

From the desk of

**John A. Crane**

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## *What it Means to be a Fiduciary*

A few years back Fred had agreed to look after his mother's finances if she ever needed help. She had put him on her bank accounts and signed a power of attorney naming him her agent. Now she was in the nursing home and could no longer make decisions for herself. He wanted to do what was necessary, but his sister (they had never been close) was demanding to see their mother's will and threatening to sue if he spent any of her money improperly. He sat in my conference room and looked exhausted from the strain. Unfortunately, what I had to tell him wasn't going to help.

"Fred, you don't have to act as your mother's agent, but if you do, you will be a fiduciary and have all the obligations that come with it. First of all, you will have to be absolutely loyal to your mother's interests, even if it means your own interests suffer. You will need to manage all of her affairs prudently. You could be held responsible if you do something you shouldn't, or if you don't do something you should." He took a gulp of water.

"If you don't know how to handle something, get professional advice because you are required to handle her affairs in a competent manner. You will have a duty to fully account for each and every action you take, and you may have to repay anything you can't explain and document. So, *always* keep receipts, bank statements, etc." I could see the color leaving his face as he tried to recall the last time he had balanced his checkbook.

"Do not pay yourself anything or do anything that may even indirectly benefit you without asking me first. Your mother did not expressly authorize you to pay yourself compensation in the power of attorney. Even if she had, there would be the question of how much is reasonable under the circumstances."

"As far as your mother's will is concerned, your sister is not entitled to see it. That will is your mother's property so long as she is alive. For that matter, you don't have the right to do anything with your mother's property that she would not want or that is not in her best interest. Just because you have the power to do something, does not mean you have the right to do it. You have the power to deal with your mother's property as if it were your own, but no legal right to do anything that is outside of your mother's

best interests." He wanted to know what his sister could do to follow through with her threats.

"Well, if your mother was competent and thought you had abused your authority under that power of attorney, she could sue you for damages or file criminal charges against you or both. Since your mother is now incapacitated, there are ways your sister could basically do the same things on your mother's behalf. Often, the first complaint is made to Adult Protective Services, which then opens an investigation. It doesn't mean that any charges against you would stick, but bear in mind that the burden of proof, at least in a civil court, is generally on the fiduciary." He sat silently and then meekly asked me what he should do.

"Fred, your mother wanted you to help her if it ever became necessary. She now needs your help, so help her. Just be prepared to be an open book about everything. Fiduciaries of all types get in trouble when they start worrying about how to cover their rear ends after they have already taken on the job. Too often, they clam up and heighten suspicion by hiding everything they are doing from everyone. I'm not suggesting you violate her privacy by divulging confidential information such as the contents of her will. Just know that someday you will be required to honestly and fully account for everything, good and bad, that you did on your mother's behalf. Since your mother cannot review or consent to anything you have done, that accounting may not be due until she dies and your sister basically inherits the legal right to demand one."

"If you keep these things in mind, work diligently on her behalf and avoid any appearance that you have something to gain by your service, you should be okay. I will certainly be here to help you along the way. If you decide you don't want to be her agent, don't do it. We can discuss asking the probate court to appoint you guardian, but it is an expensive process that your mother hoped to avoid." He promised to think it over and left muttering something about no good deed going unpunished.

Acting as a fiduciary is one of the greatest services you can render, but it is not a role to be assumed without careful consideration. If you are not prepared for the responsibility, it can be painful.