

COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Anna Bitschenauer, an Incapacitated Person
1518 IC of 2011
Control No. 125102

Sur First and Final Account of Barbara Tucker, Agent under Power of Attorney dated
July 18, 2005

The account was called for Audit June 4, 2012 **Before: Herron, J.**

Deferred audit August 6, 2012

Counsel appeared as follows:

Carol R. Livingood, Esquire- for accountant

Jeffrey R. Hoffman, Esquire – for Guardian of the Estate

Adjudication

Introduction

The accounting filed by Barbara Tucker, as agent under a power of attorney for Anna Bitschenauer, raises issues of unauthorized gifts, loans or advances, and payments to the agent and her husband. For the reasons set forth below, the account cannot be approved and Ms. Tucker is ordered to return \$ 433,518 to the guardian of the estate of Anna Bitschenauer, an incapacitated person.

Factual Background

Barbara Louise Tucker, a/k/a Tammy Tucker, was named agent for Anna Bitschenauer (“Anna”) under a Power of Attorney dated July 18, 2005. This agency lasted for six years until Anna was adjudicated an incapacitated person by decree dated December 13, 2011. At that time, Patricia Nemetch was appointed guardian of Anna’s person and estate. The decree specifically voided the power of attorney granted to Ms. Tucker and ordered her to file an account of her financial dealings as Anna’s agent.

The account Ms. Tucker filed on May 1, 2012 provoked objections from Anna’s guardian because, inter alia, of the large sums of money Ms. Tucker had paid to herself and to her husband, Michael. According to the account, Tucker initially received \$580,533.08 in assets from Ms. Bitschenauer, yet by the end of Ms. Tucker’s agency, the combined balance of income and principal on hand for Anna was only \$22,141.25. “Administrative” expenses totaled

\$617,849.90. Account at 2. During this period, Ms. Tucker paid herself \$87,505. She paid her husband Michael Tucker \$270,138 for expenses, mileage, and services rendered during the accounting period. Account at 4-5 & 11-13.

A hearing was held October 2, 2012 on the objections. Barbara Tucker was the only witness. She testified that she first met Ms. Bitschenauer back in the 1990's when Ms. Tucker was working at PNC bank. At that time, Ms. Tucker "did some investing for her."¹ Ms. Bitschenauer had never married and had no children. Her father died in the 1960's and her mother died in the early 1990's after a long illness. Her only sibling, a brother, died in a car crash. She had no nieces or nephews.² Ms. Tucker testified that when she became the agent for Anna, Ms. Tucker was working 50 hours a week as a financial consultant. By 2008, Ms. Tucker was working full time in estate planning for a law firm.³

Ms. Tucker first visited Ms. Bitschenauer's home in June 2005 after Anna failed to keep an appointment. When they arrived at Anna's home, Ms. Tucker and her husband found Anna on the floor. Anna had been there for a week without food or water and with a broken leg. They took her to the hospital. She was next transferred to a rehab center and then Ms. Tucker placed Anna in an apartment at Pilgrim Gardens, when Anna realized she could not return home. It was in July 2005 that Ms. Tucker was appointed agent for Ms. Bitschenauer under a power of attorney.⁴

After that, Ms. Tucker and her husband cleaned out Ms. Bitschenauer's home of 60 years on Roosevelt Boulevard to prepare it for sale. They each charged \$35 an hour for those services. Ms. Tucker testified that she believed they charged a total of \$15,000 for cleaning the house but had never consulted a cleaning agency to compare prices. They contacted a realtor and sold the house for \$55,000 in March 2006; as Ms. Tucker admitted, they had therefore spent 30% of the house's value in cleaning it.⁵

After selling Anna's house, Ms. Tucker and her husband continued cleaning Anna's apartment in the assisted living facility, giving her medicine and doing the food shopping even

¹ 10/2/12 N.T. at 5.

² 10/2/12 N.T. at 6.

³ 10/2/12/N.T. at 18, 58 & 60.

⁴ 10/2/12 N.T. at 6-8.

