

Discretionary Trust Distributions – When “Because I said so!” May Be Legally Sufficient

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Not too long prior to Senator Diane Feinstein’s recent passing, her daughter, exercising a durable power of attorney (POA) for the ailing Senator, filed suit seeking to force payments by the trustee of what is described as a very generously endowed trust fund (by the Senator’s late billionaire husband) reported to include provisions to cover expenses related to the Senator’s health and welfare.

So many directions to take this one! This single-sentence summary presents so many potentially valuable legal nuggets to mine! . . . from “What’s a durable POA?” to “What possible good-faith basis could the trustee have for refusing to pay/reimburse for medical/healthcare expenses with funds entrusted to his/her oversight for this very purpose?” I’ll leave the durability question to Siri and Google, noting that with the adoption in states such as Virginia of what is known as the Uniform Power of Attorney Act (or “UPOAA”), powers of attorney are now presumptively durable unless expressly indicated otherwise in the document itself. Before moving on, I’ll also add that a POA need not require the incapacity of its principal/maker to empower the agent/attorney-in-fact to act on the principal’s behalf. Many people mistakenly presume that a POA is intended only to take effect upon the incapacity or inability of the principal to act on one’s own behalf. POAs can be immediately effective or “spring” into effect if and only when specifically defined events occur, which define the circumstances when the agent’s authority springs to life on behalf of the principal. Without conducting any sort of formal study on the subject, I am confident when I say that springing POAs are by far the exception to the norm.

For now, at least, I address myself to the meatier issues stemming from the late Senator’s trustee’s alleged breach of fiduciary duties and general malfeasance.

Asked for my opinion about this “obviously-in-the-wrong” trustee after news of the legal action broke (because no one would go to the trouble of filing suit if the allegations weren’t true, right!), I instinctively provided my standard go-to, why-everyone-hates-lawyers response: “It depends!” With little more than the headline as fodder for a good cocktail party debate, any substantial opinion must necessarily depend on so many variables that any other conclusion about the merits of such a case should be presumed fiction (with similar presumptions regarding anyone who would be willing to draw any definitive conclusions about the impropriety of the trustee’s actions, motives, etc. on such scant information). For starters, the outcome of any such case and claim(s) totally depends on the precise language of the trust document governing the specific situation and the scope and extent of the authority such language extends to the trustee. Because the “correct answer” is so driven by the fact-specific trust language, it is truly pointless to speculate on whether the trustee should or should not have paid the particular expenses in the Feinstein situation. It is also precisely why two or more seemingly identical cases can produce seemingly equally contrary results. It is not necessarily true that one judge or jury gets it exactly right while another gets it completely wrong. Nearly identical facts can produce widely disparate legally correct results for a myriad of reasons. **For a separate case study on this issue, check out my co-authored piece on two seemingly identical cases resolving disputed beneficiary designations in the context of divorce-related life insurance obligations: “Same facts . . .**

opposite results!”]

All that having been said, it is not uncommon for such trusts to build in not only a certain level of discretion for the trustee to decide when it might be appropriate to pay and when a particular expense might be unreasonably “over the top” or simply unnecessary. With such built-in discretion, the trustee has effectively been entrusted by the maker of the trust to act in a manner as to reach the closest equivalent to what the maker himself or herself might have decided. Under these circumstances, the trustee is essentially in the right simply because they said so. A court will generally not seek to impose its discretion over that of the individual the now deceased trust maker trusted in the first instance to make what the trustee determines to be the best decision. With this outcome in mind, I commonly encounter provisions bestowing on trustees the ability, or even the requirement, that before releasing any funds from the trust for expenses seemingly word-for-word covered by the trust, the trustee consider and/or “take into account” other resources available to the beneficiary. In this way, the trustee is forced to exercise fiduciary responsibility not only to the current trust beneficiary but also to those who would stand to benefit from the trust after the current beneficiary has passed.

Then again, it might very well be that the scope of such authority is less than clearly defined in the trust document or that a trustee with an axe to grind and/or a personal agenda contrary to that of the beneficiary (perhaps favoring future beneficiaries over the current beneficiary, for instance) is, indeed, acting in a manner inconsistent with the trustor’s original intent. In either case, a court order might be needed to provide appropriate “aid and direction” to the trustee or forcing the trustee to act in a manner not otherwise abusing the discretion afforded to the trustee. One simply cannot presume to conclude as much from a news report, nor should one draw conclusions regarding either the trustee or the one bringing such an action against a trustee without knowing all the relevant facts – or at least substantially more of them than might be reportable in a 60-second, news soundbite. In one rather extreme example, I encountered an example recently where a trustee was empowered to provide for the health and welfare of the beneficiary, but only out of trust income (no principal) and if and only if the beneficiary passed a monthly drug test, the cost of which could be paid out of the trust income, but consequently serve to reduce the amount to be paid to the beneficiary.

Whether to bring and/or how to defend such an action requires appropriate legal experience, understanding, and, consequently, investigation and analysis of as much relevant information as can be gleaned both from what might be readily available and that which might take some digging to uncover. In my experience, whether one or more valid claims exist in such situations requires significant investigative and analytical time and should not be presumed either a simple or inexpensive process nor one which is likely to lead to an unimpeachable, singular conclusion. I have observed, advised, and/or been involved to varying degrees in numerous such disputes representing various perspectives with differing agendas (consider, for instance, how a second or third-generation, non-profit charitable organization set up as a contingent beneficiary might view as a wasteful fiduciary breach of duty any payouts by a trustee to current beneficiaries with substantial independent wealth and the means to pay their own expenses). I would welcome the opportunity to evaluate the possibility of assisting should you find yourself on one or the other side of such a situation (or perhaps as a drafting attorney seeking to minimize the chances of such a dispute down the road).