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Military Law § 317-a--Survival of Power of Attorney after Death of Donor

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MILITARY LAW § 317-A—SURVIVAL OF POWER OF ATTORNEY AFTER DEATH OF DONOR.—The Soldiers' and Sailors' Civil Relief Act,¹ an enactment to meet the war emergency, was amended recently in relation to powers of attorney executed by persons in military service and by those engaged in war work outside the United States.² This amendment was recommended by the Law Revision Commission in recognition of the pressing need for such legislation as a result of the present emergency.³ The provisions of this Act may be divided into three essential parts: (1) persons for whom it operates, (2) situations in which it is applicable, and (3) formalities in its operation.

The donors of the powers of attorney within the scope of the amendment are expressly limited to two classes of persons: those in military service or entering military service after executing such powers of attorney and those in war work outside the United States. The Soldiers' and Sailors' Civil Relief Act clearly defines "persons in military service" and "military service" as to exclude any extensive problems arising under the first group of persons for whom the statute operates.⁴ The period in which the statute is effective is prescribed by the Military Law as "the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force."⁵ The more intricate problem

¹ N. Y. MILITARY LAW §§ 300 *et seq.*

² *Id.* § 317-a.

³ "Third parties decline to recognize the power of attorney because in many instances they are unable to determine whether the principal is alive. The donee of the power is in a precarious position. He may be subject to liability to the third party for breach of implied warranty of authority if he acts pursuant to the power, and it later develops that the donor of the power was not living at the time of such act. He may be subject to liability to the donor of the power for nonfeasance, if it later develops that the donor of the power was alive, and sustained damage by reason of the donee's inaction." N. Y. LEG. DOC. (1943) No. 65 (N); REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1943) 6.

⁴ N. Y. MILITARY LAW § 301, subs. 1, 2, 4, and 5.

1. The term "persons in military service" and the term "persons in the military service of the United States", shall include all citizens and residents of the state in the active military service of the United States.

2. The term "military service" means federal service on active duty with any branch of military service of the United States, including training or education under the supervision of the United States, after induction into the military service.

5. The term "person" when used herein with reference to the holder of any right alleged to exist against a person in military service, or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

For similar provisions in the Federal Soldiers' and Sailors' Civil Relief Act, see 50 U. S. C. A. App. § 511. Cf. *Lang v. Lang*, 176 Misc. 213, 25 N. Y. S. (2d) 775 (1941) in which the court stated that a retired army officer is not entitled to the benefits of the Federal Soldiers' and Sailors' Civil Relief Act.

⁵ N. Y. MILITARY LAW § 301, subd. 4.

The Soldiers' and Sailors' Civil Relief Act is to be in force until the war

arises in the attempt to construe what is meant by persons engaging in war work. The Law Revision Commission defines this group as "civilians performing war work of various kinds in territory outside the United States."⁶ It may be assumed that engineers, laborers, theatrical groups under government supervision, and the Red Cross performing duties outside the United States are included within the provisions of the power of attorney Act. The Act specifically indicates that this work must be carried out "by permission, assignment, or direction" of a department or official of the United States government.⁷

This amendment declares that a power of attorney shall not be rendered ineffective by reason of the death of the donor of the power alone, provided that the third party had no knowledge of the death.⁸ The donee of the power is protected by a further provision that he "shall not be liable for such act to a third party or to the representatives of the donor by reason solely of the death of the donor, provided that at the time of such act he had no knowledge or actual notice of the death of the donor."⁹ It may be readily seen that were this protection not afforded the donee, he might be held liable on breach of implied warranty of authority to the third party or on the theory of indemnification to the deceased's representatives.¹⁰ The liability that may accrue in favor of the estate of the deceased or a third party is one that had to be considered and guarded against in order to make the statute an operative one.

is terminated and six months thereafter. N. Y. MILITARY LAW § 322.

