COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC No. FAR-_________

TRACEY E. FERN,
Plaintiff/Appellant

v.

ANTOHNY W. BAKER, CHRISTOPHER A. BAKER, and LISA A. LOPORTO,
Defendants/Appellees

ON APPEAL FROM A JUDGMENT OF THE BARNSTABLE PROBATE FAMILY COURT (FIDUCIARY LITIGATION SESSION) AND APPEALS COURT NO. 2024-P-1349

APPELLANT'S REQUEST FOR FURTHER APPELLATE REVIEW

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Appellant, Tracey E. Fern, respectfully requests leave for further appellate review of the Appeals Court's decision in this matter dated March 27, 2026. Tracey E. Fern v. Anthony W. Baker & others, 160 Mass App. Ct. 624 (2026)(No. 24-P-1349); AD026.[1]

This case presents fundamental issues affecting the public interest and interests of justice, as the Appeals Court approved two agents, acting under a power of attorney, gifting themselves over $5.5 million of their incapacitated mother's property where the power of attorney did not expressly authorize the agents to make gifts to themselves, but only generally "[t]o make outright gifts of my property to or for the benefit of such persons who, in the opinion of my said attorney, would be the donees I may choose." In approving the extraordinary gifts, the Appeals Court overturned Massachusetts law regarding essential, required explicit authority for fiduciary self-dealing. The Appeals Court supported its decision with a select provision of the Uniform Power of

[1] Citations to the Addendum of this Application are cited as "AD000."

Attorney Act, which Massachusetts has not adopted, providing that a general gifting power, by default, permits gifts to an agent if the agent is a descendant of the principal, while at the same time ignoring the critical attendant default provision in the same Act, providing that gifting under such circumstances is strictly limited to the annual exclusion amount under Federal law.

The Appeals Court decision imperils the protection afforded to incapacitated principals, by disregarding established case law that requires "explicit, and not inferential," authority regarding dangerous agency powers, such as the power of an agent to make self-dealing gifts.

The Appeals Court decision, separately, also sets a concerning precedent that allows conflicted agents to justify self-dealing through retrospective testimony about what the principal "would have wanted," rather than through evidence of the principal's donative intent in the form of objective proof of actual authorization or specific direction.

The Appeals Court's holding reaches far beyond the circumstances of this case. It impacts the drafting and interpretation of powers of attorneys, fiduciary self-dealing authority and standards, and the protection of elderly and incapacitated persons with respect to commonly used, yet inherently fraught, agency powers.

STATEMENT OF PRIOR PROCEEDINGS

On April 9, 2019, Appellant/Plaintiff Tracey E. Fern ("Tracey") filed an Equity Complaint against Appellees Anthony W. Baker ("Tony") and Christopher A. Baker ("Chris").[2] RA015.[3] Tracey's claims primarily related to gifts Tony and Chris made to themselves totaling $5,576,000 of their (and Tracey's) incapacitated mother's property, pursuant to the mother's power of attorney. RA015. On July 29, 2024, the Trial Court entered Judgment on Tracey's Complaint that the gifts made by Tony and Chris to themselves under the power of attorney were authorized and were not a breach of their fiduciary duties. RA322. Tracey filed a timely Notice of Appeal. RA361. On

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[2] Tony's long-time partner, Lisa A. Loporto was also named as a Defendant in Tracey's Complaint due to Lisa's receipt of gifts made by Tony and Chris, not the subject of this appeal.

[3] Citations to the Appeals Court three volume Record Appendix in this matter include: Vol. I, Record Appendix cited as "RA000"; Vol. II, Trial Transcripts Appendix cited as "TT0000"; and Vol. III, Trial Exhibit Appendix cited as "EA000."

March 27, 2026, the Appeals Court issued a decision affirming the Judgment of the Trial Court. AD026.

STATEMENT OF RELEVANT FACTS

Absent from the Appeals Court's recitation of the facts, pertinent to this Application, are the following relevant facts:

Frances R. Fern ("Frances") was born on October 14, 1922, and died on March 25, 2018 at the age of 95. RA326. Tracey, Tony, and Chris are three of her children.[4] RA326. On March 8, 2013, Frances executed her Last Will and Testament, leaving jewelry to Tracey's two children, $10,000 bequests to two charities, and all remaining property in equal shares to Tony, Chris, and Tracey. EA023. On March 21, 2013, Frances executed a standard Durable Power of Attorney appointing Tony and Chris as her agents. Paragraph 14 of the Power of Attorney authorized the agents to make gifts of Frances's property, "to or for the benefit of such persons who, in the opinion of my said attorney, would be the donees I may choose." EA039. Contemporaneous with the execution of

[4] Frances had a fourth child, Frank, who is not a party to this case.

Frances's 2013 Will and Power of Attorney, Tony (who went with his mother to a meeting with the estate planning attorney) emailed Chris (then living in California) on February 28, 2013 regarding their mother's estate plan:

> "Then the will, she said she wanted all her children (with the exception of Frank who suffers from autism) to now share equally in her estate. She feels she loves each of them equally she is proud if <sic> each and it is the right thing to do and that was her plan. This was an attempt at having peace in her family." EA083.

Both Tony, and Frances's estate planning attorney, testified at trial that Frances's expressed reason for her 2013 estate plan was to have peace in the family and treat Tony, Chris, and Tracey equally. TT849-850; TT1242-1244.

Following the execution of her 2013 Will and Power of Attorney, Frances's mental condition rapidly deteriorated into advanced dementia due to Alzheimer's. RA351. From March through May of 2013, Frances's doctors noted her cognitive decline, memory loss, and difficulty with executive functioning. RA351; EA305-380. During Frances's rapid decline, which followed her execution of the 2013 Will and Tony's contemporaneous email that she wanted to treat her children equally, Tony alleged his mother made statements that she would generally review any gifting in the future and that she "wanted to give Tracey a second chance." RA345-347.

Three years later, in July 2016, Tony and Chris began discussing gifting, the same month when, over the July Fourth weekend, they attended an open house for a luxury, oceanfront mansion in Truro. RA354. On July 18, 2016, Tony and Chris began gifting themselves what would ultimately amount to over $5.5 million. $3,250,000 of the $5.5 million was gifted over a six-day period the week before Tony and Chris make an all-cash offer of $3,300,000 to purchase the Truro property. RA353-354.

Tony and Chris claimed the gifts were spurred by the upcoming 2016 Presidential elections and anticipated changes to the estate tax laws. RA352. However, Tony emailed Chris on July 29, 2016 regarding estate tax changes if Hilary Clinton won the election, suggesting "a quick additional note" to their attorney about this "so that his working up figures take that additional information into account." EA087. This "tax-rationale for the gifts" email was sent only after the brothers attended the Truro open house and after they began making the multi-million-dollar gifts to themselves. EA087.

Tracey was wholly unaware of Chris and Tony's large gifts. RA354. Tracey only learned about the large gifts years later, well after her mother's death, when she requested a copy of Frances's estate tax return. RA354.

STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE APPEALS COURT DECISION IS SOUGHT

Tracey requests further appellate review to address the following issues:

1. Whether a power of attorney authorizing gifts to "such persons who in the opinion of my said attorney would be the donees I may choose" permits attorneys to make multi-million-dollar gifts to themselves, where the instrument does not expressly state the attorneys have the authority to self-deal with respect to gifts.

2. Whether the Appeals Court improperly relied on select, unadopted provisions of the Uniform Power of Attorney Act to improperly infer authority in a power of attorney for self-dealing gifts, while ignoring

other express provisions of the same Act that limit the amount of such gifts.

3. Whether in a fiduciary self-dealing case involving an incapacitated principal, it was error to hold that the critcial issue was not the principal’s actual donative intent, but whether the fiduciaries thought, in their own opinon, that the principal would have choosen to make the gifts at issue, substituting their own judgment for the principal’s judgment of what she would have wanted.

STATEMENT INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. THE APPEALS COURT OVERTURNS MASSACHUSETTS LAW REGARDING THE CRITICAL INTREPRETIVE PRINCIPLE APPLIED TO FIDUCIARY SELF-DEALING.

Massachusetts law has long treated self-dealing by a fiduciary as exceptional and subject to strict limitations. In Gagnon v. Coombs, the Appeals Court stated that, "self-dealing by an agent, in the absence (as here) of distinct authority from the principal expressly granted in the empowering instrument, has been continuously and uniformly denounced as one of the most profound breaches of fiduciary duty. . ." 39 Mass. App. Ct. 157-158 (1995).[5] The Gagnon court noted the prohibition against self-dealing unless "expressly granted" in a power of attorney as a "rule of strict construction," due to the inherent and potentially destructive nature an agent's self-dealing can wreak on a principal's interest. See id. at 157-158 & 158 n. 16. The strict rule of construction with respect to extraordinary agency powers, such as the authority to self-deal, demands "explicit, and not inferential, grants of authority." See id. at 158, citing Williams v. Dugan, 217 Mass. 526, 529-530 (1917).

[5] Citing fourteen other cases and sources.

This Court recently affirmed the rule of strict construction as to powers of attorney, stating, "given the broad powers they may confer on an agent, they may be used as tools of abuse against the very people they are intended to assist." Barbetti v. Stempniewicz, 490 Mass. 98, 114 (2022). In Barbetti, the issue was whether a power of attorney authorized an agent to create a trust on the principal's behalf, which this Court determined it did not. Id. at 113-114. This Court recognized the importance of strictly construing the power of attorney in the trust context, because "trusts are often used as a means of avoiding the probate process and resultant review by a court of the disbursements of a decedent's assets."[6] Id. at 114 (internal cites omitted). Similarly, in the present case, Chris and Tony kept their gifting secret from Tracey, gifting that removed over $5.5 million from Frances's estate, which she had intended to be left equally to Tony, Chris, and Tracey as evidenced by her 2013 Will and contemporaneous objective accounts of her wishes. Had Tracey not requested a copy of Frances's estate tax return, or had this been a case

[6] The power to gift is more easily abused than the power to create a trust.

where Frances's estate was not required to file an estate tax return, Tracey would have had no knowledge of the gifts.

Tracey rejects the Appeals Court's notion that Gagnon is read "too broadly" by requiring express authority to authorize Tony and Chris gifting themselves over $5.5 million of their mother's property. The Appeals Court stated, "Nothing in that decision establishes particular requirements for how explicit the language of a power of attorney (or other instrument) must be before an agent, *given express authority (such as to gift*, or to sell, buy, borrow, or lend), may exercise that authority in a manner benefiting himself." (emphasis added). Fern, supra, at 629; AD028. However, the Appeals Court is focusing only on the explicitness necessary for the power to gift, while ignoring the explicitness necessary for the power to self-deal that Gagnon clearly mandates.[7] See Gagnon, supra, at 157 & 158 n.16. Other jurisdictions support the clear reading of the Appeals Court's prior Gagnon decision that self-dealing by an

[7] Gifting was the mechanism used by the agents to carry out the separate and distinct power to self-deal. See footnote 8, infra.

agent, distinct from general power granted to the agent, is a dangerous power that must also be explicitly authorized in a power of attorney.[8]

The Appeals Court itself recognized that, "[p]lainly it would suffice" had Frances's Power of Attorney "authorized gifts to 'persons who may include my attorney' or 'persons who may include any or all of my children.'" Fern, supra, at 629-630; AD028-029. However, the Appeals Court disregards that Frances's Power of Attorney did not actually contain such sufficient language, or any distinct language expressly authorizing self-dealing with respect to

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[8] See, e.g., Estate of Lynch v. Lynch, 991 N.W. 2d 95, 105 (Sup. Ct. of S. Dakota, May 17, 2023) ("An attorney-in-fact acting under the authority of a power of attorney may only self-deal if the power of attorney provides clear and unmistakable language specifically authorizing self-dealing" and "if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist") (internal quotes omitted) AD033; Stehlik v. Rakosnik, 24 Neb. App. 34, 41 (Ct. of App. of Neb., May 17, 2016) (power of attorney granting "all powers over my estate and affairs which I can or could exercise, including but not limited to the power to make gifts" did not empower the fiduciary to make self-dealing gifts, as such power must be expressly granted) AD050; Praefke v. American Enterprise Life Insurance Co., 257 Wis. 2d 637, 644 (Ct. of App. Of Wisconsin, August 14, 2002) ("where the fiduciary argues that power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument") AD058; see also Collins v. Noltensmeier, 2018 Ill. App. (4th) 170443 (Ill. Ct. of App. April 5, 2018) AD064.

gifts. The Appeals Court instead, ***by inference***, stated that Frances's more general gifting language was, "sufficient to authorize gifts to the attorneys themselves, ***at least where they were her immediate family members***." See id. at 630; AD028 (emphasis added). ***Via inference***, the Appeals Court took general gifting language and manufactured an undefined, subjective qualifier (i.e. "immediate family members") into the power of attorney that did not exist. The Appeals Court has improperly added words which are not in the power of attorney, overturning the "interpretive principle that powers of attorney are to be strictly construed ***to require explicit and not inferential***, grants of 'dangerous' agency authority." See Gagnon, supra, at 157-158. Rewriting a power of attorney by inference is a dangerous concept.

The Appeals Court decision to disregard the requirement for express authorization for an agent to make self-dealing gifts, in favor of improperly inferring that authority in the general power to gift, overturns Gagnon. This result is not just academic but is particularly consequential in this case and will be beyond this case. There are no doubt countless familial situations in the Commonwealth where one sibling holds a power of attorney for an incapacitated parent. Many may likely involve more modest, yet no less impactful, problematic self-enrichment situations that may be less likely to come to light or have the opportunity to be scrutinized. Given the dangerous precedent set here by the Appeals Court with respect to powers of attorney, which can become dangerous "tools of abuse" and "often used as a means of avoiding the probate process," this Court has a critical opportunity to clarify and reiterate its principles regarding fiduciary self-dealing. Barbetti, supra at 114.

II. THE APPEALS COURT IMPROPERLY RELIED ON SELECT, UNADOPTED PROVISIONS OF THE UNIFORM POWER OF ATTORNEY ACT TO IMPROPERLY INFER AUTHORITY FOR THE SELF-DEALING GIFTS.

In inferring that Frances's Power of Attorney authorized Tony and Chris to make gifts to themselves "at least where they were her immediate family members," the Appeals Court relied on Section 201(b) of the Uniform Power of Attorney Act (UPAA). AD073. Under this section, a gifting power in a power of attorney includes, by default, the power to make gifts to the agent, if the agent is also an ancestor, spouse, or descendent of the principal. AD118-119.

However, the Appeals Court ignored the relevant sections limiting section 201(b). Section 201(d) states, "[u]nless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 217." AD119. Section 217 of the UPAA provides that:

> "[u]nless a power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to (1) make outright to, or for the benefit of, a person, a gift of any of the principal's property. . . in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion. . ." AD141.

Tracey agrees that although the UPAA has not been adopted in Massachusetts, the courts may look to it in certain circumstances for "guidance." See Barbetti, 490 Mass. at 110. However, setting aside that this was not an appropriate instance for "guidance" since the self-dealing power must be "explicit, and not inferential," to the extent the Appeals Court was to look at the unadopted UPAA for "guidance," the whole UPAA provisions regarding gifts should be considered, which the Appeals Court failed to do. This Court should address whether it is proper for only select provisions of the UPAA to be relied on to infer support for familial agents gifting their principal's assets to themselves under a general gifting power, a result Massachusetts courts have never embraced, and a result which ignores the express provisions of the UPAA that limit the amount of such gifts.

III. THE APPEALS COURT UTILIZED TOO DEFERENTIAL OF A STANDARD IN AUTHORIZING THE GIFTS

The Appeal Court held that "[t]he critical issue under the power of attorney was not Frances's actual donative intent[9], but instead whether Tony and Chris had shown that, in their opinions developed in accordance with their fiduciary duties, Frances would have chosen to make the gifts at issue." Fern, 106 Mass. App. Ct. at 632; AD029. This framing changes decades of jurisprudence regarding the specific donative intent necessary to make a gift. It also materially lowers protection afforded incapacitated principals, as it allows conflicted fiduciaries to justify self-enrichment through retrospective testimony about what the principal "would have wanted."

[9] The "material fact" in dispute and tried was the decedent's donative intent to make the over $5.5 million gifts. See Trial Court Order, dated 11/20/19, pg. 4; AD154.

This substitution of an agents' "good faith" for the principal's donative intent makes the fiduciary burden unmeaningful. Cleary v. Cleary, 427 Mass. 286, 290, 293 (1998); Estate of Moretti, 69 Mass. App. Ct. 642, 652 (2007). The gifts were made in 2016, after Frances had been living with advanced dementia for approximately two-and-a-half years, and Tony and Chris did not discuss the gifts with her at the time because she lacked capacity to understand. Frances's Will, executed in 2013, treated Tony, Chris, and Tracey equally. Yet the gifts significantly altered the equal framework during Frances's incapacity.

Tracey does not dispute that Frances's Power of Attorney granted Tony and Chris with authority to exercise judgment. However, the error is treating that delegated judgment as a delegation of Frances's dispositive intent. The clause required Tony and Chris to determine who Frances would choose, but does not replace Frances's standard or intent with their own "good faith." When Tony and Chris are permitted to answer the question of "the donees I may choose" in their own favor, tested only by their own "good faith" without explicit self-dealing language or consideration of Frances's intent, the instrument no longer constrains self-dealing at all; it simply ratifies it by the fiduciaries' own say-so. Such an interpretation cannot be squared with the requirement that self-dealing authority be distinctly and expressly granted. Massachusetts courts have never endorsed rewriting a power of attorney by inference, adding in words and meaning missing from the document.

Whether Massachusetts law permits a result based principally on the fiduciaries' own testimony that Frances "would have chosen" to disregard her equal estate plan to reward some children but not others, deserves review. In cases of fiduciary self-dealing involving an incapacitated principal and multi-million-dollar transfers to the fiduciaries themselves, the governing legal standard should require more than the fiduciaries' own opinions about what the principal might have done. The Appeals Court decision invites conflict amongst families, whereby individuals granted significant authority can wield that power in favor of themselves, with seeming assurance that their narratives of sibling spats and "who mom loved more" will be sufficient to carry their fiduciary burden, and change mom's will.

CONCLUSION

For the forgoing reasons, Tracey respectfully requests this Court allow further appellate review.

Respectfully Submitted,
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By her attorneys,

/s/ John P. Fulginiti

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Dated: April 17, 2026

CERTIFICATE OF COMPLIANCE

I, John P. Fulginiti, counsel for the Plaintiff / Appellant, certify pursuant to Rule 16(k) of the Mass. R. App. P. that this Application and accompanying Addendum comply with all rules that pertain to the filing such briefs. This Application complies with the length limit of Rule 27.1, as monospaced font Courier New, size 12 point was used (utilizing Microsoft Word for Microsoft 365 MSO version), with total pages no more than 10 pertaining to the Statement Indicating Why Further Appellate Review is Appropriate.

/s/ John P. Fulginiti

Dated: April 17, 2026 ________________________

John P. Fulginiti

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC No. FAR-_________

TRACEY E. FERN,
Plaintiff/Appellant

v.

ANTOHNY W. BAKER, CHRISTOPHER A. BAKER, and LISA A. LOPORTO,
Defendants/Appellees

ON APPEAL FROM A JUDGMENT OF THE BARNSTABLE PROBATE FAMILY COURT (FIDUCIARY LITIGATION SESSION) AND APPEALS COURT NO. 2024-P-1349

APPELLANT'S REQUEST FOR FURTHER APPELLATE REVIEW

CERTIFICATE OF SERVICE

This is to certify that I, John P. Fulginiti, Esq. served true copies of the Appellant's Request for Further Appellate Review to Appellees' attorneys of record, Brian D. Bixby, Esq., Wilchins Cosentino & Novins, 20 William Street, Ste. 130, Wellesley, MA 02481, bbixby@wcnllp.com; Tiffany A. Bentley, Esq., Day Pitney, LLP, One Federal Street 29th Fl., Boston, MA 02110, tbentley@daypitney.com, and Richard M. Novitch, Esq., Todd & Weld, 1 Federal Street, 27th Fl., Boston, MA 02110, rnovitch@toddweld.com via email by agreement of the parties.

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Dated: April 17, 2026

ADDENDUM

106 Mass.App.Ct. 624
Appeals Court of Massachusetts,
Barnstable.

Tracey E. FERN [1]
v.
Anthony W. BAKER [2] & others. [3]

No. 24-P-1349
|
Argued November 17, 2025.
|
Decided March 27, 2026.

Will, Power of appointment. Power of Appointment. Uniform Durable Power of Attorney Act. Gift. Fiduciary. Intent. Practice, Civil, Attorney's fees.

COMPLAINT filed in the Barnstable Division of the Probate and Family Court Department on April 9, 2019.

The case was heard by Edward F. Donnelly, Jr., J.

Attorneys and Law Firms

John P. Fulginiti (Timothy D. Braughler also present), Boston, for the plaintiff.

Tiffany M. Bentley (Richard M. Novitch also present), Boston, for the defendants.

Present: Henry, Sacks, & Tan, JJ.

Opinion

SACKS, J.

***624** ****1** Using the authority assertedly granted in a durable power of attorney from their elderly mother, Frances R. Fern ***625** (Frances), the defendants Anthony W. Baker (Tony) and Christopher A. Baker (Chris) made gifts from their mother's assets to themselves in amounts totaling $5.576 million, and an additional $43,000 to Tony's long-term partner, defendant Lisa A. LoPorto (Lisa). [4] After Frances died in 2018, leaving a gross estate of more than $37 million, the plaintiff, Tracey E. Fern (Tracey) -- who is Frances's daughter by a second marriage and thus Tony's and Chris's half sister -- learned of the gifts and brought this suit in the Probate and Family Court. Tracey's complaint asserted, as relevant here, that the gifts were not authorized by the power of attorney, were not in any event intended by Frances, and were improperly motivated and thus a breach of Tony's and Chris's fiduciary duties to Frances. Tracey did not object to Frances's will, which left the bulk of her estate in equal shares to Tony, Chris, and Tracey.

After an eight-day trial in 2022, a judge of the Probate and Family Court found against Tracey on all claims and entered judgment for Tony, Chris, and Lisa. Tracey appealed, and Tony, Chris, and Lisa cross-appealed from so much of the judgment as denied their request for attorney's fees and costs. We affirm the judgment in all respects.

Background. We summarize the most relevant facts as found by the judge, reserving certain points for later discussion. Frances was born in 1922 and had three children with her first husband, Arthur Baker: Francis R. Baker (Frank) (born in 1954), Chris (born in 1956), and Tony (born in 1958). After her first husband died, Frances married Daniel J. Fern (Daniel) in 1960; Daniel was an attorney and real estate investor and a founder of the Hy-Line Ferry. Frances and Daniel had one child together, Tracey (born in 1963). The family lived on Cape Cod.

The younger three children's relationships with Frances were, at varying times and to varying degrees, difficult. [5] Tony had some conflicts with Frances during his school and college years, but by 2001 he had become a critical support to Frances -- handling her finances, taking her to appointments, acting as her handyman, and listening to her "vent." Chris had periods of estrangement from Frances in 1974-1975 and for some months in the early 1980s, ***626** but by 2001 they spoke weekly, although Chris moved to California and lived there until 2017.

Tracey's relationship with Frances was more troubled. During Tracey's childhood, Frances was prone to becoming irrationally angry and verbally and physically abusive. After an incident in 1987 in which Frances attacked her, Tracey had no contact with Frances for six to eight months. After they resumed contact, Tracey described the relationship as "guarded," and Tony described it as "very complicated and often toxic." Tracey had two daughters, but Frances felt that she had "very limited access to [them], her only grandchildren." Frances was disappointed that "Tracey's visits were infrequent and brief." When Frances's husband and Tracey's father Daniel died in 2001, Frances was upset that Tracey did not sit with or hug her at the funeral.

****2** 1. First will and power of attorney. In 2002, Frances executed a will and a durable power of attorney. The will devised her jewelry and $50,000 each to Tracey's daughters; $100,000 to Tracey; $10,000 to each of two charities; and the remainder of her estate in equal shares to Tony and Chris, whom the will nominated as executors. Frances gave a power of attorney to Tony and Chris, authorizing them, among other things, to make gifts from her assets.

In March 2012, Frances fell and was hospitalized. She became combative, agitated, angry, and "just not herself." She accused Chris of kidnapping her and accused Tony of stealing her wallet and papers. She wanted Tracey to take care of her and began communicating more frequently with Tracey. Tracey told Frances not to trust Tony and Chris and that they were trying to take control of Frances's finances. At the suggestion of Tracey's husband, Frances retained a new attorney, and then she revoked her previous will, health care proxy, and power of attorney.

2. Second will and power of attorney. In April 2012, Frances executed a new will, which devised $150,000 each to Tony and Chris; $10,000 to each of two charities; and the remainder of her estate to Tracey, who was to serve as her personal representative. Frances also gave a durable power of attorney (which included gifting authority) to Tracey, with Tracey's husband to serve as the alternate. Frances moved from a rehabilitation facility back to her home. Frances then visited her various banks, "telling anyone who would listen that [Tony and Chris] had tried to have her declared incompetent and take over her affairs."

In the fall of 2012, however, Tracey began visiting less often, and Frances seemed to be "slowly coming back" and "starting to ***627** question what happened." At a birthday lunch for her in October 2012, Frances told Tony and Chris that she was happy to see them and "wanted things to go back to the way they had been." In February 2013, Frances wanted to revoke the power of attorney to Tracey "but had not decided who to name as the new attorney-in-fact."

3. Third will and power of attorney. In March 2013, Frances executed a new will, which after her death in 2018 was admitted to probate without objection. The will devised her jewelry to Tracey's daughters; $10,000 to each of two charities; and the remainder of her estate in equal shares to Tony, Chris, and Tracey. The will nominated Tony and Chris to serve as copersonal representatives. Frances also executed a new durable power of attorney to Tony and Chris. The power authorized them, among other things, "[t]o make outright gifts of my property to or for the benefit of such persons who, in the opinion of my said attorney, would be the donees I may choose."

Frances told Tony that the new will treated him, Chris, and Tracey equally, and that Tracey had promised that she and her daughters would be part of Frances's life. Frances told her attorney at the time that she "wanted to give Tracey a second chance." In mid-2013, however, after an emotional discussion of finances, Frances's relationship with Tracey took another turn for the worse. Tracey and her daughters did not visit as much as Frances wanted. Frances told Tony that "she hoped she had not made a mistake in changing her will."

At about this time, Frances and Tony discussed gifting. Frances "realized there would be large tax savings." She told Tony that "she would review any gifting in the future and that her only concern was who was with her in her old age."

****3** Toward the end of 2013, Frances's health declined rapidly, resulting in multiple hospitalizations and then her move to an Alzheimer's unit at a health care center, where she remained until her death in 2018. During her final years, Frances was still able to recognize visitors, including Tony, Chris, and Lisa, and was happy to see them. Tony visited five times per week and celebrated birthdays and holidays with Frances; sometimes he brought Frank along. Chris moved from California back to Massachusetts in early 2017 and visited Frances about twice per week. Lisa visited Frances three or four times per week and every other weekend.

Tracey visited once in January 2014, but she found Frances's behavior during that visit upsetting and never visited again, ***628** feeling that she was a "trigger" for Frances. Frances sometimes expressed disappointment and disbelief that Tracey and her daughters did not visit. Frances was also "hurt and puzzled" that Tracey, unlike Tony and Chris, did not maintain a relationship with their older brother, Frank.

4. Gifts. Tony and Chris first considered making large gifts in July 2016. We reserve for later discussion the judge's findings about their understanding of Frances's donative intent. For now, we note only that the judge found that "the decision to start making gifts was spurred by the Presidential elections and anticipated changes to the tax laws." Tony and Chris understood that the Democratic candidate for President proposed to substantially reduce the Federal gift and estate tax exemptions and to increase the estate tax rate. Tony

also "consulted with a tax professional and determined that gifting would result in substantial savings on the expected Massachusetts estate tax."

Beginning in July 2016, Tony and Chris caused gifts to be made to themselves in installments, as Frances's many certificates of deposit matured. Tony's gifts totaled $2.938 million and Chris's $2.638 million; in each case, all but $49,000 of gift funds was received before the 2016 election. [6] Lisa received a total of $43,000. Tony and Chris did not discuss these gifts with Frances, believing that they were consistent with her intentions but that she no longer had the capacity to understand financial matters.

5. Truro property. In July 2016, Tony and Chris learned of a house and property for sale in Truro. They purchased it that October for $3.3 million, with each of them contributing one-half of the purchase price. Tony and Chris had sufficient assets to purchase without using the gifts from Frances, and at trial they both denied that the gifts affected their decision to purchase the property. They lived there at the time of trial. The judge ultimately concluded that "[t]he optics of this purchase, close in time to the gifts, certainly were not ideal. However, where [Tony and Chris] proved that the gifts were authorized by the power of attorney and not a breach of their fiduciary duties, they could use the gifts as they wished."

Discussion. We begin by addressing Tracey's argument that the gifting clause in the third power of attorney did not authorize ***629** Tony and Chris to make gifts to themselves. [7] We then turn to Tracey's claim that, even if Tony and Chris were given such authority, they failed to carry their burden of proving that their exercise of it here was consistent with their fiduciary duties and Frances's donative intent. Finally, we consider whether the judge abused his discretion in denying the request of Tony, Chris, and Lisa for attorney's fees and costs under G. L. c. 215, § 45.

