SJC-13149

REGAN STEMPNIEWICZ BARBETTI & another[1] vs. EDWARD STEMPNIEWICZ.[2]

Hampshire. January 5, 2022. - June 28, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Trust, Creation, Constructive trust, Validity. Uniform Trust Code. Declaratory Relief. Practice, Civil, Declaratory proceeding, Summary judgment, Judgment.

Civil action commenced in the Superior Court Department on March 30, 2018.

The case was heard by Richard J. Carey, J., on motions for summary judgment; separate and final judgment was entered by Edward F. Donnelly, Jr., J., and a motion for reconsideration was considered by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Mark A. Tanner for the defendant.

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[1] Ryan Stempniewicz, individually and as special personal representative of the estate of Lubov Stempniewicz.

[2] Individually, as trustee of the Living Trust of Lubov Stempniewicz, and as trustee of the Edward Stempniewicz Revocable Living Trust.

Angelina P. Stafford for the plaintiffs.

Patrick G. Curley, Clarence D. Richardson, Jr., & C. Alex Hahn, for Massachusetts Chapter of the National Academy of Elder Law Attorneys, amicus curiae, submitted a brief.

CYPHER, J. This case arises out of a familial dispute over assets left by Lubov Stempniewicz, who was the mother and grandmother to the parties to this action. Regan Stempniewicz Barbetti and Ryan Stempniewicz initiated this action against their uncle, Edward Stempniewicz, and Edward's two children, Nikita Stempniewicz and Stanislav Stempniewicz, to determine the validity of the Living Trust of Lubov Stempniewicz (Lubov Trust).[3] Nikita and Stanislav did not participate in the litigation, resulting in the entry of a default order against them. The plaintiffs moved for partial summary judgment, arguing that Edward acted without authority in creating the Lubov Trust, and therefore the trust is void ab initio. A Superior Court judge (first motion judge) agreed, granting partial summary judgment, and separate and final judgment entered for the plaintiffs. Edward filed a motion for reconsideration or amendment of the judgment, which was denied. Edward then appealed from the grant of partial summary judgment, the entry of separate and final judgment, and the denial of his

[3] Because many of the parties share a last name, we use their first names for ease of reference.

motion for reconsideration.[4] For the reasons discussed infra, we affirm in part and reverse in part.

Background. We recite the undisputed material facts, reserving certain facts for later discussion. On March 27, 2013, when Lubov was ninety-one years old, she executed a power of attorney, titled "Durable Power of Attorney for Financial Management," which appointed Edward as Lubov's attorney-in-fact.[5] Lubov also executed a will (2013 will) to replace a prior will

[4] We acknowledge the amicus brief submitted by the Massachusetts Chapter of the National Academy of Elder Law Attorneys.

[5] There are two categories of "attorney," with widely differing "rights, duties, obligations, and responsibilities": attorneys-in-fact and attorneys-at-law. Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329, 334-335 & n.7 (2016). An attorney-in-fact is "one who is designated to transact business for another; a legal agent." Black's Law Dictionary 159 (11th ed. 2019). An attorney-in-fact is empowered to act as an agent of another "by an instrument in writing, called a 'letter of attorney,' or more commonly a 'power of attorney.'" Federal Nat'l Mtge. Ass'n, supra at 335, quoting Black's Law Dictionary 105 (1891). An attorney-at-law, or, more colloquially, "attorney" or "lawyer," is "[s]omeone who practices law." Black's Law Dictionary 159 (11th ed. 2019). This court has a "constitutional obligation to regulate the practice of law," and "[p]ermission to practi[c]e law is within the exclusive cognizance of the judicial department" (citation omitted). Rental Prop. Mgt. Servs. v. Hatcher, 479 Mass. 542, 550 (2018). Because "[o]nly [licensed] attorneys[-at-law] may represent parties in court and give legal advice," Matter of Hrones, 457 Mass. 844, 849 (2010), no power of attorney or other written instrument may confer on a nonlawyer attorney-in-fact the authority to practice law.

executed in 1999 (1999 will).[6] Lubov was not represented by an attorney with respect to the drafting, review, or execution of the power of attorney or the will.

On February 22, 2017, Edward created and signed the Lubov Trust in three capacities: (1) as attorney-in-fact under the power of attorney, as Lubov is the named grantor of the Lubov Trust; (2) as attorney-in-fact under the power of attorney, as Lubov is named as the first cotrustee of the Lubov Trust; and (3) in his personal capacity, as Edward is named as the second cotrustee of the Lubov Trust. Lubov was not represented by an attorney with respect to the creation or execution of the Lubov Trust.

The Lubov Trust provides that the purpose of the trust was "to receive and manage assets for the benefit of [Lubov] during [Lubov's] lifetime, and to further manage and distribute the assets of the [t]rust upon the death of [Lubov]." Consistent with this purpose, during Lubov's lifetime, all income and "such sums from the principal as [Lubov] may request" were to be paid "to or for the benefit of [Lubov]." The Lubov Trust further provided that, on Lubov's death, the trust assets would be distributed as follows: $25,000 would be distributed to each of

[6] The validity of both the power of attorney and 2013 will are disputed. For the purpose of the questions currently before us, we assume without deciding that the power of attorney is valid.

