COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SJC-13149

REGAN STEMPNIEWICZ BARBETTI AND RYAN STEMPNIEWICZ, AS SPECIAL PERSONAL REPRESENTATIVES OF THE ESTATE OF RYAN STEMPNIEWICZ,
PLAINTIFFS-APPELLEES,

v.

NIKITA STEMPNIEWICZ, ET. AL,
DEFENDANTS-APPELLANTS

ON APPEAL FROM A JUDGMENT OF THE HAMPSHIRE COUNTY SUPERIOR COURT

BRIEF FOR
AMICUS CURIAE,
MASSACHUSETTS CHAPTER OF THE
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus curiae the Massachusetts Chapter of the National Academy of Elder Law Attorneys ("MassNAELA") is a non-profit organization that was incorporated in 1992 to serve the legal profession and the public with the following mission:

- To provide information, education, networking, and assistance to Massachusetts attorneys, bar organizations, and other individuals or groups advising elderly clients, clients with special needs and their families;
- To promote high standards of technical expertise and ethical awareness among attorneys, bar organizations and other individuals or groups engaged in the practice of advising elderly clients, clients with special needs and their families;
- To develop public awareness and advocate for the benefit of the elderly, those with special needs and their families, by promoting public policies that support our mission; and
- To encourage involvement and enhance membership in, and to promote networking among members of, the National Academy of Elder Law Attorneys.

MassNAELA is a voluntary association whose members consist of a dedicated group of elder law and special needs attorneys across the Commonwealth of Massachusetts.

RULE 17(C)(5) DECLARATION

Amici curiae and its counsel declare that they are independent from the parties and have no economic interest in the outcome of this case.

None of the conduct described in Mass. R. App. P. 17(c)(5) has occurred:

(A) No party or party's counsel authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;

(C) No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

(D) No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUES ADDRESSED BY AMICUS CURIAE

The Court's Request for Amicus Briefs

The Court's request for Amicus Briefs identified the following question:

> Whether, pursuant to the Massachusetts Uniform Trust Code, an individual may delegate the power to create a trust to an agent through a power of attorney; and whether, if the power to create a trust is delegable, the power of attorney must specifically authorize the creation of a trust.

Response of *Amicus Curiae* the Massachusetts Chapter of the National Academy of Elder Law Attorneys

Amicus Curiae the Massachusetts Chapter of the National Academy of Elder Law Attorneys ("MassNAELA") holds the position that an individual should be able to delegate the power to create a trust through a power of attorney, but if and only if the power of attorney specifically and expressly authorizes the creation of such a trust.[1]

[1] MassNAELA does not take a position on the outcome of this case, but wishes to simply answer the legal questions posed by the Court.

If this Court were to determine that the power to create a trust cannot be delegated, this would deprive Massachusetts' estate planning, elder law, and real estate bars of a valuable tool which is commonly used to serve vital client objectives. The practice of delegating the power to create a trust is used, among other things, to serve clients with existing special needs, anticipated future disabilities, and in the context of various real estate transactions, as discussed further herein. Prohibiting such delegation would disrupt a settled practice and cast existing arrangements into doubt.

Additionally, durable powers of attorney ("DPOA") can serve as a less-restrictive, more flexible, and less-expensive alternative to conservatorships, in a manner that is clearly contemplated by the Massachusetts Uniform Probate Code ("MUPC"). If powers of attorney can no longer include the power to create a trust, this would erode the vitality of M.G.L.A. 190B § 5-501, et seq., the portion of the MUPC that governs the use of DPOA, and which contains no restrictions on delegation of trustmaking power. This erosion would in turn needlessly force the creation of conservatorships, which have an inherently restrictive quality that is not present when a principal

voluntarily delegates trustmaking power to an attorney-in-fact ("AIF"). Moreover, the creation of a conservatorship consumes significantly greater attorneys' fees and judicial resources.

M.G.L. c. 203E, Section 401, the portion of the Massachusetts Uniform Trust Code ("MUTC") which enumerates methods of creating a trust, is silent on the question of whether an agent can do so. However, another part of the MUTC, M.G.L. c. 203E, Section 602(e), does reference an agent's powers in connection with the "revocation, amendment or distribution of trust property." It also provides that these powers "may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust and the power." Drawing upon this section of the statute, it is entirely appropriate for the Court to determine that the power to create a trust may be delegated, but only in an express manner.