****4** 1. Authority granted by power of attorney. Chief among the "rules of construction related to powers of attorney" is that "[t]o ascertain and effectuate the intent of the parties as manifested by the words used and the object to be accomplished is the goal of all interpretations of written agreements" (citation omitted). Barbetti v. Stempniewicz, 490 Mass. 98, 111-112, 189 N.E.3d 264 (2022). A power of attorney is "subject to a rule of strict construction," but "[t]his rule does not go to the extent of destroying the purpose of the power" (quotation and citation omitted). Id. at 112, 189 N.E.3d 264. We determine the effect of the language of a power of attorney de novo. See id.

Tracey contends that the gifting authority Frances granted in the third power of attorney -- to make "outright gifts of my property to or for the benefit of such persons who, in the opinion of my said attorney, would be the donees I may choose" -- was insufficient to authorize gifts to Tony and Chris, i.e., the attorneys themselves. Tracey relies on our statement in Gagnon v. Coombs, 39 Mass. App. Ct. 144, 157, 654 N.E.2d 54 (1995), that "self-dealing by an agent, in the absence ... of distinct authority from the principal expressly granted in the empowering instrument, has been continuously and uniformly denounced as one of the most profound breaches of fiduciary duty." Tracey argues that the gifting language in Frances's power of attorney was not sufficiently distinct and express to authorize the gifts challenged here.

Tracey reads Gagnon too broadly. Nothing in that decision establishes particular requirements for how explicit the language of a power of attorney (or other instrument) must be before an agent, given express authority (such as to gift, or to sell, buy, borrow, or lend), may exercise that authority in a manner benefiting himself. [8] Plainly it would suffice if Frances's power of ***630** attorney had authorized gifts to "persons who may include my attorney" or "persons who may include any or all of my children." The language Frances actually used here -- "persons who, in the opinion of my said attorney, would be the donees I may choose" -- was sufficient to authorize gifts to the attorneys themselves, at least where they were her immediate family members. Under § 201(b) of the Uniform Power of Attorney Act (UPAA), the power to gift includes by default the power to make a gift to the attorney, if the attorney is also an ancestor, spouse, or descendant of the principal. Although the UPAA has not been adopted in Massachusetts, we may look to it for guidance on what authority a power of attorney ordinarily includes. See Barbetti, 490 Mass. at 110, 189 N.E.3d 264.

****5** After all, any exercise of the gifting authority in favor of the attorneys themselves must still satisfy the rule that "one acting in a fiduciary capacity for another has the burden of proving that a transaction with himself was advantageous for the person for whom he was acting" (citation omitted). Cleary v. Cleary, 427 Mass. 286, 291, 692 N.E.2d 955 (1998). Frances plainly believed that gifting could be to her advantage and in her interests, provided gifts were made in accordance with the standard she chose. The burden was still on Tony and Chris to prove that the gifts met that standard. [9]

Tracey's attempts to bolster her position with additional phrases from Gagnon are unavailing. First, she emphasizes a reference to "[t]he sedulous application and uncompromising rigidity of the prohibition against unauthorized fiduciary self-dealing." ***631** Gagnon, 39 Mass. App. Ct. at 158, 654 N.E.2d 54. But recognizing the importance of the prohibition against "unauthorized" fiduciary self-dealing does not by itself help us determine whether any particular instance of fiduciary self-dealing is unauthorized. Tracey also relies on the statement that "powers of attorney are to be strictly construed to require explicit, and not inferential, grants of 'dangerous' agency authority the exercise of which is potentially destructive of the principal's interests." Id. Again, however, Gagnon did not state that any particular form of words is required before an expressly granted power may be exercised in a manner benefiting the agent. And none of the strict-construction cases cited in Gagnon, id. at 157-158, 654 N.E.2d 54, suggests that even an expressly granted power must still be narrowly construed in order to limit self-dealing. [10]

Finally, the court in Gagnon tempered its interpretive discussion with a recognition of the same principles recently reiterated in Barbetti, 490 Mass. at 111-112, 189 N.E.3d 264. "The rule of strict construction does not go to the extent of destroying the purpose of the power, and the meaning of an unambiguous power of attorney is to be gleaned from the intent of the parties as manifested by the words used and the object to be accomplished" (quotations and citation omitted). Gagnon, 39 Mass. App. Ct. at 158 n.16, 654 N.E.2d 54. See Barbetti, supra (same). Here, Frances's clear intent, expressed in unambiguous language, was to authorize Tony and Chris to make gifts of her property to those persons who, in their opinions, would be "the donees [she] may choose." If Tony and Chris could prove that gifts to themselves met that standard, then for a court to construe the gifting power so strictly as to nevertheless bar such gifts -- particularly to two of the most natural objects of Frances's affection -- would risk "destroying the purpose of the power" (citation omitted). Gagnon, supra. We therefore conclude that the gifting authority in the power of attorney permitted gifts to Tony and Chris.

****6** 2. Frances's donative intent. Tracey argues that, even if the power of attorney authorized gifts to Tony and Chris, they failed to prove that Frances intended to make gifts to them totaling $5.576 million. She claims that the judge's decision is "devoid of ***632** any findings" that Frances had any such intent. We are not persuaded.

The critical issue under the power of attorney was not Frances's actual donative intent, but instead whether Tony and Chris had shown that, in their opinions developed in accordance with their fiduciary duties, Frances would have chosen to make the gifts at issue. Here the judge made extensive findings, based on testimony of Tony and Chris that the judge expressly credited, and then concluded that Tony and Chris "met their burden to prove that they acted in good faith and in [Frances's] interests in making the gifts." "They demonstrated that in their reasonable opinion[s], [Frances] would have chosen to make the gifts and would have chosen not to make gifts to Tracey." We now summarize those findings, none of which Tracey specifically challenges as clearly erroneous.

The judge found that Tony and Chris discussed gifting with Frances and an accountant sometime in or around April 2013. Frances told Tony that she realized gifting would result in large tax savings and that the only question was when to make gifts. She never specified a date but consistently said that it would be "when she got older, slowed down, and didn't need the money." Tony "asked her who would make decisions about gifting if she were unable to do so. She told him that he and [Chris] would be the judge and that she trusted them."

As for who would receive gifts, Frances told Tony "that her only concern was who was with her in her old age." The judge credited Tony's and Chris's testimony that, in Frances's final years, the three people in her life were themselves and Lisa, while "Tracey was not part of [Frances's] life, and [Frances] would not have wanted to 'reward' her."

As for the timing of the gifts, Tony testified that as of July 2016, Frances had "sufficient assets to last the rest of her life without touching the principal." Frances was then nearly ninety-four years old and had been living with "advanced dementia" for two and one-half years. The judge credited Tony's and Chris's testimony that by then it was clear Frances's life had slowed down and she would never leave the health care facility where she lived. He further credited their testimony that the decision to begin gifting was spurred by anticipated changes to the tax laws after the 2016 Presidential election. Frances "did not like paying taxes and ... doing so ruined her entire month each year."

As for the sizes of the gifts, the judge credited Tony's and Chris's testimony that the amounts were based on the tax exemptions ***633** in effect in 2016. The judge concluded that "[t]he gifts took advantage of the annual gift tax exclusion amounts and the unified tax credit in place at that time. There was credible evidence that the gifts reduced the Massachusetts estate tax paid by the estate." Indeed, Tracey's appellate brief concedes that "the total amount gifted ultimately maximized Frances's estate tax exemption existing at the time."

Finally, the judge credited Tony's and Chris's testimony that they believed Frances, if she were competent, "would have chosen to make gifts at that time," but that she no longer had the capacity to make such decisions. Tony believed "the gifts were appropriate and consistent with [Frances's] expressed intention to make gifts when her life was winding down and to benefit the people involved in her life." Chris understood that "his duty was to make gifts in the way [Frances] would have done herself" and believed that the gifts were consistent with that standard. He believed it was to "everyone's benefit" to make the gifts before the tax laws changed.

****7** The judge concluded from the testimony he credited that Tony and Chris had met their burden of proving that they acted in good faith and in Frances's interests; and that, in their reasonable opinions, she would have chosen to make the gifts to Tony, Chris, and Lisa, and would have chosen not to make gifts to Tracey. The judge's findings were more than sufficient to support his conclusions, and we see no error in his decision.

Tracey nevertheless contends that the gifts were undertaken for the "improper purpose" of enabling Tony and Chris to purchase the Truro property. She claims that the gifts "did not benefit Frances, nor comport with her intent in any way," and thus were a breach of Tony's and Chris's fiduciary duties. These assertions reflect nothing more than "dissatisfaction with the judge's weighing of the evidence and his credibility determinations." Adoption of Quentin, 424 Mass. 882, 886 n.3, 678 N.E.2d 1325 (1997). They require no further discussion.

Tracey also argues that the judge, by "relying on Tony['s] and Chris's self-serving statements alone to justify the gifts," failed to apply the "heightened scrutiny" that Tracey claims is required by Estate of Moretti, 69 Mass. App. Ct. 642, 652, 871 N.E.2d 493 (2007). Even if the judge here had relied solely on Tony's and Chris's testimony,[11] the heightened scrutiny referred to in Estate of Moretti consisted ***634** merely of shifting the burden to a fiduciary to prove that a transaction from which he benefited did not violate his fiduciary duties. Id. at 651-653, 871 N.E.2d 493, citing Cleary, 427 Mass. at 293, 692 N.E.2d 955. The judge here applied that rule and found that Tony and Chris met their burden. Nothing in Estate of Moretti suggested that a fiduciary cannot meet that burden with the fiduciary's own testimony.

3. Attorney's fees and costs. Tony, Chris, and Lisa appeal from the judge's denial of their request for attorney's fees and costs under G. L. c. 215, § 45 (§ 45), which allows an award of fees and costs in contested probate cases "in the discretion of the court ... as justice and equity may require." This language confers broad discretion on judges; it "certainly reaches beyond bad faith or wrongful conduct." Estate of King, 455 Mass. 796, 805, 920 N.E.2d 820 (2010). But it "still pay[s] homage to the usual American rule against an automatic award of fees to the prevailing party, and require[s] a reason, grounded in equity, why an award shifting fees should be made." Id. "Historically, the practice has been not to award costs and fees as a general matter in cases falling within the purview of the statute." Id. at 803, 920 N.E.2d 820, and cases cited. "[A]n award of costs and fees by a judge in the Probate Court under § 45 may be presumed to be right and ordinarily ought not to be disturbed" (quotation and citation omitted). Id. at 805, 920 N.E.2d 820. A decision not to award costs and fees is entitled to the same deference.

Although the brief filed by Tony, Chris, and Lisa informs us that they included a request for fees and costs in a proposed judgment they submitted to the judge, they have not included that proposed judgment in the record appendix, so we are unaware whether the fee argument that they now present to us was ever made to the judge. In any event, although the proceedings in the trial court were protracted, hard fought, and no doubt aroused strong emotions on both sides, we cannot agree with Tony, Chris, and Lisa that Tracey's position was so groundless, and her litigation conduct so unreasonable, that justice and equity demanded an award of fees and costs against her. We therefore do not disturb the judge's discretionary decision not to make such an award, and we deny the request by Tony, Chris, and Lisa for their attorney's ***635** fees and costs under § 45.

****8** Judgment affirmed.

All Citations

--- N.E.3d ----, 106 Mass.App.Ct. 624, 2026 WL 844640

Footnotes

1 Individually and as cotrustee of the Daniel J. Fern Trust.

2 Individually, as copersonal representative of the estate of Frances R. Fern, and as cotrustee of the Daniel J. Fern Trust.

3 Christopher A. Baker, individually and as copersonal representative of the estate of Frances R. Fern; and Lisa A. LoPorto, individually.

4 Because two of the defendants share a last name, and because the plaintiff shares a last name with her late mother, we use their first names for ease of reference, adopting the short forms of the names used in the parties' briefs.

5 We focus on the younger three children because Frances did not include Frank in her estate plan.

6 These amounts, as stipulated by the parties and incorporated in the judge's findings, were the subject of a postjudgment motion by Tracey to correct clerical mistakes. That motion was not acted on by the time the record was assembled for this appeal, but any changes in the totals caused by a ruling on that motion would not affect our analysis or conclusions.

7 Tracey does not challenge the gifts to Lisa.

8 Nor are such requirements established in any of the authorities relied on in Gagnon, 39 Mass. App. Ct. at 157-158, 654 N.E.2d 54. See O'Brien v. Dwight, 363 Mass. 256, 283-284, 294 N.E.2d 363 (1973); Mackey v. Rootes Motors Inc., 348 Mass. 464, 467-468, 204 N.E.2d 436 (1965); Berenson v. Nirenstein, 326 Mass. 285, 288-289, 93 N.E.2d 610 (1950); Pitman v. Pitman, 314 Mass. 465, 471, 476, 50 N.E.2d 69 (1943); Dolbeare v. Bowser, 254 Mass. 57, 61, 149 N.E. 626 (1925); Lindsay v. Swift, 230 Mass. 407, 412, 119 N.E. 787 (1918); American Circular Loom Co. v. Wilson, 198 Mass. 182, 206-207, 84 N.E. 133 (1908); Sikes v. Inhabitants of Hatfield, 79 Mass. 347, 353 (1859); Jenison v. Hapgood, 24 Mass. 1, 7–8 (1828). See also Robertson v. Chapman, 152 U.S. 673, 681–682, 14 S.Ct. 741, 38 L.Ed. 592 (1894); Jerlyn Yacht Sales, Inc. v. Wayne R. Roman Yacht Brokerage, 950 F.2d 60, 66-67 (1st Cir. 1991); Estate of Casey v. Commissioner of Internal Revenue, 948 F.2d 895, 898–899 (4th Cir. 1991); Fender v. Fender, 285 S.C. 260, 262, 329 S.E.2d 430 (1985); Creasy v. Henderson, 210 Va. 744, 749-750, 173 S.E.2d 823 (1970); Restatement (Second) of Agency §§ 34, 39, 387-389, 391, 394 (1958) (Restatement).

9 Tracey erroneously argues that the standard falls into the category of what the drafters of the Restatement termed "[a]ll-embracing expressions" that should be "disregarded as meaningless verbiage." Restatement (Second) of Agency, § 34 comment h. But the drafters were referring only to "phrases like 'as sufficiently in all respects as we ourselves could do personally in the premises,' [or] 'as the said agent shall deem most advantageous.' " Id. The standard Frances chose, in contrast, turned not just on her agent's opinion, but

also on an external standard -- the donees she may choose -- and thus meaningfully constrained Tony's and Chris's discretion.

10 See Estate of Casey, 948 F.2d at 896, 900 (power "to lease, sell, grant, convey, assign, transfer, mortgage and set over" property did not encompass power to gift it); Williams v. Dugan, 217 Mass. 526, 528-530, 105 N.E. 615 (1914) (power to manage, sell, mortgage, and pay taxes on real estate did not encompass power to borrow to pay such taxes); Hoyt v. Jaques, 129 Mass. 286, 287-288 (1880) (power to sell did not encompass power to mortgage).

11 The judge also relied on the testimony of a long-time close friend of Frances's, Ana Weatherley, that Frances heavily relied on and trusted Tony, was estranged from Tracey and found their relationship to be a source of great pain, and said her " 'biggest fear' was that Tracey would 'end up somehow having control' over [Frances's] assets." Further, the judge relied on Lisa's testimony about Frances's close relationships with Tony and Chris and her disappointment in Tracey.

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991 N.W.2d 95
Supreme Court of South Dakota.

ESTATE OF Robert T. LYNCH, Deceased, Plaintiff, Counter-Defendant, and Appellant,
v.
Kevin LYNCH, Defendant, Counter-Plaintiff, and Appellee.

#29823, #29830
|
ARGUED OCTOBER 4, 2022
|
OPINION FILED May 17, 2023
|
Rehearing Denied June 27, 2023

Synopsis
Background: Deceased father's estate brought action against decedent's son, alleging fiduciary fraud, conversion, breach of fiduciary duty, and elder exploitation arising from son's management of his father's finances and farm operation prior to father's death. Son filed counterclaim for conversion, among other claims. The Circuit Court, First Judicial Circuit, Clay County, Tami Bern, J., denied estate's motion for partial summary judgment on claims against son, and, following trial, entered jury verdict for son on the estate's claims and entered judgment as a matter of law for son on his counterclaim for conversion. Estate appealed, and son conditionally appealed.

Holdings: The Supreme Court, Jensen, C.J., held that:

[1] son was not acting under the authority of power of attorney while writing checks from joint checking account;

[2] power of attorney provided son with unfettered discretion to give himself only an amount up to the annual federal gift tax exclusion;

[3] son's use of power of attorney to withdraw certificates of deposit totaling $44,590.22 and deposit the funds into his personal account to purchase a pickup truck damaged father's estate;

[4] Court would assume the jury decided son owed but did not breach a further fiduciary duty to father and affirm with respect to those transactions for which oral extrinsic evidence of father's approval was admissible; and

[5] estate failed to rebut statutory presumption that father intended to create a joint survivorship checking account with son.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Judgment; Motion for Summary Judgment; Objection to Evidentiary Ruling; Motion in Limine.

West Headnotes (32)

[1] **Appeal and Error** De novo review

Supreme Court reviews a grant or denial of summary judgment de novo.

[2] **Summary Judgment** In conjunction with right to judgment as matter of law

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

[3] **Appeal and Error** Evidence and Witnesses in General

Appeal and Error Evidence and Witnesses in General

Evidentiary rulings made by the trial court are presumed correct and are reviewed under an abuse of discretion standard.

[4] **Appeal and Error** Review of lower court's proceedings concerning question

A court's evidentiary rulings in summary judgment proceedings are reviewed for an abuse of discretion.

[5] **Appeal and Error** Admission or exclusion of evidence in general

With regard to the rules of evidence, “abuse of discretion” occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence.

[6] **Appeal and Error** Evidence in General

An evidentiary ruling will not be overturned unless error is demonstrated and shown to be prejudicial error.

[7] **Appeal and Error** Relation Between Error and Final Outcome or Result

Error is “prejudicial error” when, in all probability it produced some effect upon the final result and affected rights of the party assigning it.

[8] **Principal and Agent** Individual Interest of Agent

An attorney-in-fact acting under the authority of a power of attorney may only self-deal if the power of attorney provides clear and unmistakable language specifically authorizing acts of self-dealing.

[9] **Principal and Agent** Construction of letters or powers of attorney

Only those powers specified in the document are granted to the attorney-in-fact.

[10] **Principal and Agent** Individual Interest of Agent

If the power to self-deal is not specifically articulated in the power of attorney, that power does not exist.

[11] **Finance, Banking, and Credit** Mutual Rights, Duties, and Liabilities of Joint Account Holders

Principal and Agent Nature of agent's obligation

Decedent's son was not acting under the authority of power of attorney while writing checks from joint checking account he owned with father, for purposes of breach of fiduciary duty claim by father's estate following father's death; son's status as a joint account holder permitted him to issue checks from the account.

[12] **Evidence** Showing Intent of Parties as to Subject Matter

Finance, Banking, and Credit Actions between joint account holders

Protection of Endangered Persons Proceedings and prosecution in general

Oral extrinsic evidence, including son's testimony as to discussions between himself and his father, was relevant and admissible as to issue of son's management and use of checking account he jointly owned with father, and thus evidence was sufficient to support finding for son on claims for breach of fiduciary duty, conversion, and elder exploitation filed by father's estate after his death.

[13] **Principal and Agent** Questions for jury

The interpretation of a power of attorney is a question of law, not fact.

[14] **Principal and Agent** Construction of letters or powers of attorney

Court must look to the extent of the attorney-in-fact's authority under the power of attorney to determine whether the attorney-in-fact breached his fiduciary duty.

[15] **Fraud** Fiduciary or confidential relations

In order for self-dealing to be authorized, the instrument creating the fiduciary duty must provide clear and unmistakable language authorizing self-dealing acts.

[16] **Principal and Agent** Transactions between principal and agent in general

Power of attorney, which expressly authorized son to make gifts "to such persons (including my attorney) or institutions, in such amounts or proportions, as my attorney, in his, her, or its sole discretion and judgment, may deem appropriate for tax or other reasons," but which limited the total value of gifts to any one donee in any calendar year to the federal gift tax annual exclusion, provided son with unfettered discretion to give himself an amount up to the annual federal gift tax exclusion, but son exceeded his powers by withdrawing certificates of deposit totaling $44,590.22 and depositing the funds into his personal account to purchase a pickup truck, as the gift tax exclusion that year was $13,000.

[17] **Evidence** Showing Intent of Parties as to Subject Matter

Oral extrinsic evidence of the long-standing farming arrangement between father and son that preexisted power of attorney which father gave son was inadmissible as to issue of whether son exceeded his powers by withdrawing certificates of deposit totaling $44,590.22 and depositing the funds into his personal account to purchase a pickup truck, as use of the power of attorney to cash in the payable-on-death certificates to purchase a pickup was a discrete transaction that had not previously been part of their course of dealing or part of the farming arrangement over the years.

[18] **Principal and Agent** Individual Interest of Agent

Son's use of power of attorney to withdraw certificates of deposit totaling $44,590.22 and deposit the funds into his personal account to purchase a pickup truck damaged father's estate even if the certificates were payable to son upon father's death and he would have inherited pickup truck under father's will if he had purchased it in father's name; damage to father's estate was the unauthorized withdrawal of the money from the certificates of deposit, their payable-on-death designation did not create an inter vivos gift, as father could have changed the payable-on-death status at any time, and father's intended disposition of the funds after the certificates of deposit had matured was speculation. S.D. Codified Laws § 43-3-6.

[19] **Appeal and Error** Instructions

The Supreme Court reviews jury instructions and refusal to give proposed jury instructions for abuse of discretion.

[20] **Trial** Nature of error or omission in general

Error occurs if, as a whole, the jury instructions misled, conflicted, or caused confusion.

[21] **Appeal and Error** Instructions

For instructional error to be reversible, the party challenging the jury instruction must show that in all probability it produced some effect upon the verdict and harmed that party's substantial rights.

[22] **Principal and Agent** Nature of agent's obligation

A fiduciary duty obligates the fiduciary to act in the utmost good faith for the benefit and in the best interest of the other party in the course of the fiduciary relationship, and to refrain from obtaining any advantage at that person's expense; the fiduciary must refrain from any act of self-dealing not authorized by the power of attorney.

[23] **Fraud** Questions for Jury

Existence of fiduciary duty and scope of that duty are questions of law for court.

1 Case that cites this headnote

[24] **Principal and Agent** Nature of agent's obligation

As a matter of law, a fiduciary relationship exists whenever a power of attorney is created.

[25] **Appeal and Error** Multiple claims, theories, or defenses; general verdict rule

In light of single verdict form which asked whether jury found in favor of son or deceased father's estate on estate's claim for breach of fiduciary duty, Supreme Court would assume the jury decided son owed but did not breach a fiduciary duty to father and affirm with respect to those transactions for which oral extrinsic evidence of father's approval of the transactions was admissible, even if trial court erred by instructing the jury to determine whether son, who held power of attorney, owed father a fiduciary duty in the management of joint account; jury could have reached its verdict by finding the absence of a fiduciary duty based upon the erroneous instruction, or the jury could have determined that a fiduciary duty existed and that son did not breach the duty.

[26] **Appeal and Error** Multiple claims, theories, or defenses; general verdict rule

Where a general verdict was handed down and the jury could have decided the case on two theories, one proper and one improper, the reviewing court will assume that it was decided on the proper theory, and only departs from that assumption if there is an affirmative showing in the record to the contrary.

[27] **Finance, Banking, and Credit** Presumptions as to joint accounts

There is a rebuttable presumption of joint tenancy in a jointly held bank account. S.D. Codified Laws § 29A-6-104.

[28] **Finance, Banking, and Credit** Presumptions as to joint accounts

A party challenging the rebuttable presumption of joint tenancy in a jointly held bank account must present clear and convincing evidence that the decedent did not intend the usual rights of survivorship to attach to the joint asset, but instead intended the arrangement for their own convenience.

[29] **Finance, Banking, and Credit** Actions between joint account holders

Whether joint accounts in question were created by decedent for their own convenience or for the benefit of the nondepositing joint payees is a question of fact to be determined from all the facts and circumstances in the case. S.D. Codified Laws § 29A-6-104.

[30] **Appeal and Error** Taking Case or Question from Jury; Judgment as a Matter of Law

A circuit court's decision to grant or deny a motion for judgment as a matter of law must be reviewed de novo on appeal. S.D. Codified Laws § 15-6-50(a).

[31] **Conversion and Civil Theft** In general; nature and elements

Successful claim for conversion will meet four necessary elements: plaintiff owned or had possessory interest in property; plaintiff's interest in property was greater than defendant's; defendant exercised dominion or control over or seriously interfered with plaintiff's interest in property; and such conduct deprived plaintiff of its interest in property.

[32] **Finance, Banking, and Credit** Presumptions as to joint accounts

Finance, Banking, and Credit Conversion

Deceased father's estate failed to rebut statutory presumption that father intended to create a joint survivorship checking account with son at the time the account was created, and thus son had right to funds in the account after father's death, and father's estate converted the funds by directing son to transfer the funds to the estate; father had authorized son to write checks on the account with a limited power of attorney form that was set up for the account, and three months later changed the account to a joint checking account with rights of survivorship, neither son nor personal banker testified as to any knowledge as to why father set up the account the way he did, and will which divided "all" cash assets among surviving children, including "checking accounts," did not expressly provide for a modification of the joint account, nor was it evidence of a contrary intention. S.D. Codified Laws §§ 29A-6-104, 29A-6-104(1), 29A-6-104(5).

***99** APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, CLAY COUNTY, SOUTH DAKOTA, THE HONORABLE TAMI BERN Judge

Attorneys and Law Firms

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Opinion

JENSEN, Chief Justice

[¶1.] The Estate of Robert T. Lynch (the Estate) sued Kevin Lynch alleging claims for fiduciary fraud, conversion, breach of fiduciary duty, and elder exploitation arising from Kevin's management of his father Robert's (Bob) finances and farm operation prior to Bob's death. Kevin answered and filed a counterclaim against the Estate for conversion, among other claims. The circuit court denied the Estate's motion for partial summary judgment on its claims against Kevin. At trial, a jury returned a verdict for Kevin on the Estate's claims, and the court entered judgment as a matter of law for Kevin on his counterclaim for conversion.

[¶2.] The Estate appeals, arguing that the circuit court erred by denying its motion for partial summary judgment, and that the court erred at trial in permitting Kevin to introduce oral extrinsic evidence responsive to the Estate's claims for self-dealing, in instructing the jury, and in granting Kevin's motion for judgment as a matter of law on his claim for conversion. In the event we reverse and remand, Kevin seeks review of the circuit court's ruling that the power of attorney naming Kevin as Bob's attorney-in-fact (POA) did not expressly authorize self-dealing and of the court's refusal to give his proposed jury instruction providing for a credit against any damages awarded for gifts authorized by the POA. [1] We affirm in part, reverse in part, and remand.

Facts and Procedural History

[¶3.] Bob was born on March 13, 1932. He had four children with his wife, Mary Imelda Lynch: Carleen, LaCarla Annette (Ann), Glenda, and Kevin. Bob was predeceased by Mary and Glenda. Bob was a lifelong farmer. He owned and operated a successful crop and cattle operation on approximately 675 acres of farmland near Vermillion. Kevin joined his father in the ***100** farming operation after he reached adulthood, while Carleen and Ann pursued other professional endeavors outside South Dakota. Bob and Kevin farmed together in an arrangement that evolved over the years as Kevin took on increased responsibilities. When Bob retired from farming in 1995, Kevin took over the operation, but Bob continued to own the land and most of the stock cows. Bob and Kevin agreed that Kevin would assume a 60% share of the expenses and income from the crops and cattle, while Bob would assume a 40% share of the same. As part of the arrangement, Kevin used Bob's equipment. Bob moved off the farm in 2006 and began living with his long-time friend, Patty.

[¶4.] Bob had a stroke in 2007 that primarily impacted his physical mobility. On December 5, 2007, Bob appointed Kevin as his attorney-in-fact under the POA. [2] On February 1, 2008, Bob completed separate paperwork with his bank that authorized Kevin to sign checks on his checking account under a power of attorney. On May 13, 2008, Bob went to the bank and changed the checking account to a joint ownership account with Kevin. The joint ownership form Bob signed included language giving Kevin a right of survivorship upon Bob's death.

[¶5.] On March 1, 2010, Bob executed a Will. The Will gave 51% of his farm real estate to Kevin, with his surviving daughters each receiving a 24.5% share. Kevin was also given a right of first refusal if his sisters wished to sell the land. The Will further gave all of Bob's farm machinery, equipment, grain, and livestock to Kevin, along with his pickup and truck. The remainder of Bob's estate was to be split between the three surviving children share and share alike, “including all of my cash assets including certificates of deposit, savings accounts, and checking accounts.” Bob stated in his Will the reasons for the disposition of his property:

> In this my Last Will and Testament I have benefitted my son Kevin J. Lynch over my two daughters. I do this because he stayed home to help me on the farm. He has also helped me considerably in my problems in daily living as I have aged. I further have the specific intention of continuing on the farming heritage in the Lynch family. For these reasons I have provided more to my son Kevin J. Lynch than to the other children.

The Will designated Kevin and Ann as co-personal representatives of his estate.

[¶6.] Bob's physical condition continued to deteriorate. It became more difficult for Patty to care for Bob in the home as he moved from using a walker into a wheelchair. He entered a nursing home in September 2011. The notes from the nursing home, at various times, indicate Bob had some cognitive impairment, including occasional confusion, short-term memory loss, and inability to recall the day, month, and year. Kevin testified that Bob had some bad days, but most days he could converse and knew what was going on at the farm.

