

# Powers of Attorney

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## **§ 689. What is a power of attorney?**

A power of attorney creates a “traditional principal-agent relationship . . . [which] has one supreme characteristic: [the agent] stands in a fiduciary relation to [the principal] with respect to all matters within the scope of agency.” *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 154 (1995). The power can be oral or written and can be limited or general in scope. A power can be durable so it survives incapacity and eliminates or minimizes the need for protective proceedings in Probate Court. The agent, also called the attorney in fact, must assent to the relationship and once that assent is manifested, the agent acts on behalf of the principal, within the authority given, and has the duties and liabilities of an agent to both the principal and third parties. “An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal, and subject to the principal’s control.” *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 742 (2000).

## **§ 690. Ordinary powers of attorney.**

An ordinary or general power of attorney allows the agent to act on behalf of the principal in all matters. The power may be time-limited, specifying an ending date or on the occurrence of a specific event.

## **§ 691. Durable power of attorney.**

Unlike a general power, a durable power of attorney is not affected by the subsequent mental incapacity of the principal. G.L. c. 190B, § 5-502, part of §§ 5-501–5-507 (hereinafter Uniform Probate Code). 2008 Mass. Acts c. 521, §§ 9, 22. A power of attorney is made durable by including the following language in the document: “[T]his power of attorney shall not be affected by subsequent disability or incapacity of the principal” or “[T]his power of attorney shall become effective upon the disability or incapacity of the principal” or words of similar import. G.L. c. 190B, § 5-501. The power that becomes effective upon subsequent incapacity requires evidence of incapacity in order to make it valid.

The Uniform Probate Code, effective July 1, 2009, repealed and replaced the Uniform Durable Power of Attorney Act. G.L. c. 201B. The Uniform Probate

Code goes further than the Uniform Durable Power of Attorney Act did by making the attorney's affidavit of no actual knowledge of the termination of the power by revocation, in addition to termination by death, disability or incapacity of the principal, conclusive proof of nontermination. Uniform Probate Code § 5-505, *added by* 2008 Mass. Acts c. 521, §§ 9, 44.

Case law relative to prior provisions of the Uniform Durable Power of Attorney Act, G.L. c. 201B, continue to be instructive, and Section 5-505 of the Uniform Probate Code is likely intended to protect third parties dealing with the attorney, and not attorneys who have constructive notice of the termination of their power. *Gagnon v. Coombs*, 39 Mass. App. Ct. 144 (1995) (interpreting Uniform Durable Power of Attorney Act). This is bolstered by Section 5-507 of the Uniform Probate Code which expressly provides that a third party acting in good faith on a durable power of attorney shall not be liable for actions taken in reliance thereon. Uniform Probate Code § 5-507, *added by* 2008 Mass. Acts c. 521, §§ 9, 44.

## **§ 692. Effect of durable power of attorney nominating guardian.**

A durable power of attorney was originally, and still is, an alternative to the appointment of a guardian or conservator. However, the Uniform Probate Code § 5-503(b), *added by* 2008 Mass. Acts c. 521, §§ 9, 44, specifically permits a principal to nominate a conservator or guardian of the principal's estate in the event that protective proceedings are thereafter commenced. Such a nomination provides priority of appointment for the nominee if probate proceedings are subsequently commenced, unless the nominated agent is disqualified or for other good cause. Uniform Probate Code § 5-503(b), *added by* 2008 Mass. Acts c. 521, §§ 9, 44. The editors of Section 5-503 stated "It is not the purpose of the act to encourage resort to court for a fiduciary appointment that should be largely unnecessary when an alternative regime has been provided via a durable power. Indeed, the best reason for permitting a principal to use a durable power to express his preference regarding any future court appointee charged with the care and protection of his person or estate may be to secure the authority of the attorney in fact against upset. . . ." Comments, Uniform Probate Code § 5-503(b).

Under the Uniform Durable Power of Attorney Act, the Appeals Court in *Guardianship of Smith*, 43 Mass. App. Ct. 493 (1997) applied the words of the statute and held that the Probate Court must appoint the designated conservator or guardian, unless shown to be unsuitable. G.L. c. 201B, § 3(b), *repealed by* 2008 Mass. Acts c. 521, § 22. *See In re Guardianship of Grzybowski*, 76 Mass. App. Ct. 1135 (Rule 1:28 decision, June 1, 2010); Sean M. Dunphy, *Probate Law and Practice* §§ 43.2, 45.5 (West 2nd ed. 1997 & Supp. 2011).

