

The **POWER** of ATTORNEY PROJECT

Avoiding Power of Attorney Disputes

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 expert is Tim Matthews and he is a partner with Stewart and Associates in Nova Scotia. Tim is also a member of the Canadian Bar Association and the past president Nova Scotia branch for the Canadian Bar Association. Welcome Tim.

Tim- Thanks very much Mary.

Mary- Could you share a bit about your practice for our audience?

Tim- I've been practicing about 35 years. As a young lawyer I did a great many things but eventually I came to narrow my practice considerably and now my focus is solely estate planning and estate litigation so I do wills and trusts and probates and the usual administrative stuff dealing with this area of law but I also have developed a practice around disputes with wills and estates where disputes may arise within family members over an estate or power of attorney and that's tremendously fascinating but also very sad.

Mary- Well thank you for that Tim. We are so honored that you take the time out of your very busy practice to share some of your wisdom and the things that you can teach our audience using your years of experience. So my first question is, what factor is one of the major causes of disputes around a power of attorney?

Tim- I would refer to it as a lack of transparency which really is a failure of communication between the attorney and other interested persons; usually other family members. This of course is worsened if there are pre-existing dysfunctional relationships in a family but these problems can arise even in happy families. Sometimes there is resentment that a parent has chosen one of a number of children to be the attorney exclusive of a number of other children. Sometimes the person who is selected as attorney has an attitude of exclusivity...you know, I have the power to make decisions, it's none of your business, etc and this is terribly misplaced. It can create suspicion and it can create resentment and proceeding from

a misplaced sense of confidentiality; sometimes an attitude of I know and you're not entitled to know; these things you would think common sense would lead people to work these things out amicably but unfortunately a lack of transparency will lead to legal proceedings.

Mary- Okay, so my next question is, what does accountability mean in this context?

Tim- Well, I think it has two sides. It serves two purposes. Speaking to the purposes first, it protects an individual who has entrusted his or her financial affairs to the attorney and it also protects the attorney. It's rather strange to think about it this way. Lawyers naturally think about risk but being an attorney is potentially a risky job so you have to protect the person that appointed you and you have to protect yourself and there are two parts to accountability I believe. The first is what you might expect. You have to have up to date records. The second part of it which is less obvious is that you have to be ready and willing to provide reporting to those who have an economic interest. Sometimes an attorney will look at a request for accounting as a challenge in effect the person who's asking is questioning the integrity of the attorney but you shouldn't look at it that way. It is a responsibility that goes along with having the power. The best way that everything is completely transparent and above board is to respond politely, promptly and completely within a reasonable time so lawyers and accountants or a judge in the worst case scenario, will think about accounting in terms of numbers and copies of relevant background papers so you can prove what money came in and what went out and everything balances perfectly to the last cent. No detail is insignificant and it should be complete and accurate. So that is why we need accountability and that's what it means and if every attorney started out with that understanding, many mistakes could be avoided.

Mary- And I guess not only just starting off but as they continue this role and sometimes this role can last for years and to maintain those records and good intentions and perhaps there's caregiver burnout that contributes to those records not being maintained but it's part of the job so they have to keep at it is what I think you're saying.

Tim- Very definitely. Let me tell you a story. Many years ago I had a lady come to see me. She had been appointed as an attorney for her aunt who was very elderly and living in a nursing home and for fifteen long years she looked after her aunt's home. She paid all the bills, took care of the house, looked after everything while the aunt was still alive and after the Aunt passed the brother insisted on having an accounting of everything that had happened over the past fifteen years that she had acted as the attorney so the lady came to see me and the first question she asked was, "do I have to provide this?" and I said, "of course you do". She said, "but Mr. Mathews, I haven't kept any records" and I asked what she had done so I said we will go back to the banks and various companies with which you dealt etc and we will try to construct an accounting as best we can but it won't be perfect and hopefully it will be enough to satisfy your brother. She asked me, "but why should I have to do this? He never did anything for my aunt. He never came near. He never visited her in all the fifteen years" and I said "but the estate is left equally to you and to him and he has an equal interest. He's entitled to this information". Well to make a long story short we were very successful in getting most of the information, perhaps 2 or 3000 dollars out of \$150000 couldn't be nailed down. She did use a debit card on occasion to buy personal items for her aunt and of course she couldn't account for all of those things

in any detail but the brother was eventually satisfied and the matter didn't have to go to court. To make sense of it, this woman had really gone above and beyond the call of duty with her aunt. I mean 15 years is almost a life sentence in this country. I mean she did the best she possibly could. Her heart was in the right place. She just didn't realize that accountability was part of her job as an attorney.

Mary- Do you have another example you could share with us?

