MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 27 | Issue 2 Article 43

2000

What are the Limitations to an Attorney-in-fact's Power to Gift and to Change a Dispositive (Estate) Plan?

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WHAT ARE THE LIMITATIONS TO AN ATTORNEY-IN-FACT'S POWER TO GIFT AND TO CHANGE A DISPOSITIVE (ESTATE) PLAN?

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I. INTRODUCTION

> *Questions:* Can the newly appointed attorney-in-fact close the principal's joint tenancy accounts and open a new account naming the attorney-in-fact as joint tenant with the principal? Can the attorney-in-fact make gifts to himself or herself from any of the principal's accounts even though the principal never made such gifts before? Can IRA beneficiary designations be changed by the attorney-in-fact? Can a revocable trust be amended by the attorney-in-fact?
>
> *Answers:* I do not have the answers.[1] I am simply trying to find the answers as well. But it seems, put simply, the answer is that the attorney-in-fact should do what any good fiduciary would do. As everybody knows, a good fiduciary will...

A power of attorney, in the context of estate planning and care for the elderly or disabled, is a common tool to manage a person's assets with administrative ease. In Minnesota, the power of attorney may be created pursuant to the common law[2] or pursuant to the Minnesota Statutory Short Form.[3] The power of attorney creates a principal-agent relationship.[4] The principal-agent relationship is often used because of its administrative ease. The extent of the agent's power is generally determined by the document granting the power.[5] Since it is relatively simple for an agent, (hereinafter the "attorney-in-fact") to be created and to exercise its power, it is also relatively simple for an attorney-in-fact to, knowingly or unknowingly, exceed his or her powers, particularly when the scope of the attorney-in-fact's powers are not clearly defined. The lack of clarity in this area raises the issue whether an attorney-in-fact may use its powers (in particular the gifting power coupled with any other power) to change a dispositive estate plan or embark on unbridled gifting of the principal's assets. Examples of changing a dispositive estate plan include terminating a joint tenancy, changing beneficiary designations, changing payable on death provisions

1. Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574 (1996).
2. MINN. STAT. § 523.02 (2000).
3. *Id.* The actual form is located at Minnesota Statute section 523.23.
4. Duluth News Tribune v. Smith, 169 Minn. 356, 358, 211 N.W. 322, 323 (1926).
5. *Infra* Part II.A-B.

or altering documents such as a revocable trust.

Further frustrating the exercise of a power under a power of attorney is the fact that the common law has traditionally restricted the use of fiduciary powers to benefit the fiduciary or to change a principal's declared intent, while the statutory power of attorney does not clearly impose such limitations upon an attorney-in-fact's powers. It is that gray area that requires review. To review this gray area, I will first examine the forms of powers of attorney and the standard of care required of an attorney-in-fact. I then review the common law traditional prohibition of alter-egos by guardians and conservators and how such policies may affect the attorney-in-fact. With the assumption that the attorney-in-fact must abide by certain standards of care in the shadow of guardianship/conservatorship law, the analysis then turns to whether that standard of care limits express or implied authority given an attorney-in-fact.

II. FORMS OF POWER OF ATTORNEY

The power of attorney in Minnesota usually takes one of two forms: (1) the Common Law Power of Attorney, and (2) the Statutory Short Form Power of Attorney.

A. *Common Law Power Of Attorney*

With the advent of the statutory short form power of attorney, the common law power of attorney might well be defined as "an instrument in writing by which one person appoints another as his agent and confers on him authority to perform certain specified acts on behalf of the principal"[6] and such writing does not satisfy the formal requirements of a statutory short form power of attorney.[7] A power of attorney is generally created by agreement (as opposed to a contract) between the principal and the agent.[8] The common law power of attorney should name an attorney-in-fact, be dated, signed by the principal and have the principal's signature acknowledged.[9] The powers given the attorney-in-fact are limited to those expressly granted in the document[10] and may include or

6. 2 MINN. DUNNELL'S DIG. § 2.05 (4th ed. 1989) (citing Duluth News Tribune v. Smith, 169 Minn. 356, 211 N.W. 322 (1926)).
7. MINN. STAT. § 523.23, subd. 3 (2000).
8. 2 MINN. DUNNELL'S DIG. § 1.01a.
9. Cox v. Manvel, 50 Minn. 87, 90, 52 N.W. 273, 273 (1892).
10. *Duluth News Tribune*, 169 Minn. at 357, 211 N.W. at 322.

refer to the powers granted in Minnesota Statute section 523.24. Thus the common law power of attorney is an agreement under the common law of agency, and is shadowed by the provisions granted by the power of attorney provisions contained in Minnesota Statutes section 523 et. seq.

B. Statutory Short Form Power Of Attorney

The statutory short form power of attorney can act as a power of attorney per se if it satisfies the strict formalities contained in Minnesota Statutes section 523 et. seq. The statutory form is contained in Minnesota Statutes section 523.23. To qualify as a statutory short form power of attorney "the wording and content of the form in subdivision 1 must be duplicated exactly and with no modifications, parts First, Second, and Third must be properly completed, and the signature of the principal must be acknowledged."[11] A copy of the statutory short form power of attorney is in Appendix A herein. If these requirements are not met, the statutory power of attorney may still operate as a common law power of attorney.[12] However, any party refusing to accept the authority of an attorney-in-fact under such a common law power of attorney shall not be held liable for such refusal under Minnesota Statutes section 523.20.[13]

III. STANDARD OF CARE OF THE ATTORNEY-IN-FACT

An attorney-in-fact must exercise a statutory standard of care (if the statute is referenced or the statutory form is used) and a fiduciary standard of care for the benefit of the principal.

