UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Abingdon Division

IN RE:

GAYNELL SLATE FIELDS, **Case No. 7-99-00345-7**

Debtor

W. ALAN SMITH, JR., TRUSTEE,

Plaintiff

v. **Adversary Proceeding No. 7-99-00152**

BILLY M. FIELDS, individually and as former attorney in fact for Gaynell Slate Fields

and

PHILLIP FIELDS,

Defendants

DECISION AND ORDER

At Abingdon in said District this ____ day of April, 2000:

The matter before the court arises as a result of a motion for summary judgment filed by W. Alan Smith, Jr., Trustee (herein the Trustee), by counsel, on February 11, 2000, against Billy M. Fields and Phillip Fields. The motion for summary judgment seeks a ruling in favor of the Trustee that certain

deeds of real estate made as deeds of gift by Billy M. Fields, as attorney-in-fact for Gaynell Slate Fields, were either without authority, and therefore invalid, or, that the gift conveyances were *per se* violations of Code of Virginia, § 55-81. Attached to a memorandum in support of the motion for summary judgment as Exhibit A is an affidavit of Charlotte M. Wilson, administrator of NHC Healthcare of Bristol; and Exhibit B, a durable power of attorney from Gaynell S. Fields to Billy Marvin Fields dated January 28, 1997, of record in the Clerk's Office of the Circuit Court of Russell County in Book 456, at page 655. Based upon those exhibits and undisputed facts concerning a deed of gift dated March 6, 1997, and two deeds of gift dated September 18, 1997, the Trustee asserts that there are no material facts in dispute and that he is entitled to judgment as a matter of law.

Billy M. Fields, individually and as former attorney-in-fact for Gaynell Slate Fields, filed a response to the motion for summary judgment dated February 25, 2000, and the Trustee responded by memorandum dated March 6, 2000. The court has considered the pleadings, including the complaint of the Trustee and underlying documents pertaining to it, the motion for summary judgment and responses thereto, and the authority submitted by the parties. For the reasons stated in this decision and order, the Trustee's motion for summary judgment will be granted because there are no material issues of fact pertaining to intent of the grantor of the power of attorney to permit the holder of the power of

attorney to gift her real property. Because the gifts are void for lack of authority in the holder of the power of attorney, it is not necessary to address the remaining grounds relied upon by the Trustee for summary judgment.

Facts:

Prior to the filing of the bankruptcy proceeding for Gaynell Slate Fields by Billy M. Fields, as her attorney-in-fact, NHC Healthcare of Bristol, herein (NHC) filed a proceeding in the Circuit Court for the County of Russell (Chancery No. 98-067), seeking to recover from the defendants the sum of $25,606.50, for health care provided to Gaynell Slate Fields during a period beginning November 18, 1996, and ending with her discharge on November 25, 1997. The Trustee's complaint proceeding is a copy of that suit.

The following facts are not in dispute:

1. Gaynell Slate Fields executed a power durable power of attorney in favor of Billy M. Fields on January 28, 1997.

2. On March 6, 1997, Billy M. Fields conveyed by deed of gift real property owned by Gaynell Slate Fields to himself and Donnie Randall Fields "to hold, use and maintain for the benefit of Phillip Fields, for the remainder of his natural life." This deed of gift is of record in the Russell County Clerk's Office in Deed Book 458, at page 391.

3. On September 18, 1997, Billy M. Fields and Donnie Randall

Fields conveyed by deed of gift the same real property back to Gaynell Slate Fields. This deed of gift is of record in the Russell County Clerk's Office in Deed Book 466, at page 475.

4. By deed of gift dated September 18, 1997, Billy M. Fields, as attorney-in-fact for Gaynell Slate Fields, conveyed the same real estate to Phillip Fields. This conveyance is of record in the Clerk's Office of the Circuit Court of Russell County in Deed Book 466, at page 477.

5. The durable power of attorney referenced above does not contain a specific authorization from Gaynell Slate Fields to Billy M. Fields to convey property by gift. It does contain the following language:

> [T]o sell any part or parts of my real estate or personal estate, or any interest which I may have in any real or personal estate wheresoever situate; to make all necessary deeds and conveyances thereof, with all necessary covenants, warranties, and assurances, and to sign, seal, acknowledge and deliver the same; and to do all such other acts, matters, and things in relation to all or any part of or interest in my property, estate, affairs or business, of any kind or description, at any place, as I myself might or could do it[sic] acting personally.[1]

6. Billy M. Fields, Donnie Randall Fields and Phillip Fields are all related by blood to Gaynell Slate Fields.

The Trustee's Positions:

[1]The last phrase is sometimes referred to as a general residual power.

