

1983 WL 182054 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 15, 1983

*1 The Honorable Robert N. King
Register of Mesne Conveyances
County of Charleston
Post Office Box 726
Charleston, South Carolina 29402

Dear Mr. King:

You have asked this office whether powers of attorney attached to a mortgage will satisfy recording requirements in the absence of any separate indexing. Based on the following discussion, this office believes that some doubt exists as to your obligation to separately index powers of attorney attached to a mortgage; however, as a precautionary measure, you may wish to continue your practice of separately indexing such powers of attorney.

Generally, a power of attorney is a document 'in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal.' 3 Am. Jur. 2d, Agency, § 23; [Bank of America, Nat. Trust & Sav. Assn. v. Horowitz](#), 248 A. 2d 446, 448, 104 N.J. Super. 35 (1968). The purpose of the document is to 'evidence the authority of the agent to third parties with whom the agent deals.' 3 Am. Jur. 2d, Agency, § 23.

[Section 30-9-30, Code of Laws of South Carolina \(1976\)](#), requires that 'all conveyances, . . . contracts and papers relating to real and personal property be filed in the clerk of court and register of mesne conveyances offices.' The act of filing means merely 'delivery to the proper official.' [State v. Noren](#), 621 P. 2d 1224 (Utah 1980). It would be questionable whether this statute would apply in the instant case, as a power of attorney is not a paper applicable to real or personal property but is instead a contract of sorts creating a fiduciary relationship between two parties. Seavey, Agency, § 21(A) (1964). The mortgage itself to which the powers of attorney are attached obviously would be presented for filing pursuant to this statute.

By Section 30-9-40, the register of mesne conveyances is directed to enter upon the proper indexes any 'deed, mortgage or other written instrument of the character mentioned in Section 30-7-10.' Section 30-7-10 mentions conveyances, encumbrances, marriage settlements, leases, contracts (between landlord and tenant), liens, assignments and 'generally all instruments required by law to be recorded in the office of the register of mesne conveyances or clerk of court in those counties.' Again, while mortgages would be included in those documents required to be indexed, there does not appear to be any provision requiring documents of the nature of a power of attorney to be filed, recorded, or indexes. [See above](#).¹

Many jurisdictions do not have a requirement of recordation of powers of attorney, and in these states, the validity of a power of attorney is not affected by non-recordation. [Huselton v. Liggett](#), 110 Kan. 145, 202 p. 972 (1921). These states have reasoned that since the purpose of the recording acts is mainly to give notice of alienation of estates and encumbrances on them, that evidence of title, shown partly by powers of attorney, is not necessary. Georgia's Supreme Court, in addressing this issue, stated: *2 'A power of attorney, under which a deed is made, is a muniment of title, and may be recorded along with the deed, but its record is not necessary to the validity of the record of the deed.' The power of attorney is 'the authority for making [the] conveyance, but it is not the conveyance; nor, strictly speaking, is it a part of the conveyance.'

[Johnson v. Johnson](#), 184 Ga. 783, 193 S.E. 345, 346 (1937).

South Carolina's Supreme Court has addressed a situation which appears to be analogous to the instant cases, whereby an assignment was attached to a mortgage, in [Mills v. Killian](#), 273 S.C. 66, 254 S.E. 2d 556 (1979). The Court there held that an assignment is 'a part of the record of the recorded mortgage,' and does not require separate indexing. The Court also found that since an attorney could discover the assignment with 'the exercise of due diligence,' then the requirements of Section 30-9-40 have been satisfied. According to this rationale, it stands to reason that if an assignment is 'essentially a part of the mortgage for purposes of recording,' then powers of attorney, similarly attached to and made a part of a mortgage, should also be considered a part of the record of the recorded mortgage, since the usefulness of the powers of attorney is solely to show validity of the mortgage transaction.²

Notwithstanding the above discussion, absent any express authority sanctioning the discontinuation of such practices and in light of possible reliance on previous practices with regard to indexing, we would advise as a matter of precaution that the present practice of separately indexing powers of attorney should be continued until such time as express law indicates otherwise. Also, legislative or judicial clarification of the foregoing statutes may be deemed advisable.

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

- 1 However, [Section 30-9-30](#) does make filing 'of papers relating to real and personal property . . . notice to all persons . . .' Even if this statute were viewed as a recording statute, as opposed to one relating to filing, it would still be somewhat tenuous to conclude a power of attorney was a 'paper relating to real or personal property.'
- 2 One factor which may distinguish the Mills case from the one you have presented is the difference between an assignment and a power of attorney. An 'assignment' is the transfer of an interest, 4 A Words and Phrases, 'Assignment,' whereas a 'power of attorney' is merely the designation of another as agent. 33 Words and Phrases, 'Power of Attorney.' Moreover, as noted earlier, many courts view a power of attorney as not a part of the conveyance, as was by statute (§ 30-7-40) the assignment in Mills. Johnson v. Johnson, supra. Nevertheless, we can find no statute expressly requiring the separate recording or indexing of powers of attorney.

1983 WL 182054 (S.C.A.G.)