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Real Estate and Special Entities

Special entities protect the interests of the vulnerable. Are you prepared to deal with them?

One fundamental question underlies every real estate transaction. Who has the authority to sell or buy a property? Although it might seem screamingly obvious for everyday transactions with your clients, there are situations where it can be hard to know. For example, what happens when a seller dies or becomes incapacitated after a listing agreement is signed? Or worse, after a purchase agreement is made? Or what should you as a Realtor® do when a couple is divorcing and one spouse wants to sell the home, and the other doesn't? To handle these and other sticky issues, Minnesota law recognizes special entities that define who has the power to purchase or sell property. These special entities include:

- Estates
- Trusts
- Power of Attorney
- Guardians/Conservators
- Divorce

Special entities can make a Realtor's® job more complex than normal transactions. Each has its own rules, structures, and purpose, so it's useful to examine them in detail, and broaden your understanding of what to do—and not do—when you encounter extraordinary circumstances during ordinary business.

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Who is the Client?

The entity or the entity's representative?

When dealing with entities it can be easy to confuse the interests of the entity with those of the person representing the entity. To be clear, in transactions involving estates and trusts, you serve the entity, and not its representative. When working with a conservatorship, power of attorney, and divorce, you will also need to distinguish between the party on whose behalf the transaction is intended versus the person who is making decisions on their behalf.

Who is Your Client?

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| The estate of a deceased person | Not heirs or the personal representative |
| The protected person in a conservatorship | Not the conservator |
| The principal in the power of attorney relationship | Not the attorney-in-fact |
| The trust created by the now deceased parent | Not the individual trustee(s) |
| The parties on the property title before divorce | Not separate individuals following divorce (unless title has been legally changed) |

Dealing with Estates and Personal Representatives

Your client, Kevin Rudin, just accepted an offer for the home he has lived in for 35 years. The 81-year-old widower is looking forward to moving from Brainerd to the Twin Cities to be near his oldest daughter, Elsa Faircloud, and her children. Tragically, two weeks before closing, Kevin has a massive stroke, falls into a coma, and dies. As Kevin's three adult children grapple with their father's death, the closing is delayed. What happens next? Is the purchase agreement still valid? If so, how does the transaction go forward?

First, the purchase agreement for Kevin's home is likely still legally binding and must be addressed by his estate. To help resolve unfinished business in the wake of a death, Minnesota requires the appointment of a **personal representative (PR)**—someone who is entrusted to work in the best interest of the estate. In the case of Kevin's estate, Elsa is the only adult child who still lives in Minnesota, so the other siblings choose her for this role.

That means Elsa can immediately sign closing papers and complete the transaction. Right? Unfortunately, no. She does not have authority to act on behalf of the estate until she is formally appointed as a PR by either the Probate Registrar—in the case of an informal probate proceeding—or the Probate Court Judge for a formal probate proceeding. Because Kevin's home is in Brainerd, this would proceed through Crow Wing County's court system.

When Elsa is appointed PR, she will receive "**letters**"—this may be "**letters testamentary**" or "**letters of**

administration" from the court—that empower her to act on behalf of the estate. That includes the ability to sign documents such as:

- Exclusive representation agreements
- Closing documents
- Purchase agreements or amendments
- Warranty agreements

Generally, the PR can perform anything that needs to be done on behalf of the estate.

Remember, as a listing agent you cannot take action on the transaction until the PR is appointed by the registrar or court. Before then, it is effectively in limbo and can't be canceled or moved forward. It's not unusual for this process to take months. So, although a buyer might understandably want to cancel the agreement, this is not possible until the PR is appointed. And as an added wrinkle, sometimes the judge determines that the PR must be supervised by the court, further slowing the transaction.

It is also important to bear in mind that until a PR is in place, you, as a Realtor® can't advise relatives of the decedent about what to do next. Nor can you disclose any of the seller's confidential information.

