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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000558-MR

L. ANNE H. DISHMAN, INDIVIDUALLY AND AS FORMER TRUSTEE OF THE CHARLES H. DISHMAN, III IRREVOCABLE TRUST — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 05-CI-003405

SUSAN DISHMAN DOUGHERTY, AS EXECUTRIX OF THE ESTATE OF CHARLES H. DISHMAN, III, AND TRUSTEE OF THE ESTATE OF CHARLES H. DISHMAN, III IRREVOCABLE TRUST — APPELLEE

AND NO. 2013-CA-000559-MR

SUSAN DISHMAN DOUGHERTY, EXECUTRIX OF THE ESTATE OF CHARLES H. DISHMAN, III — CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 05-CI-003405

L. ANNE H. DISHMAN, INDIVIDUALLY AND
AS FORMER TRUSTEE OF THE CHARLES
H. DISHMAN, III IRREVOCABLE TRUST CROSS-APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: These appeals address rulings by the Jefferson Circuit Court awarding or failing to award attorney fees to L. Anne H. Dishman in her capacity as trustee or former trustee of the Charles H. Dishman, III Irrevocable Trust (the Dishman Trust). In her direct appeal, Dishman contends that she should have recovered all of the fees and costs she personally expended. In her cross-appeal, Susan Dishman Dougherty, in her capacity as executrix of the estate of Charles H. Dishman, III seeks reversal of the fees that were awarded. Because we agree with Susan that the Power of Attorney (POA) did not provide Anne with the authority to create the Dishman Trust, we must reverse the summary judgment, vacate the final judgment, and remand for the entry of a summary judgment in favor of Susan.

Anne and Charles H. Dishman, III were married in 1997, and at that time they were both multimillionaires. Shortly before they were married, they entered into an Antenuptial Agreement dated September 5, 1997. The Antenuptial Agreement provided that each would retain complete and continuous control of the

separate property they brought into the marriage and pay their own debts.[1]

Specifically regarding Charles's property, the Antenuptial Agreement provided:

> 2. Charlie's Separate Property: Anne hereby acknowledges, understands and agrees that, except as specifically set forth herein, whether governed by the laws of the United States of America, the Commonwealth of Kentucky or of any other state, country, province, territory or jurisdiction, Charlie's interest in all assets owned by Charlie on the date of their marriage [omitted list of assets] shall remain in the separate property of Charlie after the marriage and Charlie shall keep and retain sole ownership and control of such property, free from any claim, lien or right, inchoate or otherwise, on the part of Anne, and Charlie may dispose of any part of such property, including, but not limited to, the proceeds of the disposition of such property, at any time and in any manner he may see fit.

Paragraph 1 contained an identical provision related to Anne's separate property.

Anne and Charles had two homes, one in Louisville and one in North Carolina, and they split their time between these two homes.

In 2001, Anne and Charles signed mutual POAs in favor of each other. Charles's POA, signed February 26, 2001, provided as follows:

> I, CHARLES H. DISHMAN, III, of Louisville, Kentucky, appoint my spouse, L. ANNE H. DISHMAN, of Louisville, Kentucky, my Attorney-in-Fact. I appoint my daughter, SUSAN D. DOUGHERTY, as successor Attorney-In-Fact. . . . I grant to my Attorney-in-Fact full powers for me and in my name to:
>
> 1. Draw, make and sign any and all checks, contracts or agreements;
>
> 2. Receive any money that may be due me;

[1] The Antenuptial Agreement is included as a sealed document in the certified record on appeal.

3. Enter any safety deposit box leased to me individually or jointly with another person;

4. Purchase, sell (including on installments), lease, mortgage, pledge or convey any real or personal property that I may now or hereafter own or have an interest in;

5. Retain and/or lease all liens on any real or personal property that I may now or hereafter own or have an interest in;

6. Borrow or lend money on my behalf;

7. Sign, with power of substitution and revocation, all tax returns, records, or Forms 2848, that I may be required or elect to file with any federal, state or other governmental body, to make tax elections and to pay taxes;

8. Institute or defend legal actions concerning me or my property;

9. Convey any real or personal property to the Trustee of any trust agreement between me and said Trustee and entered into either before or after the date of this instrument;

10. Disclaim, under applicable state law, in whole or in part the right of transfer to me, or my right of succession, to any property or interest therein, including a future interest;

