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COMMERCE AND TRADE

Creation and Nature of Agency Relationship: Provide for Grants of Conditional Power of Attorney

CODE SECTION:	O.C.G.A. § 10-6-6 (new)
BILL NUMBER:	SB 171
ACT NUMBER:	507
SUMMARY:	The Act clarifies the law relating to the validity of granting a conditional power of attorney. Such grants are valid if they are made in writing and if they provide for one or more persons, as designated by the principal, to determine by written declaration that the event or contingency which is to give rise to the agency relationship has occurred. The Act further provides that third parties may act in reliance on the designee's written declaration without liability to the principal, regardless of whether the specified event has actually occurred.
EFFECTIVE DATE:	July 1, 1993

History

Powers of attorney are quite common and are governed in Georgia by chapter 6 of title 10 of the Official Code of Georgia Annotated.[1] However, Georgia statutory law was previously silent on the validity and requirements of creating a conditional power of attorney. In addition, "[c]urrent Georgia law authorizing durable powers of attorney . . . does not specifically validate conditional powers of attorney."[2] A survey of Atlanta-area attorneys revealed that while fiduciary attorneys frequently drafted conditional powers of attorney, third parties were often reluctant to rely on such relationships.[3] The State Bar of Georgia urged introduction of SB 171 in order to give

1. O.C.G.A. §§ 10-6-1 to -121 (Supp. 1993). More recently, Georgia has established a durable power of attorney to grant powers to make health care decisions on behalf of those who are ill or incapacitated. *See id.* §§ 31-36-1 to -13 (1991).

2. Proposal by Thomas E. Jones, Jr., Chairman of Legislation Committee, Fiduciary Law Section, State Bar of Georgia [hereinafter Jones Proposal].

3. *Id.* The proposal to the State Bar which recommended that it adopt SB 171 in its entirety further reveals that the proposal is identical to HB 1518 which was introduced last term. *Id.* at 1.

banks and other third parties which commonly rely on conditional powers of attorney some assurance and a feeling of legal security.[4]

SB 171

The Act amends Code section 10-6-1 relating to the creation and nature of an agency relationship by adding the new Code section 10-6-6 dealing with the creation of a conditional power of attorney.[5] As introduced by its proponents, this addition is an attempt to bring clarity to the laws relating to the validity of the creation of such power of attorney by setting forth specific requirements.[6]

The Act begins by defining the term "conditional power of attorney" as "a written power of attorney stating that it becomes effective at a specified future time or on the occurrence of a specified event or contingency, including, but not limited to, the subsequent incapacity of the principal."[7] The second subsection sets forth steps the principal must take to create a valid conditional power of attorney. The principal must first designate one or more persons who have the power to determine "conclusively" that the event or contingency giving rise to the agency relationship has indeed occurred.[8] The principal may designate the attorney in fact to perform this function.[9] The individual or joint designees must determine that the specified event or contingency has taken place only "by a written declaration" under penalty of perjury.[10]

Subsection (c) states that the power of attorney becomes effective when the person or persons described in subsection (b) "execute" the written declaration therein described.[11] In addition, this subsection allows for "any person [to] act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred."[12]

The final subsections of the Act apply this new Code section to powers of attorney executed before, on, or after July 1, 1993, as long as the power of attorney contains the designation described in subsection (b).[13] Furthermore, "Subsections (b) and (c) . . . do not provide the exclusive method by which a power of attorney may be limited to take

4. Telephone Interview with Thomas M. Boller, Lobbyist, State Bar of Georgia (June 1, 1993).
5. O.C.G.A. § 10-6-6 (Supp. 1993).
6. Jones Proposal, *supra* note 2, at 2.
7. O.C.G.A. § 10-6-6(a) (Supp. 1993).
8. *Id.* § 10-6-6(b) (Supp. 1993).
9. *Id.*
10. *Id.*
11. *Id.* § 10-6-6(c) (Supp. 1993).
12. *Id.*
13. *Id.* § 10-6-6(d) (Supp. 1993).

effect" where the grant of that power is contingent upon a specified event or occurrence.[14]

The bill was passed as introduced in the Senate.[15] However, some areas of the Act could be sources of litigation. For instance, the exact requirements of a "written declaration" or what type of document will suffice as such is not addressed by the Act.[16] More significantly, ethical considerations arise where an attorney who has been designated to issue the written declaration is also the attorney in fact.[17]

Finally, the reliance by "any *person* . . . without liability"[18] may give rise to a defense to malpractice and other claims of liability where, for example, the event or contingency has not in fact taken place but the attorney in fact or some other fiduciary relies on the declaration to the detriment of the principal.[19] It is important to note, however, that this Code section does not provide the exclusive method for creating a conditional power of attorney but is merely a statutory cornerstone.[20] Such powers created which are not governed by Code section 10-6-6, although not prone to these potential problems, nonetheless may be difficult to defend as valid without the statutory support provided under this Code section.[21]

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14. *Id.* § 10-6-6(e) (Supp. 1993).

15. Actually, the bill was passed as proposed by the State Bar of Georgia. Jones Proposal, *supra* note 2.

16. Although the power must be in writing, the Act requires no specific formalities with reference to format, Telephone Interview with Thomas E. Jones, Jr., Chairman of Fiduciary Law Committee, State Bar of Georgia (June 2, 1993) [hereinafter Jones Interview]. Mr. Jones explains the written requirement by analogy with what is commonly known as the "Equal Dignity Rule," which requires that if an attorney executes an instrument under seal in his capacity as an agent, then any power of attorney relating to that instrument must also be under seal. *Id.*

17. *Id.* Although he admits that conflict may arise, Mr. Jones adds that such potential for abuse is no greater than that of any other fiduciary relationship, since the principal must always rely on the good faith of the agent. *Id.* If the principal is uncomfortable with the chosen agent, he may always appoint someone else. *Id.*

18. O.C.G.A. § 10-6-6(c) (Supp. 1993).

19. Although possible, such language is crucial to effectuate the purpose of the Act, which was to give reassurance to third parties who rely on conditional powers of attorney. Jones Interview, *supra* note 16; Jones Proposal, *supra* note 2. For an example of the ethical considerations involved in such a situation, see *Johnson v. First Nat. Bank of Rome*, 319 S.E.2d 440 (Ga. 1984).

20. O.C.G.A. § 10-6-6(e) (Supp. 1993); Jones Interview, *supra* note 16.

21. Jones Interview, *supra* note 16.