[¶7.] To ensure adequate income to pay his nursing home expenses, Bob began receiving rent for leasing his cropland to a ***101** local farmer in 2012 on a cash rent basis.[3] Kevin testified Bob agreed to begin paying him $30,000 annually to maintain the farmstead and non-tillable acres because Kevin was no longer farming the cropland and receiving 60/40 share rental income. Kevin also claimed that he and Bob agreed Kevin would continue to handle the duties associated with the cattle operation and modified the compensation arrangement so Kevin would receive all the income from the sale of the cattle produced each year while Bob paid the expenses of the cattle operation.

[¶8.] After Bob began residing in the nursing home, Kevin issued and signed checks totaling $398,000 from the joint checking account payable directly to himself and deposited the funds into his personal checking account. Kevin testified that $210,000 consisted of the annual $30,000 compensation that Bob agreed to pay Kevin. Kevin further testified that $145,000 was used to pay equipment loans and farm indebtedness Kevin was no longer able to pay after Bob began cash renting his cropland. Kevin testified that Bob made the decision to pay off these loans to ensure Kevin could continue a viable farming operation into the future. Kevin testified that the remaining $43,000 consisted of $17,000 in additional compensation; $16,000 for reimbursement of other farm-related expenses Kevin paid, such as repairing the roof on Bob's farmhouse; and $10,000 that Kevin mistakenly withdrew from the joint account and later reimbursed to Bob. Kevin claimed that each of these transactions was discussed and approved by Bob.

[¶9.] Kevin also issued checks from the joint account in the amount of $106,774.62 for Morton buildings constructed on land Kevin owned and $104,514.20 to purchase machinery and equipment that Kevin would inherit under the Will. Kevin testified that each purchase was discussed with Bob and approved by him. Kevin explained that Bob supported locating new Morton buildings on Kevin's property because the machine sheds on Bob's property had dirt floors and were in low spots that would at times flood. Kevin also testified to his own belief that the Morton buildings constructed on his property belonged to the Estate.[4] He further testified that it was necessary to continue to upgrade the farm equipment to maintain the farm, despite the cash rental arrangement. Even though Kevin had discussed parts of the Will with his sister before Bob died, Kevin testified that he was unaware he would receive the farm equipment until after Bob died.

[¶10.] Consistent with Kevin's testimony about the modified cattle arrangement after Bob went into the nursing home, Kevin also paid for most of the cattle operation expenses from the joint account from 2011 until Bob's death. The Estate presented evidence that Kevin paid $93,401 from the joint account for cattle feed during this time and purchased $60,000 in stock cattle for Bob.[5] Kevin used $17,000 of his own ***102** money to purchase two bulls and another $13,510 to purchase cattle feed after 2011. From 2011 until Bob's death, Kevin received all the income from the sale of cattle, which totaled $147,841.

[¶11.] Apart from the checks written by Kevin from the joint account, Kevin used the POA to withdraw money from several of Bob's retirement accounts (IRAs), certificates of deposit (CDs), and a money market account, totaling $322,539.89. Kevin deposited most of these funds into the joint account, except for two CDs, totaling $44,590.22, that Kevin withdrew and deposited directly into his personal checking account in 2012. Both CDs were owned by Bob, designated Kevin as the payable-on-death beneficiary, and had a maturity date in 2013. Kevin used the funds from these two CDs to buy a new mid-sized pickup, which he titled in his name. Kevin explained that he bought the smaller pickup to replace Bob's larger pickup because it was difficult for Bob to get into the larger pickup to ride with Kevin around the farm. Kevin testified that Bob approved this purchase.

[¶12.] Bob died on March 13, 2018. At the time of Bob's death, the joint bank account had a balance of $112,296.13, $110,000 of which Kevin transferred to the Estate at Ann's direction. Ann petitioned to have Kevin removed as personal representative based upon her claim that Kevin had breached fiduciary duties owed to Bob while acting as his attorney-in-fact. Kevin agreed to the entry of an order removing him as co-representative until the Estate's claims were resolved.

[¶13.] On August 23, 2018, the Estate sued Kevin, claiming fiduciary fraud, breach of fiduciary duty, conversion, and elder exploitation. The Estate sought both actual and punitive damages. Kevin counterclaimed for conversion of the $110,000 Kevin had transferred to the Estate from the joint account. Kevin also alleged he was entitled to claims for setoff, unjust enrichment, and quantum meruit for labor and expenses provided to Bob and the Estate, if he was required to repay any money he received from the joint account or CDs. Kevin also alleged a third-party complaint against Ann, in her capacity as personal representative, which was later dismissed by stipulation.

[¶14.] The Estate and Kevin both moved for partial summary judgment. The Estate argued in its motion that it was entitled to judgment as a matter of law on its claims for fiduciary fraud, breach of fiduciary duty, and conversion because there was no written documentation authorizing Kevin's self-dealing transactions as fiduciary for Bob and the oral extrinsic evidence offered by Kevin concerning Bob's approval of the challenged transactions was inadmissible under *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431. Kevin moved for summary judgment on his counterclaim for conversion against the Estate. He also moved for summary judgment on most of the self-dealing claims, arguing that the Estate had failed to present evidence of improper self-dealing or any damage the Estate suffered. [6] Kevin additionally argued the Estate's claims prior to March 2012 were barred by the statute of limitations and that there was no recognized claim for elder exploitation prior to July 1, 2016.

[¶15.] The circuit court held a hearing on the parties' motions and subsequently issued an oral ruling denying the Estate's ***103** motion in its entirety, determining that genuine issues of material fact existed as to whether Kevin engaged in improper self-dealing. The circuit court distinguished *Bienash*, reasoning "it does not necessarily follow that any act of self-dealing is also a breach of fiduciary duty[,]" because the expenditures benefitted Bob and were not just gifts to himself. The court also cited *Hein v. Zoss*, 2016 S.D. 73, 887 N.W.2d 62, in determining that evidence of the business arrangement between Kevin and Bob for the operation of the farm was admissible to allow the jury to consider whether Kevin acted in good faith and for the benefit of Bob in the transactions at issue.

[¶16.] The court determined genuine issues of material fact existed on Kevin's counterclaim for conversion and whether Bob intended to create a joint account with rights of survivorship for Kevin. The court granted Kevin's motion to dismiss the claims of elder exploitation alleged to have occurred prior to July 1, 2016, but denied the remainder of Kevin's motion, determining that questions of fact existed on the self-dealing claims and whether the Estate sustained damage.

[¶17.] Prior to trial, the Estate moved in limine under *Bienash* to exclude any oral extrinsic evidence from Kevin concerning any alleged agreements or authorization from Bob permitting Kevin to self-deal while acting as his attorney-in-fact. The court denied the motion and determined that evidence of discussions between Bob and Kevin was admissible for the same reasons the court gave at the time of its summary judgment ruling.

[¶18.] At trial, Kevin presented evidence, over the Estate's objections, that all the challenged transactions were intended as compensation or were a part of the longstanding farm arrangement between Bob and Kevin. Kevin testified to Bob's approval of each of the purchases made by Kevin over the years. At the close of evidence, the circuit court denied the Estate's motion for judgment as a matter of law on its claims but granted Kevin's motion for judgment as a matter of law on his counterclaim for conversion in the amount of $110,000.

[¶19.] During the settlement of the jury instructions, the Estate objected to several of the circuit court's instructions, including number 15, instructing the jury to determine whether Kevin owed Bob a fiduciary duty for any transactions outside the scope of the POA. The court also refused to give the Estate's requested jury instruction number 31, explaining breach of fiduciary duty.

[¶20.] The jury returned verdicts for Kevin on the Estate's claims against him. [7] The circuit court entered a judgment for Kevin on the Estate's claims. Based upon its judgment as a matter of law ruling, the court entered a judgment against the Estate in the amount of $110,000 on Kevin's counterclaim for conversion.

[¶21.] The Estate appeals and raises several issues, which we restate as follows:

1. Whether the circuit court abused its discretion in allowing Kevin to introduce ***104** oral extrinsic evidence at summary judgment and at trial to defend the claims of improper self-dealing and erred in denying the Estate's motion for partial summary judgment.

2. Whether the circuit court erred in refusing the Estate's proposed jury instruction number 31 and giving jury instruction number 15. [8]

3. Whether the circuit court erred in granting Kevin's motion for judgment as a matter of law on his counterclaim for conversion against the Estate.

Analysis and Decision

1. Admissibility of oral extrinsic evidence and denial of summary judgment.

a. Standard of review.

[1] [2] [3] [4] [5] [6] [7] [¶22.] "We review a grant or denial of summary judgment de novo. Summary judgment is proper where ... there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Sheard v. Hattum*, 2021 S.D. 55, ¶ 22, 965 N.W.2d 134, 141 (internal citation and citation omitted). "Evidentiary rulings made by the trial court are presumed correct and are reviewed under an abuse of discretion standard." *Hein*, 2016 S.D. 73, ¶ 7, 887 N.W.2d at 65 (quoting *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 16, 721 N.W.2d 438, 443). Additionally, "[a] court's evidentiary rulings in summary judgment proceedings are reviewed for an abuse of discretion." *Blanchard v. Mid-Century Ins. Co.*, 2019 S.D. 54, ¶ 17, 933 N.W.2d 631, 636. "With regard to the rules of evidence, abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *Ruschenberg v. Eliason*, 2014 S.D. 42, ¶ 23, 850 N.W.2d 810, 817 (quoting *JAS Enters., Inc. v. BBS Enters., Inc.*, 2013 S.D. 54, ¶ 21, 835 N.W.2d 117, 125). "An evidentiary ruling will not be overturned unless error is demonstrated and shown to be prejudicial error. Error is prejudicial when, in all probability it produced some effect upon the final result and affected rights of the party assigning it." *Hein*, 2016 S.D. 73, ¶ 7, 887 N.W.2d at 65 (quoting *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 63, 698 N.W.2d 555, 579).

b. Admissibility of oral extrinsic evidence.

[¶23.] The Estate relies upon the bright-line rule from *Bienash* in support of its claim that Kevin breached his fiduciary duty to Bob, as a matter of law, by engaging in improper self-dealing while acting as attorney-in-fact under the POA. The Estate argues that the circuit court improperly considered oral extrinsic evidence to find that questions of fact existed at summary judgment and erred in admitting this evidence at trial.

[¶24.] In considering the Estate's claims, we first review our rule from *Bienash* and cases since *Bienash*. *Bienash* "adopt[ed] a bright-line rule that no *oral* extrinsic evidence will be admitted to raise a factual ***105** issue" when an attorney-in-fact acting under the authority of a power of attorney engages in self-dealing. 2006 S.D. 78, ¶ 24, 721 N.W.2d at 437. In adopting this rule, *Bienash* looked to other jurisdictions. *Id.* ¶¶ 17–23, 721 N.W.2d at 435–37 (citing *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635, 644 (Neb. 2003) (holding no authority to self-deal unless authorized in instrument); *Kunewa v. Joshua*, 83 Hawai'i 65, 924 P.2d 559, 565 (Haw. Ct. App. 1996) (forbidding any extrinsic evidence of authority to self-deal); *Praefke v. Am. Enter. Life Ins.*, 257 Wis.2d 637, 655 N.W.2d 456, 459 (2002) (same)). Quoting *Kunewa*, we explained the rationale for the rule:

> When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney—of which outright transfers for less than value to the attorney-in-fact [himself or] herself are the most obvious—the justification for such a flat rule is apparent. And its justification is made even more apparent when one considers the ease with which such a rule can be accommodated by principals and their draftsmen.

Bienash, 2006 S.D. 78, ¶ 21, 721 N.W.2d at 436 (alteration in original).

[8] [9] [10] [¶25.] The Court also relied upon existing South Dakota decisional law explaining that "a power of attorney must be strictly construed...." *Id.* ¶ 13, 721 N.W.2d at 435 (quoting *In re Guardianship of Blare*, 1999 S.D. 3, ¶ 14, 589 N.W.2d 211, 214). An attorney-in-fact acting under the authority of a power of attorney may only "self-deal ... if the power of attorney provides 'clear and unmistakable language' specifically authorizing acts of self-dealing." *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 19, 935 N.W.2d 262, 267–68 (quoting *Bienash*, 2006 S.D. 78, ¶ 14, 721 N.W.2d at 435). "*[O]nly those powers specified in the document* are granted to the attorney-in-fact." *Bienash*, 2006 S.D. 78, ¶ 13, 721 N.W.2d at 435 (alteration in original) (quoting *In re Guardianship of Blare*, 1999 S.D. 3, ¶ 14, 589 N.W.2d at 214). "Thus, if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist." *Id.* ¶ 14, 721 N.W.2d at 435.

[¶26.] Since our decision in *Bienash*, this Court has reaffirmed the rule that, in the absence of express written authority, oral extrinsic evidence is not admissible to show that the principal approved a transaction benefitting an attorney-in-fact acting under the authority of a power of attorney. *See, e.g.*, *Estate of Stoebner*, 2019 S.D. 58, ¶ 23, 935 N.W.2d at 268; *Studt v. Black Hills Fed. Credit Union*, 2015 S.D. 33, ¶ 14, 864 N.W.2d 513, 517. We have likewise reaffirmed the rule that an attorney-in-fact acts in a fiduciary capacity, as a matter of law, in any transaction in which a power of attorney is used. *Johnson v. Markve*, 2022 S.D. 57, ¶ 70, 980 N.W.2d 662, 680; *Estate of Stoebner*, 2019 S.D. 58, ¶ 17, 935 N.W.2d at 267; *Hein*, 2016 S.D. 73, ¶ 8, 887 N.W.2d at 65.

[¶27.] However, we have cabined the *Bienash* evidentiary rule in three important ways. First, in *Hein*, we held that *Bienash* does not exclude oral extrinsic evidence of approval and authorization of continuing transactions that benefit the attorney-in-fact and began prior to the existence of a power of attorney. 2016 S.D. 73, ¶ 12, 887 N.W.2d at 67. At issue in *Hein* was "whether [the attorney-in-fact] acted with utmost good faith and in [the principal's] interest when he continued to rent [her] land [on favorable terms] in the same manner as he had before he became her attorney-in-fact." *Id.* Under *Bienash*, the circuit court disallowed oral extrinsic evidence that the principal approved the favorable rental arrangement after the power of attorney was executed. On appeal, ***106** *Hein* held "[t]his evidence was relevant to show whether [the attorney-in-fact] acted with utmost good faith and for the benefit of [the principal], and its omission prejudiced [the attorney-in-fact]. Therefore the court abused its discretion by excluding it." *Id.* ¶ 13.

[¶28.] Second, we have recognized that some acts by an attorney-in-fact, after a power of attorney has been executed, may be outside the fiduciary relationship created by the power of attorney and not subject to the bright-line evidentiary rule. In *Estate of Bronson*, we considered the amanuensis doctrine, which provides "that where the name of a party is signed to an instrument in the presence of the party, and by his authority, and where he knows the contents of the same, the signature will be regarded as the signature of the party whose name purports to be signed to the instrument[.]" 2017 S.D. 9, ¶ 10, 892 N.W.2d 604, 608 (quoting *Hickox v. Bacon*, 17 S.D. 563, 97 N.W. 847, 847 (1903)). We held that "[a]pplying only the laws of agency and fiduciary self-dealing in a case like this would create an irrebuttable presumption that once a power of attorney is granted, every subsequent act of the attorney-in-fact involves a fiduciary duty of that agent—even if it is an act regarding a matter unconnected to the agency." *Id.* ¶ 11. In *Estate of Bronson*, "none of the factors [9] necessary for a fiduciary relationship were present in [the] banking transaction. The evidence undisputedly indicate[d] that [the principal] was independently and competently handling his own financial affairs when he went to the bank to request the creation of the joint account." *Id.* ¶ 11, 892 N.W.2d at 609.

[¶29.] Since *Estate of Bronson,* we have clarified that when an attorney-in-fact uses the power of attorney to carry out an act, the *Bienash* rule applies without a separate showing on the presence of the traditional factors. *See* *Estate of Stoebner*, 2019 S.D. 58, ¶ 18, 935 N.W.2d at 267. In *Estate of Stoebner v. Huether*, an attorney-in-fact sold the principal's land to himself for a price lower than the values estimated in an appraisal and a board of equalization assessment after allegedly discussing alternatives with the principal. *Id.* ¶¶ 5–7, 935 N.W.2d at 264–65. The attorney-in-fact owed the principal a fiduciary duty and engaged in improper self-dealing as a matter of law because he used the power of attorney to carry out the sale. *Id.* ¶ 27, 935 N.W.2d at 270.

[¶30.] Third, we have declined to expand *Bienash* to prohibit oral extrinsic evidence of authorization to self-deal for fiduciary agency relationships arising outside the power of attorney relationship. *See* *Smith Angus Ranch, Inc. v. Hurst*, 2021 S.D. 40, ¶¶ 23–24, 962 N.W.2d 626, 631–32 (holding oral extrinsic evidence of corporate fiduciary's authorization to self-deal was admissible even though the organizational documents did not expressly provide such authorization). "Limiting the rule to acts of self-dealing by POAs is consistent with the ***107** recognition of this Court, and other courts, that the rule arises from the acute vulnerability of POAs to self-dealing." *Id.* ¶ 22, 962 N.W.2d at 631.

[¶31.] The Estate argues that Kevin was acting in a fiduciary capacity under the POA at all relevant times and breached his fiduciary duty by engaging in transactions from which he directly benefitted. In the Estate's view, Kevin was not expressly authorized by the POA to self-deal, and the oral extrinsic evidence Kevin offered concerning the challenged transactions was inadmissible. The Estate argues that the circuit court abused its discretion by permitting Kevin to offer this evidence to resist the Estate's motion for summary judgment and at trial to justify his self-dealing.

[¶32.] In response to the Estate's claim, Kevin argues that *Bienash* is inapplicable for a variety of reasons, including that (1) the challenged transactions were a part of the longstanding farming arrangement that preexisted the POA; (2) the POA authorized Kevin to make annual gifts to himself; and (3) most of the checks were written by Kevin from the joint account and did not involve the use of the POA. Kevin also claims that he did not self-deal because these transactions benefitted Bob and furthered Bob's desire to continue the farm operation through Kevin.

[¶33.] The record is undisputed that Kevin used the POA to cash in several CDs, IRAs, and a money market account held by Bob, totaling $322,539.89. However, except for $44,590.22 that Kevin deposited into his personal account to purchase a pickup, he deposited all the proceeds from these accounts into the joint account. The Estate has not asserted a claim against Kevin for his use of the POA to cash in the CDs, IRAs, and money market funds owned by Bob that he then deposited into the joint account. As to the CDs, instruction number 33 specifically informed the jury that "[The Estate's] claim for damages are for two CDs in the total sum of $44,590.22. [The Estate] is not seeking to recover damages for any other CDs that were received into evidence[.]"

[11] [¶34.] Based upon one isolated question and answer from Kevin's testimony, the Estate argues that he was acting under the authority of the POA while writing checks from the joint account. [10] However, Kevin never used the POA to write checks or manage the joint account as his status as a joint account holder permitted him to issue checks from the account. This Court has recognized that the question of whether an individual is acting under the authority of a power of attorney or as a joint account owner is generally one of law, not fact. *See* *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 15, 908 N.W.2d 170, 176. The Estate's claim that Kevin was acting under the authority of the POA to manage the joint account is not supported legally or factually on this record.

[12] [¶35.] We have never extended the *Bienash* rule to transactions that involve self-dealing by an attorney-in-fact acting outside the agency relationship created by the power of attorney, and the Estate does not ask us to extend *Bienash* to a fiduciary managing funds presumptively owned by a principal in a joint account. *See* SDCL 29A-6-103(1) ("A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."). Given ***108** the limits of the evidentiary rule in *Bienash*, the circuit court did not abuse its discretion in determining that oral extrinsic evidence was relevant and admissible to Kevin's management and use of the joint account, all of which was accomplished without using the authority conferred in the POA. The jury considered all the transactions at issue that arose from the joint account and returned verdicts for Kevin on the Estate's claims for breach of fiduciary duty, conversion, and elder exploitation.

[¶36.] In contrast, the Estate's claim arising from Kevin's use of the POA to cash in the two CDs totaling $44,590.22, which Kevin deposited in his personal account, does implicate *Bienash*. Kevin argues, however, that *Bienash* does not apply because he was expressly authorized to make gifts to himself under the POA. Alternatively, he argues, at a minimum, he is entitled as a matter of law to a credit up to the maximum annual federal gifting limits against any damages arising from alleged self-dealing. The Estate points to Kevin's testimony that he never used this gifting provision while he was acting as attorney-in-fact for Bob under the POA. It argues that "[a] party to a lawsuit cannot claim the benefit of a version of relevant facts more favorable to his own contentions than he has given in his own testimony." *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 22, 955 N.W.2d 382, 390 (quoting *Law Capital, Inc. v. Kettering*, 2013 S.D. 66, ¶ 13, 836 N.W.2d 642, 646).

[13] **[14]** **[15]** [¶37.] Regardless of Kevin's belief about whether the money was a gift, in considering the Estate's claim for breach of fiduciary duty, the relevant question under *Bienash* was Kevin's authority to act under the POA. The interpretation of the POA is a question of law, not fact. *See* *Wyman*, 2018 S.D. 17, ¶ 9, 908 N.W.2d at 174 (quoting *Estate of Lien v. Pete Lien & Sons, Inc.*, 2007 S.D. 100, ¶ 10, 740 N.W.2d 115, 119) ("Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one."). "[W]e must look to the extent of [the attorney-in-fact's] authority under the power of attorney to determine whether [the attorney-in-fact] breached his fiduciary duty." *Estate of Stoebner*, 2019 S.D. 58, ¶ 19, 935 N.W.2d at 267. "In order for self-dealing to be authorized, the instrument creating the fiduciary duty must provide 'clear and unmistakable language' authorizing self-dealing acts." *Bienash*, 2006 S.D. 78, ¶ 14, 721 N.W.2d at 435 (citation omitted).

[16] [¶38.] The POA expressly authorized Kevin "[t]o make gifts of my real or personal property ... to such persons (including my attorney) or institutions, in such amounts or proportions, as my attorney, in his, her, or its sole discretion and judgment, may deem appropriate for tax or other reasons[.]" Through the POA, Bob provided Kevin with unfettered discretion to give himself an amount up to the annual federal gift tax exclusion. In 2012 the gift tax exclusion was $13,000.[11] However, Kevin exceeded his express authority under the POA by withdrawing both CDs in 2012, totaling $44,590.22, and depositing the funds into his personal account to purchase a pickup. Any damage claim for breach of fiduciary duty would be properly offset by the specifically authorized annual gift tax exclusion amount of $13,000.

[17] [¶39.] Nevertheless, Kevin argues that the circuit court properly applied the ***109** *Hein* exception permitting oral extrinsic evidence of the long-standing farming arrangement between Bob and Kevin that preexisted the use of the POA. Kevin's attempt to apply *Hein* so broadly on this record is untenable. His use of the POA to cash in the payable-on-death CDs to purchase a pickup was a discrete transaction that had not previously been part of their course of dealing or part of the farming arrangement over the years.

[¶40.] Kevin also argues that *Bienash* has no application because this transaction did not involve improper self-dealing as the purchase of the pickup benefitted Bob by allowing Kevin to transport him more easily between the nursing home and farm. While Kevin's testimony that he purchased a smaller pickup for Bob's benefit may not have been the kind of oral extrinsic evidence prohibited by *Bienash*, the evidence did not create a genuine issue of material fact on the Estate's claim for breach of fiduciary duty. The impermissible self-dealing claim did not arise from Kevin's decision to purchase a new pickup to replace Bob's larger pickup. Rather, it arose from Kevin's decision to purchase the new pickup by cashing in Bob's CDs and using the money to purchase a pickup titled in Kevin's name. In the absence of oral extrinsic evidence, which was precluded by *Bienash*, this is exactly the kind of self-dealing by an attorney-in-fact acting under a power of attorney that is prohibited by our caselaw. *See Smith Angus Ranch, Inc.*, 2021 S.D. 40, ¶ 16, 962 N.W.2d at 630; *see also* *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 11, 605 N.W.2d 818, 821 ("[T]here is a general rule against self-dealing."). Although Kevin was authorized to give himself a maximum of $13,000 in 2012, for any reason, his effort to offer oral extrinsic evidence that Bob had approved the remaining $31,590.22 that exceeded this authority under the POA was precluded by *Bienash*. Thus, the circuit court should have determined as a matter of law that Kevin engaged in impermissible self-dealing.

[18] [¶41.] Finally, Kevin argues that, even if he breached his fiduciary duty to Bob, the Estate did not sustain any damage because the CDs were payable to Kevin upon Bob's death and Kevin would have inherited the pickup under the Will if he had purchased it in Bob's name. While Kevin may have inherited the pickup if it had been purchased in Bob's name, the damage to the Estate was the unauthorized withdrawal of $31,590.22 from the CDs. The payable-on-death designation on the CDs did not create an inter vivos gift; Bob could have changed the payable-on-death status at any time. *See* SDCL 43-3-6 ("A mere possibility, such as the expectancy of an heir apparent, is not deemed an interest of any kind."); *see also* *Briggs v. Briggs*, 2019 S.D. 37, ¶ 22, 931 N.W.2d 510, 515 ("[A] testator may, up to the moment of death, revise and amend the disposition of the estate, and a prospective beneficiary's right to inherit depends on the decedent's final testamentary disposition in favor of that beneficiary."). The CDs matured in 2013, and there was no testimony concerning Bob's intended disposition of the funds thereafter. On this record, a jury could only speculate concerning Bob's disposition of these funds and whether Kevin would have been entitled to receive the $31,590.22 at the time of Bob's death. Therefore, the Estate is entitled to recover the amount of damages Bob sustained on the day that Kevin impermissibly withdrew the money from the CDs.

[¶42.] We reverse the circuit court's denial of summary judgment on the Estate's claim involving Kevin's use of the POA to cash in the CDs, less a credit for the express authorization permitting Kevin to ***110** gift himself $13,000 in 2012. On the remaining claims of the Estate, we find no abuse of discretion in the admission of oral extrinsic evidence on the claims arising from Kevin's use of the joint account, and the circuit court did not err in denying the Estate's motion for partial summary judgment on these claims.

2. Jury instructions on fiduciary duty and breach.

[19] **[20]** **[21]** [¶43.] The Estate argues that the circuit court erred by declining to give its proposed jury instruction number 31 and by giving jury instruction number 15. We review jury instructions and refusal to give proposed jury instructions for abuse of discretion. *Behrens*, 2005 S.D. 79, ¶ 57, 698 N.W.2d at 578. "Error occurs if, as a whole, the instructions misled, conflicted, or caused confusion." *State ex rel. Dep't of Transp. v. Miller*, 2016 S.D. 88, ¶ 32, 889 N.W.2d 141, 152. For such error to be reversible, "the party challenging the instruction must show that 'in all probability it produced some effect upon the verdict' and harmed that party's substantial rights." *Id.* (citing *Behrens*, 2005 S.D. 79, ¶ 37, 698 N.W.2d at 570).

[¶44.] The circuit court did not err in refusing to give instruction number 31. Instruction number 31 provided that "[a] fiduciary breaches his fiduciary duty when he uses his position by enriching the value of property that would eventually devolve to him." This instruction was an inaccurate statement of the law. The proposed instruction would have effectively imposed a rule under which the jury was required to find a breach of fiduciary duty by Kevin if any of the transactions resulted in enhancing the value of any property he would eventually receive under the Will. But no such definitive rule exists, and instead we generally regard the question of whether a fiduciary duty has been breached as a fact question. *Bienash*, 2006 S.D. 78, ¶ 12, 721 N.W.2d at 434.

[22] [¶45.] The court properly instructed the jury that "[a] fiduciary duty obligates the fiduciary to act in the utmost good faith for the benefit and in the best interest of the other party in the course of the fiduciary relationship, and to refrain from obtaining any advantage at that person's expense. The fiduciary must refrain from any act of self-dealing not authorized by the power of attorney." Disputed issues of fact existed as to whether any of the expenditures made by Kevin from the joint account were improper and a breach of any fiduciary duty Kevin may have owed to his father.

[23] **[24]** [¶46.] "The existence of a fiduciary duty and the scope of that duty are questions of law for the court." *Ward v. Lange*, 1996 S.D. 113, ¶ 12, 553 N.W.2d 246, 250 (quoting

High Plains Genetics Rsch., Inc. v. J K Mill-Iron Ranch, 535 N.W.2d 839, 842 (S.D. 1995)). We have identified factors for determining whether a fiduciary relationship has arisen:

> A fiduciary relationship is founded on a "peculiar confidence" and trust placed by one individual in the integrity and faithfulness of another. When such relationship exists, the fiduciary has a "duty to act primarily for the benefit" of the other. "Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary." South Dakota law reflects "the traditional view that fiduciary duties are not inherent in normal arm's-length business relationships, and arise only when one undertakes to act primarily for another's benefit. The law will imply such duties only where one party to a relationship is unable to fully protect its interests and the unprotected party has placed its trust and confidence in the other." We recognize no "invariable ***111** rule" for ascertaining a fiduciary relationship, "but it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other."

Id. (quoting *High Plains Genetics Rsch., Inc.*, 535 N.W.2d at 842). "[A]s a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 26, 721 N.W.2d at 445.

[¶47.] The circuit court gave instruction number 15, which provided:

> The court has determined as a matter of law that the defendant was acting as a fiduciary for Robert Lynch by virtue of the power of attorney. The power of attorney document defines the scope of the fiduciary relationship you are directed to accept as having been proved.
>
> For any act outside of the scope of the power of attorney, you must determine whether a further fiduciary relationship exists. To establish a fiduciary relationship for acts outside of the power of attorney, the plaintiff must prove:
>
> > (1) That Robert Lynch placed faith, confidence, and trust in the defendant;
> >
> > (2) That Robert Lynch was in a position of inequality, dependence, or weakness, or possessed a lack of knowledge; and
> >
> > (3) That the defendant exercised dominion, control, or influence over Robert Lynch's affairs.
>
> If you find that all of these elements have been established, then the defendant owed Robert Lynch a fiduciary duty for any act outside of the scope of the power of attorney.

