

# The **POWER** of ATTORNEY PROJECT

## Acting Under a Continuing Power of Attorney for Property

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’s topic is Acting Under Continuing Powers of Attorney for Property with our guest speaker, lawyer, Mary-Alice Thompson, TEP, Certified Specialist Estates and Trust Law. Welcome Mary-Alice.

Mary-Alice – Thank you. Would you like me to say a little about my background now?

Mary- That would be wonderful, thank you!

Mary-Alice- I’m a lawyer in Ontario. I practice elder law and I practice specifically estates and trust law. I’m actually a certified specialist by the law society in that area. That means that as part of my practice I prepare a lot of powers of attorneys for property and I advise people who are acting under the powers of attorney for property for people and I see that a lot of people don’t understand what their basic duties are under those documents.

Mary- Thank you for that and just to let our audience know that our conversation today is going to be about Pat who is acting for his mother under a power of attorney for property in Ontario. If you don’t live in Ontario, please listen anyway because this topic may be of interest to follow up with a lawyer in your own local area. So let’s get started. My first question is what are the obligations of Pat who is acting for his mother under a continuing power of attorney for property in Ontario?

Mary- Alice- The first thing is that it depends on whether Pat’s mother is or is not capable of making her own financial decisions. Often people think of powers of attorney for property as being used only when the person who gave the power of attorney to the grantor is not capable of managing their finances but in fact, powers of attorney unless otherwise specified or restricted in some way, can be used any time after they are executed. So it might be that Pat’s mother, in this case, is perfectly well able to manage her own finances and she’s just asked Pat to give her some help. In that case, Pat’s obligation is really to act as his mother’s agent to do what she tells him to. She may tell him to go down and deposit this

cheque in the bank. She might tell him to go talk to her broker and tell him she'd like to sell some of her stock. Those kinds of things he will do but his obligation is to do what his mother directs him to do. He reports to her. If, however, his mother is no longer able to make her own decisions, his obligations then become more onerous. He has an obligation at that point to act as a fiduciary in her best interest. First of all he has to exercise the care, skill and diligence of a prudent person managing his or her own affairs. If he decides he wants to be paid, and we'll talk about that later, the standard is higher. He actually has to act with the care, skill and diligence of a person who manages other peoples' affairs. Part of that is that he has to keep careful accounts or records. He has to make sure that he has the underlying documents to support those but every transaction that he does on his mother's behalf he should record somewhere so that he knows the date that the transaction was made, what it was for, who he paid or who paid him and the amounts. Those accounts are set out in Ontario in the regulations under the governing legislation which is the substitute decisions maker's act. In addition he has to make sure that while he's managing he's looking after his mother's comfort and wellbeing, that he's working with whomever is making decisions on her behalf for her personal care if that's not her, he needs to be explaining to her what he is doing and encouraging her to participate in the decisions that he makes, and he needs to be trying to encourage contact between her and supportive family members and friends and consulting supportive family members and friends and also caregivers of his mother. So that's a lot that he has to do and he should probably give thought to where he's going to keep his records since he has to keep them well and keeping a record of the discussions he has with any of the people he's consulting.

Mary- That's very interesting and your comment there about keeping records with people that he has conversations with. That could be something even as simple as saying I had a conversation with the bank manager today and here is what we talked about and here's the date and here's what we concluded through that meeting. That's the kind of thing you're referring to.

Mary- Alice- Yes, and that's not actually set out in the legislation but it's a very wise thing for him to do because down the road he may forget that he had that conversation. If he is challenged on the decisions that he's made and the action that he's taken, it's very helpful to have that kind of record.

Mary- Thank you for that. Now I have a second question for you. Can Pat make an annual donation to a charity and can Pat help the grandchildren with their tuition?

Mary-Alice- Again, it makes a difference whether Pat's mother is or is not capable of making her own decisions. To go back to what I said at the beginning. If Pat's mother is capable of making her own financial decisions then she will make those decisions about whether there is a donation to charity or towards the grandchildren's' tuitions. If, however, Pat's mother is no longer capable, then we look to the document itself. So sometimes, the continuing power of attorney for property which is the term we use in Ontario for this document, will make statements about whether his mother wants gifts to be made on her behalf or if not and in that case, he's going to have to follow what's laid out in that document. If there is nothing in the document, the statute does provide some guidance as to how he can decide about making gifts and it does make a distinction between making gifts to family members and making gifts to charities. If we are thinking about a charity first, he needs to make sure that the gift