11. Renounce or contest a testamentary disposition;

12. Exercise all options available to me regarding policies which insure my life or the life of another including, but not limited to changing the owner of beneficiary, and canceling policies;

13. Elect methods of payment for any retirement plans (including IRAs, tax sheltered annuities, and Keogh plans), change beneficiaries of said plans, elect to

rollover distributions from said plans, alter contributions made by me to said plans, make contributions on my behalf, and waive my non-employee spousal rights;

14. Purchase United States Treasury bonds eligible for redemption at par in payment of the federal estate tax;

15. Deal with and apply for benefits from the Social Security Administration and other federal, state and local agencies on my behalf;

16. Make gifts on my behalf, either outright or in trust, in amounts not exceeding in any year to any donee the gift tax annual exclusion then in force;

17. Take charge of my person in case of sickness or disability of any kind, and to remove and place me in such hospitals or places as my attorney-in-fact may deem best for my personal care, comfort, benefit and safety; and for said purposes to use and disburse any or all of said monies and other property; and

18. To do and perform in my name all that I might individually do.

I adopt and ratify all the acts of Attorney-in-Fact which are done in pursuance of this power. Further, this power shall not terminate if I become disabled.

. . . .

In 2003, Charles was diagnosed with corticobasal gangliotic degeneration (CBD), a fatal neurologic disease that impacts the patient's physical and mental capabilities. He began exhibiting behaviors that jeopardized his safety in 2003 and 2004, and one of his treating physicians advised Anne in 2004 that Charles was mentally unable to make informed decisions regarding his healthcare or financial

affairs. In a letter dated August 27, 2004, Dr. Matthew P. Rogers, Charles's primary care physician, stated as follows:

> I care for Mr. Dishman in a primary care capacity. He has corticobasal degeneration, a progressive neurologic disease that renders affected patients immobile and demented. Mr. Dishman's condition has advanced to the point where he requires 24 hour around-the-clock care for all of his activities of daily living. His dementia and physical disabilities are extensive and will worsen. He is physically unable to care for himself, and mentally unable to make informed decisions regarding his healthcare, financial affairs and social matters. Ann [sic] (Lavera) serves as his healthcare surrogate and power of attorney. I have recommended that she seek guardianship of Mr. Dishman given his severe neurologic disease. Please contact my office for questions or concerns.

Due to his deteriorating condition, Anne consulted with attorney John Cummins of Greenebaum Doll & McDonald about how to protect Charles's assets, including creating a trust. In a letter dated September 16, 2004, to Anne, attorney Cummins stated: "We will use your authority under Paragraph 9 of Charlie's Power of Attorney to you to establish a Trust Agreement for Charlie's sole lifetime benefit, with remainder to his estate[.]" On October 15, 2004, the Dishman Trust was created between Charles via Anne's POA and Anne and Bosworth M. Todd, Jr., who were designated as co-trustees. Mr. Todd was Charles's financial advisor. The trust provided in relevant part as follows:

> WITNESSETH:
>
> A. Charles H. Dishman, III has executed a Power of Attorney dated February 26, 2001, recorded in Deed Book 8318, Page 626 in the Office of the Clerk of

> Jefferson County, Kentucky, naming his spouse L. Anne H. Dishman as his Attorney-in-Fact.
>
> B. L. Anne H. Dishman has full power to act on behalf of Charles H. Dishman, III pursuant to such Power of Attorney, including the power to convey any real estate or personal property to the Trustee of any Trust Agreement between Charles H. Dishman, III and said Trustee entered into either [before] or after the date of the said Power of Attorney.
>
> C. In order to obtain the advice, direct involvement and expert business advice of the same advisor whom Charles H. Dishman, III had consulted prior to the commencement of his disability, L. Anne H. Dishman desires to exercise her Power of Attorney to create this Trust Agreement on behalf of Charles H. Dishman, III and to enlist the involvement of the Co-Trustee above listed in the administration of the financial affairs of Charles H. Dishman, III for his benefit.

Pursuant to Article 2.2, "[t]his trust shall terminate upon the death of Settlor. Upon the death of Settlor, the entire net balance of this trust estate shall be distributed to Settlor's estate, to be distributed as part thereof." Article 3.1(c) provided:

> No trustee shall at any time be held liable for any action taken or not taken, or for any loss or depreciation of value of any trust property, unless such trustee has acted in bad faith. If any trustee is at any time involved, either individually or as trustee, in any action, claim or legal proceeding [related to] this trust, by reason of being a trustee hereunder, that trustee shall [be] indemnified from this trust estate for any demand, action, suit, claim, arbitration award, damage, judgment, settlement, cost, fee or expense (including court costs and attorney fees) in any way arising directly or indirectly therefrom, unless a final determination is made by a court of competent jurisdiction that such trustee has acted in bad faith.

