bell County, Texas, the title company must still obtain a search of Dade County records to confirm that no revocation has been filed there. Such an examination of out-of-state records, done to check for revocation of a Power of Attorney, can be time consuming.
- VIII. DO TITLE COMPANIES TYPICALLY REQUIRE THAT POWERS OF ATTORNEY BE DURABLE? No, not as a rule, BUT they do strongly recommend that a Power of Attorney be made durable. It is unlikely that the Power of Attorney will be useable if it is not durable, due to the difficulty of determining the facts which support its non-termination. Making the Power of Attorney durable eliminates the risk that unexpected incapacity of the principal would prevent the transaction from being closed.

POWERS OF ATTORNEY, CONTINUED

- IX. WHY ARE POWERS OF ATTORNEY FILED IN THE LOCAL RECORDS? Section 489 of the TEXAS PROBATE CODE actually requires recording of the Power of Attorney when it is durable and the durability feature is being relied on in the transaction. Otherwise, standards and practices of title insurers dictate that Powers of Attorney (either in original form or in the form of a certified copy obtained from another jurisdiction where it was recorded) must be filed in the County Clerk's records, in order to preserve the evidence of its existence and thereby benefit future examination of the title. The Power of Attorney is actually a part of, and necessary to, the recorded chain of title.**

POWERS OF ATTORNEY, CONTINUED

- X. DO STEWART TITLE'S AFFILIATES ACCEPT THE STATUTORY DURABLE POWER OF ATTORNEY SET OUT IN SECTION 490 OF THE TEXAS PROBATE CODE? Yes, they do. Stewart Title Guaranty Company's underwriting guidelines advise its issuing offices that a properly completed and properly executed Statutory Durable Power of Attorney is acceptable for underwriting purposes under virtually all circumstances, since the scope of the various powers normally granted under it are defined and imputed by law whenever the statutory form is used. To be usable, the Statutory Durable Power of Attorney must have the power entitled "real estate transactions" intact (not withheld by being crossed out); and, if being used by a Buyer in connection with a loan, "Banking and other financial institutions transactions" should be intact. and must have become effective upon execution (Choice "A" in the section dealing with effective date, which can also be chosen by not marking out either "A" or "B"). For normal sale/purchase transactions, no "Special Instructions" are necessary and should probably even be avoided, to make certain that nothing entered there appeared to constrict the attorney-in-fact's powers to the point that the pending transaction could not be closed with the Power of Attorney.

POWERS OF ATTORNEY, CONTINUED

- XI. Is it appropriate for an agent to deal with the property of the principal on behalf of the agent? No, unless specifically set out in the Power of Attorney document itself. As in any fiduciary capacity, it is presumed to be self-dealing and invalidates the transaction if not authorized.**

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _____ (*insert your name and address*),
appoint _____ (*insert the name and address*
of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect
to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD:

- Real property transactions;
- Tangible personal property transactions;
- Stock and bond transactions;
- Commodity and option transactions;
- Banking and other financial institutions transactions;
- Business operating transactions;
- Insurance and annuity transactions;
- Estate, trust, and other beneficiary transactions;
- Claims and litigation;
- Personal and family maintenance;
- Benefits from Social Security, Medicare, Medicaid, or other governmental programs or civil or military service;
- Retirement Plan transactions;
- Tax Matters.

STATUTORY DURABLE POWER OF ATTORNEY, CONTINUED

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY, AND MY AGENT (ATTORNEY-IN-FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION THAT I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS

Special instructions applicable to gifts (*initial in front of the following sentence to have it apply*):

I grant my agent (attorney-in-fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the Federal Gift Tax for the calendar year of the gift.

ON THE FOLLOWING LINES, YOU MAY GIVE SPECIAL INSTRUCTION LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

STATUTORY DURABLE POWER OF ATTORNEY, CONTINUED

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

- (A) This Power of Attorney is not affected by my subsequent disability or incapacity.**
- (B) This Power of Attorney becomes effective upon my disability or incapacity.**

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this Power of Attorney, I shall be considered disabled or incapacitated for purposes of this Power of Attorney if a physician certifies, in writing, at a date later than the date this Power of Attorney is executed, that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this Power of Attorney. A third party who accepts this Power of Attorney is fully protected from any action taken under this Power of Attorney that is based on the determination made by a physician of my disability or incapacity.