While there seems to be an apparent conflict between § 301, providing for the termination of the Soldiers' and Sailors' Civil Relief Act, which states, "It shall terminate with . . . death . . ." and § 317-a, an amendment to the Soldiers' and Sailors' Civil Relief Act, the provisions of which are applicable only after the death of one in military service, the solution may be found in § 322 of the Military Law, providing, "that wherever in any section or provision of this act a proceeding, remedy, privilege, stay, limitation, accounting or other transaction has been authorized or provided with respect to military service performed prior to the date herein fixed for the termination of this act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary for the exercise or enjoyment of such proceeding, remedy, privilege, stay, limitation, accounting or other transaction."

For the law applicable to missing persons and *prima facie* proof of death and military service, see § 318 of the Military Law.

⁶ N. Y. LEG. DOC. (1943) No. 65 (N); REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1943) 21.

⁷ N. Y. MILITARY LAW § 317-a, subd. 2(b).

⁸ *Id.* subd. 1.

A power of attorney to which this section applies shall not be deemed ineffective, by reason solely of the death of the donor of the power, as to a third party dealing in good faith with the donee of the power, provided that the third party, at the time of such dealing, had no knowledge or actual notice of the death of the donor.

⁹ N. Y. MILITARY LAW § 317-a, subd. 1.

¹⁰ N. Y. LEG. DOC. (1943) No. 65 (N); REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1943) 17.

The provisions for the execution of a power of attorney specify that the instrument creating the power shall be subscribed by the donor and acknowledged or proved in the manner necessary for the recording of real property.¹¹ Since under the statute, the donee can bind the estate of the deceased donor, it is advisable that the instrument conveying the power of attorney lend itself to proof as an authentic document.¹²

The effect of death of the principal upon the agent is well-settled at common law. Since a power of attorney is a form of agency, the legal consequences of the creation of an agency are equally applicable to the appointment of an attorney in fact.¹³ Death of the principal results in an instantaneous termination of the agency by operation of law.¹⁴ One may thereby deduce that the same rule of law is applied to a power of attorney. Courts abiding by the common law cling to the doctrine that an agent can perform only such duties as

¹¹ N. Y. MILITARY LAW § 317-a, subd. 4.

An instrument containing a power of attorney to which this section applies shall be signed by the party executing it, and shall be acknowledged or proved in the manner prescribed by law to entitle conveyances of real property to be recorded.

(a) § 300 of the Real Property Law prescribes possible methods of acknowledgments by persons in the military or the naval forces of the United States.

(b) § 298 of the Real Property Law provides for the acknowledgment of conveyances of real property generally.

¹² N. Y. LEG. DOC. (1943) No. 65 (N); REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1943) 19.

¹³ "All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. Agent, is the general term which includes brokers, factors, consignees, shipmasters, and all other classes of agents. By attorneys in fact, are meant persons who are acting under a special power, created by deed." *Porter v. Hermann*, 8 Cal. 619, 625 (1857); *cf. Treat v. Tolman*, 113 Fed. 892 (C. C. A. 2d, 1902); 2 C. J. 421.

¹⁴ "The rule is well settled by authority that the power of an agent to collect and receive payment of rents falling due to his principal, when such power is not coupled with an interest, terminates and ceases upon the death of the principal, and that payment made thereafter to the agent does not bind the estate of the principal, though the payment be made in ignorance of the principal's death. The rule seems to have originated in the presumption that those who deal with an agent knowingly assume the risk that his authority may be terminated by death without notice to them." *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784 (1893). *Accord, Crowe v. Tricky*, 204 U. S. 228, 51 L. ed. 454 (1906); *Long v. Thayer*, 150 U. S. 520, 37 L. ed. 1167 (1893); *Hoffman v. Union Dime Savings Institution*, 109 App. Div. 24, 95 N. Y. Supp. 1045 (1st Dep't 1905); *Goetzman v. Danitz*, 116 Misc. 140, 189 N. Y. Supp. 788 (1921); *Streit v. Wilkerson*, 186 Ala. 88, 65 So. 164 (1914); *Jones v. Jones*, 101 Me. 447, 64 Atl. 815 (1906); *Wash v. Wash*, 189 Mo. 352, 87 S. W. 993 (1905); *see* 1 MECHER, AGENCY (2d ed.) § 665.

Courts and authorities have favored this rule even where the agency was designated as irrevocable by the principal.

