



Gift Transactions Under the Statutory Short Form Power of Attorney

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Your client calls and asks your advice. He says his recently incapacitated father gave him a Statutory Short Form Durable Power of Attorney a few years ago, asking him to serve as the attorney-in-fact. The "all powers" section (item N) was checked under Part First and the authorization to transfer property to the attorney-in-fact, Part Third, was checked. The client asks "Can I make a gift to myself and my children of my father's property using the power of attorney?" You review the statute and the client's power of attorney, and advise the client that yes, in fact, he or she can; but the amount of each gift is limited to \$10,000 per year per recipient. Is your advice correct? Technically, it probably is. But what if the facts and circumstances surrounding the gift transaction were such that the gift would arguably not be in the "best interest" of the principal as required by the power of attorney statute? Would your advice change? What facts or circumstances must exist to set aside a gift transaction because the transaction was not in the best interest of the principal?

The Gift Transactions subdivision of the power of attorney statute is at best vague on this point. The vague statutory language could and probably has resulted in abuse by some attorneys-in-fact. This raises the issue of whether Minn. Stat. §523.24 should be amended to incorporate a more explicit and objective facts and circumstances test to make it more difficult for the attorney-in-fact to abuse his or her duty to a principal. The Gift Transactions subdivision, subdivision 8 of Minn. Stat. §523.24, and its potential for abuse by the attorney-in-fact will be the focus of this article.

Powers Of Attorney

Minn. Stat. §523 contains the basic provisions dealing with Minnesota powers of attorney. In general, a person who is a competent adult may, as principal, designate another person as his or her attorney-in-fact by a written power of attorney properly executed to perform certain acts on behalf of the principal.¹ A power of attorney may be made "durable" if it contains language such as "[t]his power of attorney shall not be affected by [the] incapacity or incompetence of the principal" or similar language. That is, the authority and power of the attorney-in-fact is not affected or terminated by the principal's later incapacity or incompetence.² Minn. Stat. §523.23 contains a power of attorney form (the "Statutory Short Form") that is widely used by attorneys in aiding clients with their estate plans and financial

affairs when the principal anticipates soon becoming incapacitated. The Statutory Short Form under the "First" section contains a checklist of powers that the principal authorizes the attorney-in-fact to have. In many, if not most cases, the principal will want the attorney-in-fact to have the broadest possible powers. Checking item N of the Statutory Short Form ensures that the attorney-in-fact will have the needed flexibility and latitude to meet all of the principal's needs if he or she later becomes incapacitated. Ostensibly, this broad discretion is given so the attorney-in-fact can "exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs *and have the interests of the principal utmost in mind.*" (emphasis added)³ In this regard Minn. Stat. §523.24 lays out the various transactions permitted to the attorney-in-fact.⁴ One of the permitted transactions that is the most difficult to police and monitor, and probably the most misunderstood and most widely abused, is the Gift Transactions section. A review of that subdivision is in order.

Gift Transactions

Paragraph (2) of Subdivision 8 of Minn. Stat. §523.24 provides that if the principal confers upon the attorney-in-fact the general authority with respect to gift transactions it means that the principal authorizes the attorney in fact:

to make gifts on behalf of the principal to the principal's spouse, children, and other descendants or the spouse of any child or other descendant, and, if authorized by the principal in part Third, to the attorney-in-fact, either outright or in trust, for the purposes which the attorney-in-fact deems in the best interest of the principal, specifically including minimization of income, estate, inheritance, or gift taxes, provided that, notwithstanding that the principal in part Third may have authorized the attorney-in-fact to transfer the principal's property to the attorney-in-fact, no attorney-in-fact nor anyone the attorney-in-fact has a legal obligation to support may be the recipient of any gifts in any one calendar year which, in the aggregate, exceed \$10,000 in value to each recipient.⁵

At first blush, Subdivision 8 paragraph (2) suggests and appears to say that the attorney-in-fact is "free" or has the "right" to transfer the principal's property by gift to anyone (in any amount), including the right to transfer the principal's property directly to the attorney-in-fact. The only limitation appears to be that a transfer to the attorney-in-fact (or those he or she has a legal obligation to support) cannot exceed \$10,000 in value per year to each such recipient.