Article 3.8 provided that "[t]his Trust Agreement is irrevocable, and cannot be amended by Settlor or any person acting on behalf of Settlor at any time." The corpus of the Dishman Trust included all assets Charles owned that were subject to transfer, including a securities account, shares, units, and a mutual fund account. Neither Charles nor any members of his family were notified about the creation of the trust or asked to review it.

In late 2004 and 2005, after creating the Dishman Trust and after consulting with her attorneys, Anne sought guardianship of Charles, first in North Carolina and then in Jefferson County, Kentucky. Both of these actions were dismissed; the North Carolina case due to lack of jurisdiction because Charles had moved back to Kentucky and the Jefferson County case based upon the existence of less restrictive alternatives. In January 2005, Charles revoked his POA, and in April 2005, he filed a petition to dissolve his marriage to Anne. At that time, he was seventy-three years old and Anne was sixty-seven years old. His marriage to Anne was dissolved by the Jefferson Family Court in June 2005; the family court made a finding that Charles was competent in granting the dissolution. Mr. Todd resigned as a co-trustee of the trust in February 2005.

On April 16, 2005, Charles filed the complaint underlying these appeals. He sought a declaration of rights as to the validity and legality of the Dishman Trust, removal of Anne as the trustee, injunctive relief, accountings, and damages against Anne individually and as trustee. In the complaint, Charles indicated that he was capable of managing his own financial affairs and property, that Anne had refused

to resign any position of authority with his companies or as trustee, and that Anne had not provided complete information about the trust since its creation. Charles stated that Anne had caused the trust to incur expenses exceeding $125,000.00 in attorney fees and liabilities that did not benefit him as the sole beneficiary of the trust. Rather, these funds were used to pay legal fees to represent Anne individually in her efforts to be appointed as Charles's guardian in the two guardianship cases she filed. He also asserted that Anne's conduct in regard to his assets was inconsistent with the terms of the Antenuptial Agreement. In relation to the creation of the Dishman Trust, Charles contended that the POA was not broad enough to create the trust and did not authorize Anne to do so. On Charles's motion, the court entered a restraining order enjoining Anne, without his prior written consent or order of the court, from using any trust assets to pay any expenses; authorizing the sale, exchange, or liquidation of any current asset of the trust; or incurring any debt or financial obligation for the trust. All requests for payment of expenses, bills, or invoices by the trust were to be submitted to Charles in writing through legal counsel.

Anne answered Charles's complaint on May 13, 2005, and requested its dismissal. Anne filed an amended answer in November, contending that the POA authorized her to use Charles's funds for the guardianship proceedings and to create and administer the trust, as these actions were for his benefit. Shortly after their marriage was dissolved in June, Anne moved the court to withdraw as trustee of the trust and to appoint a successor trustee. In his response, Charles requested

that he and CPA Benjamin L. Rogers be appointed as co-trustees. Charles later moved to have Susan named as a co-trustee along with Mr. Rogers. Anne objected to this motion based upon concerns that Susan would not be able to preserve and manage the trust assets for Charles's benefit or even maintain the trust.

On November 3, 2005, the court entered an order related to Anne's resignation as trustee. The court indicated that Anne had agreed to resign, but that she objected to Charles or Susan being co-trustees. She also sought absolution from any further responsibility for any actions she took while she was a trustee. Charles objected to that request. The court accepted Anne's resignation, but based upon its legal concerns regarding the appointment of Charles as a trustee, it appointed Mr. Rogers and Susan as co-trustees. Anne was to settle up in accordance with the terms of the trust until the court ruled on the ultimate issue of its validity. Anne then sought supplementation of the order for a ruling that she was released from all liability. Charles objected to the motion and stated that Anne had not settled up pursuant to the court's earlier order. By order entered in June 2006, the court dissolved the restraining order that had been entered the previous year.

