

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

In re Guardianship of John Herbert Muller, Incapacitated Person

In re Guardianship of John Herbert Muller, Incapacitated Person, 650 So. 2d 698 (Fla. Dist. Ct. App. 1995) (Fla. 4th DCA 1995) · No. 94-0451

SUMMARY

The Florida Fourth District Court of Appeal held that under section 744.441(2), Florida Statutes (1993), a guardian may, with court approval, amend a revocable trust to replace a trustee if it is in the ward's best interest. The court broadly interpreted the statute's "other power" language, relying on legislative history and dictionary definitions, and reversed the trial court's restrictive construction. The court also ruled that attorney testimony regarding the settlor's intent was inadmissible under the lawyer-client privilege.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fourth District
WRITING FOR THE COURT	HERSEY; GLICKSTEIN; POLEN
JURISDICTION	Florida
DOCKET	94-0451
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from the trial court's order denying the guardian's verified petition for authority to amend trust by concluding that the petition was not authorized by section 744.441, Florida Statutes (1993).
PRECEDENTIAL VALUE	binding
PARTIES	Anthony L. Thebaut, guardian of the person and property of John Herbert Muller v. Linda Boyle

TOPICS

[guardianship procedure](#)[guardianships](#)[trusts](#)[fiduciary duty](#)[evidence](#)

PRACTICE AREAS

[Guardianship](#)[Trusts and Estates](#)[Probate](#)

QUESTIONS PRESENTED

1. Whether section 744.441(2), Florida Statutes (1993), authorizes a guardian, with court approval, to amend a revocable trust to replace a trustee.
2. Whether an attorney's testimony regarding the settlor's intent in drafting the trust is admissible under the lawyer-client privilege exception in section 90.502(4)(d), Florida Statutes (1993).

HOLDINGS

1. Section 744.441(2) authorizes a guardian, with court approval, to amend a revocable trust to replace the trustee if it is in the best interest of the ward.
2. Testimony regarding the intent of the settlor in having the trust agreement drafted is inadmissible under the lawyer-client privilege; the exception in section 90.502(4)(d) relates only to the execution or attestation of a document.

KEY QUOTATIONS

"It is fully my intent that this Trust shall be a Revocable Trust. I therefore specifically reserve the right to revoke or amend this Agreement at any time in whole or in part." (699)

"The Court [found] that if it granted the request of the guardian, it would stretch the language contained in this specific Florida Statute beyond any reasonable interpretation of what the Legislature intended." (699)

"Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release." (700)

"The right, ability, authority, or faculty of doing something. Authority to do any act which the grantor might himself lawfully perform." (700)

"In so doing, the trial court should not consider Doane's testimony regarding the intent of Muller in having the trust agreement drafted. We determine that such testimony is inadmissible as it falls within the lawyer-client privilege. The notes to section 90.502(4)(d), Florida Statutes (1993), indicate that this exception to the lawyer-client privilege relates only to the execution or attestation of a document." (700 n.1)

FACTUAL BACKGROUND

John Herbert Muller created a revocable trust in 1989, reserving the right to amend. In 1991 he amended the trust to name Linda Boyle as successor trustee. In March 1993, Muller was adjudged incapacitated and Anthony L. Thebaut was appointed plenary guardian. The guardian petitioned to amend the trust to remove Boyle as trustee, alleging a conflict of interest due to litigation between the guardian and Boyle. The trial court denied the petition.

PROCEDURAL HISTORY

John Herbert Muller created a revocable trust in 1989, reserving the right to amend. In 1991 he amended the trust to name Linda Boyle as successor trustee. In March 1993, Muller was adjudged incapacitated and Anthony

L. Thebaut was appointed plenary guardian. The guardian petitioned for authority to amend the trust to remove Boyle as trustee, alleging a conflict of interest. The trial court denied the petition. The guardian appealed.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse and remand with direction to reconsider the evidence contained in the record in light of this opinion. Additionally, the trial court should not consider Doane's testimony regarding the intent of Muller in having the trust agreement drafted, as it is inadmissible under the lawyer-client privilege.

CITED IN

- In re Guardianship of John Herbert Muller, Incapacitated Person, In re Guardianship of Muller, 650 So. 2d 698 (Fla. 4th DCA 1995)

OPINION

Guardianship of Muller, In re, 650 So.2d 698 (Fla. App. 1995) Page 698 650 So.2d 698 20 Fla. L. Weekly D509 In re GUARDIANSHIP OF John Herbert MULLER, Incapacitated Person. Anthony L. THEBAUT, guardian of the person and property of John Herbert Muller, Appellant, v. Linda BOYLE, Appellee. No. 94-0451. District Court of Appeal of Florida, Fourth District. Feb.

