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POWERS OF ATTORNEY AND ESTATE PLANNING

The Supreme Court of Virginia recently decided a case that pertained to the authority of an attorney-in-fact to change the beneficiary designation of a certificate of deposit that belonged to the principal. In *Jones v. Brandt* (Record No. 061086, June 8, 2007), an attorney drafted a durable power of attorney naming himself as attorney-in-fact for the client, Mr. Davis. The attorney had represented Mr. Davis for many years. The power of attorney contained broad powers, and it did not include a specific grant of power to change beneficiaries on Mr. Davis's certificates of deposit, although it did include the power to make gifts.

Ms. Brandt was a widow who lived with Mr. Davis for the two years preceding his death. Mr. Davis's attorney prepared a will that appointed Ms. Brandt as trustee and executrix. In these documents, Mr. Davis only gave Ms. Brandt the right to occupy and use the home in which they lived, as well as the personal property in the home, "so long as she lives in the premises." Mr. Davis left the bulk of his estate to his daughters. Mr. Davis told his attorney that he intended to take care of Ms. Brandt outside of the will. On August 4, 2004, Mr. Davis orally directed the attorney, in his capacity as attorney-in-fact under the durable power of attorney, to designate Ms. Brandt as the payable on death (POD) beneficiary of a \$250,000 certificate of deposit. The certificate of deposit did not have a POD beneficiary named. The attorney-in-fact executed such a POD designation that same day, and he notified Mr. Davis by letter the next day that he had complied with his request. After Mr. Davis's death, Ms. Brandt qualified as executrix under Mr. Davis's will, and she brought a suit in chancery for aid and direction in the distribution of the estate. The circuit court held that the attorney-in-fact was authorized to change the beneficiary designation of the certificate of deposit, and Mr. Davis's daughters appealed.

Ms. Brandt conceded that the durable power of attorney did not have the specific authority to change the beneficiary designation on Mr. Davis's certificate of deposit, but she pointed out several other provisions in the

document as granting such power by implication. These powers included the power to sign, endorse or assign notes, open accounts, make deposits, write checks, instruct entities or persons having custody of Mr. Davis's assets, and make, sign, acknowledge and deliver any contract, deed or other document relating to real or personal property. The durable power of attorney also included a general, broad grant of authority, with the list of enumerated powers not to be construed or interpreted to narrow the granted powers.

The Supreme Court of Virginia noted that this was not a case of an attorney-in-fact, under a power of attorney, engaging in self-dealing, nor was it a case involving the authority of an attorney-in-fact to make gifts of the principal's property. There was no dispute that Mr. Davis's direction to the attorney-in-fact to designate Ms. Brandt as the POD beneficiary of the certificate of deposit acted to accomplish Mr. Davis's expressed intent to take care of Ms. Brandt outside of the will. The daughters asserted that because there was no express language in the power of attorney permitting the attorney-in-fact to change the beneficiary of the certificate of deposit, the attorney-in-fact's action was a nullity. The Court disagreed.

The Court discussed Virginia's history of strictly construing powers of attorney. The Court said that in this case it was not concerned with the power of an attorney-in-fact to make gifts of the principal's property, but the power to contract on behalf of the principal. A certificate of deposit is an instrument for deposit, and a certificate of deposit including the POD designation "is a contract between the depositor and the bank relating to personal property."

The Court acknowledged that every power of attorney will not always confer the express authority necessary for every specific circumstance in which the principal intends to give authority to the attorney-in-fact. "[S]tandard provisions granting broad general power to the agent are intended by the principal to become applicable so as to avoid any potential unintended limitation in the authority expressly granted. Such is the case here" The Court opined that Mr. Davis sufficiently expressed the intent to authorize the attorney-in-fact to change the beneficiary designation on the certificate of deposit when other provisions of the power of attorney are read in concert. The Court held that the circuit court did not err in holding that the attorney-in-fact was authorized to change the POD beneficiary designation on the certificate of deposit, and the Court affirmed the judgment of the circuit court. Three justices dissented from the Court's ruling, stating that the majority read into the power of attorney authority greater than that explicitly expressed.

The attorneys at Oast & Hook are available to assist clients with their estate planning needs. They are also available to assist fiduciaries, such as attorneys-in-fact under powers of attorney, with properly discharging their fiduciary duties.

Speakers

If you are interested in having an Elder Law attorney from Oast & Hook speak at an event, then please call Jennifer Lantz at 757-399-7506.

Oast & Hook

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