[¶48.] While jury instruction number 15 correctly states the rules for determining whether a fiduciary duty exists, generally, the court—not the jury—must determine whether a fiduciary relationship exists. To the extent there were questions of fact relating to whether a fiduciary duty existed, the court could have permitted the jury to resolve any disputed facts before the court decided the legal question of whether Kevin owed Bob a fiduciary duty in managing the joint account.

[¶49.] However, the facts involving Kevin's management of the joint account appear to be undisputed. There is no dispute that all of the funds in the joint account were owned by Bob from 2011 until his death or that Kevin exerted exclusive control over Bob's finances and property, including the joint account, after Bob entered the nursing home in 2011. During this time, by Kevin's own testimony, Bob placed complete trust and confidence in Kevin's management of his finances and the farm.

[¶50.] Further, because of Bob's health limitations, Bob fully relied upon Kevin to manage and provide information about the joint account, and Kevin exercised dominion and control over the account after 2011. Kevin made all the deposits to the joint account, wrote nearly all the checks from the account, received the monthly bank statements, and prepared Bob's tax returns each year. There is no evidence that Bob received any bank statements or information about the joint account, except through Kevin, after 2011. Kevin also admitted that he did not provide any accountings to Bob and that Bob was only aware of his finances to the extent Kevin verbally informed Bob and discussed them with him. Based upon the state of the record, there do not appear to have been any jury questions bearing on the fiduciary duty Kevin owed Bob in the management of the joint account. However, even if the ***112** court erred by instructing the jury to determine whether Kevin owed Bob a fiduciary duty in the management of the joint account from

2011 until Bob's death, the Estate has failed to show prejudice arising from the error.

[25] **[26]** [¶51.] On the Estate's claim for breach of fiduciary duty, the verdict form asked a single question: "Do you find in favor of Plaintiff or Defendant on the Plaintiff's claim Breach of Fiduciary Duty?" The verdict form did not require the jury to state separately whether Kevin owed Bob a fiduciary duty in writing checks on the joint account. Thus, the jury could have reached its verdict by finding the absence of a fiduciary duty based upon instruction number 15, or the jury could have determined that a fiduciary duty existed and that Kevin did not breach the duty. In *State Farm Mutual Automobile Insurance Co. v. Miranda*, we addressed the question of prejudice under a general verdict form and stated that where "a general verdict [was] handed down and the jury could have decided the case on two theories, one proper and one improper, the reviewing court will assume that it was decided on the proper theory." 2019 S.D. 47, ¶ 10, 932 N.W.2d 570, 574 (citations omitted). We only depart from this assumption "if there is 'an affirmative showing in the record to the contrary[.]' " *Id.* (citations omitted). Therefore, we assume the jury decided Kevin owed but did not breach a further fiduciary duty to Bob and affirm with respect to those transactions for which oral extrinsic evidence of Bob's approval was admissible.

3. Ownership of the joint checking account.

[¶52.] The Legislature has established rules for ownership of joint checking accounts at an account holder's death:

> (1) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party ... as against the estate of the decedent unless there is clear and convincing evidence of a different intention *at the time the account is created ....*
>
> (5) A right of survivorship arising from the express terms of the account ... or a P.O.D. payee designation *cannot be changed by will, unless the will expressly provides that the terms of the account should be changed or modified.*

SDCL 29A-6-104 (emphasis added).

[27] **[28]** **[29]** [¶53.] SDCL 29A-6-104 creates a rebuttable presumption of joint tenancy in a jointly held bank account. *In re Estate of Kuhn*, 470 N.W.2d 248, 250 (S.D. 1991). A party challenging this presumption "must present clear and convincing evidence that [the decedent] 'did not intend the usual rights of survivorship to attach to the joint asset, but instead intended the arrangement for [their] own convenience.' " *Estate of Card v. Card*, 2016 S.D. 4, ¶ 15, 874 N.W.2d 86, 91 (quoting *In re Estate of Steed*, 521 N.W.2d 675, 678 (S.D. 1994)). "Whether the joint accounts in question were created by decedent for [their] own convenience or for the benefit of the nondepositing joint payees is a question of fact to be determined from all the facts and circumstances in the case." *Id.* (quoting *Steed*, 521 N.W.2d at 678).

[30] [¶54.] "[A] circuit court's decision to grant or deny a motion for judgment as a matter of law must be reviewed de novo on appeal." *Magner v. Brinkman*, 2016 S.D. 50, ¶ 13, 883 N.W.2d 74, 81. "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be ***113** maintained or defeated without a favorable finding on that issue." SDCL 15-6-50(a).

[31] [¶55.] Bob authorized Kevin to write checks on Bob's account on February 1, 2008, with a limited power of attorney form that was set up for the account at the bank. On May 13, 2008, Bob changed the account to a joint checking account with rights of survivorship. Nonetheless, the Estate argues that fact questions existed for the jury concerning Kevin's claim for conversion and Bob's intent in setting up the joint account. [12] In particular, the Estate notes that "[i]n this case, the evidence did not all point one way, and there was evidence, i.e., Kevin Lynch's admission that the account was set up for convenience to pay his father's bills, thus a reasonable inference existed to sustain the position of the Estate."

[32] [¶56.] The Estate's claim that Kevin made an admission that the joint account with rights of survivorship was set up for convenience is unsupported by the record. Critically, Kevin testified at trial that he was not present when Bob set up the initial limited POA in February 2008 or when Bob established the joint account three months later, that he had no discussion with Bob about creating the joint account, and that he had no knowledge about why Bob had set up the joint account. [13] Kevin was simply unable to offer any competent evidence about Bob's decision to create the joint account because Kevin did not have any knowledge about this decision. The Estate failed to present any other evidence to show that Kevin or anyone else had knowledge that Bob's decision to change the account was merely for convenience. This included the personal banker who assisted Bob with both changes and testified that she had no recollection of any conversations with him about these changes. From our review of the record, the circuit court properly determined that the Estate failed to present any evidence to rebut the statutory presumption that Bob intended to create a joint survivorship account with Kevin in May 2008.

***114** [¶57.] We are mindful that Bob executed the Will in 2010, after the joint account was created, dividing "all" of his cash assets between the three surviving children share and share alike, "including certificates of deposit, savings accounts, and checking accounts." However, SDCL 29A-6-104(1) requires "evidence of a different intention *at the time the account is created*" to rebut the presumption of joint tenancy. (Emphasis added). More importantly, "[a] right of survivorship arising from the express terms of the account ... cannot be changed by will, unless the will expressly provides that the terms of the account should be changed or modified." SDCL 29A-6-104(5). The Will did not expressly provide for a modification of the joint account, nor was it evidence of a contrary intention by Bob with respect to the joint account, and the circuit court properly granted judgment as a matter of law for Kevin on his claim for conversion.

Conclusion

[¶58.] We reverse and remand the judgment as to the Estate's claims involving the two payable-on-death CDs Kevin deposited in his individual account. On remand, the circuit court shall enter judgment as a matter of law for compensatory damages of $31,590.22, plus prejudgment interest, on the Estate's claims for breach of fiduciary duty and conversion. Based upon this disposition, the Estate's claim for punitive damages on this portion of the Estate's claims remains an open question on remand. The remainder of the judgment on the Estate's claims and Kevin's claim for conversion is affirmed.

[¶59.] KERN, SALTER, DEVANEY, and MYREN, Justices, concur.

All Citations

991 N.W.2d 95, 2023 S.D. 23

Footnotes

1 Based upon our resolution of the Estate's first issue, it is unnecessary to consider Kevin's notice of review issue separately.

2 The POA authorized Kevin to make gifts, including gifts to himself:

> To make gifts of my real or personal property or my interest in such property (including, but not limited to, outright gifts, ...) to such persons (including my attorney) or institutions, in such amounts or proportions, as my attorney, in his, her, or its sole discretion and judgment, may deem appropriate for tax or other reasons; provided, however, the total value of gifts to any one donee in any calendar year shall not exceed (i) the amount specified for the federal gift tax annual exclusion[.]

3 Bob received cash rent of approximately $160,000 annually. His annual nursing home expenses increased each year from approximately $70,000 to $87,000 until his death. After deducting farm expenses, including depreciation, Bob's annual taxable income between 2012 and 2017 far exceeded his nursing home and personal expenses.

4 The circuit court made no determination on the ownership of the Morton buildings, and it is unknown if Kevin's testimony that the Estate owned the buildings was considered by the jury in arriving at its verdict. We do not consider this question to be before this Court on appeal.

5 Bob owned approximately 2/3 of the stock cattle while Kevin owned approximately 1/3. In order to keep the stock cattle numbers consistent, Kevin testified that he purchased the additional cattle for Bob to replace cows that were culled from the operation after they became unproductive. Kevin apparently received the money for Bob's cull cows that were sold since Bob did not receive any cattle income after 2011.

6 Kevin argued that the Estate did not sustain any damage because Bob owned the joint account until his death, when the joint account passed to Kevin by operation of law.

7 The jury marked “Defendant Kevin Lynch” in response to these questions:

> (1) Do you find in favor of Plaintiff or Defendant on the Plaintiff's claim of Breach of Fiduciary Duty?
>
> (2) Do you find in favor of Plaintiff or Defendant on the Plaintiff's claim of Conversion?
>
> (3) Do you find in favor of Plaintiff or Defendant on the Plaintiff's claim of Elder Exploitation?

After resolving the question of liability in favor of Kevin on all the claims, the jury did not reach the questions of damages or the counterclaims for setoff asserted by Kevin.

8 The Estate also argues that the circuit court erred by giving instructions number 23, 29, 30, and 31, the first three of which pertained to considerations for the jury on the claims for breach of fiduciary duty and affirmative defenses to claims of breach of fiduciary duty. The instructions contained proper statements of the law. Given our determination that oral extrinsic evidence was admissible on the claims arising from the joint account, the court did not err in giving these instructions. Number 31 instructed the jury on Kevin's right to recoup damages or expenses Kevin incurred if the Estate was awarded damages. This issue is rendered moot by our resolution of the case.

9 In *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 838 (S.D. 1990), we adopted factors to aid in determining the existence of a fiduciary relationship from an old Indiana appellate decision, *Yuster v. Keefe*, 46 Ind.App. 460, 90 N.E. 920 (1910):

> There is no invariable rule which determines the existence of a fiduciary relationship, but it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, *giving to one advantage over the other.*

We have cited these factors frequently. *See, e.g.*, *Estate of Thacker v. Timm*, 2023 S.D. 2, ¶ 21, 984 N.W.2d 679, 687 (quoting *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 28, 908 N.W.2d 170, 179).

10 During questioning by the Estate's attorney, Kevin was asked, “When you disbursed money from his checking account, you were acting as his power of attorney[?]” Kevin answered, “Correct.”

11 *See* 26 U.S.C.A. § 2503(b) (West 2023) (providing baseline amount of annual exclusion from gift tax and formula for inflation adjustment).

12 “A successful claim for conversion will meet four necessary elements: (1) [plaintiff] owned or had a possessory interest in the property; (2) [plaintiff's] interest in the property was greater than the [defendant's]; (3) [defendant] exercised dominion or control over or seriously interfered with [plaintiff's] interest in the property; and (4) such conduct deprived [plaintiff] of its interest in the property.” *Estate of Thacker*, 2023 S.D. 2, ¶ 41, 984 N.W.2d at 691–92 (alterations in original) (citations omitted). Aside from the Estate's claim that there

was evidence to rebut the statutory presumption that Bob created a joint account, the Estate does not argue that questions of fact existed as to any of the elements of conversion.

13 The Estate's "admission" claim is predicated on its effort to impeach Kevin's testimony at trial by offering a portion of his prior deposition testimony:

> Estate counsel: "Was that joint account set up for the convenience of your father to pay his bills?"
>
> Kevin: "It was set up for me to take care of paying all his bills."
>
> Estate counsel: "The purpose of it was for his convenience to pay – make sure his bills were paid and that you paid them."
>
> Kevin: "Yes."

On redirect testimony at trial, Kevin's attorney read the following portions of Kevin's deposition testimony:

> Estate counsel: "Why was this account changed from a POA account in February 2008 to a joint account with rights of survivorship on May 13 of 2008?"
>
> Kevin: "You know, you are going to have to discuss that with the bank because I was not involved in that."
>
> ...
>
> Estate counsel: "You never talked with your dad at all about why this was set up as a joint account with rights of survivorship."
>
> Kevin: "No. This was never discussed."

End of Document

24 Neb.App. 34
Court of Appeals of Nebraska.

L. Joe STEHLIK, Personal Representative of the Estate of Joseph M. Rakosnik, deceased, appellee,
v.
Michael C. RAKOSNIK et al., appellants.

No. A–15–318.
|
Filed May 17, 2016.

Synopsis
Background: Uncle's personal representative brought action against nieces and nephews, alleging breach of fiduciary duty, conversion, and civil conspiracy, and seeking to reclaim uncle's estate's property. The District Court, Pawnee County, Daniel E. Bryan, Jr., J., granted summary judgment in favor of personal representative. Nieces and nephews appealed.

Holdings: The Court of Appeals, Riedmann, J., held that:

[1] transfer by nephew, who was attorney in fact under power of attorney granted by uncle, of uncle's farm property to nephew and other relatives was not authorized by power of attorney provision allowing attorney in fact to "make gifts," and

[2] purported statement of uncle, indicating that uncle's investment account was to "go to [uncle's] kin" did not establish uncle's clear intent that nephew, as attorney in fact, should disburse investment account immediately to nephew's siblings, supporting finding that transfer of investment account was constructive fraud.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (12)

[1] **Principal and Agent** Evidence

A party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make a gift to a third party with a close relationship to the attorney in fact; whether the fiduciary acted in good faith or had actual intent to defraud is immaterial, and when the above circumstances are shown, the law presumes constructive fraud.

[2] **Principal and Agent** Evidence

Once a prima facie case of fraud is established by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make a gift to a third party with a close relationship to the attorney in fact, the burden shifts to the fiduciary to demonstrate that the gift was: (1) made pursuant to power expressly granted in the power of attorney document, and (2) made pursuant to the clear intent of the donor; the fiduciary also bears the burden of proving the fairness of the transaction.

[3] **Principal and Agent** Individual Interest of Agent

A power of attorney's blanket power to gift is not effective to authorize self-dealing; where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument.

[4] **Principal and Agent** Construction of letters or powers of attorney

Transfer by nephew, who was attorney in fact under power of attorney granted by uncle, of uncle's farm property to nephew and other relatives was not authorized by power of attorney provision allowing attorney in fact to "make gifts," where power of attorney did not authorize nephew to self-deal.

[5] **Principal and Agent** Individual Interest of Agent

Even if a transaction is not a direct gift, but indirectly promotes the interest of the holder of a power of attorney, it is still considered self-dealing by the holder.

[6] **Principal and Agent** Individual Interest of Agent

Where a power of attorney does not expressly permit gratuitous self-dealing transfers, a principal's oral authorization is not effective to empower the agent to utilize broad powers in the power of attorney instrument to make gifts.

[7] **Principal and Agent** Construction of letters or powers of attorney

Power of attorney granted by uncle to nephew was sufficient to authorize nephew to make gifts of uncle's investment account property to nephew's siblings, where power authorized nephew to "make gifts."

[8] **Principal and Agent** Fraud

Purported statement of power of attorney grantor, who was attorney in fact's uncle, indicating that grantor's investment account was to "go to [grantor's] kin" did not establish grantor's clear intent that attorney in fact should disburse investment account immediately to attorney in fact's siblings, supporting finding that transfer of investment account was constructive fraud; purported statement could have referred to grantor's intent that investment account pass via will after grantor's death.

[9] **Principal and Agent** Fraud

Fact that attorney in fact, who was power of attorney grantor's nephew, and nephew's siblings were the remainder beneficiaries of grantor's will prior to grantor's death did not establish grantor's clear intent that attorney in fact should disburse grantor's investment account immediately to attorney in fact's siblings, supporting finding that transfer of investment account was constructive fraud; a will was evidence only of a person's plan for the disposition of his property upon his death and did not establish donative intent for an inter vivos gift.

[10] **Trusts** Nature of constructive trust

Trusts Weight and sufficiency

A party seeking to establish a constructive trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.

1 Case that cites this headnote

[11] **Summary Judgment** Genuine Issue or Dispute as to Material Fact

The question on summary judgment is whether there are genuine issues of material fact; a fact is material only if it would affect the outcome of the case.

[12] **Appeal and Error** Necessity of Determination by Reviewing Court

An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

****2** *Syllabus by the Court*

***34** 1. **Agency: Principal and Agent.** Nebraska law regarding power of attorney is concerned with the potential for abuse and fraud that exists when a fiduciary has broad powers to control another person's property.

2. **Principal and Agent: Fraud: Gifts: Proof.** A party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make

a gift to a third party with a close relationship to the attorney in fact.

3. **Principal and Agent: Fraud: Gifts: Proof: Intent.** Once a prima facie case of fraud is established, the burden shifts to the fiduciary to demonstrate that the gift was (1) made pursuant to power expressly granted in the power of attorney document and (2) made pursuant to the ****3** clear intent of the donor. The fiduciary also bears the burden of proving the fairness of the transaction.

4. **Principal and Agent: Gifts.** A blanket power to gift is not effective to authorize self-dealing. Where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument.

5. **Principal and Agent: Gifts.** Where a power of attorney does not expressly permit gratuitous self-dealing transfers, a principal's oral authorization is not effective to empower the agent to utilize broad powers in the power of attorney instrument to make gifts.

6. **Trusts: Property: Title: Equity: Proof.** A party seeking to establish a constructive trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to ***35** the rules of equity and good conscience, hold and enjoy the property so obtained.

7. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.

Appeal from the District Court for Pawnee County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Attorneys and Law Firms

David W. Watermeier and Andrew K. Joyce, of Morrow, Poppe, Watermeier & Lonowski, P.C., Lincoln, for appellants.

Jeffery W. Davis and Jeffrey A. Gaertig, Lincoln, of Smith, Schafer, Davis & Gaertig, L.L.C., for appellee.

Inbody, Pirtle, and Riedmann, Judges.

Riedmann, Judge.

INTRODUCTION

Michael C. Rakosnik, Linda I. Rakosnik, and Susan M. Muell (collectively the Rakosniks) appeal from a summary judgment order of the district court for Pawnee County concerning transfers of real and personal property made to them by their brother, Lewis D. Rakosnik, under a power of attorney he held for their uncle, Joseph M. Rakosnik (Mike). On appeal, the Rakosniks argue that two of the transfers were valid gifts in accordance with their uncle's intentions and the power of attorney he executed. After review of the record, taking facts in the light most favorable to the Rakosniks, we disagree and affirm the judgment of the district court.

BACKGROUND

The evidence offered and received at the summary judgment hearing reveals the following events: Lewis and the Rakosniks were the only nieces and nephews of Mike. In February 2011, Lewis moved to Mike's home at the request of Mike's long-time companion, Evelyn Doeschot (Evelyn), who lived with Mike but could no longer take care of him alone. When Lewis moved in with Mike and Evelyn, Mike was undergoing hospice care and it was uncertain how long he would live.

***36** In March 2011, Lewis obtained a power of attorney that granted him broad powers over his uncle's property. Mike's longtime attorney, L. Joe Stehlik, prepared the power of attorney. The plenary power clause of the power of attorney document gives Lewis "all powers over my estate and affairs which I can or could exercise, including but not limited to the power to make gifts."

Transfers of Mike's Property.

Lewis utilized the power of attorney to make transfers of Mike's money and real ****4** property to himself and the Rakosniks. In June 2011, he cashed his uncle's Edward Jones account and transferred some of the proceeds to the Rakosniks and their spouses. In August 2011, Lewis transferred his uncle's farm property to himself and the Rakosniks, reserving a life estate for his uncle. During this time period, Lewis also utilized certain funds from his uncle's checking account for personal use.

Lewis stated that these transfers were a “protective measure” to prevent Stehlik and Evelyn from obtaining Mike's property. As the basis for these fears, Lewis cited a sale of 160 acres of Mike's land to a neighbor in January 2011. After conversations with his uncle, Lewis believed that his uncle had not planned to sell the land but had been influenced by Stehlik. He also found it to be suspicious that Stehlik charged Mike for preparation of a new abstract for the sale when Mike's original abstract was in Mike's safe deposit box. The Rakosniks also argue that the transfers were made in order to avoid probate.

Lewis stated that he learned about an Edward Jones account from a conversation with Evelyn and then utilized his power of attorney to request information about that account from Edward Jones. Lewis discussed the account with Mike and came to the understanding that the money was “to go to [Mike's] kin,” that is, Lewis and the Rakosniks. In depositions, the Rakosniks testified that they never discussed their uncle's finances or estate planning with Mike before his death. ***37** However, Linda later submitted an affidavit stating that on August 7, 2011, she sat with Mike at her parents' house and discussed transferring the farm property to her and her siblings to avoid probate.

Lewis consulted an attorney regarding how to avoid probate for his uncle's estate. The attorney prepared a warranty deed transferring the farm property to Lewis and the Rakosniks and reserving a life estate in Mike. Lewis testified in a deposition that he had conversations with Mike prior to transferring the farm property and that in particular, he discussed the deed with Mike to explain it and “make sure ... it was okay” the day before Lewis signed it.

In August 2011, Evelyn moved out of the farmhouse where Mike lived and Lewis was staying. On January 31, 2012, Lewis was arrested. Mike died on April 27. Following a jury trial, Lewis was convicted of 39 counts of abuse of a vulnerable adult and theft by deception. The victim was Mike.

Mike's Wills.

Beginning in 1988, Mike executed a series of wills leaving the bulk of his estate to Lewis and the Rakosniks. Mike's 2005 will, which was in effect at the time of the transfers at issue in this case, devised Mike's real property to Lewis and the Rakosniks, subject to a life estate in the farmhouse to Evelyn, and with the condition that the land must stay in the family name and not be sold or mortgaged outside the family during the lifetime of Lewis and his siblings.

Lewis testified that he discussed the will with Mike in May 2011 and that Mike told him having the farm stay in the family name was not really important to him.

On March 1, 2012, Mike executed a new will that disinherited Lewis and the Rakosniks. Stehlik testified that on March 1, Mike called him stating that his nieces and nephews were a “bunch of crooks” who had betrayed him. Stehlik stated that this telephone call was prompted by a newspaper article Mike read about the criminal charges against Lewis. Stehlik ***38** understood that Mike was also upset upon learning that Lewis had conveyed a remainder interest in all of Mike's farmland ****5** to himself and his siblings. Mike's March 1 will makes no mention of his farmland, unlike his previous wills. The will also makes no mention of Lewis and the Rakosniks. The March 1 will devises a rolltop desk and chair to Evelyn, makes a series of specific devises to other family members and charity, and leaves the residuary of Mike's estate to a charity. It also nominates Stehlik to serve as personal representative of the estate, just as the prior wills did.

After preparing the March 1, 2012, will, Stehlik asked Steve Kraviec, an attorney, to prepare another will for Mike. Stehlik had a poor relationship with the Rakosnik siblings and felt it would be less contentious if the will effective at Mike's death had been prepared by another attorney. Stehlik provided Kraviec with the March 1 will. On March 5, Kraviec met with Mike and prepared an additional will, which Mike signed on March 10. The only difference between the March 1 will and the March 10 will was the insertion of an alternate personal representative in the event Stehlik was unable to serve. Following a will contest, a jury determined that the March 10 will was the valid will of Mike.

In July 2013, Stehlik filed an action alleging breach of fiduciary duty, conversion, and civil conspiracy and seeking to reclaim the farm property and other funds for the estate. The parties filed cross-motions for summary judgment. After a hearing, the district court granted summary judgment in favor of the estate. The court ordered the farm property to be placed in constructive trust and, following a further hearing on damages, ordered Lewis and the Rakosniks to repay money damages to the estate. The Rakosniks appeal from those orders.

ASSIGNMENTS OF ERROR

The Rakosniks assign on appeal, restated and reordered, that the district court erred in (1) determining that no genuine ***39** issue of material fact exists on the issue of whether Lewis had authority to transfer the farm property, (2) determining that no genuine issue of material fact exists as to whether Lewis breached his fiduciary duty by distributing the contents of the Edward Jones account, (3) imposing a constructive trust on the farm property, (4) finding there was no evidence that Mike knew Lewis had transferred the farm property and Edward Jones account, and (5) determining that the appellants were collaterally estopped from litigating breach of fiduciary duty related to the transfers.

STANDARD OF REVIEW

An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Grammer v. Lucking,* 292 Neb. 475, 873 N.W.2d 387 (2016). When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted. *Zornes v. Zornes,* 292 Neb. 271, 872 N.W.2d 571 (2015). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.* Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Latzel v. Bartek,* 288 Neb. 1, 846 N.W.2d 153 (2014).

****6** ANALYSIS

Constructive Fraud.

As an initial matter, we note that the events in this case occurred before the effective date of the new provisions of the Nebraska Uniform Power of Attorney Act, which includes new statutory requirements for gifts made via power of attorney. ***40** See Neb. Rev. Stat. §§ 30–4024 & 30–4040 (Cum. Supp. 2014). Undoubtedly, the standard for interpreting gifting powers in future powers of attorney will be impacted by the requirements of this act. Therefore, this case should be understood to reflect analysis under the previously existing law before the enactment of the Nebraska Uniform Power of Attorney Act.

The Rakosniks' first two assignments of error involve whether genuine issues of material fact existed that precluded the district court from finding on summary judgment that Lewis' transfer of farm property and the Edward Jones account proceeds to his siblings breached his fiduciary duties.

[1] **[2]** Nebraska law is concerned with the potential for abuse and fraud that exists when a fiduciary has broad powers to control another person's property. See *In re Estate of Hedke,* 278 Neb. 727, 775 N.W.2d 13 (2009). Because of this concern, the Nebraska Supreme Court has held that a party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make a gift to a third party with a close relationship to the attorney in fact. *Id.* Whether the fiduciary acted in good faith or had actual intent to defraud is immaterial; when these circumstances are shown, the law presumes constructive fraud. *Id.* Once a prima facie case of fraud is established, the burden shifts to the fiduciary to demonstrate that the gift was (1) made pursuant to power expressly granted in the power of attorney document and (2) made pursuant to the clear intent of the donor. The fiduciary also bears the burden of proving the fairness of the transaction. *Eggleston v. Kovacich,* 274 Neb. 579, 742 N.W.2d 471 (2007).

The evidence presented at the summary judgment hearing indisputably establishes that Lewis used Mike's power of attorney to make gifts to himself and his siblings, the Rakosniks. This established a prima facie case of fraud. We therefore address whether there is a genuine issue of material fact as to whether the gifts were made pursuant to power expressly ***41** granted in the power of attorney and were made pursuant to Mike's clear intent.

Lewis' Transfer of Farm Property.

We first consider whether the Rakosniks have met their burden to demonstrate that Lewis' transfer of the farm property was authorized by the power of attorney and made pursuant to Mike's clear intent.

Power Granted in Power of Attorney.

[3] **[4]** The power of attorney granted Lewis "all powers over my estate and affairs which I can or could exercise, including but not limited to the power to make gifts." A blanket power to gift is not effective to authorize self-dealing. Where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument. *Crosby v. Luehrs,* 266 Neb. 827, 669 N.W.2d 635 (2003). A long line of Nebraska Supreme Court cases have held that "no gift may be made by an attorney in fact to himself or herself unless the power to make *such a gift* is expressly granted in the instrument and there is shown clear intent on the part of the principal to make *such a gift*." *Archbold v. Reifenrath,* 274 Neb. 894, 901, 744 N.W.2d 701, 707 (2008) (emphasis supplied). See, ****7** also, *Cheloha v. Cheloha,* 255 Neb. 32, 582 N.W.2d 291 (1998); *Mischke v. Mischke,* 247 Neb. 752, 530 N.W.2d 235 (1995).

Further, courts in other jurisdictions have held based upon the same policy concerns that the broad power to gift in a power of attorney is ineffective to empower a fiduciary to make a self-dealing gift without a specific statement that self-dealing is permissible. For example, in *Bienash v. Moller,* 721 N.W.2d 431, 436 (S.D. 2006), the South Dakota Supreme Court upheld summary judgment against fiduciaries who utilized a power of attorney that contained a power to "make gifts" to make changes to the principal's financial instruments ***42** that benefited themselves. Citing *Crosby v. Luehrs, supra,* the South Dakota court held that the power to gift did not authorize self-dealing gifts.

[5] Even if a transaction is not a direct gift, but indirectly promotes the fiduciary's interest, it is still considered self-dealing. See *id*. (finding funds that eventually pass through principal's estate to fiduciary constitute unauthorized self-dealing).

[6] Additionally, where a power of attorney does not expressly permit gratuitous self-dealing transfers, a principal's oral authorization is not effective to empower the agent to utilize broad powers in the power of attorney instrument to make gifts. See, *Cheloha v. Cheloha, supra* (oral authorization to make gifts to agent's wife and child were ineffective because power of attorney did not contain power to make gifts); *Fletcher v. Mathew,* 233 Neb. 853, 448 N.W.2d 576 (1989) (adopting rule that power to make any gift must be expressly granted in power of attorney instrument itself; oral authorization to gift is ineffective).

Mike's power of attorney authorized Lewis to "make gifts." However, the power of attorney did not authorize Lewis to self-deal; therefore, Lewis had no authority to effectuate a self-interested transfer of the farm property. See *Crosby v. Luehrs, supra*.

