The POWER of ATTORNEY PROJECT

Power of Attorney 101

Welcome to the Power of Attorney Project which is part of our Conversations that Matter podcasts.

Mary – My name is Mary Bart, Chair of Caregiving Matters. This podcast is intended to provide general information only and is not intended to be a substitute for seeking personalized legal, financial or other advice. This podcast raises issues that our audience can further explore on their own in their own local communities with their own local experts. This project will help to be a call to action for families to solve their issues, find solutions to their problems, and have greater peace of mind.

Today's Podcast topic is called Power of Attorney 101 and our guest expert is Elaine Blades and she is Director of Fiduciary Services Scotia Trust. Welcome Elaine.

Elaine - Thank you Mary. My title at Scotiatrust, Fiduciary services, encompasses a broad area where we work with clients to help them plan their estates which includes their wills and also powers of attorney. We spend a lot of time educating clients and their substitute decision makers, their attorneys and executors on what their duties are and what they need to do and the trust company is able to act as a professional executor and attorney for property for clients. I have been in the financial services industry for approximately 20 years working at various trust companies and also in private practice as an estates and trust lawyer. The main trend that I have seen happening over time which dovetails very nicely with this conversation today is an increasing interest in powers of attorney and substitute decision makers by clients. As our clients age they know the importance of having a will in place. Increasingly they are appreciating the importance of having powers of attorney in place as well.

Mary – Thank you Elaine for that and I wanted to let our audience know that today we are specifically not covering all of the possible topics about POA issues during this podcast and that Elaine will be sharing some key introductory information only with our audience. There will be other experts who will share more information about power of attorney issues throughout this project. So Elaine, let's get started. I have my first question for you.

What is a power of attorney?

Elaine – Thank you Mary. A power of attorney which is known as the mandate in anticipation of incapacity or protective mandate in Québec is a legal document in which one person authorizes another person or a trust company, to act on their behalf. There are two basic types of powers of attorney. One is for the management of your finances; the other is for the management of your personal care.

Mary – What other terminology do we need to know?

Elaine – Powers of Attorney are governed by provincial law and the terminology does vary by province so depending on where you live, the person who creates the power of attorney is called either the grantor, the donor or in Quebec, the mandator. The person or trust company, to which the authority is granted, is known as the attorney, the personal representative or the mandatory. The more generic term for the person you are granting your authority to is the substitute decision maker. So to keep things simple during this conversation, I will use the term grantor for the person making the power of attorney document and attorney as the person who is given the authority. You may also have heard the terms enduring, or continuing when referring to powers of attorney for property. These terms mean that the document will endure or continue to be effective if and when the grantor becomes incapable and this is the type of document that we are talking about today.

Mary- Thank you, Elaine. Can you explain the difference between a power of attorney for property and a power of attorney for personal care?

Elaine – Yes Mary, this is a very important distinction. A power of attorney for property provides authority to manage the grantor's finances and property. So this would include:

- A persons bank account
- Investments
- Any real estate they may own

By contrast, a power of attorney for personal care, which is referred to as a representation agreement in some provinces, empowers the attorney to make personal care decisions on behalf of the grantor. While most people immediately think of health care or medical decisions, personal care is broader than that and may include making choices about :

- Where the grantor should live
- Their nutrition
- Clothing
- Hygiene

Different rules apply in terms of who may make a power of attorney, who may act as attorney and when they may apply to these two types of documents.

Mary – Thank you. Now who can act as an attorney or more commonly known as a substitute decision maker?

Elaine – Again, we are looking at provincial legislation so it varies a little bit by province but each province does have legislation. In Ontario, for example, it's called the substitute decisions act which sets out all of the rules in terms of who may make a power of attorney and who may act as an attorney. So in terms of who may act, you may appoint one or more individuals and or a trust company to act as your attorney for property. You may appoint one or more individuals only to act as your attorney for personal care so trust companies are not able to act in respect to someone's personal care. When you appoint more than one attorney you may choose to have them act jointly, meaning that they must

agree and act together or jointly and severally meaning they can act together or separately or you may appoint successive attorneys. So for example, and we see this quite commonly, where spouses may appoint each other as the primary attorney then they go on to appoint their adult children to act in the event the spouse predeceases them or is unable to act. Your attorney must have attained a minimum age in order to act and certain other restrictions may apply and again, this minimum age is the age of majority 18 in Ontario which is also true in most provinces. Powers of attorney for personal care in Ontario only require you to be age 16. So some of the other restrictions that may apply for instance unless they are a family member a paid caregiver may not act as your attorney for personal care.

Mary – That's a very interesting point. I bet a lot of people don't know that. Thank you for sharing that. When does a power of attorney take effect? In other words, when can my attorney or substitute decision maker begin acting?

