

99-047

**CIVIL REMEDIES AND PROCEDURE: JUDGMENTS AND DECREES GENERALLY.**

**Only debtor, attorney(s), or other person(s) named in confessed judgment note may confess judgment in circuit court clerk's office. Attorney-in-fact specifically named in note in issue is authorized to confess judgment pursuant to note; individuals named in substitute power of attorney are not so authorized.**

The Honorable John T. Frey  
Clerk, Circuit Court of Fairfax County  
November 23, 1999

You ask whether an attorney-in-fact named in a confessed judgment note may appoint another party to act in his stead by executing a substitute power of attorney in which he names such party.

You relate that a debtor has executed a confessed judgment note. You also relate that, in accord with § 8.01-435 of the *Code of Virginia*, the note names a specific individual as attorney-in-fact. You state that this attorney-in-fact had been the general counsel to the creditor at the time he was so named. You further state that this individual no longer is employed by the creditor and has moved out-of-state. Finally, you advise that he has executed a substitute power of attorney, in which he appoints three attorneys from the law firm which currently represents the creditor to act in his stead.

Section 8.01-435 provides:

Confession of judgment under the provisions of § 8.01-432<sup>[1]</sup> may be made either by the debtor himself or by his duly constituted attorney-in-fact, acting under and by virtue of a power of attorney duly executed and acknowledged by him ..., provided, however, that any power of attorney incorporated in, and made part of, any note or bond authorizing the confession of judgment thereon against the makers and endorsers in the event of default in the payment thereof at maturity need not be acknowledged, but *shall specifically name therein the attorney or attorneys or other person or persons authorized to confess such judgment and the clerk's office in which the judgment is to be confessed.*  
[Emphasis added.]

A principle of statutory construction provides that language of a statute that is plain should be given its clear and unambiguous meaning.<sup>2</sup> Additionally, it is axiomatic that the use of the term "shall" in a statute indicates that the General Assembly intended its terms to be mandatory.<sup>3</sup> Furthermore, the primary goal of statutory construction is to ascertain and give effect to the intent of the legislature.<sup>4</sup>

Section 8.01-435 provides that any power of attorney incorporated in, and made part of, a note authorizing the confession of judgment shall specifically name the attorney(s) or other person(s) authorized to confess judgment in the note. A 1986 opinion of the Attorney General concludes that "the purpose of this provision is to limit the former common practice of creditors to take from the debtor a general power of attorney which authorized any attorney to confess judgment in any court."<sup>5</sup> Taking this purpose into account, coupled with the clear and mandatory language of the statute, it is my opinion that only the debtor or the person(s)<sup>6</sup> named in the note itself as the attorney-in-fact is eligible to confess the judgment.

Furthermore, the statutes regarding judgments confessed in the clerk's office "reflect a general concern with the possible abuse of confessed judgments, particularly those taken pursuant to a power of attorney waiving the right to due process."<sup>7</sup> Moreover, "[g]iven the considerable authority that is created by the power to confess judgment, [§ 8.01-435] should be strictly construed to prevent abuse."<sup>8</sup> Accordingly, only the attorney-in-fact named in the note is authorized to confess judgment under § 8.01-435.

Based on the above, it is my opinion that whereas the attorney-in-fact specifically named in the note in issue is authorized to confess judgment pursuant to the note, the individuals named in a substitute power of attorney executed by him are not so authorized.

<sup>1</sup>Section 8.01-432 provides for the confession of judgments in the clerk's office of a circuit court.

<sup>2</sup>*Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); 1996 Op. Va. Att'y Gen. 113, 113.

<sup>3</sup>See Op. Va. Att'y Gen.: 1998 at 102, 103; 1994 at 64, 68; 1986-1987 at 300, 300, and opinions cited therein.

<sup>4</sup>See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

<sup>5</sup>1986-1987 Op. Va. Att'y Gen. 49, 50.

<sup>6</sup>*Id.* (concluding that law firm may be specifically named in note as attorney-in-fact).

<sup>7</sup>Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 14.8, at 626 (3d ed. 1998); see also 1997 Op. Va. Att'y Gen. 24, 27 n.9.

<sup>8</sup>*Benton Land Fund v. NVMercure Ltd.*, 849 F. Supp. 1123, 1126-27 (E.D. Va. 1994).