Although the Rakosniks attempt to distinguish Lewis' transfer of farm property to them from his transfer of farm property to himself, it is not possible to divide the transaction in this manner. Lewis transferred all of the farm property via a single warranty deed from Mike to himself and the Rakosniks as tenants in common each enjoying an undivided interest in the property, subject to a life interest in Mike. Lewis effectuated the transaction by affixing a single signature on the warranty deed. The power of attorney, therefore, either did or did not grant him the power to sign that deed and effectuate that transfer; any attempt to partition the farm property transfer into separate transfers to Lewis and to each of his siblings is an inaccurate description of the manner in which Lewis and ***43** the Rakosniks chose to structure the transfer and would at most be legal fiction.

We find that the warranty deed, which transfers an undivided interest in the farm property to Lewis and the Rakosniks equally in a single transaction, involves gratuitous self-dealing that is not authorized by the power of attorney. See *Crosby v. Luehrs,* 266 Neb. 827, 669 N.W.2d 635 (2003) (holding that where fiduciary argues that power of attorney allowed for self-dealing, that power must be specifically authorized in instrument). Although the power of attorney contains the power to gift, the farm property transfer inextricably involves self-dealing, which must be explicitly authorized in a power of attorney. Because the power of attorney did not authorize self-dealing, Lewis did not have the power to sign the warranty deed as prepared. We agree with the trial court's determination that the transfer was ****8** void ab initio. Because the defendants cannot show that the power of attorney authorized Lewis to sign the warranty deed transferring property to himself and his siblings, we affirm the district court's grant of summary judgment regarding the farm property transfer without reaching the intent prong of the analysis.

Transfer of Edward Jones Account.

[7] As to the Edward Jones account, our analysis differs. As noted above, Stehlik has established a case for constructive fraud by showing that Lewis had a power of attorney and used that power of attorney to make gifts of Mike's property to his siblings. See *In re Estate of Hedke,* 278 Neb. 727, 775 N.W.2d 13 (2009). We note that Lewis did not directly take a share of the investment account, but, rather, put "his share" into Mike's account, from which Lewis made unauthorized withdrawals for his own benefit. Because the transfers of the Edward Jones account proceeds are separable from any self-dealing gifts to Lewis himself, we find that the gifting power in the power of attorney is sufficient to authorize these gifts and we turn to the intent prong of the analysis. See *Eggleston v. Kovacich,* 274 Neb. 579, 742 N.W.2d 471 (2007).

***44** Given the gifting power in the power of attorney, the propriety of this transfer rests upon whether evidence in the record, when viewed in the light most favorable to the Rakosniks, could support a finding that Mike clearly intended to transfer the Edward Jones account funds to Lewis' siblings before his death.

The Rakosniks argue that the gifting power in the power of attorney, Lewis' conversations with Mike, and the fact that the 2005 will left the Rakosniks the residuary of Mike's estate together create an inference that Mike authorized the transfer. We disagree.

[8] Lewis testified in a deposition that he learned about the Edward Jones account through a conversation with Evelyn and that he then utilized his power of attorney to telephone Edward Jones and learn the specifics of the account. He discussed the account with Mike and gained the understanding that the money was "to go to [Mike's] kin." This testimony does not establish that Mike instructed Lewis to disburse the Edward Jones account immediately rather than waiting for the money to pass via the will after Mike's death.

[9] Additionally, the fact that Lewis and the Rakosniks were the remainder beneficiaries of Mike's 2005 will does not demonstrate Mike's clear intent to give them the contents of his Edward Jones account during his lifetime. A will is evidence only of a person's plan for the disposition of his property upon his death and does not establish donative intent for an inter vivos gift.

Because there is no evidence in the record that Lewis distributed the Edward Jones account pursuant to the clear intention of Mike, the district court did not err in granting summary judgment to Stehlik on this issue.

Constructive Trust.

The Rakosniks next argue that the district court erred in imposing a constructive trust over the farm property because the transfer was valid and not procured by fraud.

***45** **[10]** A party seeking to establish a constructive trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy ****9** the property so obtained. *Eggleston v. Kovacich,* 274 Neb. 579, 742 N.W.2d 471 (2007).

As discussed above, we disagree with the Rakosniks that the farm transfer was proper. The deed involved self-dealing by Lewis, and the power of attorney does not expressly allow for self-gifting. Accordingly, Lewis cannot rebut Stehlik's prima facie case of constructive fraud. See *id.* Given our above analysis and following a de novo review of the record taking all facts in the light most favorable to the Rakosniks, we hold that the district court did not err in finding that the Rakosniks' title to the farm property was procured by fraud and that they should not equitably be allowed to enjoy the property. Accordingly, this assignment of error is without merit.

Knowledge of Transfers.

[11] The Rakosniks next assign that the district court erred in finding that there was no evidence on the record that Mike knew of the transfers. Mike's *knowledge* of the transfers, however, would not defeat summary judgment. The question on summary judgment is whether there are genuine issues of *material* fact. *Amanda C. v. Case,* 275 Neb. 757, 749 N.W.2d 429 (2008). A fact is material only if it would affect the outcome of the case. *Id.* The relevant inquiry is not whether Mike knew of the transfers but whether Mike clearly intended for Lewis to make the transfers. *Eggleston v. Kovacich, supra*. We have determined, on de novo review, that Lewis presented no evidence that Mike clearly intended him to transfer the Edward Jones account during Mike's lifetime. And because the farmland transfer involved self-dealing which was not expressly authorized in the power of attorney, Mike's ***46** knowledge of this transfer is also not material. Accordingly, the district court's finding of fact regarding his knowledge of the transfers is not an issue of material fact.

Issue Preclusion.

[12] The Rakosniks finally assign that the district court erred in finding that they were precluded by Lewis' prior criminal convictions from litigating whether Lewis' transfers were breaches of his fiduciary duties. Given our determination above that Lewis' transfers breached his fiduciary duties, we need not reach the issue of whether the Rakosniks' arguments also fail because they are precluded by collateral estoppel. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.,* 291 Neb. 642, 868 N.W.2d 67 (2015).

CONCLUSION

We determine that the district court did not err in determining on the merits of the issues that Stehlik was entitled to summary judgment as a matter of law. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

All Citations

24 Neb.App. 34, 881 N.W.2d 1

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Declined to Follow by Studt v. Black Hills Federal Credit Union, S.D., May 20, 2015

257 Wis.2d 637, 2002 WI App 235
Court of Appeals of Wisconsin.

Heidi PRAEFKE, Plaintiff–Appellant, †
v.
AMERICAN ENTERPRISE LIFE INSURANCE CO. and Julie Gray, Defendants–Respondents.

No. 01–2916.
|
Submitted on Briefs June 7, 2002.
|
Opinion Filed Aug. 14, 2002.

Synopsis
Attorney-in-fact who used durable power of attorney to designate herself as sole beneficiary of annuity contracts sued annuity insurer and former beneficiary to collect under annuities. The Circuit Court, Kenosha County, Michael S. Fisher, J., granted summary judgment to former beneficiary and insurer finding attorney-in-fact had violated her fiduciary duty of loyalty to principal by engaging in self-dealing. Attorney-in-fact appealed. The Court of Appeals, Brown, J., held that: (1) attorney-in-fact engaged in self-dealing by making gratuitous transfers of principal's assets that were not authorized by power of attorney, and (2) as a matter of first impression, affidavit in which attorney-in-fact claimed she had oral authority from principal to make gratuitous transfers was inadmissible.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (10)

[1] **Appeal and Error** Written documents or instruments in general

The construction of a power of attorney presents a question of law that the Court of Appeals reviews de novo.

1 Case that cites this headnote

[2] **Principal and Agent** Nature of agent's obligation

An attorney-in-fact has a fiduciary obligation to the principal.

2 Cases that cite this headnote

[3] **Principal and Agent** Individual Interest of Agent

An agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest.

2 Cases that cite this headnote

[4] **Principal and Agent** Construction of letters or powers of attorney

The powers of the attorney-in-fact are strictly construed and are interpreted to grant only those powers that are clearly delineated or specified.

[5] **Principal and Agent** Individual Interest of Agent

In the principal-agent relationship, a general authority to deal with assets is not sufficient to exculpate an attorney-in-fact from a charge of self-dealing.

1 Case that cites this headnote

[6] **Principal and Agent** Transactions between principal and agent in general

The prohibition against self-dealing by an attorney-in-fact is not linked to any duty an agent may have to third parties, but is primarily addressed to the potential for fraud that exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated.

9 Cases that cite this headnote

[7] **Principal and Agent** Individual Interest of Agent

Where a fiduciary argues that the power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument.

14 Cases that cite this headnote

[8] **Annuities** Breach of fiduciary duty

Attorney-in-fact who used durable power of attorney to designate herself as sole beneficiary on annuity contracts violated her fiduciary duty of loyalty to principal by engaging in self-dealing, where power of attorney did not specifically allow attorney-in-fact to gift property to herself or contain an unlimited or unbridled gifting power.

12 Cases that cite this headnote

[9] **Annuities** Persons Entitled to Proceeds; Annuitants and Beneficiaries

Affidavit in which attorney-in-fact claimed she had oral authority from principal to make gratuitous transfers and to change annuity contracts to designate attorney-in-fact as sole beneficiary was inadmissible in action brought against annuity insurer and former beneficiary to collect under annuities.

1 Case that cites this headnote

[10] **Principal and Agent** Admissibility of evidence

Principal and Agent Evidence

Principal and Agent Admissibility

Extrinsic evidence of principal's intent to allow gratuitous transfers of a principal's assets under a power of attorney is not admissible.

5 Cases that cite this headnote

Attorneys and Law Firms

***639** ****457** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of John P. Higgins of Guttormsen, Hartley, Guttormsen & Wilk, LLP, of Kenosha.

On behalf of the defendant-respondent American Enterprise Life Insurance Co., the cause was submitted on the brief of David E. Celebre of Kenosha.

On behalf of the defendant-respondent Julie Gray, the cause was submitted on the brief of Donal M. Demet of Demet & Demet, S.C., of Milwaukee.

***640** Before NETTESHEIM, P.J., BROWN and ANDERSON, JJ.

Opinion

¶ 1 BROWN, J.

Heidi Praefke appeals from a grant of summary judgment in favor of American Enterprise Life Insurance Co. (American Enterprise) and Julie Gray. Praefke alleges that American Enterprise failed to act in good faith by refusing to disburse certain annuities to Praefke as the sole beneficiary. Gray and American Enterprise claim that Praefke became the sole beneficiary to these accounts and other funds as a result of unlawful self-dealing while acting as power of attorney for a mutual friend, Betty Glasslein. They assert that the power of attorney did not authorize Praefke to make gratuitous transfers of Glasslein's assets to herself or her family and that by doing so, Praefke breached the fiduciary duties she owed to Glasslein as attorney-in-fact. Praefke responds that she did not breach her fiduciary duty of loyalty because the power of attorney agreement grants her the authority to make gratuitous transfers to herself and others. Alternatively, Praefke argues that if the power of attorney agreement does not clearly grant such broad authority, she can prove by evidence extrinsic to the agreement that the gratuitous transfers were made in accordance with Glasslein's express oral wishes. Pursuant to *Alexopoulos v. Dakouras,* 48 Wis.2d 32, 179 N.W.2d 836 (1970), we determine that Praefke lacked authority to make gifts to herself because the agreement did not contain express written authorization. Furthermore, because the power of attorney did not expressly authorize Praefke to make gifts to herself, extrinsic evidence of Glasslein's intent to allow such gifts is not admissible. We affirm the grant of summary judgment in favor of Gray and American Enterprise.

***641** ¶ 2 Praefke was Glasslein's attorney-in-fact under a durable power of attorney executed on April 26, 1996. Glasslein had been a friend of Praefke's mother, Irmgard Wiemer, since 1953. Approximately one year after Glasslein executed the power of attorney, she was diagnosed with an Alzheimer's type of dementia.

¶ 3 Following the diagnosis of dementia, Praefke as attorney-in-fact changed the payable on death beneficiary designations on most of Glasslein's assets to herself. On March 19, 1998, she executed a customer service request form to change the beneficiary ****458** designation on a $60,000 annuity contract naming herself the sole beneficiary. Prior to the change, Praefke was a co-beneficiary with Glasslein's former neighbor, Gray. On April 5, 1997, Praefke executed a customer service request form to change the beneficiary designation on a $75,000 annuity contract naming herself the sole beneficiary. Prior to the change, the proceeds were payable to Gray and another neighbor, Duane Paul. In addition, on May 1, 1997, Praefke as attorney-in-fact established a $50,000 insurance investment account with Putnam Investment Services. Praefke was named the sole beneficiary of the account. The source of the funds used to establish this account was a TCF Bank savings account that had belonged to Glasslein. Finally, Praefke made cash gifts out of Glasslein's checking account to herself ($10,000), Wiemer ($7500), Gray ($5000) and Gray's son ($2000).

¶ 4 After Glasslein's death on February 18, 2000, Praefke made claim to American Enterprise for the proceeds of the annuity accounts. After an investigation, American Enterprise refused to disburse the proceeds unless Praefke would: (1) obtain a waiver from Gray as the former beneficiary, or (2) provide a court order directing payment to her, or (3) consent to turning ***642** the claim over to the court as an interpleader. Praefke did not agree to this proposal.

¶ 5 Thereafter, Praefke brought suit against American Enterprise to collect under the annuities, naming Gray as a defendant. Gray counterclaimed seeking to undo the Putnam account and the gifts. The trial court granted summary judgment to Gray and American Enterprise on the basis that Praefke had violated her fiduciary duty of loyalty to Glasslein by engaging in self-dealing.

¶ 6 On appeal, Praefke asserts that the durable power of attorney's broad grant of authority includes the authority to make gifts to herself and others. In addition, she asserts a disputed factual issue exists as to whether Glasslein orally requested and authorized the self-dealing transactions engaged in by Praefke.

[1] ¶ 7 We review summary judgment determinations de novo, employing the same methodology as the trial court. *Green Spring Farms v. Kersten,* 136 Wis.2d 304, 314–15, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2) (1999–2000). [1] The construction of a power of attorney presents a question of law that we review de novo. *See* *Borchardt v. Wilk,* 156 Wis.2d 420, 427, 456 N.W.2d 653 (Ct.App.1990).

¶ 8 As a preliminary matter, we observe that Glasslein executed this document at a time when her capacity to do so was unchallenged. Indeed, no one has questioned the adequacy of the document except to the ***643** extent that it was used to make gifts and to self-deal. In addition, Praefke has stipulated that the instrument does not contain specific language that states the agent may make gifts or has gifting powers.

[2] **[3]** **[4]** ¶ 9 We begin our discussion with a review of the nature of the principal and attorney-in-fact relationship. It is a well-established tenet of agency law that an attorney-in-fact has a fiduciary obligation to the principal. *Alexopoulos,* 48 Wis.2d at 40, 179 N.W.2d 836. The agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest. ****459** *Bank of Cal. v. Hoffmann,* 255 Wis. 165, 171, 38 N.W.2d 506 (1949). In addition, the powers of the attorney-in-fact are strictly construed and are interpreted to grant only those powers that are clearly delineated or specified. *See First Nat'l Bank of Omro v. Bean,* 141 Wis. 476, 480, 124 N.W. 656 (1910).

[5] ¶ 10 The outcome of this case is controlled by *Alexopoulos,* 48 Wis.2d at 40–41, 179 N.W.2d 836. In that case, the attorney-in-fact was given a broad power to perform all acts that the donor of the power could perform. *Id.* at 35, 179 N.W.2d 836. The attorney-in-fact concluded that the power was tantamount to a gift because he had the same authority to dispose of assets that the principal had were he present. *Id.* at 40, 179 N.W.2d 836. The court rejected this "bizarre" argument based on the fiduciary nature of the relationship. *Id.* The court stated that unless the power of attorney specifically allows the agent to gift property to himself or herself, or contains an "unlimited or unbridled" gifting power, the agent lacks authority to make gratuitous transfers. *Id.* at 41, 179 N.W.2d 836. Simply stated, *Alexopoulos* stands for the proposition that in the principal-agent relationship, a general authority to deal ***644** with assets is not sufficient to exculpate an attorney-in-fact from a charge of self-dealing. *See* *State v. Hartman,* 54 Wis.2d 47, 56–57, 194 N.W.2d 653 (1972) (discussing *Alexopoulos*).

¶ 11 Praefke argues that *Alexopoulos* is inapplicable because in that case the claim was made by the estate on behalf of the deceased principal against the fiduciary. Here, Praefke notes that the counterclaim is by a third party, Gray, against the fiduciary. Praefke contends that she owes no fiduciary duty to Gray or any third parties. Instead, under *Alexopoulos,* the duty is owed only to the principal. Praefke reasons that Gray has failed to show that her actions harmed the principal.

[6] **[7]** ¶ 12 Praefke misses the basic policy concern underlying *Alexopoulos* and related law that forbids self-dealing. That concern is not linked to any duty an agent may have to third parties, but is primarily addressed to the potential for fraud that exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated. A fiduciary will not be allowed to feather his or her own nest unless the power of attorney specifically allows such conduct. In short, where the fiduciary argues that the power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument.

[8] ¶ 13 We have also considered that *Alexopoulos* does state that self-dealing may be allowed where there is an "unlimited or unbridled power of disposition." *Alexopoulos,* 48 Wis.2d at 41, 179 N.W.2d 836. Here, the power of attorney document did contain broad language in that it authorized Praefke "to do and perform everything for ***645** the purpose of ... managing, conveying ... my property, real as well as personal ... as fully as I could do and perform if personally present." However, we observe that the power of attorney in *Alexopoulos* had similar language and the supreme court still determined that the fiduciary had breached his duty. *Id.* at 40–41, 179 N.W.2d 836.[2] Therefore, we conclude that *Alexopoulos* governs this case.

****460** **[9]** ¶ 14 Praefke next asserts that Glasslein made statements allegedly modifying the terms of the written agreement. She offered the trial court two affidavits in support of her position, one from Wiemer, her mother, and her own. The trial court excluded the Wiemer affidavit because Praefke had failed to include Wiemer as a witness pursuant to the scheduling order. Praefke does not seek review of this order and therefore we do not consider the Wiemer affidavit on appeal.

¶ 15 Thus, the only evidence left to consider is Praefke's own self-serving affidavit in which she alleges that Glasslein requested her as attorney-in-fact to make the beneficiary changes to the American Enterprise annuities.[3] In this affidavit, she also claims that ***646** the funds used to establish the Putnam investment account were certificates of deposit worth $50,000 previously purchased by Glasslein and payable on death to Praefke.

¶ 16 We have already established in this case the bright-line rule that an attorney-in-fact may not make a gift to himself or herself unless there is an explicit intent in writing from the principal allowing the gift. Relying on *Minnesota Stoneware Co. v. McCrossen,* 110 Wis. 316, 322, 85 N.W. 1019 (1901), Gray argues that extrinsic evidence of the principal's oral authorization to allow such gifts is inadmissible. *Minnesota Stoneware* involved an unauthorized conveyance of real estate under a simple power of attorney. *Id.* The supreme court held that "[a] power to sell and convey real estate can no more be extended or changed by parol than can a conveyance of real estate." *Id.* To the extent that the case before us involves an alleged oral amendment to a durable power of attorney authorizing the transfer of assets that are not real estate, a question of first impression presents itself.

¶ 17 We note that courts in other jurisdictions are divided on the question of whether they will accept evidence of oral authorization to make gifts when the ***647** instrument creating the power of attorney does not specifically grant such power. One case stands unequivocally for the proposition that an oral authorization will not permit an attorney-in-fact to make gifts of the principal's assets and that is *Kunewa v. Joshua,* 83 Hawai‘i 65, 924 P.2d 559 (App.1996). The court in *Kunewa* offers compelling reasons for the rule prohibiting extrinsic evidence:

> When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney—of which outright transfers for less than value to the attorney-in-fact [himself or] herself are the most obvious—the justification for such a flat rule is apparent. And its justification is made even more apparent when one considers the ease with which such a rule can be accommodated by principals and their draftsmen.

****461** *Id.* at 565 (citation omitted). *See also* *Fender v. Fender,* 285 S.C. 260, 329 S.E.2d 430, 431 (1985) (rejecting purported oral authorization to make gifts in order to avoid fraud and abuse); *Estate of Swanson v. United States,* 46 Fed. Cl. 388, 392 (2000) (applying California law to conclude that a power of attorney may only be altered or expanded by another writing), *aff'd,* 2001 WL 569137 (Fed.Cir. May 25, 2001).[4]

***648** ¶ 18 We believe the interest of justice supports the application of this rule. A durable gifting power is a particularly dangerous power in that it survives the principal's personal ability to monitor its exercise. According to one commentator, the current widespread financial exploitation of the elderly is directly attributable to durable gifting powers and their inherent potential for fraud and abuse. Hans A. Lapping, *License to Steal: Implied Gift–Giving Authority and Powers of Attorney,* 4 ELDER L.J. 143, 167 (1996). This commentator has called the abuse of powers of attorney an "invisible epidemic" because the victims, who are usually elderly and infirm, may be unaware of what is happening or too embarrassed or frightened to assert their rights. *Id.*

¶ 19 In addition, people of advanced age, especially those who are isolated and dependent, commonly tell friends and family what they believe those individuals want to hear to promote harmony and companionship. It would be imprudent for this court to allow Glasslein's alleged statements to Praefke to negate Glasslein's formal expression of her intent as embodied in the power of attorney agreement. Glasslein could have ensured that Praefke would receive the bulk of her assets by drafting a power of attorney that explicitly ***649** authorized self-dealing. That she did not do so is perhaps more telling of her true intent than any alleged statements to Praefke.

[10] ¶ 20 In closing, we hold that an attorney-in-fact may not make gratuitous transfers of a principal's assets unless the power of attorney from which his or her authority is derived expressly and unambiguously grants the authority to do so. As a corollary to this bright-line rule, extrinsic evidence of the principal's intent to allow such gifts is not admissible. The power of attorney in this case did not grant such power to Praefke. The affidavit in which Praefke claims she had oral authority to make gratuitous transfers may not be considered by the trial court. Thus, we conclude that by making the unauthorized gratuitous transfers to herself and others Praefke breached her fiduciary duty of loyalty to Glasslein.[5] Gray is ****462** entitled to her fractional interest in the American Enterprise annuities, the Putnam investment fund and in the property constituting the gifts. These amounts are set forth in the trial court's summary judgment decision. Praefke does not challenge the trial court's calculations on appeal. The grant of summary judgment in favor of American Enterprise and Gray is affirmed.

Order affirmed.

All Citations

257 Wis.2d 637, 2002 WI App 235, 655 N.W.2d 456

Footnotes

† Petition for review denied Oct. 21, 2002.

1 All references to the Wisconsin Statutes are to the 1999–2000 version.

2 The power of attorney in *Alexopoulos v. Dakouras,* 48 Wis.2d 32, 40, 179 N.W.2d 836 (1970), authorized the agent to receive "for me and in my name, place and stead ... all sums of money" owed to the principal and to "deal in any property" and "transact ... business of what nature and kind soever." The supreme court refused to equate this broad power with an unrestricted power of disposition that would allow self-dealing. *Id.*

3 American Enterprise and Gray argue that this affidavit, which also claims Glasslein was in full use of her mental faculties when she requested the change in beneficiaries, is contradicted by deposition testimony showing that all of the transactions took place after Glasslein became incapacitated and she could therefore not have authorized or thereafter ratified them. The trial court apparently agreed with American Enterprise and Gray, stating that "[t]he transactions all occurred after it was established Betty Glasslein was suffering from diseases which made her incompetent." Praefke asserts that the trial court's summary judgment decision is based upon the disputed material fact regarding Glasslein's competency. However, our holding that an attorney-in-fact may not self-deal based upon oral authorization renders moot the issue of Glasslein's competency to provide such authorization.

4 The court in *Kunewa v. Joshua,* 83 Hawai'i 65, 924 P.2d 559, 565 (App.1996), recognized that several other jurisdictions have adopted a similar rule, such as Alaska, New York and Florida. In addition, the Internal Revenue Service requires that all powers of attorney explicitly grant gift-giving powers if the principal wants the gifted property to be excluded from his or her estate. *See* Hans A. Lapping, *License to Steal: Implied Gift–Giving Authority and Powers of Attorney,* 4 ELDER L.J. 143, 145 (1996). However, the position set forth in *Kunewa* and adopted by the Internal Revenue Service is not universally accepted. Even cases which accept the general rule that the authority to make gifts must be explicitly set out in the instrument will at the same time consider other evidentiary and factual circumstances apart from the language in the instrument in deciding whether the attorney-in-fact was authorized to make a gift. *See* Lapping, *supra,* at 160–63 (discussing cases that allow extrinsic evidence of the principal's intent and noting that such cases are a minority position).

5 Praefke raises claims of estoppel and bad faith. Because Praefke is not entitled to the funds as sole beneficiary under the annuity contracts, American Enterprise did not act in bad faith by refusing to disburse the funds nor can it be estopped from denying Praefke's claim.

End of Document

2018 IL App (4th) 170443
Appellate Court of Illinois, Fourth District.

Kenny COLLINS and Linda Richard, Plaintiffs–Appellees,
v.
Patricia NOLTENSMEIER, Defendant–Appellant.

NO. 4–17–0443
|
FILED April 5, 2018

Synopsis
Background: Principal's brother filed petition in probate court, contesting validity of principal's will and alleging that agent breached her fiduciary duty under document granting her power of attorney for property. The Circuit Court, Cass County, Bob G. Hardwick, Jr., J., granted summary judgment in favor of principal's brother. Agent appealed.

Holdings: The Appellate Court, Harris, J., held that:

[1] power of attorney document did not authorize agent to change beneficiary on principal's retirement account from principal's brother to herself;

[2] agent failed to offer evidence outside power of attorney document to rebut presumption that she engaged in fraudulent self-dealing; and

[3] trial court did not abuse its discretion in finding that contingency fee award of $14,832.15 was reasonable.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (22)

[1] **Principal and Agent** Nature of agent's obligation

A power of attorney creates a fiduciary relationship as a matter of law. 755 Ill. Comp. Stat. Ann. 45/2-7(a), 45/2-7(b).

[2] **Principal and Agent** Individual Interest of Agent

Principal and Agent Evidence

The mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining any selfish benefit for herself; if the agent seeks or obtains such benefit, the transaction is presumed to be fraudulent.

1 Case that cites this headnote

[3] **Principal and Agent** Evidence

Under a power of attorney for property, any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent.

[4] **Principal and Agent** Evidence

Once a fraudulent transaction by an agent under a power of attorney for property has been alleged, the burden then shifts to the agent to prove by clear and convincing evidence that the transaction was fair and did not result from his undue influence over the principal.

[5] **Principal and Agent** Evidence

The presumption of fraud, arising from a transaction by an agent under a power of attorney for property that either materially benefits the agent or is for the agent's own use, is rebuttable if it can be shown that the agent exercised good faith and did not betray the confidence placed in her.

1 Case that cites this headnote

[6] **Principal and Agent** Evidence

If the agent rebuts the presumption of fraud, arising from a transaction that either materially benefits an agent under a power of attorney for property or that is for the agent's own use, the transaction in question will be upheld. 755 Ill. Comp. Stat. Ann. 45/2-7(a).

[7] **Principal and Agent** Evidence

A rebuttable presumption of fraud, arising from a transaction that materially benefits an agent under a power of attorney for property or that is for the agent's own use, is not evidence in itself, but arises as a rule of law or legal conclusion from the facts proved.

[8] **Principal and Agent** Evidence

A rebuttable presumption of fraud, arising from a transaction that materially benefits an agent under a power of attorney for property or that is for the agent's own use, does not shift the burden of proof; its only effect is to create the necessity of evidence to meet the prima facie case created thereby, and which, if no proof to the contrary is offered, will prevail.

[9] **Principal and Agent** Construction of letters or powers of attorney

Principal and Agent Construction of letters or powers of attorney

A written power of attorney must be strictly construed so as to reflect the clear and obvious intent of the parties.

[10] **Principal and Agent** Evidence

Section of principal's document granting power of attorney for property, which granted agent general power to name or change beneficiaries under any beneficiary form or contractual agreement, did not authorize agent to change beneficiary on principal's retirement account from principal's brother to agent, and thus language of document failed to overcome presumption that agent engaged in fraudulent self-dealing when she made such beneficiary change to retirement account; document did not specifically grant such power.

[11] **Principal and Agent** Evidence

Agent under document granting power of attorney for property, which document did not authorize agent to change beneficiary on principal's retirement account from principal's brother to agent, failed to offer evidence outside power of attorney document to rebut presumption that agent engaged in act of fraudulent self-dealing when she made such beneficiary change to principal's retirement account.

[12] **Principal and Agent** Evidence

Some of the significant factors to be considered, in determining whether an agent under a power of attorney for property has rebutted the presumption that she engaged in an act of fraudulent self-dealing, include whether the fiduciary made a frank disclosure to the principal of the information he had, whether the fiduciary paid adequate consideration, and whether the principal had competent and independent advice.

[13] **Principal and Agent** Judgment and measure of damages

An award of attorney fees, under the statute entitling a principal or a principal's successors in interest to recovery for an agent's violation of the duty of care under a power of attorney document, does not involve an attorney's right to recover payment from his client pursuant to the express terms of their contract; instead, an award determination involves an attorney's right to statutory fees against his clients' tortfeasor. 755 Ill. Comp. Stat. Ann. 45/2-7(f).

