

Is that Interest Coupled or Naked?

“You keep using that word. I do not think it means what you think it means.”

-Inigo Montoya

Criticism of legalese is nothing new. I admit, *inter alia*, that I enjoy a good Latin phrase or two, and I may use a large word where a diminutive one will suffice, but I just can't use a phrase that I don't fully understand, no matter how insignificant it may seem. When I first came across “coupled with an interest,” I spun my wheels for quite a while until I finally confirmed that the template I was using would not work, as written, because my client's interest was, in fact, not coupled with anything. It was “naked.”

What exactly does “coupled with an interest” mean? What's the interest? What's it coupled with? Does it matter?

“Coupled with an interest” is shorthand for a larger concept regarding the irrevocability of an agent's power when the agent's authority is “coupled with an interest.” But for the minimalist, “coupled with an interest” is unnecessary. It has no more legal effect than exclaiming “I *strenuously* object” will convince a judge to sustain an objection. “Coupled with an interest” merely states a legal fact, rightly or wrongly. Neither including it nor omitting it will create or eliminate an interest or otherwise affect the principal-agent relationship. If you misuse the phrase, the worst you will probably do is to misstate what is likely an immaterial fact that no one else will notice—except those in the know.

However, if you really can't bring yourself to delete a phrase that has been passed down through generations of attorneys gone by, you should know what it means and why it matters.

As mentioned above, “coupled with an interest” describes the nature of an agent's power or authority in a principal-agent relationship. Ordinarily, an agent's authority terminates upon the death of the principal, but if the agent's authority is “coupled with an interest,” the agent's authority is irrevocable, even upon the principal's death. See *Sturgill v. Virginia Citizens Bank*, 223 Va. 394, 398, 291 S.E.2d 207, 209 (1982) (“[D]eath of a principal terminates an agent's authority, unless that authority is coupled with an interest.”). See also *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 696 (1944) (Rutledge, J., dissenting) (“In all normal agency relations, except those ‘coupled with an interest,’ the principal can revoke them by exercising the agency himself.”).

What constitutes a power coupled with an interest?

To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power, must be vested in the person to whom the agency, or power, is given, so that he may deal with it in his own



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name; such that, in the event of the principal's death, the authority could be exercised in the name of the agent.

Casey v. Walker & Mosby, 122 Va. 465, 468-469, 95 S.E. 434, 435 (1917) (citation and internal quotation marks omitted). For example, in *Mills v. Mills' Ex'rs*, 69 Va. 442, 1877 Va. LEXIS 80; 28 Gratt. 442 (1877), a testator's will established several trusts naming the executors as trustees and stated that "[a]ll the real estate which I may leave at my death, not otherwise specially disposed of, I desire my executors shall sell in such manner and on such terms as they may deem most advantageous." *Id.* at *489, **74. The Court ruled that "[t]he executors had not a mere naked power of sale, but a power coupled with an interest The estate did not devolve on the heirs for an instant, either at law or in equity, but enured at once to the executors for the purposes of the will." *Id.* at *460, **30 (emphasis added).

However, not all interests of an agent constitute a power that is coupled with an interest. "There must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority. So an interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation." *Casey v. Walker & Mosby*, 122 Va. 465, 469 (1917) (citation and internal quotation marks omitted). For example, a real estate agent may have an interest in the commission on the proceeds of the sale of property, but his authority to act on behalf of a seller is revocable and is not coupled with an interest. He has no interest in the property being sold. For a statutory example, see Virginia Code § 13.1-663(D), which identifies examples of proxy appointments that are "coupled with an interest."

If you are still not convinced to abandon this language, then consider the use of wording that says what you mean and gives appropriate guidance to the reader. For example: *This [document] vests [title/or other interest] [to/in the subject property] in [the agent] and is, therefore, irrevocable and will survive [the principal's] death or incompetence*; or for the more verbose, "*[The principal] acknowledges that this power of attorney is coupled with an interest, in that the agent has an interest in [refer to whatever is the subject of the power], and that as a result, in addition to any other consequences under law, this power is irrevocable and will survive [the principal's] death or incompetence,*" (www.adamsdrafting.com/coupled-with-an-interest).

Thanks to Ken Adams and his blog at adamsdrafting.com/coupled-with-an-interest, which informed this article. I wish I had read his blog before plowing into the law books and case opinions.