

Crimes Against the Elderly: Fraud via the Power of Attorney

People often envision typical crimes against the elderly to be robbery and assault by some unknown individual and physical or mental abuse by a known caregiver.

They are not the only instances of elder abuse. One area in which law enforcement has seen an increasing number of complaints is the financial exploitation of the elderly through the mismanagement of their income and assets. These incidents usually occur when individuals are given legal guardianship or power of attorney over the victim's finances.

A Power of Attorney document gives a person the power to act on another person's behalf (often referred to as the Donor). Powers of Attorney run the gamut from extremely limited (Limited Power of Attorney) to providing someone complete power over your care and finances (Enduring Power of Attorney).

When granting a Power of Attorney, you are authorizing someone to act on your behalf. You should only choose someone whom you trust completely both now, and at a time when you may be incapable.

Our federal fraud laws are built on the premise that exploitive dishonesty should be forbidden. Fraud is committed when a person knowingly induces another person, or the public at large, to part with any property or to suffer a financial loss by deceit, unfair non-disclosure; or unfair exploitation.

Deceit

Deceit is present where the owner of property (real estate or a bank account; any property) is deceived into willingly parting with that property by someone who has the intention of permanently depriving the owner of it.

Deceit is characterized by a false representation, but it does not include an *expression of opinion* that is not made as a statement of fact.

A seller of a product or service may glamorize the potential of his product or service as long as he does not misrepresent or assign benefits that do not exist.

“Who would use a Power of Attorney to commit fraud against a parent?” you might ask.

Sadly, it does happen. We see it more and more often these days.

Typically, the n'er-do-well son comes home to roost just as his parents are becoming vulnerable through age-related illnesses or dementia.

The parents, happy to see the lad after such a long absence—and perhaps in a bit of a financial fog—are more than willing to give him Power of Attorney when he suggests it. They are tired of the monthly effort of paying bills and are having a hard time remembering to keep their affairs up to date.

That is the perfect setting for son Billy to prematurely pluck a few plums from the inheritance pie.

Billy can easily justify this in his mind because, after all, *he* is the one helping Mom and Dad. *He* is the one who picks up groceries for them and takes them to the doctor. His siblings who live in the east seem to have little to do with Mom and Dad on a regular basis.

By the time the other siblings realize what is going on, it is too late. Billy has helped himself to the majority of the assets, leaving his parents with only their government income on which to survive.

In extreme cases, Billy might even have used his Power of Attorney to transfer the title of their home to himself although, technically, that is illegal unless the Power of Attorney document specifies he has the authority to do that.

Legal practitioners must be vigilant in protecting clients from predators. Before a legal professional takes instructions for a Power of Attorney, the following points must be discussed with the client.

1. The Power of Attorney document is effective only while the client is alive. Its power stops with the client's death.
2. The client can revoke (cancel) the power at any stage, as long as he or she has mental capability.
3. The power the client is giving to another person (the attorney) will continue to be in effect after the client has lost the mental capability to revoke (cancel) the document.
4. The client must appoint the attorney using his or her own free will and without any undue influence of a third party.
5. The person is giving power to another person to manage his or her financial affairs. That power includes but is not limited to
 - buying and selling property on the client's behalf, including the client's own home, if that action is specified in the document;
 - depositing and withdrawing money from the client's account(s);
 - paying for services for the client with the client's money;
 - borrowing money on behalf of the client, if there is a need and a method of repaying the loan from the client's income or other resources.

6. Finally, there is a possibility that the attorney might abuse the power and steal from the client. While that is a criminal offence, there is the potential for that to happen. Recovery of the money and/or property may be difficult.

In our office, we make it a practice to review, with the prospective attorney, the “Rules of Engagement” or the job description, as we like to call it. Verbally, I might even go as far as to say “What this really means is, ‘Don’t steal from your parents!’ ”

Theft by Person Holding Power of Attorney

Everyone commits theft who misappropriates money while acting as power of attorney.
Sec 331 of the Criminal Act R.S. 1985.

Punishments

If convicted, one is liable to imprisonment for a term not exceeding 10 years, where the property stolen is a testamentary instrument or the value of what is stolen exceeds \$5000; or

(b) is guilty

- (i) of an indictable offence and is liable to imprisonment for a term not exceeding 2 years, or
- (ii) of an offence punishable on summary conviction, where the value of what is stolen does not exceed \$5000.

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