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Weiss v. Wells Fargo

Use caution when acknowledging power of attorney documents

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By now, most real estate practitioners have heard about the recent decision of the United States Bankruptcy Appellate Panel for the First Circuit (BAP), issued in *Steven Weiss, Chapter 7 Trustee, v. Wells Fargo Bank, N.A.* In this appeal from a Bankruptcy Court ruling, the Chapter 7 Trustee successfully avoided a mortgage on the basis that it was not properly acknowledged.

Reactions to the decision have been varied. Some take it to mean that the acknowledgement forms in Executive Order No. 455 (04-04), setting forth Standards of Conduct for Notaries Public (the executive order), are no longer valid. Others worry that acknowledgements involving powers of attorney cannot be comfortably taken. In reality, although the BAP's decision reads the statutory acknowledgement requirements restrictively, devising a "fix" to its implications is relatively straightforward, and will not significantly change real estate practice in the commonwealth.

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First, the facts of the case: the debtors refinanced their mortgage with Wachovia Mortgage (now Wells Fargo Bank). They did not execute the mortgage themselves; instead, they executed a limited power of attorney designating Shannon Obringer as their attorney in fact, and Obringer executed the mortgage on their behalf.

The required acknowledgement, affixed to the mortgage immediately following and on the same page as the signature of Obringer, provided, in pertinent part: " … personally appeared Shawn G. Kelley and Annemarie Kelley by Shannon Obringer as attorney in fact proved to me through satisfactory evidence of identification which was/were [left blank] to be person(s) whose name(s) is/are signed on the preceding document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose."

What did the BAP find was wrong with the acknowledgement? The trustee first argued that, by stating that "Shawn G. Kelley and Annemarie Kelley by Shannon Obringer" appeared before the notary, it was unclear who actually appeared before the notary. The court dismissed this argument, stating that the use of the word "by" made it clear that Obringer personally appeared.

The BAP also rejected the trustee's second argument, that the failure to state the means of identification rendered the acknowledgement ineffective. In this regard, the court found that this requirement was contained only in the executive order, not in Chapter 183, Section 2, and therefore could not be a basis for invalidating a mortgage.

But the trustee's third argument prevailed. The trustee argued that the statute requires the acknowledgement to verify that the signature is being provided vol-

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untarily. Where a power of attorney is involved, the acknowledgement must make clear that the act was voluntary on the part of both the signer – the attorney – and the principal – the grantor. The BAP found that: "the preprinted form utilized by the notary combined with her failure to attend to the blank space and the inapplicable verbiage creates ambiguity whether the execution of the mortgage was the voluntary act of the debtors. … [W]e are left to speculate whether the voluntariness relates to the principals (the debtors) or to the attorney-in-fact (Obringer)."

AVOIDING FUTURE PROBLEMS

For the BAP, the form's several failings combined to create a defective acknowledgement. Referring to the signer as "Shawn G. Kelley and Annemarie Kelley by Shannon Obringer" created uncertainty regarding whom the phrase "signed it voluntarily for its stated purpose" referenced. That failure was compounded by the failure to complete the blank portion of the acknowledgement, the somewhat inartful use of the form's language, and the failure to designate one of "he/she/they" as having signed the document. So, what should we make of the decision, and how can practitioners avoid future problems?

First, acknowledgements should not be taken lightly. As noted by the BAP, Massachusetts law is clear that a defective acknowledgement fails to give record notice of a deed or mortgage to third parties. Defective acknowledgements – failure to identify the signatory (leaving the space blank) or reference to a person other than the grantor – have already been found to render a mortgage unenforceable against a bankruptcy trustee.

Second, the issue in the *Weiss* case relates solely to acknowledgements of signatures by powers of attorney. The confusion found by the BAP – whose free act and deed was being acknowledged – would not exist in the absence of a power of attorney arrangement.

Third, the common use of the acknowledgement (and other) forms in the executive order can continue without concern. In its decision, the BAP cited *McOuatt v. McOuatt*, 320 Mass. 410 (1946), as the seminal Massachusetts case concerning the validity of acknowledgements. The decision was cited for the principle that '[n]o particular words are necessary so long as they amount to an admission that [the grantor] has voluntarily and freely executed the instrument." Although the court also stated that failure to use of the statutory form (with the phrase "free act and deed") requires an *inquiry* into the sufficiency of the form used, it was careful not to reject use of the executive order acknowledgement.

Fourth, where a power of attorney is involved, care should be taken to adapt the acknowledgement to fit the facts of the execution, and *to identify the person whose signature is being acknowledged*. The acknowledgement form contained in the executive order is perfectly fine. It reads:

> On this ____ day of _____, 20__, before me, the undersigned notary public, personally appeared _____ (name of document signer), proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.
>
> (as partner for _____, a partnership)
> (as _____ for _____, a corporation)
> (as attorney in fact for _____, the principal)
> (as _____ for _____, (a) (the) _____)

The applicable parenthetical phrase should be added after "for its stated purpose," in all cases where the person appearing is acting on behalf of another – whether as an officer of an entity (corporation, general or limited partnership, etc.)e – or as attorney in fact. Thus, when Sarah Jones executes under a power of attorney for James Jefferson, the principal, the acknowledgement clause should read:

> On this 28th day of October, 2013, before me, the undersigned notary public, personally appeared Sarah Jones, proved to me through satisfactory evidence of identification, which **was a MA driver's license**, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that signed it voluntarily for its stated purpose, **as attorney in fact for James Jefferson, the principal.** [changes to standard form in bold]

While it seems unlikely that an acknowledgement in the form above would be invalidated because of the failure to cross out extraneous words, e.g. "he/she/they," the better practice is to remove all ambiguity by crossing out the inapplicable words.

It should also be acceptable to use the following after the words "signed it": it **as her free act and deed, and the free act and deed of James Jefferson, her principal**. This parallels other states' forms, where the voluntariness of the act of both the signer and the entity is stated.

In sum: Panic over the *Weiss* decision is unnecessary. Simply taking care with acknowledgements, particularly when the signer is acting in a representative capacity, will permit practitioners to continue using the executive order forms. ♦

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