A. Statutory Standard Of Care

While the attorney-in-fact has no affirmative duty to exercise any power conferred upon the attorney-in-fact,[14] if such power is exercised, "the attorney-in-fact shall exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind."[15]

11. MINN. STAT. § 523.23, subd. 3 (2000).
12. *Id.*
13. *Id.*
14. *Supra* note 11, at § 523.21.
15. *Id. See also* Witt v. John Blomquist, Inc., 249 Minn. 32, 34, 81 N.W.2d 265,

Among other duties, the attorney-in-fact must keep complete records of all transactions entered into by the attorney-in-fact on behalf of the principal,[16] and shall provide an accounting to the principal when requested.[17] The attorney-in-fact is authorized to reimburse himself or herself for expenditures made on behalf of the principal, even if the power of attorney does not grant the attorney-in-fact the right to make transfers to himself or herself in Part Third of the document, but the attorney-in-fact must provide an accounting for such expenditures.[18]

B. Fiduciary Standard Of Care

> An agency is the fiduciary relation that results from the manifestation of consent by one person to another that the other shall act on his behalf...There is an agency relationship only if there is an understanding between the parties that creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts.[19]

The attorney-in-fact's standard of care is a fiduciary standard because of the agency relationship between the attorney-in-fact and the principal.[20] A fiduciary is bound by common law principles and by statute (discussed above) when acting pursuant to a power of attorney to act in the best interests of the principal. The common law principles include, but are not limited to, the duty of loyalty[21] to the principal, and the duty to not engage in self-dealing.[22] These same fiduciary concepts are mirrored by the fiduciary duties owed by a trustee to trust beneficiaries.[23]

Whether the power of attorney is valid under the common law or by statute, there is clearly a standard of care required of the attorney-in-fact. It is relatively easy to argue that when the attorney-

266 (1957) (discussing a realty agent's duty to exercise reasonable care); RESTATEMENT (SECOND) OF AGENCY § 379 (1994).

16. MINN. STAT. § 523.21 (2000).

17. *Id.*

18. *Id. at* § 523.23, subd. 4 (2000).

19. 2 DUNNELL'S MINN. DIG. § 1.0.

20. Younggren v. Younggren, 556 N.W.2d 228, 232 (Minn. Ct. App. 1996).

21. Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 131-32, 94 N.W.2d 273, 281 (1959); RESTATEMENT (SECOND) OF AGENCY § 387 (1994).

22. Raymond Farmers Elevator Co. v. Am. Sur Co. of N.Y., 207 Minn. 117, 124, 290 N.W. 231, 235 (1940); RESTATEMENT (SECOND) OF AGENCY § 389 (1994).

23. RESTATEMENT (SECOND) OF TRUSTS §§ 170, 174 (1986-1999 Supp.).

in-fact exercises its power over property titled in the name of the principal alone for the sole benefit of the principal that there has been no breach of the attorney-in-fact's duty to the principal. What is problematic is when the exercise of the attorney-in-fact's power affects or effects a third person as well as the principal. What is also at issue is whether the attorney-in-fact has the actual authority to change benefits of third persons that were created by the principal, and whether the attorney-in-fact may personally benefit, directly or indirectly, from its acts. The attorney-in-fact therefore needs some form of substantive law to deviate from the traditional common law limitations upon a fiduciary.

IV. PROHIBITION OF ALTER-EGOS AND THE POWER TO ALTER PRIOR DISPOSITIVE PLANS

In guardianship/conservatorship law, it is a well established principle that the guardian or conservator is not to assume the alter ego of the ward or conservatee.[24] Based upon that principle, it has been settled law that the guardian or conservator does not have authority to alter a dispositive plan that existed before a person became incompetent because to alter the plan, for example by changing beneficiary designations or severing joint tenancies, would be to assume an alter-ego of the ward or conservatee.[25] Yet fiduciaries are often confronted with the fact that there are sound tax reasons, and practical reasons, to change a person's dispositive plan. The fiduciary must then seek some form of authority to alter the dispositive plan. An often argued authority for such acts is the Substituted Judgment Doctrine.

A. *Substituted Judgment Doctrine*

The concept of Substituted Judgment is that the fiduciary does what the principal could have done, or would have done, had the principal been competent. This doctrine is often used to justify estate tax planning, medical assistance planning, and health care management issues.[26] The doctrine has not been recognized in

24. *In re* Estate of Kroyer, 385 N.W.2d 31, 33-34 (Minn. Ct. App. 1986); Hagen v. Rekow, 253 Minn. 341, 346; 91 N.W.2d 768, 771 (1958).

25. *Kroyer*, 385 N.W.2d at 33-34; *Hagen*, 91 N.W.2d at 346.

26. SUBSTITUTED JUDGMENT: ESTATE AND MEDICAID PLANNING BY GUARDIANS, 13 Prob. & Prop. (January/February 1999); COMPELLED MEDICAL PROCEDURES INVOLVING MINORS AND INCOMPETENTS AND MISAPPLICATION OF THE SUBSTITUTED JUDGMENT DOCTRINE, JOURNAL OF HEALTH AND MEDICINE, Vol. 7: pp. 107-130 (1992).

