

The **POWER** of ATTORNEY PROJECT

Estate Planning: Can you do it for the person whom you are responsible for?

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 Doug Carroll and he is Vice President Tax and estate planning at Invesco Canada. Welcome Doug.

Doug- Thanks Mary.

Mary- Could you please share a bit of your professional background?

Doug- Sure. I'm currently the Vice President in charge of Tax and Estate Planning with Invesco Canada. My background is that I am a lawyer and I did run a practice where I did multiple types of business; mostly estate planning administration type of work. I did that for about a decade and worked with a life insurance company in a consultant role having to do with estate planning issues for quite a number of years and now I work for an investment company in a similar kind of role where I provide support to financial advisors who work ultimately for their clients and the public who have tax and estate planning questions.

Mary- I have a series of questions for you so let's get started with my first one. How would you characterize the connection between power of attorney planning and estate planning?

Doug- I like to use a definition of estate planning which is a very broad definition and sometimes people will draw a very clear line between what is power of attorney planning versus what they would talk about as estate planning. What I like to use when I talk about estate planning is taking care of yourself now and into the future and taking care of the people around you now, into the future and when you are not around. Power of attorney planning, is a part of the more generic term of estate planning when you look into it in that type of a context.

Mary- My next question is, does this affect how one operates in this role?

Doug- Well a person who is making the decisions (attorney which is not always a lawyer) for someone else it is necessary for the person operating in that role to take into consideration the existing will and wishes that the person who has granted the authority has put in place and that includes the will and beneficiary designations on for example insurance designations or on an rrsp.

Mary- So then my next question is, can estate planning be done effectively?

Doug- Well as a person acting as an attorney, does have those constraints upon them to make sure they are not doing something in the role of being the attorney which goes against what the grantor has put in place themselves so if the attorney was to do something that negates a gift out of the will or changes a beneficiary designation then that cannot be done. That's a legal limit to what the attorney can do however, there's an interesting case that I'm prompted to talk about today. There's a case out in British Columbia in 2013 which has a person who was acting as attorney creating a trust for the father and it was done using the power of attorney document and the question before the court was whether in fact a person acting as an attorney can indeed create a trust under the power of attorney on the grantor's behalf? The issue has actually been discussed in a number of provinces. What happened is the trust that was set up effectively mirrored what the ultimate distribution of what the distribution of the property would have been had the property just gone through his estate however because the trust was set up it allowed for a reduction and elimination of certain probate taxes and such and the reason it went before the court was because one of the beneficiaries was questioning the ability of the attorney to create this trust and the court decided that because it paralleled what would have happened through the will that it was acceptable to create that trust for the father.

Mary- This also speaks to the point that when we are in this role it is a very important and serious role and before we go ahead and create things like trusts they should talk to their lawyers, accountants etc. and make sure that it is legal and your example speaks to the family situation where there may have been some stress created and people need to be mindful that these documents are so important. We try to encourage people to go back to their lawyers etc. and make sure their decisions make good sense.

Doug- And I think that's a very good point and I'm sure you're emphasizing what you've said over and over to people that you do need to consult with professionals and further to not only consult with professionals but also with those who have different areas of expertise so it's important you get guidance on the legal effect and guidance to the tax consequences. There may be financial advisors that can have some input on those decisions.

Mary- Absolutely. To add to that are there any drawbacks that we need to consider?

Doug- Well we need to consider in what the consequences are. For example in the case I cited previously, we need to consider in the creation of a trust (in avoidance of probate tax) that what could happen is that trusts generally can be a taxable event so when the property is transferred into the trust there could be a tax liability and that position may be forced into the trust. So, following that case, a question was posed with CRA whether the creation of that kind of trust would be a taxable event triggering capital gains and although the CRA didn't go into a yes or no but it did repeat the issues raised during this case, that if a provincial court was content that it was legally possible for the trust to be

created then the transfer is called an alter ego trust and the CRA stated it would be content that there would be a rollover of the property without there being tax paid on that trust so it's a positive thing.

Mary- My final question for you is, can this be done in other provinces?

Doug- It certainly may be doable to do this in other provinces as we just discussed however it would be important to discuss it with a lawyer and or financial advisor to see if it is doable and/or advisable to do so. One consideration would be the federal government has now introduced legislation that has been passed as a law that will eliminate the tax benefit of creating trusts out of your will. The benefit has been that you would have graduated tax benefit with the trust that has been created out of your will. With that elimination, it could be that a person who made out a will with the intention of creating this trust has become incapacitated and the person operating as an attorney may want to consider estate planning steps for that person that may not have been considered before this change in the law. It's worth consulting legal advice if you are going to be taking on that role which really should be the usual practice since the law has changed with the elimination of those tax benefits or testamentary trusts.

Mary- Now thank you for that Doug and could you please share your corporate website address with us?

Doug- Our website address is www.invesco.ca There is a section on the site which has tax, investment and planning information for the public. It can be helpful for those looking for some guidance looking into those sorts of issues.

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 and our website is www.caregivingmatters.ca