
Folks:

Take-Away: The individual who holds a power of appointment over trust assets is generally not considered to be bound by any fiduciary duty. However, that principle may be changing.

Background: A power of appointment is an extraordinarily flexible tool that is used in many Trusts. A power of appointment is a dispositive power that enables its holder to determine who will take trust property next, and the time, terms, shares and conditions under which the recipient will receive the trust property. The settlor of the Trust gives the power of appointment in the Trust instrument to the donee as defined in the *Restatement of Property* and in the Michigan Powers of Appointment Act [Section, 2(c)]; sometimes the donee is called the *powerholder*. A power of appointment can be exercisable currently, on the death of the powerholder, or when specific events or milestones are achieved. A power of appointment gives to the donee a degree of control over the disposition of the trust property, and it is sometimes used to achieve an income tax basis 'step-up' on the donee's death.

Uniform Power of Appointment Act: In 2013 the Uniform Law Commission created the Uniform Power of Appointment Act. Twelve states have adopted this uniform legislation, but not yet Michigan.

Michigan Law: In 1967 Michigan adopted the Michigan Powers of Appointment Act that describes in extensive detail a power of appointment, how one is created, how it is exercised, and it provides the terminology associated with the creation, exercise, and of the power of appointment. [MCL 556.112.] This Act was amended in recent years to expand its scope to cover a trustee's discretion to decant a trust's assets to alter, to some degree, the dispositive provisions of a Trust, by appointing the assets from the First Trust to a Second Trust. [MCL 700.556.112a.]

Common Law: At common law, a power of attorney was understood to be a **nonfiduciary** power. So long as the donee of the power of appointment appoints the trust property to one or more *permissible appointees* and otherwise follows the rules that are explicitly set forth in the Trust instrument that confers the power of appointment and which define how the power is to be executed by the donee, the donee may exercise the power of appointment in any manner, for any reason, good or bad, or for no reason whatsoever. This **nonfiduciary** aspect of a power of appointment is adopted in the Uniform Powers of Appointment Act. [Section 102(13.)]

Michigan Trust Code: There is also a short provision in the Michigan Trust Code that deals with the donee of a power of appointment. It provides that the donee of a presently exercisable or testamentary power of appointment (general or limited) may represent and bind a person whose interest, as a permissible appointee, taker-in-default, or otherwise, is subject to that power. This provision deals with the granting consent or approval to the modification or the termination of a Trust, or a deviation from the Trust's terms, which includes entering into a nonjudicial settlement agreement. [MCL 700.7302.] The reasoning for this MTC provision is that if the donee of the power of appointment possesses the right to divest the interests of the taker-in-default of the exercise of the power of appointment; accordingly, the donee should be permitted to take other actions on behalf of the persons whose interests the donee could eliminate entirely.

Fiduciary Holds Power of Appointment: The question then arises in a situation where the trustee of the Trust is also a trust beneficiary who holds a power of appointment over the same trust assets. If that beneficiary wishes to exercise their power of appointment, is he/she bound by their fiduciary duties as the trustee of the same Trust? Common law would say that the donee is free to exercise his/her power of appointment without considering the 'best interests' of the other trust beneficiaries. A couple of court cases from other jurisdictions provide examples of this principle.

Sole Successor Trustee: A dispute arose between father and daughter

with regard to a Trust created by the deceased wife-mother. The father, Harry, was named as sole successor trustee of the Trust. The Trust instrument also gave to Harry a presently exercisable *general* power of appointment. Harry exercised the power of appointment in favor of himself, thus divesting his daughter, Janice, and her children who were contingent beneficiaries of the Trust. Janice sued Harry claiming that Harry's appointment of the trust property to himself was invalid because it constituted a breach of fiduciary duty that Harry owed to Janice and her children in his capacity as successor trustee. The Court found that Harry could not have breached any fiduciary duties because he engaged in an act that was expressly authorized by the Trust instrument. While Harry occupied two separate and distinct roles- one as successor trustee and one as the powerholder of the power of appointment- the nonfiduciary character of the power of appointment that was exercised by Harry was not constrained by any fiduciary obligation to consider its impact on the other beneficiaries of the Trust. *Tubbs v. Berkowitz*, 47 Cal. App.5th 548 (2020).

