

**COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION**

Estate of Gloria G. Capobianco, a Power of Attorney  
O.C. No. 1371 PR of 2016  
Control No. 171109

OPINION

Johann Wible (“Objector”), one of the children of Gloria G. Capobianco, objects to the Amended First and Final Account of Otto J. Capobianco Jr., under Power of Attorney of Gloria G. Capobianco, claiming that the accountant improperly disbursed and disposed of Estate principal. For the reasons stated below, the Court sustains the objections.

**I. Background**

On November 1, 2005, Gloria G. Capobianco (“Decedent”) executed a Power of Attorney that named her son Otto J. Capobianco Jr. (“Accountant”) her agent. Decedent suffered from Alzheimer’s disease, which had become severe by December 2011. (Ans. to Obj. to Am. First and Final Account, 4) She was hospitalized for pneumonia on April 24, 2016 and had to be placed into a medically-induced coma so that she could be intubated. (Ans. to Pet. for Citation, 5) Decedent never regained consciousness before her death on June 3, 2016. (Id.) While the parties believe that Decedent died testate, an original copy of her will has not been found. (Pet. for Citation ¶ 4; Ans. to Pet. for Citation ¶ 4)

On May 27, 2016, Accountant, under Power of Attorney, created an irrevocable trust (“Trust”) that named only himself and two of his six siblings as beneficiaries, and transferred the home Decedent owned along with all of her tangible personal property into the Trust. (Am. First and Final Account, Ex. 2) Accountant has indicated in various filings that he transferred Decedent’s real and personal property into the Trust to protect it from being counted for the purpose of determining Medicaid eligibility. (Ans. to Obj. to Am. First and Final Account, 11; Ans. to Pet. for Cit., 5) Ultimately, however, he stated that he “chose to only include three of [Decedent]’s children” as beneficiaries of the trust “because they either supported her financially, lived with her, cared for her, or helped her significantly since 2003 after [their] father...passed away on March 9, 2003.” (Ans. to Obj. to Am. First and Final Account, 11).<sup>1</sup>

---

<sup>1</sup> Accountant has made much of the fact that Moschella Bucci, daughter of the Objector, pleaded guilty to theft by unlawful taking of movable property under 18 Pa.C.S. § 3921 after it was discovered that she had exploited the Decedent financially. While Ms. Bucci’s actions are certainly reprehensible, it remains unclear how they are relevant.



On November 15, 2016, Objector filed a Petition for Citation to compel an accounting of Accountant's actions as Decedent's agent, which this Court granted on November 22, 2016. Accountant filed his First and Final Account on March 27, 2017, and his Amended First and Final Account on June 22, 2017; objections were filed on April 17, 2017 and July 12, 2017. Accountant filed no answer to the July 12, 2017 objections under consideration here. At a hearing held January 10, 2018, the parties agreed that there are no material facts in dispute and submitted the matter to the Court as a question of law. At that same hearing, Objector withdrew the majority of the July 12 objections; the only remaining objections are to the transfer of the Decedent's assets into the Trust.

## II. Discussion

Through both statute and common law, Pennsylvania recognizes that an agent under power of attorney has a fiduciary duty to his principal. *See e.g.* 20 Pa.C.S. § 5601.3 (2017); *In re Estate of Bechtel*, 92 A.3d 833, 838 (Pa. Super. Ct. 2014). A fiduciary is "required to use such common skill, prudence and caution as a prudent man, under similar circumstances, would exercise in connection with the management of his own estate[,]" and may be surcharged for any losses to the Estate resulting from his negligence. *Estate of Lohm*, 440 Pa. 268, 273, 269 A.2d 451, 454 (Pa.1970).

The Objector, seeking to surcharge the Accountant for principal she claims he wrongfully disposed of, has the initial burden of showing that the Accountant breached his fiduciary duty to the Decedent; when the Objector meets her burden, it then shifts to the Accountant, who must show he used due care when he acted as agent under the power of attorney. *Estate of Maurice*, 433 Pa. 103, 108, 249 A.2d 334, 336 (1969).

