

Title

FREQUENTLY ASKED ^ QUESTIONS

July 2010

We have just been told that the seller will not be at the closing and have been provided with a general Power of Attorney that is 3 years old. Will that be acceptable?

It depends. Any time we are asked to insure title being conveyed or mortgaged by use of a Power of Attorney, we must evaluate several matters.

First: Is the Power of Attorney itself acceptable? In order to be acceptable, the original document must be available and in recordable form. If we do decide to accept it for title purposes, the original Power of Attorney must be recorded before the deed or mortgage under which it was executed as a stand-alone document (i.e. not as an attachment to the deed or mortgage).

In addition, the Power of Attorney must give the Attorney in Fact the authority to convey or mortgage (as applicable). This authority does not necessarily have to be specific to the transaction you are insuring (although that is always preferable), but the authority to convey or mortgage must be clear.

Powers of Attorney that do not include a term or specifically stated termination date continue until revoked or until the principal dies. That having been said, the older a Power of Attorney is, the more scrutiny must be given to the transaction.

Second: Why are we being asked to accept documents executed by the Attorney in Fact? It is important to understand why the Principal cannot sign the documents him/herself.

If we are being asked to accept the Power of Attorney due to the Principal's disability, it must be a "durable" Power of Attorney and must contain the words, "this power of attorney shall not be affected by subsequent disability or incapacity of the principal" or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity. Please be reminded that the disability provision does not "relate back" to when the Power of Attorney was executed; the Principal must have been competent at that time.

Whether we are using the Power because of the Principal's disability or because the principal is unable to attend the closing or settlement the transaction itself must be an arms length transaction for full value. In addition you must obtain proof of non-revocation at the time the power is used. This can be in the form of an affidavit of non-revocation executed by the designated Attorney in Fact.

Third: If the proposed transaction involves mortgage financing you must ascertain if the Power of Attorney acceptable to the lender. It is important that the lender approve the use of a Power of Attorney as well as our being willing to accept it.

Please be reminded that it is not acceptable for an Attorney in Fact to delegate his/her authority nor for an Attorney-in-fact to convey to him/herself or someone related to them for nominal consideration. In fact, New Jersey law prohibits an Attorney in Fact from making any "gratuitous transfer" of the principal's property.