Tim- The other example that comes to mind is not necessarily long term but an illustration of side issues that can complicate the attorney's job. Often if a parent or some other relative appoints an attorney they will also appoint a personal health attorney so that if they should have to go to a nursing home, which nursing home and how much money can be spent. It's all very emotional not strictly financial and everyone has an opinion about what's the right thing to do. Where it does intersect with financial issues and it does is once the person is living in that nursing home, what do you do with the home itself? Sometimes some family members will say sell it immediately or some might say keep it in case mother or father can go back and live there so there can be tremendously difficult conversations or lack of as to whether it's feasible to keep the mother in the home and have her taken care of there or if a nursing home is better. So my example is a brother and sister both as co-attorneys and seven other siblings, seeing what they are doing, no arguments about financial issues but what is the right thing to do? One of the attorneys said, father is no longer able to live in the home, it doesn't make sense, let's sell it. The other attorney says no that many of the family members live in other provinces and they will come to visit and this will be a good place for them to stay. So the two attorneys needed to act in unison and they were deadlocked, they couldn't agree and there were other issues as well about the care of father that they disagreed on and so the attorney who was refusing to approve the sale was raising these issues was saying unless you agree with me about that I'm never going to sign on the deed to sell the home. So there is a situation where each of them is adamant and convinced he or she is acting in the best interest of the person who appointed them and yet they can't agree and in this case two or three years went by and the costs to maintain the home were very high. There was very little benefit to the father who was living in a nursing home and would never leave and so the attorney who wanted to sell the house along with a majority of the other siblings said they had to go to court to break the deadlock. So there's the different examples of a family dispute again both parties acting I think in good faith but simply disagreeing about the best course of action so there are some benefits in having co attorney's; you know share the work and there's two people looking at the decisions so they tend to be carefully considered but you can have disagreements and sometimes the power of attorney doesn't have a formula to resolve that other than taking it to court.

Mary- You know that is so sad and your examples are so interesting because it speaks to the legal struggle that they had but it also speaks to the stress that went on in both of those families and I can just imagine not just what you would see in your office but the nasty phone calls that happened between each other and that's when things get ugly and that's when the trust is lost. Thank you for sharing those two examples and the message that I took from those two examples was to try and find ways to have proactive conversations with our families around these ugly topics and not that all families will pick all the topics because I'm sure there's a bottomless pit of things that can happen but one of these things we are trying to say to Canadians is listen to what these lawyers are telling us and is there

something that Tim is saying that you can take back to your families to say how can we have this conversation. Maybe we need to sit down and find a lawyer, no matter where we live, so that we don't end up like an example that you gave so thank you for that.

My next question for you is, what steps might one take to be proactive in preventing disputes?

Tim- Not everyone is inclined to be an accountant. Some people enjoy doing that but most people don't and I think you have to be honest with yourself if you are appointed as an attorney about what are your strengths and weaknesses and in the areas you either have no interest or no particular skill you really need to consider getting professional help. One of the simplest things and I believe this can be done in all cases is to set up one bank account. It could be the bank account of the person who appointed you and use that one account and as much as possible do everything through that account having a paper or electronic trail and look at it every month, keep track of it, write opposite a deposit or withdrawal what it is and keep any paper, deposit slips etc and either you or an accountant can take that information and input that into an account. If you do things with cash or you are using three or four accounts and money is going all over you are going to lose track of what you're doing and five or ten years later let alone fifteen you won't remember what it was. I think if you're not good at keeping financial records it's a good idea to get accounting or legal advice as soon as you start to act under a power of attorney. If there is only a small amount of money involved it may not justify using an accountant to do the work and that's a dilemma because if you can't do it, who is going to? If there is a large sum however, this is a justifiable expense as you are protecting the interests of the person who entrusted you to do the work by doing that so it's good advice to get professional advice from an accountant or a lawyer. You're probably going to be filing tax returns for the individual and you will probably want to have an accountant do that work for you unless that's your particular specialty. I think that's pretty much common sense but there are a lot of times where common sense is lacking. People don't realize that they have to do this sort of accounting. The other aspect of being proactive to prevent a dispute is communication. Particularly if there are other family members who have an interest and usually that's a financial interest. I usually say to any client to be transparent. Don't wait to be asked. Go to your family members and send them an email or a letter by post on a regular basis in saying here are the major things that have happened in the last year or six months and do you have any questions and if you do that it tends to disarm your potential critics. It shows that you are open and acting above board and everything is done properly and you don't fear being asked why you're doing something or what it is. It's sort of obvious so I think right from kindergarten although some people didn't get this message, you have to be ethical. You have to be moral. Don't even think of doing something that is for your own benefit as opposed to the benefit of the person who appointed you. Often some people say well how do we apply that test and I would say well if it isn't obvious to you ask this question do you want to defend that in front of a judge? How would it look front page of a newspaper? I think my experience has been the vast majority of attorneys are totally honest. They may be misguided or make a bad decision out of ignorance but they seldom make decisions based on dishonesty. There are every once in a while exceptions to that rule but it's not honesty that causes most of the disputes but rather mistakes that are made because the attorney is not aware of the law or what their duties may be in a particular situation. The other aspect I would want to mention is you really have to be a diplomat. This is true of

