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Attorney-in-Fact Must be Expressly Authorized to Create a Trust

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The execution of a durable power of attorney has become a routine part of estate planning and is often relied on as a way to avoid the complications and expense of formal guardianship. One of the ways to accomplish that end is to authorize the attorney-in-fact to fund an existing revocable trust. But what if the principal has not created the trust before becoming incapacitated? Can the attorney-in-fact create the trust as well as fund it?

The Supreme Judicial Court of Massachusetts has addressed the question of an attorney-in-fact's authority to create a trust as agent for the principal—a question it describes as one of first impression—in *Barbetti v. Stempniewicz.*[1] The facts are simple: the principal executed a durable power of attorney in 2013 appointing the principal's child, Edward, as attorney-in-fact. At the same

time the principal executed a will to replace a will executed in 1999. Four years later, Edward created and signed a trust instrument as attorney-in-fact for the principal who was named as grantor, as attorney-in-fact for the principal as first co-trustee of the trust, and in his personal capacity as second co-trustee. The principal was the sole beneficiary during the principal's life and on death the terms provided cash distributions to the principal's four grandchildren (two of whom are Edward's children) and distribution of tangible personal property to Edward or to Edward's children if Edward does not survive the grantor. The remaining trust property is to be held in trust for the benefit of Edward's children.

After the principal's death in 2018 the principal's grandchildren by another child sought to probate the 1999 will. The plaintiffs in the will proceeding also brought an action challenging the validity of the trust and alleging breach of fiduciary duties by Edward. The trial court granted the plaintiffs summary judgment holding the trust invalid. An appeal followed and the high court transferred the appeal on its own motion. The court affirmed because the power of attorney under which Edward acted did not expressly grant him authority to create a trust.

The court notes first that whether or not “the power of a settlor to create a trust is delegable” has never been addressed in the law of Massachusetts. The Massachusetts version of the Uniform Trust Code (MUTC) does not address the question in the provisions governing trust creation,[2] and the corresponding provision of the UTC is equally silent.[3] The MUTC mentions actions by attorneys-in-fact only in section 602 dealing with revocable trusts which provides that the settlor's powers “with respect to revocation, amendment or distribution of trust property” may be exercised by an agent under a power of attorney only if the trust terms and the terms of the power expressly grant the attorney-in-fact the requisite authority. This provision is more restrictive than UTC section 602 which requires the terms of either the power of attorney or the trust expressly grant the necessary authority.

Looking for guidance in the law of other states, the court finds inclusion in some states' power of attorney statutes a requirement that the authority to create a trust be expressly granted, which is also the position of the Uniform Power of Attorney Act.[4] The court also notes that some states that have adopted the UTC have included in sections 401 or 402 a provision allowing an attorney-in-fact to create at trust where the terms of the power expressly grant that authority. The conclusion: the “weight of authority” is that the

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authority to create a trust is not delegable to an attorney-in-fact unless express authority is granted by the terms of the instrument.

Next is an analysis of the power of attorney under which Edward acted, governed by the principal that powers of attorney must be interpreted in a way that does not extend authority beyond what is

granted. The titles of the portions of the power of attorney that mention trusts deal with “estate, trust, and other beneficiary transactions” and “living trust transactions.” The language granting authority in the first section is indeed limited to trust transactions where the principal is a beneficiary rather a setllor. The second grants authority to transfer the principal's property to the trustee of a revocable trust “I have created as settlor.” The court concludes that language refers only to a trust created by the principal before the execution of the power of attorney and does not authorize the attorney-in-fact to create such a trust. The trust Edward purportedly created is therefore void ab initio.

The court goes on, however, to question whether it is even possible to use a power of attorney to delegate the authority to create a trust. Like the UTC, the MUTC in section 402 requires that a settlor have capacity to create a trust and indicate the intention to do so. The creation of a trust using the authority of a durable power of attorney may not meet the capacity requirement.

The opinion in *Barbetti* teaches two important lessons. The first is that there is a good argument that without statutory authorization, the authority to create a trust is no more delegable than the authority to create a will. The second, however, is that if the agent under a valid power of attorney can create a trust on behalf of the principal the terms of the power of attorney must expressly grant the authority to do so. Without such a grant, the more general question does not even arise. As the opinion also shows, there is statutory authority in some states authorizing express grant of authority to make a trust (and legislation to do so is under consideration in Massachusetts). And of course the power of attorney can also authorize the attorney-in-fact to the fund the trust with the settlor's property. If the trend is to allow delegation of the authority to create a will substitute, can statutory approval of delegation of the authority to make a will be too long in coming?

No Contest Clause Cannot Prevent Challenge to Validity of Trust

In September 2021[5] this column reported on *Giller v. Slosberg*[6] where the Georgia intermediate appellate court held that a no-contest clause in the terms of a trust requiring forfeiture of the interest of any beneficiary who contested the validity of the trust was violated when a beneficiary challenged the validity of the trust on the grounds of undue influence. The court reversed a jury verdict for the beneficiary because violation of the no-contest clause meant that the beneficiary was no longer a beneficiary and lacked standing to bring the proceeding. The beneficiary successfully sought certiorari from the Georgia Supreme Court which has now reversed the Court of Appeals in *Slosberg v. Giller.*[7]

The high court's reasoning is straightforward. The law allows a challenge to legal instruments on the ground that they are invalid and if the challenge is successful the instrument is void. Therefore, a no-contest clause in a trust that is void has no

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effect. Only if the trust is found to be valid will the beneficiary suffer the consequences of violating the no-contest clause.

