

INTRODUCTION TO POWERS OF ATTORNEY, TRUSTS AND LIFE ESTATES FOR HECM COUNSELORS

POWERS OF ATTORNEY AND REVERSE MORTGAGES

A. INTRODUCTION

A power of attorney is a **legal document** that an individual voluntarily prepares, stating that he/she grants to a second person the right to carry out certain actions on the individual's behalf and confers authority to perform certain specified acts or kinds of acts on behalf of an individual.

- 1) A power of attorney can **ONLY** be granted when the individual is mentally competent and able to understand what he/she is doing.
- 2) The person who is granted the power of attorney is called an "agent" or "attorney-in-fact."
- 3) A power of attorney is "power to" not "power over"—the agent or attorney in fact must act at the direction of the individual granting the power of attorney and in the individual's best interest, to the best of their ability.
- 4) The power of attorney can be revoked by an individual at any time.
- 5) The authority of the agent or the attorney in fact automatically ends when the person granting the power of attorney dies.

B. TYPES OF POWERS OF ATTORNEY

A power of attorney can be granted for general or limited purposes:

- 1) **General:** Example - Husband grants his wife a power of attorney giving her the right to act for him whenever necessary, because he is out of town a lot. In the event some financial decision came up that required both spouses' signatures, one spouse could carry it out on behalf of the other. It is general in the sense that it explicitly includes the right to do a wide variety of things, including buying and selling real estate, disposing of assets, etc.
- 2) **Special or limited:** Example - An individual needs to move to a new location and does not have the ability to remain and complete the sales transaction of his home. Instead, he gives his sister a power of attorney to attend the closing and sign all the papers on his behalf as the seller. It is special or limited in that it only grants permission to do this one thing, and it expires as soon as that event has been completed. Another type of

limited power of attorney is the ability to act on someone's behalf only with respect to health-related decisions.

- 3) **Durable** power of attorney: Example: An individual is concerned about who will take care of her affairs, pay her bills, etc, if she has a stroke and is unable to do these things for herself. She grants her daughter a durable power of attorney, just in case. The word "durable" means that the power survives even if the individual becomes incompetent. It can either be written so it goes into effect immediately, or it can be written as a "springing" power of attorney, so that it only becomes effective if the individual is judged incompetent. Usually, the document states how incompetency is to be determined (e.g., two doctors agree that the individual is unable to manage his/her affairs.)

This is the only kind of power of attorney that gives the agent the right to overrule the person who granted it. This "power over" only becomes effective if the person who granted the power of attorney is no longer competent. Even then, the agent has a "fiduciary responsibility" to always act in the individual's best interests.

C. POWER OF ATTORNEY vs. GUARDIANSHIP/CONSERVATORSHIP

A power of attorney is different than guardianship or conservatorship in several ways.

- 1) Unlike a guardianship or conservatorship, a power of attorney does not require any court action or judicial involvement. It is simply an agreement prepared between individuals (typically, but not always, notarized). It can be revoked by the grantor at any time. A guardianship or conservatorship is granted by a court after a hearing, and it can only be revoked by another court action.
- 2) As noted above, a power of attorney must be voluntarily granted by an individual, when that individual is mentally competent. A guardianship or conservatorship granted because a person is found legally incompetent to act on his/her own behalf and needs someone to manage his/her affairs.
- 3) A guardianship or conservatorship puts someone else in charge of an individual's affairs. The guardian or conservator may overrule the individual's wishes. On the other hand, a power of attorney only gives an agent or attorney-in-fact the ability to act on behalf of an individual. It does not prevent an individual from continuing to make his or her own independent decisions (unless the individual has been found mentally incompetent – see Durable Power of Attorney description above). This is one reason why many reverse mortgage lenders may prefer the actual

borrower to receive counseling even if they have granted power of attorney to an agent.

D. HOW A POWER OF ATTORNEY RELATES TO HECMS

Fairly frequently, the person who initially contacts the counselor is not the homeowner; instead it is a son or daughter who says, "I have a power of attorney for my mother, and I want to get her a reverse mortgage". This raises a variety of legal/ethical issues.

