STATE OF VERMONT
WINDSOR COUNTY, SS

In Re: Estate of Phillip I. Lovell	SUPERIOR COURT Docket No. 207-4-10 Wrcv

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter is before the court on Appellant Duane Amsden's appeal of the probate court's order regarding the validity of a conveyance of property made pursuant to a power of attorney. Appellant Duane Amsden, the co-executor of the estate, is represented by Stephen Ankuda, Esq. Appellees Charles and Hubert Lovell are represented by Bettina Buehler, Esq. For the reasons below, we reverse and remand.

FACTS

The facts in this case do not appear to be in dispute, and we derive them from the probate court's February 11, 2010 decision and order. On June 4, 2003, Phillip Lovell (decedent) died. Five years later an estate was opened, and Duane Amsden and Charles Lovell were appointed co-executors. On June 4, 2008, an inventory of the estate was filed that listed a farm located in Springfield as belonging to the estate. Appellees filed an objection to the proposed inventory.

Appellant filed a petition for declaratory judgment with the probate court seeking a judgment that the estate was the owner of the Springfield farm. Specifically, Appellant sought an order declaring the transfer of the farm from the decedent to Appellees to be invalid. Appellees filed a cross-petition seeking a declaratory judgment that the Springfield farm was validly transferred to the Appellees and therefore was no longer an asset of the estate.

At issue is the scope of a power of attorney (POA) executed by the decedent on June 6, 1997 which appointed his son Charles Lovell as his attorney-in-fact. The POA granted Charles

> full authority and power to do and perform any and all other acts necessary or incident to the performance and execution of the powers herein expressly granted, with power to do and perform all acts authorized hereby, as fully to all intents and purposes as the grantor might or could do if personally present, with full power of substitution.

(Appellant's Ex. A.)

One of the powers expressly granted by the decedent authorized Charles

> [t]o negotiate, execute, acknowledge and deliver leases or deeds upon any and all real property and premises owned by [the grantor], and particularly upon any real property located in Springfield, Vermont and to collect, demand and receive any rents which may become due to me from any tenants of [the grantor's] or tenants as a result of the power of attorney; and to do any other acts pertaining to said property that [the grantor] might do; including the signing of agreements of sale or other necessary papers.

Id.

Pursuant to this POA, Charles transferred the decedent's Springfield property to himself and his brother Hubert on May 29, 2003, shortly before the decedent's death. This transfer was a "gift," insofar as the Appellees gave no consideration for the decedent's property. The probate court held that this conveyance was valid and enforceable and therefore sustained Appellees' objection to the proposed inventory. Appellant has submitted the following issues to be addressed by this court on appeal: Are the limitations on the authority of the attorney-in-fact to make gifts set forth in 14 V.S.A. § 3504 applicable to a power of attorney signed before the effective date of the legislation? Is the power to make gifts grandfathered pursuant to 14 V.S.A. § 3516 and other provisions of Chapter 123, Title 14 V.S.A.?

CONCLUSIONS OF LAW

"A power of attorney is a written authorization used to evidence an agent's authority to act on behalf of another person." *Schall v. Gilbert*, 169 Vt. 627, 630 (1999) (mem.). There is no dispute that the written POA in this case authorizes Charles, as the decedent's agent, to act on behalf of the decedent. Specifically, the POA authorizes Charles to execute and deliver a deed to the Springfield property. This power is broad, giving Charles the authority to perform any act pertaining to the Springfield property that "the grantor might or could do if personally present." (Appellant's Ex. A.) Charles exercised this authority to execute and deliver a deed to the property to himself and his brother Hubert. Admittedly, the decedent had the authority to give his property to his children, and therefore, according to Appellees, Charles was exercising his proper authority under the POA when he conveyed the Springfield property to himself and Hubert.

In 2001, the legislature adopted comprehensive legislation addressing powers-of-attorney. Under this legislation, effective June 13, 2002, no attorney-in-fact can make a gift to himself or a third party of property belonging to the principal unless the terms of the POA explicitly provide for such authority. See 14 V.S.A. § 3504(e) & (f). It is undisputed that the POA in this case does not explicitly grant Charles the authority to make gifts. However, Appellees argue that section 3504 is inapplicable here because the decedent's POA was executed in 1997, before the effective date of the statute. In support of this argument, Appellees cite to the "grandfather" clause in 14 V.S.A. § 3516(2) which states: "A power of attorney shall be valid if it . . . is executed before July 1, 2002 and valid under common law or statute existing at the time of execution."

In order to determine whether Charles validly exercised his power under the POA, we

must look to the law that existed in 1997. Neither of the parties has directed the court to any Vermont statute in existence in 1997 that directly addresses the gift-giving authority at issue here. Nor has the court found any such statute. However, the common law is quite clear that the authority of an agent to make a gift on behalf of the principal must be express. See *Matter of Estate of Crabtree*, 550 N.W.2d 168, 170 (Iowa 1996). "It is well settled that no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift." *Cheloha v. Cheloha*, 582 N.W.2d 291, 297 (Neb. 1998); see also *Arambula v. Atwell*, 948 S.W.2d 173 (Mo. Ct. App. 1997) (gift by attorney in fact to himself or third party is barred absent clear intent to the contrary evidenced in writing). "Since the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney." *Whitford v. Gaskill*, 480 S.E.2d 690, 692 (N.C. 1997).

This rule is consistent with Vermont law. "Every agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, or of any person other than the principal, in the absence of an agreement that it may be so used." *John A. Westlund, Inc. v. O'Bryan Constr. Co.*, 123 Vt. 301, 308 (1963). "It is for the common security of mankind . . . that gifts procured by agents, and purchases made by them from their principals, should be scrutinized with a close and vigilant suspicion." *Ralston v. Turpin*, 129 U.S. 663, 675 (1889) (quotations omitted).

It is with this admonition in mind that we reject Appellees' claim that Charles was authorized under the broad language of the POA to transfer the decedent's property to himself and his brother without consideration. Even in the absence of the prohibitions listed under 14 V.S.A. § 3504, Charles would have been prohibited by common law from gifting the property to himself in 1997. Therefore, Charles's transfer of the property under the POA was invalid as exceeding the scope of his authority.

ORDER

For the reasons given above, the probate court's February 11, 2010 decision and order is REVERSED AND REMANDED.

Dated at Woodstock, Vermont this 12 day of May, 2010.

Harold E. Eaton, Jr.
Superior Court Judge