

Clarify Delegability of Power to Create Trust

Background. Trusts and estates lawyers commonly assist clients in granting durable general powers of attorney (DGPOA) to chosen agents. A DGPOA typically gives the agent broad authority to deal with the client's/principal's property, including (or in the event of) the principal's subsequent incapacity, thereby avoiding the need for a court-appointed conservator in that scenario. The agent's purported authority might include expressly-granted "estate planning" powers such as the power to make gifts of the principal's property, to change beneficiary designations, to fund existing trusts, or—as relevant here—to create new trusts.

SJC Opinion. In a 2022 case captioned *Barbetti v. Stempniewicz*, the Supreme Judicial Court addressed the requirements for empowering an agent to create a trust on a principal's behalf.¹ The court held that *if* a principal can ever empower an agent to create a trust, that power must be granted expressly.² The court did not decide, however, whether a principal can *ever* empower an agent to create a trust—but it suggested that an existing provision of the Massachusetts Uniform Trust Code (MUTC) might bar such a delegation.³

Proposal. The BBA should support legislation clarifying that the power to create a trust *can be* delegated, if it is delegated expressly (consistent with *Barbetti*) rather than, e.g., as part of a general grant of broad authority.

Reason #1: Upset Expectations. The suggestion in *Barbetti*, that the power to create a trust is nondelegable, came as a surprise to trusts and estates lawyers because it was contrary to what was understood to be contemporary "common law."⁴ Lawyers have been acting under the belief that the power is delegable. That means that without a legislative clarification, existing trusts may be called into doubt and agents' powers under existing DGPOAs may be questioned.

Reason #2: Unintended Statutory Implication. The MUTC provision that the *Barbetti* court cited was *not intended* to bar creation of a trust on behalf of an incapacitated principal (settlor).⁵ The provision contemplates only the more typical scenario, in which a trust is created by the settlor on the settlor's own behalf.⁶ The text of the provision and the *Barbetti* court's discussion

¹ *Barbetti v. Stempniewicz*, 490 Mass. 98 (2022).

² *Id.* at 111.

³ *Id.* at 114 (citing G.L. c. 203E, § 402(a), which says that a trust is created "only if," among other requirements, the "settlor has capacity" and "indicates an intention to create a trust").

⁴ *See, e.g.*, Unif. Power of Attorney Act § 201(a)(1) (2006) (implying that the power to create a trust is delegable); Restatement (Third) of Trusts § 11 cmt. f (2003) (arguing that the historical prohibition against delegation of a related power, the power to make a will, should be "strictly construed"). To the same end: The court in *Barbetti* cited the law of eight other jurisdictions, but in only one had it ever been established that the power to create a trust was nondelegable—and that judicial determination was later "overruled" by the Texas legislature. *See* 490 Mass. at 110–11.

⁵ *See* G.L. c. 190B, § 5-407(d)(4) (Massachusetts Uniform Probate Code provision, enacted close in time to the Massachusetts Uniform Trust Code, authorizing court to create trust on behalf of incapacitated settlor).

⁶ G.L. c. 203E (MUTC), § 402(a), is based on Uniform Trust Code § 402(a). The comments of both drafting committees indicate that the provision was intended only to codify general requirements for creating a trust, not to address the more unusual question of delegability. *See, e.g.*, Report of the Ad Hoc Massachusetts Uniform Trust

thereof, however, creates the impression that the legislature may have implicitly barred delegation of the power to create a trust. That was not intended and should be corrected.

Reason #3: The Principal’s Decision. The purpose of a DGPOA is to allow a principal to empower a trusted agent to take actions, in the event of the principal’s incapacity, that would otherwise require the appointment of a conservator without all of the associated delay and expense. Those actions should include the creation of a trust on the principal’s behalf. The power to create a trust could enable the agent to: update the principal’s estate plan based on post-execution changes to relevant law or facts; effect wishes of the principal that were not sufficiently formalized before the principal’s incapacity; and engage in beneficial tax and probate-avoidance planning. Exercise of the power would be subject to the agent’s fiduciary duty to the principal, and it could be reviewed for exceeding the scope of the power or for breach of that duty. It is believed, furthermore, that the *Barbetti* requirement—that the power be granted only expressly—would cause principals to be sufficiently alerted that the power is included and prevent it from being inadvertently included in broadly-phrased “boilerplate.”

Counterargument #1: Risk of Abuse. Although emerging consensus appears to be that the power to create a trust is and should be delegable (if delegated expressly), the grant of any power under a DGPOA—the exercise of which generally does not require prior authorization from a court—increases the risk that the power will be obtained and/or exercised wrongfully.⁷ It is believed, however, that while the ability to delegate the power to create a trust will substantially increase agents’ ability to serve incapacitated principals, it will not substantially increase the risk already created by the ability to delegate similar powers, such as the power to make gifts of the principal’s property.⁸

Counterargument #2: Wait for More Comprehensive Legislation. The Uniform Power of Attorney Act implies that the power to create a trust may be delegated (expressly).⁹ A version of that act has been introduced in Massachusetts multiple times. The act speaks to other aspects of

Code Committee 18 (rev. July 18, 2012) (“The requirements for creation of a Trust are on the whole standard.”). Furthermore, the National Conference of Commissioners on Uniform State Laws, which issued the Uniform Trust Code, also issued a Uniform Power of Attorney Act that *implies* the power to create a trust is delegable, suggesting that Conference did not believe the Uniform Trust Code bars delegation. Unif. Power of Attorney Act § 201(a)(1) (2006).

⁷ [W]hile 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. This risk is compounded in the 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.

Barbetti, 490 Mass. at 114 (citations omitted).

⁸ See Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 cmt. 1 (2003) (“The agent (attorney-in-fact) may make inter vivos donative transfers of the mentally incapacitated person’s property to the extent allowed by the terms of the power of attorney.”).

⁹ Unif. Power of Attorney Act § 201(a)(1) (2006).

relevant law, in a manner that might help limit any additional risk of abuse.¹⁰ It may be argued that the legislature should wait to correct the “*Barbetti* suggestion” until the legislature addresses DGPOA issues more comprehensively. However, because *Barbetti* upset practitioners’ expectations (see “Reason #1,” above), and because the *Barbetti* court suggested that the legislature had *already* spoken to this issue (see “Reason #2,” above), it is believed that the legislature should not wait to correct it.

¹⁰ See, e.g. *id.* § 114(a) (prescribing mandatory duties of agent that cannot be eliminated by the provisions of the DGPOA); *id.* § 114(b) (prescribing presumptive duties); *id.* § 201(b) (creating presumption that DGPOA does not empower unrelated agent to benefit from principal’s property).