In this regard, three questions arise:

- 1) Does the statute contain an objective "facts and circumstances" test or limitation on gift transactions by the attorney-in-fact?
- 2) If it does, what is it?

3) If it does not, should the statute be amended to explicitly do so?

The answer to question 1) is "probably not." Certainly, the power of attorney statute does not explicitly contain an "objective" facts and circumstances test that limits the gift transaction powers of an attorney-in-fact. On further review of the statute itself and upon review of other states' power of attorney statutes and case law, the gift transaction provision appears at best to contain such a restriction or test "implicitly." Regardless whether such a limitation is "implicit" or absent from the statute, Subdivision 8 should be amended to make it explicit and objective. Without an explicit objective facts and circumstances test the power of attorney is subject to abuse by the attorney-in-fact.

Potential for Abuse

The following four fact situations illustrate the problem and potential abuses. Each is somewhat egregious on its own but each illustrates very clearly the potential for abuse by an attorney-in-fact and the reason a change is needed. All cases are strictly hypothetical, and any resemblance to genuine persons or situations is purely coincidental.

Example 1. In 1999 an elderly single person whom we will call "Roger," in questionable health with two adult children ("Sue" and "James"), has an estate valued at \$100,000. Roger's estate includes only one asset, a bank account. The bank account is in Roger's name alone. That is, it is a probate asset and is not a multiparty account as defined in Minn. Stat. §524.6-201, Subd. 6. On January 1, 1999, Roger executes a will leaving his entire estate to his two children, Sue and James, in equal shares. On January 1, 1999, Roger also executes a Statutory Short Form as principal in favor of Sue as attorney-in-fact, checks item N of First, and also checks the provision under Third which states: "This power of attorney authorizes the attorney-in-fact to transfer my property to the attorney-in-fact."⁶ Sue is in town and lives near Roger. James is out of town. Roger was extremely frugal with his money and had no prior history of giving. On January 2, 1999, Roger becomes incompetent. The question is can Sue, as attorney-in-fact for Roger, on January 2, 1999, completely deplete Roger's estate by making a \$10,000 gift of Roger's property to herself, a \$10,000 gift of Roger's property to her husband, a \$10,000 gift to each of her three minor children, and a \$50,000 gift to her adult son, whom she has no legal obligation to support, without violating the statute?

Example 2. Example 2 has the same facts as Example 1 except that instead of Sue, as attorney-in-fact making current outright gifts of Roger's property to herself, her husband and children she merely goes to Roger's bank with the power of attorney and has Roger's bank account changed to a multiparty, P.O.D account with Sue, her husband, and her children as P.O.D payees.⁷ Again, the question is, can Sue make such a change to Roger's bank account without violating the statute?

Example 3. Example 3 has the same facts as Example 1 except Roger's only asset is \$100,000 contained in a 401(k) qualified retirement account. No beneficiary is designated. Can Sue as attorney-in-fact contact the plan administrator and designate herself, her spouse, and her children as beneficiaries under the plan, in the proportions stated in Example 1,

without violating the statute?

Example 4. Example 4 is the same as Example 1 except Sue, as attorney-in-fact goes to Roger's bank and uses the \$100,000 in the bank account to purchase a single premium life insurance policy on Roger's life and designates herself, her spouse, and her children as primary beneficiaries in the proportions stated in Example 1. Again, does this violate the statute?

An argument can be made that Sue, as attorney-in-fact, should not be allowed to enter into any of the above transactions, even though the power of attorney statute on its face appears to authorize them. Why?

First, the language of Minn. Stat. §523.21 states in relevant part that the attorney-in-fact shall exercise his or her power: 1) in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs; and, 2) *shall have the interests of the principal utmost in mind.*" (emphasis added)⁷ In the above four examples, although Sue technically followed the literal language of the gift transaction subdivision of the statute by limiting gifts to herself, her spouse and her minor children to \$10,000 each, with no limitation for her adult son, the question is did Sue make the gifts with the interest of the principal utmost in mind? The statutory language is not very helpful. But it appears for the following reasons that she clearly did not:

