# *Stop Thief!*
# *How to Rectify Attorney-in-Fact Wrongdoing*

**by W. Y. Alex Webb**

## Introduction

Strangely, a review of the index of articles to this newsletter beginning as early as December 1992 and continuing through the last edition of this newsletter, contain no articles concerning wrongdoing by attorneys-in-fact, except in a very oblique way. The immediately preceding newsletter did contain an article by Linda Funke Johnson, where she did discuss certain limitations and conditions on the rights and powers of attorneys-in-fact in a real estate context. Interestingly, she ended her article by saying the following "Attorneys should also advise your clients to name an attorney-in-fact carefully. It can be an expensive mistake to chose incorrectly." I am sure many of the readers have had experiences where bad attorneys-in-fact have done grave harm to their principal's financial affairs.

We all agonize over these choices, perhaps not enough because there is usually a family member, such as a spouse or adult children, who are willing to serve and have the capacity to serve. When there is no spouse and no children, who is the best choice? It depends, of course, but I believe the readers would agree that a former, retired Merrill Lynch executive, author of two books on family trusts, and a licensed financial adviser, who in addition had known the principal for over 20 years prior to moving to North Carolina and who in fact was a good friend of the principal would be a good choice. Certainly the principal thought so and did in fact name such a person who would be my client in the case I will shortly describe. Unfortunately, this person, for reasons still unknown, fairly soon after appointment decided that their own financial welfare should be paramount to that of the principal. In addition to the general sadness of seeing this type of person 'go bad', I would also add that this gentleman was also a good referral source for our firm and a personal friend. Accordingly when a special proceeding was commenced against him in August of 2008 by a pre-existing attorney-in-fact for the principal, and in the process of defending that action, it was learned that the alleged defalcations were in fact largely true, we began searching for a means of making things right in the context of our zealous advocacy and defense, and, unfortunately, were unable to find one. There just was no "right" way to fix everything.

## Special Proceeding

So additional facts are in order. The principal executed a Durable Power of Attorney on December 1, 2000 ("2000 Power"). Later the individual described above, the family friend and former Merrill Lynch executive, was appointed in a Durable Power of Attorney dated February 14, 2008 ("2008 Power"). Four short months later, the original attorney-in-fact, Mr. M whom is also a licensed attorney, had the principal transmit a written revocation to the Bad Attorney-in-Fact ("Bad AIF"). Simultaneously, a demand for accounting of all funds in the Bad AIF's possession, together with all records, was made. We believe but were not certain that a bank or trust company of the principal's alerted the principal or her attorney, Mr. M, to possible defalcations resulting in Mr. M's recommendation to principal to revoke the 2008 Power and commence the special proceeding.

Interestingly enough, the attorney, Mr. M, in his capacity as attorney-in-fact under the 2000 Power was styled as the petitioner. Secondly and also interesting, the petition for accounting alleged "Petitioner is informed and believes that Respondent is a fiduciary as defined as N.C.G.S. Section 32-2 and in accordance with N.C.G.S. Section 32-57, he can be made to account for all his actions through this special proceeding in accordance with Article 2, Chapter 36C of the North Carolina General Statutes together with the Common Law determined by the courts of the state of North Carolina." While an attorney-in-fact as an agent presumably is within the definition of a fiduciary under N.C.G.S. Section 32-2, interestingly again, attorney-in-fact is not specifically mentioned. Furthermore, N.C.G.S. Section 32-57 speaks of judicial review concerning payment of compensation to trustees and only tangentially invokes the review function of the court. Lastly, N.C.G.S. Chapter 36C is the North Carolina Uniform Trust Code and has nothing specifically to do with attorneys-in-fact. These defects coupled with a proper determination of the jurisdiction of accountings before a clerk of superior court for an incompetent would prove fatal to the special proceeding.

## Special Proceeding Hearings

The first hearing on the petition occurred in September 2008. It was in preparing for that event that we learned about the nature and extent of the incredible mess created by the Bad AIF and also the probability that stealing had actually occurred. Knowing this individual we had initially begun the process as 'of course the principal is entitled to an accounting, lets get her what she needs and get this petition dismissed.' As the facts were revealed it dawned upon us that not only was there a potential civil action for damages, and probably no right to compensation for horrible mismanagement, but that there had also in fact been criminal activity as well. For us, of course, this changed the complexion of the whole case. A letter outlining these dire circumstances and even more dire consequences was given to the Bad AIF in early October 2008. And by 'mess', I mean there were upwards of eight different bank accounts where the monies were deposited, transferred, re-transferred, and/or spent or taken. We hoped against hope that it was only a mess but it was becoming clearer and clearer that there was actual wrongdoing.

We suspected that regardless of the outcome of the special proceeding that there would be a subsequent civil proceeding for damages and possibly a criminal referral, since that in fact had been threatened by Mr. M, so we worked tremendously hard trying to understand the entire situation so that we could appropriately represent Bad AIF. About this time, it was discovered that there was a "Promissor Note" that Bad AIF had the principal sign ostensibly covering the taking for personal use of some of the money. It is highly questionable, of course, whether an attorney-in-fact can, in realty, make a bonafide loan to himself. We defended several inconclusive hearings on the petition on behalf of Bad AIF. We then filed for a dismissal and/or transfer with the Clerk of Court.