In his motion for summary judgment, the Trustee takes two positions:

1. That Billy M. Fields had no authority under the power of attorney given him by Gaynell Slate Fields to execute deeds of gift on her behalf thereby rendering the conveyances invalid and the real property involved in the conveyances property of the estate for purposes of this bankruptcy proceeding.

2. Even if the power of attorney was sufficient to permit the deeds of gift, the conveyances were *per se* violations of Code of Virginia § 55-81.[2]

Discussion:

Under Federal Rule of Civil Procedure 56, made applicable here by Federal Rule of Bankruptcy Procedure 7056, the Trustee, as the moving party, must establish that he is entitled to judgment. As the party who would bear the burden of persuasion on the issue of the scope of the authority of the attorney-in-fact under the power of attorney at trial, it is necessary that the Trustee sustain that burden in a motion for summary judgment and demonstrate the absence of a genuine dispute. With respect to the burden of persuasion, the level of showing at the motion for summary judgment level is an entitlement to a directed verdict at

[2]§ 55-8l. Voluntary gifts, etc., void as to prior creditors.--Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made. Even though it is decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.

trial.[3] The Trustee can make the requisite showing utilizing pleadings filed by his opponent, depositions, answers to interrogatories, admissions, and affidavits made on personal knowledge and setting forth facts admissible in evidence. Celotex 477 U.S. at 324.

In supporting his position on the scope of the authority conferred by the durable power of attorney, the Trustee relies on three cases which set forth two rules:

1. Eithel v. Schmidlapp, 459 F.2d 609, 613 (4th Cir. 1972), states that in construing powers of attorney, a Virginia court will construe the authority given in the power of attorney narrowly.

2. Estate of Casey v. Commsisioner of Internal Revenue, 948 F.2d 895 (4th Cir. 1991). The gift power will not be found in a durable power of attorney unless expressly conferred in the letter of instructions. The Trustee also cites Ridenour v. Commissioner of Internal Revenue Service, 36 F.3d 332 (4th Cir. 1994), in support of this rule.

Fields, necessarily, concedes that there is no specific language in the durable power of attorney giving him authority to gift real property. But Fields asserts that subsequent to the Casey decision, Code of Virginia § 11-9.5 was enacted to authorize gifts pursuant to a durable power of attorney despite the fact

[3]See generally Celotex Corp. v. Catrett, 477 U.S. 317, 331-332 (1986), and U. S. v. One 107.9 Acre Parcel of Land Located in Warren Township, 898 F.2d 396, 398 (3rd Cir. 1990).

that the gifting power is not expressly set forth in the durable power of attorney.[4] Fields relies on this statutory provision to bring his case under the general residual power of the durable power of attorney given him.

The court has reviewed the cases cited by the Trustee. The Casey decision states:

> The guiding principle is that in determining whether an attorney--in-fact has certain powers, courts should first seek the principal's intent as manifest in the instrument itself, and look to surrounding circumstances only to clarify ambiguity in the instrument.

Casey at 899.

In applying that principle, the Fourth Circuit noted that the Casey power of attorney set forth authority to sell, lease, and mortgage property of the grantor but omitted the gifting authority. The Casey power of attorney also had a general residual power at the end of the durable power of attorney similar to language and scope to the general residual power in the power of attorney in the case at bar. With respect to the general residual power, the Casey court stated:

> As to the quoted general residual power in paragraph (11) of the instrument, there is a wise general rule of construction that we are satisfied the Virginia court

[4] § 11-9.5. Gifts under power of attorney.--A. If any power of attorney or other writing (i) authorizes an attorney-in-fact or other agent to do, execute, or perform any act that the principal might or could do or (ii) evidences the principal's intent to give the attorney-in-fact, or agent full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals or to organizations described in §§ 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts.

