

VIRGINIA LAWYERS WEEKLY

OPINION DIGESTS

Wills & Trusts - Power Of Attorney - Real Estate Conveyance - Fiduciary Duty

By Deborah Elkins
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A Fauquier County Circuit Court refuses to enforce a woman's conveyance of property into a trust to benefit her under a durable power of attorney granted by the woman's husband after he suffered a massive heart attack, as no specific language in the DPOA authorizes wife to set up an estate plan for husband containing trust benefiting wife.

The court advised the parties that it had insufficient evidentiary information to afford the parties a complete adjudication of all the issues. However, the court believed it could effectively address the question of the validity of the durable power of attorney (DPOA), a threshold issue in this case. The court will consider only the undisputed material facts.

The parties were married in 1946 and remained married until their deaths, wife first, then husband, after this action was filed. In May 2005, husband suffered a massive heart attack placing him in a weakened physical condition. On May 19, 2005, husband executed a DPOA naming wife as his attorney in fact. The DPOA contained five paragraphs granting specific powers, but no specific authority on the part of wife to create a trust.

The DPOA contained two paragraphs dealing with general powers, granting the agent "full power and authority to do and perform all and every act, deed, and thing whatsoever in and about my estate, property and affairs ...," stating the instrument "is to be construed and interpreted as a general power of attorney," and that the "enumeration of specific items, rights, acts or powers herein does not, and shall not, in any way control, limit or diminish the general powers herein granted in order to carry out the purposes expressed."

Husband never directed wife to make an estate plan for him. Without telling husband, wife arranged for two separate trust documents to be prepared, one for her and one for husband. She executed these separate trusts on May 23, 2007. The trusts were not mirror images of each other. The estate plan included transferring real properties previously held by them as tenants by the entireties into trusts thus changing ownership to tenants in common.

After discovery of her actions two months after wife's death, husband executed a document terminating the trust in his name established by wife. He made a demand through counsel for alleged entitlements existing through wife's trust.

There is no specific language in the DPOA which authorizes wife to set up an estate plan for husband containing a trust benefiting wife. Wife's estate argues the specific powers of the DPOA authorized the fiduciary to negotiate sums of money and enter into contracts and when coupled with the general agency

powers, suffices to permit the actions taken by the fiduciary in setting up the trust. Wife's estate points to the recent case of *Jones v. Brandt Executrix*, 274 Va. 131 (2007), to suggest that Virginia has softened its stance on the requirement of specific authorization. However, a careful reading makes *Brandt* distinguishable from this case on its facts. In *Brandt*, the principal directed his fiduciary to designate a third party as a beneficiary under a payable on death provision of an existing bank certificate of deposit. That CD had no previous beneficiary designation. The day after completing this action for his principal, the fiduciary provided the principal with a written copy of the designation. The actions of the fiduciary were at the principal's explicit direction. None of those facts have a counterpart in the case at bar.

Here, the actions of the fiduciary secretly creating a 14-page inter vivos trust in consultation with an estate planning lawyer go far beyond what took place in *Brandt*. Wife could have sought court approval (or her husband's) for her actions by proceeding under Va. Code § 11-95, but she took no such action. Nor is there anything suggesting that husband ratified or acquiesced in the actions of wife. On the contrary, husband promptly moved to protect his property rights in light of wife's unauthorized actions. He terminated his trust. That was not ratification.

The court will grant partial summary judgment to plaintiff and rule that husband's inter vivos revocable trust is void and of no effect, which also will have the effect of invalidating the conveyances of the real properties to the trusts.

Mountjoy v. Smith (Parker, J.) No. C108-300, Feb. 26, 2009; Fauquier County Cir.Ct.; Mark E. Kellogg, David E. Temeles for the parties. VLW 009-8-058, 4 pp.

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707 East Main Street, Suite 1750, Richmond, VA 23219 (800) 456-5297 Fax: (804) 783-8337