[14] **Costs, Fees, and Sanctions** Contingency or certainty of compensation; effect of fee agreement

The existence of a contingent fee contract is a relevant factor to be considered in determining the reasonableness of attorney fees, for purposes of statute entitling a principal or a principal's successors in interest to recovery for an agent's violation of the duty of care under a power of attorney document. 755 Ill. Comp. Stat. Ann. 45/2-7(f).

[15] **Wills** Counsel Fees and Expenses

Trial court did not abuse its discretion in finding that contingency fee award of $14,832.15 for attorney who represented principal's brother was reasonable, in action by brother contesting validity of principal's will and alleging that agent breached her fiduciary duty under document granting her power of attorney for property when she changed beneficiary on principal's retirement account from principal's brother to herself.

[16] **Costs, Fees, and Sanctions** Necessity of Authorization for Award; "American Rule"

The general rule is that parties in a lawsuit are responsible for their own attorney fees.

[17] **Costs, Fees, and Sanctions** Statutory or contractual authorization

A court may award attorney fees if they are expressly authorized by statute or by agreement of the parties.

1 Case that cites this headnote

[18] **Costs, Fees, and Sanctions** Reasonableness in general

Only those attorney fees that are reasonable will be allowed.

[19] **Appeal and Error** Attorney Fees

The trial court's decision in awarding statutory attorney fees will not be reversed absent an abuse of discretion.

1 Case that cites this headnote

[20] **Costs, Fees, and Sanctions** Contingency or certainty of compensation; effect of fee agreement

An attorney fee award cannot be based solely on an amount necessary to satisfy a contingent fee agreement existing between an attorney and a client.

1 Case that cites this headnote

[21] **Costs, Fees, and Sanctions** Contingency or certainty of compensation; effect of fee agreement

While a court may consider the existence of a contingent fee agreement in awarding attorney fees, it is only one factor of many to be examined to determine the reasonableness of the award.

[22] **Costs, Fees, and Sanctions** Reasonableness in general

Where a statute allows fees to be paid to the other party, the fee must be reasonable regardless of the agreement between the litigant and his attorney.

***497** Appeal from Circuit Court of Cass County, No. 11CH23, Honorable Bob G. Hardwick, Jr., Judge, Presiding.

Attorneys and Law Firms

Luke A. Thomas, of McClure, Thomas & Thomas, of Beardstown, for appellant.

Jerry Tice and Bill Siders, of Grosboll, Becker, Tice & Barr, of Petersburg, for appellees.

OPINION

PRESIDING JUSTICE HARRIS delivered the judgment of the court, with opinion.

****365** ¶ 1 Defendant, Patricia Noltensmeier, appeals from the trial court's order granting summary judgment in favor of plaintiffs, Kenny Collins and Linda Richard, who had sued defendant for a breach of fiduciary duty and conversion. Defendant claims she had the authority pursuant to a power of attorney for property to change decedent's beneficiaries from plaintiffs to herself. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant and Billy D. Collins were involved in a long-term romantic relationship when Billy died on January 23, 2011, at his home from a recently diagnosed terminal illness. Defendant had acted as Billy's caretaker. Approximately one week before he died, Billy executed a will and an Illinois Statutory Short Form Power of Attorney for Property. Each document ***498 **366** was a preprinted form containing handwritten inserts in the blanks.

¶ 4 Billy's power of attorney, dated January 16, 2011, appointed defendant as his agent. Paragraph three of the document indicated the agent had the following powers, in addition to those listed previously: "power to make gifts, exercise powers of appointment, name or change beneficiaries under any beneficiary form or contractual arrangement."

¶ 5 Billy's will, also dated January 16, 2011, named defendant, his "domestic partner," as the sole beneficiary of his real property, personal property, and the "rest, residue, and remainder" of his estate. He also named defendant as his executor.

¶ 6 Defendant filed Billy's will with the Cass County circuit court in March 2011. In May 2011, plaintiff Kenny Collins, Billy's brother, filed a petition to contest the validity of Billy's will in Cass County case No. 11–P–15, alleging Billy was of unsound mind, subjected to undue influence from defendant, and not told the document he was signing was a will.

¶ 7 Kenny and plaintiff Linda Richard, Billy's niece, filed a three-count complaint in the cause before us, alleging defendant (1) breached her fiduciary duty owed to Billy, (2) wrongfully converted Billy's individual retirement account (IRA) funds to herself, and (3) did so intentionally, willfully and wantonly, and with malice, and therefore was responsible for punitive damages. The case sat dormant for approximately four years.

¶ 8 In April 2015, plaintiffs filed a first amended complaint, alleging the same causes of action with the exception of the claim for punitive damages, which plaintiffs abandoned. Plaintiffs alleged defendant wrongfully and without authorization changed the beneficiary of Billy's IRA, valued at approximately $45,000, from plaintiffs to herself. Defendant had completed the bank's change-of-beneficiary form by using her authority as the agent for Billy.

¶ 9 In May 2016, plaintiffs filed a motion for summary judgment, alleging defendant had engaged in fraudulent self-dealing. Plaintiffs claimed defendant breached her fiduciary duty because the added language in section three of the power of attorney did not authorize her to make the change of beneficiary to herself.

¶ 10 In July 2016, the trial court conducted a hearing on plaintiffs' motion for summary judgment. Both parties represented they had found no Illinois cases on point. Plaintiffs cited *Bienash v. Moller*, 721 N.W.2d 431 (S.D. 2006), a South Dakota case where, under similar factual circumstances, the court held that a power of attorney failed to specifically include language permitting the agent to name himself as a beneficiary. Therefore, the court held, the agent had breached his fiduciary duty to the principal by engaging in self-dealing. *Bienash*, 721 N.W.2d at 437.

¶ 11 In August 2016, the trial court entered a written order, granting plaintiffs' motion, finding no disputed facts remained, and holding, as a matter of law, that plaintiffs were entitled to a judgment in their favor. The court held:

> "The power of self-dealing, *i.e.*, to change the beneficiary to herself, was not included in paragraph [three] and defendant was therefore not entitled to make that change. The original designation of beneficiary form * * * remains valid and [plaintiffs] are each 50% beneficiaries of that [IRA] at Petefish, Skiles and Company Bank."

¶ 12 In September 2016, defendant filed a motion to reconsider, claiming the trial court had overlooked or failed to recognize the added language in paragraph three, which, according to her, specifically authorized ***499 **367** her to change the beneficiary designation. In December 2016, plaintiffs filed a motion for attorney fees.

¶ 13 In January 2017, the trial court conducted a hearing on the pending motions. After considering the arguments of counsel, the court stated:

> "Well, in regard to the motion to reconsider, I am going to deny the motion. There is a duty of someone acting under a power of attorney as agent there has to be a fiduciary duty. The presumption is that, if they are self-dealing, which this is [ ] in my opinion, based upon the

> cases cited from other jurisdictions, I think they do make sense. Of course, they are not totally on point, exactly on point, but the general tenor and principles of those cases are on point that if the recipient of a power of attorney is going to be able to self-deal, in other words, to make gifts and transfers to himself or herself, then there has to be specific authority, in my opinion, granted in the power of attorney. Here the authority was granted to make gifts and to change beneficiaries, but there was no specific authority for [defendant] to self-deal. In other words, to change beneficiaries under accounts to herself. The presumption is it's fraudulent and it has to be overcome by clear and convincing evidence. I don't think there is. I have not seen any evidence. I would have to assume there is evidence, and I don't think from what we discussed before a little earlier there is any extrinsic evidence that would come in, and I think the motion for summary judgment is appropriate, and I will confirm my ruling from last August."

¶ 14 On May 2, 2017, the trial court entered a written order, denying defendant's motion to reconsider and finding defendant had no authority pursuant to the power of attorney to designate herself as a beneficiary of Billy's IRA. The court awarded plaintiffs attorney fees in the amount of one-third of the value of the IRA as of January 23, 2011, pursuant to their contingency fee agreement with counsel.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 The primary issue on appeal is whether plaintiffs are entitled to a judgment as a matter of law. The answer to that question depends on whether the language included in the power of attorney granted defendant the authority to change the beneficiary on Billy's IRA to herself. If it did not, defendant presumably engaged in fraudulent self-dealing. Defendant's act of self-dealing then is invalid unless there is evidence to rebut the presumption of fraud. On appeal, defendant insists the answer lies within the four corners of the document and any analysis of fraudulent self-dealing is irrelevant.

¶ 18 The trial court, finding support from *Bienash*, held that, in order for defendant to have the authority to change a beneficiary designation to herself, the power of attorney document must have specifically stated such. See *Bienash*, 721 N.W.2d at 437. We find the trial court's reliance on *Bienash* was unnecessary. That is, to resolve this case, we need to look no further than the Illinois power-of-attorney statute and our common-law cases addressing an agent's fiduciary duty and the presumption of fraudulent self-dealing.

¶ 19 A. Standard of Review on Summary Judgment

¶ 20 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a ***500 **368** matter of law.' " *Ioerger v. Halverson Construction Co.*, 232 Ill.2d 196, 201, 327 Ill.Dec. 524, 902 N.E.2d 645 (2008) (quoting 735 ILCS 5/21005(c) (West 2000)). "Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from doubt." *Jones v. Chicago HMO Ltd.*, 191 Ill.2d 278, 291, 246 Ill.Dec. 654, 730 N.E.2d 1119 (2000). "Accordingly, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Jackson v. TLC Associates, Inc.*, 185 Ill.2d 418, 424, 235 Ill.Dec. 905, 706 N.E.2d 460 (1998). "On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*." *Bowles v. Owens–Illinois, Inc.*, 2013 IL App (4th) 121072, ¶ 19, 375 Ill.Dec. 211, 996 N.E.2d 1267.

¶ 21 B. Illinois Power of Attorney Act

¶ 22 Defendant contends that the added language in paragraph three of the power of attorney document was sufficient to unequivocally authorize her to "name or change beneficiaries under any beneficiary form or contractual arrangement" to herself included. To the contrary, plaintiffs contend that defendant engaged in fraudulent self-dealing in violation of the fiduciary duty she owed to Billy.

¶ 23 In 1987, the legislature enacted the Illinois Power of Attorney Act (Act) (755 ILCS 45/1–1 to 4–12 (West 2010)). The Act includes article III, the Statutory Short Form Power of Attorney for Property Law (755 ILCS 45/3–1 to 3–5 (West 2010)), which provides a standardized short form power of attorney for individuals to use. The form sets forth optional powers and allows a principal to "design the power of attorney best suited to his or her needs in a simple fashion and be assured that the agent's authority will be honored by third parties with whom the agent deals, regardless of the physical or mental condition of the principal at the time the power is exercised." 755 ILCS 45/3–1 (West 2010).

¶ 24 Section 3–4 of the Act explains the powers listed in the form and states:

> "[T]he agent will not have power under any of the statutory categories (a) through (o) to make gifts of the principal's property, to exercise powers to appoint to others or to change any beneficiary whom the principal has designated to take the principal's interests at death under any will, trust, joint tenancy, beneficiary form or contractual arrangement." 755 ILCS 45/3–4 (West 2010).

[1] [2] [3] [4] ¶ 25 A power of attorney creates a fiduciary relationship as a matter of law. *In re Estate of Shelton*, 2017 IL 121199, ¶ 22, 417 Ill.Dec. 743, 89 N.E.3d 391; 755 ILCS 45/2–7(a), (b) (West 2010) (codifying the agent's duty of care owed to the principal for purposes of the Act). The mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining any selfish benefit for herself; if the agent seeks or obtains such benefit, the transaction is presumed to be fraudulent. See *Shelton*, 2017 IL 121199, ¶ 23, 417 Ill.Dec. 743, 89 N.E.3d 391. "Thus, any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent." *Spring Valley Nursing Center, L.P. v. Allen*, 2012 IL App (3d) 110915, ¶ 12, 365 Ill.Dec. 131, 977 N.E.2d 1230. "Once a fraudulent transaction has been alleged, the burden then shifts to the agent to prove by clear and convincing evidence that the transaction was fair and did not result from his undue influence over the principal." *Shelton*, 2017 IL 121199, ¶ 23, 417 Ill.Dec. 743, 89 N.E.3d 391

***501 **369 [5] [6] [7] [8]** ¶ 26 In other words, the presumption of fraud is rebuttable if it can be shown that the agent exercised good faith and did not betray the confidence placed in her. *Jones v. Washington*, 412 Ill. 436, 441, 107 N.E.2d 672 (1952); *Clark v. Clark*, 398 Ill. 592, 601, 76 N.E.2d 446 (1947); *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 13, 365 Ill.Dec. 131, 977 N.E.2d 1230; *In re Estate of DeJarnette*, 286 Ill.App. 3d 1082, 1088, 222 Ill.Dec. 490, 677 N.E.2d 1024 (1997); *Glass v. Burkett*, 64 Ill.App.3d 676, 680–81, 21 Ill.Dec. 494, 381 N.E.2d 821 (1978). If the agent rebuts the presumption of fraud, the transaction in question will be upheld. See 755 ILCS 45/2–7(a) (West 2010) (agent who acts with due care for the benefit of the principal will not be held liable merely because the act also benefits the agent); *Clark*, 398 Ill. at 602, 76 N.E.2d 446 ("[i]f a conveyance was not procured through improper means attended with circumstances of oppression or overreaching, but was entered into by the grantor with full knowledge of its nature and effect and because of his or her deliberate, voluntary and intelligent desire, the existence of a fiduciary relation does not invalidate the transaction").

> " 'A rebuttable presumption, such as exists here, is not evidence in itself, but arises as a rule of law or legal conclusion from the facts proved. [Citations.] These presumptions "do not shift the burden of proof. Their only effect is to create the necessity of evidence to meet the *prima facie* case created thereby, and which, if no proof to the contrary is offered, will prevail." [Citations.] Stated differently, the presence of a presumption in a case only has the effect of shifting to the party against whom it operates the burden of going forward and introducing evidence to meet the presumption. If evidence is introduced which is contrary to the presumption, the presumption will cease to operate. [Citations.]' " (Internal quotation marks omitted.) *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 461–62, 69 Ill.Dec. 960, 448 N.E.2d 872 (1983) (quoting *McElroy v. Force*, 38 Ill.2d 528, 532–33, 232 N.E.2d 708 (1967)).

¶ 27 Section 2–7(a) of the Act provides, in part, as follows:

> "Whenever a power is exercised, the agent shall act in good faith for the benefit of the principal using due care, competence, and diligence in accordance with the terms of the agency and shall be liable for negligent exercise. An agent who acts with due care for the benefit of the principal shall not be liable or limited merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal or acts in a different manner with respect to the agency and the agent's individual interests." 755 ILCS 45/2–7(a) (West 2010).

¶ 28 Here, because the transaction in question is presumed to be an exercise of fraudulent self-dealing, defendant must demonstrate either (1) the language of the power of attorney itself authorized the act of self-dealing or (2) by some other evidence, Billy intended, without undue influence, to authorize defendant to so act.

¶ 29 C. Language of the Power of Attorney

[9] ¶ 30 "A written power of attorney must be strictly construed so as to reflect the 'clear and obvious intent of the parties.' " (Internal quotation marks omitted.) *Shelton,* 2017 IL 121199, ¶ 31, 417 Ill.Dec. 743, 89 N.E.3d 391 (quoting *Fort Dearborn Life Insurance Co. v. Holcomb*, 316 Ill.App. 3d 485, 499, 249 Ill.Dec. 384, 736 N.E.2d 578 (2000)). As this court has previously stated: "We look to the words of the actual power of attorney to see what ***502** ****370** powers were granted to respondent." *In re Estate of Nicholls*, 2011 IL App (4th) 100871, ¶ 25, 355 Ill.Dec. 635, 960 N.E.2d 78.

[10] ¶ 31 Defendant relies on the inserted language in paragraph three, which stated she had the "power to make gifts, exercise powers of appointment, name or change beneficiaries under any beneficiary form or contractual arrangement" to argue she had been granted the power to change a designated beneficiary to herself. However, the general powers granted to defendant pursuant to paragraph three did not specifically include the power to change the beneficiary on Billy's IRA to herself, a presumed fraudulent act of self-dealing. Thus, we find no authorization for such transaction in the document itself.

¶ 32 D. Rebuttable Presumption of Fraudulent Transaction

[11] ¶ 33 Absent the expression of authority in the document itself to designate herself a beneficiary, it is presumed defendant engaged in an act of fraudulent self-dealing. As such, plaintiffs are entitled to summary judgment on this issue unless evidence exists to rebut the presumption of fraud. See *Franciscan Sisters*, 95 Ill.2d at 462, 69 Ill.Dec. 960, 448 N.E.2d 872 ("If evidence is introduced which is contrary to the presumption, the presumption will cease to operate." (Internal quotation marks omitted.)).

[12] ¶ 34 "Some of the significant factors to be considered in determining if the presumption of fraud has been rebutted include whether the fiduciary made a frank disclosure to the principal of the information he had, whether the fiduciary paid adequate consideration, and whether the principal had competent and independent advice." *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 13, 365 Ill.Dec. 131, 977 N.E.2d 1230. No such evidence exists in the record before us.

¶ 35 There is no question that, under the law, defendant's act of changing the beneficiary of Billy's IRA from plaintiffs to herself gave rise to a presumption of fraud. See *Clark*, 398 Ill. at 601, 76 N.E.2d 446; *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 15, 365 Ill.Dec. 131, 977 N.E.2d 1230. The presumption is strengthened by the absence of (1) specific language in the power of attorney authorizing such transaction and (2) any other evidence of Billy's intent. Further, nothing in the record suggests defendant acted in a manner directed by Billy, that Billy received separate and independent advice on the matter, or that he intended to name defendant, while removing plaintiffs as beneficiaries on his IRA. See *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 16, 365 Ill.Dec. 131, 977 N.E.2d 1230.

¶ 36 Here, defendant is unable to demonstrate by clear and convincing evidence she indeed had the authority as Billy's agent to self-deal. Defendant did not carry her burden of rebutting the presumption of fraud related to her self-dealing transaction. Therefore, we affirm the trial court's order granting summary judgment in favor of plaintiffs.

¶ 37 E. Attorney Fees

¶ 38 Defendant next contends the trial court erred in awarding attorney fees to plaintiffs pursuant to section 2–7(f) of the Act. 755 ILCS 45/2–7(f) (West 2010). That section provides as follows:

> "An agent that violates this Act is liable to the principal or the principal's successors in interest for the amount required (i) to restore the value of the principal's property to what it would have been had the violation not occurred, and (ii) to reimburse the principal or the principal's successors in interest for the attorney's ***503** ****371** fees and costs paid on the agent's behalf. This subsection does not limit

any other applicable legal or equitable remedies." 755 ILCS 45/2–7(f) (West 2010).

[13] **[14]** ¶ 39 The legislative intent behind this section of the Act suggests that attorney fees should be awarded whenever a violation of the Act is proved in order to make the principal's estate whole. That is, an award of attorney fees under this section does not involve an attorney's right to recover payment from his client pursuant to the express terms of their contract. Instead, an award determination involves an attorney's right to statutory fees against his clients' tortfeasor. See *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill.App.3d 231, 240, 219 Ill.Dec. 601, 671 N.E.2d 768 (1996). The existence of a contingent fee contract is a relevant factor to be considered in determining the reasonableness of attorney fees. *Berlak*, 284 Ill.App.3d at 241, 219 Ill.Dec. 601, 671 N.E.2d 768.

[15] ¶ 40 The trial court granted plaintiffs' motion for attorney fees. Relying on the statutory intent of making plaintiffs whole, the court found "the costs and fees to correct the wrongdoing of the defendant should not fall on the plaintiffs in any way." Counsel for plaintiffs indicated to the court that they were retained by plaintiffs on a one-third contingency contract plus costs. After reviewing an affidavit from plaintiffs' counsel, the retainer agreement on the contingent fee, and the representation from the bank that the IRA had a value of $44,496.46 as of January 23, 2011 (the date of Billy's death), the court entered judgment against defendant for attorney fees in the amount of $14,832.15, representing one third of the value of the IRA, plus costs.

[16] **[17]** **[18]** **[19]** ¶ 41 The general rule is that parties in a lawsuit are responsible for their own attorney fees. *Myers v. Popp Enterprises, Inc.*, 216 Ill.App. 3d 830, 838, 159 Ill.Dec. 783, 576 N.E.2d 452 (1991). However, a court may award attorney fees if they are expressly authorized by statute or by agreement of the parties. *In re Marriage of Magnuson*, 156 Ill.App. 3d 691, 700, 109 Ill.Dec. 569, 510 N.E.2d 437 (1987). Only those fees that are reasonable will be allowed. *LaHood v. Couri*, 236 Ill.App. 3d 641, 648, 177 Ill.Dec. 791, 603 N.E.2d 1165 (1992). "This court has held that, for purposes of determining statutory attorney fees, the term 'reasonable' applies regardless of the nature of the client's contractual relationship with his attorney." *Blankenship v. Dialist International Corp.*, 209 Ill.App. 3d 920, 927, 154 Ill.Dec. 503, 568 N.E.2d 503 (1991). The trial court's decision in awarding statutory attorney fees will not be reversed absent an abuse of discretion. *Blankenship*, 209 Ill.App. 3d at 927, 154 Ill.Dec. 503, 568 N.E.2d 503.

[20] **[21]** **[22]** ¶ 42 However, "an attorney fee award cannot be based solely on an amount necessary to satisfy a contingent fee agreement existing between an attorney and a client." *Collins v. Hurst*, 316 Ill.App. 3d 171, 173, 249 Ill.Dec. 406, 736 N.E.2d 600 (2000). Though the trial court found the contingent fee agreement between plaintiffs and their attorney reasonable, defendant was not a party to that agreement. Further, the statute allowing for an award of attorney fees in this case did not provide for the payment of fees based on a contingent fee. While a court may consider the existence of a contingent fee agreement, it is only one factor of many to be examined to determine the reasonableness of the award. See *Blankenship*, 209 Ill.App. 3d at 927, 154 Ill.Dec. 503, 568 N.E.2d 503. Where a statute allows fees to be paid to the other party, the fee must be reasonable regardless of the ***504** ****372** agreement between the litigant and his attorney. *Blankenship*, 209 Ill.App. 3d at 927, 154 Ill.Dec. 503, 568 N.E.2d 503.

¶ 43 In this case, the trial court appropriately enforced the attorney fee provision contained in the statute after finding defendant had violated the Act. The court then determined the above-referenced contingent fee constituted a reasonable award in this case. Plaintiffs' counsel provided an affidavit in support of their motion for fees. Counsel averred that two attorneys worked a total of 134.5 hours between them on this case. At their respective hourly rates, their fees totaled $25,290. However, as noted, the fee due on the contingency contract equaled $14,832.15, as one-third of the value of the IRA at the time of Billy's death. The court found the contingency fee to be a reasonable award. We find the trial court did not abuse its discretion in its consideration of plaintiffs' contingency-fee agreement and subsequent award of attorney fees in this case.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, the trial court's judgment is affirmed.

¶ 46 Affirmed.

Justices Holder White and Steigmann concurred in the judgment and opinion.

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIFTEENTH YEAR
HILTON HEAD, SOUTH CAROLINA

July 7-14, 2006

WITH PREFATORY NOTE AND COMMENTS

February 12, 2020

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UNIFORM POWER OF ATTORNEY ACT (2006)

Prefatory Note

The catalyst for the Uniform Power of Attorney Act (2006) (the "Act") was a national review of state power of attorney legislation. The review revealed growing divergence among states' statutory treatment of powers of attorney. The original Uniform Durable Power of Attorney Act ("Original Act"), last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the review found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was increasing divergence included: (1) the authority of multiple agents; (2) the authority of a later-appointed fiduciary or guardian; (3) the impact of dissolution or annulment of the principal's marriage to the agent; (4) activation of contingent powers; (5) the authority to make gifts; and (6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.

A national survey was then conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. Forty-four jurisdictions were represented in the 371 surveys returned.

The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

(1) provide for confirmation that contingent powers are activated;
(2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
(3) include a portability provision;
(4) require gift making authority to be expressly stated in the grant of authority;
(5) provide a default standard for fiduciary duties;
(6) permit the principal to alter the default fiduciary standard;
(7) require notice by an agent when the agent is no longer willing or able to act;
(8) include safeguards against abuse by the agent;
(9) include remedies and sanctions for abuse by the agent;
(10) protect the reliance of other persons on a power of attorney; and
(11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

Informed by the review and the survey results, the Conference's drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, the Act codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

While the Act contains safeguards for the protection of an incapacitated principal, the Act is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct. Among the Act's features that enhance drafting flexibility are the statutory definitions of powers in Article 2, which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Article 3. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national review found that eighteen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Sections 119 and 120 of the Act address the problem of persons refusing to accept an agent's authority. Section 119 provides protection from liability for persons that in good faith accept an acknowledged power of attorney, but is not intended to change existing common law rules regarding the validity of a conveyance of an interest in real property executed by an agent pursuant to a defective power of attorney. Section 120 sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions. An alternate Section 120 is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.

In exchange for mandated acceptance of an agent's authority, the Act does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 201(a)), provisions that set out the agent's duties and liabilities (Sections 114 and 117) and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 116). The following provides a brief overview of the entire Act.

Overview of the Uniform Power of Attorney Act

The Act consists of 4 articles. The basic substance of the Act is located in Articles 1 and 2. Article 3 contains the optional statutory form and Article 4 consists of miscellaneous provisions dealing with general application of the Act and repeal of certain prior acts.

Article 1 – General Provisions and Definitions – Section 102 lists definitions which are useful in interpretation of the Act. Of particular note is the definition of "incapacity" which replaces the term "disability" used in the Original Act. The definition of "incapacity" is consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act (1997/1998). Another significant change in terminology from the Original Act is the use of "agent" in place of the term "attorney in fact." The term "agent" was also used in the Uniform Statutory Form Power of Attorney Act (1988) and is intended to clarify confusion in the lay public about the meaning of "attorney in fact." Section 103 provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the default rule in Section 104 that a power of attorney is durable unless it contains express language indicating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 105 requires the principal's signature and provides that an acknowledged signature is presumed genuine. Section 106 recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act's effective date. Section 107 states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

Section 108 addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent's authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is consistent with the state legislative trend that has departed from the Original Act.

The default rule for when a power of attorney becomes effective is stated in Section 109. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 109 permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal's incapacity, Section 109 provides that the person designated to make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health-care information and communicating with the principal's health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal's ability to manage property or business affairs is impaired, or by an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

The bases for termination of a power of attorney are covered in Section 110. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal's spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment.

Sections 111 through 118 address matters related to the agent, including default rules for coagents and successor agents (Section 111), reimbursement and compensation (Section 112), an agent's acceptance of appointment (Section 113), and the agent's duties (Section 114). Section 115 provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. Section 116 sets out a comprehensive list of persons that may petition the court to review the agent's conduct and Section 117 addresses agent liability. An agent may resign by following the notice procedures described in Section 118.

Sections 119 and 120 are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney. Section 119 protects persons that in good faith accept an acknowledged power of attorney without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. Section 119 is not intended to change existing common law rules regarding the validity of a conveyance of an interest in real property executed by an agent pursuant to a defective power of attorney; the validity of such a conveyance is governed by law other than the Act. Subject to statutory exceptions, alternative Sections 120 impose liability for refusal to accept a power of attorney. Alternative A sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only refusal of an acknowledged statutory form power of attorney.

Sections 121 through 123 address the relationship of the Act to other law. Section 121 clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 122 further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 123 provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

Article 2 – Authority – The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections 204 through 217 of the Act set forth detailed descriptions of authority relating to subjects such as "real property," "retirement plans," and "taxes," which a principal, pursuant to Section 202, may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. Section 202 further states that a principal may modify in a power of attorney any authority incorporated by reference. The definitions in Article 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Article 3. Section 203 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.

Article 2 also addresses concerns about authority that might be used to dissipate the principal's property or alter the principal's estate plan. Section 201(a) lists specific categories of authority that cannot be implied from a grant of general authority, but which may be granted only through express language in the power of attorney. Section 201(b) contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant of the principal from creating in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

Article 3 – Statutory Forms – The optional form in Article 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the Section 201(a) categories of specific authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Article 3 also contains a sample agent certification form.

Article 4 – Miscellaneous Provisions – The miscellaneous provisions in Article 4 clarify the relationship of the Act to other law and pre-existing powers of attorney. Enacting jurisdictions should repeal their existing power of attorney statutes, including, if applicable, the Uniform Durable Power of Attorney Act (1979/1987) (formerly codified at Article V, Part 5 of the Uniform Probate Code), and the Uniform Statutory Form Power of Attorney Act (1988).

UNIFORM POWER OF ATTORNEY ACT (2006)

[ARTICLE] 1

GENERAL PROVISIONS

General Comment

The Uniform Power of Attorney Act (2006) replaces the Uniform Durable Power of Attorney Act (1979/1987) (formerly codified at Article V, Part 5 of the Uniform Probate Code), and the Uniform Statutory Form Power of Attorney Act (1988). The primary purpose of the Uniform Durable Power of Attorney Act (1979/1987) was to provide individuals with an inexpensive, non-judicial method of surrogate property management in the event of later incapacity. Two key concepts were introduced by the Uniform Durable Power of Attorney Act (1979/1987): (1) creation of a durable agency–one that survives, or is triggered by, the principal's incapacity, and (2) validation of post-mortem exercise of powers by an agent who acts in good faith and without actual knowledge of the principal's death. The success of the Uniform Durable Power of Attorney Act (1979/1987) is evidenced by the widespread use of durable powers in every jurisdiction, not only for incapacity planning, but also for convenience while the principal retains capacity. However, the limitations of the Uniform Durable Power of Attorney Act (1979/1987) are evidenced by the number of states that have supplemented and revised their statutes to address myriad issues upon which the Uniform Durable Power of Attorney Act (1979/1987) is silent. These issues include parameters for the creation and use of powers of attorney as well as guidelines for the principal, the agent, and the person who is asked to accept the agent's authority. The general provisions and definitions of Article 1 in the Uniform Power of Attorney Act (2006) (codified at Article 5B of the Uniform Probate Code (2011)), address those issues.

