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ATTORNEY-IN-FACT'S POWER TO AMEND PRINCIPAL'S TRUST EXAMINED

The powers conferred under a statutory form of Power of Attorney are prescribed in the provisions of the General Obligations Law (GOL) Article 5, Title 15, § 1501, et seq. While extensively detailed, few statutes are so precisely drafted that they can address all the circumstances it might apply to. The provisions of GOL pertaining to the powers of an attorney-in-fact are no exception. In a decision issued in *Perosi, etc. et al. v LiGreci, et al.,*[1] the Appellate Division, 2d Department was asked to consider *"whether an irrevocable trust can be amended by its creator's attorney-in-fact."*[2] The Supreme Court had answered the question in the negative.

The trust in issue was created in late 1991 for the benefit of the creator's three adult children. The creator named his brother and his accountant as the trustee and the successor trustee respectively. In April, 2010 the creator appointed his daughter as his attorney-in-fact pursuant to a NY Short Form Power of Attorney. The power was unrestricted and specifically conferred upon the attorney-in-fact the power over *"estate transactions"* (§ 5-1502G) as well as *"all other matters"* (§ 5-1502N). The power also granted the authority *"to create and fund a grantor retained annuity trust or other estate planning trust"* with the power to *"designate the trustee, income beneficiary and remainder beneficiary of any trust."* As required, a *"New York Major Gifts Rider"* was signed and appended to the power of attorney conferring *"full authority to establish and fund revocable or irrevocable trusts, transfer assets to a trust, make gifts, and act as grantor and trustee"*.

On May 19, 2010 the attorney-in-fact executed an amendment to the 1991 trust pursuant to Estates Powers and Trust Law (EPTL) § 7-1.9 in which she removed the trustee and successor trustee and appointed in their place her son, the creator's grandson, Nicholas Perosi and Ericalee Burns, as trustee and successor trustee respectively. All of the beneficiaries executed consents in the form required under § 7-1.9. The creator died on June 3, 2010.

On July 28, 2010 the attorney-in-fact and Nicholas, as trustee, filed a petition in Supreme Court seeking an order requiring that the former trustee to account or submit to examination; and to turn-over of all of the trust assets, property and records in the former trustee's possession. The petition was opposed and the former trustee moved to set aside the amendment arguing that the trust was irrevocable and that the amendment by an attorney-in-fact for the creator was an *ultra vires* act since the petitioners failed to seek judicial intervention pursuant to EPTL § 7-2.6. Curiously, he also argued that the amendment was an act of *"self-dealing"* aimed at depriving him of commissions in order to increase the value of the shares of the beneficiaries. The trial court acknowledged that the trust could have been amended pursuant to EPTL § 7-1.9, but it opined that the attorney-in-fact was not authorized to act for the creator holding the right to amend was a *"personal right"* and thus was non-delegable. It also held that any right with respect to trusts was prospective only, and could not be applied to the 1991 trust.

EPTL § 7-1.9 authorizes the revocation or amendment of a trust where the creator and the beneficiaries consent in writing in a form that would permit a deed to be recorded. This means that the consent must be signed and acknowledged by the consenting party. Since the beneficiaries had given their consent in the requisite form, could an attorney-in-fact's signature be substituted for that of the creator's? The question requires an analysis of the authority of an attorney-in-fact under a power of attorney and the nature of the act. Where the trust itself establishes the requirements for a valid revocation or amendment

[1] 2012 NY Sip Op 05533, 948 N.Y.S.2d 629, decided July 11, 2012.

[2] Id. at Pg. 630.

these requirements will govern.[3] Since the trust in the instant case did not provide a mechanism for amendment, the provisions of § 7-1.9 controlled. Moreover, since § 7-1.9 does not require judicial intervention, § 7-2.6 did not apply.

The attorney-in-fact was granted among the other powers, authority to act in *"estate transactions"* and *"all other matters."* Section § 5-1502G(2) confers the following authority –

> *"To the extent that an agent is permitted by law thus to act for a principal, to represent and to act for the principal in all ways and in all matters affecting any estate of a decedent, absentee, infant or incompetent, or any trust or other fund, out of which the principal is entitled, or claims to be entitled, to some share or payment, or with respect to which the principal is a fiduciary;"*

Section 5-1502(N) supplements the forgoing authority stating that –

> *"[i]n a statutory short form power of attorney, the language conferring general authority with respect to 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 sections 5-1502A to 5-1502M, inclusive, of this title, and which the principal can do through an agent . . . [.]"*

Section 5-1502G(4) further authorizes an attorney-in-fact *". . . to initiate, to participate in and to oppose any proceeding, judicial or otherwise, for the removal, substitution or surcharge of a fiduciary . . .[.]"* Furthermore, under § 1502(N) the attorney-in-fact is granted broad powers to act in all matters *". . . which the principal can do through an agent . . . [.]"* Not mentioned in the decision, but reflected in the commentaries is the 2010 amendment to § 5-1502G which added a final paragraph to make clear the intention of the NY Legislature that the powers conferred under this section in respect to trusts is to be applied to all the powers described in the section.