Minnesota. The problem with application of the Substituted Judgment Doctrine is that if the principal did not engage in such planning before becoming incompetent, then there is no level of certainty that the principal would consent to the planning if the principal had been competent. Additionally, such planning usually only benefits third parties and does not directly benefit the principal. If the fiduciary is to manage assets for the benefit of the principal (as is the duty of a guardian or conservator), then planning to reduce estate taxes has no relevance to a principal because the principal receives no real benefit from such planning.

Additionally, before the fiduciary can validly exercise the power of substituted judgment for tax (or other) purposes in a manner that clearly provides a primary benefit to third persons, there must be some basis in law authorizing the fiduciary make the transfers.[27] In Minnesota, there appears to be no substantive law authorizing the application of the Substituted Judgment Doctrine.

B. Common Law Powers

Minnesota case law has consistently held that the guardian, absent court approval, does not have the right to remove joint tenant names or survivor names on certificates of deposit (or totten trusts) after the donor became incompetent.[28] The rationale for this rule is that the guardian does not become the alter ego of the incompetent and therefore the guardian lacks authority, absent a court order, to alter personal decisions made by the ward when the ward had mental capacity.[29]

Despite the long standing precedent of the rule against changing dispositive language, the court decided in the case of *In Re Conservatorship of Gobernatz*,[30] that a guardian may change a joint tenancy account that existed before appointment of a guardian. In this case, Dardanella Luke was the friend and caregiver for Mr. Gobernatz for approximately 12 years. On September 7, 1990, Mr. Gobernatz opened a certificate of deposit listing himself and Ms. Luke as joint tenants. In the summer of 1997, Mr. Gobernatz became ill and special conservators for Mr. Gobernatz's person and estate were appointed. The conservators provided proof of their

27. C.I.R. v. Bosch's Estate, 387 U.S. 456, 458 (1967).
28. *Supra* note 24.
29. *Kroyer*, 385 N.W.2d at 33-34; *Hagen*, 91 N.W.2d at 768-769.
30. 603 N.W.2d 357 (Minn. Ct. App. 2000).

appointment and written instruction to the bank and the bank changed title to the certificate of deposit to the name of the conservators as such. Mr. Gobernatz died on September 2, 1997. The conservators demanded the certificate of deposit and Ms. Luke refused. She cashed in the certificate and the conservators sued for recovery of the funds.

The court reviewed Minnesota Statutes section 524.6-205 which provides that a joint account may be changed "by written order given by a party to the financial institution to change the form of the account." The court went on to reason that since Minnesota Statutes section 524.6-201 subdivision 8 includes a guardian in the definition of "party" then a guardian may change a joint account. The court reached this conclusion despite the fact that the guardian does not have such power under the guardianship statutes and despite the fact that common law has held that the guardian does not have the power to change such accounts. Apparently the court imputed this power upon the guardian because of the statutory provisions of Minnesota Statute section 524.6-201 subdivision 8.

The court in *Gobernatz* noted in footnote 1 of its decision that "[c]ase law before 1973 that based conclusions regarding joint tenancy accounts on the theory of joint tenancy with right of survivorship is no longer persuasive...."[31] While that statement seems to infer that the *Gobernatz* decision may be intended to overrule precedent on this issue, several questions remain unanswered. For example, is the 1986 *Kroyer* case still valid precedent (since it was decided after 1973) or was it not known to the *Gobernatz* court? Also, is the reasoning in *Gobernatz* limited to joint tenancy certificates of deposit, or is the rationale that the guardian shall not be the alter ego of the ward overruled and the guardian may re-title other forms of a ward's assets and beneficiary designations?

It seems the *Gobernatz* court believed that Minnesota Statute section 524.6-205 provides that a power is imputed upon a guardian to change a joint account because such acts by a guardian are contemplated in the multi-party account statute despite precedent that restricts such activity. If this is the case, then by closely related analogy, if an attorney-in-fact is specifically granted the power to transfer property to himself or herself or to engage in banking transactions (or other transactions), may the attorney-in-fact become the alter-ego of the principal and change dispositive asset

31. *Id.* at 360 (citation omitted).

provisions of the principal?

In the case of *In re Groedel's Estate*,[32] the Surrogate's Court stated:

> [u]nder the statutory form, the authorization to represent [Mr. Groedel] in 'all other matters' must be construed to mean 'that the principal authorizes the agent to act as an alter ego of the principal with respect to any and all possible matters and affairs which are not enumerated' in [the New York Statutes].[33]

Thus, at least in New York in 1960, the Surrogate's Court believed that an attorney-in-fact could act as the alter-ego of the principal because the attorney-in-fact was given authority to act in "all other matters."

There is simply no substantive guidance whether the statutory power of attorney has changed the common law regarding changing dispositive plans or whether the statutory power of attorney should be interpreted broadly or narrowly. Thus, we must look to the specific language of the power of attorney statute for guidance to determine the scope of the attorney-in-fact's authority.

