

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

GADE NURSING HOME, INC.	:	CASE NO. 09-CV-00830
Plaintiff,	:	Jonathan P. Hein, Judge
vs.	:	
JENNIFER BUCKINGHAM	:	
Defendant.	:	TRIAL DECISION AND JUDGMENT ENTRY

This matter comes before the Court for trial pursuant to notice. The Plaintiff was represented by Travis Fliehman, Esq. The Defendant was represented David Pixley, Esq.

Case Facts

Briefly stated, the facts are as follows. Jennifer Buckingham was appointed the agent for Charles Rhoades by a General Power of Attorney which was signed on April 6, 2005. [See Exhibit 1.] This relationship was necessitated by Mr. Rhoades' deteriorating health and inability to properly manage his financial affairs. While the reason for his selection was not known, Jennifer Buckingham is his grand-daughter.

Mr. Rhoades chose to reside in Gade Nursing Home, and was admitted therein on about January 11, 2007. [See Exhibit 2.] However, as might be expected, his resources soon dwindled and Medicaid assistance through the Department of Job and Family Services was needed, effective October 1, 2007. Based upon Mr. Rhoades' monthly income – as discussed

later – it was determined that Medicaid should pay all monthly living expenses at Gade Nursing Home which exceeded \$3,259 per month in 2007 and \$3,332 per month in 2008 and thereafter.

[See Exhibit 5.]

The determination of Medicaid eligibility requires an analysis of an applicant’s assets and income. In Mr. Rhoades’ case, his assets were not sufficient to be considered. Therefore, Medicaid considered his monthly income. Specifically, he received the following monthly income: \$1,519 from the Veteran’s Administration; \$1,465 from Social Security; and \$194.02 from Ohio Public Employees Retirement System.¹ Medicaid expected these sources of income to be applied to the monthly charges at Gade Nursing Home, except \$30 per month as an allowance for personal incidental expenses, after which Medicaid would pay the balance of the monthly expenses.

The summary of charges by Gade Nursing Home reflects services provided from January 11, 2007 through November 24, 2009, the apparent date of death for Mr. Rhoades. By this date, the account was in arrears by a total of \$24,384.63. Subsequent payments reduced this amount to \$14,916.08. Ultimately, in a separate law suit [Case 08-CV-64513], it was determined that Mr. Rhoades owed \$15,250.00 to Gade Nursing Home. [See Exhibit 9.] Further, pursuant to Order from the Probate Court, Gade Nursing Home received an assignment of all rights which Mr. Rhoades might have against Jennifer Buckingham arising out of her “control and/or misappropriation of Mr. Rhoades’ personal property and/or real property.” [See

¹The evidence generally indicated that the amounts for subsequent years would increase slightly due to cost of living increases, but such increases are not accounted for in the Court’s analysis, since such generalization was not specific enough.

Exhibits 10, 11.]

Gade Nursing Home brought this matter to collect the judgment previously adjudicated in this matter. Further, Gade Nursing Home asserted all claims on behalf of Mr. Rhoades, including Ms. Buckingham's failure to properly receive and expend funds on his behalf. Ms. Buckingham denies any wrongdoing or misappropriation; further, she claims that Mr. Rhoades' daughter, Shirley Jay, had access to his mail and the opportunity to convert his funds to Ms. Jay's purposes.

Preliminary Issue: Failure to Join Necessary Parties

The Defendant has requested a dismissal of this action on the basis of Civil Rule 19, the requirement to join necessary and indispensable parties. First, Defendant claims that Shirley Jay should have been joined, based on the allegation that Mrs. Jay actually stole retirement checks which were payable to Mr. Rhoades. Second, Defendant claims that the Guardian ad Litem should have been joined.

The Court disagrees with the Defendant. First, the duty which Defendant owed Charles Rhoades is based on the agency relationship established by the General Power of Attorney. The actions of an intervening party do not alter the duties set forth under the General Power of Attorney. Admittedly, Mrs. Jay could have been responsible for the missing funds, but such proof is mere speculation and proof thereof could have been brought by Defendant – not as the sole duty of Plaintiff. As to failure to join the Guardian ad Litem, the Court does not see the logic of requiring Plaintiff to join the representative of Mr. Rhoades. The General Power of Attorney was an agency relationship established when Mr. Rhoades was apparently unable to manage his personal affairs. The Defendant has failed to allege – or prove – that Mr. Rhoades

was contributorily negligent in not collecting retirement income or ensuring payment to Gade Nursing Home. Finally, such claims against Mrs. Jay and the Guardian ad Litem can -- and may still be -- brought by the Defendant. See *St. Clair Builders, Inc. V. Aetna Casualty and Surety Co.* 1994 Ohio App. LEXIS 3350 (8th District). Based on the legal duty between the agent and the principal, the Court denies the Defendant's motion to dismiss due to failure to join necessary and indispensable parties.

Legal Duty of Ms. Buckingham

The duty which an agent under a power of attorney owes to the grantor / principal was succinctly explained in the case of *In re Scott*, 111 Ohio App. 3d 273, 675 N.E.2d 1350 (6th Dist. 1996):

The holder of a power of attorney has a fiduciary relationship with his or her principal. Such a relationship is "one in which special confidence and trust is reposed in the integrity and fidelity of another * * * by virtue of this special trust." *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78, 20 O.O.3d 64, 66-67, 419 N.E.2d 1094, 1097-1098. In such a relationship, the person who holds the power bears the burden of proof on the issue of the fairness of the transaction. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 166, 542 N.E.2d 654, 660. Additionally, as the trial court in this matter noted, any transfer of property from a principal to his attorney-in-fact must be viewed with some suspicion.

