

Powers of Attorney with Respect to Borrowing/Mortgaging

Powers of attorney may be enacted for many different reasons. Frequently, they are used by older adults to ensure that someone will be able to make decisions for them and manage their affairs when they are no longer able to do so, in the context of estate planning. They may also be used by individuals to allow someone else to perform specific duties when they are unable to do so (for example, if they are out of the country) or for corporations to allow specified individuals to receive documents or perform other duties. In short, a power of attorney appoints someone to act in place of another.

When a power of attorney is enacted, the person making the power is called the grantor. The person appointed to act on their behalf is called an attorney. The duties that the attorney can have vary widely, and depend on the specific wording of the power of attorney. A power of attorney may relate only to a specific transaction, may be valid only until a specific date or event, or may remain in effect indefinitely. An enduring power of attorney, for example, continues to be in effect even if the grantor loses capacity (note, however, that all powers of attorney are automatically revoked upon the death of the grantor). For this reason, it is important for the grantor to carefully consider what powers he/she wants to give to the attorney, and to ensure that those responsibilities and/or limits are clearly set out in the power of attorney. The grantor will want to consult with his/her lawyer to ensure that the terms of the power of attorney accurately reflect his/her wishes.

In many instances when powers of attorney are being used as part of estate planning, the grantor gives the attorney a broad, sweeping power, which grants the attorney the ability to act on the grantor's behalf in all personal and financial matters. In essence, if the grantor uses a common phrase such as "all property and financial affairs," without designating any restrictions on this power, the attorney is entitled to perform all transactions that the grantor him/herself would be able to carry out, with the notable exception of making and/or altering a will. These powers could include paying bills, purchasing personal items or property, managing accounts and investments, starting or defending a lawsuit, gifting items, or mortgaging property.

It is important to consider the significant implications that may arise from this broad power afforded to attorneys. The power of attorney is a potent document, and can be destructive of the grantor's estate if it is abused. While no one wants to think that his/her attorney will disregard his/her best interests and seek personal profit, abuse of power of attorney does occur. One way that this may happen is through the mortgaging of property. When this occurs, the attorney is no longer

simply managing the affairs of the grantor; he/she is, in fact, incurring new debt to the estate. Because the mortgage is made in the sole name of the grantor, he/she will be entirely responsible for any payments to be made, and risks having his/her property foreclosed upon if the payments are not rendered.

A mortgage placed upon a property by an attorney is valid under our Land Titles System and is binding upon the grantor and his/her property. Even a fraudulently obtained power of attorney will be considered by the courts to be a valid basis for a mortgage once it has been registered against the title (*Household Realty Corporation Ltd. v Liu*, [2005] O.J. No. 5001, Ontario Court of Appeal).

One simple solution to this problem is to expressly remove the ability to mortgage from the attorney in the power of attorney document. In the alternative, the grantor could make a list, itemizing the transactions that the attorney is able to perform, and deliberately exclude mortgaging or borrowing from this list. A further option could be to appoint two attorneys to act jointly. In that case, the transaction would require the approval of both attorneys before it could be carried out. However, if both attorneys decide to mortgage a property on the grantor's behalf, this solution will be of no merit. In addition, unless the power of attorney states otherwise, it remains valid even if one attorney dies, indicates that he/she is unwilling to act, or is found by the court to lack capacity.

A solution to this potential for abuse is particularly difficult in some circumstance where the grantor does not want to unilaterally suspend all the rights of the attorney to borrow money and/or mortgage property. For example, if the attorney is the spouse of the grantor, and the home mortgage and/or title to the property are in the sole name of the grantor, it may not be in the grantor's best interest to prohibit renewal of the mortgage or further mortgaging of the property. This can make it difficult for the grantor to express in the power of attorney exactly what powers the attorney is to have with respect to mortgaging. In addition, some grantors may find that they do not have sufficient assets to meet their ongoing care needs, and would require that the property be mortgaged in order to finance long-term home care or residence at an institution. A lawyer can help the grantor to ensure that these possibilities are considered and taken into account in drafting the power of attorney. Failing to cover the issue of mortgaging or borrowing could give the attorney a right to unilaterally perform these transactions. The grantor may wish to add a clause to the power of attorney which prohibits the attorney from incurring debts on his/her behalf, or may wish to designate, specifically, in what circumstances the attorney may do so. In order to ensure that that this is done effectively, the grantor will want to consult with his/her lawyer.

Section 15 of *The Powers of Attorney Act, 2002*, sets out the duties of an attorney. The attorney must act honestly, in good faith, in the best interests of the grantor, and with the care that could reasonably be expected of some one with the attorney's experience and expertise. Examples of a failure to act in the best interest of the grantor could include inappropriate mortgaging of property, gifting of items or assets to the attorney and/or his/her family, or transferring the grantor's property into joint names, often with the attorney. Failure to do so can result in liability on the part of the attorney. However, it is important for the grantor to realize that if he/she lacks the capacity to do so, someone else will need to hold the attorney accountable. Section 15 cannot be enforced if there is no one to enforce it.

One of the best ways to keep the attorney's powers in check is to appoint someone to demand an accounting. In an accounting the attorney must provide records of the transactions involving the grantor's estate. If there has been an abuse of the power of attorney, the attorney may be held liable, subject to s.15 of *The Powers of Attorney Act*. The grantor is entitled to demand an accounting from the attorney at any time, and should do so if he/she is able. However, in looking to the possibility that he/she may be unable to do so in the future, the grantor may appoint someone in the power of attorney document who can demand an accounting on his/her behalf. If no one is appointed, an accounting may be demanded by an adult family member of the grantor. If the attorney refuses to provide an accounting, any interested party may apply to the Public Guardian and Trustee of Saskatchewan to direct the attorney to provide an accounting, or directly to the courts for an order requiring the attorney to produce an accounting.

A power of attorney is an important part of overall estate planning. It ensures that someone will be able to manage the grantor's financial and personal affairs if he/she becomes unable to do so him/herself. However, there are some important considerations to keep in mind when preparing a power of attorney. Depending on the specific wording of a power of attorney, the attorney may be able to sell the grantor's property, purchase new property in the grantor's name, borrow money, or mortgage existing property. In order to prevent abuse of this power, the grantor may wish to seek legal advice unique to his/her situation. Only by specifying exactly what powers the attorney is to have in what specific circumstances can the grantor limit the potential for abuse by the attorney.

This document is intended for general information only. If you are creating a power of attorney, you should consult with a lawyer at Robertson Stromberg Pedersen LLP for further specific advice. Please consult with a lawyer in the Wills, Estates, Powers of Attorney and Health Care Directives Group, listed on our website at <http://www.thinkrsplaw.com>.

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