would have been authorized by his mother when she was capable and that there's evidence that she made similar expenditures in the past. So if she's authorized it in the POA itself, then that would be good enough but if there was for example evidence that she gave a hundred dollars to the united way every year, then that would be evidence that similar expenditures had been made while she was capable and that would make it acceptable for him to do. There are some limits on that. With a charity or with a gift to family he can't make the gift if mother is saying now that she doesn't want to pay anything to the united way for example. Similarly with the charitable gifts there are limits on how much of his mom's income he can use to make a donation and if he wants to go over that amount he would have to make a court application. With respect to helping the grandchildren with their tuition, again there may be something within the POA that is going to be helpful but if there isn't we go back to the statute and what it says about making gifts to family. There has to be reason to believe, based on what mom expressed when she was capable, that she would have made them if she were capable. That could be something in writing in the power of attorney itself or somewhere else where very clearly; preferably in writing, if her grandchildren need help with their education that she wants to be able to do that. There has to be an indication that this is the type of thing that mom would have wanted to do. Again, however, if mom is now saying she doesn't want any money going to the grandchildren's tuition, then that would put the brakes on making the gifts for tuition. There's also another concern here and that is that Pat can't give away the money that mom needs for herself. There are no expenditures that can be made unless mom's needs have been met and the needs of any dependants if mom has dependants. Pat can't think about making a gift to a charity or to grandchildren, unless he's satisfied that what he has in hand is going to be sufficient to meet mom's needs, her dependants and other legal obligations. I should have mentioned in connection to Pat's obligations that one of the things that Pat has to do is familiarize himself with mom's assets. When he begins to act under that power of attorney for property, he has to find out what mom owns, and he has to make sure that he's in a position to control it, make sure it's protected, and insured. In other words, he has to guard that property and make sure that it's kept in good condition. Similarly he has to find out whether mom has a will and what's in the will. He can't begin to give away things that are dealt with in the will except in very certain circumstances.

Mary- And just to add a note to that, about taking care of the assets. I believe it is a lot of homework in some cases for people to find all the assets and to find all the bank accounts, savings bonds, and insurance policies so the person has a lot of work to get it all organized and that takes time and patience.

Mary-Alice- It does. This is not an easy job and sometimes people think it's a great honor to be appointed as a power of attorney under property and that's as far as they go. In fact, it can involve a lot of work so anyone who is going to undertake the job needs to be aware of that.

Mary- Thank you for that and to go on to our next question, can Pat sell the house and distribute the proceeds to the children?

Mary-Alice- Well, there's two parts to that question and I'd like to deal with the house selling and the distributing as separate issues. As far as selling the house, Pat needs to look at his mother's will and find

out what is in it because supposing the will actually makes a gift of the house to a specific person. That's a problem if the house is going to be sold. The substitute decision act does actually say that Pat is not to sell the house if he knows that it is subject to be a gift to an individual in the will. There are some exceptions to that and the first is if he needs to sell the house because there are no funds for mom's living expenses unless the house is sold. That might then be an acceptable reason to sell it. The other exception in which he may consider selling it or gifting it is if there is a person named as the recipient of the house in the will, and the house was within the guidelines as a gift he could potentially sell it now to gift to the individual. Obviously, he shouldn't sell it if mom is living there. We are assuming here that mom is moving to a facility and of course, all of this is subject to the assumption that his mom is incapable because otherwise, he would do what mom tells him to do.

As to distributing the proceeds to the children, again, if we go back to the discussion about gifting, the question is going to be, first of all, is this going to be something that mom would have done and that Pat knows she would have done based on intentions that she expressed while she was capable? That's the first thing and secondly, is it contrary to her wishes right now? So, she has to have indicated when she was capable that when her house is sold she definitely wanted the money distributed to her kids, and she has to be now willing for that to happen even if she's not capable. Of course, if the house is being sold so that there is money for mom to live on, then the money would not be distributed to the kids.

Mary- Thank you for that and our next question is can Pat take money to make up for his time and expenses?

Mary-Alice- There's two parts to this. Making up for his time and making up for his expenses. We make a distinction between the money that Pat is actually out of pocket and the money that he may be paid for his time and trouble. Let's deal with the expenses...the money that Pat is actually out of pocket. Let's say he is helping mom move out of her house to her new residence and he puts the cost of the mover on his visa bill. He can reimburse himself for that money that he has spent on mom's behalf and that is a legitimate expense. He needs to document it and keep it in his records as to what he spent that day, the purpose, the amount then he can expense those things. The question of compensation for his time and trouble however is different. This is set out in the substitute decision makers act and they say how a person is entitled to be paid if they are acting under a power of attorney for property. They can be paid 3% of the capital and income receipts...so if you think about Pat managing money for mother, for example her pension, her RR's and say he sells the house and the money gets deposited into his account. He can take 3% on the value of each of those transactions. Similarly 3% on capital and income disbursements so if he's paying for her rent in a new facility, if he's paying for clothing or utilities on her behalf, then he is entitled to take 3% of that. In addition, he can take 3/5 of a percent on the average annual value of the assets that he is looking after. Now if he does that, he raises the standard to which he is going to be held to. You remember that I said that the standard for Pat when he's acting under these circumstances is the standard of a prudent person managing her/her own affairs? Well, now if he is paid and takes that compensation, he will be held to a higher standard of a professional trustee. The standard of someone who manages other peoples' money or affairs. Pat may want to take compensations but he needs to be aware that if he does that the standard for his behaviour goes up. If Pat is going to take compensation, he may want to go through a process known as passing of accounts.

This is a process where the courts can look at his accounts and approve the compensation that he's taking. It's something that sometimes people are shy of doing because they don't like the idea of going to court, but what it does is give Pat the comfort of knowing that the compensation he is taking in fact is appropriate and approved by the courts.