Elaine – Again, this is a case where we need to distinguish between the two types of powers of attorney. In the case of your power of attorney for personal care, or representation agreement depending on your province, your attorney may only begin acting and begin making decisions on your behalf when you are no longer capable of making personal care decisions for yourself and legislation for each province provides details on what it means to be incapable of personal care. It actually sets out in the act the test for knowing whether or not you are capable of making these decisions and this makes sense. So long as you are capable of making your own health care decisions and choices about where to live for example, no one else should be able to take this power away from you and be able to make these decisions for you. The situation in respect to the power of attorney for property is more complicated. A power of attorney for property is effective on execution meaning once it's signed unless otherwise stated in the document. This is very important to know as the document grants significant powers to the attorney.

Mary – Now what if I don't want my attorney or substitute decision maker to begin acting right away?

Elaine – And that's an excellent question and one that we spend a lot of time discussing with our clients. That's the normal situation. For most people, the power of attorney is a cautionary document. We all know we are going to die one day and need a will. We hope we don't become incapable before that time and need to have an attorney begin acting for us. So for most of us we only want our attorney for property to begin to act only in the event that we become incapable of managing our affairs at some time in the future and it is indeed possible to make the power of attorney document conditional on the occurrence of certain events. In some provinces, this is referred to as a springing power of attorney and the conditions are set out in the document itself. This is the common practice in the province of Alberta for example. In Quebec, there is a formal process which is required before the mandatory is authorized to act. So again, you are seeing the provincial variation and this is why it is so important to make sure that you receive specific advice for your province. In other provinces, such as Ontario, where I practice, the usual practice is to prepare what we refer to as a clean or unconditional power of attorney document so the document itself is effective when it is signed and doesn't contain any conditions in the face of it. However, we prepare a side document which sets out when it is to be released and made available for use. In that case, it is very important that the original documents are held by someone you can trust. It may be the trust company if we are appointed as attorney, it may be the lawyer who

prepares the documents for you, and then those documents will only be released under the circumstances stated in this side document. Some of the circumstances are "if two of my physicians say I am now incapable of managing my affairs or could use help managing my affairs ". You may choose one or more family members to make that decision so you may ask your children to make that decision that mom or dad is no longer capable of managing their affairs or you can simply direct your attorney to start acting. We often see this at the trust company where we have a client who has appointed us as their attorney for property, they are still mentally capable but they may either have some difficulty now in managing their affairs due to some infirmity or it may be a good news situation where they're spending a lot of time travelling out of the country and just don't want to be bothered managing their affairs. They can certainly authorize us to begin acting right away in that circumstance.

Mary – So, what if I become incapable but haven't prepared for powers of attorney?

Elaine – Well, that's a situation that we're hoping we can avoid with programs such as this. If you become incapable and don't have valid powers of attorney in place an application to court may be required to give authority to someone to act on your behalf. This can be a costly and time consuming process and the public guardian trustee and other provincial equipment may become involved. It's very important to know that having a will doesn't help in this situation. We often hear clients say, "Well, if I was to become incapable, that's okay, I've prepared a will and my son can take over". Your executor's or authority that you've appointed in your will ...their authority begins only after your death. They have absolutely no authority to act during your lifetime. So, if again, if you're to become incapable of managing your affairs and you have not prepared these important documents, likely someone will need to go to court to be appointed to act on your behalf.

Mary – Can an attorney or substitute decision maker be compensated?

Elaine – Yes they can and again very important for both the person making the document and the person who may be acting to be aware of this. This is a job and there's a lot of responsibility attached to the job. You are responsible as a fiduciary, which is a special term of law which means you are responsible for looking after someone else and there is a very high standard of care which attaches to that and you have a number of specific duties such as :

- Accounting to beneficiaries
- Managing the assets properly

Yes you can be compensated for both reasonable out of pocket expenses and also for direct compensation. However, in some provinces, the payment may only be possible where it's expressly authorized in the power of attorney document. In Ontario, for example, you are authorized under the substitute decisions act, the document doesn't need to mention compensation. In certain other provinces, it's very important that that compensation is actually written in the document in order for the attorney to be able to take the fee. In every province there are guidelines on what constitutes a reasonable fee and as a general rule, trust companies such as where I work at Scotiatrust, we explain compensation structure up front to clients and we generally enter into a compensation agreement with

the client at the time that the document is being signed so that they are aware what our fees will be if and when we are called upon to act as their attorney.

Mary – So what duties does an attorney or a substitute decision maker assume?

Elaine – As I mentioned in the last section, the role of the attorney is what we call fiduciary in nature. This means that the attorney must always act diligently, in good faith and in the grantors' best interest. Specific attorney for property duties may be set out in the applicable provincial legislation. Some of these specific duties that are set out in the Ontario act include:

- Keeping accounts of all transactions regarding the grantors' property
- Consulting with the grantor and with supportive family members and friends
- Determining whether the grantor has a will and if so you must review the terms of the will
- Making expenditures from the grantors' property that are necessary for the grantors support and care
- Managing the grantors' financial assets, investments and other property

As you can tell from that list, depending on the situation this can be a very time consuming and daunting task.

