

The **POWER** of ATTORNEY PROJECT

A General Overview from a PEI Perspective

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 guest expert is John Carr. John is a senior partner with Carr, Stevenson & MacKay. He is speaking to us today from his offices today in Charlottetown, Prince Edward Island.

John- Thank you, Mary. Pleased to be here.

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

John- Well our firm is relatively small. We have about 12 lawyers and we do a general practice with the exception of criminal law and labour law. We don't practice in those areas or at least not very much. We do a lot of corporate commercial work as well as estates, trusts, and of course a lot of work with powers of attorneys. I am a member of Step which is the society of trust estate practitioners and have been for a number of years so I'm supposedly an expert in this area although I'm not really.

Mary- Well thank you for that and I'm sure your years of experience and wisdom will be of great interest to our audience. So I have a few questions and the first one is, can a person appoint a corporate attorney?

John- Mary, maybe I should begin by saying that a power of attorney itself is a bit of a misnomer, it is a legal document signed by the donor and is a document that legally establishes an attorney or person to act on behalf of the maker. Despite that, it's a bit confusing with the definition of attorney. The attorney doesn't have to be a lawyer. Many people believe it does and that is not the case at all. For the most part the attorneys are generally the spouse of the donor. Can a person appoint a corporate attorney? Yes, under certain conditions. An individual is defined under the interpretation act in PEI to include corporations for example a trust company can be appointed or a public trustee under certain circumstances so the short answer is yes under certain circumstances a person can appoint a corporate attorney although it's not usual.

Mary- Okay then. My next question is will a general power of attorney allow the person I appoint to operate my business or sell my property?

John- Yes, that certainly can be done. I'll start with the sale of property which is the most common use of a POA in PEI. Many people who are buying or selling property cannot be available for signing documents and often appoint another family member to be their attorney to sign the documents or affect the sale or purchase. Now, there can be POA's which are limited to the sale or purchase of certain named properties or if in the case where you have given general POA that individual can still sell or purchase property in Prince Edward Island. With respect to the operation of a business again the general answer is yes provided you understand that the person named as an attorney cannot act as a director of the corporation, only deal with the day to day business because that person is considered having a fiduciary duty and POA's do not apply in those circumstances. For the most part however, the answer is yes they can perform the day to day operating of the business.

Mary- That's an interesting topic because there are a lot of business people who are entrepreneurs and as they look at these documents and sit down with their lawyer that's part of the conversation they should have with people like you. They need to address their personal life and their business life and I'm sure people will come to you with those questions.

John- Yes that's true and often I want to say I think it's forgotten or not given the importance it should have especially those involved in a private corporation should give specific directions to their attorney to address operations and direct them to take part in it. The question remains, can the directors name new officers? Certainly you don't have to be a shareholder to be an officer of the company but certainly they can if the directors appoint them.

Mary- My next question is can an executor appoint someone to perform some of the duties of an executor or trustee?

John- Some of the duties, yes, but any duty that would require an executor to act in the role of a fiduciary or trustee under the will should not be performed by an attorney. There is a best practice that the will state that the executor may retain expert advice and other financial advice and that power given to the executor and in effect the attorney acts on behalf of the estate and those powers have to be given under the last will and testament of the individual.

Mary- Alright, my next question is, is my power of attorney effective if I become mentally incapacitated?

John- The answer to that is yes in PEI all general powers of attorney are through legislation deemed to be enduring powers of attorney which means they do survive the disability of the giver. For example, section 5 of the POA act states that the provision of the power of attorney states that it may be exercised during any subsequent legal incapacity of the donor is valid and effectual and that is without question in PEI but in other jurisdictions I know that that is not necessarily the case. In the general power of attorney in PEI, we always include the statement that in accordance with the power of attorneys act I declare that this power of attorney may be exercised during any subsequent legal

incapacity on my part. Therefore it is clear that yes an attorney can continue to act contrary to what the common law was on behalf of the donor.

Mary- My next question is can the person I appoint make a new will or replace me as a director of my corporation?

John- The answer to that is, no. An attorney cannot make a will and an attorney cannot act as a director even though they may be an attorney. Fiduciary responsibilities must be personally performed and therefore cannot be delegated to an attorney.

Mary- My next question is, what responsibilities does the person I appoint have with acting on my POA?

John- Generally, the duties are to account to the donor or donor's family for the actions exercising the POA. The attorney must exercise reasonable care in dealing with the donor's estate and the attorney is held to a strict standard more than a friend acting. The attorney is not allowed to make a profit from the estate and not to act contrary to the interests of the donor in any case. Those are general rules and pretty much apply across the country.

Mary- People need to know that this is a very important job and a big job; a job that could last many years and not something to be taken lightly. You have to be prepared that the job may last ten or fifteen years so people need to know how important this is and maybe talk to a lawyer to see what's involved. I don't think a lot of people know how much work it is until you take it on. It's an honor but comes with a lot of work, legal responsibility and financial accountability.

John- I agree it can be a very big job and what I should have said on the duties is that you are also responsibility to account for every penny spent on behalf of the donor especially if the donor is incapacitated and be prepared to present that accounting to the court if it is challenged. Yes it can be an onerous task. Many people ask if they receive pay for doing the job and the answer is yes providing the court advises that and if the estate is large, annually we present accounting to the court and we ask the court under the trustee act to reimburse the attorney for expenses and pay the attorney some reasonable amount for the work they have incurred. We always tell them to be prepared to go to court, account and seek compensation which is usually between 3 and 5% of the gross estate that is administered.

Mary- That's very interesting because laypeople may not know that and you cannot just decide how much you want to get paid and they think they're missing their regular job and should get equivalent and there are rules and laws and they need to speak to a lawyer. People can't assume they can wing it. On the whole topic of how long and how important the accounting is, I talked to a lady last week and she has been taking care of her husband for upwards of 15 years and she can't imagine how to track the money and too busy to track because of taking care of it. This is one of the things we have to figure out. I advised to come up with a plan that you can manage. Talk to an accountant and a lawyer to get help and many times in this role it is the caregivers that do this and they can't forget the financial part.

John- it's very important especially if the caregiver isn't aware of who the beneficiaries are and one day they may have to account to someone. If she is the beneficiary then there's no problem but if there are others she will have to account and as well all know it's emotional and contentious. I would advise her to get advice

Mary – Could you share your contact information with our audience please?

John- Well the easiest way to contact us is on the internet at www.csmlaw.com and my name is John Carr and you can contact me anytime and we'd be happy to help out if you have any questions. It's only in the last years that powers of attorney have become more common so it's growing law and evolving law and we will try to keep up. Thank you Mary and have a great day.

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