The burden of proof of unsuitability of the nominated person lies with the challenger, and the challenger must show evidence of actual conflict; a mere appearance of or potential for a conflict is insufficient. *Guardianship of Smith*,

43 Mass. App. Ct. at 501. The language of Uniform Probate Code § 5-503(b) is identical to Section 3(b) of the repealed Uniform Durable Power of Attorney Act. 2008 Mass. Acts c. 521, §§ 9, 44 (effective July 1, 2009).

Furthermore, the guardian or conservator designated in a durable power of attorney has standing to contest the appointment of another as guardian or conservator, and is entitled to notice of a hearing on the appointment.

### **§ 693. Limited powers of attorney.**

Both general and durable powers of attorney may be limited in scope, which allows the agent to act on the principal's behalf only in an expressly delineated matter or topic. These are often granted by sellers of real estate to the conveyancing attorney to allow the attorney to attend the closing and complete the required seller's affidavits and documents on the principal's behalf.

Both general and limited powers of attorney may also be limited in time, allowing the agent to act only during a specified time period or until the happening of a specific event.

### **§ 694. Creation of a written power of attorney.**

A power of attorney can be created orally or by a writing. A written power of attorney is not required to authorize an agent to execute a written instrument; oral authority is sufficient, even if the contract signed by the agent is within the statute of frauds. *Hawkins v. Chace*, 36 Mass. (19 Pick.) 502, 505 (1837); *Shaw v. Nudd*, 25 Mass. (8 Pick.) 9, 12 (1829). "An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal. . . ." *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass 736, 742 (2000).

A written contract may be modified by a subsequent oral agreement with sufficient consideration, *Costonis v. Medford Hous. Auth.*, 343 Mass. 108, 112 (1961), even if it is a sealed instrument. *Zlotnick v. McNamara*, 301 Mass. 224, 226 (1938).

No written authority is required to authorize an agent of the mortgagee to give the notices, make the entry and conduct the sale to foreclose a mortgage. *Cranston v. Crane*, 97 Mass. 459, 464 (1867), *Brown v. Wentworth*, 181 Mass 49, 52 (1902). Authorization of an agent to sign a mortgagee's affidavit must be in writing. G.L. c. 244, § 15. Since July 1, 1991, the writing does not have to be under seal. 1991 Mass. Acts c. 157, § 6. It is customary and advisable to record a power of attorney to show the agent's authority to make the entry.

A creditor's attorney receiving seisin and possession of land from the officer after a levy of execution need not have written authority. Previous consent or subsequent ratification by the creditor is sufficient and is presumed unless the creditor disaffirms. *Pratt v. Putnam*, 13 Mass. 361, 362 (1816).

**§ 695. Creation of an oral power of attorney.**

If an agent signs the name of a principal at the principal's request and in the principal's presence, no written authority is necessary. If written authority were required, a person physically incapable of making a mark could never execute a legal instrument. *Omaha Flour Mills Co. v. Santarpio*, 240 Mass. 375, 377 (1922); *Gardner v. Gardner*, 59 Mass. (5 Cush.) 483, 484 (1850).

No particular form of language is required; the acknowledgment of the document by the principal should be satisfactory evidence of the adoption of the agent's signing, although signatures by witnesses are a wise precaution. The instrument should, however, indicate that it was not executed by the grantor's own hand.

Oral authority has been held sufficient to authorize an agent to make a tender to a mortgagee to prevent a foreclosure. *Walden v. Brown*, 78 Mass. (12 Gray) 102, 105–06 (1858).

**§ 696. Powers given by women.**

Single women have long been able to grant a power of attorney. Because of the former restrictions placed upon conveyances by married women, there was some question of the power of a married woman to appoint an attorney. Prior to St. 1879 c. 86, powers of attorney by a married woman to convey real estate required the acknowledgment of both husband and wife. A power of attorney from a married woman to her husband was upheld in *Malaguti v. Rosen*, 262 Mass. 555, 560 (1928); *Burns v. Lynde*, 88 Mass. (6 Allen) 305, 306 (1862); *Fowler v. Shearer*, 7 Mass. 14, 19 (1810). There was some doubt under *Gibson v. Gibson*, 15 Mass. 106, 110–11 (1818), as to the validity of a wife's release of dower by attorney.

There is no doubt, under the present wording of G.L. c. 209, §§ 1 and 2, about the right of a married woman to convey real estate by means of a power of attorney. *Merrick v. Plumley*, 99 Mass. 566, 573 (1868); *Cranston v. Crane*, 97 Mass. 459, 464 (1867).