> would follow. It is, in effect, that such expansive language should be interpreted as intended only to confer those incidental interstitial powers necessary to accomplish objects as to which authority has been expressly conferred . . . We, therefore, do not believe that the Virginia court would infer from this general language a power of gift nowhere expressly conferred, and whose omission indeed bears such strong marks of deliberate intent.[5]

The Casey decision would appear to indicate that an examination of the four corners of the power of attorney is necessary to see if it expresses the intent of the giver of the power of attorney that the holder of the power of attorney be able to make gifts of property. In the case at bar, as in Casey, there is no specific indication of gifting power. In fact, the power of attorney appears to be more restrictive than the Casey power of attorney since it grants only the power to "sell any part or parts of my real estate or personal estate." In addition, there are no facts before the court extrinsic to the power of attorney that would suggest an intent by the grantor that gifts of property by the holder of the power of attorney were intended. For example, there is no indication from the documents provided in support of the motion for summary judgment or in response thereto that there was a pattern of gift giving by Gaynell Slate Fields.[6]

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[5]It is this language in Casey that Billy M. Fields argues is superceded by Code of Virginia § 11-9.5. While Fields is correct in his argument, Ridenour makes clear that the Casey decision holds that finding the principal's intent is key and that the statute does not automatically create the requisite intent when general residual power language is used.

[6]By contrast, see the Ridenour case for a factual situation which coupled general residual power language with a pattern of gift giving to find the requisite intent.

Casey was clarified by the Fourth Circuit in Ridenour:

> In Casey, this court found that the Virginia Supreme Court might well adopt a flat rule that an unrestricted power to make gifts would not be found in a durable power of attorney that does not expressly grant such power. We recognize, however, that the 'Virginia court may not be disposed to go so far as to adopt such a flat rule, even if confined to durable powers.' [citation omitted]. This court therefore found that the appropriate method to resolve the question was to review the complete text of the particular instrument and the circumstances of its execution to determine whether we could infer in it a power, though unexpressed, to make the gifts at issue. [citation omitted]. Casey thus stands for the proposition that to infer an implied gift power, the court must look to the intent of the person granting the power of attorney.

Ridenour at 334.

In Ridenour, the power of attorney was constructed somewhat differently than either Casey or in the case at bar. The Ridenour power of attorney gave a general grant of authority and then had language which stated "without limiting the generality of the foregoing," the attorney-in-fact was empowered to perform a variety of acts listed following the general grant of authority. Mr. Ridenour had a history of gift giving to his family. Also, Code of Virginia § 11-9.5 was passed after the Ridenour grant of power of attorney and the gifts thereunder and the Fourth Circuit ruled that the code section was retroactive to cover the gifts pursuant to the power of attorney.

The Ridenour decision also held that the language of Code of Virginia § 11-9.5 looks to intent by examining the entire instrument and surrounding circumstances. "The statute merely clarifies that a court may infer a gift power when one is not explicitly set forth." Ridenour at 335.

Intent is a factual issue. At this stage of the proceeding, the power of attorney is the only document which has been filed which would shed light on the grantor's intent. The plain reading of the power of attorney shows that it grants authority only to sell. The defendants have not filed any documentation concerning the power of attorney or the circumstances of its execution or the circumstances surrounding the power of attorney or any gifting that the grantor engaged in prior to granting the durable power of attorney. Based upon the pleadings and documents properly before the court on the motion for summary judgment, the Trustee has borne the burden of persuasion which he would have bear at trial and has demonstrated the absence of a genuine dispute. Accordingly, summary judgment is in order unless the adverse party's response, by affidavits or as otherwise provided in Bankrutpcy Rule 7056, demonstrates that there is a genuine issue for trial. There is no such showing in the adverse parties' response in the case at bar.

Conclusion:

For the foregoing reasons, the Trustee's motion for summary

judgment is **GRANTED** and the conveyances referenced in the Trustee's complaint are held to be invalid and the real property of Gaynell Slate Fields described in those deeds of gift is subject to administration by the Trustee in this Chapter 7 proceeding for the benefit of creditors. Because the Trustee prevails on the issue of the invalidity of the deeds of gift due to lack of authority in the durable power of attorney under Virginia law, it is not necessary to rule on that portion of the motion for summary judgment pertaining to Code of Virginia § 55-81.

Copies of this decision and order are directed to be mailed to W. R. McCall, P. O. Box 56, Bristol, Virginia, 24203, counsel to the Trustee; and to Matthew J. Cody, Jr., Esquire, P. O. Box 1450, Lebanon, Virginia, 24266, counsel to Billy M. Fields; and to Nancy Combs Dickenson, Esquire, P. O. Box 2499, Lebanon, Virginia, 24266, counsel to Phillip Fields.

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Ross W. Krumm
U. S. Bankruptcy Judge