

Listing Agreements and Future Interests



By **Brian Madigan LL.B.**

One issue that commonly plagues the real estate industry is who should sign the listing agreement. In some cases, it's relatively straightforward and in other cases, the issues become somewhat complex.

Everyone will agree that if someone eventually needs to sign the deed, then they should sign the listing agreement in the first place. The problem is that among co-owners and among new relatives, the respective legal interests are often not recognized. A mother may say that the child doesn't need to sign, and similarly, the new son-in-law has no interest in the house. So, who do you believe, and what should you do?

You are better to know the law and apply it carefully, than make an error either at the outset or when an Offer is to be signed.

Let's look at some fact situations and see how they might vary.

John Smith is married to Mary Smith and they have three children, David, William and Sarah. John dies and his estate is administered.

a) The deed is to Mary until her son David reaches 30 years of age, at which time it goes to him. Consider what happens when David is 16, 26, or 36 years of age.

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Mary must sign for herself, and David's interest must also be protected. Since he is considered an infant (at law), he cannot sign for himself. An exception exists in respect to necessities of life, but in all likelihood, the house would not qualify. So, the Public Guardian and Trustee (PGT) must sign on his behalf. The only alternative is to have the Court appoint a Guardian for David other than the PGT. This could be his mother Mary provided the Court determined that there was no conflict of interest.

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Mary again signs for herself, and David having reached 18 years of age is legally considered to be an adult, so he signs for himself.

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Mary's signature is no longer necessary. David reached the age of 30, so he becomes the sole owner and the rights of Mary in the property are extinguished. David signs alone.

When it comes to the actual conveyance of the property, the only additional document necessary will be proof of David's age.

b) The deed is to Mary for life and then to her children; presently her children are David 26, William 21, and Sarah 18.

Since Mary is alive, she must sign. She holds the life interest in the property. All three adult children must also sign since they hold the future interest in the property.

c) The deed is to Mary for life and then to her children, presently her children are David 26 (married to Jane 24), William 21 (married to Kathy 20), and Sarah 18 (living common law with Frank 17).

For the reasons mentioned above, we need to have Mary, David, William and Sarah all sign the document. But, what about the two spouses? Do they have to sign? And, Frank?

The *Family Law Act*, gives some rights to possession of a matrimonial home to the two spouses, Jane and Kathy, so they must sign as well. As for Frank, he is out of luck, you must actually "be married" to acquire these rights.

The listing agreement is somewhat different from the actual deed conveying the property. The signatures of Jane and Kathy are obtained out of an abundance of caution. There is an alternative legal argument to the effect that their consent is not required. The argument is that Mary holds the life interest and with the life interest goes possession of the premises. David, William and Sarah only occupy the house with the consent of their mother Mary. They have no independent right to possession. The rights of Jane and Kathy are personal as against their respective spouses, and not against Mary as the life tenant. Therefore, they need not sign.

When it comes to an actual conveyance of the property, the solicitor acting on behalf of the vendors may consider that such a consent is unnecessary, thereby attaching an appropriate affidavit to the deed, which will have the effect of validly conveying the title to a third party. So, on that particular point, the jury is still out.

d) The deed is to Mary Smith and David Smith as joint tenants.

Both Mary and David must sign.

e) The deed is to Mary Smith and David Smith as joint tenants. David is married to Jane and they live in the house.

Mary and David still sign, but Jane needs to sign as well. If David dies while still holding the title in joint tenancy with his mother, the joint tenancy is deemed to be severed immediately before the time of death and they hold title as tenants-in-common. That is based, of course, on the assumption that the property is the matrimonial home of David and Jane. David's interest would then go to his estate to be transferred in accordance with law. We might reasonably assume that Jane would be the beneficiary, although that might not be the case.

In addition, Jane has an equal right to possession of the premises, basically, the same as David's. If he has this right, then so does she.

f) The deed is to Mary Smith for life and, on her death, it will go to Sarah, her daughter. Sarah is married to Adam and they live on the property.

Mary signs to convey the life interest and Sarah signs to convey the future interest.

Mary is entitled to possession since she holds the life interest. Sarah occupies only with Mary's consent. She has no right to occupy unless she were to sign a lease.

Adam has a personal right as against his wife Sarah, but since she has no legal right to occupy the premises, the property will not qualify as a matrimonial home

Sarah's interest although a future interest will not be sufficient. While it does qualify as family property, it does not possess all the qualifying requirements to constitute it a matrimonial home.

However, even if one did extend the definition of matrimonial home under the Act so as to include this property; it is terminable at-will by Mary. So, Mary signs and Sarah signs.

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