Finally, because this Court has found that the relationship between a principal and agent is essentially contractual, and because this Court also recognizes a broad freedom to contract, to prohibit the delegation of the power to create a trust would thus conflict with that basic freedom. *See Beacon Hill Civic Ass'n v. Ristorante Toscano,*

Inc., 422 Mass. 318, 320 (1996) ("[i]ndividuals and legal entities enjoy a freedom to contract—a freedom into which we should be loath to interfere.") Consistent with this, allowing trustmaking power to be delegated appropriately entrusts principals, their estate planners, and their AIF with the power and responsibility to craft and enter into arrangements that serve the expressed interests of the principal.

ARGUMENT

I. Prohibiting the Delegation of the Power to Create a Trust Would Deprive Estate Planning Attorneys and Their Clients of an Important Tool and Would Unsettle Existing Arrangements.

At root, estate planning attorneys in Massachusetts – and, most importantly their clients – would be deprived of an important tool by a holding that prohibits the delegation of trustmaking powers to an agent. MassNAELA, as the Massachusetts chapter of the leading national association of estate planning and elder law attorneys, represents the perspectives of many practitioners who responsibly and diligently use this practice to serve the needs of clients – clients who would be prejudiced by the absence of this tool. By contrast, a holding that trustmaking power may be delegated, albeit only in an express

manner, will allow the continued productive use of this practice while also accommodating those who do not wish to include authority in their DPOA. Such a holding would be in harmony with relevant portions of the MUTC and MUPC, as well as with the basic rule that parties should be free to enter into contractual relationships with minimal judicial restrictions.

In *23 Mass. Prac., Estate Planning § 3.16* (3d ed., June 2021 Update), entitled "*The Combination of the Durable Power of Attorney and the Living Trust*," numerous examples are provided concerning the benefits of a living trust in conjunction with a power of attorney:

> A trust can save a substantial amount in probate expenses and administrative time. It provides flexibility and security in administering assets. The combination of [a power of attorney and living trust] provides excellent protection in the event the person becomes disabled or incapacitated. The trust…permits more flexible management of the assets and greater flexibility of distribution than could be permitted under a power of attorney alone….

This treatise does not specifically discuss the delegation of the power to create a trust. However, it speaks directly to how the use of trusts and powers of attorney can in combination best serve clients who

develop special needs (including special needs not amounting to legal incapacity) and are thus in the greatest need of flexibility.

Consistent with this, DPOA are often created and intended to serve as an alternative to conservatorships, as reflected in the language and structure of relevant portions of the MUPC. Article V of the MUPC, entitled "Protection of Persons Under Disability and Their Property," sets forth a comprehensive scheme of obligations, procedures, and protections relating to disabled persons and their property. These include procedures for the judicial creation and monitoring of conservatorships. However, Section 5-501, et seq., also set forth a framework for the use of DPOA to serve the needs of incapacitated persons in a manner that does not require judicial relief. Indeed, the MUPC's overall structure and substance makes it clear that DPOA are intended to function, where appropriate, as a less-restrictive, more flexible alternative to conservatorships.

Further, nothing in Section 5-501, et seq., reflects any legislative intent to preclude delegation of trustmaking power to an agent. As such, estate planning attorneys and their clients use such delegation in a variety of salutary ways, as set forth below. If such delegation

became impermissible, this would needlessly incentivize, and in many cases force, the creation of conservatorships, given the many contexts in which an incapacitated principal can benefit from the creation of a trust. The result would be an unfortunate loss of autonomy in situations where a simple, minimally restrictive solution exists in the form of a DPOA that expressly delegates trustmaking power.

Moreover, under M.G.L. c. 190B, Section 5-407(d)(4), when a person is under conservatorship, revocable and irrevocable trusts can be created only upon court approval. Thus, absent the ability to delegate trustmaking power, incapacitated persons who would benefit from the creation of a trust will not only face the possibility of an extraneous, costly, and potentially restrictive conservatorship, but also additional judicial approval for the creation of a trust. In short, arrangements that could have been accomplished efficiently through the use of a DPOA would become subject to cumbersome, time-consuming, and expensive judicial proceedings, including the need for annual accountings to the Probate and Family Court. Furthermore, given that Section 5-501, et seq. allow the use of DPOA to create powers analogous to those created via conservatorships, such a

limitation on the powers of an AIF would be contrary to the Legislature's intent.

