

# FIDUCIARY PITFALLS UNDER POWERS OF ATTORNEY AND OTHER INSTRUMENTS

DBA Probate Section Meeting

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# POWER OF ATTORNEY

- Chapter XII is the Durable Power of Attorney Act which governs financial Powers of Attorney.
- A statutory form for a power of attorney is set forth in Tex. Prob. Code § 490.

# “DURABLE” POWER OF ATTORNEY

Defined under Section 482 as a written instrument that:

- (1) designates another person as attorney in fact or agent;
- (2) is signed by an adult principal;
- (3) states that “This power of attorney is not affected by subsequent disability or incapacity of the principal” or “This power of attorney becomes effective on the disability or incapacity of the principal;” and
- (4) is acknowledged by the principal.

# FIDUCIARY DUTY

- “A power of attorney creates an agency relationship, and an agent owes a fiduciary duty to its principal with respect to matters within the scope of its agency.” *Plummer v. Estate of Plummer*, 51 S.W.3d 840, 842 (Tex. App.—Texarkana 2001, pet. denied).
- “The attorney in fact or agent is a fiduciary.” Probate Code Section 489B(a).

# FIDUCIARY DUTY

- “A fiduciary owes the principal a high duty of good faith, fair dealing, honest performance, and strict accountability.”

*Sassen v. Tanglegrove Townhouse*

*Condominium Ass’n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

# FIDUCIARY DUTY

- Duty to timely inform the principal of actions taken pursuant to the power of attorney. Probate Code Section 489B(a)(b).
- Duty to maintain records of each action taken or decision made by agent, and keep them until delivered to the principal, released by the principal, or discharged by the Court. Probate Code Section 489B(c).

# FIDUCIARY DUTY

- A fiduciary has “a duty of full disclosure of all material facts known to [him] that might affect [the principal’s] rights.”

***Montgomery v. Kennedy***, 669 S.W.2d 309, 313 (Tex.1984)(citations omitted).

# FIDUCIARY DUTY

- “When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standard of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions.”

***Texas Bank and Trust Co. v. Moore***, 595 S.W.2d 502, 508 (Tex.1980), *citing Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938).

# FIDUCIARY DUTY

- “By accepting both the role of fiduciary and gifts from the principal, the agent consents to have her conduct measured by a higher standard of loyalty.”

*Texas Bank and Trust Co. v. Moore*, 595 S.W.2d at 509.

# FIDUCIARY DUTY

- “The fiduciary relationship casts upon the profiting fiduciary the burden of showing the fairness of the transactions.”

*Moore*, 595 S.W.2d at 509.

## ***VOGT V. WARNOCK***

- Barton Warnock was a professor of biology at Sul Ross University.
- Warnock and his wife, Ruel, had been married for over 60 years.
- The Warnocks had a son, Tony, who was 57 years old at the time of trial.
- Rebecca Vogt was an anthropologist and artist specializing in archaic basket making and weaving.

# ***VOGT V. WARNOCK***

- Ruel Warnock died and Rebecca Vogt went through a divorce.
- Vogt and Warnock spent a good deal of time together, and their friendship became a romance.
- Warnock named Vogt his attorney-in-fact under a statutory durable power of attorney.
- Vogt never acted under the POA.

# *VOGT V. WARNOCK*

“THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THIS APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.”

# ***VOGT V. WARNOCK***

- Warnock revoked a living trust he and Ruel had created in favor of Tony.
- Warnock transferred ownership of four real properties to Vogt and retained life estates for himself.
- Warnock named Vogt as the beneficiary of his brokerage account and his veteran's life insurance policy.

## ***VOGT V. WARNOCK***

- Warnock prepared a handwritten codicil to his earlier will, leaving his furniture, household goods, jewelry and personal effects to Vogt.
- He made specific bequests of a sentimental nature to Tony.
- After Warnock's death his nephew was appointed executor.
- Executor filed suit against Vogt alleging breach of fiduciary duty, fraud and undue influence.

## ***VOGT V. WARNOCK***

- At trial the estate stipulated that Warnock had done what he wanted to do in transferring the property, and his competency and undue influence were no longer questions that would be submitted to the jury.
- The jury found that the transfers of two of the properties were not fair to Warnock, the other two transfers and the other benefits provided to Vogt were fair.

## ***VOGT V. WARNOCK***

- Two of Vogt's points of error on appeal.
- She was not a fiduciary, as a matter of law, and the trial court should not have shifted the burden of proof to her to prove that the property transfers were fair; and
- The trial court should have submitted a jury issue on the existence of a fiduciary relationship.

## ***VOGT V. WARNOCK***

- Despite the fact that Vogt had never acted under the Power of Attorney, the Court held that she was a fiduciary as a matter of law.
- No question to submit to the jury about whether she was a fiduciary.
- She had the burden of proof to prove that the transactions were fair to Warnock.