Objector argues that Accountant acted improperly and beyond the scope of the powers granted to him by the power of attorney when he created the Trust and transferred all of the Decedent's real and personal property into it. Relying on *In re Weidner* and *In re Slomski*, Accountant argues that he drew that authority from the provisions of the power of attorney authorizing him to engage in real property transactions, handle interests in estates and trusts, and/or create revocable or irrevocable trusts and make gifts.

Agents under power of attorney do indeed have broad latitude in the exercise of powers granted to them by the instruments of their appointment. *See e.g.* *In re Weidner*, 938 A.2d 354 (Pa. 2007); *In re Slomski*, 987 A.2d 141 (Pa. 2009). However, agents may only exercise powers granted to them, and they must exercise their powers in good faith. 20 Pa.C.S. § 5601.3(a). In addition to all other powers that may be delegated to an agent, any or all of the powers referred to in 20 Pa.C.S. § 5602(a) may lawfully be granted in writing to an agent and, unless the power

of attorney expressly directs to the contrary, are construed in accordance with 20 Pa.C.S. § 5603. 20 Pa.C.S. § 5601(a).

Paragraph 15 of the power of attorney naming Accountant agent gave him the power “to handle interests in estates and trusts.” As the wording is drawn directly from § 5602(a) without modification, its definition is undoubtedly provided in its entirety by § 5603(q). That provision allowed the Accountant to “receive a bequest, devise, gift or other transfer of real or personal property to the principal in the principal's own right or as a fiduciary for another and give full receipt and acquittance therefor or a refunding bond therefor; approve accounts of any estate, trust, partnership or other transaction in which the principal may have an interest; enter into any compromise and release in regard thereto; and receive on behalf of the principal all notices and reports required by section 7780.3...or permitted by section 7785(a).” 20 Pa.C.S. § 5603(q). No reasonable reading of § 5603(q) would permit an agent to change the principal’s estate plan; it does not grant the agent any power to create an estate plan for the principal, but rather to make decisions regarding any interests the principal may have in the estates of others. The Accountant simply cannot claim to draw the authority to effectively disinherit four of the Decedent’s seven children from a provision that gives him no power over the testamentary disposition of the Decedent’s estate.

Accountant is correct that Paragraphs 6 and 7 of the power of attorney grants him the authority to dispose of the Decedent’s real and personal property. However, because the conveyances at issue are conveyances to the Trust, the conveyances are only effective if the Trust itself is valid. It is not.

Agents under a power of attorney only have the power to make gifts and create trusts if it is expressly granted to them by the principal. 20 Pa.C.S. § 5601.4. Accountant is correct in noting that Decedent granted him those powers; Paragraph 16 of the power of attorney authorizes Accountant to:

Make unlimited gifts, outright or in trust, revocable or irrevocable, to any donees (including the agents) in such amounts as the agents may decide including such gifts which will serve to accelerate eligibility for government assistance programs such as Supplemental Security Income and Medical Assistance...[and] create revocable or irrevocable trusts of my property which may extend beyond my disability or life[.]

However, agents under power of attorney are also bound by a fiduciary duty to attempt to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including: the value and nature of the principal's property; the principal's foreseeable obligations and need for

maintenance; minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes; and eligibility for a benefit, program or assistance under a statute or regulation. 20 Pa.C.S. § 5601.3(b)(6). The language of § 5601.3(b)(6) clearly anticipates that it may not be possible—or indeed, advisable—for an agent under power of attorney to preserve the principal’s estate plan, and provides agents with factors to consider when attempting to determine whether and when it would be appropriate to deviate from the principal’s estate plan. The statute’s anticipation that estate plan preservation may not be advisable or feasible is reinforced by 20 Pa.C.S. § 5601.3(c)(1), which states that “[a]n agent that acts *in good faith* shall not be liable to a beneficiary of the principal's estate plan for failure to preserve the plan.” (emphasis added). Nowhere in the power of attorney was Accountant granted the power to alter the Decedent’s estate plan.

Relatedly, “[a]n agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including: the value and nature of the principal's property; the principal's foreseeable obligations and need for maintenance; minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes; eligibility for a benefit, program or assistance under a statute or regulation; and the principal's personal history of making or joining in making gifts.” 20 Pa.C.S. § 5601.4(d).