Co-Trustee: The daughter of the settlor, Christine, was a co-trustee of the Trust who also held a special, aka *limited*, power of appointment over trust assets. The limited power of appointment authorized Christine during her life or at her death to direct distribution of trust property 'to or for the benefit of such one or more of the issue of Christine...as Christine...may appoint.' The beneficiaries of the Trust included Christine's three sons, Joe, Matt, and Max. Joe sued the co-trustees alleging various breaches of fiduciary duty and he sought the removal of the co-trustees. Anticipating that his mother might retaliate against Joe's lawsuit by exercising her limited power of appointment, Joe obtained an injunction that prohibited Christine from exercising her power of appointment without notice to Joe and without further court approval. The Pennsylvania Supreme Court vacated the lower court's injunction. The Court stated: "*the holder of a power of appointment is a beneficiary of a trust and not a trustee or other fiduciary, and is not bound by a duty of good faith.*" In sum, Christine held the power of appointment in her individual capacity and she could not be prohibited from exercising the

power based on her conduct as a co-trustee. *In re Trust Under Deed of Trust of Nell G. Jack Trust*, 284 A.3d 451 (2022).

Outliers? However, a couple of recent court cases in Georgia have held that the donee of the power of appointment, while also acting as a fiduciary over the same Trust, was nonetheless constrained by her fiduciary duties. The decedent's surviving spouse, Mary, and her three sons (Alex, David, and (only in Georgia!) Calhoun) were all named as co-trustees of a testamentary marital Trust and bypass Trust. Mary was the sole lifetime beneficiary of the marital Trust. Mary and her three sons were the beneficiaries of the bypass Trust. With regard to the marital Trust, Mary had 'the power at any time and from time to time ...to direct the Trustees to turn over any part of the property...to my said wife or to or among such of my descendants or spouses of such descendants.' Mary held a similar power of appointment over the bypass Trust, but she could not appoint the bypass Trust's assets to herself. Alex and David filed petitions for an accounting and breach of trust against Mary and Calhoun. In response (retaliation?) Mary then exercised her power of appointment over the marital Trust by demanding that all of its assets be turned over to Calhoun. Alex and David, as co-trustees, rejected Mary's demand. The trial judge found, consistent with common law, that Mary did not owe any fiduciary duties to either Alex or David when she exercised her power of appointment. Surprisingly, the Georgia Court of Appeals reversed and held that Mary's role as co-trustee necessarily resulted in her 'having fiduciary duties in connection with any and all acts that she carried out with respect to the Trusts.' The Court noted that "*trustees cannot divorce themselves of their fiduciary duties if they are also a beneficiary under the same instrument...[and]...Mary could not act exclusively in her capacity as beneficiary of both Trusts in exercising her appointment power.*" *Peterson v. Peterson*, 835 S.E.2d 651 (Georgia, 2019).

This same reasoning was then later adopted by another Georgia court in *McCollum V. Pendleton Square Trust Co., LLC*, 2021 Ga. Superior Court, LEXIS 1472 (May 7, 2021) where the trustee exercised a power of

appointment to remove one contingent trust beneficiary. The Court found that *“as Trustee, he had a duty to administer the Trust solely in the interests of the beneficiaries, including Sarah [the disinherited contingent beneficiary].”* Thus, the Court found that the donee-trustee lacked the authority to exercise his power of appointment to eliminate Sarah completely as a beneficiary of the Trust in which the donee-trustee was given a power of appointment.

Conclusion: While we think we know what the common law permits when we work with a Trust, there are always surprises, as the common law is always evolving, albeit slowly. Probably the outcome in the two Georgia court cases is not the result if a comparable dispute were to arise in Michigan. That said, it may pay to think twice about giving a trustee-beneficiary a power of appointment where its exercise might be viewed by other trust beneficiaries as a breach of trust.

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