V. POWERS OF THE ATTORNEY-IN-FACT

The authority granted to an attorney-in-fact must be expressly stated in the power of attorney document[34] and the provisions of the power of attorney are strictly construed to carry out the intent of the principal and agent.[35] "The general rules concerning the construction of instruments are applicable."[36] Minnesota Statutes section 523, however, provides for specific reference to attorney-in-fact powers that may be granted by the statutory short form, or incorporated into the common law power of attorney by reference[37] or specifically listed in the common law power of attorney. The statute goes on to provide the construction of the specific powers granted in Part First of the statutory power of attorney form. Despite the specific enumeration of powers in Minnesota Statute sec-

32. 203 N.Y.S.2d 587 (1960).
33. *Id.* at 590.
34. Duluth News Tribune v. Smith, 169 Minn. 356, 357, 211 N.W. 322, 322 (1926).
35. *Id.*
36. 2 DUNNELL'S MINN. DIG. § 2.05 (citing Carson v. Smith, 5 Minn. 78 (1860)).
37. MINN. STAT. § 523.23, subd. 3 (2000).

tion 523, there continues to be ambiguity regarding the extent by which such powers may be exercised by the attorney-in-fact if the exercise of such power is in conflict with the attorney-in-fact's fiduciary duties to the principal, or conflicts with a potential prohibition of alteration of dispositive provisions. In particular, the question whether the attorney-in-fact may exercise powers that benefit the attorney-in-fact, directly or indirectly, or if the attorney-in-fact can change the principal's testamentary plan that is in place at the time the power of attorney can be exercised, are recurring issues for an attorney-in-fact. Powers that typically affect such issues are the power over banking transactions, the power over insurance contracts, and the power over beneficiary transactions. Each of theses powers might be used in conjunction with the power to gift. Therefore, what is most often at issue is the extent of the gifting power used in conjunction with other powers under the power of attorney statute.[38]

A. Power To Amend A Revocable Trust Or Create A Will

I have often been told that a statutory power of attorney grants the power over "contracts." It is then argued that since a revocable trust is a "contract"[39] then the attorney-in-fact may amend the trust. The statutory power of attorney does provide power over "business" contracts.[40] A revocable trust, arguably, is not a business. Thus there does not appear to be direct authority in the statutory powers for an attorney-in-fact to execute changes to a principal's revocable trust. Yet assuming such a power exists, there is no direct authority to allow the attorney-in-fact the power to change a dispositive plan except pursuant to the gifting power discussed below. On the other hand, I have not found any real authority that limits a principal's ability to delegate the power to create a Will or revocable trust.[41]

38. Although a common law power of attorney may separately define such powers, for purposes of consistency, it is assumed for this analysis that the common law power and the statutory power granted the attorney-in-fact are the same.

39. A revocable trust may also be an agreement, which is distinguishable from a contract; a revocable trust may also be a declaration of trust which is distinguishable from a contract.

40. MINN. STAT. § 523.24, subd. 5(3)(a).

41. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 34.5 (1990), cmt. on subsection 3. The comments provide no substantive support for the proposition that a person cannot delegate the power to make a Will. *Id.*

B. Power Of Banking Transactions

Minnesota Statute section 523.24, subd. 4 provides the attorney-in-fact the power to perform banking transactions for the benefit of the principal. Nothing in this provision provides that the attorney-in-fact may withdraw funds for the attorney-in-fact's personal benefit, nor does the statute expressly provide that the attorney-in-fact may convert an account to a joint account or payable-on-death account for the personal benefit of the attorney-in-fact. The attorney-in-fact may be tempted to follow the reasoning of the *Gobernatz* decision and argue that if the attorney-in-fact is given the power over banking transactions then that infers the power over all parts of banking including changing dispositive provisions. But if the attorney-in-fact exercises its required standard of care, the change in dispositive provisions of bank accounts (i.e., terminate joint tenancy, change P.O.D. provisions, etc.) must be for the benefit of the principal and not a third person. Also, a change depriving a beneficiary of an account must be for the principal's benefit. Absent a showing of a benefit to the principal, it seems the dispositive provisions of bank accounts may be changed only pursuant to the banking power exercised in conjunction with the gifting power, but then only if the gifting power allows such a change. But again, there is no guidance whether these powers, individually or together, are to be interpreted broadly or narrowly.

C. Power Of Insurance Transactions

Minnesota Statutes section 523.24, subd. 6 provides that the attorney-in-fact may exercise transactions related to insurance on behalf of the principal. In particular, paragraph (2) of this provision provides:

> [T]he attorney-in-fact [may]designate the beneficiary of the [insurance] contract, provided, however, that the attorney-in-fact cannot be named a beneficiary except, if permitted under subdivision 8 [the gifting power], the attorney-in-fact can be named the beneficiary of death benefit proceeds under an insurance contract, or, if the attorney-in-fact was named as a beneficiary under the contract which was procured by the principal prior to the granting of the power of attorney, then the attorney-in-fact can continue to be named as the beneficiary....[42]

42. *Supra* note 40, at § 523.24, subd. 6(2).

The statute clearly contemplates the fact that the attorney-in-fact may purchase life insurance and may designate the beneficiary of such insurance, but the statute limits the attorney-in-fact's ability to personally benefit from the insurance to the limitations of the gifting power. Interestingly, however, is the fact that there is no statutory prohibition for the attorney-in-fact to name his or her spouse, children, or other related parties as beneficiary of an insurance contract.[43] Thus the statute seems to infer that the attorney-in-fact may change dispositive provisions related to insurance already established by the principal, and only a designation naming the attorney-in-fact as beneficiary requires the use of the gifting provision. This provides an initial view that the powers granted under the power of attorney statute may be used to change dispositive language and may be used for the benefit of the attorney-in-fact unless such acts are limited by the statute. This is also the only language in the statute that limits the exercise of the power of attorney as it relates to changing dispositive provisions and gifting.