⁵ 10/2/12 N.T. at 8-11, 16. 20-23. 41. According to the Account, the house sold for \$53,000. Account at 3.

though those services were provided by the facility.⁶ According to her accounting, Ms. Tucker paid herself \$87,505.00 and her husband Michael \$270,138.00 from Anna's funds during the period of the accounting. When questioned about the large sums paid to her husband, Ms. Tucker admitted that Michael was paid \$252,800 from October 3, 2005 to September 14, 2007. When pressed for details as to what services Michael performed, Ms. Tucker stated that a significant portion of these payments to Michael had been either loans or advances that are not identified as such in the accounting. Ms. Tucker had prepared a spreadsheet listing the amounts she paid to herself and Michael for mileage, expenses and time. The spreadsheet listed these sums by month and year from June 2005 to June 2011 without specifying the services provided or the time expended.⁷ When asked about a discrepancy of \$190,000 between the spreadsheet and the accounting in payments to Michael, Tucker initially testified that they were loans, until she amended her answer to characterize the payments as "advances:" "a loan or an advance, yes. Are they two different things?"⁸

There was no written document for this loan or advance. This loan or advance did not appear in the accounting. The loan or advance was non interest-bearing. 10/2/12 N.T. at 37 & 47. In her confused, contradictory testimony on this loan or advance, Ms. Tucker suggested that it "was being repaid with Michael's time that he'll put forth over the future years, time and expenses." 10/2/12 N.T. at 38. Ms. Tucker modified this loan amount by stating that Michael had paid some of it back with his services so that the amount he still owes as an advance is \$160,000, but "I don't know the exact number."⁹ When asked point blank whether it troubled her that she had made an advance to Michael for work not yet performed, Ms. Tucker responded that "Yes, it troubled me" and "No, it was not wise giving him that money." 10/2/12 N.T. at 53.

Ms. Tucker's explanations of the specific sums she paid herself were also unclear and undocumented. Her testimony as to how much time she spent providing services to Anna was not credible. In 2005, for instance, Tucker paid herself \$33,700 for services at \$35 per hour which, Ms. Tucker agreed, would have been 20 hours a week. Yet during that year, Ms. Tucker testified, she had worked 50 or more hours a week as a financial advisor while caring for her two children. 10/2/12 N.T. at 57-58.

⁶ 10/2/12 N.T. at 25-26. Ms. Tucker testified that she never looked into whether it would have been less expensive for the facility to provide these services. *Id.* at 26.

⁷ 10/2/12 N.T. at 32-36; Ex. O-2

⁸ 10/2/12 N.T. at 36.

⁹ 10/2/12 N.T. at 52.

There are also discrepancies between the petition for adjudication attached to the account and the account itself. The petition for adjudication, for instance, specifically acknowledged that Tucker had made gifts of \$12,000 each to herself and her husband in 2005 and 2006 but the account does not reflect these gifts. In her attempt to explain this discrepancy, Tucker observed that a \$12,000 check was listed in the account for December 5, 2008 and January 1, 2006.¹⁰ Those checks, however, were under the heading “reimbursement, mileage and services” and not gifts.

Legal Analysis

The scope of authority under a Power of Attorney is determined by the language of the document creating the agency and the PEF code. See generally 20 Pa.C.S. §§ 5601-5611; In re Weidner, 595 Pa. 263, 267-268, 938 A.2d 354, 357-58 (2007)(analyzing language of POA in the context of the PEF Code to determine propriety of agent’s actions). The Power of Attorney signed by Anna T. Bitschchenuer (“POA”) requires that the Agent “must use due care to act for your benefit and in accordance with this power of attorney.”¹¹ In the “acknowledgment of agent,” Ms. Tucker agreed to “exercise reasonable care and prudence.” Anna’s Power of Attorney outlines her agent’s specific authority to perform such tasks as withdrawing funds from any bank deposits, entering her safety deposit box and redeeming any US bonds. It states that “My agent shall not be entitled to compensation for serving as agent hereunder, but shall be entitled to reimbursement for reasonable out of pocket expenses.”¹² Significantly, it does not give her agent any authority to make gifts.

The PEF code sets forth special rules for making gifts under a power of attorney. See, e.g., 20 Pa.C.S. § 5601.2 (“special rules for gifts”). As a general rule, in fact, a “principal may empower an agent to make a gift in a power of attorney only as provided in this section.” 20 Pa.C.S. § 5601.2(a). See also Estate of Metcalf, 2005 Pa. Super. 346, 885 A.2d 539 (2005) The Joint State Government Commission Comments to section 5601.2 explains that the purpose of this provision is to require specific authorization for any gift by an agent under a POA:

It is the intent of subsections (a), (b), and (c) to overrule Estate of Reifsneider, 531 Pa. 19, 610 A.2d 958 (1992), to the extent that Reifsneider would permit an agent to make a gift under a power of attorney which does not specifically provide for that power. **The purpose of these subsections is to provide that when the principal intends to**

¹⁰ 10/2/12 N.T. at 67-70.

