

**Appointing Multiple People – Benefits and Pitfalls**

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- Our guest speaker today is Lisa Feldstein and she practices health law. Welcome Lisa.

Lisa- Hi Mary and thank you so much for having me.

Mary-Thank you for joining us. Could you share a bit about your practice with our audience please?

Lisa- Sure, so my background as a health lawyer started out as giving advice to hospitals and other health sector clients and I transitioned about a year and a half ago with my own practice and now I call my niche family health law. What that means is I give health law advice and representation to caregivers and individuals so people who are dealing with the health care system in their capacity whether that is caregivers, attorneys or guardians because I realized there were not many lawyers giving advice to those individuals. Myself and most of my colleagues were advising only the care institutions and the care providers so that involved a variety of all different areas of law that come together with the theme of helping family caregivers.

Mary- That’s wonderful and just to let our audience know, you do practice in the province of Ontario.

Lisa- Yes I do so my comments today will be based on Ontario law although the theme of appointing multiple attorneys, some of the factors and situations will be relevant in other provinces but certainly should be discussed with lawyers in each jurisdiction to make sure that it’s all applicable.

Mary- And that’s great Lisa. Thank you for mentioning that because it is a common issue across the country but people can listen to this podcast and then go back to their own local lawyer, perhaps in Alberta or New Brunswick and say how does that relate to where we live so they can go back to this podcast and then have personalized confidential conversations with their own lawyers. I have a series of questions so let’s get started. My first one is, when a lawyer is drafting a POA document why might you want to have more than one person appointed?

Lisa- So there are actually a number of reasons why you might want to have more than one person appointed as the attorney and they really fall into two categories. One is really for your own benefit and the other is for the benefit of the person or people that you’re appointing. So in terms of your own benefit, when you look at the skills of the people or person you are appointing, it may be that some people are more suited to making personal care decisions and others might be more suitable to make financial decisions under a power of attorney for property. So it could be beneficial to appointment more than one or two people to address the different skill sets that you may need because as you’ve mentioned in other podcasts, there’s a poa for personal care and a poa for property and you want to make sure the people you’ve named have the skills and abilities to carry out your decisions. The alternative is to appoint one person under each of those power of attorneys so the person who has the personal care skills, maybe who is a health care professional or more comfortable with medical terminology or being involved in those kinds of decision and then one person who has the skills to manage your finances. So that’s for your own benefit to make sure that you’ve got the right skills set. I’ve actually done that for myself. I’ve appointed my husband but then after that I’ve appointed my mother under my personal care power of attorney substitute and my father for my power of attorney over property because he’s a charter accountant so based on their skill set that’s what I found would work for me. The other benefit is practically there are checks and balances. If you do appoint more than one person it’s less likely that one person will try to take advantage. We all like to think that one person we are appointing is trustworthy but I’ve seen in my practice that that isn’t always the case so having more than one person can increase the chance that our decisions will be followed, money will not be used inappropriately or stolen. Then the second set is for the benefit of your family… because being an attorney can be a very busy job and it can be a burden so sometimes having more than one person to attend appointments or sign cheques can make the job a little easier. I have one client who was very concerned about the burden she was creating because her daughter has a young family of her own so she wanted to try and structure her affairs in a way that wouldn’t be too time consuming for her daughter. Finally multiple attorneys can be useful in terms of perception of fairness. Definitely when we choose one person and exclude another, in particular this is true in the case of a parent choosing one child, there can be a perception of unfairness so for some people they want to choose multiple attorneys so that nobody feels left out and that inclusiveness can avoid fighting at the outset.

Mary- Okay then that’s very interesting. What are the risks of appointing more than one person?

Lisa- That’s a great question because where there are benefits there are often risks or pitfalls and sometimes the benefits outweigh the risks and sometimes they don’t. It’s definitely important to think through the risks as well. Some of the risks are actually for the attorneys themselves depending on how the power of attorney is drafted, it may be that one attorney is able to make decisions without permission from the other and I mentioned there can be a benefit but the flip side is that somebody could be making decisions or taking actions that may expose the other attorney to liability. Also, if there’s more than one person if they don’t agree it can cause family conflict or litigation can arise from that so if they don’t agree that can be very challenging whereas one person has the freedom to make decisions on their own. The other risk is delay. Practically, even if everyone agree it can take time for example, the hospital could have to make three calls in order to get authorization for a treatment to obtain informed consent. That can take time and there may not be that kind of time and it can also take time if all three for example have to reach consensus even if it’s not litigious...simply to talk through the issues may take time and particularly if there is an attorney for personal care and power of attorney for property, those two may have inherent conflicts. The example I often give is making a decision about home care or long term care where there is a cost associated with it. The attorney for health care will be focusing on the wellness aspect and the attorney for property is focusing on the bottom line with discussion around how much is this going to cost? Is there a cheaper option? It’s conflict that slows down the process.