**§ 697. Powers given by minors.**

Powers of attorney given by minors are void or voidable, except perhaps in some cases where the act to be done is clearly for the benefit of the minor. *Brewster v. Weston*, 235 Mass. 14 (1920), *Seaver v. Phelps*, 28 Mass. 304, 311–12 (1831). See Restatement (Third) of Agency § 3.04 and comment b (2006).

**§ 698. Powers given by mentally ill persons.**

A power of attorney given by a mentally ill person has been held by the U.S. Supreme Court to be not merely voidable but absolutely void. *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 26 (1872); see also Restatement (Third) of Property (Wills)

§ 8.1 (2003). Note, however, that *Brewster v. Weston* holds that contracts made by an “insane person” are voidable. *Brewster v. Weston*, 235 Mass. 14, 16 (1920).

### **§ 699. Powers given to women, minors, or mentally ill persons.**

A power of attorney given to a minor or to a married woman is valid, and the attorney’s acts are binding on the principal. *Cranston v. Crane*, 97 Mass. 459, 464 (1867) (mortgagee’s power of sale). See Restatement (Third) of Agency § 3.05 (2006).

Note, however, that the mentally ill and minors are likely not subject to the duties and liabilities of a fiduciary. Restatement (Third) of Agency § 3.05 (2006), Restatement (Third) of Property (Wills) § 8.2, cmt. f (2003).

### **§ 700. Powers given to a corporation or partnership.**

A power of attorney given to a corporation or partnership is valid. *Searcy v. Paul*, 20 Mass. App. Ct. 134 (1985). A broadly worded power can give a corporate officer powers beyond those usually available to the agent in his or her corporate office. *Craig Silver Co. v. Smith*, 163 Mass. 262, 269 (1895).

### **§ 701. Joint powers.**

A power of attorney may be given to two or more persons. In that case, the attorneys must act jointly in all matters. “An authority to two cannot be exercised by one alone.” *Gibson v. Mfrs.’ Fire & Marine Ins. Co.*, 144 Mass. 81 (1887); *Copeland v. Mercantile Ins. Co.*, 23 Mass. (6 Pick.) 198, 202 (1828).

### **§ 702. Seals.**

Historically, a power of attorney to execute an instrument requiring a seal or to affix a seal must itself be under seal. *Alfano v. Donnelly*, 285 Mass. 554, 556 (1934); *Burns v. Lynde*, 88 Mass. (6 Allen) 305, 311 (1863); *Warring v. Williams*, 25 Mass. (8 Pick.) 326 (1829). In fact, the expression “powers of attorney” implies an instrument under seal. *Cutler v. Haven*, 25 Mass. (8 Pick.) 490, 493–94 (1829).

No actual seal is required for a document executed under seal. G.L. c. 4, § 9A. However, the use of seals in a document not requiring them is to be disregarded. *Vigdor v. Nelson*, 322 Mass. 670, 674 (1948).

The difference between sealed and unsealed documents has been under “heavy assault” and “eroded considerably.” *Knott v. Racicot*, 442 Mass. 314, 320–21 (2004). Since 1977, seals are not required for instruments purporting to affect an interest in real estate. G.L. c. 183, § 1A.

**§ 703. Execution of powers of attorney.**

The proper way for an attorney to execute a deed or other instrument is by writing the principal's name followed by the signature of the attorney "as attorney in fact under a power of attorney dated \_\_\_\_\_ and recorded in \_\_\_\_\_."

**§ 704. Acknowledgment, recording and registration of power.**

A power of attorney giving an agent authority to deal with real estate, or revoking such authority, must be recorded or registered. G.L. c. 183, § 32; G.L. c. 185, § 110. However, ratifying actions of an undisclosed principal can bind him even without a recorded power of attorney. *Selig v. Kopsiaftis*, 357 Mass. 91, 92 (1970). Prior to 1845, powers of attorney were not required to be acknowledged or recorded. *Valentine v. Piper*, 39 Mass. (22 Pick.) 85, 91 (1839).

A recorded but not registered power of attorney is sufficient in a conveyance of registered land and vice versa. *Malaguti v. Rosen*, 262 Mass. 555, 567 (1928).

Powers of attorney between husband and wife do not have to be recorded or registered while both are alive, despite a pre-1971 requirement that deeds between spouses must be recorded during the lifetime of both. *Malaguti v. Rosen*, 262 Mass. 555, 564 (1928); *Burns v. Lynde*, 88 Mass. (6 Allen) 305, 306 (1863).