## ***VOGT V. WARNOCK***

- “. . . we think public policy mandates a finding that Vogt was Warnock's fiduciary. Once a fiduciary relationship is established, we believe the courts are well advised to hesitate in finding exceptions to that high standard of fair dealing and mutual trust it imposes.”

***Vogt v. Warnock***, 107 S.W.3d 778, 784 (Tex. App. – El Paso 2003, pet. denied), *citing Moore*, 595 S.W.2d at 508.

## ***VOGT V. WARNOCK***

- “The less opportunity the law provides for a ‘sharp bargain’ by a fiduciary, the more secure a vulnerable principal will be, and that is the very essence of fiduciary law.”

***Vogt***, 107 S.W.3d at 784.

## ***VOGT V. WARNOCK***

- “. . . we find it worth repeating that **fiduciary status does not prohibit the beneficiary from giving the fiduciary gifts or bequests; instead, it insures that the fiduciary will be prepared to prove the transaction was conducted with scrupulous fairness.** Surely this is no more than the law should require.”

***Vogt***, 107 S.W.3d at 784 (emphasis added).

## ***VOGT V. WARNOCK***

- The Court concluded that “. . . the evidence established fairness as a matter of law.”

***Vogt***, 107 S.W.3d at 785.

# *PLUMMER V. ESTATE OF PLUMMER*

- Agnes Plummer had eight children.
- Three were involved in this lawsuit.
- Wesley and Carolynn, who lived in the same town as Agnes; and
- Sandra, who lived out of town.

# ***PLUMMER V. ESTATE OF PLUMMER***

- Agnes had a five accounts with Sandra as the Joint Tenant with Right of Survivorship that totaled \$24,976.23.
- Wesley and Carolynn had a power of attorney from Agnes.
- Agnes became ill and the doctors informed Wesley and Carolynn that if she lived she would require long term care.

# *PLUMMER V. ESTATE OF PLUMMER*

- Wesley and Carolyn, using the durable power of attorney from Agnes, cashed out the Certificates of Deposit with Sandra as the joint tenant with right of survivorship.
- They deposited the money into their mother's checking account – an account on which they had right of survivorship.
- They testified that they consolidated the funds so that they would be available to pay hospital bills and for nursing home care.

# ***PLUMMER V. ESTATE OF PLUMMER***

## ***JURY CHARGE***

- The transactions in question were fair and equitable to Agnes;
- Wesley and Carolynn made reasonable use of the trust that Agnes placed in them;
- Wesley and Carolynn acted in the utmost good faith and exercised the most scrupulous honesty toward Agnes;

# *PLUMMER V. ESTATE OF PLUMMER*

## *JURY CHARGE*

- Wesley and Carolynn placed the interests of Agnes before their own, did not use the advantage of their position to gain any benefit for themselves at the expense of Agnes, and did not place themselves in any position where their self-interest might conflict with their obligations as a fiduciary; and
- Wesley and Carolynn fully and fairly disclosed all important information to Agnes concerning the transactions.

# *PLUMMER V. ESTATE OF PLUMMER*

- The checking account had been created before the POA and at least two years before the money was transferred into it.
- Liquid assets were marshaled for Agnes' expense.
- The jury could have concluded that the combining of these funds was a legitimate function of agents under the power of attorney.

# *PLUMMER V. ESTATE OF PLUMMER*

- Carolynn testified that she and her brother were only trying to take care of their mother's affairs and that Carolynn was not aware that there was a right of survivorship provision in this account.
- She further represented at trial that the remaining funds in the account would pass equally to all of the children under the terms of their mother's will.

# *PLUMMER V. ESTATE OF PLUMMER*

- Even though placing the money in Agnes' account negated Sandra's potential advantage under the right of survivorship provision, the jury was justified in determining that this was properly done under the power of attorney for the benefit of their mother.
- Wesley and Carolynn's willingness to divide the property equally under the terms of their mother's will further established that they were not exercising their power of attorney for the purpose of gaining any benefit for themselves.

# TERMINATION OF THE AGENCY RELATIONSHIP

- When an agent takes actions that are antagonistic to the principal, the breach of fiduciary duty terminates the agency relationship. *Remenchik v. Whittington*, 757 S.W.2d 836 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1988, no writ); *Cotton v. Rand*, 51 S.W. 838, modified on other grounds, 53 S.W. 343 (1899).

# TERMINATION

- The power of attorney can provide for a date of termination by modifying the statutory form.
- A power of attorney ceases on the death of a principal. *Wall v. Lubbock*, 118 S.W. 886 (Tex. Civ. App. – Fort Worth 1936, no writ).
- A power of attorney can also cease upon the incapacity of the principal unless it is expressly made durable: “This power of attorney is not affected by my subsequent disability or incapacity.”