## Motion to Dismiss

*First* ground for dismissal we alleged was that Mr. M, either as attorney at law or attorney-in-fact, for the principal was not a 'real party in interest' under North Carolina Rules of Civil Procedure Rule 17(a) and 17(b). Rule 17(b) specifically requires that an incompetent person must appear by general guardian or guardian ad litem. Mr. M had been somewhat ambivalent as to whether or not the principal was in fact incompetent and this was an extremely important issue because the 2000 Power

specifically stated "This durable power of attorney.....shall become effective *after* I am deemed to be physically incapacitated or mentally incompetence shall be made by my attending physician at that time." (Emphasis added, and note that the grammatical errors were in the original.) *Second* ground for dismissal was of course the lack of any evidence that the principal was adjudicated an incompetent or in fact "deemed" incompetent by her attending physician. Accordingly, even if Mr. M as attorney-in-fact could be a real party in interest pursuant to Rule 17, since the "trigger" in the 2000 Power had apparently not occurred he could not bring the special proceeding on her behalf. *Third* ground for dismissal made reference to North Carolina Constitution Article IV, Section 12(3) which provides "The Clerks of Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State." We also sited several cases confirming that the Clerk's subject matter jurisdiction can only be conferred by statute. See **In re Legitimation of Locklear**, 314 N.C. 412, 334 S.E.2d 46(1985), *citing* N.C. Const. Art IV, §12(3) and **Pruden v. Kemmer**, 262 N.C. 212, 136 S.E.2d 604 (1964). In the **Pruden** case the court stated "The clerk of superior court has no common law or equitable jurisdiction. **McCauley v McCauley**, 122 N.C. 288, 30 S.E. 344. The clerk is a court "of very limited jurisdiction - having only such jurisdiction as is given by statute." **Pruden v. Kemmer**, 252 N.C. 212, 216, 136 S.E.2de 604, 607 (1964), *quoting* **Moore v Moore**, 224 N.C. 552, 555, 31 S.E.2d 690,691 (1944). The only statute deemed to be relevant seemed to be N.C.G.S. Section 32A-11(b) which states in parts "Any provision in the power of attorney waiving or requiring the rendering of inventories or accounts shall govern, and a power of attorney that waives the requirement to file inventories and accounts need not be filed with the clerk of superior court. Otherwise, *subsequent* to the principal's incapacity or mental incompetence, the attorney-in-fact shall file in the office of the clerk of superior court in the county in which the power of attorney is filed, inventories of the property of the principal in his hands and annual and final accounts of the receipt and disposition of the property of the principal and of other transactions on behalf of the principal." (Emphasis added) The 2008 Power appointing Bad AIF did not in fact waive the requirement for inventories and accountings. However, since the requirement to file such accountings with the clerk of superior court is expressly made conditional upon and begins "...subsequent to the principal's incapacity or mental incompetence..." and since there was no adjudication of or other evidence of the principal's incapacity or mental incompetence there could be no proper jurisdiction before the clerk of superior court.

**Motion to Transfer**

As grounds for transfer, Bad AIF *first* moved the court pursuant to N.C.G.S. Section 1-301.2(b) to transfer the special proceeding to the appropriate court because of many issues of fact (and also of law) that must be determined in the proceeding. N.C.G.S. Section 1-301.2(b)states in relevant part "...when an *issue of fact*, and equitable defense or request for equitable relief in any pleading in a special proceeding....the clerk *shall* transfer the proceeding to the appropriate court." (Emphasis added) We listed over eleven factual and legal issues that we felt could not be determined by the clerk of superior court, those being:

1. There was the issue of whether or not the 2008 Power was given new life by a hand written revocation of the revocation that Bad AIF obtained without our knowledge from the principal.
2. Whether or not the so-called Promissor Note was a valid promissory note from Bad AIF to the principal.

3. Whether or not the Bad AIF could in fact legitimately borrow from his principal either as a matter of law or whether it was permitted under the terms of the 2008 Power.
4. Whether the fees and commissions that the Bad AIF declared and paid himself under the 2008 Power were in fact reasonable.
5. Whether or not the powers and authorities delegated by Bad AIF through his wife were actually and properly delegated to her pursuant to the provisions of the 2008 Power.
6. Whether or not the Bad AIF's wife must separately account for the handling of some portion of the funds of the principal.
7. Whether instructions given by Bad AIF to a certain bank custodian of assets of the principal (which were not honored by the bank), were instructions that Bad AIF could in fact give to the custodian and whether or not the failure of the custodian to honor those instructions constituted a claim in favor of Bad AIF and whether that would mitigate the potentional damages he may have as a result of the proceeding.
8. Whether or not the Bad AIF was liable for any penalties and /or interest due to the late filing of the 2007 income tax returns of the principal. Prior year returns had been prepared by the same bank.
9. Whether or not Bad AIF is liable for any part of any surrender charges or other costs and expenses assessed upon termination of certain annuity contracts.(The funds from which were used by Bad AIF to purchase gold coins.)
10. Whether or not Bad AIF violated the limitations and powers set forth in the 2008Power under Article VI (i.e., no self-dealing).
11. Whether or not the principal is physically incapacitated or mentally incompetent raised several crucial issues of law and fact:
    a. whether or not Mr. M is properly empowered as an attorney-in-fact under the 2000 Power;
    b. whether or not the clerk of superior court is properly authorized under N.C.G.S. Section 32A-11(b) to require Bad AIF to file inventories and accounts;
    c. whether or not the principal has sufficient mental capacity to execute a new power of attorney-specifically the 2008 Power; and finally,
    d. whether or not the principal had sufficient mental capacity to affect a revocation of a power of attorney, specifically the 2008 Power.