Lubov's four grandchildren, plaintiffs Regan and Ryan and defendants Nikita and Stanislav; all tangible personal property would be distributed to Edward, or Edward's children if Edward predeceased Lubov; and all remaining assets would continue to be held in trust by Edward for the benefit of his two children, Nikita and Stanislav.

After executing the trust document, Edward executed two deeds, signed under power of attorney for Lubov, conveying from Lubov to the Lubov Trust two parcels of real property. Edward also opened six bank accounts in the name of the Lubov Trust. According to Edward, Edward funded the trust accounts with assets owned by Lubov individually, assets owned by Edward individually, and those owned by Lubov and Edward jointly.

On Lubov's death in 2018, the plaintiffs in this action filed a petition in the Probate and Family Court Department seeking probate of the 1999 will. After Edward appeared and objected to the petition, that action evolved into a will contest as to the validity of the 1999 and 2013 wills. That action remains pending. The plaintiffs also brought this action in the Superior Court challenging the validity of the Lubov Trust. The two cases have not been consolidated, but they have been assigned to a single judge pursuant to a joint request for interdepartmental assignment. The plaintiffs brought fourteen counts in this action, relating to the creation and funding of

the trust and to Edward's alleged breach of fiduciary duties, as follows:

1. conversion, related to Edward's transfer of Lubov's assets to himself or to the Lubov Trust;

2. conversion, related to Edward's transfer of Lubov's assets to himself and to his own living trust;

3. breach of fiduciary duties owed to Lubov when acting as Lubov's attorney-in-fact and as trustee of the Lubov Trust and breach of fiduciary duties owed to the plaintiffs when acting as trustee of the Lubov Trust;

4. breach of fiduciary duties owed to Lubov based on Edward's and Lubov's close personal relationship, in transferring Lubov's assets to Edward's own living trust;

5. demand for accounting;

6. demand for trust accounting;

7. declaratory judgment that the Lubov Trust is invalid and the trust assets belong to Lubov's probate estate;

8. constructive trust;

9. undue influence;

10. rescission of deed;

11. intentional interference with inheritance;

12. removal of trustee;

13. injunctive relief to prevent Edward from transferring or spending any contested assets; and

14. trustee process, seeking payment from Edward's and the Lubov Trust's account assets held by Florence Bank.

Relevant to this appeal, the plaintiffs moved for summary judgment on count 7 of their amended complaint, seeking a

declaration that the Lubov Trust is invalid and that the assets then held by the Lubov Trust belong to Lubov's estate, and count 8, seeking a declaration that Edward is holding Lubov's assets in constructive trust for the benefit of the plaintiffs. The first motion judge granted partial summary judgment in favor of the plaintiffs on both counts.[7] The plaintiffs then moved for entry of separate and final judgment on counts 7 and 8 pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974). A different judge (second motion judge) granted the motion, "having found and determined that there is no just reason for delay . . . for the reasons set forth in the [p]laintiffs' motion and supporting documents." The second motion judge denied Edward's subsequent motion for reconsideration, and this appeal followed. We transferred the case from the Appeals Court on our own motion.

Discussion. 1. Separate and final judgment. As a threshold matter, we must determine whether the second motion judge properly entered separate and final judgment pursuant to Mass. R. Civ. P. 54 (b) as to the two counts of the plaintiffs' complaint on which partial summary judgment was granted, as the grant of partial summary judgment is "normally a non-appealable

[7] The plaintiffs also sought summary judgment on count 3, breach of fiduciary duties. The judge denied summary judgment on that count.

interlocutory order." Long v. Wickett, 50 Mass. App. Ct. 380, 385 n.6 (2000).

When an action involves multiple claims or multiple parties, rule 54 (b) allows the entry of separate and final judgment "as to one or more but fewer than all of the claims or parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[8] Mass. R. Civ. P. 54 (b). The power to grant a motion for separate and final judgment "is largely discretionary, to be exercised in light of judicial administrative interests as well as the equities involved, and giving due weight to the historic [F]ederal [and State] policy against piecemeal appeals"[9] (quotations and citations omitted). Reiter v. Cooper, 507 U.S. 258, 265 (1993). As such, "[a rule

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[8] Rule 54 (b) of the Massachusetts Rules of Civil Procedure, 365 Mass. 820 (1974), provides in relevant part:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

[9] "We note that Federal decisions are sources of precedent with respect to issues under our rule 54(b) because that rule was taken verbatim from Fed.R.Civ.P. 54(b), so that in construing our rule we may rely upon Federal Cases interpreting its Federal cognate" (quotation and citation omitted). Long v. Wickett, 50 Mass. App. Ct. 380, 385 n.6 (2000).

54 (b)] certificate should not be entered 'routinely or as a courtesy or accommodation to counsel.'" Acme Eng'g & Mfg. Corp. v. Airadyne Co., 9 Mass. App. Ct. 762, 764 (1980), quoting Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958).