In addition to providing greater detail than the Uniform Durable Power of Attorney Act (1979/1987), this Act changes two presumptions in the earlier act: (1) that a power of attorney is not durable unless it contains language to make it durable; and (2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 104 of this Article reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section 108 gives deference to the principal's choice of agent by providing that if a court appoints a fiduciary to manage some or all of the principal's property, the agent's authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Article 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 114(a)), recognition of persons who have standing to request judicial construction of the power of attorney or review of the agent's conduct (Section 116), and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney or the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 119). In contrast with the rules of general application in Article 1, the default provisions are clearly indicated by signals such as "unless the power of attorney otherwise provides," or "except as otherwise provided in the power of attorney." These signals alert the draftsperson to options for enlarging or limiting the Act's default terms. For example, default provisions in Article 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 109), co-agents may exercise their authority independently (Section 111), and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 112).

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Power of Attorney Act (2006).

Comment

This Act, which replaces the Uniform Durable Power of Attorney Act (1979/1987), does not contain the word "durable" in the title. Pursuant to Section 104, a power of attorney created under the Act is durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable," with respect to a power of attorney, means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(B) is:

(i) missing;

(ii) detained, including incarcerated in a penal system; or

(iii) outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

(13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(14) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

Legislative Note: *An enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the definition of incapacity.*

Comment

Although most of the definitions in Section 102 are self-explanatory, a few of the terms warrant further comment.

"Agent" replaces the term "attorney in fact" used in the Uniform Durable Power of Attorney Act (1979/1987) to avoid confusion in the lay public about the meaning of the term and the difference between an attorney in fact and an attorney at law. Agent was also used in the Uniform Statutory Form Power of Attorney Act (1988) which this Act supersedes.

"Incapacity" replaces the term "disability" used in the Uniform Durable Power of Attorney Act (1979/1987) in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual's impairment–inability to manage property and business affairs–rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act (1997) (Section 5-401 of the Uniform Probate Code (2011)).

The definition of "power of attorney" clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words "power of attorney" are actually used in the grant.

“Presently exercisable general power of appointment” is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. *Cf.* Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee’s agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal’s property and financial affairs. The term appears in Section 211 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (*see* Section 211(b)(3)), and in Section 217 (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (*see* Section 217(b)(1)). The term is also incorporated by reference when using the statutory form in Section 301 to grant authority with respect to “Estates, Trusts, and Other Beneficial Interests” or authority with respect to “Gifts.” If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 201(a)(7) requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent’s authority is necessarily limited by whatever terms govern the principal’s ability to exercise the power.

SECTION 103. APPLICABILITY. This [act] applies to all powers of attorney except:

(1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) a power to make health-care decisions;

(3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

Comment

The Uniform Power of Attorney Act (2006) is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual’s property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent’s conduct, the Act specifies minimum agent duties and protections for the principal’s benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition of a power of attorney. Section 103 lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent's role with respect to the delegation, or a combination of the foregoing, would make application of the Act's provisions inappropriate.

Paragraph (1) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent's interest in the subject matter of the power, the agent is not intended to act as the principal's fiduciary. S*ee* Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of "a power given to or for the benefit of a creditor in connection with a credit transaction" is highlighted in paragraph (1), it is not meant to exclude application of paragraph (1) to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. S*ee, e.g., Hayes v. Gessner*, 52 N.E.2d 968 (Mass. 1944).

Paragraph (2) excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 114(b)(5) a default rule that an agent under the Act must cooperate with the principal's health-care decision maker.

Likewise, paragraph (3) excludes from the Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity-specific statutes within a jurisdiction. *See, e.g.,* Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996). Notwithstanding the exclusion of such delegations from the operation of this Act, Section 209 contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to "exercise in person or by proxy . . . a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds . . . ."(*see* paragraph (5) of Section 209). Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 209 authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal's agent or "attorney in fact" may appoint a proxy on behalf of the principal. *See, e.g.,* Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996).

Paragraph (4) excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in paragraphs (2) and (3), the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (7) of Section 203 that a grant of authority to an agent includes, with respect to that subject matter, authority to "prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or governmental regulation." Section 203, paragraph (8), further clarifies that the agent has the authority to "communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal." The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

SECTION 104. POWER OF ATTORNEY IS DURABLE. A power of attorney created under this [act] is durable unless it expressly provides that it is terminated by the incapacity of the principal.

Comment

Section 104 establishes that a power of attorney created under the Act is durable unless it expressly states otherwise. This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability as a hedge against the need for guardianship. *See also* Section 107 Comment (noting that the default rules of the jurisdiction's law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

SECTION 105. EXECUTION OF POWER OF ATTORNEY. A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

Comment

While notarization of the principal's signature is not required to create a valid power of attorney, this section strongly encourages the practice by according acknowledged signatures a statutory presumption of genuineness. Furthermore, because Section 119 (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and alternative Sections 120 (Alternative A–Liability for Refusal to Accept Acknowledged Power of Attorney, and Alternative B–Liability for Refusal to Accept Acknowledged Statutory Form Power of Attorney) do not apply to unacknowledged powers, persons who are presented with an unacknowledged power of attorney may be reluctant to accept it. As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal. *See* R.P.D., Annotation, *Recording Laws as Applied to Power of Attorney under which Deed or Mortgage is Executed*, 114 A.L.R. 660 (1938).

This section, at a minimum, requires that the power of attorney be signed by the principal or by another individual who the principal has directed to sign the principal's name. If another individual is directed to sign the principal's name, the signing must occur in the principal's "conscious presence." The 1990 amendments to the Uniform Probate Code codified the "conscious presence" test for the execution of wills (Section 2-502(a)(2)), which generally requires that the signing is sufficient if it takes place within the range of the senses–usually sight or hearing–of the individual who directed that another sign the individual's name. *See* Unif. Probate Code § 2-502 cmt. (2003). For a discussion of acknowledgment of a signature by an individual whose name is signed by another, see R.L.M., Annotation, *Formal Acknowledgment of Instrument by One Whose Name is Signed thereto by Another as an Adoption of the Signature,* 57 A.L.R. 525 (1928).

SECTION 106. VALIDITY OF POWER OF ATTORNEY.

(a) A power of attorney executed in this state on or after [the effective date of this [act]] is valid if its execution complies with Section 105.

(b) A power of attorney executed in this state before [the effective date of this [act]] is valid if its execution complied with the law of this state as it existed at the time of execution.

(c) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Section 107; or

(2) the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b [, as amended].

(d) Except as otherwise provided by statute other than this [act], a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

Legislative Note: *The brackets in subsections (a) and (b) of this section indicate where an enacting jurisdiction may elect to insert the actual effective date of the Act.*

Comment

One of the purposes of the Uniform Power of Attorney Act (2006) is promotion of the portability and use of powers of attorney. Section 106 makes clear that the Act does not affect the validity of pre-existing powers of attorney executed under prior law in the enacting jurisdiction, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act. *See, e.g.,* Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in order to record a deed, "some states require that the document of transfer be signed, sealed, attested, and acknowledged").

SECTION 107. MEANING AND EFFECT OF POWER OF ATTORNEY. The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

Comment

This section recognizes that a foreign power of attorney, or one executed before the effective date of the Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 107 provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of attorney (*see* Section 104), the authority of coagents (*see* Section 111) or the scope of specific authority such as the authority to make gifts (*see* Section 217). Section 107 clarifies that the principal's intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with inter-jurisdictional use of powers of attorney, see Linda S. Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 107 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between "the law of the jurisdiction indicated in the power of attorney" and "the law of the jurisdiction in which the power of attorney was executed" is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. *See, e.g.,* Section 301 (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

SECTION 108. NOMINATION OF [CONSERVATOR OR GUARDIAN]; RELATION OF AGENT TO COURT-APPOINTED FIDUCIARY.

(a) In a power of attorney, a principal may nominate a [conservator or guardian] of the principal's estate or [guardian] of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. [Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.]

(b) If, after a principal executes a power of attorney, a court appoints a [conservator or guardian] of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. [The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.]

Legislative Note: *The brackets in this section indicate areas where an enacting jurisdiction should reference its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the terminology and substance of the bracketed language.*

Comment

Section 108(b) is a departure from the Uniform Durable Power of Attorney Act (1979/1987) which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. *See* Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 108(b) is consistent with the state legislative trend that has departed from the Uniform Durable Power of Attorney Act (1979/1987). *See, e.g.,* 755 Ill.

Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997/1998), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).

Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination *(see* subsection (a)). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

SECTION 109. WHEN POWER OF ATTORNEY EFFECTIVE.

(a) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(b) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(c) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(1) a physician [or licensed psychologist] that the principal is incapacitated within the meaning of Section 102(5)(A); or

(2) an attorney at law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of Section 102(5)(B).

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, [as amended,] and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health-care provider.

Legislative Note: *The phrase "or licensed psychologist" is bracketed in subsection (c)(1) to indicate where an enacting jurisdiction should insert the appropriate designation for the mental health professional or professionals in that jurisdiction who are qualified to make capacity determinations. An enacting jurisdiction should also review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the definition of incapacity.*

Comment

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a "springing" or contingent power of attorney–one that becomes effective at a future date or upon a future event or contingency–the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred (subsection (b)). Because the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, subsection (d) qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 109 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a "best practices" philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. *See* Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis,* National Conference of Commissioners on Uniform State Laws, 6-7 (2002), http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal's incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal's impairment may be verified by a physician or licensed psychologist (subsection (c)(1)), and incapacity based on the principal's unavailability (*i.e.,* the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official (subsection (c)(2)). Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 102(5)(B) include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made. It is not available to challenge the determination made by the principal's authorized designee.

SECTION 110. TERMINATION OF POWER OF ATTORNEY OR AGENT'S AUTHORITY.

(a) A power of attorney terminates when:

(1) the principal dies;

(2) the principal becomes incapacitated, if the power of attorney is not durable;

(3) the principal revokes the power of attorney;

(4) the power of attorney provides that it terminates;

(5) the purpose of the power of attorney is accomplished; or

(6) the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(b) An agent's authority terminates when:

(1) the principal revokes the authority;

(2) the agent dies, becomes incapacitated, or resigns;

(3) an action is filed for the [dissolution] or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) the power of attorney terminates.

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (b), notwithstanding a lapse of time since the execution of the power of attorney.

(d) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(e) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(f) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

Legislative Note: *The word "dissolution" is bracketed in subsection (b)(3) to indicate where an enacting jurisdiction should insert that jurisdiction's term for divorce or marital dissolution.*

Comment

This section addresses termination of a power of attorney or an agent's authority under a power of attorney. It first lists termination events (*see* subsections (a) and (b)), and then lists circumstances that, in contrast, either do not invalidate the power of attorney (*see* subsections (c) and (f)) or the actions taken pursuant to the power of attorney (*see* subsections (d) and (e)).

Subsection (c) provides that a power of attorney under the Act does not become "stale." Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act (1979/1987). *See* Unif. Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (f) clarifies that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation, a subsequently executed power of attorney must expressly revoke a previously executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out-of-town real estate.

Subsections (d) and (e) emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal's death terminates a power of attorney (*see* subsection (a)(1)), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal's death will bind the principal's successors in interest with that action (*see* subsection (d)). The same result is true if the agent knows of the principal's death, but the person who accepts the agent's apparent authority has no actual knowledge of the principal's death. *See* Restatement (Third) of Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end any apparent authority held by an agent"). *See also* Section 119(c) (stating that "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . terminated . . . may rely upon the power of attorney as if the power of attorney were . . . still in effect . . . ."). These concepts are also carried forward from the Uniform Durable Power of Attorney Act (1979/1987). *See* Unif. Durable Power Atty. Act § 4 (1987).

Of special note in the list of termination events is subsection (b)(3) which provides that a spouse-agent's authority is revoked when an action is filed for the dissolution or annulment of the agent's marriage to the principal, or their legal separation. Although the filing of an action for dissolution or annulment might render a principal particularly vulnerable to self-interested actions by a spouse-agent, subsection (b)(3) is not mandatory and may be overridden in the power of attorney. There may be special circumstances precipitating the dissolution, such as catastrophic illness and the need for public benefits, that would prompt the principal to specify that the agent's authority continues notwithstanding dissolution, annulment or legal separation.

SECTION 111. COAGENTS AND SUCCESSOR AGENTS.

(a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

(b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

(1) has the same authority as that granted to the original agent; and

(2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(c) Except as otherwise provided in the power of attorney and subsection (d), an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(d) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

Comment

This section provides several default rules that merit careful consideration by the principal. Subsection (a) states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (*see* Section 201(a)(5)).

Subsection (b) states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (*see* Section 201(a)) may be appropriate for a spouse-agent, but not for an adult child who is named as the successor agent.

Subsection (c) provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the power of attorney, an agent has no duty to monitor another agent's conduct. However, subsection (d) does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Subsection (d) provides that if an agent fails to notify the principal or to take action to safeguard the principal's best interest, that agent is only liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

SECTION 112. REIMBURSEMENT AND COMPENSATION OF AGENT. Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

Comment

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.

SECTION 113. AGENT'S ACCEPTANCE. Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

Comment

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (*see* Section 114(a)). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an agency relationship commences is necessary to protect both the principal and the agent. *See* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts"). The Act also provides a default method for agent resignation (*see* Section 118), which terminates the agency relationship (*see* Section 110(b)(2)).

SECTION 114. AGENT'S DUTIES.

(a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

(C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

Comment

Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. *See generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996). Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (*see, e.g.,* Fla. Stat. Ann. § 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West 2001)). Section 114 clarifies agent duties by articulating minimum mandatory duties (subsection (a)) as well as default duties that can be modified or omitted by the principal (subsection (b)).

The mandatory duties–acting in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; acting in good faith; and acting only within the scope of authority granted–may not be altered in the power of attorney. Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for "substituted judgment" over "best interest" as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests. *See* Wingspan–The Second National Guardianship Conference, *Recommendations*, 31 Stetson L. Rev. 595, 603 (2002). *See also* Unif. Guardianship & Protective Proc. Act § 314(a) (1997).

The Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances. However, when a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent's conduct (*see* Section 116).

If a principal's expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent's family. Without the principal's clear expression of this objective, investment by the agent of the principal's property in the agent's business may be viewed as breaching the default duty to act loyally for the principal's benefit (subsection (b)(1)) or the default duty to avoid conflicts of interest that impair the agent's ability to act impartially for the principal's best interest (subsection (b)(2)).

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (b)(5)) and the duty to preserve the principal's estate plan (subsection (b)(6)). However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c)).

Subsection (d) provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. *See* Restatement (Second) of Agency § 387 (1958); *see also* Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust "solely in the interests" of the beneficiary). Subsection (d) is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. *See* Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (*see* Reporter's note a). *See also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (e) provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent's conduct. If a principal chooses to appoint a family member or close friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (*see* comment to Section 115).

Subsections (f) and (g) state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (f) holds an agent harmless for decline in the value of the principal's property absent a breach of fiduciary duty (*cf.* Unif. Trust Code § 1003(b) (2003)). Subsection (g) holds an agent harmless for the conduct of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal's behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (*cf.* Unif. Trust Code § 807(c) (2003).

Subsection (h) codifies the agent's common law duty to account to a principal (*see* Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons:*

Policy Issues and Recommendations for Addressing Them, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective counter-measure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. *See* Section 116 and Comment.

SECTION 115. EXONERATION OF AGENT. A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Comment

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee's failure to adhere to that standard cannot be excused by language in the trust instrument. *See* Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries"). *See also* Section 102(4) (defining good faith for purposes of the Act as "honesty in fact"). Section 115 provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent's conduct in order to gain control of the principal's assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

SECTION 116. JUDICIAL RELIEF.

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal's spouse, parent, or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Comment

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. *See* Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann.§ 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b)

(2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 116 is Section 114(h) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. *See* Section 114 Comment. Section 116 operates as a check-and-balance on the narrow scope of Section 114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

SECTION 117. AGENT'S LIABILITY. An agent that violates this [act] is liable to the principal or the principal's successors in interest for the amount required to:

(1) restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

Comment

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts. Pursuant to Section 123, remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).

SECTION 118. AGENT'S RESIGNATION; NOTICE. Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(1) to the [conservator or guardian], if one has been appointed for the principal, and a

coagent or successor agent; or

(2) if there is no person described in paragraph (1), to:

(A) the principal's caregiver;

(B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(C) a governmental agency having authority to protect the welfare of the principal.

Legislative Note: *The brackets in this section indicate where the enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the bracketed language.*

Comment

Section 118 provides a default procedure for an agent's resignation. An agent who no longer wishes to serve should formally resign in order to establish a clear demarcation of the end of the agent's authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. If the principal still has capacity when the agent wishes to resign, this section requires only that the agent give notice to the principal. If, however, the principal is incapacitated, the agent must, in addition to giving notice to the principal, give notice as set forth in paragraphs (1) or (2).

Paragraph (1) provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an appointed fiduciary and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (2). Paragraph (2) permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. *See* Section 114(a) (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

SECTION 119. ACCEPTANCE OF AND RELIANCE UPON ACKNOWLEDGED POWER OF ATTORNEY.

(a) For purposes of this section and Section 120, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.

(b) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under Section 105 that the signature is genuine.

(c) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

(d) A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:

(1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;

(2) an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

(3) an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(e) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.

(f) For purposes of this section and Section 120, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

Comment

This section generally protects persons who in good faith accept an acknowledged power of attorney. Section 119 does not apply to unacknowledged powers of attorney. *See* Section 105 (providing that the signature on a power of attorney is presumed genuine if acknowledged). Subsection (a) states that for purposes of this section and Section 120 "acknowledged" means "purportedly" verified before an individual authorized to take acknowledgments. The purpose of this definition is to allow a third party to follow the instructions of an agent as identified in an acknowledged power of attorney, without liability for doing so, if the third party was without actual knowledge of a defect in the power of attorney (e.g., that it contained a forged signature or a latent defect in the acknowledgment). *See, e.g.,* Cal. Prob. Code § 4303(a)(2) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (Supp. 2006); Ind. Code Ann. § 30-5-8-2 (West 1994); N.C. Gen. Stat. § 32A- 40 (2005). This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (*see* Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty-three percent reported occasional difficulty and seventeen percent reported frequent difficulty. Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws 12-13 (2002), *available at* http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm.

Section 119 permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority—and thus to carry out the agent's instructions in effecting a transaction—unless the person has actual knowledge to the contrary (subsection (c)). Although a person is not required to investigate whether a power of attorney is valid or the agent's exercise of authority proper, subsection (d) permits a person to request an agent's certification of any factual matter (*see* Section 302 for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (f) for persons that conduct activities through employees. Subsection (f) states that for purposes of Sections 119 and 120, a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

Section 119 is not intended to modify common law real property rules governing the validity of a conveyance of an interest in real property executed pursuant to a defective power of attorney. The validity of such a conveyance is governed by law other than this Act. If the power of attorney is forged or otherwise void, a conveyance executed by the agent identified in the power of attorney is void, and the grantee of that conveyance (or a successor of the grantee) cannot be protected as a bona fide purchaser from the grantor. See, e.g., Neuman v. Neumann, 971 N.Y.S.2d 322 (N.Y. Sup. Ct. App. Div. 2013). If the power of attorney is merely voidable, then a conveyance executed by the agent is likewise voidable (such that a successor who acquires title from the grantee before the grantor takes action to invalidate the conveyance could be protected as a bona fide purchaser). Although Section 119 generally protects persons who accept an acknowledged power of attorney in good faith against liability, it is not intended to protect a person against contractual liability under the terms of a title insurance policy.

Alternative A

SECTION 120. LIABILITY FOR REFUSAL TO ACCEPT ACKNOWLEDGED POWER OF ATTORNEY.

(a) Except as otherwise provided in subsection (b):

(1) a person shall either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel under Section 119(d) no later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation, or an opinion of counsel under Section 119(d), the person shall accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

(3) a person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(b) A person is not required to accept an acknowledged power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(c) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Legislative Note: *Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.*

Under both alternatives, the phrase "local adult protective services office" is bracketed to indicate where an enacting jurisdiction should insert the appropriate designation for the governmental agency with regulatory authority to protect the welfare of the principal.

Comment to Alternative A

As a complement to Section 119, Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 119, Section 120 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 120. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (b) of Alternative A provides the bases upon which an acknowledged power of attorney may be refused without liability. The last paragraph of subsection (b) permits refusal of an otherwise valid acknowledged power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (b) for refusing an acknowledged power of attorney, subsection (a) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 119. If a request under Section 119 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (a)(2)). Provided no basis exists for refusing the power of attorney, subsection (a)(3) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (c) of Alternative A provides that a person that refuses an acknowledged power of attorney in violation of Section 120 is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.*, Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

Alternative B

SECTION 120. LIABILITY FOR REFUSAL TO ACCEPT ACKNOWLEDGED STATUTORY FORM POWER OF ATTORNEY.

(a) In this section, "statutory form power of attorney" means a power of attorney substantially in the form provided in Section 301 or that meets the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b [, as amended].

(b) Except as otherwise provided in subsection (c):

(1) a person shall either accept an acknowledged statutory form power of attorney or request a certification, a translation, or an opinion of counsel under Section 119(d) no later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation, or an opinion of counsel under Section 119(d), the person shall accept the statutory form power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

(3) a person may not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

(c) A person is not required to accept an acknowledged statutory form power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(d) A person that refuses in violation of this section to accept an acknowledged statutory form power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Legislative Note: *Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.*

Under both alternatives, the phrase "local adult protective services office" is bracketed to indicate where an enacting jurisdiction should insert the appropriate designation for the governmental agency with regulatory authority to protect the welfare of the principal.

Comment to Alternative B

As a complement to Section 119, Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 119, Section 120 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 120. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (a) of Alternative B defines "statutory form power of attorney" as a power of attorney substantially in the form provided in Section 301 or one that meets the requirements for a military power of attorney.

Subsection (c) of Alternative B provides the bases upon which an acknowledged statutory form power of attorney may be refused without liability. The last paragraph of subsection (c) permits refusal of an otherwise valid acknowledged statutory form power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (c) for refusing an acknowledged statutory form power of attorney, subsection (b) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 119. If a request under Section 119 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (b)(2)). Provided no basis exists for refusing the power of attorney, subsection (b)(3) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (d) of Alternative B provides that a person that refuses an acknowledged statutory form power of attorney in violation of Section 120 is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.*, Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

End of Alternatives

SECTION 121. PRINCIPLES OF LAW AND EQUITY. Unless displaced by a provision of this [act], the principles of law and equity supplement this [act].

Comment

The Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the Uniform Power of Attorney Act (2006) is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. *See* Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, Southerland Statutory Construction § 52.5 (6th ed. 2000).

SECTION 122. LAWS APPLICABLE TO FINANCIAL INSTITUTIONS AND ENTITIES. This [act] does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this [act].

Comment

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations which govern those entities that conflict with provisions of this Act. Although no specific conflicts were identified during the drafting process, Section 122 provides that in the event a law applicable to a financial institution or other entity is inconsistent with this Act, the other law will supersede this Act to the extent of the inconsistency. This concern about inconsistency with the requirements of other law is already substantially addressed in Section 120, which provides, in pertinent part, that a person is not required to accept a power of attorney if, "the person is not otherwise required to engage in a transaction with the principal in the same circumstances," or "engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law."

SECTION 123. REMEDIES UNDER OTHER LAW. The remedies under this [act] are not exclusive and do not abrogate any right or remedy under the law of this state other than this [act].

Comment

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (*see* Section 102(6) (defining "person" for purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (*see* Article 2) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.,* Section 117 Comment.

[ARTICLE] 2

AUTHORITY

General Comment

Article 2 is based in part on the predecessor Uniform Statutory Form Power of Attorney Act, approved in 1988. It provides the default statutory construction for authority granted in a power of attorney. Sections 204 through 217 describe authority with respect to various subject matters. These descriptions may be incorporated by reference in the optional statutory form (Section 301) or in an individually drafted power of attorney. Incorporation is accomplished either by referring to the descriptive term for the subject or by providing a citation to the section in which the authority is described (Section 202). A principal may also modify any authority incorporated by reference (Section 202(c)). Section 203 supplements Sections 204 through 217 by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Most of the language in Sections 204 through 216 of Article 2 comes directly from the Uniform Statutory Form Power of Attorney Act. The language has been revised where necessary to reflect modern custom and practice. Where significant changes have been made, they are noted in a comment to the relevant section. In general, there are two important differences between the statutory treatment of authority in this Act and in the Uniform Statutory Form Power of Attorney Act (1988). First, this Act includes a section that provides a default rule for the parameters of gift making authority (Section 217). Second, this Act identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 201(a)). Express authorization for the acts listed in Section 201(a) is required because of the risk those acts pose to the principal's property and estate plan. The purpose of Section 201(a) is to make clear that authority for these acts may not be inferred from a grant of general authority.

SECTION 201. AUTHORITY THAT REQUIRES SPECIFIC GRANT; GRANT OF GENERAL AUTHORITY.

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) create, amend, revoke, or terminate an inter vivos trust;

(2) make a gift;

(3) create or change rights of survivorship;

(4) create or change a beneficiary designation;

(5) delegate authority granted under the power of attorney;

(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]

(7) exercise fiduciary powers that the principal has authority to delegate[; or

(8) exercise authority over the content of electronic communications, as defined in 18 U.S.C. Section 2510(12)[, as amended,] sent or received by the principal[; or

(9) disclaim property, including a power of appointment].

(b) Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(c) Subject to subsections (a), (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 204 through 216.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 217.

(e) Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

Legislative Note: *The phrase "or disclaim property, including a power of appointment" is in brackets in subsection (a) and should be deleted if under the law of the enacting jurisdiction a fiduciary has authority to disclaim an interest in, or power over, property and the jurisdiction does not wish to restrict that authority by the Uniform Power of Attorney Act (2006). See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, "[e]xcept to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment . . . ."). See also Section 301 Legislative Note.*

Comment

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 201(a) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See*, *e.g.,* Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). See also Section 9 of the Revised Uniform Fiduciary Access to Digital Assets Act, which applies "[t]o the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal …." The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent.

The Act does not contain statutory construction language for any of the acts enumerated in subsection (a) other than the making of gifts (*see* Section 217). Because a gift of the principal's property reduces the principal's estate, the Act, like a number of state statutes, sets default per-donee limits on gift amounts. *See, e.g.*, N.Y. Gen. Oblig. Law § 5-1502M (McKinney 2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (West 2005). However, as with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 201(a), the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (a)(3)) or beneficiary designations (subsection (a)(4)) the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 201(a), but also whether to limit the scope of such actions.

Subsection (b) contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependant of the agent without the principal's express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal's expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (a), an agent is bound by the mandatory fiduciary duties set forth in Section 114(a) as well as the default duties that the principal has not modified. For a list of these default rules, see Section 301 Comment. If the principal's expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal's expectations, modification of the default duties, or both, may be advisable. *See* Section 114 Comment.

Authority for acts and subject matters other than those listed in Section 201(a) may be granted either through incorporation by reference (*see* Section 202) or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is interpreted under the Act as including all of the subject matters and authority described in Sections 204 through 216 (*see* subsection (c)).

Historical Note. Section 201(a) and the accompanying Comment were revised in 2016 to conform them to the Revised Uniform Fiduciary Access to Digital Assets Act.

SECTION 202. INCORPORATION OF AUTHORITY.

(a) An agent has authority described in this [article] if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Sections 204 through 217 or cites the section in which the authority is described.

(b) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in Sections 204 through 217 or a citation to a section of Sections 204 through 217 incorporates the entire section as if it were set out in full in the power of attorney.

(c) A principal may modify authority incorporated by reference.

Comment

This section provides two methods for incorporating into a power of attorney the Act's statutory construction for authority over various subject matters. A reference in a power of attorney to the descriptive term for a subject in Sections 204 through 217, or to the section number, incorporates the entire statutory section as if it were set out in full in the power of attorney. Subsection (c) provides that a principal may modify any authority incorporated by reference. The optional statutory form power of attorney provided in Section 301 uses the descriptive terms in Sections 204 through 217 to incorporate statutory construction for authority granted on the form and provides a "Special Instructions" section where the principal may modify any authority incorporated by reference.

SECTION 203. CONSTRUCTION OF AUTHORITY GENERALLY. Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in Sections 204 through 217 or that grants to an agent authority to do all acts that a principal could do pursuant to Section 201(c), a principal authorizes the agent, with respect to that subject, to:

(1) demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(3) execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(5) seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(6) engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

(7) prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(8) communicate with any representative or employee of a government or governmental

subdivision, agency, or instrumentality, on behalf of the principal;

(9) access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

(10) do any lawful act with respect to the subject and all property related to the subject.

Comment

This section is based on Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). It describes incidental types of authority that accompany all authority granted to an agent under each of Sections 204 through 217, unless this incidental authority is modified in the power of attorney. The actions authorized in Section 203 are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 204 through 217. *See* Unif. Statutory Form Power of Atty. Act prefatory note (1988). Paragraph (10), which states that an agent is authorized to "do any lawful act with respect to the subject and all property related to the subject," emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (8) and (9) were added to the section to clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication.