"The rule that a power of attorney is revoked by the death of the principal is the same though it is specifically provided that the power of attorney shall not be so revoked." *Ann. Cas.* 1917 E 384. *Cf. Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235 (1885).

may be effected by his principal, and that the death of the principal precludes not only his own acts but also those of one who is merely his substitute.¹⁵ The one exception recognized by common law is the continuance after the death of the principal of an agency coupled with an interest.¹⁶

The civil law, on the other hand, has adopted a more lenient attitude towards the effect of death of the principal upon the agent. Death of the donor or principal does not revoke the agency if third parties dealing with the agent in good faith have no knowledge of the death.¹⁷ A further requirement for the recognized validity of

¹⁵ "The reason usually given for the rule that death revokes a power is that, as the act authorized by the power is to be done for and in the name of the principal, it cannot survive the power of the principal to act, which is terminated by his death." *Weaver v. Richards*, 144 Mich. 395, 108 N. W. 382, 389 (1906). *Accord*, *Galt v. Galloway*, 4 Pet. 332 (U. S. 1830); *Hunt v. Rousmanier*, 8 Wheat. 174 (U. S. 1823); *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25 (1822); *Smith v. Smith*, 46 N. C. 135, 59 Am. Dec. 581 (1853); *Jenkins v. Atkins*, 1 Humph. 294, 34 Am. Dec. 648 (Tenn. 1839); *Weber v. Bridgman*, 113 N. Y. 600, 21 N. E. 985 (1889); see 2 KENT, COMM. (14th ed.) 646.

In *Farmers' Loan and Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784 (1893), the court intimates the necessity of legislative sanction to procure any change in the law.

¹⁶ The court, in *Hunt v. Rousmanier*, 8 Wheat. 174, 203 (U. S. 1823), states, "This general rule that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest', it survives the person giving it, and may be executed after his death. . . . We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing."

The honoring of a check by a bank after the death of the drawer has been held valid payment as to excuse the bank from further liability. See *Glennan v. Rochester Trust & Safe Deposit Co.*, 209 N. Y. 12 (1913); Note, *Death of the Drawer of a Check* (1903) 17 HARV. L. REV. 104; Note, *Payment of a Bill of Exchange or Check by the Drawee After the Drawer's Death* (1901) 14 HARV. L. REV. 588.

¹⁷ Some states have incorporated this rule into their statutes.

CALIFORNIA: Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by:

1. Its revocation by the principal;
2. His death; or,
3. His incapacity to contract.

CAL. CODE CIV. PROC. (Deering, 1941) § 2356; see *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906 (1891); *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. 706 (1886).

LOUISIANA: *Death or cessation of rights of principal—Acts of agent in ignorance thereof—Validity.* If the attorney, being ignorant of the death or of the cessation of the rights of his principal, should continue under his power of attorney, the transactions done by him, during this state of ignorance, are considered as valid. LA. CIV. CODE ANN. (Dart. 1932), art. 3032.

Third persons acting in good faith—Rights. In the cases above enumerated, the engagements of the agent are carried into effect in favor of third persons acting in good faith. LA. CIV. CODE ANN. (Dart. 1932) art. 3033.

the acts of the agent after the principal's death is that the acts to be performed by the agent need not be effected in the name of the

MARYLAND: All payments of money, transfers of property or other dealings made or had to or with any person acting under a power of attorney, or other agency duly executed or created by any person within this State, which would be binding upon the party giving such power of attorney or agency if the same was in full force and unrevoked at the time of such payment, transfer, or other dealings, shall be equally binding and obligatory upon the representatives or other assignees of such party, although at the time aforesaid said party may be dead or may have assigned his interest in such money, property or dealings; provided, that the person paying, transferring or having such dealings with the person acting under such power of attorney or agency had not at the time notice of the death of the party giving such power or creating such agency, or of the fact of the assignment aforesaid. MD. ANN. CODE (Flack, 1939) art. 10, § 41.

MONTANA: Essentially the same as that of California. MONT. REV. CODE ANN. (1935) § 7975.