1. Roger clearly directed in his will that his property was to pass equally to Sue and James. Roger made a will and made it abundantly clear where he wanted his property to go. He did not give Sue a power of attorney to change his estate plan. Only Roger can do that by making a new will or codicil. Sue's actions clearly injured James, Roger's now disinherited son.
2. Roger's will and power of attorney were executed at or about the same time *and* Sue took action as attorney-in-fact shortly thereafter. There was no substantial delay between the execution of the will, the execution of the power of attorney in favor of Sue, and Sue's transactions in Roger's assets. The close proximity in time of these events suggests very strongly that Sue acted not in Roger's best interest but in her own self-interest.
3. Roger was incapacitated at the time Sue took action. Roger's incapacity shortly after or in close proximity to the execution of the power of attorney made it virtually impossible for him to monitor or stop Sue's actions or execute a new will to change his estate plan. Roger's vulnerable condition makes Sue's actions even more suspect and egregious.

A second reason why Sue's transactions should not be permitted is that they run counter to the apparent policy of the Gift Transactions subdivision itself. Paragraph (2) of Subdivision 8 of Minn. Stat. §523.24 delineates some transactions that the authors of the statute wanted to preserve and retain for the benefit of the principal: namely, gift transactions that would have the effect of "minimizing income, estate, inheritance, or gift taxes." Clearly, the \$10,000 limitation on gifting to the attorney-in-fact is not an arbitrary number. The limitation amount is the same as the \$10,000 annual gift tax exclusion under Internal

Revenue Code §2503(b). It seems abundantly clear that the authors of Subdivision 8 incorporated this limitation primarily to allow the principal to carry out a preexisting gifting program and/or to avoid federal and Minnesota income, estate, inheritance or gift taxes by allowing the attorney-in-fact to continue or to initiate annual exclusion gifts for the principal's benefit to reduce the size of the principal's estate upon his or her death. Pennsylvania's power of attorney statute incorporates this obvious policy consideration directly in its statute by allowing only "limited gifts" to the attorney-in-fact, defined as gifts that qualify for the annual exclusion from federal gift tax. In some situations, where the principal has a large estate, these tax avoidance objectives would probably be in the "best interest" of the principal regardless and notwithstanding that such gift(s) might accrue to the direct or indirect benefit of the attorney-in-fact. However, in the above examples, Roger had no prior history of gifting to Sue or James and his estate was modest, valued at only \$100,000. Such an estate would, in all likelihood, not be subject to federal or Minnesota estate tax in that it falls below the current applicable exclusion amount of \$650,000.

Need for Change

There appears to be no credible argument that Sue could make to suggest that the gifts in question were made to avoid gift or estate taxes for Roger's benefit or to carry out his historic pattern of gifting. This is true for all the examples. None of the hypothetical transactions were executed to save income, estate or gift taxes; none were consistent with any prior gifting program of Roger's; and, given the timing of the transactions and Roger's health and mental condition, all were clearly contrary to Roger's intended estate plan as articulated in his last will. These transactions were, therefore, clearly not done in Roger's best interest or "with the interests of the principal utmost in mind" as required by the power of attorney statute.

Clearly, Sue's motives were self-serving, egregious, and contrary to the apparent policy of the power of attorney statute. But, were her actions a technical violation of the statute? Would the statute protect James? The statute is not explicit and clear on this point. And these are egregious examples! If the statute does not "catch" these transactions, what hope is there that more subtle abuses by the attorney-in-fact would be caught?

To date Minnesota has no case law directly on point on the issue of gifting under a Statutory Short Form Power of Attorney. However, a review of other states' power of attorney statutes and some of the surrounding case law in those jurisdictions suggests very clearly that the gift provision [in a power of attorney] is relatively new and is clearly the exception and not the rule. In most jurisdictions, a gift by an attorney-in-fact will not be allowed unless the power of attorney specifically authorizes it.⁸ A general grant of power(s) is not enough. A general power to sell, exchange, transfer, lease, bargain, mortgage, and convey or to perform any act with regard to the principal's property is not an authorization by the principal to the attorney-in-fact to make gifts.⁹ The apparent hesitation in allowing an attorney-in-fact to make unbridled gifts to himself or third parties is clearly the dominant theme and policy in most if not all state power of attorney statutes. And it should be. Without such limitations, the attorney-in-fact would in effect be free to make wholesale changes in the principal's

estate plan. This would clearly not be good public policy.