**§ 705. Termination of power.**

A power of attorney will always terminate upon the principal's death. Unless it is a durable power, it will also terminate upon the principal's incapacity. Since January 1, 1978, acts of the attorney after the death or disability of the principal are valid if done in good faith without knowledge of the death or incapacity. An affidavit to that effect, in the absence of fraud, is conclusive proof of the nontermination of the power. G.L. c. 201, § 50, *repealed by* 1981 Mass. Acts c. 276, § 1. *See* Uniform Probate Code Rule § 5-504, *added by* 2008 Mass. Acts c. 521, §§ 9, 44 (replacing G.L. c. 201B, § 5, which was repealed by 2008 Mass. Acts c. 521, § 22 (effective July 1, 2009)).

A power may terminate at the end of a specified period or on the happening of a specific event. A power may provide, subject to termination by operation of law, that it will continue in effect until revoked by a recorded instrument and that, in the meanwhile, any persons dealing with the attorney may rely on the continued existence of the power.

A principal may also revoke a power, unless it is coupled with an interest.

**§ 706. Effect of appointment of guardian or conservator.**

The appointment of a guardian or conservator does not automatically terminate a durable power of attorney, but the guardian or conservator has the power to revoke it. Uniform Probate Code § 5-503(a), *added by* 2008 Mass. Acts c. 521, §§ 9, 44. The attorney in fact is liable to the guardian or conservator, as well as the principal, for his or her acts. Uniform Probate Code § 5-503(a), *added by* 2008 Mass. Acts c. 521, §§ 9, 44.

**§ 707. Revocation of powers not coupled with an interest.**

A power of attorney can be revoked (unless it is irrevocable or coupled with an interest) by the principal's "conduct that is inconsistent with its continuance." *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 151 (1995). It is revoked by implication if the attorney has reason to know that the power has been revoked—for example, when a competent principal enters into an agreement to sell the subject of the power. *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 151 (1995); see *Rochalski v. Sklodowski*, 81 Mass. App. Ct. 1107 (Rule 1:28 decision, Jan. 6, 2012).

The appointment of another attorney does not necessarily revoke the earlier appointment. *Malaguti v. Rosen*, 262 Mass. 555, 561–62 (1928); *Davol v. Quimby*, 93 Mass. (11 Allen) 208, 209 (1865).

The principal's death terminates all powers of attorney. *Gallup v. Barton*, 313 Mass. 379, 382 (1943); *Mitchell v. Weaver*, 242 Mass. 331, 335 (1922). Prior to 2009, the attorney's authority ceased immediately upon death; now agent's actions in good faith and without knowledge of the principal's death are within his or her authority. G.L. c. 190B, § 5-504.

A power given by bank directors remains valid after the term of office of the directors who gave it. *Northampton Bank v. Pepoon*, 11 Mass. 288, 294 (1874).

A power of attorney which provides that it will remain in effect until a revocation is recorded is nevertheless revoked by death.

Prior to 1981, all powers were terminated by the insanity of the principal, unless rights of innocent third parties intervened. *Witherington v. Nickerson*, 256 Mass. 351, 356 (1926). Now, only a power with the required nontermination language (see § 690, above), known as a durable power of attorney, survives mental incapacity. From 1981 to 2009, the Uniform Durable Power of Attorney Act, G.L. c. 201B, allowed for the creation of durable powers of attorney. The Uniform Probate Code, superseding the Uniform Durable Power of Attorney Act, specifically states that a written durable power of attorney is not revoked by lapse of time, disability, or the principal's incapacity.

Knowledge of revocation is not imputed to third parties "unless the revocation is in a writing executed by the principal or a duly appointed personal representative of the principal and is actually received by such person or, in the case of transactions involving real estate or any interest therein, is recorded in due course as provided in section 25 of chapter 184." G.L. c. 190B, § 5-504.

**§ 708. Revocation of powers coupled with an interest.**

A power of attorney is not revocable by the principal if it is coupled with an vested interest, or given for consideration or as security. *Hunt v. Rousmanier's Adm'rs*, 21 U.S. (8 Wheat.) 174, 201 (1823); *MacDonald v. Gough*, 326 Mass. 93, 97–98 (1950); *Wheeler v. Slocumb*, 33 Mass. (16 Pick.) 52, 55–56 (1834). See also Restatement (Third) of Agency § 3.12 (2006). A power is coupled with an interest is created when the "agent" actually holds power for his or her own

benefit or for the benefit of a third party, and thus vested, acts more as an owner or part owner. Restatement (Third) of Agency § 3.12 (2006). The giver of the power has usually relinquished the right to control and the power is not held for his or her benefit. Restatement (Third) of Agency § 3.12 (2006). A traditional example of a power coupled with an interest is an insurance company given power, through the contract with the insured, to settle claims against the insured.

