

# The **POWER** of ATTORNEY PROJECT

## **Powers of attorney for property: The basics**

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-** We have two guest speakers with us today. One is Kimberly Whaley and the other is Heather Hogan and they are from Whaley Estate Litigations in Toronto. Welcome. Could we start by you sharing a little bit about yourselves and your practice please?

**Kimberly-** So Heather Hogan and I primarily do power of attorney litigations, guardianship disputes, will and trust disputes, dependent support claims, fiduciary accountings; anything that is ancillary or related to an estate or planning for incapacity. Our details can be found on our website at [www.whaleystatelitigations.com](http://www.whaleystatelitigations.com) including all of our contact details and email addresses.

**Mary-** Okay and thank you for that. Is there anything that you would like to share about your personal bios?

**Heather-** I'm an associate here. I've been practicing for almost three years. Before I joined Whaley Estate Litigation, I was counsel for the Ontario Office of the Public Guardian and Trustees.

**Kimberly-** I have a beautiful 15 year old daughter. Does that count for personal? She keeps me most busy in my other waking hours, let's put it that way Mary.

**Mary-** Thank you for that. Let's get started. I have a series of questions for you. The first is, what a power of attorney is and what is an attorney for property?

**Heather-** I'm going to take this first question. I'll start by clearing up some of the confusion around terminology. I know that most people when they hear the word attorney they assume we are talking about a lawyer but in Ontario when we are talking about attorneys for property we are talking about a legislative form for substitute decision making; someone who has the authority to manage the property on behalf of someone else under certain circumstances. A lawyer can be appointed as a power of attorney for property but the POA is actually a document in which one adult, the grantor can grant a

specific form of authority to another adult to manage the grantor's property or personal care. When someone is acting on that they are acting on the authority granted through the document. There are statutes that apply to this particular document so if you are acting under the authority of a power of attorney, or if you are thinking about signing one, you should familiarize yourself with the applicable laws of your province as the laws differ from one province to the next and you should consider consulting with a lawyer who has experience in this area of practice to make sure you are familiar with the processes and aware of the legal consequences of signing a document or acting as an attorney for property .

**Kimberly-** If I can just add something to that as well. The powers of attorney act although it's not used as much anymore it does govern the granting of the power of attorney which is not a continuing power. In other words it should be distinguished against a continuing power which is established for the intent of surviving incapacity and so that continuing power of attorney document would be granted under our substitute decision makers act whereas a power of attorney for property that's not intended to survive incapacity could be granted under the powers of attorneys act and is more generally used where a limited authority is granted for a one off purpose.

**Mary-** Thank you for answering my first question. My second question is, are these documents used in other provinces?

**Kimberly-** Most, if not all provinces in Canada, have similar legislation or statutes which authorize the use of some kind of substitute decision making whether that be in a continuing form surviving incapacity or in an agency relationship or for a limited purpose. Powers of attorney are not federally legislated. There's no common form across the provinces. The relative laws vary from one province to the next and the legal documents in one province will not necessarily be recognized as a legal document in another province. Obviously, it would be prudent for anyone contemplating having a power of attorney put into effect governing property in other provinces or jurisdictions, to consult a lawyer in the applicable province and also the attorney who is meant to be acting under the document would seek guidance from a lawyer in that jurisdiction.

**Mary-** I would like to stop us there because that's a really important point because our families live across this country. We all don't live in one province or one jurisdiction and being knowledgeable about the local laws is very important. If you live in Alberta for example, and perhaps your parents live in New Brunswick don't assume everything will be the same and I like the ideas of speaking with lawyers in each jurisdiction so that you have an understanding of those laws and differences so that you can point that out.

**Kimberly-** It really is important. I can give an example of how we see it in litigation arise we see in one province a person /grantor grants a new power of attorney and revokes all other powers of attorney they may inadvertently not apply in other jurisdictions and may leave the person without the requisite authority in the jurisdiction where other property is held and that happens more than I'd like to say but it does give us lots of litigation for sure.

**Mary-**That's important because one of the goals of this project is for people across this country just to be a little more aware of how important these documents are and to really go back and say "can I be proactive so I don't get myself and my family in trouble?" We really want to say to people go and seek the legal advice so that down the road you don't have those discussions that state if only; if only I had known this or that we wouldn't be in the nasty position we are so we really say to people who are a part of this project go and read the documents and seek local advice. They will help you and if there are issues they can help and straighten them out long before you get into trouble.

So my next question is, if someone needs help paying their bills do they need to appoint an attorney for property?

**Heather-** This is a difficult question to answer definitively because there are so many different approaches to assisting an older adult with matters such as this. There are a lot of different factors that you need to take into account but you might wish to start your decision making process by trying to identify the least intrusive method of obtaining that assistance. You need to remember that unless the power of attorney document is carefully drafted, the authority of your continuing attorney for property document is not limited to only one bank account for the purpose of paying a particular bill. An attorney for property will have the authority to do anything the grantor could do except make a will and this applies to Ontario ( you need to find what your own rules are in your own jurisdiction) meaning that your attorney for property will have access to and authority over all of your real estate properties, all of your bank accounts, and any other assets you may own. So, if you are not sure whether an attorney for property document would be appropriate in your circumstances, of course you should speak to a lawyer but remember a good place to start is which is the least intrusive option.

**Kimberly-** Just to add to that Heather, of course many people, not just older adults do require from time to time substitute decision making for instance if they are going to be out of town and they need bills paid and or transactions completed in their absence, so it's a good way to plan in a cost effective manner for absenteeism as well.

**Mary-**My next question is what happens if someone loses their capacity to manage their property and they don't have a power of attorney for property in place?

