

THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Powers Of Attorney And The Double Agent

BY MICHAEL A. BURGER

A durable power of attorney is a powerful document, allowing an appointed agent to handle designated affairs for his or her principal. While a convenient and even a vital document for those who find themselves indisposed due to travel or incapacity, an uninformed or ill-motivated agent (or "attorney in fact") can do great harm and is in a position to surreptitiously engage in self dealing.

This article addresses the fiduciary duties of an attorney in fact and possible remedies for their violation.

Case In Point

A client, call her Jane, told me her elderly mother had passed away. Jane is in her 70s and her mother had lived a long life, passing away peacefully in her 90s. Jane, an only child, had enjoyed a close relationship with her mother.

Her mom was independent; at her own insistence she resided alone in her house in the country, about an hour away, until her death. Jane and her mom spoke on the telephone every week and visited as often as Jane could make the trip — less often in the wintertime.

Her mom would occasionally comment upon a married neighbor couple down the street who helped her with shopping and mowing the lawn. Of course she trusted them — they had lived on the same block in the same small country town for many years. The neighbors had always been kind to her.

When these trusted neighbors offered to assist with her mom's banking, she was grateful and immediately acceded to their suggestion that she grant them a power of attorney to facilitate the process.

As you have probably guessed, Jane was calling me with more than the sad news of her mother's passing. After the funeral, as Jane had begun to sort through her mother's belongings and close up the house, she realized that her mother's financial records were missing. Jane found one lone bank statement stuffed into the back of her mom's sock drawer. All other bank records were absent; also absent was her mom's diary.

Jane went to her mother's bank where an uncomfortable teller confirmed to Jane that her mother was a customer for many years and that there were no accounts titled in her



MICHAEL A. BURGER

name anymore. Jane asked what had happened to her mother's accounts but the teller replied that she was sorry she could not give out any more information and quietly suggested Jane call her lawyer.

The laws governing powers of attorney were instrumental in helping Jane and may be helpful for others to review as well.

An Agent Has A Strict Duty Of Loyalty To His Or Her Principal

An agent under a power of attorney owes his principal a duty of allegiance, loyalty and care that was described by New York's highest court as "[n]ot honesty alone, but the punctilio of an

honor the most sensitive," *Meinhard v. Salmon*, 249 NY 458, 464, 164 NE 545, 546 (NY 1928). This standard flows from a tradition that is "unbending and inveterate," *Id.*

An attorney-in-fact is an agent of a principal, and therefore, a fiduciary, which creates a relationship of trust and confidence between them, *In re DeBelardino*, 77 Misc2d 253, 256, 352 NYS2d 858, 862 (Surr. Ct. 1974), *affd*, 47 AD2d 589, 363 NYS2d 97 (Fourth Dept. 1975).

"Accordingly, an agent must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing," *Id.*; see also *Elco Shoe Mfrs., Inc. v. Sisk*, 260 NY100, 183 NE 191 (1932); *In re Naumoff*, 301 AD2d 802, 803, 754 NYS2d 70, 72 (Third Dept.), motion for leave to appeal dismissed, 100 NY2d 534 (2003); *Mantella v. Mantella*, 268 AD2d 852, 701 NYS2d 715 (Third Dept. 2000).

"Furthermore, an agent is prohibited from acting in any manner which is inconsistent with his agency or trust," *In re DeBelardino*, 77 Misc2d at 256, 352 NYS2d at 862.

Self-Dealing Is Prohibited

"An attorney-in-fact, in exercising the broad powers granted to him should surely be required to turn especially sharp corners in the discharge of his fiduciary responsibilities, particularly when he stands to benefit personally from his acts or dealings," *Id.*

Naturally, an agent is prohibited from "making a gift to himself of money or property which is the subject of the agency relationship," *Semmler v. Naples*, 166 AD2d 751, 752, 563 NYS2d 116, 117 (Third Dept. 1990); see also, *Mantella*, at

Continued ...

THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

715; *Moglia*, 144 AD2d 347, 348, 533 NYS2d 959 (Second Dept. 1988).

"A power of attorney, no matter how broadly drawn, cannot be held to encompass an authorization to the attorney-in-fact to make a gift to himself of the principal's property. Such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make the gift," *In re DeBelardino*, 77 Misc2d at 255-56, 352 NYS2d at 859-60; see *In re Roth*, 283 AD2d 504, 724 NYS2d 476, 477 (Second Dept. 2001); *Leonard Nursing Home, Inc. v. Kay*, 2003 WL 1571579 (N.Y. Sup. 2003).

"A power of attorney proffered by a principal is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal," *Moglia*, 144 AD2d at 347-48, 533 NYS2d at 959.

"It is an elementary principle that an agent cannot take upon himself incompatible duties, and characters, or act in a transaction where he has an adverse interest. ... In such a case he must necessarily be unfaithful to one or the other, as duties which he owes to his respective principals are conflicting, and incapable of faithful performance by the same person."

— *In re DeBelardino*, 77 Misc2d at 255-56, 352 NYS2d at 862-63, (quoting *Lamdin v. Broadway Surface Advertising Corp.*, 272 NY 133, 139, 5 NE2d 66-67 [1936]).

Further, construction of the language conferring authority granted by a power of attorney with respect to "banking transactions" is governed by the General Obligations Law § 5-1502D. Nothing contained therein allows an agent who is not a statutorily designated relative to make a gift to him or herself, see, *Moglia*.

Illegal Transfers Set Aside

Jane did call her lawyer and we immediately applied for a court order freezing the accounts that had once been titled in Jane's mother's name.

"Injunctive relief is appropriate to remedy the conversion

of identifiable proceeds," *Amity Loans, Inc. v. Sterling Nat'l Bank and Trust Co. of N.Y.*, 177 AD2d 277 (First Dept. 1991); *Interfaith Med. Ctr. v. Shahzad*, 507 NYS2d 702, 703-04 (Second Dept. 1986) (misappropriation and conversion grounds for injunctive relief).

Subpoenaed bank records revealed that certificates of deposit had also been transferred by the neighbors to themselves using mom's power of attorney.

Neither the power of attorney issued by Jane's mother nor General Obligations Law § 5-1501 authorized the neighbors as agents and attorneys in fact to make gifts to themselves. The exceptions to this rule are set forth in New York General Obligations Law section 5-1502 and those following (for instance when the agent is also a designated relative).

The New York statutory short form durable power of attorney set forth in General Obligations Law § 5-1501 only permits a principal to appoint an agent to act as she could and to make "gifts to [her] spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$10,000 to each of such persons in any year."

Thus, the neighbors' transfer of mom's money to themselves was illegal and voidable. Thanks to Jane's perceptive observations and prompt action, the neighbors ultimately surrendered and settled the lawsuit against them, disgorging all claims to the funds and paying attorneys' fees as well.

Conclusion

A power of attorney is a very powerful document. Readily available in stationary stores, powers of attorney are often issued casually. Practitioners are wise to caution their clients about the perils of a dishonest or incompetent agent and to consider tailoring the scope of the powers to suit a purpose. It may be helpful to remind our more vulnerable clients that con artists always seem trustworthy; it's part of their con.

Michael A. Burger is a litigator and a member of the law firm Dible, Miller & Burger, PC. He thanks "Jane" and her family for their trust, and his law partners for their invaluable collaboration and advice. He also congratulates Kristine M. Demo-Vasquez, on this her first foray into the law as a licensed attorney.