If the borrower is legally competent and the loan application is being executed by an agent or attorney-in-fact, then the reverse mortgage counseling may be conducted with the agent. However, every effort should be made to include the borrower in the counseling session. Not only does the borrower need to understand what is being done in their name, but the lender may very well require counseling even if HUD does not.

If a borrower lacks legal competency and the loan application is being executed by a person holding a durable power of attorney, the reverse mortgage counseling must be conducted with the agent/attorney-in-fact.

HECMs FOR PROPERTIES HELD IN TRUST

A. INTRODUCTION

A trust is a legal entity created by a grantor for the benefit of designated beneficiaries. A trust is created when the owner of a property conveys the property into a trust for his/her own benefit or for the benefit of third parties (the beneficiaries). The property is then owned by the trust, rather than by the individual.

The trustee, which may be a person or an entity such as a bank, controls the trust and holds a fiduciary responsibility to manage the assets in the trust for the economic benefit of all the beneficiaries.

In some cases, the grantor, the trustee, and the beneficiary may all be the same person(s).

”Contingent” beneficiaries are those who receive no benefit from and have no control over the trust until some event, such as the death of the grantor, takes place.

Property held in the name of a **living trust** is eligible for a HECM. A living trust is created during the lifetime of a person (as opposed to a testamentary trust which is created upon a person’s death).

B. CONDITIONS FOR ORIGINATION IN THE NAME OF A TRUST

All beneficiaries of the trust must be eligible HECM borrowers (over age 62 and meet occupancy requirements) at the time of origination of the loan and until the loan is paid off. Contingent beneficiaries **DO NOT** have to be eligible HECM borrowers.

All beneficiaries of the trust (other than contingent beneficiaries) must attend HECM counseling prior to loan origination.

The trustee (usually, but not necessarily, a bank) and each borrower/beneficiary must sign the mortgage to create a valid HECM. The borrower/beneficiary must sign the Note and Loan Agreement. The lender may also require the signature of the trustee on the Loan Agreement. The trustee is not required to attend counseling.

The lender must be satisfied that the trust is valid and enforceable, and that it provides the lender with a mechanism to be notified of any change in occupancy or change in beneficiaries.

C. TRANSFER OF THE PROPERTY INTO AND FROM A TRUST

A borrower with a HECM may transfer a home into a trust without causing the HECM to become due and payable so long as the lender is notified and the lender determines that the trust meets all of the requirements that would have applied if the trust was in place at the time of the HECM closing.

If the trust is terminated during the duration of the HECM or the property is transferred out of the trust at some point, the loan will not become due and payable so long as one or more of the original borrowers/former beneficiaries who signed the Note and Loan Agreement continue to live in the property as their principal residence and remain on title.

LIFE ESTATES

A. INTRODUCTION

A life estate is the right to use or occupy real property for one's life. For instance, Mrs. Jones has put her home in her daughter's name, but retains a life estate. This means that she can live in and use the home as long as she wants to. When she dies, the life estate disappears, and her daughter will automatically have full ownership of the property. Her daughter's future interest in the property is called a "reversionary" or "remainder" interest.

Life estates may be used as an estate planning tool, to ensure that the property passes to a certain person without going through probate.

Another example might be in the case of a second marriage, to guarantee the new spouse the lifetime use of the property, while making sure it reverts to the children of the first marriage. For instance, Mr. Smith, who has three children, marries again after the death of his first wife. He wants to be sure that his second wife does not become homeless after his death, but he wants his three children to inherit the home eventually. He does this by granting his new wife a life estate in the property and leaving the remainder or reversionary interest to his kids. This allows her to live there as long as she wants, while his kids will get the house after she dies.

A HECM can be done on a property in which the borrower only holds a life estate (see Mortgagee Letter 97-15). The person or persons who have the future interest in the property will also have to execute the mortgage (but not the note or loan agreement). This means that the person who has the future interest can veto the reverse mortgage.

In the example above, after Mr. Smith's death, if his children choose not to cooperate, his second wife will be unable to get a HECM.

B. LIFE ESTATE AFTER A HECM HAS BEEN EXECUTED

A borrower who had a fee simple title to the property when the HECM was executed can later convey his/her interest in the property (transfer the property into someone else's name), as long as he/she retains a life estate (see ML 97-15).