# TERMINATION

- Upon appointment of a permanent guardian of the estate, the power of attorney terminates.
- Does not terminate with the appointment of a guardian of the person only.
- Does not terminate with a temporary guardian of the estate unless the Court, in its discretion, suspends the power.

# DUTY TO ACCOUNT

- The principal can demand an accounting from the agent under Section 489B of the Texas Probate Code
- If an accounting is not provided within 60 days or in the time set by the principal, the principal can file suit to compel an accounting from the agent.

# DUTY TO ACCOUNT

- The specific requirements of an accounting are set forth in Section 489B.
- All property of the principal coming into the agent's knowledge or possession;
- All actions taken or decisions made by the agent;
- Complete account of receipts, disbursements and other actions of the agent;
- List of all property over which the agent has exercised control with description and value, if known;

# DUTY TO ACCOUNT

- Cash balance on hand and the name and location of depository where kept;
- All known liabilities; and
- Any other information known to the agent as may be necessary to a full and definite understanding of the property of the principal.

# STANDING TO DEMAND AN ACCOUNTING

- Who can make the demand?
- Principal
- Any person designated by the Principal
- Guardian of the Estate
- Personal Representative
- Section 489B(i).

# DUTY TO ACCOUNT

- To prevent distrust and family discord, address in the POA to whom the agent must account if the principal becomes incapacitated.
- Consider that the agent must account annually, or more frequently, to principal's other children of his actions in serving as agent.
- This clause may help prevent the filing of unnecessary guardianship applications.

# STATUTORY “SHORT FORM” POWER OF ATTORNEY

- Added in 1993
- Menu of 13 areas in which principal can confer authority on agent
- Scope of the powers of the agent for each of the 13 areas is defined in separate sections of the Probate Code

# POWERS RELATING TO ESTATE, TRUST AND OTHER BENEFICIARY TRANSACTIONS

- Section 499 of the Texas Probate Code deals with these powers.
- Under Tex. Prob. Code Sec. 499(6), an agent may transfer all or part of the principal's property to the trustee of a revocable trust created by the principal as settlor.
- This power does not appear to allow the agent to *create* the revocable trust and then transfer property to it, but only gives the agent the power to fund a trust already created.

# TRUSTS

- *Filipp v. Till*, 230 S.W.3d 197 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2006, no pet.).
  - An agent does not have the right to create a trust unless the POA gives that specific authority to the agent.
- *Hardy v. Robinson*, 170 S.W.3d 777 (Tex. App.–Waco 2005, no pet.).
  - Indicates that if specific authority is given to the agent to create a trust for others, then that expands as a special power what is allowed under the Probate Code, and it will be recognized.
  - However, in *Hardy*, the agent had not created the trust at the time the principal died, and the language in the instrument did not create the trust, so no trust existed on his death when the power of attorney terminated.

# POWERS RELATING TO INSURANCE CONTRACTS

- Section 498 of the Texas Probate Code deals with the construction of powers related to Insurance Transactions.
- Under Section 498(4) and (10), an agent may designate or change the beneficiary of a contract, except that the agent may be named a beneficiary of the contract only to the extent the agent was named as a beneficiary under a contract procured by the principal prior to executing the power of attorney.

# CHANGE OF BENEFICIARY DESIGNATION ON A BANK ACCOUNT

- The statute does not address this situation, and the case law is not well developed in Texas.
- *Tetens v. Garcia*, 1996 WL 656443 (Tex. App.—Austin 1996)
- Principal established a bank account (CD) in 1987.
- Granddaughter Ruthie was the beneficiary upon the principal's death.
- Principal executed a POA in 1990 naming son as agent.
- When the CD matured, the son instructed the bank that he was closing the account.

# *TETENS V. GARCIA*

- Bank issues a check to the principal as trustee.
- The agent reinvested the funds in a bank account in the principal's name with no beneficiary designation.
- After the principal died, Ruthie filed a Declaratory Judgment Action.
- At trial, the agent stated that his purpose was to reinvest the funds at a higher rate of interest because the principal needed more income.
- Trial Court held in Ruthie's favor.

## *TETENS V. GARCIA*

- Court found that the principal had sufficient other funds to live comfortably. If not, this case may have turned out differently given the *Plummer* case.
- The court of appeals affirmed. When the agent moved the account, he breached his fiduciary duty to the principal. As a result, upon the principal's death the funds were held in constructive trust for Ruthie.

# CHANGE OF BENEFICIARY DESIGNATIONS

- Note that the statutory form gives the agent the power to designate or change beneficiaries of at least insurance contracts and to open or close bank accounts.
- However, the statute does not directly address the issue with designating or changing the beneficiary of bank accounts.