"[A] valid rule 54(b) certification requires the confluence of four factors: (1) the action must involve multiple claims or multiple parties; (2) there must be a final adjudication as to at least one, but fewer than all, of the claims or parties; (3) there must be an express finding that there is no just reason for delaying the appeal until the remainder of the case is resolved; and (4) there must be an express direction of the entry of judgment" (footnote omitted). Long, 50 Mass. App. Ct. at 385-386, citing J.W. Smith & H.B. Zobel, Rules Practice § 54.4, at 307 (1977 & Supp. 2000). "We . . . expect strict compliance with this rule." Appleton v. Hudson, 397 Mass. 812, 813 n.3 (1986). While the judge "should ordinarily make specific findings setting forth the reasons for [the judge's] order" (citation omitted), Long, supra at 402, a failure to do so is not always fatal, particularly where the reasons for the judge's ruling are clear, see Dattoli v. Hale Hosp., 400 Mass. 175, 176 (1987); O. Ahlborg & Sons, Inc. v. Massachusetts Heavy Indus., Inc., 65 Mass. App. Ct. 385, 392-393 (2006); Quinn v. Boston, 325 F.3d 18, 26 (1st Cir. 2003).

Here, the final judgment on counts 7 and 8 of the plaintiffs' complaint stated that "there is no just reason to delay in entry of final judgment for the reasons set forth in the [p]laintiffs' motion and supporting documents," and expressly directed the entry of judgment. Although separate findings would have been preferable, the second motion judge's reference to the plaintiffs' motion and supporting documents indicated that he adopted the plaintiffs' analysis as his own for the purposes of granting the plaintiffs' motion, and thus the reasons for the judge's order are sufficiently clear.

a. Multiple claims and finality. "Whether multiple claims exist and whether there has been a final adjudication as to any claim are questions of law upon which our review of the judge's decision is de novo." O. Ahlborg & Sons, Inc., 65 Mass. App. Ct. at 392, citing Long, 50 Mass. App. Ct. at 386. "To satisfy the requirements of Rule 54(b) . . . the claim [finally] adjudicated must be a 'claim for relief' separable from and independent of the remaining claims in the case." Long, supra at 391, quoting Brunswick Corp. v. Sheridan, 582 F.2d 175, 182 (2d Cir. 1978). "In deciding whether one of several separately stated counts [is a] genuinely separate claim[], . . . [a] critical[] distinction has been drawn between separate claim[s] for relief within the meaning of the rule . . . [and] different theories of recovery arising out of the same cause of action"

(quotations omitted). Long, supra at 391, quoting Curtis-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10 (1980), and Lubanes v. George, 386 Mass. 320, 323 n.5 (1982). "A [party] presents multiple claims for relief . . . when the facts give rise to more than one legal right or cause of action. . . . Conversely, when a party asserts only one legal right, even if seeking multiple remedies, there is only a single claim for relief for rule 54(b) purposes" (citations omitted). Long, supra at 392. "Finally, there is only a single claim for relief . . . where the facts underlying the adjudicated portion of the case are largely the same as or substantially overlap those forming the basis for the unadjudicated issues" such that they are "inextricably intertwined." Id., quoting Spiegel v. Trustees of Tufts College, 843 F.2d 38, 45 (1st Cir. 1988).

Here, the plaintiffs assert fourteen separate counts in their complaint. There do not, however, appear to be fourteen separate claims or causes of action. Critically here, count 8, "constructive trust," asserts that Edward is "in possession, custody, or control of assets, property and funds which rightfully belong to [Lubov's] estate and/or the [p]laintiffs." This count has substantial factual and legal overlap with the conversion claim asserted in counts 1 and 2, and to the extent it does not separately assert a legal basis on which the court should conclude Edward is in possession, custody, or control of

Lubov's assets, it does not constitute an independent claim that properly may be subject to an entry of separate and final judgment.

However, count 7 is on different footing. Although there is some potential for mootness if the power of attorney pursuant to which Edward was acting is adjudicated to be void, the claim for the trust's invalidity raised in count 7 may be evaluated independently from the plaintiffs' other claims, such as that for undue influence and breach of fiduciary duties, because count 7 raises a pure question of law as to whether the power of attorney granted Edward the authority to create a trust on behalf of a settlor.[10] Thus, the grant of summary judgment on count 7, declaring the Lubov Trust void ab initio, constituted a final decision on a single claim. Additionally, although not properly an independent claim on its own, the resolution of count 8 depends, in part, on the resolution of count 7 such that "no economy will be achieved by a dismissal" of the final and separate judgment entered on count 8 (citation omitted). See Tiffany v. Sturbridge Camping Club, Inc., 32 Mass. App. Ct. 173, 179 (1992) (deciding not to dismiss appeal from separate judgment because, after full briefing and oral argument, "no

[10] "The determination of the legal effect of [a] written power [of attorney] is for the court." McQuade v. Springfield Safe Deposit & Trust Co., 333 Mass. 229, 233 (1955).

economy will be achieved by a dismissal"). Thus, where entry of summary judgment on count 7 constitutes a final adjudication on a single claim, the judge's grant of final and separate judgment meets the "bare minimum" requirement that it "dispose[] . . . 'of at least a single substantive claim.'" Spiegel, 843 F.2d at 43, quoting Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978).

b. No just reason for delay. "The determination of the presence or absence of a just reason for delay . . . is left to the sound discretion of the trial judge and is subject to reversal only for an abuse of . . . discretion." Long, 50 Mass. App. Ct. at 386. Under the abuse of discretion standard, we "do not disturb the judge's ruling 'simply because [we] might have reached a different result; the standard of review is not substituted judgment'" (citation omitted). Laramie v. Philip Morris USA Inc., 488 Mass. 399, 414 (2021). "An abuse of discretion occurs only where the judge makes a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotations and citations omitted). District Attorney for the N. Dist. v. Superior Court Dep't, 482 Mass. 336, 342 (2019).

