

## USE OF POWERS OF ATTORNEY IN REAL ESTATE TRANSACTIONS

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Individuals generally have the freedom to sell, transfer, or mortgage their property however they see fit. What happens, however, if an individual loses the capacity to do so? In these instances, the individual's attorney(s) appointed pursuant to a Power of Attorney for Property ("POA") may seek to manage the individual's property and perform these transactions on their behalf.

**Lawyers Beware: The use of a POA in real estate transactions is a red flag which should put both the solicitor for the seller and the buyer on alert.**

Since POAs create separation between the identity of the principal (the individual who owns the property) and the attorney (the person signing the documents), they are often the centerpiece of title or mortgage fraud.

**Solicitors who are too trusting or who fail to recognize and follow-up on indicia of fraud may become innocent dupes to a fraudulent transaction.**

Appropriate precautions must be taken.

### **What is Needed to Authorize a Transfer or Charge under a POA?**

If a POA is being used to effect a transfer or charge, the following must be provided:

- A statement by the attorney for property** that, to the best of the attorney's knowledge and belief:
  - (i) when the POA was executed, the principal was at least eighteen (18) years old and had the legal capacity to grant it; and
  - (ii) the POA is still in full force and effect.
  
- A statement by the solicitor** (handling the transfer or charge) that confirms that they have reviewed the POA with the attorney and that to the best of the solicitor's knowledge and belief:
  - (i) the attorney is the lawful party named in the POA;
  - (ii) the attorney is acting within the scope of authority granted under the POA; and
  - (iii) the POA was lawfully given and has not been revoked.

In addition, the POA document itself must also be registered and then referred to by Instrument Number in the authorized document.

### **What are the Responsibilities of the Solicitor for the Seller/Principal?**

Where a POA is used to effect a transfer or charge, the solicitor for the *seller/principal* has an elevated professional responsibility. Accordingly, the solicitor must:

- Obtain the original or an authenticated copy of the POA;**
- Be informed as to the details of its use**, including examining the POA for conditions and/or restrictions, understanding whether the principal does in fact lack capacity, and questioning why the use of a POA is even necessary;
- Understand what becomes of the funds generated;**
- Determine if the attorney's decisions are a proper exercise of their fiduciary duty.**

Relying on the attorney's word alone to answer these questions may well be insufficient. Solicitors should make independent verifications as necessary, especially when they did not prepare the POA document and do not already know the parties involved in the transaction.

**Remember: A sale or mortgage of a property is a highly significant transaction.** If the owner is capable, they ought to be involved and, if it is possible to effect the transaction without a POA, then it should be done. Mere inconvenience is not enough.

### **What are the Responsibilities of the Solicitor for the Buyer?**

A solicitor for a *buyer* in real estate transactions involving POAs must be similarly vigilant. Notably, they should:

- Review the agreement of purchase and sale** to look for any indication that the transaction is being completed with the use of a POA;
- Obtain an authenticated copy of the POA;**
- Ensure the POA was executed in accordance with the statutory requirements;**
- Be informed as to the details of its use**, including examining the POA for conditions and/or restrictions that would be relevant to the use of the document;
- Make inquiries as to why the POA is necessary and follow up** if the answer is evasive or otherwise unsatisfactory;
- Notify the mortgage lender** that documents will be executed under a POA, obtain the lender's consent (which is required), and respond to the lender's request for information; and,
- Inform the title insurer** that documents will be executed under a POA and respond to their requests for information.

### **Caution**

The participation of lawyers in a transfer of property is mandatory. As such, lawyers have a professional responsibility to see that it is done properly. For some years, the Law Society, Law Pro and title insurers have all published recommended fraud-prevention guidelines for real estate documents signed in this way. For further information, please visit: [https://lso.ca/lawyers/practice-supports-and-resources/practice-area/real-estate-law/guidelines-on-powers-of-attorney-in-real-estat-\(1\)](https://lso.ca/lawyers/practice-supports-and-resources/practice-area/real-estate-law/guidelines-on-powers-of-attorney-in-real-estat-(1))

*This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Kimberly A. Whaley, Whaley Estate Litigation Partners, 2022*