Mary – Well you know, I remember when I was responsible for both of my parents when they became incapable and it is a very important job and it is almost, depending on the level of care, a full time job. So I hope people really understand that this is so important to do it well and it really brings me to my next question for you. Who should I appoint as my attorney or substitute decision maker for property?

Elaine – Well there's no one right answer to that question, Mary and I will just add a little bit to the comment you made in terms of the work involved. It can be even more difficult a job than acting as an executor under someone's will. In most cases, with the will, it may take some time to administer an estate but at some point you will close the estate. In the case of a power of attorney, depending on the grantor's incapacity, this job may potentially go on for many, many years. We have situations where my understanding of Alzheimer's for example, after diagnosis the general life expectancy is somewhere in the range of 5 – 15 years so think about the job that you're taking on. This is not a relatively quick, meaning a couple of years wrap up of an estate. You may be essentially on the hook as attorney for many years so that's one of the factors you need to consider when you're thinking about whom you should appoint. So due to the nature of the role it's important that you appoint an individual who is honest, trustworthy, has integrity along with the time, skills and inclination to act on your behalf and I will just underscore that honesty is the most important attribute. For some people, a trust company such as Scotia Trust, acting alone or along with a family member may be a good choice. My experience has been most clients that we see and I appreciate this isn't every situation but most clients we see are husband and wife and most families they have children and they think of appointing their children automatically. It's only when we start to go through some of the legal requirements of what that child may need to do and sometimes it is a legal issue such as a child that lives out of the country. There may be complications in terms of appointing someone who lives in a foreign jurisdiction. Sometimes it's simply more practical matters such as they have very busy lives, families of their own etc…they live

maybe in another town. How would they have the time or how would the logistics work in terms of how they will look after you? So it can be legal considerations or it can be very mundane practical considerations but in every case, it's very important that honesty and trustworthiness are key.

Mary – Well you know there could be situations that I'm sure you see where the parents know that their adult children just don't get along with each other. So there could be situations where appointing your adult child might instantly cause problems and or conflict within the family so not always having your children is something that I think they should talk to their lawyers and talk to trust companies about because although it might assume to be the best choice, I'm sure in your business you find many situations where it is not the best choice.

Elaine – Absolutely. I would add to that Mary, that when you appoint more than one attorney you have the option of appointing them jointly meaning they must act together or jointly and severally meaning they can act on their own. Very important that your estate planner whether it be an outside lawyer or the person in the trust company that you're speaking with explains clearly what those choices mean and the pros and cons. When you appoint, for example if there are two daughters appointed jointly, it can give you some protection that they can't go off and do anything on their own. The two of them need to agree on everything. The problem with that is that it can be somewhat restrictive. So if one of your daughters is maybe less available, travels for business for example, and a decision needs to be made quickly- ie. An investment is coming up for renewal ; you may want to have the flexibility of having them able to act jointly and severally but then you don't have the level of protection you would with them acting together. The one thing I can guarantee clients is that if your children don't get along now, they aren't going to get along when they are required to act as your attorney or on your passing when they are acting as executor and although there is no requirement that you get the preconsent of the person that you're naming, I think it's very important to discuss with them. Again, I meet with many clients whether we are talking about who they are naming as executor or power of attorney who assumes that their children will want to take on the role. When they actually raise this with their children they may find out that their children would really not be the least bit offended if mom or dad did not appoint them. They've already planned if they were going to be named to hire someone to help them with the role or they just would not be in a position to do it. So I think it's a very good idea to talk to them to see if they know what is involved or if they have the interest in taking the role on and sometimes just the professional, third party choice is just the best option for everyone.

Mary – So Elaine, another question for you. Does an attorney or substitute decision maker assume any liability?

Elaine – Potentially yes; again this is a big job with a very high threshold in terms of the standard of care and they may be liable for any loss resulting from a breach of their duties. An attorney who abuses their position or fails to properly discharge their duties may be required to compensate the grantor or other interested parties such as estate beneficiaries and I hate to tell you that this happens all the time. I do a fair amount of public speaking to client audiences and other audiences and for a period I was collecting headlines related to powers of attorney from across the country and these appeared, not so much in legal publications but in newspapers such as Maclean's and they were related to theft by power of

attorney, abuse by power of attorney, etc. This does happen a lot and at law, yes there could be a case against the attorney. That doesn't always help if they've already gone and taken the money so again very important that the grantor (the person choosing the attorney) needs to make sure that the person they are choosing is someone that they trust implicitly and the attorney also needs to know that they are under very strict rules in terms of how they should act and if they do something that is a breach of their duties they may indeed be personally liable at the cost of themselves.