In determining whether there is no just reason for delay, "the facts of each case [must] be closely examined to ensure that allowing an appeal will not wrongly fragment the

case. . . . A court should also examine whether [certification] will advance the interests of judicial administration and public policy." Long, 50 Mass. App. Ct. at 395, quoting Consolidated Rail Corp. v. Fore River Ry. Co., 861 F.2d 322, 325 (1st Cir. 1988). While a number of factors may be relevant to any given case, we note that there is no mechanical test to be applied in determining whether a case presents no just reason for delay. Instead, the fact-specific analysis "entails an assessment of the litigation as a whole, and a weighing of all factors relevant to the desirability of relaxing the usual prohibition against piecemeal appellate review in the particular circumstances." Spiegel, 843 F.2d at 43.

Separate and final judgment may be appropriate where there is a showing of "hardship or injustice," where an early appeal may "simplify, shorten or expedite the trial of any of the other claims still pending in the [trial court]," Harrison v. Roncone, 447 Mass. 1001, 1002 n.3 (2006), and where allowing an immediate appeal would be in the public interest, Quinn, 325 F.3d at 27. Conversely, separate and final judgment may not be appropriate where there is a "possibility that the need for [rule 54 (b)] review might . . . be mooted by future developments in the [trial] court." Long, 50 Mass. App. Ct. at 398, quoting Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975). Additionally, "[t]he greater the degree of

similarity or factual overlap [between the claims on appeal and the claims remaining pending in the trial court], the less persuasive the case for certification." Long, supra at 399. Where "the action remains pending [in the trial court] as to all of the parties," such fact also counsels against granting separate and final judgment. Spiegel, 843 F.2d at 44. "Judgments under [rule 54 (b)] must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." Id. at 42.

Here, because the validity of the Lubov Trust depends on our resolution of a pure question of law, this claim, as articulated in count 7 of the plaintiffs' complaint, may be considered separately from the numerous factual disputes still pending between the plaintiffs and defendant. As the second motion judge concluded, the resolution of the validity of the Lubov Trust also may "simplify, shorten or expedite the trial of . . . the other claims still pending in the [trial court]," Harrison, 447 Mass. at 1002, as, for example, the resolution of the plaintiffs' claim that Edward committed a breach of his fiduciary duties as trustee of the Lubov Trust inherently depends on whether there is a trust in the first instance or whether the purported trust is void ab initio, cf. Massachusetts

Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. 39, 54 (1991) (contract that is void ab initio may not be enforced, and "no breach of contract is possible"). Thus, the judge did not abuse his discretion in granting separate and final judgment on count 7. See Clair v. Clair, 464 Mass. 205, 214 (2013) (appellate court may affirm correct result based on reasons different from those articulated by judge below).

We already have observed that count 8 does not constitute a separate claim subject to final adjudication and, thus, it is not properly before this court. However, we have also noted that, where the relevant issues have been fully briefed and argued, dismissal on that count alone would not achieve any judicial economy, a primary goal of rule 54 (b). Tiffany, 32 Mass. App. Ct. at 179. See Long, 50 Mass. App. Ct. at 396 n.12. Thus, we exercise our discretion to consider the merits of the defendant's appeal as to both counts.

2. Summary judgment. We review the grant of a motion for summary judgment de novo, "view[ing] the evidence in the light most favorable to the part[y] opposing summary judgment" (citation omitted). Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016). "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Conservation Comm'n

of Norton v. Pesa, 488 Mass. 325, 330 (2021); Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

a. Validity of the trust. We first address whether Edward had the authority, acting as Lubov's attorney-in-fact under the power of attorney, to create the Lubov Trust.[11] We hold that he did not and that the Lubov Trust is therefore void ab initio.

[11] On appeal, Edward argues that, regardless of whether he had authority as Lubov's attorney-in-fact under the power of attorney to create the Lubov Trust, he validly created the trust pursuant to express actual authority orally granted to him by Lubov. Edward signed the Lubov Trust as "Edward Stempniewicz under power of attorney for Lubov Stempniewicz, Grantor," "Edward Stempniewicz under power of attorney for Lubov Stempniewicz, Co-Trustee 1," and "Edward Stempniewicz, Co-Trustee 2." Thus, in creating the Lubov Trust, Edward did not appear to assert any authority separate from that provided to him under the power of attorney.

Additionally, a trust may be created only where the settlor manifests, at the time the trust is created, an intention to create a trust. See G. L. c. 203E, § 402 (trust may be created only if settlor indicates intention to create trust); UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 407 (2019) (settlor's expressed intent to create trust is prerequisite to trust creation); Freedman v. Freedman, 445 Mass. 1009, 1010 (2005) (reformation of trust to conform to settlor's intent requires proof of settlor's intent at time he or she created trust); Restatement (Third) of Trusts § 13 comment a (2003) (creation of inter vivos trust "requires that the intention be to create the trust at that time. . . . [A]n intention to create a trust at some time in the future ordinarily does not create an express trust"). Thus, if Edward purported to create the Lubov Trust based not on his authority under the power of attorney but on instructions given by Lubov at some time prior to Edward's creation of the trust, the trust would be void for lack of the requisite contemporaneous manifestation of intent by the settlor.

