



Powers of Attorney

February 2002

What is a Power of Attorney?

A Power of Attorney is an authorization by one person or entity (the “principal”) to another person or entity (the “agent” or “attorney in fact”) to deal with the property, real and/or personal, of the principal.

In Colorado, the Power of Attorney must be in writing, be signed by the principal with signature notarized, and be recorded.

New form and process for POAs

Effective January 2002, Land Title Guarantee Company has a new Power of Attorney (real estate) form and process that will be used for all closings.

Changes to the new form and process include:

- The new Power of Attorney form replaces the multiple forms Land Title used to have available for various types of real estate transactions. On the new form, the type of real estate transaction (sale/purchase or refinance) will be noted by placing a check-mark next to the paragraph describing the transaction type.
- The new form also specifies that the Power of Attorney shall not be affected by the disability of the principal.

If the principal wants to withhold this power (so that the POA is revoked in the event of disability of the principal), the principal must cross out *and* initial the sentence.

- In addition to the Power of Attorney form, CRS §15-14-501 requires recording of an “Agent Affirmation Affidavit.” This Affidavit will be signed by the Agent at closing affirming that (s)he has no knowledge of the revocation or termination of the Power of Attorney by death, disability, or incompetence of the principal. The Affidavit is required even if the Power of Attorney is already of record.
- Many lenders do not allow an Attorney in Fact to execute their documents. The use of a POA for loan documents remains open to the discretion of the lender.
- Land Title employees may draw up only Powers of Attorney from individuals to individuals. All other Powers of Attorney must be prepared by the principal’s legal counsel and provided to Land Title prior to closing for review and approval by a title officer.

Past concerns regarding POAs

At common law, a Power of Attorney was terminated upon the revocation, death, or mental incompetency of the principal. Historically, a third

party—for example, a title company—that had to rely upon a Power of Attorney had the following concerns:

- forgery;
- competency of the principal at the time of giving the power;
- competency of the principal at the time of acts by the agent;
- revocation by the death of the principal;
- revocation by the affirmative action of the principal prior to the time of the acts by the agent;
- sufficiency of the powers granted to the agent to accomplish the intended acts;
- the ability of a person already acting in a fiduciary capacity to further delegate responsibilities under a power to another person.

In an effort to make Powers of Attorney more readily acceptable by third parties, Colorado enacted three statutes in the 1990s that address some of these concerns.

Competency of the principal

CRS §15-14-501 and 502 deal with the incompetency of the principal at the time of acts by the agent.

This statute defines a “durable” Power of Attorney as one in which the principal waives termination due to disability of the principal, or where a Power of Attorney becomes effective upon the disability of the principal. It provides that “the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive.”

The statute further provides that “all acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect...and bind the principal or his heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled.”

An affidavit should be obtained from the agent stating that he did not have, at the time of doing the act pursuant to the Power of Attorney, actual knowledge of the termination of the power by death of the principal. In the absence of fraud, this affidavit is conclusive proof of the nontermination of the power at that time, as stated in CRS §15-14-501 (2). The affidavit should be recorded.

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Definition of “principal”

Another matter of concern is the ability of the principal to delegate certain powers, where the principal is already acting in a fiduciary capacity, such as personal representative, conservator, guardian, trustee, partner, member of a limited liability company, or corporate officer.

Effective January 1, 1995, Colorado adopted CRS §15-14-601, et seq., which contains the following declaration: “The general assembly hereby recognizes that each adult individual has the right as a principal to appoint an agent to deal with the property or make personal decisions for the individual, but that this right cannot be fully effective unless the principal may empower the agent to act throughout the principal’s lifetime, including during periods of disability, and be sure that any third party will honor the agent’s authority at all times.”

In CRS §15-14-602 (4), a “principal” is defined as an individual, corporation, trust, partnership, limited liability company, or other entity, including, but not limited to, an individual acting as trustee, personal representative, or other fiduciary, who signs a Power of Attorney or other instrument of agency granting powers to an agent.

Further protection to a third party relying on a Power of Attorney is granted by CRS §15-14-607 (1)(a), which provides that “any third party who acts in good faith reliance on an agency instrument that is duly notarized shall be fully protected and released to the same extent as if such third party dealt directly with the principal as a fully competent person.” The third party may demand an affidavit from the agent (a copy of which can be obtained from your Land Title Sales Representative).

Standardization of POAs

In 1994, Colorado adopted the Uniform Statutory Form Power of Attorney Act (CRS §15-1-1301 et seq.) which was an effort to create a more “standard and definite” document as to the principal’s intentions. CRS §15-1-1301 provides that when a Power of Attorney is created “using substantially the form set forth in §15-1-1302, any third party may rely in good faith on the acts of the agent within the scope of the Power of Attorney without fear of liability to the principal.” However, the Statutory Form is not exclusive and other forms may be used.

Under the Statutory Form, the principal is to initial each of the powers being granted.

If the line in the Statutory Form that reads “(A) Real property transactions (when properly recorded)” is initialed, then the agent has the power to “sell, exchange, convey, quitclaim, mortgage, etc. any real property,” as well as other specific powers as set forth in CRS §15-1-1304 and 1305.

The title company and the POA

As a rule, a title insurance company will look for the following items when a Statutory Form is used:

- that the Form is signed by the principal as (s)he holds title and is properly acknowledged,
- that the Form is properly filled out, and
- that there are no limitations that would prevent the attorney in fact from completing the insured transaction.

When a Power of Attorney is appointed using any form other than a Statutory Form and is specific to the transaction, a title insurance company will make sure that:

- the principal is granting the power and signing the power the same way in which (s)he holds title, and the form is properly acknowledged,
- the Power of Attorney is specific as to the property involved; i.e., the legal description matches the legal description of the property to be insured,
- the form recites the ability of the agent to “sell, and convey” the referenced property, and
- there are no limitations that would prevent the attorney in fact from completing the insured transaction.

When non-Statutory Form Powers of Attorney are used, a title company relying on the power of attorney may also make the following or similar additional inquiries:

- Why is the Power of Attorney being used, as opposed to execution of the documents by the principal?
- Is the principal still living?
- If not a durable Power of Attorney, then is the principal still mentally competent?
- Has the Power of Attorney been revoked to the best knowledge of the parties involved?
- If the property is not owned nor to be owned by the principal, then what is the principal’s relationship to it (fiduciary capacity)?
- If the property is being purchased, does the Power of Attorney recite that the agent has the specific authority to acquire, and if a loan is involved, that the agent can borrow money for the acquisition and execute and deliver the promissory note?
- What is the relationship of the principal to the agent?

Finally, if the Power of Attorney is not durable, a title company will usually prefer that it be current, i.e., prepared within the last six months.

If a Power of Attorney is involved in a real estate transaction, please see your Land Title account representative or title officer regarding any additional requirements that may be necessary.

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