In February 2006, Anne moved for and was granted leave to file a second amended answer as well as a counterclaim. In her counterclaim, Anne sought reimbursement for $94,968.00 she expended of her own funds to pay for attorney fees that had been incurred on behalf of Charles that should have been paid pursuant to the terms of the Dishman Trust. In his answer, Charles stated that the

attorney fees sought in the counterclaim were not incurred on his behalf or for his benefit.

Charles passed away on July 25, 2006, and Susan was appointed as the executrix of his estate on August 2, 2006. On February 21, 2007, Susan, as executrix, moved to be substituted as the plaintiff in the action. The court granted the motion by order entered March 2, 2007.

In May 2007, Susan filed a motion to dismiss Anne's counterclaim, stating that it failed to state a cause of action, was barred by the statute of limitations, and was without merit. Susan argued that Anne had never sought permission of the court pursuant to the terms of the restraining order to use trust assets to pay the attorney fees at issue. Susan also argued that Anne had failed to present a claim to her as executrix within six months of her appointment pursuant to Kentucky Revised Statutes (KRS) 396.011, meaning that the counterclaim was filed outside of the limitations period. In addition, Susan filed a motion for partial summary judgment in favor of the estate to recover a judgment for $81,769.03 in attorney fees that Anne had personally incurred that had been paid by the trust between August 26, 2004, and March 12, 2005. Susan argued that these fees were used for Anne's personal benefit to create the trust and to file two guardianship suits to establish that Charles was incompetent. Susan went on to state that Anne had expended $176,842.03 in total.

In September 2007, Anne objected to the motion to dismiss, and the court granted her additional time to conduct discovery and respond to the motion for

summary judgment. Anne also moved for summary judgment on Susan's complaint, arguing that the only remaining claim to be decided was her claim for monetary damages: which party should be liable for attorney fees Anne incurred in creating the trust and instituting the guardianship proceedings. She asserted that the fees she expended were for a proper exercise of her fiduciary duty as attorney-in-fact for Charles and as trustee.

Thereafter, the parties engaged in lengthy discovery disputes. In August 2010, Anne moved the court for an order terminating discovery and requiring Susan to file a response to her motion for summary judgment. The court granted Susan thirty days to file her response by order entered October 5, 2010, but did not close discovery.

On November 3, 2010, Susan filed her response to Anne's motion for summary judgment, arguing that the POA did not authorize Anne to create the Dishman Trust and that Anne used Charles's funds to further her own interests rather than Charles's interests. By separate motion, Susan moved the court to declare the rights of the parties and to enter partial summary judgments in her favor to recover $80,233.43 in attorney fees paid by the trust that were incurred by Anne, personally, between October 15, 2004, and March 12, 2005. She also requested an additional accounting from Anne.

The court held oral arguments on the cross-motions for summary judgment on February 25, 2011. Anne argued that she had acted in good faith and that she had the authority under the POA to create the Dishman Trust. On the other hand,

Susan argued that good faith was not at issue because the POA did not authorize Anne to create the trust and the creation of the trust violated the Antenuptial Agreement, both of which were questions of law. Susan argued that Anne mischaracterized Paragraph 9 of the POA. She stated that the general rule in Kentucky is that an attorney-in-fact may only exercise rights that are explicitly given. The specific right to create a trust had to be provided for in the POA for Anne to be able to do so. Susan cited to extra-jurisdictional cases addressing specific versus general language provided in a POA, stating that there were no cases on point in Kentucky. Susan characterized this action as an estate planning activity. In reply, Anne argued that a POA was not required to delineate every action an attorney-in-fact may take.

On May 27, 2011, the circuit court entered a memorandum and order ruling on the pending motions. The court ultimately denied Susan's motions for summary judgment and for dismissal of Anne's counterclaim, and partially granted and partially denied Anne's motion for summary judgment. The court held that Counts 2 and 3 of the complaint were moot. The court then addressed Susan's argument that the POA did not authorize the creation of the trust because such an action was not expressly authorized. The question before the court was "whether Paragraph 9 can reasonably be construed as conferring authority on [Anne], as attorney-in-fact, to create the Irrevocable Trust." The court concluded:

> [Susan] refers the Court to a number of cases, primarily from other jurisdictions, which found that the attorney-in-fact exceeded his or her authority by creating

> a trust which was not prescribed by the principal in the Power of Attorney. In each of these cases, the Power of Attorney was a general one, authorizing the attorney-in-fact to act in the principal's stead in all matters of business or assets, but silent on the issue of trusts. In contrast, the Power of Attorney executed by Mr. Dishman specifically confers upon Ms. Dishman the power to convey real or personal property to the trustee of any trust agreement between Mr. Dishman and the trustee, whether the trust agreement was entered into before or after the Power of Attorney was executed. Because the Power of Attorney contemplates that a trust agreement may be entered into after the date of execution, Ms. Dishman had the authority to act in Mr. Dishman's stead, and the document does not restrict Ms. Dishman's power to convey only to [a] trust created personally by Mr. Dishman, the Court finds that Ms. Dishman was authorized to create the Trust under the terms of the Power of Attorney.