This court never has determined whether the power of a settlor to create a trust is delegable, either at common law or under the Massachusetts Uniform Trust Code (MUTC), G. L. c. 203E, §§ 101 et seq. The MUTC was enacted in 2012, after an ad hoc Massachusetts Uniform Trust Code committee (ad hoc committee) completed a thorough review of and made revisions to the Uniform Trust Code drafted by the Uniform Law Commission. See St. 2012, c. 140, § 56; Report of the Ad Hoc Massachusetts Uniform Trust Code Committee 1-2 (rev. July 18, 2012) (Report). Although the MUTC was passed, in part, to "hav[e] all trust law in one place," the MUTC was "not intended to replace the common law of trusts in Massachusetts except where the [MUTC] modifies it." Report, supra at 2, 7. See G. L. c. 203E, § 106 (§ 106) ("The common law of trusts and principles of equity shall supplement this chapter, except to the extent modified by this chapter or any other general or special law"). Thus, pursuant to § 106, the common law continues to apply where it has not been modified by the MUTC.

Two sections of the MUTC address trust creation. Section 401 provides three methods for trust creation.[12] None of the

[12] General Laws c. 203E, § 401, entitled "Methods of creating trust," provides in relevant part:

"A trust may be created by:

enumerated methods involves creation by an agent acting pursuant to a power of attorney. G. L. c. 203E, § 401 (§ 401). The absence of language relating to creation by an agent is not dispositive, however, particularly where the ad hoc committee's comment to § 401 provides that "[§ 401] states familiar ways of creating a trust, but is not an exclusive list of methods." Report, supra at 17. Section 402 provides requirements to create a trust, regardless of the method used. G. L. c. 203E, § 402. A trust may be created only if, among other things, "the settlor has capacity to create a trust" and "the settlor indicates an intention to create the trust." G. L. c. 203E, § 402 (a) (1)-(2).

Section 303 of the MUTC codifies certain common-law principles related to agency, such as that "an agent having authority to act with respect to the particular question or dispute may represent and bind the principal." G. L. c. 203E, § 303 (3). Section 602 is the only section of the MUTC that specifically addresses the delegation of a settlor's power to an

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"(1) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

"(2) declaration by the owner of property that the owner holds identifiable property as trustee; or

"(3) exercise of a power of appointment in favor of a trustee."

agent acting under a power of attorney. G. L. c. 203E, § 602. That section 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 added). G. L. c. 203E, § 602 (e). Notably, § 602 of the Uniform Trust Code (UTC) allows an agent acting under a power of attorney to exercise authority related to revocation, amendment, or distribution of trust property where either the power of attorney or the trust document expressly authorizes such exercise. Uniform Trust Code § 602(e) (2000). The ad hoc committee intentionally revised UTC § 602 such that, in the MUTC, such authorization must expressly appear both in the trust document and the power of attorney. Report, supra at 29-30. Thus, the ad hoc committee, and by extension the Legislature in adopting the MUTC, chose to limit to a greater extent than under the UTC the ability of a settlor to delegate the power to amend or revoke a trust to an agent acting under a power of attorney.

However, § 602 facially addresses revocation and amendment of a trust, but not trust creation. Although the ad hoc committee's revisions to § 602 may indicate a general hesitancy to allow delegation of a settlor's powers, such evidence is far from conclusive of legislative intent as to trust creation where

the MUTC is silent on the ability of a settlor to delegate trust-creation power and where § 401, which deals with methods of creating a trust, provides only a nonexhaustive list. G. L. c. 203E, § 401. See Report, supra at 17. Thus, no section of the MUTC addresses the ability of a settlor to delegate the power to create a trust.[13] However, an examination of the law in other jurisdictions is instructive.

Several States have adopted the Uniform Power of Attorney Act (UPAA) or otherwise provided by statute that the power to create a trust may be delegated to an agent or attorney-in-fact acting under a valid power of attorney. See, e.g., Cal. Prob. Code § 4264 ("An attorney-in-fact under a power of attorney may perform any of the following acts on behalf of the principal or with the property of the principal only if the power of attorney expressly grants that authority to the attorney-in-fact: [a] Create, modify, revoke, or terminate a trust, in whole or in part"); Colo. Rev. Stat. § 15-14-724(1) ("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

[13] The Massachusetts Uniform Trust Code (MUTC) provides for the continuing application of the common law in circumstances not addressed by the MUTC. G. L. c. 203E, § 106. The common law of Massachusetts, however, is no more instructive on the question before us than the MUTC, as the ability of a settlor to delegate the power to create a trust to an agent acting pursuant to a power of attorney appears to be a question of first impression in the Commonwealth.

expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: [a] Create, amend, revoke, or terminate an inter vivos trust"); Neb. Rev. Stat. § 30-4024(1) (same); Tex. Est. Code Ann. § 751.031(b) ("An agent may take the following actions on the principal's behalf or with respect to the principal's property only if the durable power of attorney designating the agent expressly grants the agent the authority and the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: [1] create, amend, revoke, or terminate an inter vivos trust").