D. Power Of Beneficiary Transactions

Minnesota Statute section 523.24, subd. 7 provides the attorney-in-fact power

> to represent and act for the principal *in all ways and in all matters* affecting any trust, probate estate, guardianship, conservatorship, escrow, custodianship, qualified benefit plan, nonqualified benefit plan, individual retirement asset, or other fund out of which the principal is entitled, or claims to be entitled, as a beneficiary or participant, to some share or payment, including, but not limited to the following:[44]...(e) to execute, acknowledge, verify, seal, file, and deliver any deed, assignment, mortgage, lease, consent, *designation*,...or other instrument which the attorney-in-fact deems useful for the accomplishment of any of the purposes enumerated in this subdivision.[45]

It is common for a principal to possess the power to designate an alternate beneficiary for property to which the principal is the primary beneficiary. It appears that this statutory provision provides the attorney-in-fact broad powers over the designated beneficiary assets and that such power may include the power to change a

43. *Id.* at subd. 6(1).
44. *Id.* at subd. 7(1) (emphasis added).
45. *Id.* at 7(1)(e)(emphasis added).

beneficiary designation already in place. Also, if the interpretation of the phrase "all other matters" in the *Groedel*[46] case is applied to the Minnesota statute, the attorney-in-fact's power "in all ways and in all matters" might be interpreted to mean that the attorney-in-fact may become the alter-ego of the principal in defiance of the Minnesota common law resistance to such actions. Regardless of how broadly the beneficiary power is interpreted, the attorney-in-fact must exercise its power for the benefit of the principal.[47] The attorney-in-fact must then have reasons to change beneficiary designations. Of course, the first reason may be to make gifts. If the attorney-in-fact interprets this provision as broadly as the insurance provision might be interpreted, then the attorney-in-fact may deem it reasonable that the principal's desire to make gifts is more important than the principal's interest in retaining a dispositive plan.

Alternatively, in the case of retirement account planning, for example, there may be tax benefits to changing beneficiary designations. By changing the distribution options regarding recalculating life expectancies[48] the principal may receive tax benefits by slowing the rate of distributions. However, if beneficiary designations are changed to provide optimal tax planning for the principal and a beneficiary, that raises the question whether the change is actually for the benefit of the principal, or for the benefit of the principal and the beneficiary. As stated earlier, the attorney-in-fact must act with the best interests of the principal in mind and may not benefit from his position as attorney-in-fact without the full knowledge and consent of the principal.[49] If the attorney-in-fact benefits directly or indirectly with the decision to change a beneficiary designation, then the attorney-in-fact may be violating its duty of loyalty to the principal, even if the change also benefits the principal. Thus, the power to change beneficiary designations may also need to rely upon the gifting powers if the attorney-in-fact is to benefit from the exercise of this power, even if the exercise provides a direct benefit to the principal.

E. Power To Gift Minnesota Statutes Section 523.24

Minnesota Statutes section 523.24, subd. 8 elaborates on the

46. *In re* Groedel's Estate, 203 N.Y.S.2d 587, 590 (1960).
47. MINN. STAT. § 523.21 (2000).
48. Prop. Treas. Reg. § 1.401(a)(9)-1(f) Q&A E-5, E-6, E-7, E-8.
49. *Supra* Part III.

power to gift that the principal may delegate to the attorney-in-fact. It seems that many of the powers given an attorney-in-fact may be used in conjunction with the power to gift. Under this provision, the attorney-in-fact may make gifts on behalf of the principal to the following:

> [T]o an organization, whether charitable or otherwise, to which the principal has made gifts;[50]
>
> [T]o satisfy pledges made to an organization by the principal[51] and
>
> [T]o the principal's spouse, descendants, spouse's descendants, and to the attorney in fact provided the amount does not exceed 10,000 per recipient, per year.[52]

The gifting provision provides that the attorney-in-fact may make gifts for reasons "the attorney-in-fact deems to be in the best interest of the principal, specifically *including the minimization of income, estate, inheritance or gift taxes.*"[53] The principal may also authorize the attorney-in-fact to make gifts to himself or herself.[54] This language in the gifting powers is of particular importance because, unlike traditional guardianship and conservatorship principles, the statute specifically acknowledges that gifts may be made for reasons other than a direct benefit to the principal, and the fiduciary is apparently authorized to make gifts to himself or herself.

It seems, then, that the attorney-in-fact must still address at least three additional questions when making a gift:

(1) Is the power to gift absolute, or is it subject to a standard of care?

(2) Is the power to make gifts limited to gifting property that the principal possessed in his or her sole name, or does the power to make gifts include making gifts from property subject to dispositive language, such as from a joint tenancy account?

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50. MINN. STAT. § 523.24 subd. 8 (1)(2000).

51. *Id.*

52. *Id.* at subd. 8(2). The purpose of limiting gifts the attorney-in-fact may make for the principal to $10,000 per year to himself or herself or to any person the attorney-in-fact has a legal obligation to support, is for federal estate and gift tax reasons. If the power to make such gifts exceeded $10,000 per year, the attorney-in-fact could be deemed to have a power of appointment over the principal's property (or a portion thereof). Such power of appointment would cause the attorney-in-fact to be liable for the gift tax on the transfer of such property, or the property may be subject to estate tax in the attorney-in-fact's estate. I.R.C. §§ 2514, 2041.

53. MINN. STAT. § 523.24 subd. 8(2)(emphasis added).

54. *Id.*

(3) Is the attorney-in-fact immune from any breach of duty of loyalty or failure to avoid self-dealing if the power of attorney specifically provides the attorney-in-fact the right to gift to himself or herself?

(1) Is the power to gift absolute, or is it subject to a standard of care?