Once Elsa is appointed PR, you should get a copy of the letters to confirm she has the authority to transact on behalf of the estate. Any documents signed by the PR should reflect the name of the PR and that they are signing on behalf of the estate. See example below:

Elsa Faircloud,
Personal Representative of the Kevin Rudin Estate

Always put the Client's Interests First

But follow the lawful instruction of the legal representative
In the abstract, it's easy to say you serve the client and no one else. However, entities—like dead men—don't talk. Legal representatives, on the other hand, can have quite a lot to say. As a Realtor®, it's your duty to take direction from the entity's legal representative, provided their instruction is lawful. A personal representative is a fiduciary for the estate and must act prudently.

Trusts

Some property owners may want to place real property in a trust and appoint a particular person—a trustee—to manage decisions pertaining to that property. In this fiduciary relationship, the property owner—or settlor—places the property into an entity—the trust—and appoints a person—the trustee—to make decisions about that property for a beneficiary such as an heir(s). Trusts can be created for many different purposes and in many different ways, but the trustee can transact on behalf of the trust, including the sale of real property. A settlor may, however, restrict the trustee's ability to sell real property in a trust up to 21 years maximum. See Minn. Stat. §501C.1202, Subd. 2.)

Anatomy of a Trust

A trust is a fiduciary relationship in which the trustee looks out for best interest of the trust for the benefit of the beneficiary.

Settlor

Property owner who sets up the trust

Trustee

Authorized to act for trust

Beneficiary

The one for whom the trust was established

Before proceeding with a property sale administered by a trust, it's imperative to obtain a copy of the trust documents including the certificate of trust and affidavit of trustee. The document includes vital information defining who the trustees are, and what rights, duties, and authorities are assigned to them and whether they can sell the property in question. When there is more than one trustee, you need to determine which of them has the authority to act on behalf of the trust.

In many cases, adult children are named as trustees instead of a third party like an attorney. Complications arise if the trustees don't agree on what to do with a property. For example, Estelle Evans created a trust where her five children were named trustees. After her death, three of them wanted to sell the lakeshore property, but two wanted to hang on to it. Technically, Minnesota's Trust Code dictates that a majority of trustees must agree on an action (Minn. Stat. 501C.0703). So, in this case, those who want to sell would legally prevail. However, it's not quite that simple. The dissenting trustees can take legal action to delay sale of the property. If you encounter a situation like this, consult your brokerage's attorney to determine the best course of action.

In Minnesota, trust property sales must meet these conditions, or they are voidable:

- Authorized by terms of the trust
- Approved by the court
- Beneficiary consented or ratified
- Beneficiary didn't commence judicial proceeding to object within three years of trustee sending notice
- Trustee was obligated to the contract prior to becoming trustee

See Minn. Stat. 501C.0802 for more information.

What You Need to Close the Trust Sale

To complete a sale involving a trust, you'll need the following documents if it's power of sale or within Minnesota trustee's powers:

Certificate of Trust (Minn. Stat. 501C.1013)

This document takes the place recording the entire trust into the real property records.

Affidavit of Trustee (Minn. Stat. 501C.1014)

Identifies trustee, property to be transferred, and attests the trust is still valid.

Trustee's Deed

This document is always required for transfer of trust property.

Sometimes you'll need a court order

In rare cases, there is no reference to a power of sale of Minnesota trustee's powers. When this happens, a court order is required for the sale.

Power of Attorney

Power of Attorney (POA) allows one person to act on behalf of another in a defined set of circumstances. For example, an older parent might name an adult child to administer some or all of her affairs. Legally, her child would become the attorney-in-fact (AIF), and could be authorized to manage everyday finances, medical decisions, real estate transactions, and any number of items connected to the parent's—or principle's—interests.

Unlike the role of a trustee, POA is only valid while the principle is alive and well. If the principle is incapacitated or dies, the POA is terminated. An exception is durable power of attorney, which allows the AIF to continue acting while the principle is incapacitated and unable to make decisions for herself, e.g., she has fallen into a coma.

Anatomy of Power of Attorney

Principle

The person whose affairs are administered by the POA

Power of Attorney

The document that empowers the attorney-in-fact to act on behalf of the principle

Attorney-in-Fact

One who is authorized by a POA as the agent or representative of another person and can act in their place and name.

