

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Robin W. Hammer,
Defendant Below, Petitioner**

vs) **No. 11-0075** (Randolph County 10-C-103)

**Thomas M. Hammer, Robert B. Hammer,
Teresa C. Hammer Lang, Mark J. Hammer,
And Sharon M. Helms, Plaintiffs Below,
Respondents**

FILED

May 9, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner appeals from an order by the Circuit Court of Randolph County granting a declaratory judgment in favor of the respondents. Judge Jaymie Godwin Wilfong declared that a 2008 power of attorney appointing the petitioner as an agent for his mother was invalid and unenforceable.

Upon consideration of the standard of review, the parties' briefs and oral arguments, and the record presented, we find no substantial question of law has been raised by the parties, and no prejudicial error was committed by the circuit court. We therefore affirm the circuit court's declaratory judgment. *See Rule 21 Revised Rules of Appellate Procedure.*

The petitioner and the respondents are the adult children of Ethel M. Hammer ("Mrs. Hammer"). The petitioner in this appeal is Robin W. Hammer, who is acting *pro se*. The respondents (represented by their lawyer, David H. Wilmoth) are Thomas M. Hammer, Sharon M. Helms, Robert B. Hammer, Teresa C. Hammer Lang, and Mark J. Hammer. A seventh child, Guy St. Clair Hammer, II, was a defendant below but is not a party to this appeal.

In November 2002, Mrs. Hammer executed a durable "General Power of Attorney" appointing two of the respondents (Thomas M. Hammer and Sharon M. Helms) as her agents. The November 2002 document authorized them to act jointly as her attorneys-in-fact.¹

¹The power of attorney, signed on November 27, 2002, states in part:
I, Ethel Marie Hammer, . . . hereby appoint Sharon M. Helms . . . and
Thomas M. Hammer . . . as my attorneys-in-fact (collectively referred
to as my "Agent"). The Agents must act jointly, with the consent of

(continued...)

On September 22, 2008, Mrs. Hammer executed a new durable “General Power of Attorney” revoking all prior powers of attorney, and appointing her other five children as her agents: petitioner Robin W. Hammer; Guy St. Clair Hammer, II; and respondents Robert B. Hammer, Teresa C. Hammer Lang, and Mark J. Hammer. The September 2008 document authorized each agent to act individually, but provided that any act taken individually “may be reversed if 3 of 5 Agents agree.”

The latter three respondents executed a document in November 2009 stating that they “contest[ed] the competency of Ethel M. Hammer at the time of the execution” of the September 2008 power of attorney. Nevertheless, the latter three respondents exercised their purported power as agents to “reverse” any and all actions taken by Guy St. Clair Hammer, II, or by petitioner Robin W. Hammer. The three respondents specifically objected to any past or future actions taken by Guy St. Clair Hammer, II, or the petitioner under the September 2008 power of attorney.

On June 3, 2010, the five respondents filed the instant action against the petitioner (and Guy St. Clair Hammer, II) seeking a declaratory judgment that the September 2008 power of attorney executed by Mrs. Hammer was void and of no force or effect. The respondents asked for an order declaring the November 2002 power of attorney to be the only valid expression of Mrs. Hammer’s wishes, and prohibiting the petitioner from acting or attempting to act as her agent.

In an order dated December 14, 2010, the circuit court determined that the November 2002 power of attorney was the only valid expression of the intent of Mrs. Hammer as to the individuals she wanted to act on her behalf. The circuit court found the appointment of five people empowered to work individually as her agents, with a provision that any three could veto or later rescind any action taken by another agent, was unworkable and unreliable to third parties who might be called upon to rely upon the power of attorney. The circuit court also concluded, based upon a report by a guardian *ad litem*, that Mrs. Hammer was not competent at the time she executed the September 2008 document. Accordingly, the circuit court declared the September 2008 document was void and no force or effect.

Petitioner Robin W. Hammer now appeals the circuit court’s declaratory judgment order.

The purpose of a declaratory judgment:

. . . is to avoid the expense and delay which might otherwise result, and in securing in advance a determination of legal questions which, if pursued, can be given the force and effect of a judgment or decree without the long and tedious delay which might accompany other types of litigation.

¹(...continued)
the other Agent.

Crank v. McLaughlin, 125 W.Va. 126, 133, 23 S.E.2d 56, 60 (1942). As the instant declaratory judgment involves a determination of a purely legal question, we review the circuit court’s order *de novo*. Syllabus Point 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995).

The parties dispute whether Mrs. Hammer actually gave anyone clear authority to act as her agent when she signed a power of attorney in September 2008. That document stated, in part:

I, Ethel Marie Hammer, . . . hereby appoint Guy Saint Clair Hammer, II, . . . Robert Bruce Hammer . . ., Robin William Hammer . . ., Teresa Caroldeen Hammer . . ., and Mark Joseph Hammer . . . as my attorneys-in-fact (collectively referred to as my “Agent”). The 5 Agents may each act individually, but may be reversed if 3 of 5 Agents agree.