any job where you are dealing with people; particularly in a familial situation where emotions can run high. As you mentioned the phone calls or emails going back and forth in the heat of the moment sometimes family members are harsher with other family members than strangers. I don't know why this is however that only fuels any controversy if there's a question being asked and there's a snarky or insufficient answer, it doesn't improve the situation. We all have family members who can be difficult or who have a different view of the world and if you're a diplomat you take that into account, you take people as they are but you also first and foremost realize that you have a job to do and part of that job is to avoid legal disputes so you want to be transparent. You want to be proactive.

Mary- Thank you for that Tim. My next question is, what does the term, passing accounts mean?

Tim- When you've completed the job as attorney you want to have closure in the sense that you are released from your duties and you know that nobody is going to make a claim in the future as a result of something that you've done. Occasionally you can have this kind of passing of accounts while the grantor is alive but typically this is done near or after the end. So somebody has to approve the accounting that you've done. In rare cases the person who appointed the attorney may be totally capable to do that for example if the person is unconscious but recovers their mental capabilities and then they're in a position where they can say, okay fine you've done a good job and you're off the hook. However that is a very rare situation. The most common situation is that the attorney keeps on doing the job until the appointing individual actually dies. At that point, there are several options and one is if there is a different person who is an executor of the will, the executor of the estate can look at the attorney's accounting and release the attorney and if that is impossible then the heirs of the estate or beneficiaries of the will can review it and then they can release the attorney. That may not be possible in some cases either because one of the beneficiaries is a child or perhaps one is also mentally incapable and then there is the last resort which is an application to the courts for a judge to review the accounting and there is a procedure in every province which is slightly different but in general it involves filing the documents with the court and either the court will set a date for a hearing or alternatively in some provinces there can be a more informal method where the accounting is reviewed by a clerk or judge and if there's that aside they will issue a court order which will discharge you as an attorney and approve your accounting. So that's what the term passing of accounts refers to. It involves having your records/accounting reviewed and approved with the order that you are discharged by the courts, from the duties of attorney. You are free to go. You've done your job properly.

Mary- I'm guessing if you're not free to go then that's where they have to get into greater detail around how everything got spent.

Tim- That's true. One example might be where one of the other beneficiaries or other interested parties questions some of the expenses that were incurred. Alternatively the judge or the court official may raise questions, may want explanations or may disallow some of the expenses. They may say no that's not a proper expense and that does happen in some cases. It would be particularly important if the attorney had in effect created a breach of trust and spent money to benefit the attorney or the attorney's family rather than the individual whose money it really is. Those are the types of things that may have to be revised and financial consequences for the attorney. Those are fairly rare and typically

the problem is there isn't sufficient explanation for the expense and usually they simply need more information and in most cases the accounts will be approved. Part of the passing of accounts is the asking of questions such as what was the expense, why, how it happened and to make sure they occurred so that there's appropriate proof usually in the form or paper although in these days it can be electronic.

Mary- So my next question is, who pays the cost of passing accounts?

Tim- The passing of accounts is for the benefit of everyone involved. It is for the benefit of the attorney, the beneficiaries and the person who has passed. So the view that the law takes is that a passing of accounts is a correct thing to do and should be paid for out of the money of the estate. It's not something that the attorney should have to pay because it's not just for the attorney's benefit but also for everyone else. The cost may only be accounting costs with an informal or it may be legal expenses to go to court if that is the alternative. Almost all cases would have the costs paid out of the estate. Once in a while there may be a challenge and the challenger may be able to convince the judge that the attorney went off the rails somewhere that did something wrong and the court in that case has the option of saying that the attorney should pay some of those costs. That's a fairly rare situation but there's no question if there's serious wrongdoing that this would be the case.

Mary- So a simple example would be if it had been proven that someone had taken a vacation on the money and it was proven then I'm guessing they would have to pay that money back into the account.