Mary – So knowing that, can an attorney or substitute decision maker refuse to take on that role?

Elaine – Yes. No one is obliged to take on the role as attorney. I mentioned that it may be a good idea to get this consent from them in advance because they have no obligation to take on that role if they find out that they have been made an attorney and the time has come for them to act. What is very important for an attorney to know is that they should think very carefully at the time they are called upon to act. Although they are not required to take on the role, if indeed they do begin acting, there will be legal restrictions on them getting out of the role. They can't simply say "I've had enough. I don't want to do this anymore". Depending on how the document is drafted if there is no provision for resignation in place, they may need to consult a lawyer and see what's involved and there may also be a court application. If there's no alternate attorney that's been appointed this could take you back to square one as if you'd never prepared the documents in the first place so this is really advice for both the person who's choosing the attorney to make sure it's someone who will be inclined to take on the role and be available. Often times what we see people do is that they appoint a peer in terms of age whether it's a spouse or say a sibling. They have to keep in mind that we are all getting old together and they just may not be around to take on the role so make sure that you have another alternative in place in the document and if you yourself are an attorney I think it's great advice for you yourself to consult an attorney or legal professional before you take on the job so that you really understand what it is that you're getting into.

Mary – A final question for you. If you can share some of your experience and wisdom with our audience. What are the common misunderstandings about powers of attorney?

Elaine – The first one is the terminology can be a bit confusing for people. I often hear, and this could be from friends of mine, "I am power of attorney for my mom" That isn't technically correct. The person is the attorney under her mom's power of attorney for property and or personal care. So you are actually the attorney when you are acting for someone else as their substitute decision maker and in this case it is confusing because attorney does not mean lawyer. For most of us when we hear the word attorney it makes us think of lawyer but in this case it does have a different meaning so that's always something that we need to clarify with our clients. The other main thing that there is a misunderstanding on both the part of the people who are granting the authority and for the attorneys themselves is just how big a role this is and how wide the power. This is actually a more powerful document than your will and I think a lot of people overlook that point. Your will is of no power or effect until you pass away. Unless the document states otherwise, your power of attorney for property is established the moment you sign it. You are giving someone authority to deal, unless you put certain restrictions in the document which is unusual, with all of your assets and that is a very powerful thing. On the attorney's side, I think that

most attorneys are completely oblivious to the role that they're taking on. Many attorneys, and I'm not suggesting they necessarily do this dishonestly or in bad faith, they are not keeping the meticulous records that the need to be keeping. Sometimes they use the money belonging to their parent for their own benefit under the assumption that they are getting it under the will anyway. It is not your money while that parent is still alive. It can only be used for their benefit, you must invest it properly and there are certain rules in terms of how a fiduciary must act. The idea of consulting with supportive family and friends etc , again this can be a very daunting task and again I think most people are not aware of the significance of the role at all.

Mary – Well thank you for that Elaine and thank you for joining us on this podcast. Could you please share your contact information with the audience?

Elaine – Certainly. I am based in Scotiatrust head office in Toronto and I would be very pleased if anyone has any additional questions that I can either answer or I can refer to my associates as we have offices coast to coast across Canada where they may be better placed to answer a question from a different province. I can be reached at my email which is elaine.blades@scotiaprivateclient.com or I encourage you to visit Scotiabank's website which would be scotiabank.com and if you navigate the website you will find Scotia Private Client Group and the Scotiatrust tab will give you more information about the services that the trust company offers and also there is contact information on that page as well.

Mary – Thank you Elaine for that. Just as a final note, our conversation today was an introduction to powers of attorney and we have purposefully not covered off all of the issues that we could have today because throughout this project, we will have other experts talking about other parts of power of attorney issues.

Chris - **Mary, who are our initial project supporters?**

Mary – We wish to acknowledge that this project is funded in part by the government of Canada's New Horizons for Seniors Program. Our other initial supporters include Care Connect, The Care Guide, The Healing Cycle Foundation and Scotiatrust. Caregiving Matters is an internet based registered Canadian Charity dedicated to educating and supporting family caregivers. 90% of our work is done online and by leveraging technologies. 10% is done by producing local educational events. We leverage technologies in everything that we do ensuring greater reach and sustainability. I trust that we have given some of the highlights of our exciting new initiative. If you are interested in speaking with me about the project, please let me know. We look forward to your questions and your ideas.

Chris - **Mary, if listeners have questions, what is the best way for them to contact us?**

Mary Bart- You can contact me directly Mary Bart, Chair of Caregiving Matters at 905-939-2931. My email is mary@caregivingmatters.ca and our website is www.caregivingmatters.ca