Additionally, where other States that have adopted the UTC wished to allow the delegation of the power to create a trust, they included in their versions of § 401 or § 402 express language to that effect. See, e.g., Ark. Code Ann. § 28-73-401 ("A trust may be created by: . . . [4] an agent under a power of attorney that expressly grants the agent the authority to create a trust"); Conn. Gen. Stat. § 45a-499w(d) ("The settlor's power to create or contribute to a trust may be exercised by [1] an agent under a power of attorney only to the extent expressly authorized to create or contribute property to a trust . . ."); Miss. Code Ann. § 91-8-401 ("A trust may be created . . . [5] [b]y an agent or attorney-in-fact under a power of attorney" in

certain circumstances). Regardless of whether trust-making power may be delegated under a State's version of the UPAA or the UTC, the statutes reviewed by this court provide that such power may only be delegated where the specific power to create a trust is expressly granted to the attorney-in-fact in the power of attorney.

Prior to Texas's adoption of a statute permitting an agent acting under a power of attorney to create a trust on behalf of a settlor, the Texas Court of Appeals held that the power to create a trust was nondelegable because "[a]n agent acting under a power of attorney cannot have the requisite intent to create a trust." Ritter v. Till, 230 S.W. 3d 197, 203 (Tex. App. 2006), superseded by Tex. Est. Code Ann. § 751.031, inserted by 2017 Tex. Gen. Laws c. 834, § 3. Conversely, prior to Vermont's adoption of a statute providing for trust creation by an agent, the Vermont Supreme Court concluded that an agent acting pursuant to a power of attorney may create a trust where "the express language of the power of attorney authorized the attorney-in-fact to create [the] trust." In re Estate of Kurrelmeyer, 179 Vt. 359, 363 (2006). See Vt. Stat. Ann. tit. 14A, §§ 401(5)(A), 402(b), inserted by 2009 Vt. Acts & Resolves no. 20, § 1.

"The general weight of authority suggests that the power to create, modify, or revoke a trust is personal and non-delegable

to an attorney-in-fact unless expressly granted in the [power of attorney]," and "several state courts have held that, in the absence of an express grant of authority, an attorney-in-fact does not have the power to create a trust on behalf of [his or] her principal." Stafford v. Crane, 382 F.3d 1175, 1183-1184 (10th Cir. 2004). Thus, although jurisdictions vary in their conclusions as to whether the power to create a trust is ever delegable, our review of the statutes and case law of other States reveals an underlying principle: where the power to create a trust is delegable, either pursuant to a statute or judicial opinion, it is only so where there is an express grant of the power to create a trust in the power of attorney.

This principle is consistent with our rules of construction related to powers of attorney. Certainly, "[t]o ascertain and effectuate the intent of the parties as manifested by the words used and the object to be accomplished is the goal of all interpretations of written agreements." MacDonald v. Gough, 326 Mass. 93, 96 (1950), quoting Marcelle, Inc. v. S. Marcus Co., 274 Mass. 469, 473 (1931). A power of attorney, however, is also subject to a rule of strict construction. McQuade v. Springfield Safe Deposit & Trust Co., 333 Mass. 229, 233 (1955). This rule "does not go to the extent of destroying the purpose of the power." Id., citing Malaguti v. Rosen, 262 Mass. 555, 561 (1928). "Authority to conduct a transaction includes

authority to do acts which are incidental to it, or are reasonably necessary to accomplish it." McQuade, supra. However, authority to conduct incidental transactions only arises where authority has been granted in the first instance to conduct a primary transaction. Thus, where a power of attorney contains a general grant of authority, we have declined to interpret such grant to provide more authority than absolutely necessary to effectuate the purpose of the power, absent some additional express authorization. See Williams v. Dugan, 217 Mass. 526, 529-530 (1914) (general power of attorney "couched in comprehensive terms" without specific authority to borrow money "fall[s] short of conferring the right to borrow money on the principal's account"); Wood v. Goodridge, 6 Cush. 117, 123 (1850) (power of attorney "must be . . . interpreted . . . as not to extend the authority given to [the attorney-in-fact] beyond that which is given in terms, or which is necessary and proper for carrying the authority expressly given into full effect").

We now review de novo the legal effect of the terms of the power of attorney that Edward claims provided him the authority to create the Lubov Trust. See McQuade, 333 Mass. at 233. We assume for this analysis that the power of attorney is valid, but we do not decide the matter, as it is not properly before us.

Part 1 of the power of attorney provides, "I, Lubov Stempniewicz, appoint the person named below [Edward] as my attorney-in-fact to act for me in any lawful way with respect to the powers delegated in [p]art 4, below." Part 4 of the power of attorney, which "grant[s Lubov's] attorney-in-fact power to act on [her] behalf in the following matters," includes two matters relating to trust transactions: number 7, "Estate, trust, and other beneficiary transactions," and number 8, "Living trust transactions." The powers enumerated in part 4 are further defined in part 12.

Part 12 of the power of attorney, titled "Definition of Powers Granted to Attorney-in-Fact," provides, "[t]he powers granted in [p]art 4, above, authorize my attorney-in-fact to do the following." Thus, contrary to Edward's assertion, the powers granted in part 4 of the power of attorney do not grant Edward "near plenary authority over Lubov's assets." Instead, part 4 defines the matters or subject areas in which Edward has authority to act as attorney-in-fact on Lubov's behalf, while part 12 defines the scope of Edward's authority to act in such matters. Such an interpretation of the power of attorney is consistent with the rule of strict construction to which we must adhere.