Although a gift may be made for reasons "the attorney-in-fact deems to be in the best interest of the principal"[55] the gifting power does not negate the fact that the attorney-in-fact is still under a statutory duty to "exercise the power [to gift] in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind."[56] Also, under the common law fiduciary principles of loyalty and no self-dealing, the attorney-in-fact must act with the best interests of the principal in mind and may not benefit from his position as attorney-in-fact without the full knowledge and consent of the principal.[57] Therefore, unless the standard of care is eliminated, the power to gift is not absolute and is subject to a standard of care.

(2) Is the power to make gifts limited to gifting property that the principal possessed in his or her sole name, or does the power to make gifts include making gifts from property subject to dispositive language, such as from a joint tenancy account?

Despite the gifting provision's specific grant of authority to make gifts for tax reasons, such provision, unlike the statute cited in the *Gobernatz* case, does not give the attorney-in-fact specific authority to change dispositive language, thus the *Gobernatz* decision is reasonably distinguishable.

There does not appear to be any direct authority for the proposition that an attorney-in-fact may make gifts from assets subject to dispositive language such as joint tenancy accounts. On the other hand, the power given an attorney-in-fact over insurance transactions, for example, specifically limits the attorney-in-fact's power to name himself or herself as a beneficiary of new insurance, but it does allow such an act if authorized by the gifting powers[58] and does not appear to limit such acts for the benefit of anyone

55. *Id.*

56. MINN. STAT. § 523.21 (emphasis added).

57. Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 131-32, 94 N.W.2d 273, 281 (1959).

58. *Supra* note 56 at § 523.24, subd.6.

other than the attorney-in-fact. Therefore it seems the statutory powers of gifting and insurance contracts, acting in concert, may change dispositive provisions for the benefit of an attorney-in-fact and others. If this same reasoning is applied to the banking power and beneficiary transactions power, then it seems that attorney-in-fact has substantial authority to change prior dispositive provisions, but such powers are not specifically listed in the banking power or the beneficiary power. There are two reasonable inferences from such statutory silence. The statutory silence assumes the attorney-in-fact may exercise such powers to his or her benefit, or the statutory silence assumes the attorney-in-fact may not benefit from such power. The insurance power provides the only tangible guidance that the statutory silence infers broad application of the power. Yet when the attorney-in-fact considers the fiduciary responsibilities of its office, he or she should feel compelled to restrain the broad use of the power.

It seems that if actual authority exists to gift from assets subject to dispositive provisions established by the principal (other than insurance transactions), the authority comes from, and must rest squarely upon, the attorney-in-fact's judgment that gifts from such accounts are in the best interest of the principal,[59] despite the principal's prior acts and the principles of known guardianship/conservatorship common law.[60] Thus it seems the fiduciary discretion of the attorney-in-fact is the most direct authority to change prior dispositive provisions. Whether the attorney-in-fact can ever make such a judgment is not known.

(3) Is the attorney-in-fact immune from any breach of duty of loyalty or failure to avoid self-dealing if the power of attorney specifically provides the attorney-in-fact the right to gift to himself or herself?

Whether the attorney-in-fact makes gifts from assets subject to dispositive provisions or not, the attorney-in-fact must make the gifts based upon his or her judgment that the gift is in the best interest of the principal.[61]

A power of attorney, however, may be drafted to be durable. That means the attorney-in-fact may continue to exercise the power of attorney after the principal is incapacitated or incompetent.[62] If

59. *Id.* at subd. 8(2).
60. *Supra*, Prohibition of Alter-Ego discussion.
61. MINN. STAT. § 523.24, subd. 8(2).
62. *Id.* § 523.07; *see also* Minnesota Statutes section 523.03 for the definition of

the principal is incapacitated or incompetent, that may render the principal incapable of either giving consent to a gift or acquiring full knowledge of the proposed gift thereby relieving the attorney-in-fact of its common law breach of duty (assuming for the moment that the specific authority to transfer property to the attorney-in-fact is not granted). If the attorney-in-fact cannot acquire the prerequisite common law relief for breach of duty of loyalty or self-dealing because the principal is incompetent or incapacitated, then the issue is whether the attorney-in-fact's specific authority to make gifts to himself or herself is a per se waiver and/or consent to a breach of fiduciary duty by the attorney-in-fact.

In the case of *Schock v. Nash*,[63] the court was reviewing several gift transfers made by the attorney-in-fact to herself and her family members. The court started from the proposition that "[t]he creation of a power of attorney imposes the fiduciary duty of loyalty on the attorney-in-fact."[64] The court held that the duty of loyalty of an agent is similar to the duty of loyalty of a trustee and that such trust concepts were therefore applicable.[65] The court went on to conclude that the creation of a durable power of attorney that does not expressly provide for gratuitous transfers does not waive the duty of loyalty for the attorney-in-fact.[66] This begs the question whether the Delaware court would find that if a durable power of attorney specifically provides for gifting by the attorney-in-fact, then the fiduciary duty of loyalty is presumed waived. Such a holding may seem consistent with the trust principle that a breach of duty of loyalty may consented to by the beneficiary of a trust, i.e., the principal.[67]

If the principal provides the attorney-in-fact specific authority to make gifts to the attorney-in-fact, it would seem that the principal is consenting to the per se breach of loyalty and acts of self-dealing by the attorney-in-fact. The attorney-in-fact may also argue that such duties are not breached because of the rule of construction that "[w]here the language used [in the power of attorney] is not ambiguous, its literal scope cannot be restricted by parol evidence as to the reasons that motivated the maker to execute the instrument."[68] If the power of attorney allows for gifts to the attorney-

"incapacity" and "incompetency."