Not even death can revoke a power coupled with an interest. *MacDonald v. Gough*, 326 Mass. 93, 98 (1950). If, however, the right to revoke is reserved in the power then it can be revoked by the principal. *Wilson v. Smith*, 256 Mass. 85, 87 (1926). It appears that a power of attorney under seal cannot be revoked by an instrument not under seal. *Wallis v. Carpenter*, 95 Mass. (13 Allen) 19, 24 (1866). But see § 702, above, regarding the diminution in distinction between sealed and unsealed documents.

To avoid any question as to whether the power is coupled with an interest, the principal could convey the property to the agent in trust to execute the power, reserving the right to revoke by a recorded revocation prior to the execution of the power.

### § 709. Duties and liabilities of an agent to the principal.

As long as the agent has manifested his or her assent to act as agent, the principal has at all times during the relationship the ability to control the agent's actions on the principal's behalf. Restatement (Third) of Agency § 1.01 (2006). An agent must act within his or her actual authority, under the terms of the contract between the agent and the principal, including any implied terms, and any specific instructions received from the principal. *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 155 (1995), Restatement (Third) of Agency §§ 8.07, 8.09 (2006).

A fiduciary must act with "utmost good faith and absolute loyalty. The quintessential mandate of that primal fiduciary duty obligate[s] the attorney] to act, in the absence of language in the power of attorney to the contrary, *solely* in and to further [the principal's] interest, even at the expense of [the agent's] own interest in matters connected with the agency." *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 154 (1995). This duty can be breached by selfdealing, by interfering with the principal's intention, by failure to honor the principal's requests regarding his or her property, by impairing the principal's rights to his or her property, or by failure to inform the principal of material facts. *Gagnon v. Coombs*, 39 Mass. App. Ct. 144 (1995); *see also Rochalski v. Sklodowski*, 81 Mass. App. Ct. 1107 (Rule 1:28 decision, Jan. 6, 2012).

In "novel, critical and unforeseen emergencies" where an agent cannot promptly obtain direction from the principal, an agent may be justified in exceeding the authority of the power of attorney. "In circumstances of necessity or great urgency it is only necessary that the agent should act *bona fide* and with reasonable discretion." *Greenleaf v. Moody*, 95 Mass. (13 Allen) 363, 367 (1866).



### § 710. Delegation by agent of powers.

An agent may delegate authority to a subagent if the ability is expressly granted in the power of attorney, *Smith v. Abbott*, 221 Mass. 326, 330 (1915), or if the grant is necessary or implied in the scope of employment and known to the other party. *Dorchester & Milton Bank v. New England Bank*, 55 Mass. (1 Cush.) 177, 186 (1848); *Darling v. Stanwood*, 96 Mass. (14 Allen) 504, 507 (1867); *Brewster v. Hobart*, 32 Mass. (15 Pick.) 302, 307 (1834).

An attorney may delegate merely mechanical, clerical or ministerial acts that involve no judgment or discretion. *Malaguti v. Rosen*, 262 Mass. 555, 564 (1928).

Guidance may be gleaned from the Uniform Trust Code. As of July 8, 2012, when the Uniform Trust Code took effect, G.L. c. 203E, § 807 states that “a trustee may delegate duties and powers if it is prudent to do so,” and must exercise reasonable care in selecting an agent, establishing the scope and terms of the delegation which must be consistent with those of the trust, and monitoring the agent’s actions. G.L. c. 203E, § 807. If properly selected and monitored, the agent is liable to the trust and the trustee is not liable for the agent’s actions. G.L. c. 203E, § 807. Before the Uniform Trust Code, the duties of a trustee were personal and nondelegable. *City of Boston v. Curley*, 276 Mass. 549, 562 (1931). Powers that were discretionary could not be delegated but merely ministerial acts may be. See *Kirschbaum v. Wennett*, 60 Mass. App. Ct. 807, 814 (2004), for a listing of some acts which are administrative and delegable.

A bank board of directors may delegate authority and may authorize one individual to sell the bank’s real estate. *Burrill v. Nahant Bank*, 43 Mass. (2 Met.) 163, 167 (1840).