Notably, the comment to M.G.L.A. 190B, Section 5-502 (the section which establishes that there is no time limit on the effectiveness of a DPOA) makes clear that DPOA can be used to conduct affairs on behalf of persons whose disability falls short of legal incompetence. Specifically, the comment states that:

> The words "any period of disability or incapacity of the principal" are intended to include periods during which the principal is legally incompetent, but are not intended to be limited to such periods. In the Uniform Probate Code, the word "disability" is defined, and the term "incapacitated person" is defined. *In the context of this section, however, the important point is that the terms embrace "legal incompetence," as well as less grievous disadvantages.*

This comment illustrates that a person who is suffering from some intellectual or physical deficit that falls short of legal incapacity – including a transitory deficit such as a condition that later responds to medical treatment – can make use of a DPOA rather than a conservatorship, which creates powers that do not expire without further court action. And a DPOA that gives an AIF trustmaking

powers can serve a myriad of purposes without the necessity for a conservatorship.

By way of example, the delegation of trustmaking power to an agent can be of particular value to those living with special needs. Disabled individuals are permitted, pursuant to 42 U.S.C. § 1396p(d)(4)(a), to create and transfer assets into trusts before age 65 in a manner that does not impact Medicaid eligibility. Self-evidently, allowing an agent of a disabled individual to use this tool could be extremely important if the individual becomes incapacitated and cannot create the trust herself. Conversely, depriving a disabled principal of such a tool could detrimentally impact their ability to create such a trust without a conservatorship.

There are myriad other examples of the benefits of delegating the power to create a trust. Among other things, because a trust may be a vehicle for holding and managing property, a principal may wish to invest an agent with the power to create and utilize a trust for the accomplishment of such goals. A principal who foresees a potential loss of capacity may wish to invest an agent with the power to create and utilize a trust to address taxation issues, avoid probate upon death,

manage real property, or even make non-self-interested changes to a testamentary scheme that are warranted by material and substantial changes in circumstances (for example, the death of a beneficiary or a significant change in the law).

Real estate transactions are another area where delegation of the power to create a trust can be an important tool. For example, an AIF with trustmaking power can act to sign a deed conveying the principal's home into the trust. In such cases, the deed and the power of attorney itself are recorded at the appropriate registry of deeds. In such a scenario, the title examiner for the buyer issues a title policy based on her review of the power of attorney (which is recorded in the chain of title) as well as the trust. In short, these instruments are viewed in tandem to ascertain that the seller has clean title. A similar scenario occurs during the application for a reverse mortgage, wherein a title examiner examines the DPOA that vested the agent with the power to create the trust.

With the utility of the foregoing practices being clear, it should also be apparent that many existing arrangements, likely going back decades, have rested upon the delegation of trustmaking powers. The

validity of existing trusts, including special needs trusts created by AIFs, would be called into question by a rule prohibiting delegation of trustmaking powers. Real estate transactions that relied on this practice would be potentially unsettled. And the authority of AIFs who hold trustmaking powers under currently existing instruments would be suddenly in doubt. In short, a judicial restriction upon such delegation would in essence strike a clause from many existing, live instruments, in addition to unsettling previously consummated arrangements. Even a purely prospective restriction would be disruptive to estate plans that are being created even as the Court evaluates this case.

II. Relevant Provisions of the MUTC Support the View That the Power to Create a Trust Should be Delegable.

M.G.L. c. 203E, Section 401 of the MUTC enumerates various means by which a trust may be formed in the Commonwealth. This section of the MUTC does not refer to the creation of a trust by an AIF. However, there is no reason for concluding that the Legislature intended this list to be exhaustive. And importantly, Section 602(e) provides that "[a] settlor's powers with respect to revocation, amendment or distribution of trust property *may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust and the power*." (Emphasis supplied.) It is entirely consistent with this language to allow the creation of a trust by an AIF, especially in the absence of any prohibition elsewhere in the MUTC against doing so.

Also, there is also no reason for the Court to conclude that the ability to create a trust is inherently personal to the settlor and thus non-delegable. Countless actions by an AIF involve the formulation of intentions that could otherwise be considered "personal," including intentions with a testamentary quality. Section 602(e) itself refers to

the amendment or revocation of a trust by an AIF; by nature, these tasks and the creation of a trust require a similar intentionality. In short, the Legislature has already decided that agents can be delegated certain discretionary tasks relative to trust administration and even trust amendments. There is thus no basis for concluding that the power to create a trust is inherently non-delegable.

III. The General Rule that Parties are Free to Enter to Into Contractual Relationships Should Apply to the Delegation of Trustmaking Powers.

