

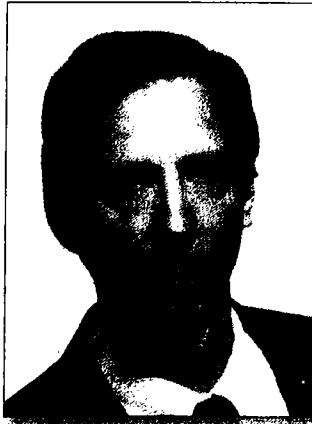
ELDER LAW

BY DANIEL G. FISH

Expanded Gift-Giving Under Power of Attorney Restricted

It has been common practice for elder law attorneys to add expanded gift-giving language under the statutory short form power of attorney, but a recent decision requires a reassessment. The New York Court of Appeals, *In the Matter of Ferrara*,¹ has strictly limited the authority of an agent under a statutory power of attorney to make gifts. Any gift must meet the test of being in the principal's best interest. This requirement cannot be waived by simply inserting additional language in the form.

The elder law attorney frequently counsels clients with slow-moving neurological illnesses such as Alzheimer's disease or Parkinson's disease. It is often predictable when these clients will lose the ability to manage finances in the future. The power of attorney is a useful tool to ensure an orderly transition and avoid the need for a guardianship. The client may wish to include authority for the agent to make gifts, including gifts to the agent himself or herself. The standard language limits gift-giving to \$10,000 per person per year, the annual exclusion amount when this provision was enacted. The client may wish to expand this amount for tax and estate planning purposes or to qualify for government benefit programs.

**Facts in 'Ferrara'**

George J. Ferrara, single with no children, was retired and living in Florida. The opinion suggests that he was estranged from his immediate family, because in June of 1999 he executed a will specifically making no provision for any family member, leaving his entire estate to the Salvation Army. He confirmed that plan in August 1999 when he signed a codicil naming the attorney draftsman as executor.

In December 1999 he was hospitalized. His nephew, Dominick Ferrara, came to Florida and brought him to New York where George entered an assisted-living facility. He signed a New York statutory short form power of attorney on Jan. 25, 2000, appointing his brother (John Ferrara) and nephew (Dominick Ferrara) as agents. The form contained the standard, preprinted, gift-giving authority language. A typewritten provision was added to the preprinted form "[t]his Power of Attorney shall enable the Attorneys in Fact to make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara." An attorney who was acquainted with the nephew was present at the signing of the power of attorney. She testified that the nephew asked her to be at the signing but she acted as notary only and was not counsel to George Ferrara or to his nephew.

Pursuant to this expanded gift-giving power, Dominick Ferrara transferred \$820,000 of George Ferrara's assets to himself. This represented virtually all of George Ferrara's assets, including IBM stock, bank accounts, certificates of deposit and the proceeds of the sale of the Florida property.

George Ferrara died on Feb. 12, 2000. The court described this time interval as "...less than a month

after moving to New York and approximately three weeks after the power of attorney."

A doctor in Florida, whose bill was outstanding, contacted the Florida attorney who was the named executor. This led to notification of the Salvation Army, which commenced a turnover proceeding under §2103 of the Surrogate's Court Procedure Act, after being "stonewalled" by Dominick Ferrara.

General Obligations Law

General Obligation Law §5-1501 sets forth the language of a statutory short form power of attorney. There are 15 categories on the form describing different areas of authority that the principal may delegate to the agent. They are identified by letters A through O. Letter "M" permits the agent to exercise authority in the place of the principal regarding the making of gifts. The exact language permits "making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$10,000 to each of such persons in any year."

Each of these lettered areas of delegated authority is more fully defined in General Obligations Law §5-1502, the constructional section. Subdivision "M" defines the gift-giving authority with a restriction, that the gift may be made "...only for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes."

General Obligations Law §5-1503 permits additional language to be inserted in the power of attorney. But, the additional provision must be consistent with the provisions of the constructional section.

The Opinion

The agent under the power of attorney was successful in the Surrogate's Court and the Appellate Division. The general principles of agency law govern the analysis of the relationship between an agent and a principal under a power of attorney. The agent owes the principal a very high duty of loyalty and can expect that there will be scrutiny when self-dealing is present. The nephew argued successfully below that the additional language typewritten in the power of attorney authorized him to make unlimited gifts to himself. These courts concluded that the burden of showing invalidity of the gift was upon the objectant. They held that George Ferrara was competent to sign the power of attorney, specifically authorized the gift-giving authority to his nephew and the Salvation Army failed to demonstrate the invalidity of the transfers.

The Court of Appeals ruled that a modification to the statutory power of attorney gift-giving section had to be consistent with the best interest test. "The Legislature intended §5-1503 to function as a means to customize the statutory short form power of attorney, not as an escape-hatch from the statute's protections." Further in the opinion, the Court held that "In short, the Legislature sought to empower individuals to appoint an attorney-in-

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fact to make annual gifts consistent with financial, estate or tax planning techniques and objectives—not to create gift-giving authority generally, and certainly not to supplant a will.” The court drew attention to the fact that the gift-giving in this case virtually impoverished George Ferrara and held that the best interest did not include “such unqualified generosity.”

Conclusion

This case occurs at a time when there is a heightened awareness of elder financial abuse:

- the *Ferrara* opinion may have been influenced by the former estrangement;
- the short time between the signing of the power of attorney and death;
- the use of the power of attorney to undo the prior will;
- the lack of independent counsel for the principal;

- the lack of any written instruction from the principal confirming his wishes;
- the existence of only one other person who heard the principal orally state his gift-giving wishes (the nephew's wife), and
- the fact that the gift transferred virtually all of the principal's assets.

The ubiquity of the power of attorney in the elder law practice makes the *Ferrara* decision a case of great practical consequence. It has a direct impact on the common cases where the authority runs between spouses of a long-term marriage or between parent and child where there has been no estrangement. If gift-giving authority is contemplated, the elder law attorney will be left with a perplexing drafting problem. The gift-giving authority must be in the best interest of the principal but there is no guideline in determining the limits of that standard.

General Obligations Law §5-1502

(M) states that minimization of taxes is specifically included within that standard. It suggests that there are other purposes that are within the best-interest standard but it does not define them. The *Ferrara* opinion itself is silent as to what other purposes will meet the best interest test.

Drafting attorneys now risk challenges to a power of attorney with expanded powers that are not tax motivated. To strengthen such drafting, the principal could include a statement that the expanded power is in his or her best interest and an explanation of that conclusion. The expanded power could be contained in a separate power of attorney that is not a statutory short form. The expanded power could be contained in a revocable trust agreement. Caution should be exercised until there is greater legislative or judicial clarity.

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1. *In the Matter of the Estate of George J. Ferrara*, 7 N.Y. 3d 244, decided on June 29, 2006.