

# The **POWER** of ATTORNEY PROJECT

## **What Lawyers Don't Tell You – The Realities of Record Keeping**

Welcome to the Power of Attorney Podcast which is part of our Conversations that Matter Podcasts. 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.

Mary - Today the title for our podcast is called:

**What Lawyers Don't Tell You ...The Realities of Record Keeping. Our guest expert today is Linda Alderson. She is a chartered accountant and co-author of a book called: " Let the Records Show".**

Welcome Linda to our project.

Linda – Thank you, Mary. It's a pleasure to be here today and perhaps I will start by just giving a little bit of information about myself. I'm educated in Ontario but I moved to Australia after passing my chartered accountant exams in 1986 and I returned in 2000. During the time away I was employed in a number of accounting positions but upon coming back to Canada, I decided to be self-employed and I started of doing very general accounting work but gradually moved into doing estate work, primarily preparing accounts for litigation. During that process, I became aware of the lack of knowledge people had when looking after someone else's money and also the trial and error method of winding up estates that executors seem to adopt so I co-wrote a book with my brother who is a wills and estate lawyer called Let The Record Show – A Practical Guide to Power of Attorney and Estate Record Keeping. Now I primarily focus on helping people understand the record keeping requirements when looking after someone else's money. I also speak on these issues with particular focus on how our own sound record keeping habits not only sets a good example for our attorney or our executor but really plays a key role in minimizing the risk of financial elder abuse happening to us.

Mary – That's wonderful and it's a scary topic when you talk about elder abuse. Not everybody who is named as the POA or substitute decision maker ends up being as honest as had been thought they were

going to be. Elder abuse, definitely from a financial perspective I believe is real and I believe it is on the rise. So, let's start. I have a couple of questions. The first one is why do POA's have to keep records?

Linda – The simple answer is because the law requires that as an attorney you do so. Across Canada, each province and territory actually has their own legislation that sets out the requirements for record keeping but the substance of these requirements is pretty much similar right across the board and for our purposes today, I will be referring to the Ontario legislation which is called the Substitute Decisions Act of 1992 where we find a regulation entitled regulations 100/96 that identifies the exact kind of information that's required.

There are even more practical reasons why an attorney would want to keep records. Primarily to help manage that person's money efficiently and knowing where one stands in regards to financial resources versus those that are tied up in investments. Unplanned for expenses can be dealt with calmly and in a timely manner. There's also the aspect of in order to help the attorney and the grantor, that is the person who's money is being looked after, if they're competent to do so then they can work with the attorney to plan ahead and determine whether financial resources are going to be sufficient to sustain the grantor in their current standard of living and of course if there's concerns about that then the exercise in investigating long term care facilities needs to be started sooner rather than later.

Mary – That's very interesting that you say that about the planning process and so what does it really mean to keep records? What do people think though when you say keeping records?

Linda – The regulation that we referred to a few minutes ago is quite detailed in listing exactly what needs to be kept track of and if you actually look at that page it can look rather daunting because it's a whole page, however, when you look at it more carefully, you realize it's just asking the attorney to keep track of cash coming in, cash going out and what's happening with the big ticket items. So when they say you have to keep records, you don't need a software package or to use excel, but you do need to be organized. You do need to have a bankers box or a filing cabinet drawer where you're filing things appropriately every month and that you're reviewing things every month for example the credit card statements so that you're sure you have adequate supporting documentation to substantiate all the activity that's happening on behalf of the person who's money you're looking after. Most of the litigation arises over the expense side of the equation. Things like siblings will come along and say "I can't believe that's how much money you spent for mom, show me the invoices to prove that that's how much the nursing home costs".

Mary – That's really interesting and I'm just going to take a second here to clarify for our users that there's a great number of terms people use to call themselves. Many people call themselves power of attorneys and legally I've been told that that is an incorrect term. The correct term is what you have been using which is attorney or substitute decision maker. For people listening in, when Linda refers to the attorney she is not talking about the person's lawyer but she's actually talking about the person who is responsible for taking care of someone. It's kind of a funny thing. There are three terms that get thrown around and the most common and the most incorrect is the term POA. I just thought I might

help people just clarify that little point. For most people, it is quite confusing. Most people will not even know that they are substitute decision makers but they think of themselves as power of attorney.

I have another question for you Linda. Why does a POA care about how accurate the records are?

Linda – There's quite a number of reasons why the accuracy is so important and we've already discussed one of them and that being that with accurate records it will help ensure that unexpected expenses can be dealt with efficiently should they arise. In some situations the grantor is helping the attorney look after their affairs but if something happens all of a sudden, for example, they suddenly have a stroke and they are no longer able to contribute anything to making decisions, the attorney needs to determine what kind of financial resources are at their disposal in order to decide care options for that person. Having accurate records to immediately fall back on and review is going to help decisions be made in a timely basis.

Another reason is to ensure there is an evidentiary record. This helps if someone who has a right to information starts asking questions of the attorney. It's important that they get answers quickly. There's a lot of litigation that starts simply because the attorney didn't come up with the information fast enough and therefore that led to suspicion on the part of a sibling. Whether it turned out that it was proper suspicion or not, the fact is it was there so being able to supply answers in a timely manner is so important. Also, to preserve the estate, having accurate information means that the decisions are more apt to be wiser and prudent.