Mary- Here is a real life question for you. What happens if there is more than one person appointed and they do not agree with each other?

Lisa- That does happen with some of the people that end up in my office. A big part of my business is not just drafting the document but helping family members who don’t agree. There are really two categories of helping those and the first is actually looking at the document. What does the POA say? Sometimes, and it’s excellent when they do this, they have clauses in there that anticipate disagreements and that’s wonderful because that gives direction to the attorneys. One type of clause I’ve seen is what happens if the two people need a tie breaker which is a third individual and majority rules or sometimes the clause gives a veto power to one of the attorneys. Sometimes it can directly seek out mediation or a third party binding decision. I recently had a client who appointed her sons as the decision makers/ attorneys but in the event they could not agree they would have to ask her husband whose decision would be binding. That’s one option. Of course the first option is to check the document and if it isn’t then the attorneys have to sort it out amongst themselves whether that’s talking it out, going to mediation or choosing someone they know. Sometimes as a last resort they may go to litigation. One could try to outrank the other by becoming the guardian but typically there are very serious circumstances only which allow that. Under the health care consent act, there can be situations where if the two attorneys cannot agree and this can happen for significant health care decisions such as pulling life support, it can be that the public guardian and trustee is called upon to decide and either the PGG decides or the two attorneys are finally forced to reconcile because they don’t want the decision to be in the hands of someone who doesn’t know their loved one. Those are sort of the two categories…look to the document and then otherwise do your best to figure it out and hopefully do it in a way that balances the wishes of the loved one and hopefully doesn’t create a negative impact on the family because sometimes those can be the cracks that when the family falls apart and it’s sad to see when those types of disagreements have such a negative impact on the families but they do.

Mary- Thank you for that information, Lisa. What flexibility is there after a POA is signed to increase the number of people responsible? For example, what can a person do if they feel they should have been appointed or if you are appointed can you bring on another person to also be responsible?

Lisa- The first question in there is the easy one. The person who makes the power of attorney can change anything at any time provided that they are still capable in a legal sense; referring to mental capacity, and as long as they have that capacity they can make changes. The harder question is for the person who was not appointed and feels they ought to have been, or somebody who was appointed and wants to bring on someone else and the short answer is other than the person who created the power of attorney, no one else can make changes so for example, my brother can’t come back and say I should have been made a power of attorney; we can’t go ahead and change it. There are other options to have other people in the decision making process or hold the attorney accountable. So to appoint others the attorney may actually permit a delegation or assignment. More often than not, I find they are silent on this but sometimes they do mention it and I think it can be useful to mention it. I actually had a client who was very upset because one daughter was relying on one daughter so heavily that the other daughters perception was that she wasn’t just relying on her, she was delegating her job to her so that was not okay. So instead it can be useful to address delegation right in the document. For example, I had a client where she directly said my daughter in law should be involved. She is not an attorney but she needed to be involved to help explain the medical terminology and to play a useful role to support the attorney and that can be useful if there’s anticipated that there may be some kind of family disagreement so that if this happens there can be a resolution using this third party. To involve others the attorney can still seek input whether it be with attorneys, accountants etc and in fact under the substitute decision makers act there can be legal requirements to consult with supporting family members who are in consistent contact with the incapable person. There are options to involve other people if the attorney wants to seek that input. The attorney however can be held accountable through a process called passing of accounts that involves going to court and having the attorney show the records of what decisions have been made and what’s been done if there’s a concern that the attorney is exploiting the loved one and of course police can always be called if there’s a concern about theft or elder abuse and someone can apply to become a guardian and outrank the attorney and that can be through the courts but it’s an option in the event that someone is taking advantage of their position as an attorney and somebody else thinks they need to be held accountable so the bottom line is there are options that the law provides even if we can’t add on others or get ourselves placed on.

Mary- Excellent and my final question is, how can some of the risks of appointing multiple attorneys be mitigated?

