

Are there limits on a Power of Attorney for Property under the *Family Law Act and Rules (Ontario)*?

Part II: Applying for an Incapable Spouse's Entitlement to Equalization

By: Diya Chopra, Articling Student and Mary Wahbi, Partner

This is the second article in a three-part series discussing the powers and limits of an attorney, acting under a power of attorney for property, in the context of Family Law.

Section 7(2) of the *Family Law Act* imposes a strict limitation period on equalization applications. Where a spouse dies without having made a claim for equalization, his or her estate is precluded from applying for equalization. In essence, the right to claim dies with the spouse.

Apart from this restriction, where a spouse applies for equalization before he or she dies, the application may be continued by the attorney after the spouse's death.¹ An attorney can also make an election under section 6(1) of the *FLA* where the payor spouse has died.² Furthermore, an attorney acting under a power of attorney for property can apply for equalization on behalf of the incapable person under section 5(1) of the *FLA*. This was the case in *Anderson v. Anderson Estate*, 1990, 74 O.R. (2d) 58 (Ont. H.C.) where the Court stated:

Although the legislation is silent on the matter, the legislature could not have possibly intended that an incompetent surviving spouse, merely because of disability, should be deprived of his or her right to elect. That would be a grave injustice. The right to elect can be delegated to a legally appointed personal representative. It is not the right to elect that is personal, but the right to the entitlement.³

In that case, Mr. Justice Potts held that so long as the power of attorney expressly states that it continues after any subsequent incapacity, the attorney has the power to make such an application.

¹ *Ashton Estate v. Ashton*; Atlin J., "Application for Equalization: Death of Separated Spouse" 2003, 21 CFLQ 235

² *Calvert (Litigation Guardian of) v. Calvert*, 37 O.R. (3d) 221 (Ont. C.A.)

³ *Anderson v. Anderson Estate* 1990, 74 O.R. (2d) 58 (Ont. H.C.), holding