

Wills, trust and estate essay sample

Law



**ASSIGN
BUSTER**

Our client Mark Down had our firm do a will for him several years ago that gives all of his assets to his children (his wife died previously). He also executed a power of attorney, giving his son, Slowe, the power to handle all of his financial assets. Slowe called and told me that old Mark's health is starting to deteriorate and although he's still healthy, Slowe is worried that Mark may need Medicaid assistance sometime in the future. Therefore, he wants to try to remove Mark's assets (which consist mainly of a \$300, 000 brokerage account) from his name and give his assets to his children. Slowe told me that Mark is losing competency and really doesn't want to deal with any financial matters any more. So, I think we ought to tell Slowe to transfer Mark's assets to Mark's children under his power of attorney. Sure, we're looking at a 5 year period of ineligibility for long term care Medicaid, but Mark's ineligible now anyway. However, one thing is bothering me: I heard that a recent case here in New York, Matter of Ferrara, 2006 N. Y. LEXIS 1759; 2006 NY Slip Op 5156, put some kind of limit on what a person can do under a power of attorney in terms of gift transfers, what impact will this case have on the Down case? Applicable Law

In Matter of Ferrara, 7 N. Y. 3d 244 (N. Y. 2006), The Principle, Mr. George Ferrara had a will that stated all assets were to go charity and the family was not to receive anything, his health faded and he signed a durable power of attorney naming both his brother and nephew as the attorney in fact. NY Gen Oblig Law 5-1501 (1) (M) permitted an attorney in fact to give gifts to family members not exceeding \$10, 000 to each person in any year. The form executed by Mr. Ferrara removed the \$10, 000; the nephew transferred \$820, 000 of assets to self. The short form was expanded under NY Gen

Oblig Law 5-1503 to remove the \$10, 000 limit giving the attorney in fact the power to make the gifts in the principal's best interest. As stated in NY gen Oblig Law 5-1502 (M) as gifts to out the principal's financial, estate or tax plans. The nephew did not follow through with this statute. Mr. Ferrara's will clearly states that he wanted to his assets to go to charity and not family. The court determined that notwithstanding the addendum removing the \$10, 000 limitation, the nephew did not make transfers in the Principle's best interest as required by statute. Application to Our Case

In our case Mr. Mark Downs has a will that states since his wife has passed previously then his surviving children are to receive all his assets including Slowe. So even though Slowe is the power of attorney, he can and should transfer the assets. Under the NY Gen Oblig Law 5-1501 it is stated clearly that the attorney in fact can make self-gifts as long as it is in the principle's best interest, as well as minimizing income estate. In 1996 the Legislature amended 5-1501(1) adding M, authorizing the attorney in fact to make gifts to the principle's spouse, children, remote descendants and parents not to exceed \$10, 000 in any year. This addition feels that gift giving is meant that the principal authorizes the attorney in fact " to make gifts either out right or to a trust for the sole benefit of one or more specific persons only for the 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". In Matter of Ferrara, the nephew transferred gift to himself under his power of attorney. The gifts were not in the best interest of the principle, which is required under state statute. Our case Slowe is acting in the best interest of his father Mark Downs.

Conclusion

With the NY Gen Oblig Law, it is clear that Slowe was acting within the best interest of Mr. Downs, as well as what is clearly stated in the will. The Ferrara case should not affect our case.