Although both parties have stated their belief in the validity of the 2005 Will, it is well settled that when an original will in the testator's possession cannot be located, a rebuttable presumption arises that the testator destroyed it with the intent to revoke it. *In re Estate of Wilner*, 636 Pa. 277, 283, 142 A.3d 796, 799 (Pa. 2016). Only copies of the 2005 Will have been found, and no proof has been offered to rebut the presumption that the will has been revoked. Therefore, the Court must assume that the Decedent died intestate. It is worth noting, however, that even if the original 2005 Will was found, it would not change the distribution scheme of the Decedent’s estate.

The purpose of the intestacy statute is to approximate the probable intent of a decedent. *See Estate of Cox*, 327 Pa.Super. 479, 488, 476 A.2d 367, 372 (Pa. Super. Ct. 1984). Under the intestacy statute, each of the Decedent’s seven children would be entitled to an equal share of her Estate. 20 Pa.C.S. § 2103. Further, while the 2005 Will is presumed to be revoked, Accountant knew that it would have distributed Decedent’s estate equally among her children, and held a subjective belief in its validity at the time he created the Trust. In creating the Trust and naming only himself and two of his six siblings as beneficiaries, Accountant deviated substantially from the intent that Pennsylvania presumes when a person dies intestate and from the estate plan he believed the Decedent herself created that antedated her incapacity.

There is no discernible purpose in creating the Trust other than disinheriting the Accountant's siblings. The Trust would have been subject to Medicaid lookback rules, and would not have prevented the Decedent's property from being counted for the purposes of Medicaid eligibility. 55 Pa.C.S. § 178.162(1); 55 Pa.C.S. § 178.104a(a). Accountant has not even attempted to explain how his disregard for the Decedent's estate plan fits into the framework for permissible deviations established by § 5601.3(b)(6) and/or § 5601.4(d). The only other purpose—aside from the pretextual suggestion that the Trust would have somehow shielded Decedent's assets from being considered in determining Medicaid eligibility—can be gleaned from the narrative accompanying the Account and Paragraph 1 of the Trust, which was drafted while the Decedent was unconscious.<sup>2</sup> Paragraph 1 of the Trust states that the Decedent “desir[ed] to create a trust (the “Trust”) for the equal benefit of three (3) of [her] children[.]” In his narrative accompanying the Account, Accountant stated:

I chose to only include three of [Decedent's] children, myself, Otto J. Capobianco, Jr. (“Accountant and Son”), Gloriajane Capobianco Lademar (“Daughter”), and Geraldine Capobianco Jones (“Daughter”), because they either supported her financially, lived with her, cared for her, or helped her significantly since 2003 after our father Otto J. Capobianco, Sr. (“Decedent's Spouse”) passed away on March 9, 2003.

Accountant's creation of the Trust was a product of his perception that, unlike himself and the other two named beneficiaries of the Trust, the four excluded siblings had not earned a share in their mother's estate. Using his power as agent under power of attorney to disinherit his four siblings based only on his evident resentment toward them is an action that cannot be characterized as being taken in good faith. Accountant breached his fiduciary duty to attempt to preserve the Decedent's estate plan and acted beyond the powers granted to him by the Decedent.

### **III. Conclusion**

For the foregoing reasons, the objections are SUSTAINED; the Account is rejected, the Trust is invalid, and all transfers to the Trust are stricken and shall be returned to the Decedent's probate Estate.

---

<sup>2</sup> As noted *supra*, Decedent's cognition had deteriorated substantially by December 2011. While the record does not contain enough evidence to determine her capacity, Accountant's own statements regarding her Alzheimer's disease cast doubt that the Decedent would have had capacity even if she were not unconscious.

BY THE COURT:

A handwritten signature in black ink, appearing to read "John W. Heron". The signature is written in a cursive style with a large initial "J".

John W. Heron, J.

Dated this 18<sup>th</sup> day of April, 2018

Lisa Shearman, Esq.  
Dara Burns, Esq.