The Probate Code which took effect in 2009 holds a similar standard for delegation of powers of a conservator. G.L. c. 190B, § 5-423A.

For a power given by one trustee on behalf of two trustees to terminate a lease, see *Zevitas v. Adams*, 276 Mass. 307, 314 (1931).

### § 711. Duties and liabilities of the agent to third parties.

The acts of an agent acting within the bounds of authorization bind the principal to affected third parties, and the agent is not personally liable to the third party or a party to a contract properly executed in his or her capacity as attorney in fact. *Cent. Trust Co. v. Rudnick*, 310 Mass. 239, 246 (1941), Restatement (Third) of Agency §§ 6.01–.03 (2006).

One purporting to act as an agent, but not actually authorized, is personally liable in tort to a third party, regardless of whether he or she knew that he or she was not authorized as an agent or thought honestly that he or she was so authorized. *Magaw v. Beals*, 242 Mass. 321, 324 (1922). However, a purported principal’s actions may ratify the action and relieve the “agent” from personal liability to the third party.

**§ 712. Duties and liabilities of the principal to the agent.**

A principal must act fairly and in good faith with the agent and must conform to the terms of the contract between the attorney and the principal, including any terms implied at law. The principal has a duty to disclose any risks known to him or her but possibly unknown by the agent. *Reed v. A.E. Little Co.*, 256 Mass. 442, 448 (1926).

**§ 713. Liabilities of the principal to third parties.**

The principal is liable to third parties for acts and representations of the agent which are within the scope of the agent's actual authority, under apparent authority, or are ratified by the principal. *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 743 (2000), Restatement (Third) of Agency §§ 6.11, 7.08, 8.14 (2006). The principal may also be liable to third parties if the principal was negligent in selecting or controlling the agent or vicariously liable if the agent's conduct is with the principal's apparent authority, and therefore it is the principal who must bear the burden of the misuse to which that appearance is put. *Kansallis Fin. Ltd. v. Fern*, 421 Mass. 659, 665 (1996), Restatement (Third) of Agency § 7.03-.05 (2006).

There is no liability from the ostensible principal to a third party without either ratification by the principal of the purported agent's acts or apparent authority. *Mendelsohn v. Holton*, 253 Mass. 362, 365 (1925); *see also Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 743 (2000).

"Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of Agency § 2.03 (2006). If apparent authority exists, that is the third party "reasonably relied on the principal's words or conduct at the time he entered the transaction that the agent is authorized to act on the principal's behalf," then the principal is liable to the third party. *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 745 (2000). The purported agent may be liable to the principal for damages incurred by the principal. *Karcher v. Burbank*, 303 Mass. 303, 305 (1939), Restatement (Third) of Agency § 2.03 (2006).

In the absence of knowledge by the third party, the misuse of the proceeds by an agent who violated the authority given by the power of attorney does not give the principal grounds for avoiding the transaction. *Malaguti v. Rosen*, 262 Mass. 555, 563 (1928); *Twohig v. Daly*, 248 Mass. 49, 52-53 (1924).

**§ 714. Principal's ratification of acts done without or exceeding power.**

An action by a purported attorney without power or authority, including an outright forgery, is validated by a principal's subsequent ratification of the act.

*Coral Gables, Inc. v. Granara*, 285 Mass. 565, 571 (1934) (ratification of promissory note); *Holbrook v. Chamberlain*, 116 Mass. 155, 161 (1874) (ratification of deed); *Rand v. Farquhar*, 226 Mass. 91, 97 (1917) (ratification of contract); *DiLorenzo v. Atlantic Nat. Bank of Boston*, 278 Mass. 321, 326 (1932) (ratification of a forgery).

This ratification can be written or oral. *Coral Gables, Inc. v. Granara*, 285 Mass. at 571, citing *McIntyre v. Park*, 77 Mass. (11 Gray) 102, 106 (1858) (oral ratification). It does not need to be an affirmative act: inaction can also work a ratification. “Allowing the misimpression to stand uncorrected in these circumstances was tantamount to acquiescing in its accuracy. . . .” *Rex Lumber Co. v. Acton Block Co., Inc.*, 29 Mass. App. Ct. 510, 518 (1990).

The ratification only validates the unauthorized act if the principal has full knowledge of the material facts. *Combs v. Scott*, 94 Mass. (12 Allen) 493, 496 (1866). However, a principal cannot “wilfully or deliberately ignore the facts” to avoid ratification and repudiate an act. *Kidder v. Greenman*, 283 Mass. 601, 615 (1933).