As such, the Court must carefully consider the conduct of Ms. Buckingham during the tenure of her duties as agent for Charles Rhoades to determine whether she acted in the best interests of her grandfather in those matters delegated to her in the General Power of Attorney. In this case, it is clear that the General Power of Attorney [Exhibit 1] was broadly drafted and clearly delegated to Ms. Buckingham a broad range of financial duties, including the obligation to collect and disburse Mr. Rhoades' money, for numerous purposes, including nursing care.

The Court has reviewed the monthly bank records of Mr. Rhoades with regard to the receipt of payments from his three retirement plans. For numerous months, as described below, there is no record of receipts from some or all of the retirement plans. The Court finds the failure to collect the retirement benefits to be a violation of her fiduciary duty under the General Power of Attorney. Regardless of whether the checks were nefariously taken by a third-party (such as Mrs. Jay), or if the retirement plan innocently failed to mail the checks, or if the checks were “lost in the mail,” Ms. Buckingham possessed the legal duty to account for them and to ensure that the funds were deposited into Mr. Rhoades’ account. Ms. Buckingham cannot merely claim that the funds were never received and rest on this conclusion that she had no duty to inquire about the lack of receipt and to discover the cause for the failure to receive them. The failure to ensure receipt of the retirement benefits mandates the Court’s conclusion, as a matter of law, that Ms. Buckingham was negligent in completing her duties in the agency relationship created by the General Power of Attorney. As such, Gade Nursing Home is entitled to a judgment for damages resulting from the breach of legal duty.²

Measure of Damages

²R.C. 1339.092 provides as follows: (B) An attorney in fact is not personally liable for a debt of the attorney in fact's principal, unless one or more of the following applies: (3) The negligence of the attorney in fact gave rise to or resulted in the debt.

Regarding the calculation of damages, the Court first focused on deposits into Mr. Rhoades' account [Exhibit 8] and determines that Veteran's Administration benefits were generally not deposited therein. In the absence of proof of a deposit into his account, the Court finds that Ms. Buckingham owes Mr. Rhoades (and now Gade Nursing Home) for her failure to collect VA retirement funds unless a corresponding payment was made to Gade Nursing Home on Mr. Rhoades' account [Exhibit 6]. The Court gives no credit to Ms. Buckingham for funds deposited into her personal account when not actually received by Gade Nursing Home [Exhibit 7] since co-mingling of funds eliminates the ability to conclusively determine whether Mr. Rhoades' funds were actually paid for his own expenses or some other, presumably personal expenses, of Ms. Buckingham. The Court finds that Ms. Buckingham failed to collect the VA income of \$1,519 per month for the following months while she was the agent for Mr. Rhoades:³ for 2005 – May, June, July, August, September, October, November, December; for 2006 – January, February, March, April, May, June, July, August, September, October, November, December; for 2007 – January, February, April, June, July, August, September, October; for 2008 – March, August, September, October, November, December; for 2009 – January, February, March, April, May, June, July, August, September, October and November. This totals 45 months at \$1,519 per month for a total of \$68,355.

However, from other reliable evidence, the Court determines that the following amounts should be credited to the Defendant as properly applied to the benefit of Mr. Rhoades at Gade's Nursing Home: 2/15/07 - \$5,200 [Exhibit W]; 9/12/07 - \$4,500 [Exhibit X]; 4/29/09 -

³ The evidence either failed to establish receipt of the income or, if received, that there was a corresponding disbursement for the direct benefit of Mr. Rhoades (i.e. to Gade Nursing Home or an specific creditor)

\$1,625 [Exhibit WW]; and 9/17/07 - \$1,533 [Exhibit ZZ]. The total payments equal \$12,858.

Therefore, the Court finds that Jennifer Buckingham has failed to properly account for \$55,497 of VA proceeds. However, the Court determines that granting a judgment for this amount would be inappropriate since Ms. Buckingham purportedly disbursed some money through her checking account for the benefit of Mr. Rhoades. Precise proof of the amount actually paid was not presented, nor was it economically feasible to fully audit all her transactions to make a reliable determination. Accordingly, the Court reduces the amount which she owes to Gade Nursing Home to the amount left unpaid on its statement, to-wit: \$14,916.08.

Further, due to the failure of Ms. Buckingham to properly account for Mr. Rhoades' funds, and the wantonly egregious manner in which she failed to perform her duties under the General Power of Attorney, the Court finds that Plaintiff is entitled to reasonable attorney fees and expenses incurred in prosecuting this case, both on its own behalf and in the interests of Mr. Rhoades. Therefore, additional judgment is granted to Plaintiff in the amount of \$11,185.80. [See Exhibit 14.]

Finally, due to her failure to properly manage the checking account for Mr. Rhoades, overdraft charges in the amount of \$2,798 were incurred. This amount clearly would not have been incurred if Ms. Buckingham had properly performed her fiduciary duty. Additional judgment is granted to the Plaintiff in the amount of \$2,798.00.

IT IS, THEREFORE ORDERED AND DECREED that Gade Nursing Home, Inc. is granted judgment against Jennifer Buckingham in the total amount of \$28,899.88, plus judgment interest at four percent (4%) per annum from the date of judgment, plus the Court

costs. Costs to the Defendant. **FINAL APPEALABLE ORDER.**

Jonathan P. Hein, Judge

cc: Travis Flichman, Attorney for Plaintiff (via fax)
David Pixley, Attorney for Defendant (via fax)

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