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Probate & Fiduciary Litigation Newsletter - October 2022

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This newsletter is intended to keep readers informed about developments in probate and fiduciary litigation in Massachusetts and New York. Our lawyers are at the forefront of this area of the law, shaping how it is handled in the Probate and Family Court. Goulston & Storrs is the go-to firm in the Northeast for litigation involving Probate and Fiduciary matters.

Power of Attorney Did Not Provide Authority to Create a Trust on Behalf of the Elder Who Granted the Power of Attorney

Barbetti v. Stempniewicz, 490 Mass. 98 (Sup. Jud. Ct. June 28, 2022)

Does a power of attorney ("POA"), notwithstanding a broad delegation of authority to its holder, provide authority to the holder to create a trust to hold the assets of the elderly relative who granted the POA? In *Barbetti v. Stempniewicz*, 490 Mass. 98 (Sup. Jud. Ct. June 28, 2022), the Massachusetts Supreme Judicial Court answered that question in the negative, setting a precedent important for those drafting or using POAs as part of elder planning.

In 2013, when Lubov Stempniewicz ("Lubov") was 91 years old, she executed a POA delegating broad powers of financial management to her son Edward. Lubov was not represented by an attorney in connection with her execution of the POA. In 2017, Edward created a trust (the "Lubov Trust"), providing for Lubov's financial support during her lifetime but, upon her death, disposing of the assets in the trust in a manner favorable to Edward and his two children, but unfavorable to Lubov's other two grandchildren, Regan and Ryan. After Lubov died in 2018, Regan and Ryan brought proceedings in Superior Court challenging (among other things) Edward's authority under the POA to create the Lubov Trust. The Superior Court granted summary judgment declaring the Lubov Trust to be invalid.

The Supreme Judicial Court affirmed, finding the Lubov Trust to be void *ab initio* because Edward lacked the authority under the POA to create the trust. Noting that "[t]his court never has determined whether the power of a settlor to create a trust is delegable, either at common law or under the Massachusetts Uniform Trust Code (MUTC)," the court performed a detailed review of the law and concluded that the MUTC itself does not authorize creation of a trust pursuant to a POA. While noting that some other states' laws do expressly authorize this, the court found that "our review of the statutes and case law of other States reveals an underlying principle: where the power to create a trust is delegable, either pursuant to a statute or judicial opinion, it is only so where there is an express grant of the power to create a trust in the power of attorney" (emphasis

in original). Finding no such express grant in the Lubov POA, the court affirmed the finding that the Lubov Trust was void because Edward lacked authority to create it.

The court stopped short of creating a bright-line rule for future cases, however; and deferred to the Legislature for a rule on the delegability of authority to create a trust. "[W]hile we acknowledge the critical importance of powers of attorney in the area of elder life planning, we likewise acknowledge that, 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. …Therefore, we conclude that, at this time, the more prudent path is to allow the Legislature the opportunity to decide whether and how to allow delegation of the power to create a trust."

Takeaway: At this time, the prudent approach appears to be for the holder of a POA to avoid creating a trust lest it been deemed void as in *Barbetti*. However, if this is to be done, the POA should expressly grant the power to create a trust on behalf of the grantor.

Merely Adding Caregiver to Bank Accounts Held Insufficient to Establish Donative Intent of Decedent

Petition of Fischer, 76 Misc.3d 1208(A) (Sur. Queens September 1, 2022)

Was it sufficient to show donative intent of a decedent to show that she had added her caregiver as a party to the decedent's bank accounts? In *Petition of Fischer*, 76 Misc.3d 1208(A) (Sur. Queens September 1, 2022), the Surrogate's Court in Queens County, New York, answered that question in the negative, and ordered funds withdrawn from the accounts by the caregiver to be returned to the decedent's estate.

