Florida Land Title Association

FLTA

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Power of Attorney Act Updated

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As you will recall, Florida's Power of Attorney act (POA) was substantially modified during the 2011 Legislative Session (effective October 2011). Since the POA Act was passed, various improvements were suggested and adopted during the 2013 Legislative Session. Only a few of the changes have a direct impact on the use of Powers of Attorney for real estate transactions. As we go through these, please keep in mind that these changes, like the 2011 Act do NOT apply to powers of attorney issued by an entity such as a corporation.

1. A power of attorney must be executed by the principal, but prior to the 2013 amendments there was no express mechanism for execution by a principal who was not physically able to sign. The bill adopts the same procedures as have long been found in the Notary statute, allowing the notary to execute at the direction of the principal and to provide any additional signatures or initials that might be required as to specific powers in the POA. When the notary is executing on behalf of a principal, the principal must expressly direct the notary to sign or initial, the execution by the notary must be done in the presence of the principal and two witnesses (just as if the principal was signing) and the notary must include a reference to §117.05(14) in each instance. This is understandably an unusual procedure, so discuss it with your favorite underwriter.

2. One of the key changes made in the 2011 Act was to provide a mechanism for a power of attorney executed pursuant to the laws of another state to be recognized in Florida – even if its technical details did not comply with the requirements of Florida law. The mechanism chosen in the 2011 Act was to allow third parties to request an opinion of counsel that the out-of-state POA was properly executed under the laws of the other state. The 2013 bill clarified that if the requested opinion of counsel was not provided, that alone was sufficient grounds to refuse to accept the POA.

For most purposes, a copy of the POA is acceptable, rather than requiring the agent to produce an original each time. In the 2013 bill, we clarified that a title agent may require an original power of attorney where necessary for recording, and to expressly authorize the recording of the original POA.

3. As has long been the case, the agent appointed under a power of attorney can't generally turn around and delegate his or her authority to someone else. There are only limited circumstances in which this is permitted. The 2013 bill adds the express authority for the agent under a POA to delegate his or her authority when using a prescribed government form – such as

the power of attorney for transferring title to a motor vehicle (or mobile home) or converting a mobile home to real property.

4. An important part of the 2011 Act was the ability of a third party (title agent) to request that the agent provide an affidavit as to the continued validity of the POA. The 2013 bill added a recommended form of affidavit that specifically included statements regarding the marital status of the principal and agent if appropriate. Even though a suggested "form" of affidavit is included in the statute, you should rely on your underwriter's guidance as to the information to be set forth in an affidavit in each instance.

5. Section 709.2120 of the 2011 Act provides that there IS a duty to accept a POA and potential liability for not accepting it. However there is an exception for this where the third person is "not otherwise required to engage in a transaction with the principal in the same circumstances." This carve-out clearly includes title agents and closing agents. Except in very unusual circumstances, we have no affirmative duty to insure or close for anyone, so we are not under any duty to accept a POA.

There are other bases for declining to accept a POA spelled out in the statute, and those require the third person to provide a reason in writing. The 2013 bill clarified that the written notice of rejection is NOT required when the third person (title agent) is not otherwise required to engage in the transaction.

When faced with this situation, discuss it with your underwriter. The better practice is sometimes to provide a written explanation even when it is not required by law.

While there are many legitimate uses for powers of attorney, they are sometimes used to facilitate fraud and other bad acts. Great care and a degree of skepticism on the part of the title agent is required. Please discuss any proposed use of a power of attorney with your underwriter.

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