*Second* ground for the motion to transfer was that we felt the Bad AIF may have one or more equitable defenses against the assertion of damages that might mitigate those damages.

**Motions Hearing**

The hearing on our motions to dismiss and transfer was heard by the clerk on November 18, 2008. Not unsurprisingly, the clerk ruled against us on the motion to dismiss but did grant our motion to transfer. In that same November 18th hearing, the clerk had also granted a request by the Petitioner for a surety bond and an injunction upon use of personal and business funds by Bad AIF. Our appeal included an appeal from those actions as well.

**Appeal**

Notice of appeal of the clerk's order requesting *hearing denovo* was filed on December 17th. On February 9th, 2009, a hearing on our appeal was held before a superior court judge. Our appeal was

granted and the actions of the clerk were overruled. Immediately after that hearing, we met with the Bad AIF and terminated our representation. Subsequently, Mr. M with the principal as the real party in interest filed a civil action that is still pending.

**Lesson**

Now to answer the question posed in the title: How does one stop the thieving and rectify the actions of a bad attorney-in-fact? I would respectfully submit that regardless of whether or not the power of attorney is springing and also whether or not it waives accountings, that the attorney for the principal immediately bring a civil action with a request for temporary restraining order and subsequent injunction upon any actions of the defalcating attorney-in-fact. While the filing of the special proceeding generally stopped the actions of our Bad AIF, there were in fact still continuing contacts- remember the Bad AIF and the principal had been family friends for over 20 years. There were some additional defalcations that occurred after the notice of revocation. Specifically including additional "loans" and payment of some attorney-in-fact compensation.

**Criminal Charges?**

As an aside, I have checked with the new attorney representing Bad AIF and no criminal charges have been brought. In a particularly egress case where I was Mr. M, in other words where I was representing the principal, about 12 years ago, I had occasion to learn after the principal died, because I became the executor of the estate, that in a period of four short months the attorney-in-fact (commencing within five days after appointment!) had begun to steal from the principal. As executor, I brought criminal charges and spent some time pressing the local prosecutor to try to put this person "away" because I felt they were deliberately praying on older folks with diminished capacity, as the principal had been in that case. I also immediately began a civil action which the thief in that case attempted to avoid by declaring personal bankruptcy when we were close to closing the civil action. That required an adversary proceeding in bankruptcy court which the estate won and then after the laborious effort of getting the "foreign" judgment of the federal bankruptcy courts recognized in the local superior court, we then proceeded to execute on the judgment and obtained approximately $50,000 by forcing the sale of the thief's house. Since he had also "loaned" over $200,000 to his brother, a realtor in a nearby town, we then proceeded to press for collection on those notes and that effort is still on-going (over 10 years!).

**Principal Protector?**

You can see that once the attorney-in-fact that has nefarious intentions gets started it is very difficult to stop their efforts. Again in my earlier case, I was counting on the siblings of the principal to keep an eye on the 'family friend' who had been appointed attorney-in-fact. I spent some time with this so-called 'friend' explaining the duties and responsibilities of an attorney-in-fact but I was not alerted until after the death of the principal that he had not been carrying out his duties appropriately. He was attorney-in-fact only from approximately May to September of 1997. As a possible structural protection for clients who are not using spouses and children, we have considered using a concept similar to the trust protector concept, I guess that would be called a 'principal protector' and building that into our durable powers of attorney. A principal protector would be empowered to received copies of all information, particularly brokerage statements and bank accounts, on a routine basis and have the right to inquire of IRA sponsors, banks and brokerage houses as to the actions of an

attorney-in-fact. And finally, again similar to a trust protector, have the power to remove an attorney-in-fact. They would not have the power to appoint themselves. It is a concept we are still considering but it might be worthy of implementation.

## Legislation?

Finally, I have tried to consider whether or not the proceedings in this case might implicate some need for legislative reform. My general opinion is that that is not necessary. Mr. M as the principal's attorney at law could have initiated the action on behalf of the principal as a civil action initially and requested the trial court *ab initio* to name him, or someone else, as guardian ad litem pursuant to the December 1, 2003, amendment of N.C.G.S. Section 35A-110. As amended, that section reads, "This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or incompetent child. However, nothing in this Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure."

If this article encourages you to be even more careful about whom you allow your clients to designate as their attorneys-in-fact then it will have served a useful purpose.

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