63. 732 A.2d 217 (Del. Super. Ct. 1999)
64. *Id.* at 224.
65. *Id.* at 225.
66. *Id.* at 226.
67. RESTATEMENT (SECOND) OF TRUSTS § 170.
68. Rheinberger v. First Nat'l Bank, 276 Minn. 194, 199, 150 N.W.2d 37, 41

in-fact then statutory construction may absolve the attorney-in-fact from the duty of loyalty and self-dealing for such gifts.

However, the grant of a power is not clearly a consent to each and every exercise of the power. If there is a presumption that all gifts made by an attorney-in-fact while the principal is competent are valid, then all gifts made by an attorney-in-fact while the principal is incompetent would appear to also be valid. But the attorney-in-fact is obligated to exercise its fiduciary duty when the principal is competent, even if the attorney-in-fact is specifically authorized to make gifts (including to himself or herself),[69] therefore it would follow that the attorney-in-fact is also subject to a fiduciary duty when the principal is incompetent.

If the attorney-in-fact is still subject to a standard of care when making gifts then it must follow that the attorney-in-fact can breach that standard of care. If the attorney-in-fact breaches the standard of care, then the principal may either consent to the gift, or compel the attorney-in-fact to remedy the breach.[70] It seems, therefore, that a specific grant of a power to gift does not equate to a pre-approval of each and every gift made by an attorney-in-fact, although the duty of loyalty and to avoid self dealing might be waived if the attorney-in-fact is given authority to transfer property to the attorney-in-fact.

The case law in Minnesota is sparse on the effect of the statutory short form power of attorney. In the case of *Younggren v. Younggren*,[71] the attorneys-in-fact transferred money from the principal's liquid assets into an account in their own names. The attorney's-in-fact also transferred the principal's land to themselves retaining a life estate in the principal. The principal revoked the power of attorney. The (now former) attorney's-in-fact then used the cash they had transferred to themselves to pay down outstanding debt on the transferred land. The trial court found that the attorneys-in-fact acted properly in their role as such, but used the transferred cash for their own benefit and must return the cash used to pay down the debt.[72] The court affirmed that the attorney-in-fact shall exercise its power "in the same manner as an ordinarily

(1967)(emphasis added); *see also* Bache & Co. Inc. v. Wahlgren, 235 N.W.2d 839, 841 (Minn. 1975) (citing Rheinberber v. First Nat'l Bank, 276 Minn. 194, 199, 150 N.W.2d 37, 41 (1967)).

69. *Supra* Parts II.A-B, III.A-B.

70. *Id.*

71. 556 N.W.2d 228 (Minn. Ct. App. 1996).

72. *Id.* at 232.

prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind."[73] With that standard established, the court believed the money transferred to the attorneys-in-fact was still to be held for the benefit of the principal even though the power of attorney was revoked. The payment of the debt on the land only benefited the remaindermen, i.e., the attorneys-in-fact, and therefore provided no benefit to the principal. Therefore the funds had to be paid back.[74]

Although the *Younggren* court did not categorize the transfers made by the attorneys-in-fact as gifts, it did find that when the attorneys-in-fact make transfers to themselves that the transfers must be made for the benefit of the principal in accordance with the applicable standard of care despite the specific authority in the power of attorney to transfer funds to themselves.

The *Younggren* case does not give an attorney-in-fact much instruction on the attorney-in-fact's duties when making a gift. While the power of attorney may clearly grant the power to gift, there does not appear to be any authority for the proposition that gifts are no longer subject to a fiduciary standard of care, although concern regarding a breach of the duties of loyalty and to avoid self-dealing seem to be minimalized. Although the gifts may be made for reasons that do not specifically benefit the principal, such as for tax reasons,[75] the attorney-in-fact is not relieved of its duty of care.

V. CONCLUSION

The attorney-in-fact is a fiduciary subject to statutory and/or common law duties and standard of care. The attorney-in-fact does not have clear guidance or authority to change any dispositive provisions established by the principal. The case law has historically restricted such acts by fiduciaries, but the broad powers granted by the power of attorney statute leaves this area in conflict and problematic. At the very least, it does not seem that a broad or liberal use of the powers granted by a power of attorney is unwarranted. However, when exercising the powers the attorney-in-fact remains subject to a fiduciary standard of care. If the attorney-in-fact is given the power to gift to himself or herself that (quite probably)

73. *Id.*
74. *Id.*
75. MINN. STAT. § 523.24 subd. 8.

waives a per se breach of fiduciary duty, but the gift must still be made, for whatever reason, in the best interests of the principal.

VII. APPENDIX

523.23 STATUTORY SHORT FORM OF GENERAL POWER OF ATTORNEY; FORMAL REQUIREMENTS; JOINT AGENTS.

Subdivision 1. FORM. The following form may be used to create a power of attorney, and, when used, it must be construed in accordance with sections 523.23 and 523.24:

STATUTORY SHORT FORM POWER OF ATTORNEY
MINNESOTA STATUTES, SECTION 523.23

IMPORTANT NOTICE: The powers granted by this document are broad and sweeping. They are defined in Minnesota Statutes, section 523.24. If you have any questions about these powers, obtain competent advice. This power of attorney may be revoked by you if you wish to do so. This power of attorney is automatically terminated if it is to your spouse and proceedings are commenced for dissolution, legal separation, or annulment of your marriage. This power of attorney authorizes, but does not require, the attorney-in-fact to act for you.