Note that ratification of the acts of an attorney exceeding or misusing the attorney’s authority is “more readily implied from slight acts of confirmation,” compared to situations where the attorney had no authority. *A. Blum Jr.’s Sons v. Whipple*, 194 Mass. 253, 257 (1907) (citing *Harrod v. McDaniels*, 126 Mass. 413, 415 (1879)).

Actions can ratify the deeds of one partner to bind the partnership as principal and actions of a trustee that bind the trust. *Holbrook v. Chamberlain*, 116 Mass. at 161 and *Kansallis Fin. Ltd. v. Fern*, 421 Mass. 659, 665 (1996) (partnership); *Rand v. Farquhar*, 226 Mass. at 97 and 288 (trust). The unauthorized assignment of a mortgage by a bank officer was held to be ratified by the receipt, acceptance and retention of a payment of money equal to the full value of the property transferred. *Boruchoff v. Ayvasian*, 323 Mass. 1, 9 (1948).

Subsequent ratification will validate even documents signed under seal. *McIntyre v. Park*, 77 Mass. at 106. Ratification was formerly valid only against named principals, but not against undisclosed principals. *Moran v. Manning*, 306 Mass. 404, 410 (1940). The distinction was eliminated in *Nalbandian v. Hanson Rest. and Lounge, Inc.*, 369 Mass. 150 (1975).

## § 715. Interpretation of the power by a court.

A power of attorney is a type of contract and interpretation of the legal effect on the contract is the court’s responsibility. *McQuade v. Springfield Safe Deposit & Trust Co.*, 333 Mass. 229, 233 (1955). As a contract, it must be interpreted as a whole and all provisions need to be considered to ensure the contract accomplishes its overall purpose. *J. A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 795 (1986). The court must consider the intentions of the parties. *Shea v. Bay State Gas Co.*, 383 Mass. 218, 224–25 (1981).

Powers of attorney are subject to a special rule of construction which requires the power to be strictly construed to limit the agent's authority. *McQuade v. Springfield Safe Deposit & Trust Co.*, 333 Mass. 229, 233 (1955); *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 158 (1995). Nevertheless, the requirement of strict interpretation does not go so far as to destroy the purpose of the power. *Malaguti v. Rosen*, 262 Mass. 555, 561 (1928); *McQuade v. Springfield Safe Deposit & Trust Co.*, 333 Mass. 229, 233 (1955).

Although a power of attorney is to be strictly construed, it includes the authority to do incidental acts or those reasonably necessary to accomplish the objective. *MacDonald v. Gough*, 326 Mass. 93, 96 (1950); *Hayes v. Gessner*, 315 Mass. 366, 370 (1944); Restatement (Third) of Agency § 2.02, cmt. d (2006).

### § 716. Powers of attorney involving real estate transfers.

An attorney's authority in real estate closings is limited, and the attorney has no power to make substantial modifications to the contract. *Torrazo v. Cox*, 26 Mass. App. Ct. 247, 252 (1988). The attorney may not give an option to purchase additional land. *Lucey v. Hero Int'l Corp.*, 361 Mass. 569, 572 (1972). However, an agent's change to the closing date will be valid unless promptly disaffirmed by the principal or relied on by others to their detriment. *Rex Lumber Co. v. Acton Block Co., Inc.*, 29 Mass. App. Ct. 510, 516 (1990).

An agent authorized to sell may not personally become the purchaser. "It is a general principle that an agent clothed with naked power to sell, while he may transfer a good title to a third person, cannot purchase for himself, at least not without the full knowledge and assent of his principal. [The agent's] obligation to his principal requires him to secure the highest price obtainable, while his self-interest prompts him to buy at the lowest practicable price. The law does not trust human nature to be exposed to the temptations likely to arise out of such antagonistic duty and influence." *Hall v. Paine*, 224 Mass. 62, 73 (1916). This rule applies even in auctions and even the agent pays full market value. See also *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 157–59 (1995). *Union Mkt. Nat'l Bank of Watertown v. Derderian*, 318 Mass. 578, 582 (1945) (foreclosing mortgagee held to strictest standards when bidding on property); *Fay v. Winchester*, 45 Mass. (4 Met.) 513, 517 (1842); *Copeland v. Mercantile Ins. Co.*, 23 Mass. (6 Pick.) 198, 204 (1828).