Tim- Yes a fairly clear example they might have to pay the cost of the vacation back and they might be penalized by having to pay some of the court fees back however, just on that issue let me put forward another situation that may be a little more difficult. What if, the attorney goes on vacation and takes the grantor with them? Then they argue there's no way a person could go on a vacation by herself and she enjoyed it so much and they couldn't go on their own and they enjoyed it so much. Maybe it's plausible that the grantor did often vacation or go south in the winter and maybe the grantor did enjoy the vacation. Then maybe it was impossible that the incapable individual could travel without the attorney. Arguably, the attorney should pay for his or her own costs and only pay the incapable individual's cost out of that person's money but maybe there would be circumstances where the attorney couldn't afford to pay so that's a tougher one where it's not so clear unlike the example you gave.

Mary- It speaks to before people do those kinds of things they should go and talk to a lawyer. They should say this is what I'm planning on doing and is this a good idea or a bad idea? If they went and spoke to you, you could guide them on all scenarios and give them recommendations as to what is wise to do and what is not. I think that when people are in this position I think it's a good idea for them to invest in some advice with a lawyer to say here's where I'm at and could this get me into trouble?

Tim- I would endorse that. I think if you have any doubt about taking a particular action then it's always best to bounce it off someone else and if necessary to get professional advice or even if you bounce the idea off other family members that will give you a pretty good sense of how they would regard you going to florida with the relative. They may resent that or they may think that's a great idea and you go this year and I'll go next year. In families where they can discuss and work towards being agreeable

these things can be diffused and not develop into legal disputes and people understand the reasoning behind it.

Mary- Well that makes sense and my final question for you today is, how does accountability fit in with compensation for services rendered?

Tim- This is an area that causes some confusion and I think it arises in part because most attorneys are family members and in most cases they have no expectation to be paid and are doing it out of love. They realize that some older person no longer can function and are intervening to help out so in most cases they don't think about compensation but this is a hard job and there is an entitlement to compensation but it has to be done in a proper way. Professional attorneys charge a fee and draw up a contract with their client and up front the client and trust company agree on the fees that can be charged but that's not a common thing with family members. If you look at most powers of attorney they don't say anything about compensation so the real fall back is that there are two other sources of legal authority to be paid. Let's say one member has been an attorney for 15 years and that attorney asks the other two beneficiaries and says to them I would like to be compensated for all the work I've done over the last 15 years and they would have the discussion and agree on an amount and say that's perfectly acceptable. The authority there comes from an agreement among the interested parties after the fact. More commonly, particularly if the attorney presents accounts in court, at that point the court can award compensation if requested by the attorney. They will take into account a number of factors such as how well the attorney did their job, the level of work involved, the success the attorney had at the job and whether it was difficult, out of the ordinary or routine and the judge would balance all of these factors and although there isn't an absolute entitlement the court can still make a decision as to whether a good attorney should be compensated. I would just add that even if there is a legal contract the court can still refuse compensation if there is a breach of trust or lack of accounting. If you are asked by someone will you be my attorney then maybe you should have that conversation and it may be awkward but it's always good to ask up front well if I do this is it your expectation that I be paid for this and under what basis? Imagine having that conversation with a family member? It may be awkward but boy it could avoid a lot of trouble later on.

Mary- you know I think everything around this whole topic with families creates opportunities for conversation but difficult conversations and ones that people avoid having all the time. If any family could even have the simplest conversations around power of attorney issues and documents, our families would be in much better shape for sure.

Tim- I agree with that. I think it's relatively rare that you see parents and children have these sorts of conversations. I think it's such a shame. The onus is really on the parent I think but they may not think about these questions. I've been told so many times by parents that they're children all get along and they will all do the right thing. Perhaps the parent is right in many of the cases but I think they miss a wonderful opportunity which could strengthen the family and avoid any breakdown in relationships just by being upfront and transparent. These are tough conversations and rare conversations but I hope

that your project will alert Canadians to some of the problems that do arise and encourage these sorts of conversations to happen and that would be a great outcome not only for attorneys to be more aware but for family members who can play a role in helping the attorney and play a role in making a better future without legal disputes and damaging personal relationships.

Mary- Thank you so much Tim for being a part of this project and sharing your wisdom and insights as a lawyer for many years. Give our audience time to think and ask themselves where am I in this journey, how do I fit in, what can I do to understand how important the accounting part is and giving us some real life examples for people to know that things can go well and that's wonderful but when they don't families can get into so much trouble so quickly and yes there's legal issues and legal costs. There are financial costs and it's also the relationships and to see families break up over these issues is heartbreaking. I don't think anybody when they create these documents have any idea of the breakup in families that can be caused so I thank you so much for sharing some time with us. Could you share your contact information with our audience?

Tim- Thank you Mary. A pleasure speaking with you today. You can reach out to me through my firm's website www.stewartmckelvey.com and read about what we do and you can see a page that describes me and my background.

Mary-I would like to wrap up with some closing remarks 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