Respondent was the caregiver for the decedent, "an elderly woman, wholly reliant upon the respondent for her activities of daily living, 24 hours a day, seven days a week." Two years before decedent's death, respondent brought decedent to the local branch of her bank for the purpose of "adding" respondent to decedent's bank accounts. When the local branch declined to do this, respondent brought decedent to another branch of the bank, which complied with the request. Once "added" to the account, respondent transferred $246,681 to a new joint account at a different bank. At decedent's death, there was $273,115 in that joint account, which respondent transferred to herself after decedent passed away.

The executor filed a petition requesting, among other things, an order that those funds be transferred to decedent's estate. Respondent testified to decedent's intent that "adding" respondent to the accounts was a gift for respondent's devoted service as caregiver to decedent. The court found this insufficient, noting that a caregiver in respondent's position was in a "confidential relationship" with the decedent: "The relationship often serves as a double-edged sword in these scenarios. On the one hand, providing a plausible basis as to why the donor, grateful for assistance, would bestow her largess on her caregiver. On the other hand, reflecting a donor, weakened by the rigors of time, rendered peculiarly susceptible to manipulation and overreaching by the person upon whom she has come to desperately rely." This relationship, the court found,

created burdens to show not only that the transaction was "free from undue influence" but "the fairness and voluntariness of the transaction." The court found respondent failed to meet these burdens, relying "solely o[n] self-serving claims concerning decedent's wishes," and ordered respondent to return the $273,115 to decedent's estate.

Takeaway: *Fischer* is certainly a real-life cautionary tale suggesting that those with loved ones who depend on full-time caregivers be alert to any possibility that the caregiver is taking financial advantage of the elderly care recipient. Conversely, in a circumstance where the elderly person being cared for really does wish to make gifts, thought should be given to making some form of record of the giver's capacity and donative intent.

A Reminder as to the Potential Importance of Signature Cards for Joint Accounts

Matter of Estate of Manchester, 172 N.Y.S.3d 918 (Sur. Erie Aug. 18, 2022)

Estate litigation sometimes brings up the question of whether funds in a joint bank account, following the death of one party to the account, are property of the estate or belong to the surviving party to the account. Under New York Banking Law § 675, where deposits are made in joint form, that is, so as to be "paid or delivered to either of [the account parties], or the survivor of them," the making of deposits in that form "shall, in the absence of fraud or undue influence, be prima facie evidence … of the intention of both depositors" to create a joint tenancy and "to vest title … in such survivor." The burden of proof in refuting such prima facie evidence "is upon the party or parties challenging the title of the survivor." A pair of recent New York cases involving joint bank accounts illustrates the potential importance of bank signature cards in proof of joint tenancy.

In *Matter of Estate of Manchester*, 172 N.Y.S.3d 918 (Sur. Erie Aug. 18, 2022), the decedent's wife and his daughter from a prior marriage disputed whether the wife "was a joint owner [of a joint bank account] with the right of survivorship, or whether her name had been placed on the account solely for convenience (which, if so, would make the account an asset of the estate)." The court noted Banking Law § 675 and reviewed the account signature card, which contained language providing for a right of survivorship. The court stated: "When an account has been established in accordance with the statute, *and* the "survivorship" language appears on the account's signature card, a presumption arises that the parties intended to create a joint tenancy with rights of survivorship" (emphasis in original). Finding that the daughter had failed to rebut that presumption, the court ruled for the wife.

Conversely, in *Petition of Fischer*, 76 Misc.3d 1208(A) (Sur. Queens September 1, 2022) (discussed elsewhere in this month's newsletter for other points of interest), in considering whether a caregiver for an elderly decedent who was "added" to a joint account might have rights of survivorship, the court stated: "Interestingly enough, neither petitioner nor respondent [the caregiver] submitted copies of the signature cards for the [joint bank] accounts. Accordingly, the presumption [under Banking Law § 675] cannot be applied." This was one factor, among others, that led the court to rule against the caregiver.

Takeaway: In the event of a possible dispute as to the right of survivorship as to an account styled as a joint account, it can be important to obtain and review the bank account signature cards to see if they contain language providing for a right of survivorship. Failure to do so may result in losing the advantage of the presumption under Banking Law § 675.