PRINCIPAL (Name and Address of Person Granting the Power)

_____
_____
_____

ATTORNEYS(S)-IN-FACT (Name and Address)	SUCCESSOR ATTORNEY(S)-IN-FACT (Optional) To act if any named attorney-in-fact dies, resigns, or is otherwise unable to serve. (Name and Address)
	First Successor
	Second Successor

NOTICE: If more than one attorney-in-fact is designated, make a check or "x" on the line in front of one of the following statements:

__Each attorney-in-fact may independently exercise the powers granted.

__All attorneys-in-fact must jointly exercise the powers granted.

EXPIRATION DATE (Optional)
_____
Use Specific Month Day Year Only

I, (the above-named Principal) hereby appoint the above named Attorney(s)-in-Fact to act as my attorney(s)-in-fact:

FIRST: To act for me in any way that I could act with respect to the following matters, as each of them is defined in Minnesota Statutes, section *523.24*:

(To grant to the attorney-in-fact any of the following powers, make a check or "x" on the line in front of each power being granted. You may, but need not, cross out each power not granted. Failure to make a check or "x" on the line in front of the power will have the effect of deleting the power unless the line in front of the power of (N) is checked or x-ed.)

Check or "x"
___(A) real property transactions;
I choose to limit this power to real property in _____County, Minnesota, described as follows:
(Use legal description. Do not use street address.)
_____
_____
_____
_____
(If more space is needed, continue on the back or on an attachment.)

____(B) tangible personal property transactions;
____(C) bond, share, and commodity transactions;
____(D) banking transactions;
____(E) business operating transactions;
____(F) insurance transactions;
____(G) beneficiary transactions;
____(H) gift transactions;
____(I) fiduciary transactions;
____(J) claims and litigation;
____(K) family maintenance;
____(L) benefits from military service;
____(M) records, reports, and statements;
____(N) all of the powers listed in (A) through (M) above and all other matters.

SECOND: (You must indicate below whether or not this power of attorney will be effective if you become incapacitated or incompetent. Make a check or "x" on the line in front of the statement that expresses your intent.)

____This power of attorney shall continue to be effective if I become incapacitated or incompetent.
____This power of attorney shall not be effective if I become incapacitated or incompetent.

THIRD: (You must indicate below whether or not this power of attorney authorizes the attorney-in-fact to transfer your property to the attorney-in-fact. Make a check or "x" on the line in front of the statement that expresses your intent.)

____This power of attorney authorizes the attorney-in-fact to transfer my property to the attorney-in-fact.
____This power of attorney does not authorize the attorney-in-fact to transfer my property to the attorney-in-fact.

FOURTH: (You may indicate below whether or not the attorney-in-fact is required to make an accounting. Make a check or "x" on the line in front of the statement that expresses your intent.)

____My attorney-in-fact need not render an accounting unless I request it or the accounting is otherwise required by Minnesota Statutes, section *523.21*.
____My attorney-in-fact must reder_____
(Monthly, Quarterly, Annual)
accountings to me or_____
(Name and Address)
during my lifetime, and a final accounting to the personal representative of my estate, if any is appointed, after my death.

In Witness Whereof I have hereunto signed my name this____day of_____

_____
(Signature of Principal)

(Acknowledgment of Principal)
STATE OF MINNESOTA)
_____)ss.
COUNTY OF_____)
The foregoing instrument was acknowledged before me this ____day of_____, by_____
(Insert Name of Principal)

_____
(Signature of Notary Public
or other Official)
This instrument was Specimen Signature of
drafted by: Attorney(s)-in-Fact
(Notarization not required)

_____
_____
_____
_____

Subd. 2. FAILURE TO CHECK OR "X" A POWER. Any of the powers of the form in subdivision 1 which is not checked or X-ed is withheld by the principal from the attorney-in-fact unless the power of (N) of the form in subdivision 1 is checked or X-ed.

Subd. 3. REQUIREMENTS. To constitute a "statutory short form power of attorney," as this phrase is used in this

chapter the wording and content of the form in subdivision 1 must be duplicated exactly and with no modifications, parts First, Second, and Third must be properly completed, and the signature of the principal must be acknowledged. Failure to name a successor attorney-in-fact, to provide an expiration date, or to complete part Fourth does not invalidate the power as a statutory short form power of attorney. A power of attorney that does not satisfy the requirements of this subdivision, but purports to be a statutory short form power of attorney, may constitute a common law power of attorney that incorporates by reference the definitions of powers contained in section *523.24*; however, a party refusing to accept the authority of the common law attorney-in-fact is not liable under section *523.20*.

Subd. 3a. LEGAL DESCRIPTION. Use of a street address instead of a legal description under the power of (A) in part First of the statutory short form power of attorney invalidates the power of (A) for all real property transactions, but does not affect the powers of (B) to (M), nor does it affect the power of (N) except with respect to real property transactions.

Subd. 4. POWERS OF ATTORNEY-IN-FACT. All powers enumerated in section *523.24* may be legally performed by an attorney-in-fact acting on behalf of a principal.

Subd. 5. REIMBURSEMENT OF ATTORNEY-IN-FACT. The attorney-in-fact acting under a statutory short form power of attorney is authorized to reimburse the attorney-in-fact for expenditures the attorney-in-fact has made on behalf of the principal even if the principal has not authorized the attorney-in-fact to receive transfers directly under part Third. In the event a reimbursement is made, the attorney-in-fact shall render an accounting in accordance with section *523.21*.

HIST: 1984 c 603 s 25; 1986 c 444; 1992 c 548 s 21-25; 1995 c 130 s 9; 1998 c 254 art 1 s 107

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