23, 1995. Page 699 Brian M. O'Connell and Ronald E. Crescenzo, Boose Casey Ciklin Lubitz Martens McBane & O'Connell, West Palm Beach, for appellant. D. Culver Smith, III, Jones Foster Johnston & Stubbs, P.A., West Palm Beach, for appellee. PER CURIAM. This is an appeal from the trial court's order denying the guardian's verified petition for authority to amend trust by concluding that the petition was not authorized by section 744.441, Florida Statutes (1993).

We reverse and remand with direction to reconsider the evidence contained in the record in light of this opinion. 1 Appellant is the guardian of the person and property of his incapacitated grandfather, John Herbert Muller.

In 1989, prior to his incapacitation, Muller created and funded a revocable trust, which reads in pertinent part: "It is fully my intent that this Trust shall be a Revocable Trust. I therefore specifically reserve the right to revoke or amend this Agreement at any time in whole or in part." Muller was the named life beneficiary.

In 1991, Muller amended the revocable trust to appoint appellee, Linda Boyle, as successor trustee in the event of Muller's death or incapacitation. In March 1993, Muller was adjudged incapacitated and appellant was appointed plenary guardian of Muller's person and property. Apparently, it was also at this time that appellee became trustee of the revocable trust.

On June 15, 1993, appellant as guardian filed a verified petition for authority to amend the trust to appoint a new trustee, pursuant to sections 774.441(2) and 774.441(19), Florida Statutes. The petition asserted that appellee had a severe conflict of interest with Muller and that it would be in Muller's best interest to amend the trust to remove appellee as trustee and name either appellant or an independent third party as trustee.

The alleged conflict of interest was premised on litigation between appellant as guardian and appellee, individually and as trustee. Appellee's motion to dismiss was denied and the cause proceeded to final hearing. Subsequently, the trial court issued its order denying "with reluctance" appellant's petition to amend the trust and ruling that such authority to amend the trust was not authorized by section 744.441, the guardianship statute, nor by any other Florida statute.

"The Court [found] that if it granted the request of the guardian, it would stretch the language contained in this specific Florida Statute beyond any reasonable interpretation of what the Legislature intended." Both parties contend the governing statute is plain and unambiguous with each giving his or her interpretation of what the statute Page 700 says. While believing the statute to be ambiguous, we conclude it will permit the present action.

The pre-1987 version of the governing statute permitted a guardian to: Execute any power of appointment or other power that the ward might have lawfully exercised, Guardianship of Muller, In re, 650 So.2d 698 (Fla. App. 1995) consummated, or executed if competent, if the best interest of the ward requires such execution. Sec. 744.441(2), Fla.Stat.

(1985) (emphasis added). With additions to the 1987 amendment underlined, the current version reads: (2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

Sec. 774.441(2), Fla.Stat. (1993). The legislative history relied upon by appellant is helpful. It suggests that the intent of the 1987 amendment was to broaden the powers of the guardian, not to limit the term "other power" to powers that the ward held as a donee, as was suggested by appellee. Appellant points to several places in titles and summaries of the senate and house bills where it is stated that the effect of the bills is to "broaden" or "increase" a guardian's powers, including the house staff analysis summary which reads: Section 744.441(2), F.S., is amended to clearly give a guardian, upon court approval, the power not only to execute powers of the ward, but to exercise or release any powers the ward would have as trustee, personal representative, custodian, conservator or donee.

It is clear that the legislature envisioned that the general provision referring to "other power" held by the ward was distinct from the enumerated fiduciary powers held by the ward. The legislative

history strongly suggests that the legislature did not intend that the term "other power" be given a restrictive meaning as suggested by appellee.

Moreover, as appellant points out, Black's Law Dictionary includes the following as the first and primary definition of "power": "The right, ability, authority, or faculty of doing something. Authority to do any act which the grantor might himself lawfully perform." Black's Law Dictionary 1053 (5th ed. 1979).

Thus, the trial court erred in ruling that the power to amend the revocable trust to replace the trustee was not authorized by section 744.441(2). HERSEY, GLICKSTEIN and POLEN, JJ., concur. 1 In so doing, the trial court should not consider Doane's testimony regarding the intent of Muller in having the trust agreement drafted.

We determine that such testimony is inadmissible as it falls within the lawyer-client privilege. The notes to section 90.502(4)(d), Florida Statutes (1993), indicate that this exception to the lawyer-client privilege relates only to the execution or attestation of a document.