STATUTORY DURABLE POWER OF ATTORNEY, CONTINUED

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable Power of Attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this Power of Attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:

_____.

Signed this _____ day of _____, 20_____.

(Your Signature)

STATE OF _____ }

}

COUNTY OF _____ }

This document was acknowledged before me on _____ (date) by _____
_____ (name of principal).

(Signature of Notarial Officer)

(Seal, if any of Notary)

(Printed Name)

THE ATTORNEY-IN-FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

SUGGESTIONS FOR
PREPARATION OF
AFFIDAVITS OF FAMILY
HISTORY

SUGGESTIONS FOR PREPARATION OF AFFIDAVITS OF FAMILY HISTORY

Each Affidavit of Family History should be executed by two credible adults who know the facts stated in the Affidavit and who will be able to testify to such facts. The persons making the Affidavit should have no interest in any of the property of the Deceased. They may be relatives, neighbors, or business associates of the Deceased. The Affidavit should be obtained from persons who actually know the principal facts from their own knowledge or from family tradition and not from hearsay. One of more of the heirs should also join in the Affidavit.

Each Affidavit of Family History should contain the following:

1. That Affiants knew the Deceased and are acquainted with the facts hereinafter stated.
2. The length of time each of the Affiants have known the Deceased and his/her family.
3. The extent of their acquaintance with the Deceased, whether they were relatives, neighbors, associates in business, or connected with the Deceased by other relationships which would indicate that they had occasion to know the facts recited.
4. That Affiants (except the heirs joining) own no interest in any of the property of the Deceased.
5. The date of death of the Deceased.
6. Whether or not the Deceased left a Will and, if so, whether or not it has been probated and, if probated, in what county it was probated.
7. The County and State in which the permanent home of Deceased was located.

SUGGESTIONS FOR PREPARATION OF AFFIDAVITS OF FAMILY HISTORY, CONTINUED

8. In case of a man, the Affidavit should state:

(a) The number of times he was married, the date of each marriage, and whether his wife survived him, giving her name, address, present marital status, and the name of her present husband, if any.

(b) The names of all children born to such marriages (or out of marriage, as the case may be).

(c) Which of such children survived the Deceased.

(d) Whether they are now adults (if minors, give date of birth, with month, day, and year).

(e) The marital status and names of husbands and wives of all surviving children.

(f) Present mailing address of each surviving child.

(g) Whether any children may have been “adopted by estoppel”.

SUGGESTIONS FOR PREPARATION OF AFFIDAVITS OF FAMILY HISTORY, CONTINUED

9. In case of a woman, the Affidavit should state:

(a) The number of times she was married, the date of each marriage, whether or not her husband survived her, giving his name, address, present marital status, and the name of his present wife, if any.

(b) The names of all children ever born to her. It is not sufficient to say “the deceased woman was married only one time and to that marriage was born only one child”, because such statement does not exclude the possibility of illegitimate children who might inherit.

(c) Which of the children survived her.

(d) Whether they are now adults (if minor, give date of birth, with month, day and year).

(e) The marital status and names of husbands and wives of all surviving children.

(f) Whether any children may have been “adopted by estoppel”.

SUGGESTIONS FOR PREPARATION OF AFFIDAVITS OF FAMILY HISTORY, CONTINUED

10. Whether or not the Deceased ever adopted any child or children, and, if so, their names, etc., as indicated under Paragraph 8.
11. Whether there has been any administration on the estate of the Deceased; if so, in what county.
12. If there has been no administration, whether or not there are any unpaid debts of the Deceased.
13. In the event any child or children of Deceased died prior to the death of the Deceased, the Affidavit should give the date such death occurred and whether or not such deceased child left children and, if so, their names, addresses, present marital status, and names of husbands or wives.
14. In the event any of the persons who inherited from the Deceased have died since the death of the Deceased, full information as to their heirs should be given, as indicated under Paragraphs 5-12, inclusive.

