

POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

September 1, 2017

NEW TEXAS POWER OF ATTORNEY LAWS.

To Clients and Friends:

Effective September 1, 2017 a new Texas law made changes to the Texas statutes pertaining to a Durable Powers of Attorney. (Note: All references herein to Sections are sections of the Texas Estates Code.)

The new law only applies to a “durable power of attorney”.

An instrument is a durable power of attorney if it is:

- (a)
 - (i) a writing or inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form,
 - (ii) that designates another person as agent and grants authority to that agent to act in the place of the principal,
 - (iii) is signed by an adult principal or in the adult principal's conscious presence by another adult directed by the principal to sign the principal's name on the instrument,
 - (iv) contains words that clearly indicate that the authority conferred on the agent shall be exercised notwithstanding the principal's subsequent disability or incapacity, and
 - (v) is properly acknowledged by the principal or another adult directed by the principal as authorized by law.

or

(b) If the law of a jurisdiction other than this state determines the meaning and effect of a power of attorney and that law provides that the authority conferred on the agent is exercisable notwithstanding the principal's subsequent disability or incapacity, then is considered a durable power of attorney under this subtitle.

(See: Tex. Est. Code Ann. § 751.0021.)

.....

POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

Snapshot:

Under the new law:

- Unless you believe in good faith that the durable power of attorney is not valid or the agent is not granted the requisite powers, you must accept a durable power of attorney.
- The meaning and effect of a durable power of attorney is determined by: (a) the law of the jurisdiction indicated in the durable power of attorney; (b) if none stated, then by the law of the jurisdiction of the principal's domicile; (c) if none stated, by the law of the jurisdiction in which the durable power of attorney was executed.
- The Fannie Mae criteria states that it applies “Except as otherwise required by applicable law”. Since Texas law mandates acceptance, the Fannie Mae requirements are overridden by Texas law.
- The new law authorizes acceptance of a durable power of attorney upon receipt of a promulgated agent’s certificate that states among other matters, that the powers have not been altered or terminated. But the request for such certificate must be made within 10 business days of receipt of the durable power of attorney.
- We recommend that within 10 business days of receipt of a durable power of attorney you require the agent provide to you the promulgated agent’s certification. (Copy attached.)
- A certification made in compliance with the law is *conclusive proof of the factual matter that is the subject of the certification.*”

.....

Details:

The statutory changes mandate that if a power of attorney is durable pursuant Sections 751.002 and 751.0021, is properly created, and the requisite powers are granted, then you must accept the durable power of attorney. Therefore such acceptance is required irrespective of Fannie Mae criteria.

“Unless one or more grounds for refusal under Section 751.206 exist, **a person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall: (1) accept the power of attorney,**” (Tex. Est. Code Ann. Section 751.201.)

However, as a condition for acceptance of the durable power of attorney, Section 751.201 affords you the right (to be exercised within 10 business days after the date the power of

POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

attorney is presented) to require the agent to provide you with a promulgated Certificate (promulgated under Section 751.203) certifying, among other matters, that the requisite powers for the transaction are granted by the durable power of attorney and that such powers have not been altered or terminated. Failing to request such a certification within the 10 business day period constitutes a waiver of such right.

There is no time frame stipulated in the statutes for the agent to deliver the Certificate to you, but once such Certificate has been timely required, you do not have to accept the durable power of attorney until you are provided with the Certificate.

It will be a good business practice for lenders to require the agent's Certificate as a condition for acceptance of a durable power of attorney because Section 751.203 provides:

"A certification made in compliance with this section is conclusive proof of the factual matter that is the subject of the certification."

In addition Sections 751.201 and 751.204 afford you the right within the same 10 business days period to require an opinion of counsel regarding the durable power of attorney; however, you must specify the reason for the request and matter of law to be addressed in the attorney's opinion.