Mary- I have a related question to that that I just thought of. So if Pat takes compensation does he have to report that as income when he does his annual filing to the CRA?

Mary- Alice- Yes he does and he has to pay tax on it and CPP on it. It is work that he is doing and being paid for.

Mary- Thank you for that and my next question is, can Pat show the other adult children the accounts and financial information?

Mary- Alice- Again let me go back and if his mother is still capable and she consents to having the children shown the accounts then that's fine as he's simply acting on her direction. If on the other hand, his mother is incapable, then we go back to the fact that he is the fiduciary, his mother still has privacy rights and these accounts are confidential. If he shows them to the other children, he may well be breaching his obligation to keep her financial affairs confidential. If he decides however that he wants to pass his accounts and the executor wants to challenge what he has done, all of that information is going to be made available to the other children so he may feel it is better at that point that it is better if he could share what he was doing and got their consent for what he was doing. Now he could get consent for particular actions. You'll remember I said that he consults with supportive family and friends but to show the complete accounts and financial information is probably a breach of his mother's confidentiality.

Mary- That's very interesting. Thank you for that. My final question for you is, can Pat take some steps to reduce the probate on his mother's estate?

Mary- Alice- He can but he may not be able to do as much as he thinks he can. For example, using the power of attorney and assuming we are talking about a situation where the mother is no longer capable, and he's thinking there are these assets so let's see if there isn't some way that we can keep them out of the estate and not pay probate on them, it may indeed plan on the type of planning he intends to do and it may depend on actually what is in the continuing power of attorney document. A continuing power of attorney for property may or may not give him some support in making a series of transactions but there are some transactions that he probably can't do at all. That's because the substitute decision makers' act says that a person acting under a continuing power of attorney for property can do anything with that person's property that the person themselves could do, except make a will. So Pat could do anything with Mom's assets that she could do except make a will. What that has been interpreted as meaning is not just that Pat can't sit down and write a will for mother, but that there are some transactions that are like enough to making a will because they have effect only when the person dies, they transfer assets and so forth. A person acting under a power of attorney for property can't do those things either. For example, a person acting under a power of attorney for property will not be able to designate a beneficiary on a registered plan. So for example, if Pat's mother

has a registered retirement income fund and the original beneficiary on those funds was Pat's dad, and Pat's dad has since predeceased, so by default what's going to happen is those funds would be payable into the estate. Pat might think, well why can't I just change the designated beneficiary using my power of attorney to be payable to myself and the children. That's where it was going to go under the estate anyways and avoid the probate. The problem is the bank will refuse to recognize his power of attorney for that purpose because that is a will-like act. Things that Pat might think about doing is putting assets into both his mother and his name so for example if they are both living in the house they both have their name on the house to avoid probate. The difficulty is first of all, that once Pat is named on the house that may have other repercussions and may even give a spouse an interest in the house. Also the status of the house as a principal residence but if Pat is not living there it's not his principal residence. The assumption in that case is for Pat to treat it as part of the estate and when mom dies and there has to be a statement about mom's assets, the house will have to be listed anyway so the attempt to remove the house from probate will have failed and actually cost them money. Also other family members may be upset when they find out what has been done. So although Pat may be able to do it legally, it may not be a very wise thing to do and it may not be effective to reduce the probate on the house. Pat may also look at trying to change life insurance designations and he may find he has the same problem that he would have with registered retirement plans as it's seen as making a will-like type of change and his attempt to use the power of attorney is not likely to be recognized. One other thing that Pat might consider trying to do is set up a trust so if mom is over 65 and living alone then what Pat may consider doing is setting up an alter ego trust because the assets that are in the trust will not belong to mom when she dies and it does appear that this is something Pat can use his power of attorney to do. If he decides he wants to do that, however, he needs to be extremely careful about how he does it and what the wording in the trust is and that he be very well advised both from a legal and a tax perspective.

Mary- You bring up so many interesting points and as a lay person it really makes me want to encourage people to seek legal advice and ask the questions that we've been asking because it is complicated and it is complex and one of the goals of this project is to say these are really important issues and I encourage people to not try and solve these on their own. There are experts that are there to answer questions and give examples and scenarios so really the message for people listening is to go and find a lawyer and an accountant in your area, and have these conversations so that you are more knowledgeable about the benefits and the risks of many of your ideas. Thank you for sharing all of that. To wrap up I would like to take this opportunity to thank you Mary-Alice for joining our project, for sharing your wisdom and helping people to understand that it is a complicated and very important role and I often say it is one of the most important roles we will play in our family's lives. Thank you so much again for that.

Mary-Alice- You're most welcome. May I say also that there is information available on our website which is [www.cswan.com](http://www.cswan.com) on acting on power of attorney for property or acting on a power of attorney for personal care.

Mary- Thank you for that and do you have any other contact information to share?

Mary- Alice- I can be found on that website and all of my contact information is there.

Mary- And now to wrap up this conversation that matters, Chris Kata and myself who are on the board of directors have a few words to say.

**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 Scotiabank. 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)