¹¹ Ex. O-1, Notice.

¹² Ex. O-1 at 5.

authorize the agent to make a gift under the power of attorney, that authorization is specifically stated in the power of attorney.

20 Pa.C.S. § 5601.2, Joint State Government Commission Comments (emphasis added).

Both the account filed by Ms. Tucker and her testimony raised serious credibility issues about her general financial dealings as Anna's agent because, inter alia, of Ms. Tucker's cavalier attitudes towards gifts she gave to her husband and herself despite the absence of any language in the POA document providing for that authority. First, there is a blatant discrepancy between the petition for adjudication filed with the account and the account itself. Paragraph 6 of the petition for adjudication states:

Gifts were made to Barbara J. Tucker in the amount of \$12,000 each in 2005 and 2006; gifts were made to Michael J. Tucker in the amount of \$12,000 each in 2005 and 2006; gifts were made to various charitable organizations in that totaled \$1,438 from 2005 to 2009.

Nowhere in the account are any of these payments to Ms. Tucker or her husband listed—or disclosed-- as gifts. When asked to explain this omission, Ms. Tucker noted that “on 12/5/2005 there was a check for \$12,000 and on 1/3/2006 there was a check for \$12,000, page 4.”¹³ These checks, however, are listed under the heading “Barbara Tucker; Reimbursement for out of pocket expenses, mileage and services rendered.” Ex. O-3 at 4-5. By identifying these checks as “gifts” in her testimony while labeling them as “reimbursement for out of pocket expenses, mileage and services.” Ms. Tucker inadvertently concedes the specific—and general-- unreliability of her accounting.

An even greater discrepancy or omission in Ms. Tucker's accounting relates to her loans or advances to her husband Michael. The account on pages 11 and 12 state that between October 3, 2005 and June 16, 2011, Michael Tucker had been paid \$270,138 from Anna's funds by Ms. Tucker for “out of pocket expenses, mileage and services rendered.” In the shorter period between August 15, 2006 to September, 14, 2007, he had been paid \$252,800.¹⁴ During the hearing, a serious discrepancy was discovered between the accounting and a spreadsheet Ms. Tucker prepared that outlined amounts spent for mileage, expenses and time for herself and her husband and was introduced into evidence as Ex. 0-2. According to the spreadsheet, Michael was paid roughly \$60,000 for his time, mileage and expenses for the years 2005, 2006 and 2007.

¹³ 10/2/12 N.T. at 68.

¹⁴ See Account at 12-13; 10/2/12 N.T. at 32-36.

According to Ms. Tucker's accounting, between October 2005 and September 2007 she had paid Michael \$252,800.¹⁵ When asked to explain this discrepancy of \$190,000, Ms. Tucker first characterized those additional payments to her husband as "loans:"

THE COURT: The question is what does the \$190,000 discrepancy represent?

THE WITNESS: Those were just additional payments to Michael.

THE COURT: What type of payment? Expenses, gift or something else?

THE WITNESS: Loans.

THE COURT: Loans?

THE WITNESS: Yes.

THE COURT: Loans from Anna to your husband through you?

THE WITNESS: Yes. Because—yes.

THE COURT: So as power of attorney you expended Anna's funds to make loans to your husband?

THE WITNESS: I don't know what the right word is.

THE COURT: Well, you used the word loan. I didn't.

THE WITNESS: I'm sorry. She told—I know that I can't say this.

THE COURT: Without responding as to what you were told by anyone, what was the \$190,000? You say it was a loan to Anna to your husband? That's your answer?

THE WITNESS: A loan or an advance, yes. Are they two different things?

10/2/12 N.T. at 35-36.

There was no note or documentation to evidence this loan or advance. The loan did not bear interest. And Ms. Tucker could not explain why it did not appear in the accounting as a loan.¹⁶ To further complicate the record, Ms. Tucker asserted that this advance or loan "was being repaid with Michael's time that he'll put forth over the future years, time and expenses."¹⁷ According to Ms. Tucker, the outstanding amount Michael still owed Anna is \$160,000 though she went on to concede: "I don't know the exact number."¹⁸ The notice to the power of attorney granted to Ms. Tucker specifically required that the "agent must use due care to act for" Anna's "benefit." Ex. O-1. Ms. Tucker on cross examination conceded that "it had not been wise giving him that money" out of Anna's funds for work not yet completed and that she was troubled by this.¹⁹ Her credibility was further undermined by her admission that on their joint

¹⁵ 10/2/12 N.T. at 29-33; Account at 12-13.

