



## SPAGNUOLO & COMPANY REAL ESTATE LAWYERS

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### **USING A POWER OF ATTORNEY TO BUY, SELL OR REFINANCE REAL ESTATE**

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It is not uncommon for clients to be away at the time they are closing a real estate transaction. In this situation there are a few options to ensure the transaction closes on time, one of them being the use of a Power of Attorney.

Legislation relating to the use of Power of Attorney's was passed effective September 1, 2011. The changes were mostly to the form of the Power of Attorney, and do not substantially change the use of a Power of Attorney for real estate. Below is a discussion on how to use a Power of Attorney to sell, refinance or purchase a property.

In all of these situations we are assuming there are no trust issues between the person giving the Power of Attorney (the "Adult") and the person who is allowed to sign pursuant to the Power of Attorney (the "Attorney"), and all parties are acting in a professional manner. Giving a Power of Attorney to an untrustworthy person will result in serious difficulties.

#### **GENERAL INFORMATION ON POWER OF ATTORNEY'S**

A Power of Attorney is a document which authorizes one person, an "Attorney", to make decisions or perform tasks on behalf of another person, the "Adult". A Power of Attorney can only authorize an Attorney to make legal and financial decisions on behalf of the Adult and not personal care or health care decisions.

Although the *Power of Attorney Act* was substantially revised effective September 1, 2011, Powers of Attorney executed before September 1, 2011 will continue to be valid.

An enduring Power of Attorney has no expiration date, and is not commonly used for estate planning purposes. These are broad in nature, and will remain valid when the Adult becomes incapable of looking after her own affairs.

A Non-Enduring Power of Attorney is usually limited to a specific task such as to sell the Adult's property while she is away, or may have an expiry date.

While a Power of Attorney is not self-expiring unless specified, s. 56 of the *Land Title Act* provides that a Power of Attorney is not valid for land title purposes 3 years after the date of execution unless it is an enduring Power of Attorney or the Power of Attorney expressly excludes the effect of s. 56.

An Adult cannot appoint an individual who is compensated for providing personal care and health care to the Adult or an employee of a facility providing personal care or health care services to the Adult (unless the individual is also the Adult's child, parent or spouse). While these are the only legal restrictions, the Adult should obviously trust an individual's honesty and judgment before appointing her as an Attorney.

So long as the Adult is capable, a Power of Attorney can be revoked at any time. There are also certain circumstances when the Power of Attorney terminates, such as upon the death of the Adult or court order.

An Attorney must act honestly and use reasonable care and diligence. The Attorney's authority must be exercised in the best interests of the Adult. It should be noted that a Power of Attorney cannot be used to transfer land to the Attorney unless the Power of Attorney specifically permits.

### **USING A POWER OF ATTORNEY TO SELL PROPERTY**

So long as the Power of Attorney is properly drafted, there are very few issues with using a Power of Attorney to sell property. The Power of Attorney should be limited in terms of how long the Power of Attorney is valid, and to what purpose it is to be used. A general example is:

"To sell real estate legally described as (legal description of property) and any interest therein, in such manner as my attorney may think fit, and execute and deliver all documents and other instruments required for such purpose as my attorney may think fit.

This Power of Attorney shall expire on (insert date)."

### **USING A POWER OF ATTORNEY TO PURCHASE OR REFINANCE PROPERTY**

A Power of Attorney can be used to purchase or refinance real estate, but you must check with the lender to confirm their willingness or requirements about using a Power of Attorney. Each lender has different rules regarding the use of a Power of Attorney.

At the time of writing this page, Scotiabank will allow a Power of Attorney but they require that the lawyer preparing the mortgage be the lawyer that prepares AND witnesses the Adult's signature on the Power of Attorney. Our office recently completed a file where we prepared the Power of Attorney but the Adult was already in the UK so her signature was witnessed there. Scotiabank made an exception on this file to allow it to fund, but they advised that for future deals, the Adult either has to fly to B.C. to sign the Power of Attorney or Scotia will not do the deal. Obviously if the Adult has to fly to B.C. they could sign the documents on their own, and a Power of Attorney is not required.

**RBC** will allow a Power of Attorney to be used but RBC will insist on a title insurance policy, which has a minimum cost of \$250.00.

**TD** will also allow a Power of Attorney except for equity takeouts, but have extensive requirements. They will require at least two days notice, information on the relationship between the Adult and Attorney, circumstances as to why a Power of Attorney is required, banking relationships, and knowledge of the Adult to the financing request. Even if all this information is provided and they approve of the Power of Attorney, title insurance will be required.

Rather than review all of the other lenders requirements, we suggest you (the client) contact the lender at the time of making the application. Lender requirements constantly change and even the above may change frequently.

If a transfer of the property to the Attorney is required as a part of the refinancing transaction, keep in mind that there must be specific wording in the Power of Attorney to permit this.

## **SUMMARY**

Our goal is to remind you that a Power of Attorney can be used for out of town clients, but consideration should be given to the lender requirements for a refinance or purchase of property.

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