Another reason would be to safeguard the attorney's own reputation. An attorney certainly doesn't want any accusations of maleficence or mismanagement that might taint their professional or personal reputation. The law protects the attorney in terms of clearly stating that the debts of the grantor do not become the debts of the attorney, and that's good, however, if deficient record keeping results in bad decisions being made and debts being incurred by the grantor, then the attorney could very well be held accountable. So it's all very important that accurate records are kept and of course if they find that they have to go to court then being able to hand over well maintained financial records to the lawyer and the accounting partner is going to reduce the legal and accounting costs as they get everything organized for a court forum.

Mary – And I would think if it's really accurate it would help decrease the stress too. To go through those situations must be incredibly stressful. If you're better prepared, you're hopefully less stressed through this whole thing. Now, could you give us a real life example of this topic and how important it is for the audience?

Linda – There's just so many cases out there. The courts are full of litigation as siblings challenge their siblings when it comes to the management of their parents' financial affairs. Often nothing is said until the second parent dies and it's only when the estate is being settled and the final distribution is made that one of the beneficiaries will say when they get their cheque something like "well, is this all I'm getting?" I was involved in that exact scenario where there were two brothers, the will was very straight forward, and the split was 50/50 and one of the brothers had been looking after their mother's affairs for ten years before she passed away. He hadn't kept any records. He was also the executor of the

estate so he wound up the estate when his mother died and handed his brother his 50% cheque and the brother just looked at it and said “you’ve got to be kidding. Mom had way more money than this. What did you do with it all?” It was very stressful. I don’t know that the two brothers are talking to each other yet. To go back and try to construct accounts over ten years, you can imagine the time and the inconvenience and everything that would have been involved in that situation.

Mary – That’s a very sad situation because from what I gather, from what you’re saying, the one trusted the other one but at the end he didn’t trust him at all and the lack of record keeping might have permanently ruined their relationship. That’s naturally sad and that could have been avoided.

Linda – Yes, exactly.

Mary – wow...families. I’ll tell you! It’s true, it’s so hard sometimes to hear these stories and yet if one had done a better job they wouldn’t be where they are. That’s one reason why we are doing this project so that people can say “what can we do so we don’t end up like your example?”. It’s as simple as that. Another question for you Linda. Who might a power of attorney have to show their record keeping to?

Linda – A very good question. If the person is just assisting the grantor in his affairs and the grantor is still pretty cognizant in taking part in decisions on how they’re spending their money and what not, then the attorney is only accountable to that person. The attorney owes that person privacy and therefore should not be disclosing any information about their financial affairs to anybody else unless the grantor has given them permission. However, in situations where the grantor becomes incapacitated, they have a stroke for instance or they’re going downhill in the final stages of dementia, then the person who is the attorney for personal care (if it’s a different person than the attorney for property, that is if they have one) then that person will have to be aware of the financial circumstances of the grantor in order to assist in determining the level of private care that can be afforded if any. If there is no attorney for personal care than the courts can appoint another family member or if there’s no family member available or willing, then the public guardian will step in. So the attorney for property will have to share the records with the public guardian. The Substitute Decisions Act also stipulates that when the grantor becomes incapacitated, then supportive family members and friends as well as persons providing care for the incapacitated person are to be consulted. The content of this consultation isn’t really defined within the Act. It’s really a matter of discretion on the part of the attorney while keeping in mind the best interests of the grantor. It’s conceivable that the attorney won’t be sure of how much information they should be disclosing and they might have to obtain legal advice. For example, if they think someone is just getting a little bit too nose-y for whatever reasons and they’re not comfortable with divulging quite so much. Then they should seek a lawyer just to make sure they’re not giving up that privacy part or crossing over the line in that regard. It can be tricky when beneficiaries of the will who are perhaps sitting there waiting for it to happen, they can start hounding the attorney for information.

Mary – That’s very interesting. You mentioned that you are co-author of a book. Could you tell us about your book please?

Linda – Thank you so much for allowing me this opportunity to talk about the book. You know I think it's a wonderful book. My brother does and he's a wills and estates lawyer. It's a resource and it provides a 10 Step Guide to help ensure good financial records. It's written for the layperson. It's not written for a lawyer. It's written for the man on the street as it were or a power of attorney or attorney winding up an estate. It reviews some common mistakes and how to fix them. There are also a number of checklists

and templates to help get organized and to stay on top of things. We think that for a little \$20 investment it can help save thousands of dollars down the road from lawyers and accountant fees.

Mary – Well thank you Linda very much for that and thank you for being a guest as part of our project. People will be very interested in what you have to say and could you share with us your contact information and how people can go and purchase your book?

Linda – Yes, we have a website [www.showmetherecords.ca](http://www.showmetherecords.ca) and our book is available at amazon or chapters/indigo so it's easily accessible.

Mary – That's wonderful. Thank you for that, Linda.

**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](mailto:mary@caregivingmatters.ca) and our website is [www.caregivingmatters.ca](http://www.caregivingmatters.ca)