Lisa- That is such an important question because it’s proactive rather than reactive. This is where a lot of problems can be resolved. In my practice often people come to me for advice and the family is already in conflict and I do often think to myself if only the power of attorney had addressed XX?! Often we view the POA as the cherry on top of doing a will and I wish that weren’t so. There’s so much that can go into the document and it should be considered stand alone as its own important legal document. I will give you a number of examples that would help to avoid issues if appointing multiple power of attorneys. One is the tie breaking clause…examples like mediation, veto power, third part decision maker and there are a number of options. Don’t’ leave them stuck to resolve the situation as it can become time consuming, expensive and nasty so definitely give instructions about how to deal with those situations. Another way to mitigate risk is like thinking through there is joint and several which is legal terminology that lawyers can explain to them but the short of it is thinking through whether the decisions can be made independently or if they must be unanimous, whether checks and balances are desirable or whether that independence is desirable for convenience. There isn’t always one right answer but it’s important to think through for your family to see what is right for the people having to make decisions on your behalf. Clear communication cannot be understated and I mean in the document and in person. Sometimes someone will make a power of attorney and they won’t tell anyone in their family. That can be a situation ready for conflict. It’s important to sit the family down and others and explain your reasons and let them ask questions so that after the fact they don’t feel surprised and they don’t feel offended. Likewise I encourage clients to include reasons right in their document because sometimes there really are good reasons as to why someone is included or excluded and putting those reasons in there helps if by chance the document is challenged then the reasoning behind the choices are clear. Also, in terms of looking at their intention it’s less likely to be found otherwise and helping people to understand the reasons helps in dealing with personalities and family dynamics and whether it makes sense to appoint multiple people or not. Sometimes people think it makes sense if they appoint multiple people that don’t get along it will keep them honest and sometimes that will often backfire because those people have so much trouble trying to reach common ground and make decisions. Think through personalities. Sometimes rather than appointing two people at once, one can just be the substitute in case one is unable or unwilling, but they don’t actually have to work together. Really think through the family dynamic and don’t make decisions just to please people if they’re not going to be able to get along and finally giving some detail. Far too often Power of attorneys are one page documents completely lacking in detail and that’s really hard because situations arise and the decision makers have no idea what to do and they may have their own feelings about what their loved ones may have wanted but aren’t sure. Give details and if you don’t know everything, as we can’t predict everything, give priorities. Maybe spending money on home care is more important than anything and you would rather deplete your estate and be able to stay in your home or maybe there’s some kind of value to being independent so whatever details you can give makes the attorney’s job far easier because they don’t have to engage in guesswork when there are specific instructions and all those things can be done in the power of attorney document. Finally the attorneys themselves if they find out they’ve been appointed and they’re working with someone else, risks can be mitigated by planning ahead for example, how responsibilities can be divided and how disputes can be resolved and then finally, my last tip for risk mitigation is keeping others in the loop so they’re not left wondering. A great example is I was speaking with one individual who was worried. His two siblings were appointed and he was worried that the two siblings would make the decision to withdraw life support and he would wake up one day to find that his mother was gone because he was simply kept out of the loop because he was not made an attorney. That started to create division within the family, people picking sides, a lot of conflict, a lot of fear and especially when there’s certain children who aren’t appointed it can be useful to keep them in the loop, get their input, make them feel involved particularly with end of life decision making because sometimes that communication can be enough to keep issues from escalating and turning into a bigger problem.

Mary- Well thank you for that Lisa and I guess what you’re really saying is that people need to go and think about all these ideas that you have suggested. Go find a lawyer where you live and have discussions and make your document with the help of a lawyer, as specific and clear as possible so that they have peace of mind and your family has peace of mind. Thank you for your insight and for sharing some of your wisdom with us. As a wrap up can you share your contact information with our audience?

Lisa- Certainly so my website is [www.familyhealthlaw.ca](http://www.familyhealthlaw.ca) and my phone number and email are all available through the website but for those taking notes right now, my phone number is 416-937-8768 and I would be pleased to speak with anybody about writing a power of attorney or about resolving disputes surrounding a power of attorney because in most cases they really can be resolved and we don’t have to resort to the court system.

Mary- Well thank you Lisa for that. I would like to wrap up with a closing sentence and that is that Chris Kata, one of our board of directors and I would now like to share a few closing comments.

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](http://www.caregivingmatters.ca)