### § 717. Powers to sell.

A power to sell includes the power to convey, *Alger v. Fay*, 29 Mass. (12 Pick.) 322, 324 (1832), including subsequently acquired real estate, *Fay v. Winchester*, 45 Mass. (4 Met.) 513, 516 (1842); to affix the corporate seal and to execute the necessary transfer documents, *Burrill v. Nahant Bank*, 43 Mass. (2 Met.) 163, 167 (1840); and to convey with the usual covenant against encumbrances, *Johnson v. Knapp*, 146 Mass. 70, 75 (1888). If the powers enumerated are sufficiently broad, it may allow the agent to bind the principal by giving a deed

with warranty covenants; however a “naked power to sell land may not give the attorney power to bind the principal by any covenants.” *Bronson v. Coffin*, 118 Mass. 156, 160–61 (1875). A power may be drawn to authorize the agent to negotiate the sale, leaving it to the principal to ratify it and execute the deed. *O’Neill v. Nicolls*, 324 Mass. 382, 384 (1949) (merely leaving an executed deed with the attorney does not authorize the agent to bind the principal to any sale negotiated by the agent.)

### § 718. Powers to mortgage.

Similarly, a “naked” power to sell does not include the power to mortgage. *Wood v. Goodridge*, 60 Mass. (6 Cush.) 117, 123 (1850). *But see Malaguti v. Rosen*, 262 Mass. 555, 561 (1928). For discussions of the ability to mortgage under a testamentary power to sell, see *Brunton v. Easthampton Savings Bank*, 336 Mass. 345, 348–51 (1957); *Sanger v. Farnham*, 220 Mass. 34, 37 (1914); and *Hoyt v. Jaques*, 129 Mass. 286, 288. If the power does not explicitly contain the power to mortgage, it would behoove the agent (or life tenant) to apply for a license to mortgage. *Kent v. Morrison*, 153 Mass. 137, 139 (1891).

A power to borrow money includes the power to execute a note and security instruments. *Malaguti v. Rosen*, 262 Mass. 555, 561 (1928).

### § 719. Power to fill blanks in deed.

Written authority, under seal, is generally required to properly execute a deed or mortgage on behalf of a principal. *Bretta v. Meltzer*, 280 Mass. 573, 576 (1932). However, when a signed deed with blanks is given to an agent with verbal authorization to fill in the blanks and deliver to grantee, and an innocent grantee accepts the deed, the grantor is estopped from denying the deed. *Phelps v. Sullivan*, 140 Mass. 36, 37 (1885). Estoppel is not valid when the agent has violated the principal’s instructions. *Bretta v. Meltzer*, 280 Mass. 573, 576 (1932).

Because a deed is valid upon delivery and acceptance, unauthorized alterations to a deed after delivery but before recording invalidates the altered deed. *Lima v. Lima*, 30 Mass. App. Ct. 479, 487–88 (1991). It does not invalidate the conveyance as originally intended, although record title may be held by the grantee as altered. *See also Smigliani v. Smigliani*, 358 Mass. 84, 90–91 (1970).

### § 720. Form—general power to deal in real estate, including sale.

#### General Power of Attorney for Representing Seller

I, \_\_\_\_\_ of \_\_\_\_\_ do hereby make, constitute and appoint \_\_\_\_\_ of \_\_\_\_\_, my/our true and lawful attorney, for me/us in my/our name, to represent me/us in the sale and conveyance of the following described real estate situated in \_\_\_\_\_, Massachusetts:

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[insert details about limits of any powers]

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Giving and granting to said attorney full power and authority to negotiate the purchase price of said property, to sign an agreement for the purchase and sale of said property, to negotiate an agreement with a broker for the broker's commission on the sale; to execute, acknowledge and deliver a deed to the purchaser or purchasers; to sign all documents, including, but not limited to, required government forms concerning the transaction and the reporting of the sale to the Internal Revenue Service; to receive and disburse, on my/our behalf, the proceeds of any sale; and, to do all such other things necessary or convenient to accomplish the sale of said real estate as I/we might or could do if personally present.

This power of attorney shall not be affected by the subsequent disability or incapacity of the principal(s).

Executed as a sealed instrument this \_\_\_\_ day of \_\_\_\_, 20\_\_.

[SIGNATURES OF PRINCIPALS]

[ACKNOWLEDGMENT]

### **§ 721. Form—general power to represent seller at closing.**

See Real Estate Bar Association for Massachusetts, Form No. 10 for cases where the attorney is to be given the power to do all things necessary for the closing.

### **§ 722. Form—limited power to represent seller at closing.**

See Real Estate Bar Association for Massachusetts, Form No. 11 for cases where the attorney is to be given the power only to handle matters and to sign documents at the closing.

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