Brodsky Estate

Power of attorney - Abuse

Objections to account of agent under power of attorney filed after principal's death; agent surcharged for transferring $210,000 to himself from account in joint names between agent and principal contributed solely by principal. (Hunter Powers of Attorney 2).

In the Orphans' Court Division of the Court of Common Pleas of Montgomery County. Estate of Cecelia Brodsky, principal. Objections to first and final account of Brent Brodsky, agent under power of attorney. No. 08-0862.

James F. Casale and Philip J. Berg, for accountant.

Stephen N. Huntington, for administrator of Estate of Cecelia Brodsky, deceased, objectant.

ADJUDICATION BY OTT, J., DECEMBER 11, 2008:

The account, which was not in the form required by Orphans' Court Rule 6.1, lists the assets as personalty only, specifically, two pieces of jewelry. It shows no other assets remaining, and it improperly lists receipts, disbursements, and transfers of assets to the accountant after the date of the principal's death on December 24, 2001.[1]

The account is filed pursuant to the Order of this Court dated February 15,2008. The agency has terminated because of the death of the principal.

All parties having or claiming any interest in the trust of whom the accountant has notice are stated to have received written notice of the audit in conformity with the rules of court. The instant account was directed to be filed following a contest involving the principal's will. By opinion and decree dated February 23, 2006, the undersigned found that the accountant exercised undue influence over his mother, the instant principal, and this resulted in her executing a will dated November 10, 2000, leaving everything to him. In that

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[1] An agent's authority terminates upon the death of his or her principal. The instant accountant was the executor of the decedent's estate before the objectant was granted letters of administration. The post-death receipts and disbursements may have been handled properly by Brent Brodsky in his capacity as executor of the decedent's estate, and the transfers may have been appropriate under the provisions of the Multiple-Party Accounts provisions of the PEF Code, 23 Pa. C.S.A. §6301, et seq.; however, in the context of this accounting, we can neither approve nor disapprove these transactions.

decision,[2] we invalidated that will and held that the principal's earlier will, dated February 16, 2000, was valid. Under that document, the accountant herein would share equally in the estate with the children of his sister who predeceased their mother. One of these grandchildren, Steven Lichtenstein, is the administrator of the estate of the deceased principal and the objectant herein.

The only objection pursued at the time of hearing arose from accountant's having transferred money out of certain accounts as gifts to himself, his wife, and their two sons during the principal's lifetime. He argues under two alternate theories for the validity of these transfers. Under the first theory, he contends the gifts were authorized under the power of attorney. Under the second, he claims that because these gifts were made from joint accounts with right of survivorship between him and his mother, regardless of what occurred during her lifetime, all of the finds became his at the time of her death.

The February 16, 2000, power of attorney authorized the accountant:

> 16.To
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> (a) make unlimited gifts, outright or in trust, revocable or irrevocable to any donees (including the agents) in such amounts as the agent may decide;
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> (h) ... but in exercising any such power, my agent (1) must first act to maintain me and my well-being; (2) in adopting a plan of gifts should consider whether or not they will minimize current or prospective income, estate or inheritance taxes, or will carry out an established lifetime giving pattern, provided nevertheless, that my agent shall not distribute any of my income or principal to or for the benefit of himself except for his health, maintenance, support or education; and (3) in exercising his judgment may consider my testamentary and inter vivos intentions insofar as they can be ascertained;

At the hearing, the agent testified that he made gifts of $200,000 to himself, and four gifts of $10,000 each to himself, his wife, and his two sons. He made it clear that the purpose of these transfers was to spend down his mother's money so the government could "pick up the tab" for his mother's care. In light of this admission, it is clear the $210,000 he paid to himself was improper. He did not exercise his gift power to maintain the decedent or her well-being, or to minimize taxes, or to continue her tradition of gift-giving, or to benefit his own health, maintenance, support or education.

The accountant and his counsel seem to view this litigation as

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[2] See Brodsky Will, 26 Fiduc. REP. 2d 173.

much ado about nothing. The accountant does not deny that the account from which he paid himself the $210,000 contained funds contributed only by his mother. That account was titled jointly between him and his mother. From this, he argues, because the money would have become his at her death by operation of law, his having taken the money during her lifetime is not a problem. He is wrong. Cecelia Brodsky was never adjudicated an incapacitated person. In the eyes of the law, she retained authority and control over her assets even after she gave her son a general durable power of attorney. Until the day she died, she could have emptied out the joint account and used the money for any purposes she wished. Her agent breached his fiduciary duty when he made the improper gifts to himself. Had he not exceeded his authority under the gift provisions of the power of attorney, he would, indeed, have been entitled to any balance that remained at his mother's death pursuant to 20 Pa. C.S.A. §6304(a). However, when he removed the $210,000 from the joint account during her lifetime, he severed the joint tenancy and thereby lost any right he would have had to the money as the surviving party on a multiple-party account. Accordingly, the accountant is hereby surcharged for this entire amount he paid himself plus interest at the rate of 6% per annum from December 15, 2000.

A different analysis applies to the other gifts made by the agent under the power of attorney. Despite the accountant's having acted with the intent to qualify his mother for government benefits, the amounts of these gifts exceeded neither his authority under the power of attorney nor the annual gift exclusion amount. Therefore, we will not invalidate the gifts totaling $30,000 to the accountant's wife and his two sons, and we will assess no surcharge on account thereof.

Throughout the proceedings involving the instant account and the prior will contest, the accountant and his counsel have exhibited a pattern of obstreperous and dilatory behavior. As just the most recent examples of this conduct, we point to the filing of frivolous preliminary objections to the instant objections and a refusal to cooperate with discovery, including the failure to produce certain requested documents until the very day of the hearing. In light of such tactics, we find it necessary to take the unusual step of assessing counsel fees, under 42 Pa. C.S.A. §2503(7), against the accountant and/or his counsel, Philip J. Berg, Esquire. We will therefore schedule a hearing forthwith, limited to the reasonable fees incurred

by the objectant in countering such questionable behavior. After that hearing, the Court will issue a supplemental adjudication setting forth the fees to be taxed as costs and rendering both adjudications final and appealable. Because this adjudication is not yet final, no exceptions or appeals may be filed hereto.