Proposed Test

The Minnesota Statutory Short Form Power of Attorney, although authorizing gift transactions, does not give the attorney-in-fact *carte blanche* to transfer property by gift to himself or third parties. There are both explicit and implicit restrictions identified in the statute. These need to be more restrictive and more objective. Something similar to the following facts and circumstances test should be incorporated directly into Subdivision 8 of the power of attorney statute:

A gift transaction made by an attorney in fact under subsection A of Minn. Stat. §523.24 is presumed to be authorized by the principal. Notwithstanding, if an interested person¹⁰ by a preponderance of the evidence¹¹ shows that the following facts and circumstances existed at the time a gift transaction was made by the attorney-in-fact under Subdivision 8 of Minn. Stat. §523.24, then such gift transaction shall be presumed to have been unauthorized by the principal at that time and the attorney-in-fact shall be held liable for damages incurred thereby to such interested person or persons:

- At the time of the gift transaction the fair market value of the principal's taxable estate was less than one-half of the applicable exclusion amount under Internal Revenue Code §2010(c) and the corresponding provision under applicable Minnesota law.
- It was not foreseeable that the gift would and in fact the gift did not minimize the principal's income, estate, inheritance or gift tax.
- The gift was not made to a charity or for charitable purposes.
- The gift was not substantially consistent with any prior gifting or estate planning program of the principal.
- The principal executed his last will and testament or other testamentary instrument within three years prior to executing the power of attorney and the gift transaction occurred within three years after the date of the power of attorney.
- The principal was incapacitated or incompetent at the time the gift transaction was made.
- The gift transaction is substantially inconsistent with the principal's property distribution scheme as stated in the principal's last will or other testamentary instrument.
- The gift was made to the attorney-in-fact, the attorney-in-fact's spouse, a descendent of the attorney-in-fact or anyone the attorney-in-fact had a legal obligation to support.

If the above facts and circumstances test were explicitly incorporated into Subdivision 8 of Minn. Stat. §523.24, then all of the transactions in Examples 1-4 would most likely have been set aside. And rightfully so. They were clearly not in the best interest of the principal.

The power of attorney gift transaction issues raised in this article undoubtedly touch only the tip of the iceberg. Nevertheless, some form of more objective facts and circumstances test must be incorporated into Minn. Stat. §523.24 to protect the principal from the excesses of some unscrupulous attorneys-in-fact. It is the smaller estate, the less wealthy principal, that needs the most protection and it is this group of principals that the above proposal and suggestion is aimed to protect. ▲

Notes

1. See Minn. Stat. §523.01-Authorization.
2. See Minn. Stat. §523.07-Durable Power of Attorney.
3. See Minn. Stat. §523.21-Duties of an Attorney-in-Fact.
4. See Minn. Stat. §523.24-Construction.
5. See Minn. Stat. §523.24 subd. 8 - Gift Transactions.
6. See Minn. Stat §523.23 subd.23.-Statutory Short Form of General Power of Attorney; Formal Requirements; Joint Agents.
7. See Minn. Stat. §523.21-Duties of Attorney-in-Fact.
8. *Sevigny v. New South Fed. Sav. & Loan Ass'n*, 586 So2d 884 (Ala.1991); *Johnson v. Fraccacreta*, 348 So2d 570 (Fla. Dist. Ct. App. 1977); *Estate of Collins v. United States*, 1994 WL 464357 (E.D. Michigan. 1994); *Manna v. Pirozzi*, 130 A2d 55 (N.J. Super. Ct. App. Div. 1957).
9. See *Aiello v. Clark*, 680 P2d 1162 (Alaska 1984); *Shields v. Shields*, 19 CalRptr 129 (Cal. 1962); *LeCraw v. LeCraw*, 401 SE2d 697 (Ga. 1991); *Okihara v. Clark*, 71 FSupp 319 (D. Hawaii. 1947); *First Nat'l Bank of Shreveport v. Crawford*, 455 So2d 1209 (La. Ct. App. 1984).
10. See Minn. Stat. §524.1-201, which defines "interested person" to include "heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or a claim against the estate of a decedent."
11. The evidentiary standard to set aside a multiparty account transaction is "clear and convincing." See Minn. Stat. .§524.6-204(a).