**Kimberly-** In Ontario, a continuing power of attorney is meant to give the attorney authority that continues after a grantor loses their capacity as long as when the grantor granted the document, the grantor was capable to grant it. If there is no continuing power of attorney, nothing happens until a decision regarding property is required and the adult in question is not capable of making that decision. What happens next really depends on the circumstance in which this occurs so sometimes there may be a hospitalization and there's an assessment in accordance with the legislation, then automatically a public guardian is appointed and trustee as the statutory guardian of a person. Relatives or family members can subsequently apply to take over that statutory guardianship from the public guardian and trustee or we have another guardianship regime in Ontario which is the court appointment of the guardian for property. An application is submitted to the Ontario court of justice and there are like provisions in other provinces to seek an appointment of guardianship and in order to do that a

management plan would need to be filed and the public guardian of trustee would oversee and it would be on notice to the person whose capacity is an issue in the proceedings. So we have statutes and rules of course that govern these applications. Obviously they are more expensive because it does require a court application. There is a process attached to it so in many cases it would have been beneficial had the person contemplated a situation of incapacity and had granted a power of attorney document but that doesn't always happen and so guardianship is an alternative to obtaining an appointment where somebody is able to make substitute decisions for the incapable person. I should say at this point that capacity is law, it doesn't fluctuate and so a person who has lost capacity to take care of property for a time period may later become capable so that guardianship at some point may come to an end through another court process.

**Mary-** I'm guessing to your point that that may be not only the most expensive way to go but is it also more time staking? Does that take a longer length of time to go and get these documents done?

**Kimberly-** It takes a bit of time. The current regime in Ontario is such that if it is a court appointed guardianship you have to have evidence of incapacity such that the court is able to make a declaration of incapacity to manage property so you have the time that it takes to get the medical supporting documentation and you have to of course follow the service requirements as noted and because the public guardian and trustee oversees court proceedings, for persons under disability, the public guardian and trustee needs to be given the appropriate amount of time to review the application and to assist with a proper management plan being approved by the court and of course like any jurisdiction these days courts are busy places and unless there's an urgency you're going to get placed into the court system in accordance with the availability of the courts.

**Mary-** My next question is, what should an older adult do if they are being pressured to execute a power of attorney document?

**Heather-** At the risk of sounding smug, I would say the easy answer is just say no and if you feel unsafe or threatened you should consider calling the police. Forcing anyone to execute any legal document is a form of abuse and when it's an older adult be coerced by a friend or family member or a third party who's being overly intrusive it's a form of elder abuse and it's against the law. An alternative might be for you to speak to a lawyer who has experience in this practice area so for example, we often have clients who come to us in these circumstances and by speaking to them and meeting with them we can help them come up with a strategy for avoiding any further coercion without unnecessarily fracturing a family relationship. We do everything we can to help the parties come to an agreement without any further damage to relationships. Nobody has to execute a power of attorney document. You just heard Kim talk about all of the other processes and procedures that are in place to make sure that the interests of a vulnerable adult will be protected in the event that they lose capacity and they haven't taken the initial step of putting the powers of attorney in place. So, you ought not to feel that you absolutely have to sign one of these documents. It's not true, get legal advice, talk to someone your trust; get help.

**Mary-**And my final question is, are joint bank accounts a good alternative to executing a power of attorney document?

**Kimberly-** Well Mary, to adopt Heather's approach, I'm just going to say no. Joint accounts are not a good alternative. Joint accounts are an arrangement that some people put in place when they need help with bill payments and other minor financial transactions and sometimes even major financial transactions. A joint account can be set up under a power of attorney for property and also could be set up by the grantor or the account holder and that may seem to be at the beginning an easy and cheap way of getting some assistance. However, signing joint accounts are dangerous for a number of reasons. On the one hand, a joint account holder only has access to that one particular bank account which may be a good restriction, and preventative measure depending on the size of the account, but on the other hand there is no statute that dictates the duties and obligations of joint account holders. They're deemed to have a beneficial interest. Often if you go to a bank to set up a joint account, you'll be asked to check a box as to whether or not it is intended to be a proceeds divided in half to the surviving joint account holder and at the end of the day we see a lot of litigation over these sorts of arrangements. They can interfere with testamentary plans so if the initial intent of the account holder is to put somebody on as joint just to facilitate bill payments, sometimes that gets lost in translation over a period of time and at the end of a person's life the joint account holder may assert that they were always a beneficial owner and that the remaining proceeds passed by way of survivorship which may not have been the actual intent of the grantor of the power or attorney document or the account holder. There are of course common law doctrines and presumptions of law that would apply to the ownership of assets and joint accounts so I would suggest that anybody contemplating this sort of arrangement should consult a lawyer to understand what the legal consequences are arising from common law doctrine from the statute and from the presumption and we see a lot of abuse through joint bank accounts so again I don't think it is a good alternative but it is an arrangement. A lot of these things that we talked about today, Mary, we have tools and information on our website and I invite your listeners to look at our website. We have checklists for attorneys for property and attorneys for personal care as well as information on joint accounts and situations of elder abuse generally.

**Mary-**Well thank you for that and I would now like to thank both you and Heather for joining us on this podcast. Could you take a moment and share your contact information with our audience?

**Kimberly-**Again, you can contact us through our contact found on our website at [www.whaleyestatelitigation.com](http://www.whaleyestatelitigation.com) and incidentally we do have for anyone who is interested, a limited number of publications that we jointly wrote with a body of professionals. It's called, What's Next? Navigating Life's Transitions. If you contact our office coordinator, while supplies are still available, we would be happy to share a copy of this book.

**Mary-**Well thank you very much for that and to wrap up today's podcast, Chis Kata, one of our board of directors, and I have 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 Scotiitrust. 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)