Uses of a POA

The POA can be used to administer almost any of the principle's transactions, including:

- Real estate (if designated as power in Box A of the statutory short form)
- Banking
- Gifts
- Business operations
- Family maintenance
- Litigation and claims
- Etc.

Selling Real estate with a POA

Get a Certified Copy

When doing transactions involving a POA, it is vital to obtain a certified copy of the POA document and confirm:

- Who acts as AIF and are they permitted to do real estate transactions
- If it is durable or non-durable
- If it is legally legitimate and valid

Further you should make sure the principle is still living, or in the case of a non-durable POA ensure that the person still has capacity.

Determine what property can be sold under the POA

A POA does not necessarily empower an AIF to sell all—or any—of a principle's real property. For example, the principle, Graham Baedecker, might want to sell his cabin in Ely while

retaining his townhome in Edina. In that case, the POA should have real estate selected as a designated power and include a legal description of only the Ely property. If real estate is selected but no particular property is specified, you can assume the AIF, his son Ethan Baedecker, is empowered to sell any or all the principle's properties. This would include properties outside of Minnesota, too.

To clearly establish the AIF's power to act, you should attach a copy of the POA to the purchase agreement (PA). When Ethan signs, his role as AIF should be clearly stated on the form:

Ethan Baedecker, Attorney-in-Fact for Graham Baedecker

Determining the Validity of a POA

The POA is Valid if:

The principle is alive

- All POAs are terminated upon death of the principle

The principle is well

- POA is no longer valid if the principle becomes incapacitated—unless it is durable

It is not terminated by:

- Divorce
- Revocation
- Expiration

What if the POA is fake?

Sometimes, it's difficult to know if a POA has been revoked, terminated, invalidated, expired—or is an outright forgery. Fortunately, as a Realtor® you are free from liability if there is/are:

- No actual notice of revocation
- No actual knowledge of the death or incapacity (nondurable only) of the principal
- An expiration date on the POA, it hasn't passed
- An affidavit executed by the AIF in support of the POA (see Minn. Stat. 523.17)
- Certain conditions met, when acting as a successor AIF (based on death of previous AIF) or if AIF is for a member of the military and only goes into effect under certain conditions. (see Minn. Stat. 523.16)

If you ever question the validity of a POA, consult an attorney.

Guardians/Conservators

Guardian and conservatorships are entities that protect the interests of incapacitated people. Appointed by a court, each has specific duties toward the incapacitated person or "ward." Guardians are responsible for the ward's living conditions and well-being. While conservators look after financial and property interests. One person is often assigned both roles.

Anatomy of Guardian and Conservatorships

Guardian

Does not have power to buy or sell real estate, but if there

isn't a conservator, can contract for necessities, including housing. Might be involved in decision to move ward into assisted living or other new living arrangements. Powers granted to the guardian by the court vary based on the petition and what is requested.

Guardian's powers can include:

- Determining where the ward will live
- Providing care, comfort, and maintenance
- Facilitating care and sale of personal property
- Managing medical treatment
- Leveraging power of contract if there is no conservator and it is used for necessities
- Supervisory authority – only to extent necessary to provide necessary care
- Applying for government benefits if there isn't a conservator

Guardian's powers are defined by Minn. Stat. 524.5-417-18

Conservator

Has the right to transact real estate deals but must petition court and obtain approval. The court has the power to order a sale if circumstances merit it. Generally, the court authorizes the extent of a conservator's powers based on the individual case.