SUGGESTIONS FOR PREPARATION OF AFFIDAVITS OF FAMILY HISTORY, CONTINUED

15. The Affidavit should state that “This Affidavit is made to show affirmatively of record the facts bearing upon ownership of _____ (describe land in which Deceased had an interest or on which he held a lien) and other property of the Deceased.” This paragraph is suggested in order that the Abstracter may post the Affidavit to his record of the particular land on which the facts stated have some bearing.

16. If the Deceased left no surviving children, give the names, etc., of other persons entitled to inherit under the Statutes of Descent and Distribution.

17. Each Affidavit should contain both, a Jurat (sworn to and subscribed before me, etc.) and an Acknowledgement.

18. The Affidavit should state whether or not State and Federal Estate and Federal Inheritance Taxes have been paid, or incurred; and, if none, the value of the Estate should be given, together with the statement that no Inheritance Taxes are due.

SUGGESTIONS FOR PREPARATION OF AFFIDAVITS OF FAMILY HISTORY, CONTINUED

The purpose of these suggestions is to aid in putting into the Affidavit the material facts, rather than conclusions, so that we may know the facts upon which the claim of family history is based.

The facts will then be compared to the law and determined if the title is insurable.

SUGGESTIONS FOR
PREPARING AFFIDAVITS OF
LIMITATION

SUGGESTIONS FOR PREPARING AFFIDAVITS OF LIMITATION

The following suggestions are submitted in order to aid you in reviewing Affidavits of Limitation Title.

Each Affidavit of Limitation Title should be executed by two credible adults who know the facts stated in the Affidavit and could testify to such facts, if called to the witness stand, and such two persons making the Affidavit should have no right, title, or interest in, or to, any of the land referred to in the Affidavit.

The two persons making the Affidavit may be neighbors or relatives of the owner, or other persons who have had occasion to go across the land regularly and observe its condition, such as riders for mercantile houses and officers of banks. Care should be taken to obtain the Affidavit from two persons who actually know the facts stated in the Affidavit of their own knowledge, from personal observation of the land, and the Affidavit should not be taken from persons who know the land only by hearsay.

Each Affidavit of Limitation Title should contain the following statements:

(1) That Affiants know the land (identifying it by number of acres, owner, and general location, but not necessarily by legal description [but the more exact and precise, the better]), and are acquainted with the facts hereinafter stated.

SUGGESTIONS FOR PREPARING AFFIDAVITS OF LIMITATION, **CONTINUED**

(2) How long each of the Affiants have been personally familiar with the land; that is, how long they have had occasion to pass by it or go across it regularly.

(3) What the extent of Affiant's acquaintance with the land was; whether they lived in the neighborhood (and, if so, where they lived with reference to the land, and how long); or what relationship they had to the land, or the owner of it, which caused them to be on, or near, the land from time to time; and how often they had occasion to be on, or in the vicinity of, the land in question.

(4) That Affiants own no right, title, or interest in, or to, any of the land in question.

(5) Beginning 25 years back, or as far back as the Affiants can remember, the Affidavit should then state some particular year, and state who was living on the land at that time, who was cultivating it, what crops were being grown, what the extent of the cultivation was; that is, how many acres, approximately, were in cultivation, whether there were any cattle being pastured on the land that year, and how much of the place was fenced and what the condition of the fences was. It is important to get the names of the persons who were living on, or using, the land; and specific information as to what use they were making of the land. In the event pasturing was the only use made of the land, it is important to ascertain whether or not the land was under fence which would make such pasturing exclusive; and it is important to state whether or not the fence around the land was built by the owner of this particular land, rather than by the owner of some adjoining land.

SUGGESTIONS FOR PREPARING AFFIDAVITS OF LIMITATION, **CONTINUED**

(5, continued) As an illustration, the following is approximately the type of statement we desire to get:

“I remember when Joe Smith bought this land in 1915, along late in the fall. He moved there shortly after Christmas with his family. There was no fence on the land at that time, but within about two months, he built a 4-wire barbed-wire fence all around the place, capable of turning cattle. That Spring, he put in about 20 acres in cotton and made a crop, and he and his family moved off to another place just before Christmas.”

