Minden Gross LLP

Powers of Attorney in Real Estate Transactions

Dangers and Dilemmas

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Topics:

Powers of Attorney in Real Estate Transactions - Dangers and Dilemmas
front page

Powers of Attorney - Are They Potential Ticking Time Bombs?
page 4

Professional Notes and Firm News
page 6

From time to time it happens that a party involved in a real estate transaction is unable to personally sign documents relating to that transaction. In such cases a arty (the "donor") may grant a power of attorney to another (the "donee") in order to authorize the donee to act on the donor's behalf and to sign documents with respect to the transaction.

A power of attorney must be in writing and it must be signed by the donor in front of at least one witness (two witnesses are required for a "continuing power of attorney" - i.e. a power of attorney that may be exercised even during the donor's incapacity to manage property). Although no additional procedures are required in order to activate a power of attorney (unless the power of attorney expressly states otherwise), no document executed by the donee pursuant to the power of attorney may be registered in a land registry office unless the original power of attorney or a certified/notarial copy thereof is first registered and the document presented for registration includes a prescribed statement by the donee to the effect that the power of attorney is still in full force and effect and that the donor had the capacity to give the power of attorney and was at least 18 years of age when it was executed. The document presented for registration must also include a prescribed statement by the lawyer for the donee confirming that he has reviewed the power of attorney with the donee and that the donee has confirmed that he is the party named in the power of attorney, that he is acting within the scope of the authority granted under the power of attorney and that to the best of his knowledge the power of attorney was lawfully given and has not been revoked.

On the face of it, one would think that the procedures outlined above would be sufficient to prevent fraudulent or improper use of powers of attorney in real estate transactions. Unfortunately, such has not been the experience. The frequency with which powers of attorney have been successfully used to perpetrate fraud in real estate transactions has resulted in the recent issuance by the Law Society of Upper Canada of guidelines on powers of attorney in real estate transactions. Illustrative of the futility of the protective measures recommended by the Guidelines is the very first Guideline:

1. To the extent lawyers are able, they should avoid the use of powers of attorney. The use of a power of attorney should be the exception and not the rule.

There have been numerous reported cases of powers of attorney being used to commit fraud in real estate transactions. *Reviczky v. Meleknia* is one widely reported example of a case in which a forged power of attorney in favour of a fictitious person was successfully used to perpetrate a real estate fraud against:

- an owner of a property
- a purchaser of that property
- a mortgage lender who financed that purchase
- a title insurer
- a bank who unwittingly paid out the closing funds to the fraudster, and
- a number of lawyers involved on various sides of the transaction

all of whom were innocent dupes of the fraudster. This fraud is nothing short of astounding both in terms of its simplicity and in terms of the broad net of innocent victims who became caught up in it.

It has been suggested that although the vast majority of powers of attorney used in real estate transactions are legitimate documents, as a result of *Reviczky* and many similar cases, it will become more difficult to get people to accept the use of powers of attorney in real estate transactions.

The facts in *Reviczky* are simple. Paul Reviczky owned a rental property at 220 Sheppard Avenue West. In March 2006 when Paul Reviczky was 88 years old, he rented the property to a couple who paid the rent in cash in advance for March, April and May 2006. (In retrospect, the advance payment of cash should have been the first tip-off that something was amiss.) The couple did not occupy the property. (That should have been the second clue that something was amiss). In June 2006 Paul Reviczky checked the vacant property and discovered a hydro bill in the name of Pegman Meleknia ("Meleknia"). A search of the Land Registry office records disclosed that the property had purportedly been transferred to Meleknia on May 15, 2006 for $450,000 and that HSBC financed Meleknia's purchase by way of a $300,000 first mortgage.

What had occurred is as follows. The couple who rented the property were fraudsters. In April 2006, posing as a non-existent grandson of Paul Reviczky with the authority to sell the property under a power of attorney that included the forged signature of Paul Reviczky, the fraudster listed the property for sale with a broker who placed the listing on MLS. Meleknia came along and submitted an offer to purchase the property for $450,000. Meleknia's offer was accepted by the fraudster who signed it pursuant to the forged power of attorney which was alleged to be held by Aaron Paul Reviczky, the grandson of Paul Reviczky. There is no evidence that such a grandson ever existed. But what is clear is that the power of attorney was a forgery. Paul Reviczky never gave a power of attorney to anyone.

Neither the fraudster's lawyer nor Meleknia's lawyer (who also represented HSBC in connection with the mortgage) were aware that the power of attorney was a forgery. Meleknia had secured a purchaser's title insurance policy with regard to his purchase. HSBC had secured a lender's title insurance policy with regard to its mortgage. Title insurance policies typically cover fraud.

On the completion of the purchase by Meleknia, the fraudster received from Meleknia's lawyer a certified cheque payable to Paul Reviczky in the amount of $429,861.06 representing the balance of the purchase price. The fraudster forged Paul Reviczky's signature on the back of the cheque and deposited the cheque into an account in the name of Aaron Paul Reviczky, the fictitious grandson, at the Korea Exchange Bank. The Korea Exchange Bank paid out the money to the fraudster. The fraudster then disappeared with the money.

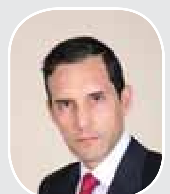
Cleaning up the mess created by the fraudster took two years and two court hearings, not to mention many thousands of dollars in legal fees. The first court hearing decided that the transfer to Meleknia as well as the HSBC mortgage were invalid. The transfer to Meleknia was held to be invalid because that transfer was a fraudulent document. It was signed by the fraudster pursuant to a forged power of attorney. The HSBC mortgage was held to be invalid because HSBC's lawyer (the same lawyer that represented Meleknia) failed to properly scrutinize the forged power of attorney. After that court decision, the title insurer paid off the HSBC mortgage and also reimbursed Meleknia for the loss he suffered by purchasing a house that the seller/fraudster didn't own.

Then the title insurer sued the Korea Exchange Bank for paying out the cheque to the fraudster on the basis of a forged endorsement. In the fall of last year the court handed down its decision to the effect that the Korea Exchange Bank is liable for having paid out the funds to the fraudster and was ordered to pay those funds to the title insurer which had reimbursed HSBC and Meleknia for the losses they suffered as a result of the fraud.

At the end of the day, after several years of legal proceedings, Paul Reviczky got his property back, Meleknia and HSBC were reimbursed for their losses, the title insurer recovered the funds it paid out to Meleknia and HSBC on the title insurance policies, and Korea Exchange Bank bore the entire loss caused by the fraudster.

Notwithstanding various protective measures put in place by recent legislation and by the Law Society Guidelines, as a result of the recent spate of real estate frauds using improper powers of attorney, of which the *Reviczky* case is but one example, it is likely that the use of powers of attorney in real estate transactions will be far more limited than it has been in the past. Neither buyers nor lenders will wish to run the risk of having relied upon a forged power of attorney. Furthermore, lawyers representing clients in real estate transactions will recommend to their clients that nothing short of original signatures of the parties involved should be accepted. It will be only in extreme circumstances and after careful verification that documents signed pursuant to a power of attorney will be accepted, and even then the parties relying upon such documents will have to be advised of the risks they run in doing so.

Martin Maierovits
Tel: 416.369.4128
mmaierovits@mindengross.com



Powers of Attorney - Are They Potential Ticking Time Bombs?

In the estate planning context, a power of attorney is a document by which you appoint another person, referred to as the "attorney" (not to be confused with the American term for a lawyer), to act as your substitute decision-maker in the event that you should subsequently become mentally or physically unable to properly manage your financial and personal affairs on your own.

The governing legislation in Ontario dealing with powers of attorney, the *Substitute Decisions Act*, provides for two types of power of attorney: a Continuing Power of Attorney for Property (to deal with financial decisions, such as paying bills, making or renewing investments, entering into contractual arrangements, etc.) and a Power of Attorney for Personal Care (to deal with personal care decisions, such as consent to medical treatment, admission to a hospital or nursing facility, nutrition, grooming, etc.).

Both types of powers of attorney are critical documents for a person of any age to have since one can never predict the onset of physical or mental incapacity. The consequences of becoming incapable without having signed a power of attorney in advance are fairly dramatic in that a government official, known as the Public Guardian and Trustee, acquires the automatic legal authority to commence making decisions on behalf of the incapable individual. Most people, faced with the choice of having their affairs handled by a loved one or close friend, as opposed to a government official, would readily choose the former.

As legal documents go, the form of these powers of attorney is relatively straightforward and the cost associated with having them properly drafted is relatively inexpensive. While the actual document might, therefore, appear to be rather innocuous on its face, decisions made pursuant to the legal authority that is granted by the document can have significant consequences. If the documentation is prepared with careful thought and intention, a power of attorney has the ability to serve as a very valuable estate-planning tool. Occasionally, however, decisions made under the authority of a power of attorney may also result in unintended consequences and, instead of serving the best interests of the incapable person, might bring about a complete opposite result.

Remember that a power of attorney has the effect of giving another person the right to sign *your* name.

