



Can Your Agent Under a Power of Attorney Create a Trust for You? Maybe.

This isn't really a trick question, though it can seem that way - how do you create a trust? In Massachusetts, you can create a trust by transferring your assets to someone else as trustee, by making a will with trust provisions taking effect on your death, or by giving someone the legal authority to make a trustee the outright owner of the property left by a decedent. Massachusetts also allows someone to just declare they hold property in trust.

How does this work when someone acting as your agent under a power of attorney creates a trust on your behalf? A recent Massachusetts case dealt with that question.

What Happened?

In 2013 at age 91, Lubov Stempniewicz ("Lubov") signed a will and a durable financial power of attorney naming her brother Edward as her agent in the power of attorney. The will replaced an earlier one executed in 1999, when Lubov was only 77. Lubov was not represented by an attorney with respect to the drafting, review, or execution of the power of attorney or the will naming Edward as the agent.

Four years later, Edward, acting as agent, created a trust for Lubov's benefit. He signed the trust once on Lubov's behalf as the trust settlor, once on her behalf as trustee, and once on behalf of himself as co-trustee. He then executed two deeds as Lubov's agent. Edward also transferred Lubov's financial accounts in addition to some of his own financial accounts into the trust's name.

The trust Edward signed left \$25,000 to each of Lubov's children and grandchildren, but primarily benefitted Edward's two children.

Lubov's other children and grandchildren sued Edward to recover her assets after she died in 2018. They argued the trust was not valid because Edward lacked the power to create the trust under the power of attorney. They asked the court to order that Edward held the assets in trust for their benefit.

Lubov's power of attorney gave Edward the authority to "act for me in all matters that affect a trust . . . from which I am, may become or claim to be entitled, as a beneficiary, to a share or payment" and it authorized Edward to "transfer ownership of any property ... to the trustee of a revocable trust I have created...."

How the Massachusetts Courts Ruled

The trial judge ruled that these provisions did not give Edward authority to create a trust, and on appeal, the Supreme Judicial Court of Massachusetts ("SJC") agreed. The SJC then remanded the case for the probate judge to determine whether any trust assets were Edward's, to be returned to him, with the balance payable to Lubov's estate or children.

The SJC noted it had never before determined whether the power of a settlor to create a trust is delegable, either at common law or under the Massachusetts Uniform Trust Code ("MUTC"). The SJC indicated that the MUTC does not seem to permit an agent to create a trust for the principal and held that at a minimum, the agent must be given the express authority to do so. Lubov's power of attorney only gave Edward authority over existing trusts and did not grant him the requisite authority to create a new trust. The decision does not address whether a settlor could expressly delegate the power to create a trust in a power of attorney.

The SJC noted Lubov's failure to consult with an attorney before signing her 2013 will and power of attorney and Edward's failure to consult with an attorney before using the power of attorney to establish the trust. However, the SJC recognized the importance of powers of attorney in estate and elder life planning, and it refrained from foreclosing their use.

What This Means for You

While Massachusetts' Uniform Trust Act is silent on whether an agent can create a trust under a power of attorney, Connecticut's Uniform Trust Act does allow an agent to create a trust for a principal, but only if the power of attorney specifically allows it¹. Likewise, Connecticut's Power of Attorney Act categorizes these powers as "hot" or optional ones that must be expressly granted and the exercise of the powers are not prohibited in the trust instrument.²

¹ C.G.S. Sec 45a-499w(d).

² C.G.S. Sec.1-351(a)(1).



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