June 12, 2017

Chief Justice Ralph D. Gants
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 2500
Boston, MA 02108

Re: SJC No. 12200; Mary E. Daley, personal representative, vs. Secretary of the Executive Office of Health and Human Services & another; rescript dated May 30, 2017.

Dear Chief Justice Gants:

Under the Massachusetts Rules of Appellate Procedure, Rule 27, a Petition for Rehearing is hereby made by Mary E. Daley. The petitioner and her counsel appreciate the complexities involved in writing such a lengthy decision, but believe that in the interests of justice there are technical corrections and reconsiderations of law that should be considered by the Supreme Judicial Court.

FIRST: The tax reimbursement issue in the trusts was raised below and adequately briefed; as a matter of law, there seems to be no need for the Court to remand the issue back to the Agency. The point of such a reimbursement provision is that the settlor of a "grantor trust" can end up being taxed on the sale of or income from an asset owned by the trust that is

no longer owned by the settlor.[1] Per this Court's decision in Guerriero v. Commissioner of the Division of Medical Assistance, 433 Mass. 628 (2001), the Agency is required to follow state law in determining whether principal is distributable to or for the settlor's benefit, and the Massachusetts legislature has already concluded that such reimbursement does not make principal available to the settlor:

> "Trust property shall not be considered distributable to or for the settlor's benefit solely because the trustee has the discretion under the terms of the trust to reimburse the settlor for any tax on trust income or capital gain that is payable by the settlor under the law imposing such tax." M.G.L. c. 203E, s. 505(a)(2).

Thus, the Court can easily dispose of this issue as a matter of law without the need for a remand.

SECOND: There is one sentence on page 15 of the rescript that seems to be somewhat contrary to the sentence at the end of page 10. Although the Court had explained the law differently and correctly on page 10, in that one sentence on page 15 the Court wrote:

> "If the grantor of the irrevocable trust leaves open even a "peppercorn" of

[1]On pages 28 and 30 of the rescript, the term "grantors trust" is used, but it not a term used by tax practitioners; the term used is "grantor trust."

> discretion for the trustee to pay the grantor from the principal of the trust under any circumstance, the entire principal of the trust will be deemed available to the applicant and therefore will be treated as a "countable asset," making the applicant ineligible for Medicaid benefits."

This sentence on page 15 could possibly be viewed as contradicting the last sentence on page 10 and, viewed in isolation, could be misinterpreted as meaning that if $0.01 per year could be distributed to the settlor, then all of the principal of the trust could be considered distributable and countable. Federal Medicaid trust law at 42 USC 1396p(d)(2)(B)(i), however, states the opposite; it states that if only some of the principal is available, then only the portion of the trust that is available is countable, i.e., "the portion of the corpus from which … payment to the individual could be made shall be considered resources available."

That sentence on page 15 could be made clearer if the phrase "entire principal" were replaced with "distributable portion of principal."

THIRD: The Court commented on an unbriefed issue when it wrote:

> "[T]he Nadeaus may "appoint ... all or any part of the trust property . . . to any one or more charitable or non-profit

> organizations" over which they have no controlling interest. Had Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home, to pay the nonprofit organization for his care."

Briefing on this issue would assist the Court, because under Massachusetts statutory and case law and the Restatements of Property and Trusts, the power holder of a limited power of appointment is prohibited from exercising the power of appointment in favor of the power holder.

The power to appoint principal to charitable or nonprofit organizations is merely a power to direct that gifts be made to such entities, and is not a power to make payment of the power holder's personal expenses. Any attempt of the power holder, if a beneficiary of trust income only, to use such power to pay the settlor's personal nursing home costs from trust principal would be negated by M.G.L. c. 203E, s. 808, which conclusively states:

> "[a] person who holds a power to direct is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries."

Thus, under Massachusetts law a limited power of appointment cannot be interpreted to override other

portions of the trust which prohibit the payment or usage of principal for the benefit of the settlor, especially where under settled Massachusetts law, a trust must be read as a whole.[2] See Ferri v. Powell-Ferri, 476 Mass. 671 (2017).

Further, a settlor cannot exercise a limited power of appointment collusively with an appointee to utilize it to pay the settlor's personal expenses, as a limited power of appointment is exercisable only in favor of permissible appointees, and any attempt to exercise a limited power in favor of an impermissible appointee is ineffective. Restatement 3rd Property (Wills and Donative Transfers) § 19.15.[3] Where an appointment is made to a permissible appointee, but with the purpose and expectation that any of the

[2] "When interpreting trust language, . . . we do not read words in isolation and out of context. Rather we strive to discern the settlor's intent from the trust instrument as a whole[]." Hillman v. Hillman, 433 Mass. 590, 593 (2001), citing Pond v. Pond, 424 Mass. 894, 897 (1997).

[3] See also Pitman v. Pitman, 314 Mass. 465 (1943)("[T]here is a fraudulent exercise of a power not only where the donee acts corruptly for a pecuniary gain but where he acts primarily for his own personal advantage or that of a third person who is a non-object of the power and thereby abuses the power [].")

appointed property or some collateral benefit will pass to the power holder, the appointment is invalid:

> "An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the appointee conferring a benefit on an impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the appointee's creditor, if that creditor is an impermissible appointee, or (vi) motivated in any other way to be for the benefit of an impermissible appointee." Restatement 3rd Property (Wills and Donative Transfers) §19.16.

Such an attempt to benefit personally from a limited power of appointment is "frequently referred to as a 'fraud on the power.'" Restatement 3rd Property (Wills and Donative Transfers) Chapter 19 Part D Introduction and § 19.15.[4]

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[4] See also Annotation, "Validity of exercise of power of appointment as affected by purpose, request, agreement, or condition that appointee benefit, or knowledge that he intends to benefit, one not an object of the power," 115 ALR 930 (1938) (an appointment under a limited power is void if made pursuant to a prior agreement that the property appointed will be paid back to the appointer); Annotation, "Validity and effect of agreement by donee of power of appointment respecting its exercise or nonexercised," 163 A.L.R. 1449 (1944).

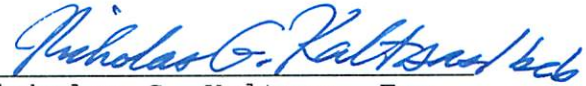
By its very nature, a limited power of appointment cannot be exercised in favor of the settlor or the settlor's creditors, and the settlor's creditors cannot reach the assets subject to such a power:

> "[T]he creditors of the donee of a nongeneral power of appointment (one that cannot be exercised for the economic benefit of the power holder), whether or not presently exercisable, cannot reach the property subject to the power for the satisfaction of their claims[]." Restatement (Third) of Trusts, § 56, comment b (2003)

The Restatements have detailed coverage of limited powers of appointment because such powers have been utilized for many decades in estate planning (such as in multi-generational estate tax planning and charitable remainder trusts), and the Court's comment on the unbriefed issue has the potential for wreaking havoc with many existing estate plans and charitable trusts that were not Medicaid-oriented planning.

Respectfully submitted, and thanking you in advance

for your consideration of these matters,



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