SECTION 204. REAL PROPERTY. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(1) demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) pledge or mortgage an interest in real property or right incident to real property as

security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

(5) manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(D) purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(A) selling or otherwise disposing of them;

(B) exercising or selling an option, right of conversion, or similar right with respect to them; and

(C) exercising any voting rights in person or by proxy;

(8) change the form of title of an interest in or right incident to real property; and

(9) dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

SECTION 205. TANGIBLE PERSONAL PROPERTY. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(1) demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or, otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

(5) manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(D) moving the property from place to place;

(E) storing the property for hire or on a gratuitous bailment; and

(F) using and making repairs, alterations, or improvements to the property; and

(6) change the form of title of an interest in tangible personal property.

SECTION 206. STOCKS AND BONDS. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

(1) buy, sell, and exchange stocks and bonds;

(2) establish, continue, modify, or terminate an account with respect to stocks and bonds;

(3) pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

(4) receive certificates and other evidences of ownership with respect to stocks and bonds; and

(5) exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

Comment

The substance of this section remains unchanged from Section 6 the Uniform Statutory Form Power of Attorney Act; however, the wording is revised to reflect that "stocks and bonds" is now a defined term in the Act. *See* Section 102(14).

SECTION 207. COMMODITIES AND OPTIONS. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

(1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

(2) establish, continue, modify, and terminate option accounts.

SECTION 208. BANKS AND OTHER FINANCIAL INSTITUTIONS. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

(1) continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

(2) establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

(3) contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(4) withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(5) receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(6) enter a safe deposit box or vault and withdraw or add to the contents;

(7) borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt

guaranteed by the principal;

(8) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

(9) receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(10) apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(11) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

SECTION 209. OPERATION OF ENTITY OR BUSINESS. Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(2) perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) enforce the terms of an ownership agreement;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

(5) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(6) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(7) with respect to an entity or business owned solely by the principal:

(A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(B) determine:

(i) the location of its operation;

(ii) the nature and extent of its business;

(iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) the amount and types of insurance carried; and

(v) the mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(C) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(8) put additional capital into an entity or business in which the principal has an interest;

(9) join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(10) sell or liquidate all or part of an entity or business;

(11) establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

(13) pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Comment

The substance of this section remains unchanged from Section 9 of the Uniform Statutory Form Power of Attorney Act (1988); however, the wording is updated to encompass all modern business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

SECTION 210. INSURANCE AND ANNUITIES. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

(1) continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) procure new, different, and additional contracts of insurance and annuities for the

principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment;

(3) pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(4) apply for and receive a loan secured by a contract of insurance or annuity;

(5) surrender and receive the cash surrender value on a contract of insurance or annuity;

(6) exercise an election;

(7) exercise investment powers available under a contract of insurance or annuity;

(8) change the manner of paying premiums on a contract of insurance or annuity;

(9) change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(10) apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(12) select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(13) pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Comment

This section contains a significant change from Section 10 of the Uniform Statutory Form Power of Attorney Act (1988). The default language in the Uniform Statutory Form Power of Attorney Act (1988) permitted an agent to designate the beneficiary of an insurance contract. *See* Unif. Statutory Form Power of Atty. Act § 10(4) (1988). However, under Section 210 of this

Act, an agent does not have authority to "create or change a beneficiary designation" unless that authority is specifically granted to the agent pursuant to Section 201(a). The authority granted under Paragraph (2) of Section 210 is more limited, allowing an agent to only "procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents." A principal who grants authority to an agent under Section 210 should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

SECTION 211. ESTATES, TRUSTS, AND OTHER BENEFICIAL INTERESTS.

(a) In this section, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled to a share or payment.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

(1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose,

or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(6) conserve, invest, disburse, or use anything received for an authorized purpose; [and]

(7) transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor [; and

(8) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest].

Legislative Note: *The bracketed language in paragraph (8) of subsection (b), which grants an agent a power to "reject, renounce, disclaim [or] release," should be omitted by an enacting jurisdiction if that jurisdiction elects to include bracketed paragraph (8) in Section 201(a), which authorizes an agent to disclaim property, including a power of appointment, only if specifically authorized in the power of attorney. If, however, other law of the enacting jurisdiction, such as the state's disclaimer statute, authorizes an agent to disclaim an interest in, or power over, property even without specific authority and the jurisdiction does not wish to restrict that general authority, the jurisdiction should not adopt Section 201(a)(8), but should enact the bracketed language in Section 21l(b)(8). See Unif. Disclaimer of Property Interests Act § 5(b) (2006) (providing, "[e]xcept to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment . . . .").*

Comment

This section, which corresponds to Section 11 of the Uniform Statutory Form Power of Attorney Act (1988), has been revised to clarify that an agent's authority includes authority to exercise, for the benefit of the principal, a presently exercisable general power of appointment held by the principal (subsection (b)(3)). "Presently exercisable general power of appointment" is defined for purposes of the Act in Section 102(8).

SECTION 212. CLAIMS AND LITIGATION. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(1) assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(3) seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(5) submit to alternative dispute resolution, settle, and propose or accept a compromise;

(6) waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest

of the principal in property or other thing of value;

(8) pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(9) receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

SECTION 213. PERSONAL AND FAMILY MAINTENANCE.

(a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(A) the principal's children;

(B) other individuals legally entitled to be supported by the principal; and

(C) the individuals whom the principal has customarily supported or indicated the intent to support;

(2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) provide living quarters for the individuals described in paragraph (1) by:

(A) purchase, lease, or other contract; or

(B) paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(4) provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in paragraph (1);

(5) pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (1);

(6) act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, [as amended,] and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;

(7) continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in paragraph (1);

(8) maintain credit and debit accounts for the convenience of the individuals described in paragraph (1) and open new accounts; and

(9) continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(b) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this [act].

Comment

This section, based on Section 13 of the Uniform Statutory Form Power of Attorney Act (1988), contains three important changes. The first is clarification in subsection (a)(1) of who qualifies to benefit from payments for personal and family maintenance. Subsection (a)(1) states that the individuals who may benefit include not only the principal's children and other individuals legally entitled to be supported by the principal, but also "individuals whom the principal has customarily supported or indicated the intent to support," "whether living when the power of attorney is executed or later born." This definition is broad enough to include common recipients of family support such as parents and later-born grandchildren if such support is intended by the principal.

The second important addition to Section 213 is the inclusion of paragraph (6) in subsection (a) which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 213 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The third important addition to this section is subsection (b) which provides that authority under Section 213 is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under Section 213 may in fact be subject to gift tax treatment, subsection (b) clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 217. This is an important distinction because the Act requires a grant of specific authority under Section 201(a) to authorize gift making, and the default provisions of Section 217 limit the amounts of those gifts. The authority to make payments under Section 213 is not constrained by either of these provisions.

SECTION 214. BENEFITS FROM GOVERNMENTAL PROGRAMS OR CIVIL OR MILITARY SERVICE.

(a) In this section, "benefits from governmental programs or civil or military service" means any benefit, program or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(1) execute vouchers in the name of the principal for allowances and

reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in Section 213(a)(1), and for shipment of their household effects;

(2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(3) enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program;

(4) prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(6) receive the financial proceeds of a claim described in paragraph (4) and conserve, invest, disburse, or use for a lawful purpose anything so received.

SECTION 215. RETIREMENT PLANS.

(a) In this section, "retirement plan" means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

(1) an individual retirement account under Internal Revenue Code Section 408,

26 U.S.C. Section 408 [, as amended];

(2) a Roth individual retirement account under Internal Revenue Code Section 408A, 26 U.S.C. Section 408A [, as amended];

(3) a deemed individual retirement account under Internal Revenue Code Section 408(q), 26 U.S.C. Section 408(q) [, as amended];

(4) an annuity or mutual fund custodial account under Internal Revenue Code Section 403(b), 26 U.S.C. Section 403(b) [, as amended];

(5) a pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code Section 401(a), 26 U.S.C. Section 401(a) [, as amended];

(6) a plan under Internal Revenue Code Section 457(b), 26 U.S.C. Section 457(b) [, as amended]; and

(7) a nonqualified deferred compensation plan under Internal Revenue Code Section 409A, 26 U.S.C. Section 409A [, as amended].

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

(1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) establish a retirement plan in the principal's name;

(4) make contributions to a retirement plan;

(5) exercise investment powers available under a retirement plan; and

(6) borrow from, sell assets to, or purchase assets from a retirement plan.

Comment

This section, based on Section 15 of the Uniform Statutory Form Power of Attorney Act (1988), has been substantially updated to reflect changes in the laws governing retirement plans. A significant departure from the Uniform Statutory Form Power of Attorney Act (1988) is the deletion of default authority in the agent to waive the right of the principal to be a beneficiary of a joint or survivor annuity (*see* Unif. Statutory Form Power of Atty. Act § 15 (1988)). Under this Act, the authority to waive the principal's right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 201(a).

SECTION 216. TAXES. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

(1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code Section 2032A, 26 U.S.C. Section 2032A, [as amended,] closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;

(2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

(3) exercise any election available to the principal under federal, state, local, or foreign tax law; and

(4) act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

SECTION 217. GIFTS.

(a) In this section, a gift "for the benefit of" a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act (1983/1986), and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529 [, as amended].

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(1) make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), [as amended,] without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, [as amended,] in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(2) consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, [as amended,] to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(c) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

(1) the value and nature of the principal's property;

(2) the principal's foreseeable obligations and need for maintenance;

(3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(4) eligibility for a benefit, a program, or assistance under a statute or regulation; and

(5) the principal's personal history of making or joining in making gifts.

Comment

This section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney (*see* Section 201(a)(2); *see also* Section 301). The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal's spouse consent to make a split gift.

Subsection (a) of this section clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (a) provides examples of gifts made for the benefit of a person, but these examples are not intended to be exclusive.

Subsection (c) emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (c) provides examples of factors relevant to the principal's best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. *See* Section 114 Comment.

[ARTICLE] 3

STATUTORY FORMS

Legislative Note: *An enacting jurisdiction should review its respective statutory requirements for acknowledgments and for the recording of documents and amend, where necessary for conformity with those requirements, the statutory forms provided in Sections 301 and 302.*

General Comment

Article 3 provides a concise, optional statutory form for creating a power of attorney under this Act (Section 301). With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

In addition to the statutory form power of attorney, Article 3 provides an optional form for agent certification of facts pertaining to a power of attorney (Section 302). Pursuant to Section 119, a person may request an agent to certify any factual matter concerning the principal, agent, or power of attorney. The form in Section 302 is intended to facilitate agent compliance with these requests. The form lists factual matters about which persons commonly request certification (*e.g.*, the principal is alive and has not revoked the power of attorney or the agent's authority), and provides a designated space for certification of additional factual statements. Both the statutory form power of attorney and the agent certification form may be tailored to accommodate individual circumstances and objectives.

SECTION 301. STATUTORY FORM POWER OF ATTORNEY. A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this [act].

[INSERT NAME OF JURISDICTION]

STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act [insert citation].

This power of attorney does not authorize the agent to make health-care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I ____ name the following
(Name of Principal)
person as my agent:

Name of Agent: ____

Agent's Address: ____

Agent's Telephone Number: ____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: ____

Successor Agent's Address: ____

Successor Agent's Telephone Number: ____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: ____

Second Successor Agent's Address: ____

Second Successor Agent's Telephone Number: _____________________________________

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act [insert citation]:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

(___) Real Property
(___) Tangible Personal Property
(___) Stocks and Bonds
(___) Commodities and Options
(___) Banks and Other Financial Institutions
(___) Operation of Entity or Business
(___) Insurance and Annuities
(___) Estates, Trusts, and Other Beneficial Interests
(___) Claims and Litigation
(___) Personal and Family Maintenance
(___) Benefits from Governmental Programs or Civil or Military Service
(___) Retirement Plans
(___) Taxes
(___) All Preceding Subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

(___) Create, amend, revoke, or terminate an inter vivos trust
(___) Make a gift, subject to the limitations of the Uniform Power of Attorney Act [insert citation to Section 217 of the act] and any special instructions in this power of attorney
(___) Create or change rights of survivorship
(___) Create or change a beneficiary designation
(___) Authorize another person to exercise the authority granted under this power of attorney
(___) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
(___) Exercise fiduciary powers that the principal has authority to delegate
(___) Access the content of electronic communications
[(___) Disclaim or refuse an interest in property, including a power of appointment]

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

____
____
____
____
____
____
____

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF [CONSERVATOR OR GUARDIAN] (OPTIONAL)

If it becomes necessary for a court to appoint a [conservator or guardian] of my estate or [guardian] of my person, I nominate the following person(s) for appointment:

Name of Nominee for [conservator or guardian] of my estate:

____

Nominee's Address: ____

Nominee's Telephone Number: ____

Name of Nominee for [guardian] of my person: _______________________________________

Nominee's Address: ____

Nominee's Telephone Number: ____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

____ _______________
Your Signature Date

____
Your Name Printed

____
Your Address

____
Your Telephone Number

State of ____________________________
[County] of___________________________

This document was acknowledged before me on _______________
(Date)
by ______________________________________.
(Name of Principal)

____ (Seal, if any)

Signature of Notary ____

My commission expires: _______________

[This document prepared by:
____
____]

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
(2) act in good faith;
(3) do nothing beyond the authority granted in this power of attorney; and
(4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

<u>(Principal's Name)</u> by <u>(Your Signature)</u> as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

(1) act loyally for the principal's benefit;
(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) act with care, competence, and diligence;
(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
(5) cooperate with any person that has authority to make health-care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
(6) attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) death of the principal;
(2) the principal's revocation of the power of attorney or your authority;
(3) the occurrence of a termination event stated in the power of attorney;
(4) the purpose of the power of attorney is fully accomplished; or
(5) if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act [insert citation]. If you violate the Uniform Power of Attorney Act [insert citation] or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

Legislative Note: *The brackets which precede the words "Statutory Form Power of Attorney" indicate where the enacting jurisdiction should insert the name of the jurisdiction. An indication of the jurisdiction in a power of attorney is important to establish what law supplies the default rules and statutory definitions for interpretation of the power of attorney (see Section 107 and Comment). Likewise, the brackets in the first paragraph of the "Important Information" section of the form indicate where the enacting jurisdiction should insert the citation for its codification of the Uniform Power of Attorney Act.*

In the "Grant of Specific Authority" section of the form, the phrase "Disclaim or refuse an interest in property, including a power of appointment" is in brackets and should be deleted if under the law of the enacting jurisdiction a fiduciary has authority to disclaim an interest in, or power over, property and the jurisdiction does not wish to restrict that authority by the Uniform Power of Attorney Act. See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, "[e]xcept to the extent a fiduciary's right to disclaim is expressly restricted or limited by another *statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment . . . ."). See also Section 201 Legislative Note.*

The brackets in the "Nomination of Conservator or Guardian" section of the form indicate areas where an enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the terminology and substance of the bracketed language.

The bracketed language "This document prepared by:" at the conclusion of the "Signature and Acknowledgment" section of the form may be omitted or amended as necessary to conform to the jurisdiction's statutory requirements for acknowledgments or the recording of documents.

Comment

This section provides an optional form for creating a power of attorney. Any power of attorney that substantially complies with the form in Section 301 constitutes a statutory form power of attorney with the meaning and effect prescribed by the Act.

The form begins with an "Important Information" section that contains instructions for the principal and concludes with an "Important Information for Agent" section that contains general information for the agent about agent duties, events that terminate an agent's authority, and agent liability. The form is constructed to guide the principal through designation of an agent, optional designation of one or more successor agents, and selection of subject areas and acts with respect to which the principal wishes to grant the agent authority. The form also contains an option for nomination of a conservator or guardian in the event later court-appointment of a fiduciary becomes necessary (*see* Section 108 and Comment).

The grant of authority provisions in the form are divided into two sections: "Grant of General Authority," which corresponds to the subject areas defined in Sections 204 through 216 of the Act, and "Grant of Specific Authority," which corresponds to the actions for which Section 201(a) requires an express grant of authority in a power of attorney. Article 2 of the Act provides statutory construction with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the "Special Instructions" section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 217 unless the principal expands or narrows that authority in the Special Instructions.

Cautionary language in the Grant of Specific Authority section alerts the principal to the increased risks associated with a grant of authority that could significantly reduce the principal's property or alter the principal's estate plan. The form is constructed to require that the principal initial each action over which the principal grants specific authority. The separate authorization of acts covered by Section 201(a) is intended to emphasize to the principal the significance of granting such specific authority and to minimize the risk that those actions might be authorized inadvertently.

Many principals may wish to grant an agent comprehensive authority over their day-to-day affairs. If this is the case, the principal may grant authority over all of the subject areas in the Grant of General Authority section by initialing "All Preceding Subjects." Otherwise, the principal may authorize fewer than all of the subjects listed in the Grant of General Authority section by initialing only those particular subjects.

The statutory form is drafted to follow the Act's default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory form power of attorney include:

(1) the power of attorney is durable (Section 104);
(2) the power of attorney is effective when executed (Section 109);
(3) a spouse-agent's authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 110(b)(3));
(4) lapse of time does not affect an agent's authority (Section 110(c));
(5) a successor agent has the same authority as the original agent (Section 111(b));
(6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 111(b));
(7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 112);
(8) an agent is entitled to reasonable compensation (Section 112);
(9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 113);
(10) an agent has a duty to act loyally for the principal's benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal's best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal's health-care agent; to attempt to preserve the principal's estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal's best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal's estate (Section 114);
(11) an agent must give notice of resignation as specified in Section 118; and
(12) an agent that is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal's property (Section 201(b)).

Although the statutory form does not include express prompts for deviating from the foregoing default rules, any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions.

SECTION 302. AGENT'S CERTIFICATION. The following optional form may be used by an agent to certify facts concerning a power of attorney.

AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of ____________________________
[County] of __________________________]

I, ____ (Name of Agent), [certify] under penalty of perjury that ____(Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated
________________________.

I further [certify] that to my knowledge:

(1) the Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;

(2) if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4)
____
____
____
____
____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

____ _______________
Agent's Signature Date

____
Agent's Name Printed

____
Agent's Address

____
Agent's Telephone Number

This document was acknowledged before me on _______________,
(Date)
by ____
(Name of Agent)

____ (Seal, if any)
Signature of Notary
My commission expires: _______________

[This document prepared by:

____]

Legislative Note: *The phrase "certify" is bracketed in this section to indicate where an enacting jurisdiction should review its respective statutory requirements for acknowledgments and the recording of documents and amend, if necessary for consistency, the terminology and substance of the bracketed language. Likewise, the bracketed language "This document prepared by:" at the conclusion of the Agent's certification form may be omitted or amended as necessary to conform with the jurisdiction's statutory requirements for acknowledgments or the recording of documents.*

Comment

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 119.

[ARTICLE] 4

MISCELLANEOUS PROVISIONS

SECTION 401. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

SECTION 402. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 403. EFFECT ON EXISTING POWERS OF ATTORNEY. Except as otherwise provided in this [act], on [the effective date of this [act]]:

(1) this [act] applies to a power of attorney created before, on, or after [the effective date of this [act]];

(2) this [act] applies to a judicial proceeding concerning a power of attorney commenced on or after [the effective date of this [act]];

(3) this [act] applies to a judicial proceeding concerning a power of attorney commenced before [the effective date of this [act]] unless the court finds that application of a provision of this [act] would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

(4) an act done before [the effective date of this [act]] is not affected by this [act].

SECTION 404. REPEAL. The following are repealed:

(1) [Uniform Durable Power of Attorney Act]

(2) [Uniform Statutory Form Power of Attorney Act]

(3) [Article 5, Part 5 of the Uniform Probate Code]

SECTION 405. EFFECTIVE DATE. This [act] takes effect _______________.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

Barnstable Division **Docket No. BA19E0017QC**

TRACEY E. FERN,[1] ***Plaintiff***

v.

ANTHONY W. BAKER,[2] **CHRISTOPHER A. BAKER**[3]
and LISA A. LOPORTO, ***Defendants***

MEMORANDUM OF DECISION & ORDER
(Motion for Summary Judgment filed 10/1/19)

The above-captioned matter came before the Court (Ordoñez, J.) for hearing on October 16, 2019. The Plaintiff, Tracey E. Fern (individually and as Co-Trustee of the Daniel J. Fern Trust) (hereinafter "Tracey"), was present and represented by Attorney John Fulginiti. The Defendants, Anthony W. Baker (individually, as Co-Personal Representative of the Estate of Frances R. Fern, and as Co-Trustee of the Daniel J. Fern Trust) (hereinafter "Tony"), Christopher A. Baker (individually, and as Co-Personal Representative of the Estate of Frances R. Fern) (hereinafter "Chris"), and Lisa A. LoPorto (hereinafter "Lisa"), were present and represented by Attorney Brian Bixby. After hearing, it is ordered as follows:

1. The Plaintiff's Motion for Summary Judgment dated October 1, 2019 is hereby *denied.*

Memorandum of Decision

Background

The parties, the Plaintiff, Tracey, and the Defendants, Christopher and Anthony, are the children of Frances R. Fern (hereinafter "the decedent").[4] Further background information pertaining to this matter is provided in the Court's Memorandum and Order dated July 19, 2019.

On April 9, 2019, the Plaintiff filed a Complaint in Equity wherein she alleged that the Defendants "illicitly" transferred $5,574,000 of the decedent's property to themselves via a Durable Power of Attorney prior to the decedent's death, which decreased the value of the decedent's gross estate from approximately $42 million dollars to $37 million dollars. The

[1] Individually, and as Co-Trustee of the Daniel J. Fern Trust.
[2] Individually, as Co-Personal Representative of the Estate of Frances R. Fern, and as Co-Trustee of the Daniel J. Fern Trust.
[3] Individually, and as Co-Personal Representative of the Estate of Frances R. Fern.
[4] The Defendant Lisa is the partner of the Defendant Tony. The decedent also had a fourth child who is not a party to this action.

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Plaintiff further alleged that the "*unlawful transfers deprived the decedent's estate of substantial appreciation on the converted funds*" and that it has also resulted in the Plaintiff having to pay "*an improper and unfair portion*" of the decedent's estate taxes on the alleged improper transfers.

On May 16, 2019, the Defendants filed a Motion to Dismiss the Complaint in Equity, which was subsequently denied by the Court (Ordoñez, J.) on July 19, 2019, pursuant to a Memorandum and Order dated the same. On September 25, 2019, the Court (Ordoñez, J.) entered an Order which provided, *inter alia*, that Count I (Conversion) and Count V (Civil Conspiracy) of the Plaintiff's Complaint in Equity were dismissed as it lacked subject matter jurisdiction over those two counts.

On October 1, 2019, the Plaintiff filed the instant Motion for Summary Judgment. The Defendants filed an Opposition thereto. The parties appeared before the Court (Ordoñez, J.) for hearing on October 16, 2019.

Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to request for admissions under Rule 36, together with the affidavits, if any, show that ***there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.***" Mass. R. Civ. P. 56 (c) (emphasis added). The Court "resolve[s] any conflicts in the summary judgment materials, and [it] make[s] all logically permissible inferences, in the [nonmoving party's] favor." Coveney v. President & Trustees of the College of the Holy Cross, 388 Mass. 16, 17 (1983). Summary judgment is proper only if "all material facts have been established and the nonmoving party is entitled to judgment as a matter of law," where all the evidence is "view[ed] . . . in the light most favorable to the nonmoving party." See Augat, Inc. v. Liberty Mutual Ins. Co., 410 Mass. 117, 120 (1991). If the moving party is able to demonstrate a lack of genuine issue, "the burden shift[s] to the [nonmoving party] to show with admissible evidence the existence of a dispute as to material facts." Godbout v. Cousens, 396 Mass. 254, 261 (1985). The nonmoving party must then go beyond the pleadings and demonstrate specific facts to show that there remains a genuine issue of material fact requiring a trial. See Slaven v. City of Salem, 386 Mass. 885, 890 (1982), citing Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975).

Plaintiff's Motion for Summary Judgment

The dispute between the parties involves a disagreement over funds transferred by the Defendants to themselves via a Durable Power of Attorney prior to the decedent's death. The Defendants do not dispute that the transfer of the decedent's funds occurred, but assert that they had the authority to do so based upon power conferred upon them by Paragraph 14 of the Durable Power of Attorney.[5]

[5] Paragraph 14 of the Durable Power of Attorney dated March 21, 2013 provides as follows: "*Power to Make Gifts. To make outright gifts of my property to or for the benefit of such persons who, in the opinion of my said attorney, would be the donees I may choose.*"

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The Plaintiff now requests that the Court enter summary judgment in her favor with respect to Count II (breach of fiduciary duty), Count III (unjust enrichment) and Count IV (constructive trust) of her Complaint. The Plaintiff asserts that because the Power of Attorney did not expressly grant the Defendants the authority to "self-deal" with respect to gifts made of the decedent's property, that as a matter of law, they breached their fiduciary duty to the decedent when they gifted $5,546,000 of the decedent's property prior to her death. Furthermore, the Plaintiff argues that because her claim for breach of fiduciary duty gives rise to her related claims of unjust enrichment and constructive trust, summary judgment is appropriate relative to those counts as well.

The Defendants alternatively assert that summary judgment is inappropriate here as the Durable Power of Attorney at issue granted the Defendants, Christopher and Anthony, the "broad" power "*[t]o make outright gifts of [the decedent's] property to or for the benefit of such persons who, in the opinion of [the decedent's] said attorney, would be the donees [the decedent] may choose.*" The Defendants further claim that the decedent's intent ("*the donees [she] may choose*") is a "material and highly contested" issue of fact which therefore precludes the Court from entering summary judgment.

Moreover, the Defendants deny that the prior Power of Attorney, the Power of Attorney in favor of Tracey in 2012, was validly executed by the decedent. The Defendants assert that even if the aforementioned document had been validly executed, it conferred no present authority on the Plaintiff as it contained "springing" language[6] which was not included in the subsequent Power of Attorney in 2013 which conferred "broad gifting authority" on her sons.

The Defendants further assert that the decedent's "longstanding intent" to primarily benefit her sons with only minimal bequests to the Plaintiff is confirmed by a prior Will in 2002, and that the Plaintiff has neglected to reference her estrangement from the decedent for many years prior to her death. The Defendants assert that discovery will further confirm additional material facts supporting that the gifting actions they took as attorneys-in-fact were consistent with their mother's wishes, including the Plaintiff's "abandonment" of the parties' specials needs brother, and the Plaintiff's receipt of "substantial financial benefit" from her father, to the exclusion of the Defendants.

The Defendants also argue that summary judgment is inappropriate to determine whether the Defendants breached their fiduciary duty to the decedent or to determine whether the Plaintiff is entitled to recover under the theories of unjust enrichment or constructive trust. The Defendants assert that the Power of Attorney in question did not limit or exclude them from making gifts to themselves, and that as the decedent's children, they should "naturally" be considered to fall within the class of "*donees [the decedent] may choose.*" The Defendants argue that the Plaintiff's suggestion that they could act as they did, with respect to gift giving, only if the Power of Attorney specifically authorized "self-dealing" is illogical, and that a reading of the document "as a whole"

[6] The "springing" language contained within the 2012 Power of Attorney provided as follows: "*this power of attorney shall not be effective unless accompanied by a letter from a duly licensed physician or such physician's letterhead stating that in such physician's opinion, due to the physical or mental incapacity of the principal, the principal is unable to properly care for her finances or estate.*"

demonstrates that the decedent "contemplated" and "authorized" transactions to the benefit of the Defendants themselves.[7]

The Court has carefully reviewed the cases cited by the Plaintiff in support of her Motion for Summary Judgment, and finds that each case can be distinguished from the instant case, primarily due to specific gifting language included within the decedent's 2013 Power of Attorney.

The Defendants finally assert that the disposition of this matter will depend on the Court's interpretation as to who, specifically, which individuals, the decedent would have chosen to make lifetime gifts if she had remained competent to do so at the time the gifting was effected (*"who[m], in the opinion of my said attorney, would be the donees I may chose."*). The Defendants anticipate that discovery will further confirm additional material facts supporting their position that the disputed gifts were consistent with their mother's wishes. The Defendants assert that because the Power of Attorney at issue conferred "broad gifting authority" upon them, and because the decedent's donative intent is a contested issue of material fact, the Plaintiff is not entitled to judgment as a matter of law on her claims. The Court agrees.

In consideration of the foregoing, the Court cannot find that the Plaintiff is entitled to judgment as a matter of law. In applying the standard provided in Rule 56 (c), and in considering the evidence in the light most favorable to the nonmoving party, the Defendants, the Court finds that the Defendants have presented specific facts establishing a genuine, triable issue. Accordingly, the Plaintiff's Motion for Summary Judgment dated October 1, 2019 is hereby *denied*.

November 20, 2019

Angela M Ordoñez

Angela M. Ordoñez, Justice

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[7] The Defendants assert that Paragraph 12 of the Power of Attorney, which provides as follows, supports their position:

> "***To transfer any or all property** . . . whether created by me or by my said attorney on my behalf . . . and **with such provisions as my attorney deems to be in the best interest of myself and my family.** Further, my said attorney shall have full power and authority . . . to make written instructions and demands . . . and the **making of distributions of income or principal of the trust property . . . to or for the benefit of others including members of my family . . . In this regard, the fact that my said attorney may be a remainderman or a beneficiary in connection with any such transfer hereunder shall not affect the validity thereof nor, by itself, constitute a breach of my attorney's fiduciary duty hereunder.***" (emphasis added).

The Defendants assert that because the above language authorizes them to transfer the property at issue into a trust or other entity, and that from there, they could have directed distributions of income or principal for their own benefit, therefore, to suggest that they could not make outright gifts to themselves under the "broad gifting provision" is "nonsensical."

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