

Power of Attorney: Potential Tool for Fraud

by Professor Michael Myers

A power of attorney is a valuable estate planning tool; however, it has the potential for perpetrating fraud. It can be used to deplete an estate.

That is what happened in a case brought to the USD Senior Legal Helpline by a 69-year-old woman who was named in an aunt's will to receive a parcel of farmland. When the aunt died six months ago at age 82, the caller learned that the land had been sold to a nephew for half its fair market value through a power of attorney prepared by an attorney who should have exercised greater oversight.

The nephew lives in a coastal state and was not mentioned in the aunt's will. Last summer he traveled to the upper plains community where the aunt and her sister, also in her 80s, resided. The sister was named in the will as the personal representative. The aunt, in failing health, also had her sister's name placed on a joint checking account.

The nephew persuaded the aunt's sister to withdraw money from the account and loan it to him for the purpose of purchasing the farmland intended for the helpline caller. He and the sister then had a lawyer draft an all-inclusive power of attorney that specifically gave the sister, as agent, power to sell the farmland to a family member.

He and the sister then took the power of attorney to the aunt, who was terminally ill in a nursing home and barely able to make a mark on the power of attorney signature line. Nursing home employees witnessed the signing. The sister then used the power of attorney to convey the land to the nephew, again, at half its market value with money taken from the aunt's checking account.

The attorney for the aunt's estate discovered the fraud. She filed an action against the nephew and sister, who have agreed to return the money and land to the estate. The state attorney for the county where the will is being probated has so far declined to file criminal charges. The sister has been replaced as personal representative.

This is a case of estate planning gone awry. The aunt executed a will drafted by legal counsel. She designated who should receive her property upon her death. She planned her funeral. She acted responsibly and with foresight

But she could not plan for a nephew with fraudulent intent. Lawyers who draft powers of attorney have a duty to make certain the person who is giving away legal powers has independent representation.

(Pro bono legal information and advice is available to persons 55 and older through the USD Senior Legal Helpline at 1-800-747-1895)

Power of Attorney: Potential Tool for Fraud by Professor Michael Myers