Elder Fraud and Financial Abuse

By Craig Matthews
Craig T. Matthews & Associates

A friend called for help. He was a caretaker for an elderly man who had been "robbed" while in the hospital. The victim was retired, lived alone, and had no immediate family. The elderly gentleman had suffered an injury that required hospitalization. His nephew found out and drove to the hospital with flowers and an offer to "help." The old man would be away from home for weeks, and was worried about paying his bills. "Let me help with that, so you can focus your energy on getting better," came the offer from the nephew.

The next day the nephew showed up with a power of attorney. By the time the aged man returned home, his nephew had robbed him blind, using the power of attorney to close bank and investment accounts. Assuring his uncle he was merely keeping the money "safe," he had instead transferred it to an accomplice, who in turn invested it in a mobile home development in South Carolina.

Tracing how the money went from A to Z was not easy, nor was the litigation. The nephew maintained that his uncle had "gifted" him the money out of "love and affection," and the power of attorney was evidence of the trust his uncle placed in him. The jury awarded the full amount taken, interest, punitive damages, and attorneys' fees.[1] The Second District Court of Appeals sustained the award and eventually every penny of the judgment was recovered.[2]

This is one of a growing number of cases where attorneys may be called upon to help an older person recover money taken by a family member "for safekeeping." Financial scams targeting seniors are common, and often the perpetrator is a family member. Older Americans are vulnerable to fraud and financial abuse because they commonly experience some degree of cognitive decline, through natural causes or from medications, and can have difficulty understanding their changing world. The Internet, personal computers, appliances with complex controls and other indicia of contemporary life can accelerate disorientation of an aging mind, and seniors who spend most of their time at home can feel isolated and alone.

A power of attorney is a written authorization giving one person the legal authority to act for another person, typically regarding financial affairs like bank accounts and investments. In the hands of someone trustworthy, a power of attorney can be an important tool to manage finances in the event of a disability. In the hands of a financial predator or a greedy family member, a power of attorney can be used to secretly steal money and assets, readily bypassing the normal safeguards employed by financial institutions.

If someone has been the victim of fraud or financial abuse involving an unauthorized use of power of attorney, a lawsuit can be filed against the appointee for breach of fiduciary duty and conversion.[3] If successful, the victim will be entitled to recover the stolen property, and may receive punitive damages and attorneys' fees.[4] This is because the execution of a power of attorney gives rise to a fiduciary relationship between the principal (here, the victim) and the agent (the perpetrator).[5] The agent owes his or her principal a fiduciary duty of exercising the utmost fidelity, good faith and loyalty.[6]

Fiduciary status imposes on an agent a duty to inform the principal of all facts relating to the subject matter of the agency that would affect the principal's interests.[7] Although the agent may gain a profit with the knowledge and consent of the principal, he or she may not acquire an interest adverse to the principal and reap a secret profit.[8] Likewise, a power of attorney does not authorize the agent to transfer the principal's property to themselves or to others, unless the power of attorney specifically confers that power.[9] If the agent fails to act in accordance with his fiduciary duties of fidelity and good faith, he or she is liable to the principal for any resulting losses.[10]

An agent who uses his or her principal's assets for their own benefit also commits the tort of conversion. Conversion consists of three basic elements: (1) a defendant's exercise of dominion or control (2) over the victim's property (3) in a manner inconsistent with the victim's rights of ownership.[11] If a defendant comes into possession of property lawfully, as is the case when a power of attorney is employed, the victim must prove two additional elements to establish conversion: (1) that he or she demanded the return of the property after the defendant exercised dominion or control over the property and (2) that the defendant refused to deliver the property to the victim.[12] If the victim proves conversion, the court will order the property be returned. If the defendant's conduct was wanton or otherwise aggravated or involved elements of fraud, malice, or insult, the victim is entitled to punitive damages.[13]

It is not uncommon for the perpetrator to defend his or her actions by claiming the victim was senile, needed to be "protected" from foolishly spending their own money, and that the money therefore was taken for "safekeeping." However, an honest friend or family member would be ill-advised to employ a power of attorney to transfer assets from the senior to their own account for safekeeping, because the act of changing ownership constitutes conversion if the victim's demands for its return are refused.[14]

As the number of seniors in the general population rapidly increases, we are going to see a corresponding increase in fraud perpetrated using a power of attorney.

Be prepared:

- Advise clients not to grant powers of attorney unless the recipient of the power is well-known and completely trusted.
- Advise clients not to release the power of attorney until it is needed; in the meantime, keep it in the attorney's offices.

- When release of the power to the recipient is needed, advise the client to get it back as soon as the client can manage their own affairs, and notify any institution who was provided with a copy of the power that it is no longer active.
- If the recipient of the power transfers assets into his or her own name, send a written demand that he or she immediately return the assets and render an accounting.
- If the recipient refuses, an action for conversion and breach of fiduciary duty may be needed, and the claim for damages should include punitive damages and attorneys' fees. ●

Endnotes

1 *Scott v. Hall* (Nov. 20, 1987), Montgomery C.P. No. 87-CV-3727, unreported.

2 *Scott v. Hall* (Sept. 9, 1988), 2nd Dist. No. 88-CA-010921.

3 See *Spitzer v. Jackson* (1994), 96 Ohio App.3d 313, 644 N.E.2d 1122.

4 *Fisher v. Barker*, 159 Ohio App.3d 745, 2005-Ohio-1039, 825 N.E.2d 244, ¶17-25.

5 See *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440, 116 N.E.2d 701, 52 O.O. 329, and *LeMar v. Ickes*, 9th Dist. No. 08CA0036, 2009-Ohio-3650, at ¶7.

6 *Hey v. Cummer* (1950), 89 Ohio App. 104, 140, 97 N.E.2d 702, 59 Ohio Law Abs. 67, 45 O.O. 392.

7 *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164, 542 N.E.2d 654.

8 See *Hey, supra,* and In *re Stauffer's Estate*, 57 N.E.2d 145, 149, 40 Ohio Law Abs. 254.

9 Compare *In re Estate of Kirkland,* 175 Ohio App.3d 73, 2008-Ohio-421, 885 N.E.2d 271, at ¶35 with *MacEwen v. Jordan,* 1st Dist. No. C-020431, 2003-Ohio-1547, at ¶12-13.

10 *Rudy v. Bodenmiller* (Dec. 11, 1990), 2nd Dist. No. 89-CA-54.

11 *Dice v. White Family Cos.*, 173 Ohio App.3d 472, 2007-Ohio-5755, 878 N.E.2d 1105, at ¶17.

12 *Id.*

13 See *Preston v. Murty* (1987), 32 Ohio St.3d 334, 336, 512 N.E.2d 1174, and *Fisher v. Barker, supra*, 159 Ohio App.3d at 750, 825 N.E.2d at 248.

14 See, *e.g., Preston v. Murty, supra.*