

by Professor Michael Myers

A power of attorney lapses upon incapacitation. A “durable” power of attorney survives incapacitation. Both terminate upon the death of its maker.

I so advised a USD Senior Legal Helpline caller concerned about the inappropriate exercise of authority being exercised by her younger brother over the estate of their recently-deceased mother.

“He had mother’s power of attorney and will not provide me or any of our family with a copy of her will,” she said. “He contends that since he had mother’s power of attorney for the past four years, he is in control. He has always been that way: manipulative and conniving.”

“He’s not in control,” I advised. “When your mother died, her power of attorney lapsed, and your brother’s legal authority over her assets terminated. He is without legal standing, unless he was named as the executor or legal representative under her will.” She believes she is the designated personal representative in her mother’s will.

I recommended she promptly engage an attorney, initiate probate, and force the immediate disclosure of the will, assuming there is one. “Oh, I am sure mother had a will; and I am also sure he has a copy of it. I’m concerned he might destroy it,” she said.

If he does destroy the will—and it can be proven—he will be subject to civil and criminal penalties. And, if he destroys the will and it cannot be proven, then his mother will be deemed to have died intestate (without a will) and he will have to share the estate equally with his siblings, including the caller.

Often it is the least virtuous family member who exercises the greatest influence over a parent with assets. One of the most effective ways of gaining such influence is through a power of attorney. A person who executes a power of attorney (called the “principal”) surrenders personal and financial autonomy. It is a bold legal gesture, with risk-filled and lasting implications.

It behooves all members of a family to protect parents from exploitation by those both outside and inside the family. In this instance, it is probable the caller’s brother is not the named personal representative of his mother’s estate, but rather she is. His power of attorney has lapsed.

And, he probably knows it.

(Pro bono legal information and advice is available to persons 55 and older through the USD Senior Legal Helpline, 1-888-747-1895).

*THE ELDERLAW FORUM - Power of Attorney Dies with Its Maker by Professor Michael Myers*