*"Before accepting a durable power of attorney under Section 751.201, the person to whom the power of attorney is presented may request from the agent presenting the power of attorney an opinion of counsel **regarding any matter of law concerning the power of attorney so long as the person provides to the agent the reason for the request in a writing** or other record." (Tex. Est. Code Ann. Section 751.204.)*

The changes also impact which jurisdiction's laws apply to the meaning and effect of the durable power of attorney. Section 751.0024 provides:

The meaning and effect of a durable power of attorney is determined by the law of the jurisdiction indicated in the durable power of attorney and, in the absence of an indication of jurisdiction, by: (1) the law of the jurisdiction of the principal's domicile, if the principal's domicile is indicated in the power of attorney; or (2) the law of the jurisdiction in which the durable power of attorney was executed, if the principal's domicile is not indicated in the power of attorney. (Tex. Est. Code Ann. Section 751.0024.)

That means that if the durable power of attorney states that it is to be construed under the laws of particular state, then law of the stipulated state applies to its meaning and effect. But, if the durable power of attorney does not stipulate the jurisdiction whose laws will apply to it, then the durable power of attorney will be construed under the laws of the jurisdiction where the principal resides, and if the durable power of attorney does not specify the jurisdiction in which the principal resides, then the durable power of attorney will be construed under the laws of the state in which it is executed.

Because of this jurisdiction issue, a power of attorney which does not stipulate the jurisdiction whose laws will apply to it but it states for example that the principal resides in New York, then the meaning and effect of the durable power of attorney will be construed under laws

POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

of the state of New York, even though the power of attorney pertains to real estate located in Texas.

Such jurisdictional issue can be further complicated if a durable power of attorney is executed in foreign country by a resident of such country and the durable power of attorney does not stipulate the jurisdiction whose laws will apply to it. Then its meaning and effect will be determined under the laws of that foreign country. That issue can be compounded if the durable power of attorney is written in a foreign language.

The new law affords the lender assistance in such matters. Section 751.205 provides:

“Before accepting a durable power of attorney under Section 751.201 that contains, wholly or partly, language other than English, the person to whom the power of attorney is presented may request from the agent presenting the power of attorney an English translation of the power of attorney.” (Tex. Est. Code Ann. Section 751.205.)

If the request for an English translation is made no later than the fifth business day after the date the durable power of attorney is presented to the Lender, the expense of the English translation is at the expense of the principal. If such request is made after such five business day period, then (unless otherwise agreed by the parties) the expense of the translation is at the expense of the lender.

In addition, the new law provides:

“(a) **person may rely on, without further investigation or liability to another person, an agent's certification, opinion of counsel, or English translation that is provided** to the person under this subchapter.” [See: Tex. Est. Code Ann. Section 751.210.]

With respect to foreign language durable powers of attorney or durable powers of attorney which are to be construed under the laws of a foreign jurisdiction, in addition to requesting an English translation, the lender can request an attorney's opinion, pursuant to Sections 751.201 and 751.204 regarding whether or not the power of attorney is durable, whether or not it was properly created and valid under the laws of the jurisdiction which apply to it, and whether or not the power of attorney grants the agent the proper power and authority to borrow money, execute notes, and mortgage real property on behalf of the principal.

The provisions of the new law do not require a lender to accept a durable power of attorney if the lender in good faith believes the power of attorney is not valid or fails to grant the agent the requisite powers to borrow money, execute notes, and mortgage real property. Section 751.206 provides that:

“... regardless of whether an agent's certification, opinion of counsel, or translation has been requested or received by the person under this subchapter, the person believes in good faith that: **(A) the power of attorney is not valid;****(B) the agent does not have the authority to act as attempted**” (Tex. Est. Code Ann. Section 751.206)

POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

If you have any questions regarding this memorandum, please contact any of our firm attorneys below.

Allan Polunsky at Allan.Polunsky@mortgagelaw.com

Jay Beitel at Jay.Beitel@mortgagelaw.com

Marty Green at Marty.Green@mortgagelaw.com

Lauren Polunsky Dreszer at Lauren.Polunsky@mortgagelaw.com

Jonathan Jaskot at Jonathan.Jaskot@mortgagelaw.com