The defendant cited a number of cases where the courts had voided attempts by an attorney-in-fact to amend a trust. The Court however, distinguished these cases from the facts present in this case. First cited by the defendant is the *Matter of Chiaro, 28 Misc3rd 690,* a proceeding to hold the guardian appointed pursuant to Article 81 of the Mental Hygiene Law of the surviving incompetent creator of the trust in contempt for refusing to amend the trust. The court found that the surviving grantor's guardian could not, pursuant to its terms amend the trust created by the incompetent surviving creator and her deceased husband after the survivor was found incompetent and her husband was deceased. In another case where the terms of the trust limited an agent's authority to amend, *Matter of Rice v Novello,* 25 AD3rd 992, the court voided the amendment of a revocable trust by the creator's attorney-in-fact. Here again the language of the trust itself limited to the creator personally the right to amend. In *Matter of Elser v Meyer,* 29 AD3rd 580, the appellate panel remitted the case back to the to the trial court to determine if a consent by the trustee required under the terms of the trust was unreasonably withheld. Finally, in the *Matter of Goetz,* 8 Misc 3d 200, the terms of the trust required an amendment to be signed and acknowledged by the *"Grantor"* of the trust. A subsequent amendment by his wife acting as attorney-in-fact was deemed ineffective. Here, the creator had signed the amendment but for reasons unknown it was never acknowledged. Shortly before his death the creator's wife signed and acknowledged the amendment as his attorney-in-fact. The court held that the power to amend was limited and personal to the creator by its terms.

If we assume thus, that through the GOL the legislature has expressed an intent that an attorney-in-fact can act on behalf of the principal in respect to estate and trust matters, the question remains whether amending a trust is an act *". . . that an agent is permitted by law thus to act for a principal . . ." (GOL § 5-1502G(2))*

Is the amendment of a trust or the choice and appointment or removal of a trustee so personal to the creator of the trust, that it cannot be exercised by an agent? There is precedent in cases that not all acts can be performed by an agent. Quoting the decision in *Zaubler v Picone,* 100 AD2d 620, 621 (action for dissolution of a partnership) the court noted

> *"An attorney in fact is essentially an alter ego of the principal and is authorized to act with respect to any and all matters on behalf of the principal with the exception of those acts which, by their nature, by public policy, or by contract require personal performance."*

The power of an attorney-in-fact has been broadly construed, but the powers and limitations are not always obvious. For example, it has been held that an attorney-in-fact can act for a principal under the Election Law in the matter of a judicial candidacy,[4] exercise a surviving spouse's right of election,[5] but cannot execute a principal's will;[6] execute a principal's affidavit[7]; or

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[3] *Whitehouse v Gahn,* 84 AD 3d 949, 951

[4] *Arens v Shainwit,* 37 AD2d 274, affd 29 NY2d 663.

[5] EPTL §§ 5-1.1, 13-2.2, GOL § 5-1502G(7), *Matter of Lando,* 11 Misc 866.

[6] EPTL § 3-2.1(a)(3).

[7] *Cymbol v Cymbol,* 122 AD2d 771.

effect a principal's divorce.[8] Finding the requisite authority existed in the GOL and concluding there is no precedent inconsistent with that authority, the Appellate Division reversed the Supreme Court and held that amendment to the 1991 trust by the creator's attorney-in-fact was the valid act of her principal.

AFFIDAVITS BY AN ATTORNEY-IN-FACT

*In **Perosi v LiGreci,** the appellate panel discussed the boundaries of an agent's authority under a power of attorney. One of the cases cited in the decision discussed above involves an everyday issue that arises frequently at real estate closings. In the case of **Cymbol v. Cymbol** (122 A.D.2D 771, the Appellate Division (Second Dept.), in a 1986 ruling, held that an agent acting pursuant to a power of attorney, was incapable of giving an affidavit of fact in the principal's name. Frequently, an agent attending a title closing on behalf of the principal will be required to establish facts necessary to dispose of routine and not so routine title exceptions raised in the title report. Examples are those pertaining to questions of heirship, title, ancient mortgages, tenancies, money judgments and other general liens, to name a few.*

While it is clear that an agent cannot satisfy the request for proof by affidavit in the name of the principal, it might be possible that an agent having personal knowledge of the relevant facts is competent to offer an affidavit in the agent's name. Caution should be exercised, however, if the agent's statements are made based on an inquiry to the principal. The affidavit would be deemed "heresay" evidence subject to the admissibility exception negating its probative value to the title insurer. Moreover, if the principal lies, recourse to the principal for fraud would be at best a difficult road to hoe and a questionable claim against the agent if he or she merely recited what the principal told the agent – unless of course the agent knowingly restated misrepresented facts.

For the reasons stated above, title insurers and their agents cannot rely upon the agent's affidavit of facts in the name of the principal or heresay statements in the form of an affidavit by the agent based on statements made to the agent by the principal.

[8] *Mallory v Mallory,* 113 Misc 2d 912, attorney-in-fact sought to vacate a consent order which had vacated a default judgment of divorce.