
Folks:

Take-Away: The 6-year statute of limitations applies when a claim is made that a settlor mistakenly gave to a trust beneficiary a limited power of appointment. The statute of limitations runs when the limited power of appointment is irrevocable, i.e., when granted, not when it is exercised by the power holder.

Background: A power of appointment used in estate planning documents, and particularly Trusts, is a growing trend considering the flexibility those powers provide, not to mention the ‘free-basing’ opportunity with testamentary general powers of appointment. However, it is important to follow explicated when and how the power of appointment is exercised. And for those beneficiaries who fail to become the donees of the powerholder, their claims need to be timely filed.

Power of Appointment Act: The Michigan Powers of Appointment Act, provides:

“ Power of appointment means a power created or reserved by a person having property subject to his or her disposition that enables the donee of the power to designate,[or, the powerholder] within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it shall be received. The term power of appointment may include a power of amendment or revocation, but does not include a power of sale or a power of attorney.” [MCL 556.112(c).]

A power of appointment is ‘presently’ exercisable whenever the creating instrument does not manifest an intent that its exercise shall be solely by will or otherwise postponed. [MCL 566.112(l).]

A recent Michigan Court of Appeals decision sheds some light on when and how a power of appointment is exercised and disinherited children's challenges their father's exercise of that power of appointment.

In re December 23, 2002 Restatement of the Vivian Stolaruk Living Trust, Michigan Court of Appeals, No. 361518 (April 4, 2024)

Facts: Vivian and her husband, Steve, each created a revocable Trust. Vivian died in 2003. Steve was named as Successor Trustee of Vivian's Trust. Steve was also given a limited power of appointment to appoint assets in both the marital and family subtrusts to Vivian's descendants, the spouses of her descendants, and other charitable organizations. Steve, as powerholder, later exercised the limited power of appointment in his Trust in favor of St. Joseph Mercy Oakland hospital (the residue) and some other charitable organizations (subject to the condition that the hospital name a patient tower after him and his late wife.) Specifically, Steve exercised the limited power of appointment and directed the assets held in Vivian's Trust to Steve's Trust on his death (in 2018), where his trustee could then fund the various charitable gifts. Vivian's two children claim that they did not realize that the limited power of appointment gave Steve, their father, the power to disinherit them. The children claim that they relied on flow charts and did not further investigate the extent of their father's limited power of appointment under their late mother's Trust prior to their father's death. The result of Steve's exercise of the limited power of appointment was that his children were disinherited under both their parents' Trusts. The children also argued that Steve exercised the limited power of appointment in violation of the terms of their mother's Trust because the appointment exposed their mother's Trust assets to Steve's creditors, and it conferred an economic benefit on Steve.

Dispute: The children filed a petition to reform their mother's Trust. They claimed that their mother's Trust needed to be reformed since their mother 'could not have intended for Steve to have the power to deny them their distributive shares' and that the limited power of appointment should

be reformed to reflect Vivian's intent that they receive the distributions stated in their mother's Trust. The trustee of Steve's Trust, well-known estate planning attorney Julius Giamarco, moved for summary disposition on the grounds that the children delayed challenging Steve's limited power of appointment and that their petition was barred by the equitable defense of laches. The trustee also argued that Steve's Trust would be unfairly prejudiced by the belated attempt to invalidate the limited power of appointment. The trustee and the hospital also argued that the hospital would be prejudiced since it relied on the multimillion-dollar bequest from Steve's Trust.

Probate Court: The probate court granted the trustee's motion for summary disposition of the children's petition, and it also found that their claim that Steve exercised the limited power of appointment contrary to law or not in compliance with Vivian's Trust to be without merit.

Appellate Court: The appellate court sustained the probate court's decisions.

Statute of Limitations: The children argued that Steve's limited power of appointment was 'created' when it was exercised by him in his own Trust, on his death in 2018. The trustee argued that the children's claim about Steve's power of appointment accrued when Steve was given the limited power of appointment, in 2003 on Vivian's death.

The Court sustained the probate court's application of MCL 600.5813 that the children's petition was untimely, considering that general 6-year statute of limitations. The Court found that the children's claim *accrued* in 2003 on their mother's death when Steve was given the limited power of appointment which included the ability/power to disinherit his children. The alleged wrong was the alleged wrongful inclusion of the limited power of appointment in Vivian's Trust which allegedly conflicted with her intention, leading the children's injury to have *accrued* in 2003, thus triggering the

general 6-year statute of limitation when the power of appointment became irrevocable. It was then, in 2003 on Vivian's death, that the children were allegedly 'harmed' by the inclusion of the limited power of appointment in Vivian's Trust.

Exercise of Power of Appointment: The language of Steve's limited power of appointment was the following (as redacted):

“My spouse shall have the limited testamentary power to appoint to or for the benefit of my descendants, persons who at any time were married to a descendant of mine, and/or to ..organizations described in IRC 501(c)(3), either by a valid last will and testament or by a valid living trust agreement executed by my spouse... This power shall not be exercised in favor of my spouse's estate, the creditors of my spouse's estate, or in any manner that would result in any economic benefit to my spouse.”

The children argued that the limited power of appointment could only be exercised in favor of Vivian's descendants or their spouses. The Court focused on the words *“to or for the benefit of”* in the grant of the power of appointment as giving Steve options in his exercise of the power, including an exercise of the power through a 3rd party, i.e., a trustee of a trust who holds the distribution for the benefit of the recipient, or the Trustee of Steve's Trust for the benefit of charities.

Other Arguments: The Court also rejected the children's other claims, e.g., that the limited power of appointment exposed the Vivian Trust's assets to Steve's creditors (since creditors could be paid from Steve's Trust), nor did Steve derive any economic benefit from his exercise of the limited power of appointment (an estate tax charitable deduction.)

Trust Reformation: The Court's decision did not focus on the

children's claim that the inclusion of the limited power of appointment in their mother's Trust allegedly conflicted with Vivian's intentions, thus warranting a reformation of Vivian's Trust. That is perhaps because the Michigan statute that authorizes a Trust's reformation [MCL 700.7415] requires proof by clear and convincing evidence that both the settlor's intent and the terms of the Trust were affected by a mistake of fact or law, whether in expression or inducement. Apparently, there was only supposition by the children as to what their mother would have wanted with her Trust assets as opposed to any direct evidence that was, in fact, her intent to not give her husband (Steve) the ability to disinherit her children.

Conclusion: This is an interesting case and I've skipped over some of the other observations made by the Court of Appeals. The primary take-away is that an alleged claim arising from the inadvertent or mistaken grant of a power of appointment triggers the 6-year statute of limitations from when the grant of the power of appointment became irrevocable, not when the power is exercised by the powerholder.

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