Conservator's powers can include:

- Paying living expenses
- Paying debts and expenses
- Managing property
- Power over undivided interests in real property
- Power of contract
- Applying for government benefits
- Having ability to revoke POA
- Managing sales, mortgages, leases of real property*
- Holding power over revocable trusts

Conservator's powers are defined by Minn. Stat. 524.5-417-18

Selling properties administered by a conservator

Real property belonging to a ward is typically sold when funds are needed to care for the person. In the case of Myron, it was determined he needed to move to assisted living. His daughter Lisa was named guardian/conservator and wants to sell the lake property on Myron's behalf. Although she is empowered to do that in principle, she needs court approval before entering any transaction. This is multi-step process* and can be time consuming:

- Two court-approved appraisers assess the property value
- Petition is filed seeking court permission to proceed with sale
- Hearing determines whether the sale is allowed
- Sale is approved via court order

Additionally, the court might require a bond from the conservator or guardian/conservator. When a potential buyer is found, the court must confirm there are no conflicts of

*These transactions require a hearing per Minn. Stat. § 524.5-418

interest between the conservator and the buyer. When the buyer is approved, a report is filed with the court, and the sale is finally confirmed.

As a Realtor® dealing with this kind of transaction it's vital to get copies of:

- Certified Letters of Guardianship or Letters of Conservatorship
- Certified Order Directing Sale sale/mortgage/lease of specified property
- Certified Order Confirming Sale
- Conservator's Deed

The "Letters" give you a full understanding of the authorities invested in the guardian/conservator. And the Order Directing Sale and Order Confirming Sale provide the legal sign off to proceed with the property sale. All these documents can be obtained relatively quickly from the district court.

If it is a homestead property co-owned with a spouse, the spouse's signature is also required.

Divorce and Real Estate Transactions

The three stages of union and disunion

Married

Legally united and sharing in purchase and sale of most property.

- No effect on ability to purchase
- One spouse can purchase or inherit property in name of only one spouse*
- However, other spouse may have a spousal interest that might matter for divorce or transfer of the property at later date

*Spouse not taking out mortgage may have to sign the mortgage for the marital interest

Before Divorce Decree

For real property purposes this is the same as married.

If the divorce is not yet final:

- Refer buyer to lawyer
- Both parties need to sign all documents to sell

After Divorce Decree

No longer married but may still have real property-related complications left over from divorce.

If the divorce is final:

- Realtor® should get a copy of the divorce decree confirming title and ability to sell property

When couples divorce, Realtors® can get caught in the middle

When you have clients going through a divorce, or recently completing one, many legal and ethical issues can arise. Consider the following scenario.

Your clients, Jack and Diane Fielder, are in the process of divorcing but the divorce is not yet final. Jack wants to sell the house and get top dollar, but Diane wants to stay in the home where they raised their children. What should you do? As an agent, advise your clients that nothing can go forward until they work out their conflict, likely in the process of their legal divorce. If they eventually agree to sell, Jack and Diane must both give you the permission to list and sell the property. As the transaction progresses, recognize your limitations and remember your duty to communicate with both sides and represent each party fully. Again, if they disagree over any aspect of the transaction, from sale price to closing date, nothing can proceed until they agree on a course of action.

Property sale after divorce is final

When divorce has already occurred, the divorce decree will state which party owns what property or how the property is to be handled after the divorce. For example, the court may order Jack and Diane to sell the property and split the proceeds or it may require transfer of the property to one individual, such as Diane. In that case, the title needs to be modified accordingly. After that, she is free to do with the property as she pleases. If she eventually decides to sell her home, she is fully empowered to do so.

Buying property during divorce

In another scenario, Melissa, who is legally separated, decides she wants to purchase a condo in St. Paul. The divorce is ongoing but hasn't been finalized. Should she go ahead with the transaction? As a Realtor®, you don't have the authority to provide legal advice, so should urge her to consult an attorney to assist her with drafting a purchase agreement including appropriate provisions to ensure the current spouse is not joined in the transaction nor have any title or interest in the property to be purchased. Remember, in some circumstances it won't make sense for the divorcing client to purchase property. That's why it's vital to explore options with an attorney.

Learn More About Entities

From estates and trusts through power of attorney, guardian-conservatorships, and divorce, special entities protect the interests of people in a wide range of circumstances. Transacting real estate deals with persons authorized to act on behalf of others involves innumerable ethical and legal dimensions. That's why it is always advisable to know and understand the basics on these types of transactions and consult your attorney when you encounter unfamiliar or challenging situations.

*As required by Minn. Stat. § 524.5-418.