

Every so often, I encounter a real estate transaction in which a Power of Attorney for Property (“POA”) is used for either the buyer or seller. In sale transactions, for example, the use of a POA may be necessary where the seller suffers from a diminished cognitive ability such that he or she is no longer able to make property-related decisions. In purchase transactions, the buyer may wish to make use of a POA if he or she will be out of the country when the deal closes.

Whatever the case, when a POA is used in the context of a real estate transaction, bright red flags will invariably be raised in a number of different places: the real estate brokerage; the law offices for both the buyer and seller; the buyer’s lending institution; and, of course, the title insurance company that is being asked to insure against fraud.

### **Why does the use of a POA in a real estate transaction attract such scrutiny?**

A POA is one of the most significant and important documents a person may ever sign in his or her lifetime.

The person who executes the POA document, known as the grantor, essentially confers the authority to do anything the grantor could do, except make a will, upon the person named as the attorney (which is not to be confused with a lawyer – the “attorney” is simply the person named as the substitute decisions maker). A grantor can, of course, limit the scope of the POA by imposing restrictions as to its use; by limiting the duration of the attorney’s authority; or by specifying that it may only be used for a limited purpose, such as selling a home.

In recognition of the power that a POA confers upon the substitute decision maker, the Ontario legislature has set out strict formal requirements for execution of the document. The *Substitute Decisions Act* also establishes that to have the requisite mental capacity to grant a POA, the grantor must, among other things, appreciate "that unless the attorney manages the property prudently its value may decline" as well as "the possibility that the attorney could misuse the authority given to him or her."

That said, there is no magic or secret formula required to prepare a POA. In fact, the Ontario government offers sample forms that can be downloaded from its web site, together with an instruction package for completion. No doubt such forms are offered by the Ontario government to encourage and enable people to plan for periods of incapacity and, therefore, retain greater control over their own affairs.

The problem, unfortunately, is that POAs are notoriously easy to forge and, consequently, a great deal of fraud – particularly real estate and mortgage fraud - has been perpetrated using bogus POA documents. This fact stands as one of the primary reasons that a POA document attracts such scrutiny in real estate deals.

In some instances, especially those in which the POA is a homemade document, it may be difficult to determine if the document is valid. If you are involved in a transaction where a POA is to be used, it is best to provide ample notification to the usual set of

players, including your real estate agent, your lawyer and your mortgage broker or bank. This will allow the parties time to vet the document and make all necessary inquiries and hopefully eliminate problems before they arise.