Section 7 of part 12, titled "Estate, trust and other beneficiary transactions," provides in relevant part: "My

attorney-in-fact may act for me in all matters that affect a trust . . . from which I am, may become or claim to be entitled, as a beneficiary, to a share or payment. My attorney-in-fact's authority includes the power to disclaim, release or renounce any assets which I am, may become or claim to be entitled, as a beneficiary, to a share or payment." This section addresses only trust transactions where Lubov is a beneficiary of a trust, not a settlor. It discusses no authority to create a trust, and trust creation is not an authority necessary for Edward to act on behalf of Lubov in situations where she is or may become entitled to trust assets as a beneficiary of a trust. Thus, this section confers on Edward no authority to create a trust on Lubov's behalf.

Section 8 of Part 12, titled "Living trust transactions," provides: "My attorney-in-fact may transfer ownership of any property over which he or she has authority under this document to the trustee of a revocable trust I have created as settlor. Such property may include real property, stocks, bonds, accounts with financial institutions, insurance policies or other property." Where this section speaks of trusts "[Lubov] ha[s] created as settlor," and not of any trusts that may be created in the future or trusts that may be created by another on Lubov's behalf, it would be pure speculation for this court to read into this section an authority in Edward to create a trust

on Lubov's behalf. Such an interpretation is also unnecessary to effectuate the purpose of the section to allow Edward to transfer Lubov's property to a preexisting trust created by Lubov. Thus, it is an impermissible interpretation pursuant to the rule of strict construction.

Because the power of attorney did not grant Edward the authority to create the Lubov Trust as Lubov's attorney-in-fact, any trust he purported to create as Lubov's attorney-in-fact, including the Lubov Trust, is void ab initio. We therefore affirm the grant of summary judgment in favor of the plaintiffs on count 7 of the complaint. In so doing, we do not decide whether, as a matter of law, a settlor may ever delegate the authority to create a trust pursuant to a power of attorney. If this court were to so conclude, it would raise questions related to how the trust creation requirements set forth in G. L. c. 203E, § 402, may be observed when a trust is created on behalf of a settlor by an attorney-in-fact.

For example, § 402 (a) provides that "[a] trust shall be created only if[, among other things]: (1) the settlor has capacity to create a trust; [and] (2) the settlor indicates an intention to create the trust" (emphasis added). G. L. c. 203E, § 402 (a) (1)-(2). As discussed, see note 11, supra, the requisite manifestation of intent must occur contemporaneously to the creation of the trust. See UBS Fin. Servs., Inc., 483

Mass. at 407; Freedman, 445 Mass. at 1010. Additionally, the power of attorney at issue here purported to provide the defendant with "broad legal powers" that "will continue to exist even if [the principal] become[s] disabled or incapacitated." See G. L. c. 190B, § 5-502 (attorney-in-fact acting pursuant to durable power of attorney may bind principal during period of disability or incapacity of principal); Johnson v. Kindred Healthcare, Inc., 466 Mass. 779, 785 (2014). Thus, where an agent creates a trust pursuant to a power of attorney, such action may conflict with the requirement of § 402 that the settlor -- the principal in the principal-agent relationship -- have capacity to create a trust.[14] G. L. c. 203E, § 402 (a) (1).

Additionally, while we acknowledge the critical importance of powers of attorney in the area of elder life planning, we likewise acknowledge that, given the broad powers they may confer on an agent, they may be used as tools of abuse against the very people they are intended to assist. See Bautz, Modernizing Financial Legislation to Protect Older Americans from Financial Abuse, 25 U. Miami Bus. L. Rev. 89, 96-99 (2017); Black, The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population, 82 St. John's L. Rev. 289, 291 (2008). This risk is compounded in the

[14] We note that the common law of trusts is superseded by any conflicting provision of the MUTC. G. L. c. 203E, § 106.

trust context, where trusts are often used as a means of avoiding the probate process and resultant review by a court of the disbursement of a decedent's assets. See Sacks v. Dissinger, 488 Mass. 780, 780-781, 788 & n.10 (2021) (plaintiffs sued aunts and grandmother's estate, alleging undue influence caused them to be excluded from grandfather's trust); Matter of the Colecchia Family Irrevocable Trust, 100 Mass. App. Ct. 504, 509-511 (2021) (petitioner asserted that sister exerted undue influence on parents in creation of trust, resulting in his partial disinheritance).

In sum, there is significant opportunity for powers of attorney and trusts to be used as tools of abuse against vulnerable individuals. The Legislature has enacted comprehensive legislation related to trusts that must be considered when determining the scope of an agent's ability to create a trust on behalf of a principal-settlor. The Legislature is currently considering whether to adopt the Uniform Power of Attorney Act, which would permit an agent acting under a power of attorney to "create, amend, revoke, or terminate an inter vivos trust" on behalf of a settlor "only if the power of attorney expressly grants the agent the authority." House Bill No. 1598, at 20 (Jan. 22, 2021). Therefore, we conclude that, at this time, the more prudent path is to allow

the Legislature the opportunity to decide whether and how to allow delegation of the power to create a trust.

b. Constructive trust. Count 8 of the plaintiffs' complaint asserted that Edward and the other defendants are "in possession, custody, or control of assets, property and funds which rightfully belong to the Decedent's estate and/or the Plaintiffs" and sought a declaration that they are holding such assets in constructive trust for the plaintiffs' benefit. In granting summary judgment on this count, the motion judge concluded that the assets Edward conveyed to the Lubov Trust were part of Lubov's estate, and as a result, those assets should be held in constructive trust for the benefit of Lubov's estate. This was error.