“A ‘power of attorney’ is ‘an instrument granting someone authority to act as agent or attorney-in-fact for the grantor.’” *In re Richard P.*, 227 W.Va. 285, 293, 708 S.E.2d 479, 487 (2010) (quoting *Black’s Law Dictionary* 1290 (9th ed. 2009)). See also, *Vance v. Vance*, 192 W.Va. 121, 123, 451 S.E.2d 422, 424 (1994) (“[A] power of attorney creates an agency relationship, and this establishes a fiduciary relationship between the principal, or the party who granted the power, and the agent, or the party who receives the power.”); *Milner v. Milner*, 183 W.Va. 273, 277, 395 S.E.2d 517, 521 (1990) (“[W]hen a competent adult grants a power of attorney to another, an agency relationship between the two is created, and the principal and agent are ultimately responsible for the actions arising out of the power of attorney and not some third party who is without knowledge of any wrong doing.”); *Kanawha Valley Bank v. Friend*, 162 W.Va. 925, 928, 253 S.E.2d 528, 530 (1979) (“A power of attorney creates an agency and this establishes the fiduciary relationship which exists between a principal and agent.”)

“A principal is bound by acts of an agent if those acts are either within the authority the principal has actually given his agent, or within the apparent authority that the principal has knowingly permitted the agent to assume.” *Thompson v. Stuckey*, 171 W.Va. 483, 487, 300 S.E.2d 295, 299 (1983) (citing *General Elec. Credit Corp. v. Fields*, 148 W.Va. 176, 133 S.E.2d 780 (1963)).

The respondents assert that the September 2008 power of attorney does not clearly delegate actual or apparent authority to any agent. On the one hand, the document gives five people authority to act individually. On the other hand, the document allows any three people to “reverse” an act done by any one of the five individuals, even after the act has been consummated. The circuit court correctly discerned that no stranger could ever complete a transaction with one agent of Mrs. Hammer without concern that, at some future date, three agents might agree to reverse the transaction. Under this language, it would be virtually impossible for these five people to carry out the duties delegated by Mrs. Hammer.

The petitioner asserts that the language is clear, but also points out that in the event it is not enforceable, the September 2008 power of attorney has a severance clause. The document says:

If any provision of this instrument shall be invalid or unenforceable . . . such part shall be ineffective . . . without in any way affecting the remaining parts of such provision or the remaining provisions of this instrument.

The petitioner argues that, if the “reversal” language is invalid, it can be eliminated while the remainder of the delegation of authority provision continues intact.

We find, as a matter of law, that the delegation of authority language in the September 2008 power of attorney is unworkable and ineffective. Further, we find the “reversal” language could not be deleted from the document without eviscerating Mrs. Hammer’s garbled attempt to delegate authority. Accordingly, we find no error in the circuit court’s decision.

The petitioner argues on appeal that the circuit court’s decision was wrong on a second issue, namely whether Mrs. Hammer was incompetent at the time she signed the September 2008 power of attorney. The petitioner contends the circuit court’s decision on her competency was premature, and the parties should have been given more time to develop evidence and produce witnesses.

Essentially, the petitioner asserts that the five respondents have acted inconsistently. For instance, in October 2009, two of the respondents had Mrs. Hammer sign a medical power of attorney saying she was “of sound mind,” but in November 2009 three different respondents said she was incompetent when the general power of attorney was signed in September 2008. Further, the petitioner asserts that his respondent siblings have financially mismanaged his mother’s estate. Even more far afield, the petitioner contends his siblings have carelessly managed his deceased father’s intestate estate, which as of 2010 had been pending administration for 12 years. Put succinctly, even though the respondents’ complaint for declaratory relief focused solely on the validity of the September 2008 power of attorney, the petitioner seeks to go beyond the complaint and to use the instant action to discover information relevant to his mother’s and father’s estates.

The circuit court, however, correctly focused on the validity of the September 2008 power of attorney. On the existing record, we cannot say that the circuit court was clearly wrong. The record establishes that Mrs. Hammer was diagnosed with, and began treatment for, dementia in 2005, and the parties stipulated that by 2010 she was incompetent and “oblivious to the struggle between her children.” And, a guardian *ad litem* for Mrs. Hammer stated that she was not competent when she executed the September 2008 power of attorney.

For all the foregoing reasons, we affirm the circuit court’s December 14, 2010 declaratory judgment order.²

²The petitioner also asserts, on appeal, for the first time, that the circuit court should have been disqualified from hearing this case, allegedly because one of the respondents purchased several mobile homes from the circuit judge’s mother- or father-in-law over a decade ago. We decline to consider this issue, as it was not preserved for appeal.

Affirmed.

Issued: May 9, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh