ATTORNEYS BEHAVING BADLY: tips for agents when receiving instructions from third parties and enduring powers of attorney

It is not uncommon for real estate agents to be approached by someone acting under a Power of Attorney on behalf of a registered proprietor.

Where a registered proprietor has appointed an attorney under an Enduring Power of Attorney, it is important that the agent make some enquiries to ensure that person has the legal authority to provide instructions.

We are living in an ageing population. It is fast becoming a luxury to remain in the family home until death. There is an increasing need for people to move into residential aged care facilities, where a standard method of payment is by way of a ‘Refundable Accommodation Deposit’ (RAD). A RAD is a lump sum payment that operates like a loan in favour of the particular aged care facility. The balance of the RAD is then refunded to the estate of the resident on their death.

For many elderly people, it is not financially viable to fund a RAD without selling their main residence.

To complicate matters, once an incoming resident elects to pay a RAD, they generally only have a period of six months to come up with the money. This increases the pressure on sellers, agents and conveyancers to efficiently bring about exchange and settlement of the property.

An Enduring Power of Attorney is a legal document under which a principal appoints an attorney (or attorneys) to make decisions on their behalf. The document is ‘enduring’ in that it continues to operate even if the principal loses decision-making capacity. In the Australian Capital Territory, an Enduring Power of Attorney typically gives an attorney broad decision-making powers, including in relation to the property and financial affairs of the principal. It is possible for a person to have a valid Enduring Power of Attorney that grants no powers in relation to property. If an attorney does have powers in relation to a principal’s property matters, these powers may be of immediate effect, or, more often, the use of the powers is conditional on the principal having lost capacity.

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The first thing a real estate agent should do when approached by an attorney is request a certified copy of the Enduring Power of Attorney. The agent should then review the document and consider the following issues:

1. Is the person giving the instructions actually appointed as an attorney?;
2. Is the attorney granted powers over property matters?; and
3. When does the attorney’s power come into effect?
If the power is expressed to be conditional on the loss of capacity, the agent should go on to request some type of supporting evidence. Generally, a letter from the principal’s General Practitioner, treating Geriatrician, or other specialist is sufficient in this regard.

Real estate agents should also be aware that where an attorney intends to act on behalf of a person who is entering into contracts for the sale, purchase or leasing of land, the Enduring Power of Attorney must be registered at the ACT Land Titles Office.

All Enduring Powers of Attorney must be witnessed by a qualified witness. If you are unsure about any of the issues discussed in this article, or if you would merely like some peace of mind, it is a good idea to contact the person who witnessed the document. Often this will be the solicitor who drafted the document, and who has acted for the client previously in relation to their estate planning arrangements. It was only last week that we had a telephone call from a concerned real estate agent: “Joe Bloggs has turned up at our office waving a document and telling us to sell his mother’s house, including its contents”.

ASIDE FROM SUPERANNUATION, THE FAMILY HOME IS OFTEN A PERSON’S MOST VALUABLE ASSET.

A significant percentage of elder abuse is committed by attorneys (frequently adult children) appointed under an Enduring Power of Attorney. Aside from superannuation, the family home is often a person’s most valuable asset. Both of these facts highlight the importance of communication between real estate agents and solicitors, and the value in adopting a collaborative approach. As the saying goes, it is better to be safe than sorry. There are a few simple steps real estate agents can take when instructed by attorneys to protect not only themselves, but ultimately the interests of the vulnerable property-owner.

The Estates & Business Succession Team of BAL Lawyers, a Corporate Partner of REIACT, can assist agents and agencies in reviewing Powers of Attorney. Please give us a call to discuss.
WE ARE PLEASED TO OFFER ALL CURRENT REIACT MEMBERS A 10% DISCOUNT ON SIMPLE WILLS, POWERS OF ATTORNEY & RESIDENTIAL CONVEYANCING SERVICES.