

STANDARD NO. 302

PROBLEM:

When may the title examiner rely on a power of attorney for the execution of a recorded document by a party to that document?

RECOMMENDATION:

- A. Recorded Power of Attorney: Power of attorney documents can be relied on to be effective indefinitely until revoked by the principal, unless language in the document limits its duration, or until the principal dies or, in the case of a power of attorney that is not durable, until the principal becomes disabled or incapacitated. The document or a copy of the document must be recorded in a Registry of Deeds in Maine to be relied upon by a title examiner. The best practice is to record the power of attorney document or a copy of the document in the Registry of Deeds for the county in which the property which is conveyed pursuant to the power of attorney is located.
- B. Durable Power of Attorney: The examiner may not rely on any “durable financial power of attorney” document executed between September 19, 1997 and June 30, 2010 which does not have the notices to principal and agent described in the now repealed 18-A M.R.S. §5-508 of the Maine Probate Code. The examiner may not rely on any “durable power of attorney” document executed on or after July 1, 2010 and prior to September 1, 2019 which does not contain notices to principal and agent substantially in the form as those described in the former 18-A M.R.S. §5-905(b), repealed September 1, 2019. The examiner may not rely on any “durable power of attorney” document executed on or after September 1, 2019 which does not contain notices to principal and agent substantially in the form as those described in §5-905(2) of the Maine Uniform Power of Attorney Act, codified in Title 18-C M.R.S. However, a power of attorney executed in Maine on or after September 1, 2019 is valid and enforceable 2 years after execution if the notice required by §5-905(2) is included but is incomplete or defective in any respect. 18-C M.R.S. §5-906(5).

A power of attorney executed on or after July 1, 2010 is automatically durable unless the power of attorney provides that it is terminated by the incapacity of the principal. 18-C M.R.S. §5-904 (formerly, 18-A M.R.S. §5-904, repealed September 1, 2019).

The examiner may rely on non-durable power of attorney documents which do not contain the statutory notices to principal and agent.

First adopted August 28, 1962; amended June 19, 1975, December 7, 1983, May 21, 2002, February 13, 2007, November 19, 2014 and January 30, 2020. Formerly Title Standard No. 51.

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C. Power of Attorney Executed in Another State:

1. Jurisdiction Not Indicated:

Power of attorney documents executed in a State other than Maine may be relied upon if executed in compliance with the laws of that State, unless the power of attorney was executed on or after July 1, 2010 and an alternative jurisdiction is indicated in the power of attorney.

2. Jurisdiction Indicated:

Power of attorney documents executed on or after July 1, 2010 in a State other than Maine which indicate the jurisdiction that determines the meaning and effect of the power of attorney may be relied upon if executed in compliance with the law of the jurisdiction indicated in the power of attorney.

See Discussion C. below.

3. Power of Attorney Executed Prior to July 1, 2010:

Powers of Attorney executed prior to July 1, 2010 in a State other than Maine are governed by the now repealed 18-A M.R.S. §5-510 which read as follows:

“Notwithstanding any contrary requirements of law, a durable or nondurable health care power of attorney or a durable or nondurable financial power of attorney that was duly executed in another jurisdiction within the United States in compliance with the laws of that jurisdiction is not ineffective in this State due to noncompliance with the laws of this State.”

- D. Military Power of Attorney: A military power of attorney does not need to meet Maine law requirements as to form or recording in the Registry of Deeds. See 10 U.S.C. §1044b(a). Evidence of the military power of attorney should be recorded in the Registry of Deeds.

- E. Validation of Defect in Power of Attorney: A deed or other instrument for the conveyance of real property, or any interest in the real property executed by a person or persons purporting to act as the agent or attorney of the grantors or their spouses, that has been recorded for at least 20 years in the registry of deeds of the county or district in which the real property is located is valid even if no power of attorney authorizing and empowering an agent or attorney to make the conveyance or execute and deliver the deed or instrument appears of record, but the real property has in the meantime been occupied, claimed or treated by the grantees or their heirs, successors or assigns as their own property. 33 M.R.S. §353-A(4).

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DISCUSSION:

- A. Basic Power of Attorney: A power of attorney is the written authority by which a “principal” delegates authority to act for the principal to an “agent.” Written power of attorney documents have been recognized in Maine’s common law since at least 1832.
- B. Death or Disability of Principal: At common law, the death or disability of a principal ended the authority of the agent. Effective October 1, 1975, 14 M.R.S. §4202(1) was enacted stating that the death or disability of a principal does not revoke authority of an agent who acts in good faith, without actual knowledge of the death or disability of the principal. The section was recodified in the Maine Probate Code as §5-504. This section was repealed and recodified, effective July 1, 2010, in the Maine Uniform Power of Attorney Act as 18-A M.R.S. §§5-910(d) and (e). This section was repealed and recodified, effective September 1, 2019, as 18-C M.R.S. §§5-910(4) and (5).

An affidavit executed by the agent stating that the agent did not have, at the time of exercising their power, actual knowledge of the death or disability of the principal is conclusive proof that the power of attorney was not revoked. 14 M.R.S. §4202(2) became effective October 1, 1975, was repealed on January 1, 1983 when the Maine Probate Code was adopted, but was recodified as §5-505 of the Maine Probate Code effective June 30, 1992. This section was repealed, effective July 1, 2010, but a similar provision relating to a certification by the agent was codified in the Maine Uniform Power of Attorney Act as §§5-919 and 5-920. Such affidavits or certifications are not required for an examiner to rely on a recorded power of attorney document but are recommended.