When a trust is declared void ab initio, or void from the beginning, the courts act as though the trust never existed. See Massachusetts Mun. Wholesale Elec. Co., 411 Mass. at 55 (when contract is void ab initio, "courts treat the contract as if it had never been made"). Assets transferred into the trust are therefore returned to the sources from which they came, as if the transfer of those assets to the trust never occurred in the first instance. See Stafford v. Crane, 241 F. Supp. 2d 1239, 1247 (D. Kan. 2002), aff'd, 382 F.3d 1175 (10th Cir. 2004); Jasser v. Saadeh, 97 So. 3d 241, 247 (Fla. Dist. Ct. App. 2012). Cf. Service Employees Int'l Union, Local 509 v.

Department of Mental Health, 476 Mass. 51, 58 (2016) (where privatization contracts were void ab initio, renewal contracts based thereon also were void ab initio); Brown v. Coggeshall, 14 Gray 134, 134 (1859) (where proceedings in insolvency were adjudged void ab initio, "all proceedings under them became, as far as then practicable, void and of no effect").

The plaintiffs contend that the undisputed facts establish that the Lubov Trust was funded exclusively with Lubov's assets and that Edward's "disingenuous, conclusory" assertion to the contrary is insufficient to defeat their motion for summary judgment. This argument ignores the rule that, on a motion for summary judgment, "a court does not resolve issues of material fact, assess credibility, or weigh evidence" (emphasis added). Bulwer, 473 Mass. at 689. Specifically, "[q]uestions of credibility of affidavits . . . do not concern the trial court" or this court. Norwood Morris Plan Co. v. McCarthy, 295 Mass. 597, 603 (1936). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). Further, in reviewing the grant of a motion for summary judgment, we "view the evidence in the light most favorable to the part[y] opposing summary judgment . . . , drawing all

reasonable inferences in [the opponent's] favor" (citations omitted) Bulwer, supra at 680.

In response to the plaintiffs' motion for summary judgment, Edward asserted by affidavit that he funded the trust with "assets owned by [Lubov], individually; by [Edward], individually; and by [Edward] and [Lubov], jointly." It is not for this court to assess whether this allegation is "disingenuous" or "conclusory." Where the affidavit specifically alleges that the Lubov Trust was funded, in part, with Edward's assets, it is sufficient to establish the existence of a genuine issue of material fact regarding to whom at least some of the assets must be returned now that the Lubov Trust has been declared void ab initio.

The plaintiffs further argue that, even taking the assertions in Edward's affidavit as true, any transfers he made to the Lubov Trust constituted completed gifts. This argument is unavailing. Where the Lubov Trust is void ab initio, any transfers of assets into the Lubov Trust are likewise void ab initio, and the status of such assets after transfer into the Lubov Trust is irrelevant. The only relevant inquiry is to whom those assets belonged prior to their void transfer into the Lubov Trust. If Edward proves at trial that his own assets were transferred into the Lubov Trust, then he is entitled to the return of those assets. See Stafford, 241 F. Supp. 2d at 1247;

Jasser, 97 So. 3d at 247. Cf. Service Employees Int'l Union, Local 509, 476 Mass. at 58; Brown, 14 Gray at 134. We therefore reverse the grant of summary judgment in favor of the plaintiffs on count 8 of the complaint.

3. Motion for reconsideration. After the first motion judge had granted summary judgment in favor of the plaintiffs on counts 7 and 8, the second motion judge entered final and separate judgment on those counts. Edward moved for reconsideration, making largely the same argument raised in his opposition to the plaintiffs' motion for summary judgment and on appeal, namely that the evidence establishes that the Lubov Trust was partly funded with assets owned by Edward.

First, we already have reviewed the underlying decision on the plaintiffs' motion for summary judgment on which Edward sought reconsideration. Second, the motion for reconsideration raised no additional arguments beyond those this court already has considered. Third, our review of the underlying grant of summary judgment has led to a reversal of the grant of summary judgment on count 8, which is the result sought in the motion for reconsideration. Fourth, our review of the underlying grant of summary judgment was de novo, which was less deferential than the abuse of discretion standard under which we would review the motion for reconsideration. Blake v. Hometown Am. Communities, Inc., 486 Mass. 268, 278 (2020). Thus, because our earlier

discussion addressed Edward's arguments raised in his motion for reconsideration and granted the relief sought therein, the motion for reconsideration has been rendered moot and we do not consider it. See Guardianship of D.C., 479 Mass. 516, 520 (2018) (judge's subsequent allowance of hospital's guardianship petition rendered moot appeal from dismissal of earlier petition).

Conclusion. We reverse the judgment with respect to count 8 of the plaintiffs' complaint. In all other respects, we affirm the judgment. The case is remanded for further proceedings consistent with this opinion.

So ordered.