

Agents Amending Trusts

Quick-Take: Tension exists if an agent acting under their principal's durable power of attorney attempts to exercise authority to amend, or terminate, the principal's revocable trust. If the trustee refuses to recognize that assertion of authority, the trustee might be liable for damages for its 'unreasonable' rejection of the durable power of attorney.

Background: A couple of months ago a missive reported on a Kentucky Court of Appeals decision. In that case a woman had executed a springing durable power of attorney. Under that durable power of attorney instrument the principal provided that if her 'treating physician certified in writing of her mental incapacity', then her designated agent was empowered to act on her behalf. The woman had a court appointed guardian and other physicians, but not her treating physician, had examined her and certified her mental incapacity. Her designated agent then created a trust for the principal in reliance on the springing durable power of attorney. The Kentucky Court held that the trust created by the agent was invalid, not due to any trust law principles, but due to the law of contract. According to the Court, the condition precedent imposed under the springing durable power of attorney instrument, that the principal's treating physician had to certify her incapacity *before* the agent was empowered to act on her behalf had not been met – her treating physician had not examined her and made a certification. Because that condition had not been satisfied, the designated agent was powerless to act, despite a court having held a hearing and formally appointed a guardian for the principal, and despite the fact that two or three other physicians had examined the principal and had determined that she lacked capacity. Clearly this is a good example of one of the dangers of using a *springing* durable power of attorney, or by describing the condition precedent so narrowly, e.g., "my treating physician," that it was impossible to meet the principal's required condition precedent.

Question: After reading the Kentucky decision, that got me thinking about whether an agent acting under a durable power of attorney possesses the authority to modify or terminate the principal's revocable trust if one exists?

Restatement (Third) of Trusts: If the settlor of a revocable trust is incompetent, he/she cannot exercise their reserved right to amend or revoke their trust. The settlor's retained rights under the trust are equitable, nonfiduciary, general powers of appointment. An agent

acting for the incapacitated settlor can act to amend or revoke the settlor's revocable trust, but only if the terms of either the power of attorney or the revocable trust grant that power. [Restatement (Third) of Trusts, Section 63, comment 1.]

Uniform Power of Attorney Act: This uniform law provides that there must be express authority granted in the power of attorney instrument to amend or revoke the settlor's trust, i.e., by proxy. [Section 201(a)(1) of the Act.] The agent's authority would be missing if the trust instrument's terms expressly prohibited the agent's taking such actions on behalf of the settlor. This Act generally states that the 'general authority' in a power of attorney 'with respect to trusts' authorizes the agent to "exercise for the benefit of the principal a presently exercisable general power of attorney held by the principal." [Section 211(b)(3) of the Act.]

Michigan adopted its version of this uniform law in 2024. [MCL 556.201 et seq.]

Fiduciary Duties: Both the agent who is acting under the principal's durable power of attorney, and the trustee (or successor trustee) of the principal's revocable trust are fiduciaries. Must the trustee (or successor trustee) acquiesce to the agent's assertion of authority to amend, or terminate, the principal's trust? This direction could place the acting trustee in a tight spot since the Uniform Power of Attorney Act (and its comments) permit an adopting state to impose tort liability against the trustee for an 'unreasonable refusal of an agent' who is acting under a power of attorney. [Section 120 of the Act.]

Restatement (Third) of Property: Added to the trustee's potential exposure to tort liability is the Restatement (Third) of Property (Wills and Other Donative Transactions, which appears to give to the agent an assumption of authority to exercise a right of trust amendment or revocation, subject to the limitation that the agent's exercise must be "for the benefit of the donee [the settlor] to the same extent that the agent could make an effective transfer of similarly owned property for the benefit of the donee [settlor.]" [Section 19.8, comment d.] I presume that the 'similarly owned property' condition refers to property that is owned outright by the principal, although comments are not all that clear.

This, then, brings to a head the potential clash between the agent who seeks to amend or terminate the settlor-principal's revocable trust, and the trustee who has a fiduciary duty to not blindly honor an agent's claimed ability to amend or terminate the principal-settlor's trust. The trustee could be exposed to potential tort liability for its 'unreasonable' refusal to recognize the agent's assertion of full authority to amend or modify the settlor's trust. The trustee will have to use due diligence to confirm the agent's authority, but does that due diligence extend to confirming what will be done with the trust assets if the trustee is directed to terminate the trust? Or can the trustee simply rely on the fact that the agent has fiduciary duties to the settlor-principal?

Conclusion: If you have read this missive to the end then fortunately there is also some good news. The rules described above are default rules that can be negated by either the terms of the principal's durable power of attorney and the settlor-principal's revocable trust instrument, or better yet, both instruments.

Aside: There is an interesting, albeit short, discussion when the agent directs the trustee to transfer trust assets to another trust, Must the transferring trustee conduct due diligence on the receiving trustee before the transferring trustee follows the agent's direction. Would that additional due diligence be an unreasonable denial of the power of attorney? *Loring and Rounds: A Trustee's Handbook (2026) Section 6.2.3.*

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