The court finds the basic principle on which it rests its opinion in the common law of England adopted by the state at the time of the Revolution (the Georgia "reception date" is May 14, 1776). That principle is a legal doctrine independent of both statute and public policy. The Court of Appeals was wrong, therefore, to find significant the fact that the statute dealing with conditions in wills prohibits conditions that are contrary to public policy[8] and that statue dealing with trusts does not.[9]

The Supreme Court's decision ends the possibility that a settlor can create a trust under Georgia law that is completely immune from challenge simply by including a no-contest clause. The court expresses no opinion on whether a beneficiary whose challenge is unsuccessful can avoid forfeiture by showing that the beneficiary had probable cause for the challenge. The exculpatory effect of probable cause is widely recognized in United States jurisdictions and is part of both the Uniform Probate Code[10] and Restatement (Third) of Property.[11] The court does note, however, that the probable cause exception to enforcement of a no-contest clause may be part of the common law of England received by the new state of Georgia and cites a 17th century case that recognizes such an exception.[12] Unless the legislature answers the question by statute, the question of such an exception in Georgia law will have to await the appropriate case.

Method of Amendment did not Substantially Comply with Terms of the Trust

This column has reported cases dealing with the amendment of revocable trusts under UTC section 602 which allows amendment by substantial compliance with the method set out in the terms of the trust, by a provision in a later will or codicil that expressly refers to the trust or specifically devises trust property, or by any method that manifests "clear and convincing evidence" of the settlors intent so long as the terms of the trust do not make the method in the trust terms the "exclusive" method of amendment. The latest such report involved *In re Omega Trust*[13] in which the New Hampshire Supreme Court held that a party must have the opportunity to show that an exchange of emails between the settlor and the settlor's attorney provided clear and convincing evidence of the settlor's intent to amend the trust.

In *Baker v. Baker*[14] the Arkansas intermediate appellate court has spoken on the substantial compliance method of amendment under Arkansas's enactment of the UTC.[15] Charles F. Baker created a revocable trust on July 30, 2018. The trust terms provided that any amendment be accomplished "by a signed, dated, written document titled 'The Charles F. Baker Living Trust

Amendment.'" The settlor's spouse and children by a previous marriage were the beneficiaries on the settlor's death. On April 10, 2019 the settlor executed a document titled "First Amendment of the Charles F. Baker Living Trust" which removed the spouse as a beneficiary. On May 30, 2019 the settlor executed another document titled "The Charles F. Baker Living Trust" which reinstated the spouse as a beneficiary and successor trustee. This 2019 trust is identical to the 2018 trust except on the settlor's death real property held in trust is distributed only to the spouse rather than to the spouse and the settlor's children. The settlor and the spouse then executed a quitclaim deed conveying to this trust the same property they had conveyed to the 2018 trust.

After the settlor's death the spouse asked the court to "confirm" the 2019 trust and quiet title to the real estate in the surviving spouse's name. The settlor's children answered by alleging the invalidity of the 2019 instrument because it was not a valid amendment to the 2018 trust and also because it was not properly funded because the real property purported conveyed to the 2019 trust by the settlor and the spouse was property of the 2018 trust.

The trial court granted the children's summary judgment motions on both issues. The spouse appealed the finding that the 2019 trust did not amend the 2018 trust. The Court of Appeals affirmed, holding that an amendment that did not include the word "amendment" in its title could not substantially comply with a method of amendment that requires the inclusion of that word in the title of the document purporting to amend the trust.

The decision illustrates the limits of substantial compliance when the required formalities are set forth with a high degree of specificity. The court noted the spouse did not timely raise the issue of whether the 2019 document evidenced the settlor's clear and convincing intention to amend the trust and therefore it did not reach that issue.

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[1] 189 N.E.3d 264 (Mass. 2022).

[2] G.L. c. 203E, section 401.

[3] U.T.C. section 401.

[4] Unif. Power of Att'y. Act section 201(a)(1).

[5] 48 ETPL 38 (Sept. 2021).

[6] 858 S.E.2d 747 (Ga. App. 2021).

[7] 876 S.E.2d 228 (Ga. 2022).

[8] O.C.G. section 53-4-68.

[9] O.C.G. section 53-12-22.

[10] UPC sections 2-517 and 3-905.

[11] Rest. (3d) Property (Wills & Don. Trans.) section 8.5.

[12] *Powell v. Morgan*, 23 Eng. Rep. 668 (Ch.1688).

[13] ___ A.3d. ___, 2022 WL 1498499 (N.H. 2022).

[14] 646 S.W.3d 397 (Ark. App 2022).

[15] A.C.A. section 28-73-602.

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