¹⁶ 10/2/12 N.T. at 36-37.

¹⁷ 10/2/12 N.T. at 38.

¹⁸ 10/2/12 N.T. at 52.

¹⁹ 10/2/12 N.T. at 53.

income tax return Michael did not report the income he had received in 2005: “As you say it now, I realize that I should have done that but I did not do it.”²⁰

Equally problematic was the vague nature of the services Michael allegedly performed for Anna. No receipts were moved into evidence to document any out of pocket expenses or mileage. When asked what services Michael had performed for Anna especially after her house was sold in March 2006, Ms. Tucker repeated the general litany that he and she cleaned Anna’s apartment in the assisted living facility, they did her washing, and they gave her medicine.²¹ It is well established that “when an individual renders personal services to another, ‘evidence of the value of such services rendered and accepted is sufficient if it affords a basis for estimating with reasonable certainty what the claimant is entitled to.’” Pettit Estate, 22 Fid. Rep. 2d 182, 193 (O.C. York Cty. 2001), *quoting* In re Estate of Cecchine, 336 Pa. Super. 111, 485 A.2d 454 (1984). The present record does not afford a reasonable basis for assessing the value of services Michael rendered to Anna. Based on this record, therefore, none of the payments to Michael from Anna were properly accounted for and the sum of \$270,138 listed as payments to him in the account must be returned to Anna’s estate.

According to the account, Barbara Tucker paid herself \$87,505.00 between October 20, 2005 to March 25, 2011 as reimbursement for out of pocket expenses, mileage and services rendered. All of these payments are lumped together in the account at pages 4 through 5 so that the various expenses cannot be distinguished. The spreadsheet that was presented as Ex. O-2 gives figures for each category, but these sums are not supported. Moreover, there is once again a serious discrepancy between the account which states that the first payment to Ms. Tucker was on October 20, 2005 and the spreadsheet which states that the first payment to Ms. Tucker was in June 2005, thereby undercutting the credibility of both documents. A more serious problem is that the July 18, 2005 Power of Attorney document specifically forbids payments to Ms. Tucker, as agent, for her services:

My agent shall not be entitled to compensation for serving as agent hereunder, but shall be entitled to reimbursement for reasonable out-of-pocket expenses.

Ex. O-1 at 5

The account indiscriminately lumps together payments for Ms. Tucker’s time and out of pocket expenses. It is therefore not possible on this record to determine how much was expended

²⁰ 10/2/12 N.T. at 54

²¹ 10/2/12 NT at 41.

for out of pocket expenses and whether those expenditures were reasonable. Consequently, Ms. Tucker must return to Anna's estate the \$87,505 set forth on pages 4 to 5 of the Account.

Finally, the account states that between November 9, 2005 and December 21, 2011, Ms. Tucker gave Anna \$15,675.00 in cash "for her day to day expenses and outings" and as "cash withdrawals from First Cornerstone Bank."²² In her testimony, Ms. Tucker admitted that she never documented this with receipts nor does she have any proof that Anna received these sums.²³ The guardian's objections to these expenditures as undocumented are therefore sustained and Ms. Tucker shall return this \$15,675 to Anna's estate.

Because of the unreliability of the power of attorney accounting, it will not be confirmed but instead returned unaudited. Based on the record, the accountant, Ms. Tucker, shall return the following amounts to the guardian of the estate of Anna Bitschenauer, an incapacitated person, for a total of \$433,518:

\$270,138	(payments to Michael Tucker)
\$48,000	(gifts to Michael and Barbara Tucker 2005-2006)
\$87,505	(payments to Barbara Tucker)
<u>\$27,875</u>	(undocumented cash payments to Anna Bitschenauer)
\$433,518	Total

Accordingly, this 11th day of February 2013, it is hereby ORDERED that the First and Final Account of Barbara Tucker, Agent under the power of attorney dated July 18, 2005, is returned to the Clerk of Orphans' court UNAUDITED. The accountant shall return to the Estate of Anna Bitschenauer, an incapacitated person, the total sum of \$433,518.

BY THE COURT:

John W. Herron, J.

²² Ex. O-3, Account at 6-7.

²³ 10/2/12 N.T. at 56-57.