Effective October 1, 1975, 14 M.R.S. §4201 created a “durable power of attorney,” allowing a principal to declare an intent that the agent still can have authority to act even after the disability (but not death) of the principal. This section was recodified in the Maine Probate Code as §5-501 and §5-502. Effective July 1, 2010, §§5-501 and 5-502 of the Maine Probate Code were repealed and recodified in substantially the same form as §5-904 of the Maine Uniform Power of Attorney Act. Note, however, that under §5-904 of the Maine Uniform Power of Attorney Act, a power of attorney is automatically durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

Effective September 19, 1997, §5-508 of the Maine Probate Code defined a “durable financial power of attorney” as a durable power of attorney that affects the principal’s “finances and property.” This statute requires that such power of attorney documents contain specific notices to both the principal and the agent regarding their authority.

Effective September 18, 1999, the requirement for the statutory notices was repealed with respect to principals which are not natural persons.

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Effective July 1, 2010, the concept of the “durable financial power of attorney” was eliminated by the repeal of §5-508 of the Maine Probate Code.

Notices to Principal and Agent: Between September 19, 1997 and June 30, 2010, a “durable financial power of attorney” was required by §5-508 of the Maine Probate Code to contain certain notices to principal and agent. The text of these notices to principal and agent was modified several times between September 19, 1997 and June 30, 2010. Effective July 1, 2010, the concept of a “durable financial power of attorney” was replaced by the concept of a “durable power of attorney” under the Maine Uniform Power of Attorney Act and new notices to principal and agent are now required by 18-C M.R.S. §5-905(2) (formerly, 18-A M.R.S. §5-905(b), repealed September 1, 2019) of the Maine Uniform Power of Attorney Act. Below is a list of the effective dates for revisions to the statutory notices to principal and agent with a brief summary of the revisions made.

- September 19, 1997 - Notices to principal and agent were first required in a durable financial power of attorney.
- April 3, 1998 – Notices to principal and agent were modified to add the term “Attorney-in-Fact” and to change the phrase “your money and property” to “your money, property or both.”
- September 18, 1999 – Notices to principal and agent were repealed with respect to principals who are not natural persons.
- July 1, 2005 – Notices to principal and agent were modified to reflect certain changes in the statutory references as a result of the enactment of the Maine Uniform Trust Code.
- July 1, 2010 – Notices to principal and agent were significantly re-drafted as a result of the enactment of the Maine Uniform Power of Attorney Act. The Act provides that the notices must be in “substantially” the same form as that set forth in § 5-905(b) of the Act.
- September 1, 2019 – Notices to principal and agent were modified to reflect the repeal of 18-A M.R.S. and the recodification of the Maine Uniform Power of Attorney Act in 18-C M.R.S.

First adopted August 28, 1962; amended June 19, 1975, December 7, 1983, May 21, 2002, February 13, 2007, November 19, 2014 and January 30, 2020. Formerly Title Standard No. 51.

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Note that a common defect in durable powers of attorney is the lack of the proper statutory notices to principal and agent. As noted in Recommendation B. above, a power of attorney executed in Maine on or after September 1, 2019 is valid and enforceable 2 years after execution if the notice required by §5-905(2) is included but is incomplete or defective in any respect. 18-C M.R.S. §5-906(5). In addition, since July 1, 2010, a “substantial compliance” test has applied to the statutory notices to principal and agent.

Since July 1, 2010, the Maine Uniform Power of Attorney Act has provided that a durable power of attorney is not valid unless it contains notices to principal and agent “substantially” in the form set forth in the Act. See 18-C M.R.S. §5-905(2) and the former 18-A M.R.S. §5-905(b), repealed September 1, 2019.

- C. Powers of Attorney Executed On or After July 1, 2010 in Another State: Powers of Attorney executed on or after July 1, 2010 in a State other than Maine are governed by 18-C M.R.S. §5-906(4) (formerly, 18-A M.R.S. §5-906(c), repealed September 1, 2019) of the Maine Uniform Power of Attorney Act which reads as follows:

“(4). A power of attorney executed other than in this State is valid in this State if, when the power of attorney was executed, the execution complied with:

(A). The law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to section 5-907; or

(B). The requirements for a military power of attorney pursuant to 10 United States Code, Section 1044b, as amended.”

The meaning and effect of a power of attorney are determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of such indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed. 18-C M.R.S. §5-907 (formerly, 18-A M.R.S. §5-907, repealed September 1, 2019).

NOTE: The Uniform Comment to Section 107 of the Uniform Power of Attorney Act, which section is codified in Maine as 18-C M.R.S. §5-907 (formerly 18-A M.R.S. §5-907, repealed September 1, 2019) provides guidance on what language in a power of attorney is sufficient to indicate the governing jurisdiction. The Uniform Comment reads, in part, as follows:

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“This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, “the law of the jurisdiction indicated in the power of attorney,” is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 107 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between “the law of the jurisdiction indicated in the power of attorney” and “the law of the jurisdiction in which the power of attorney was executed” is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney.”

- D. Military Power of Attorney: A “military power of attorney” is one that is executed by a member of the armed forces or other individuals described in 10 U.S.C 1044a. See 10 U.S.C. 1044b(b).