

## PROBATE CORNER

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ARTICLE: May An Attorney-In-Fact Withdraw Money From the Principal's Totten Trust Without Express Authority Under The Power Of Attorney?

In Beane v. SunTrust Banks, Inc., 2010 Fla. App. LEXIS 17153 (Fla. 4<sup>th</sup> DCA 11/10/10), the decedent, Lillian Wilde, executed a durable power of attorney naming her niece, Deborah Lorenzo, as her attorney-in-fact. The durable power of attorney authorized the Lorenzo to "demand, sue for, collect, recover and receive all goods, claims, debts, monies, interest and demands whatsoever now due, or that may hereafter be due, or belong to me . . . ."

The next day, Lorenzo, utilizing the power of attorney, transferred \$150,000 from Wilde's Totten trust account at SunTrust Bank, which named Frances Wallin as the beneficiary, to another account in the name of Orson Lorenzo.

In 2007, the PR of Wilde's estate filed suit against SunTrust for allowing the transfer of the funds from Wilde's Totten trust. The trial court and the parties agreed that the dispositive issue was whether Lorenzo had the authority under the power of attorney to withdraw \$150,000. The PR claimed that the executed power of attorney did not expressly authorize the withdrawal of money from the Totten trust and relied on §709.08(7)(b), Fla. Stat. which states in part:

Notwithstanding the provisions of this section, an attorney in fact may not:

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5. Create, amend, modify, or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal *unless expressly authorized by the power of attorney*... [Emphasis Added]

The PR claimed that a Totten trust is a "disposition effective at the principal's death."

The trial court determined that the power of attorney allowed Lorenzo to withdraw the funds and that SunTrust could not be held liable as a matter of law. The appellate court, in affirming Judge Oftedal's order, reasoned in part as follows:

Since an owner of a Totten trust can withdraw from the account without constraint, the prospective Totten trust beneficiary cannot object to the depositor's withdrawal from the Totten trust. As this court explained:

Like a depositor's withdrawal of funds from a Totten trust bank account, a settlor/trustee's withdrawal of funds from a revocable trust is tantamount to a revocation or termination of the trust with respect to the funds withdrawn. It is in this context that Malasky held that a prospective trust

beneficiary has no standing to object to such a disposition of the property; the settlor retained the right to remove the property from the trust for any purpose and for any reason.

*Siegel v. Novak*, 920 So. 2d 89, 95 (Fla. 4th DCA 2006). Because the depositor can change the beneficiary without constraint, and the prospective beneficiary has no standing to object to such changes, we therefore find that merely withdrawing money from the Totten trust does not, as a matter of law, change the "disposition effective at the principal's death." The depositor, or in this case the attorney-in-fact, merely changes the amounts within the Totten trust, which is a right retained by the depositor at all times, or by the attorney-in-fact while the durable power of attorney is in force.

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**PRACTICE TIP:** You should consider adding language to your Durable Power of Attorney restricting the Attorney-In-Fact's authority to revoke (i.e., withdraw assets from) all revocable trusts or Totten trusts created by the principal during the principal's lifetime. Additionally, you should consider adding language to your client's revocable Trust expressly reserving the right to withdraw assets from the Trust to the grantor and prohibiting any other person (including any Attorney-In-Fact) from exercising that right during the grantor's lifetime. *See Gurfinkel v. Marmor*, 972 So. 2d 927 (Fla. 3<sup>rd</sup> DCA 2007) where the Trust expressly reserves the right to amend or withdraw assets from the Trust to the grantor and prohibits any "conservator," "guardian," or "any other person" from exercising these rights during the lifetime of the grantor.

**QUERY:** Could the PR have successfully argued that the Attorney-In-Fact was making a gift of the principal's property without express authority under the power of attorney? *See James v. James*, 843 So. 2d 304 (Fla. 5th DCA 2003) ("In general, an agent cannot make gifts of his principal's property to himself or others unless it is expressly authorized in the power.").