This Court has long construed powers of attorney as being, in essence, a species of contracts that may be readily and freely used. *See McQuade v. Springfield Safe Deposit and Trust Co.*, 333 Mass. 229 (1955). *See also Grabowski v. Bank of Bos.*, 997 F. Supp. 111, 125 (D. Mass. 1997) (calling power of attorney a "species of contract"). And this Court has long spoken of what it characterizes as the "freedom to contract." *See Attorney General v. Prudential Ins. Co. of America*, 310 Mass. 762, 766 (1942). The Court has observed that "[i]ndividuals and legal entities enjoy a freedom to contract—a freedom into which we

should be loath to interfere." *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 320 (1996).

Accordingly, there is no reason why a well-drafted power of attorney that includes within its ambit the power to create a trust should not be permissible as an ordinary contractual relationship. Indeed, as with any other form of contracting, a strong legal presumption exists that persons are free to do it. *See also E.A. Farnsworth, Contracts § 5.1,* at 345 (2d ed.1990) (discussing "premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements").

Supporting this view is relevant language from the Uniform Power of Attorney Act ("UPAA" or "the Act"), approved and recommended for enactment in all of the states in 2006 by the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Laws Commission, and the same body that developed the Uniform Trust Code and Uniform Probate Code). The Act specifically contemplates that the power to create a trust may be delegated to an AIF. Section 201 provides in relevant part that:

> (a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority…:(1) *create, amend, revoke, or terminate an inter vivos trust*….

In short, this model statute is entirely consistent with the notion that an individual, under basic contract law rules, should be able to delegate the power to create a trust to an agent.

IV. The Court Should Find that the Power to Create a Trust Must be Specifically and Expressly Delegated.

To answer the second part of the Court's question, MassNAELA's opinion is that an agent should not be able to create a trust unless that power has been expressly delegated in a power of attorney. The aforementioned Uniform Power of Attorney Act answers both parts of the Court's question – it contemplates that the power to create a trust may be delegated to an agent, but also that such delegation must be express and specific. Section 201 provides that:

> (a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property *only if the power of attorney expressly grants the agent the authority*…:(1) create, amend, revoke, or terminate an inter vivos trust….

(Emphasis supplied.)

Further, the Comment to Section 201 provides that:

> This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 201(a) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority….

The Comment further notes that "[t]he rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan." Indeed, any such risks are mitigated by requiring that a grant of authority to create a trust be specific, as opposed to implicit in a general grant of authority.

The Court's authority to impose such a restriction is clear. Notwithstanding the broad freedom to contract, the Court has also always felt free to impose tailored restrictions upon that right. *Nussenbaum v. Chambers & Chambers Inc.*, 322 Mass. 419, 422 (1947) ("it is a principle universally accepted that the public interest in freedom of contract is sometimes outweighed by public policy, and in

such cases the contract will not be enforced"). As this Court put it in *Feeney v. Dell, Inc.*, 454 Mass. 192, 199-200 (2009), "'[p]ublic policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare."

Finally, the aforementioned Section 602(e) of the MUTC is explicit in providing that the "settlor's powers with respect to revocation, amendment or distribution of trust property *may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust and the power*." (Emphasis supplied.) For the Court to find that the power to create a trust need not be expressly delegated, but rather is inherent in a broad power of attorney, would be inconsistent with the statute. Indeed, it makes little sense to find that the power to revoke a trust must be specifically delegated, but that the power to create a trust need not.

CONCLUSION

Amicus Curiae the Massachusetts Chapter of the National Association of Elder Law Attorneys respectfully submits the foregoing arguments in response to the questions posed by the Court to *amicus curiae*.

Respectfully submitted,
MassNAELA,

By its attorneys,

/s/ C. Alex Hahn, Esq.

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Dated: December 14, 2021

CERTIFICATION

I, C. Alex Hahn, Esq., certify that this brief complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P.16 (a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21(redaction).

Compliance with the applicable length limit of Rule 20(a)(2) was ascertained as follows. Century Schoolbook, a proportionally-spaced font, was used. The portions of this Brief that are required by Rule 16(a)(5)-(11), including headings, footnotes, and quotations, contain fewer than 7,500 words.

Pursuant to Rule 16(a)(8), in light of the Argument section of this brief being less than 4,500 words, a Summary of Argument was not included in this brief.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

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C. Alex Hahn, Esq.

Dated: December 14, 2021

CERTIFICATE OF SERVICE

I, C. Alex Hahn, Esq. hereby certify that I have this day caused a copy of this pleading to be served on all counsel of record via efilema, the efiling portal for the Massachusetts Supreme Judicial Court.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

_____
C. Alex Hahn, Esq.

Dated: December 14, 2021