(6) The Affidavit should then continue and trace the possession and use made of the premises during each and every year from the beginning date selected, up to the present, or for as many years as the Affiants have a personal knowledge of what use was made of the land in question. There is no objection to a statement to the effect that “Joe Smith and his family lived on the land continuously from 1915 to 1930 and made a crop on the land each and every year during that period”, provided the Affiants actually know of their own knowledge that Joe Smith and his family did live on the land continuously during all that period and did make a crop during each and every year, without exception.

(7) The Affidavit should then state that the persons who were in possession of the land during the period mentioned had peaceable, exclusive and adverse possession of the land under claim of right adverse to the world, and that such possession and claim was open and well known in the community.

SUGGESTIONS FOR PREPARING AFFIDAVITS OF LIMITATION, **CONTINUED**

(8) The Affidavit should further state that no claim adverse to the owners' (mentioning their names) has ever been made, either on the ground or in court, so far as known to Affiants, and that if any such claim had been made, Affiants would have known of it.

Separate Affidavits may be made by each Affiant, or they may both sign the same Affidavit, if the facts known to each of the Affiants are sufficiently identical. One or more of the persons owning an interest in the property may also join in the making of the Affidavit, but it is essential to secure the execution of the Affidavit by at least two disinterested persons.

The purpose of these suggestions is to aid in putting into the Affidavit the material facts, rather than conclusions, so that we may know the facts upon which the claim of limitation title is based.

The facts will then be compared to the law and determined if the title is insurable.

THE FOLLOWING IS AN EXAMPLE
OF A DOCUMENT WHICH MAY BE
OF ASSISTANCE IN CLOSING A
TRANSACTION IN WHICH YOU
ARE CONCERNED ABOUT A
“PRETENDED SALE OF
HOMESTEAD”

EXAMPLE OF BONAFIDE'S AFFIDAVIT

THE STATE OF TEXAS }
 }
COUNTY OF _____}

BEFORE ME, the undersigned authority, on this day personally appeared _____

_____, who, after being by me duly sworn, each for himself or herself, and not one for the other, deposes and says:

That the Affiants _____ are the same parties who are the Grantors in a Deed made by them to Affiants _____ on the ___ day of _____, 20____, and filed at Volume _____, Page ____, Real Property Records of _____ County, Texas, whereby they conveyed to the Grantee named in said Deed _____ acres of land, situated in _____ County, Texas, described in said Deed to which its record reference is made for all pertinent purposes; that the sale and conveyance of said tract of land was, and is, in all respects an absolute, genuine, and bona fide conveyance; that said Deed was intended by Grantors to convey, and the same did convey, to the Grantees named therein the fee simple title to the tract of land therein described;

EXAMPLE OF BONAFIDE'S AFFIDAVIT, CONTINUED

that the cash consideration recited in said Deed as having been paid, was, in fact, paid as therein recited; that the Grantors received the money representing the cash consideration of said Deed and have used said money as their own property; that before and at the time of the execution of said Deed, there was no agreement or understanding either expressed or implied, that the tract of land described in said Deed, or any part thereof, was to be reconveyed to the Grantors or either of them, or to anyone else for the use and benefit of either of said Grantors, and that there was no reservation by Grantors of any right in, or title to, said land, but on the contrary, said land was actually sold for the consideration recited in said Deed; and that the Grantors in said Deed have no interest whatsoever in said land; and claim no title thereto, save and except the lien retained in said Deed to secure the payment of the Vendor's Lien Notes therein described and forming a part of the consideration for the conveyance of said land.

That this Affidavit is made for the purpose and with the intent that it shall be relied upon and used by The Federal Land Bank of Houston in making a loan to the Grantees in said Deed, the proceeds of said loan to be used to take up and extend Vendor's Lien Notes retained in said Deed. And we represent to said Bank that said Notes are what they purport to be, genuine Vendor's Lien Notes, executed in connection with an actual bona fide sale of the land described in said Deed.

We, and each of us, have read the above and foregoing and swear that the statements herein contained are true.