# CHANGE OF BENEFICIARY DESIGNATIONS

- Changing a beneficiary designation may give rise to tortious interference with inheritance rights. *See King v. Acker*, 725 S.W.2d 750 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1987, no writ).
- Also, if anyone assists the agent in these activities, he can be liable for conspiring with an agent to breach his fiduciary duty. *Kinzbach Tool Co. v. Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942).

# CHANGE OF PRINCIPAL'S TESTAMENTARY PLANS

- Generally believed that this action is personal to an individual and cannot be designated to an agent.
- Supreme Court of Texas held that a guardian, without court authority, does not have the right, without prior agreement by the Trustor, to revoke a revocable trust created by the principal. *Weatherly v. Byrd*, 556 S.W.2d 292 (Tex. 1978)(purely personal right of trustor that could not vest in the guardian).

# CHANGE OF TESTAMENTARY PLANS

- Under same reasoning, agent, without specific authority, would not have right to change the testamentary disposition or estate plan created by the principal without court authority.

# LIFETIME GIFTS

- Since September 1, 1997, the statutory durable power of attorney form requires the principal to initial next to the provision granting gifting authority in order to confer that power on the agent.
- Absent special instructions, gift cannot exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year in which gift is made.
- If this provision is not initialed, likely that gifts will be invalid if challenged.

# LIFETIME GIFTS

- The principal can also list special instructions limiting or extending the gifting powers.
- If it is anticipated that gifting is required of the agent, then the gifting clauses should be drafted for the particular circumstances anticipated.

# COMPENSATION

- The agent is specifically granted the authority to be reimbursed for expenses incurred in exercising any powers chosen by the principal. Tex. Prob. Code § 491(10).
- The statute does not address other compensation.

# COMPENSATION

- An agent is not entitled to compensation unless the principal specifically authorizes it. *Powell v. Mulder*, 228 S.W. 302 (Tex. Civ. App.—Dallas 1921, no writ).
- Principal may want to specifically include the way in which compensation will be calculated. For example, the principal could provide for the agent to receive \$ x/hour or in accordance with a trustee fee schedule for a local bank.

# ETHICAL ISSUES

- If the principal is or may be incapacitated, this presents difficult questions for the lawyer representing the principal through a power of attorney.
- Especially difficult if you believe that the agent is taking advantage of the principal.
- The principal is the client – no different than any other agency relationship.

# ETHICAL ISSUES

- Guardian's hiring of counsel for ward established an attorney-client relationship between the lawyer and the ward.
- So the lawyer owes duties to the ward and not the guardian.

***Daves v. Comm. for Lawyers Discipline*, 952 S.W.2d 573 (Tex. App. – Amarillo 1997, writ denied).**

# ETHICAL ISSUES

- Attorney-client relationship exists between a child and the attorney hired by the child's next friend.

***Byrd v. Woodruff***, 891 S.W.2d 689, 700-01 (Tex. App. – Dallas 1994, writ dism'd by agr.).

# ETHICAL ISSUES

- But, as a practical matter, the lawyer has the primary relationship with the agent – who has hired the lawyer – and not with the principal even though the principal is the client.
- In the course of representing the principal, via the agent, the lawyer may have learned confidential information pertaining to the agent.

# ETHICAL ISSUES

- If a conflict exists or develops between the principal, on the one hand, and the agent, on the other hand, the lawyer will most likely not be able to represent either.
- Especially true if the agent did share personal confidential information with the lawyer.

## ETHICAL ISSUES – INCAPACITATED PRINCIPAL

**“A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.”**

Tex. Disciplinary R. Prof'l Conduct  
1.02(g)(emphasis added).

# ETHICAL ISSUES – INCAPACITATED PRINCIPAL

Comment 13 provides that:

**13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05 (c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.**

# ETHICAL ISSUES

- There is only one reported case under Tex. Disciplinary R. Prof'l Conduct 1.02(g).

*Franks v. Rhoades*, 310 S.W.3d 615 (Tex. App. – Corpus Christi 2010, no pet.).

# PROTECTING AN INCAPACITATED PRINCIPAL

- What can a third party do?
- Successor Agents under POA?
- File Declaratory Judgment Action that agency relationship has terminated due to breach of fiduciary duty?
- Guardian of the Estate?
- If no successors named, file Application for a Guardian of the Estate.
- Guardian can demand an accounting of agent under 489B.

# PROTECTING THE ESTATE AFTER THE DEATH OF THE PRINCIPAL

- Section 489B allows the personal representative to demand an accounting from the agent.
- If not provided, the personal representative can file suit to compel the accounting.
- What if the agent is also named as the Executor?  
This may be a conflict of interest that could disqualify the named Executor.
  - *See In Re Estate of Boren*, 268 S.W.3d 841 (Tex. App.—Texarkana 2008, pet. denied).

**THE END**