

POWERS OF ATTORNEY AND ESTATES

- Some of the Basics –

POWERS OF ATTORNEY:

A Power of Attorney is an instrument in writing whereby one person (the Donor) appoints another (the Attorney) as his/her attorney and confers upon the Attorney the authority to perform certain specified acts or kinds of acts on behalf of the Donor. The Donor is the person who grants the Power of Attorney. The Attorney is the person who exercises the Power of Attorney.

Ontario recognizes three different types of written authorization for someone to sign and/or act on another's behalf:

- A Power of Attorney For Personal Care. This type of Power of Attorney is provided for in the *Substitute Decisions Act*, SO 1992 to deal with medical and care decisions.
- A Continuing Power of Attorney for Property, which is also provided for in the *Substitute Decisions Act*. This document is designed to continue in force even during a subsequent incapacity of the Donor.
- A Power of Attorney under the *Powers of Attorney Act*, RSO 1990. This is the older form of Power of Attorney, which was most often used prior to the enactment of the *Substitute Decisions Act*. It generally deals with property and other matters. It is not often used these days because it does not continue in force during a subsequent incapacity of the Donor.

Although many of these Powers of Attorney are of a general nature; they can be given for a specific purpose and time such as for dealing with a particular property. The Continuing Power of Attorney for Property is the document now most often used when parties wish to deal with property, since it continues despite a subsequent incapacity of the Donor.

There are statutory provisions that govern the ability to give such a power; when it becomes effective; how it can be revoked, who may act as the Attorney; any limitations in the power; the obligations of the Attorney; and other significant legal issues. For these reasons it is important that the Donor seek legal counsel when creating a Power of Attorney.

If the Continuing Power of Attorney for Property is to be used to deal with real estate matters, it must be registered in the registry office. The name of the Donor must be shown, as well as the name of the Attorney.

Any document that is signed by the Attorney, on behalf of the Donor, should be shown to be in the name of the Donor. When the Attorney signs a document pursuant to the Power of Attorney, that document should state that the Donor was of age when the Power of Attorney was signed and that the Power of Attorney is in effect.

Example:

Susan Smith has been appointed the Attorney for William Smith to sell William Smith's home.

The listing agreement, agreement of purchase and sale, deed, etc. would show "William Smith" as the seller.

However, the documents would be signed by Susan Smith, William Smith's Attorney, as follows:

Susan Smith,
as Attorney for William Smith

The documents would also contain a recital, such as the following:

Continuing Power of Attorney for Property (or Power of Attorney) registered January 1, 2001 as Instrument No. LT 123456. To the best of my knowledge and belief the Continuing Power of Attorney for Property (or Power of Attorney) is still in full force and effect and the principal was at least 18 years of age when it was executed.

An Attorney can only sign for the Donor who granted the Power of Attorney. The Attorney cannot sign documents for other parties, such as the Donor's spouse or the Donor's co-owner. Separate Powers of Attorney for those other parties would be necessary in that situation.

Caution:

The Attorney has legal obligations, duties and liabilities and it is therefore not recommended that REALTORS act as Attorneys for their clients. One concern is whether the RECO errors and omissions insurance program would cover a REALTOR for any actions as an Attorney under a Power of Attorney. It may also be virtually impossible for a REALTOR who is an Attorney under a Power of Attorney to act as a dual agent because an Attorney effectively steps into the shoes of the Donor/client. OREA members should think long and hard before they ever accept a Power of Attorney for a client and should only do so with legal advice.

ESTATES:

Although it is not the only circumstance that terminates a Power of Attorney, the death of a Donor automatically revokes a Power of Attorney. An Attorney cannot act or sign on behalf of a deceased Donor.

The Estate Trustee

The personal representative who signs on behalf of a deceased person is an Estate Trustee. If the deceased left a valid Will, the person is called an Estate Trustee With A Will (formerly, an executor). If the deceased did not have a Will, the person is called an Estate Trustee Without A Will (formerly, an administrator).

Anyone dealing with property owned by a deceased person will have several concerns such as: the authority of the person selling the deceased's property; the rights of a beneficiary to deal with the property; how the debts of the estate will be satisfied; whether the Will is valid; and who may be entitled to any claims against the estate. The estate solicitor should be involved at an early stage of any dealings with the property to resolve any potential concerns. The particular circumstances will determine who can sign the documents and whether the Buyer will obtain good title.

In a typical situation where there is a Will, the Will be processed through the court and a Certificate of Appointment of Estate Trustee With A Will is issued. If there is no Will, there will be an application by someone to whom the court will issue a Certificate of Appointment Without A Will.

Until such time as a Certificate is issued by the Court, no-one has the ability to deal with the property either to sign a Listing or enter into an Agreement of Purchase and Sale. The exception to this is property that was held in joint tenancy by the deceased and another (please see below – *Joint Ownership*).

The application process to obtain a Certificate of Appointment may take a considerable period of time. The first step in the process will be to determine the nature and value of all of the estate assets. That may require a valuation by a REALTOR or other professionals. The lawyer for the estate will then apply to the court and the Certificate will be issued by the court in approximately six weeks from the filing all of the court documents. It is only at that point that a Listing and an Agreement of Purchase and Sale can be lawfully signed by the Estate Trustee.

Once obtained, the Certificate of Appointment is registered at the registry office and the appropriate recitals are inserted in any documents. There are numerous legal statements that must be included in the documents depending on the circumstances of the deceased, the nature of the property, the rights of a spouse, the rights and consent of beneficiaries etc.

There are numerous situations that can occur when dealing with the property of a deceased and it is not possible to generalize them in this pamphlet. Needless to say, the estate solicitor will be the best source of information of what is required in your specific transaction.

Joint Ownership

Property in joint tenancy is outside of the estate. Therefore, it is not necessary to wait for the Certificate of Appointment to be issued by the court before the joint tenancy property can be dealt with. Once the estate solicitor has registered the appropriate documentation on title to confirm that title is now in the name of the sole surviving joint tenant, that surviving joint tenant can deal with the property as he/she wishes.