Just as it is important to carefully consider who it is that you wish to name as your executor in your Will, so is it critical that you give great thought as to whom you wish to grant the authority to make decisions on your behalf *that will impact you during your lifetime*. (The authority granted under a power of attorney is only exercisable during your lifetime and ceases to have effect once you die. At that point, the provisions of your Will take over.)

In considering the identity of your "attorney", I offer clients the following somewhat obvious comment: "If you have *any doubt whatsoever* that the individual might not make decisions in your best interests, then you should not name that individual as your "attorney"". You have to be 100% confident that the appointed individual will make decisions on your behalf, whether they are financial or health-related, with only one interest in mind and that is *your* best interest.

While children are often considered to be the best and most obvious people to name as your "attorneys", this is not always the case. Remember that each dollar that is not spent on you means that there will be an additional dollar for those children to share after you are no longer alive (assuming that your estate is to be divided equally among your children). Will your children have your exclusive best interests at the forefront of their minds when making decisions on your behalf or will they be motivated by their personal self-interests?

While the governing legislation contains formal mechanisms in place that can require your "attorney" to account for all decisions made on your behalf, such "checks and balances" are not automatic but, instead, have to be initiated either by the "attorney" or by someone who has a financial interest in your assets (such as a beneficiary) and who has concerns as to whether your affairs are being managed appropriately.

There is hardly a day when I will not receive a phone call or meet with someone who is concerned that a power of attorney was signed by an elderly individual who may not have understood what he or she was doing or that financial abuse and mismanagement are occurring. Often, those calls or meetings will come from one child complaining about a sibling, or a stepchild complaining about a stepparent. Upon further investigation, there is often merit to the complaint; in other situations, the complaint is based solely on greed or jealousy.

Having read all of this, you might think that you are better off *without* a power of attorney. That is definitely not the case. A Continuing Power of Attorney for Property and a Power of Attorney for Personal Care (which can include wishes concerning medical treatment and end-of-life concerns, often known as a "living Will") are two very important documents that every person should have. What this article has hopefully revealed, however, is that, in spite of the simplicity of the actual documents, the consequences that flow from them can be very significant and potentially very damaging.

One final word: in arranging for your Will or Powers of Attorney, it is critical that you seek a professional advisor that will not only address the relevant technical and legal issues but, equally as important, someone who will also consider and discuss with you the practical and "real life" consequences of your decisions.

Howard S. Black, LL.M.
Tel: 416.369.4332
hblack@mindengross.com

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barristers & solicitors
145 king street west, suite 2200
toronto, on, canada M5H 4G2
tel 416.362.3711 fax 416.864.9223
www.mindengross.com

Professional Notes

Alan D. Litwack was recently interviewed in the April edition of the UK-based *Financier Worldwide* magazine.

Howard S. Black was quoted in the article "The Power Of A Power of Attorney. A Poorly Handled Document Can Rip Families Apart" that appeared in the May 23 edition of the *Financial Post*. Howard also was quoted in the article "When Cottage SuccessionTurns Toxic" that appeared in the *National Post* on June 21. On July 3, Howard taped a segment on *BNN: MoneyTalk* with Patricia Lovett-Reid dealing with "Keeping the Vacation Property in the Family".

Steven I. Pearlstein was recently quoted in an article on Commercial Real Estate in the May 12 edition of the *Globe & Mail Report on Business.*

David T. Ullmann was interviewed June 9 on *BNN: The Street* to discuss the consequences of the bondholders throwing a wrench in the Chrysler restructuring. On July 6, David appeared on *BNN: Squeeze Play* with Amanda Lang and Kevin O'Leary, in a panel discussion, to give the Canadian perspective on certain issues regarding the US court approval of the GM sale as part of the GM restructuring.

Steven I. Pearlstein and **Timothy R. Dunn** were both quoted in the article "Powers Of Sale, Foreclosures Expected To Rise" that appeared in the *Law Times* on June 15.

Minden Gross' Tax Group sponsored and participated in the 11th National Conference hosted by the Society of Trust & Estate Practitioners (STEP) held at the Metro Toronto Convention in Toronto on June 18-19. **David Louis, Hartley R. Nathan, Q.C.** and **Joan E. Jung** were speakers at the session entitled "Estate Freeze from Hell (The Sequel)".

Firm News

Minden Gross is proud to announce that "Tax & Family Business Succession Planning, 2nd ed." by **David Louis** and **Samantha Prasad** has been selected by the *Financial Post Magazine* (May 2009) as a recommended resource for the Entrepreneur's Tool Kit as part of their feature on Succession Planning.

Hartley R. Nathan, Q.C. was awarded with an academic Gold Medal by the Dean of Osgoode Hall Law School, York University, at the Annual Alumni Reception at Convocation Hall on May 20, 2009.