NORTH DAKOTA: Essentially the same as that of California. N. D. COMP. LAWS ANN. (1913) § 6366.

PENNSYLVANIA: *Powers valid until notice of revocation.* No sale of lands, tenements and hereditaments made by virtue of such power or powers of attorney or agency as aforesaid shall be good and effectual unless such sale be made and executed while such power is in force; and all such powers shall be accounted, deemed and taken to be in force, until the attorney or agent shall have due notice of a countermand, revocation, or death of the constituent. PA. STAT. ANN. (Purdon, 1930, Supp. 1942) tit. 21, § 304.

See *Cassidy v. McKenzie*, 4 Watts & S. 282, 39 Am. Dec. 76, 78 (Pa. 1842), in which the court states, "Thus, if a man is the notorious agent for another to collect debts, it is but reasonable that debtors should be protected in payments to the agent until they are informed that the agency has terminated. But this, it is said, is only true of an agency terminated by express revocation, and does not hold, of an implied revocation by the death of the principal. It would puzzle the most acute man to give any reason why it should be a mispayment when revoked by death, and a good payment when expressly revoked by the party in his lifetime. Why not place it on the rational ground, that although the conveyance would be bad at law yet it would be good in equity, when made *bona fide* without any notice whatever of the death of the principal?"

SOUTH CAROLINA: *Act of Agent Good though Principal be Dead.* If any agent, constituted by power of attorney or other authority, shall do any act for his principal which would be lawful if such principal were living, the same shall be valid and binding on the estate of said principal, although he or she may have died before such act was done: Provided, the party treating with such agent dealt *bona fide*, not knowing at the time of the doing of such act that such principal was dead. S. C. CODE (1942) § 7018.

SOUTH DAKOTA: Essentially the same as that of California. S. D. CODE (1939) § 3.0109.

A few states have followed the civil law without the aid of statute. See *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212 (1858); *Dick v. Page and Bacon*, 17 Mo. 234, 57 Am. Dec. 267 (1852); *Ish v. Crane*, 8 Ohio St. 521 (1858); *Catlin v. Reed*, 141 Okla. 14, 283 Pac. 549 (1929).

"Undoubtedly, the rule is that the death of the principal instantly terminates the agency. But it by no means follows that all dealings with the agent thereafter are absolutely void. Where, in good faith, one deals with an agent within his apparent authority, in ignorance of the death of the principal, the

principal.¹⁸ A few jurisdictions have adopted the civil law in recognition of a need for the modification of the common law. However, the Law Revision Commission, after extensive research of the New York rule which strictly conforms to the common law, saw no need for the recommendation of any change in the then existing law in New York.¹⁹ The Commission stated in its report that it has recommended the addition of § 317-a to the Military Law only as an emergency measure.²⁰ This sentiment seems consistent with that of the legislature in that the new power of attorney statute is to be in effect only for the duration of the war and six months thereafter. Whether this may be an innovation to modify the common law towards closer conformity with the civil law is questionable in view of the strong opinion to the contrary as expressed by the Law Revision Commission.

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heirs and representatives of the latter may be bound, in case the act to be done is not required to be performed in the name of the principal." Deweese v. Muff, 57 Neb. 17, 77 N. W. 361 (1898).

¹⁸ See *Dick v. Page and Bacon*, 17 Mo. 234, 57 Am. Dec. 267 (1852). In *Ish v. Crane*, the court asserts, "I apprehend, however, that the weight of authorities upon this subject will be found to go no further than to hold absolutely void acts of the agent, after the death of his principal and without notice, which must necessarily be done in the name of the principal."

¹⁹ N. Y. LEG. DOC. (1939) No. 65 (L); REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1939) 687 *passim*. As a conclusion of their research, the Law Revision Commission stated, "It is a question of policy whether to protect the third party who deals with the agent, or to protect the estate. In view of the small number of cases in which the third party has lost, it is difficult to determine which side can usually better afford the loss. Then, too, there is a question as to how long it is desirable to tie up the estate of the principal, where performance of the principal's side of the contract may require a long period."

²⁰ N. Y. LEG. DOC. (1943) No. 65 (N); REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION (1943) 6.