The court went on to conclude that the trust did not breach the Antenuptial Agreement, that Susan had failed to timely preserve her objections to the final accounting, that Susan failed to establish any proof of conversion, that Anne's counterclaim was not time-barred, and that Anne's objections to discovery requests regarding the attorney fees she paid did not constitute a judicial admission. However, the court determined that genuine issues of material fact remained as to whether Anne had acted in good faith in her capacities as attorney-in-fact and trustee. The court later scheduled a bench trial for March 27, 2012, on the remaining issues.

Susan moved the court to alter, amend, or vacate its interlocutory order on December 28, 2011, to correct a factual error and to grant her motions for summary judgment and dismiss the counterclaim based upon Anne's failure to

revive her counterclaim within one year after Charles's death pursuant to KRS 395.278. Anne objected to the motion, and the court entered an order on March 6, 2012, denying Susan's motion, reasoning that "the substitution of the personal representative alone revives the claim, regardless of which party moves for the substitution" and that Anne's counterclaim was timely filed.[2]

In her listing of special damages, Susan indicated that she was seeking damages in the amount of $81,133.43, the total of ten invoices or bills for legal fees or costs. In her itemization of damages filing, Anne indicated that she was seeking a total of $95,073.00 in damages from three invoices from Greenebaum. The first invoice, dated March 25, 2005, was for $51,077.88; the second invoice, dated April 18, 2005, was for $27,808.04; and the third invoice, dated May 25, 2005, was for $16,187.08.

The matter proceeded to an eight-day bench trial on the issue of whether Anne acted in good faith in her capacities as attorney-in-fact and trustee in expending funds belonging to Charles and the trust. On September 5, 2012, the court entered its findings of fact and conclusions of law. The court observed:

> Attorney fees of $176,101.43, the total amount of attorney fees claimed by both sides, are significant under almost anyone's definition. However, the attorney fees of $81,133.43 that [Susan] claims are owned [sic] to the estate from Mrs. Dishman total less than one-half of one percent of Mr. Dishman's total assets. The total amount represents just under one percent of Mr. Dishman's total assets. If Anne was acting in good faith when she

[2] We note that the record contains an order signed by Judge Mitch Perry entered March 2, 2012, purporting to grant Susan's motion. On Anne's motion, the court ruled that this was a clerical error and that the order was not, therefore, effective.

> incurred those fees, it does not seem to be unreasonable to pay that small percentage to preserve the balance of the fortune for dissipation, either through Charlie's imprudence or from overreaching by family, friends and acquaintances. **The issue was, and remains, whether Anne Dishman acted in good faith when she undertook the course of action that resulted in the creation of the trust, and whether she acted in good faith in managing the trust, until she was ultimately removed as Trustee by the Court**. [Emphasis in original.]

The court also observed,

> [T]his is an emotionally charged case. While there is not a great deal of disagreement as to the actual events that precipitated this lawsuit, the interpretation each side has of the meaning of those events could not be more different. . . . It is clear that both Susan Dougherty and Anne Dishman see themselves as the protector of Mr. Dishman against the perceived greed of the other, and perceive each other's motives accordingly, whether accurate or not. Therefore, the Court places more weight on the objective facts than it does the testimony of the parties relating to motive.

The court concluded that from an objective review, Anne's actions were taken on advice of counsel and did not result in the dissipation of any of Charles's assets, other than the attorney fees expended in preserving his assets. Therefore, the court found that the $81,133.43 in attorney fees paid for by the trust until the March 25, 2005, invoice "were amounts expended upon advice of counsel and in good faith[.]" Therefore, Anne did not have to reimburse the estate for these expenses. Regarding Anne's counterclaim, the court first noted that the amount claimed had been reduced by $105.00 to $94,968.00. The court considered the three statements and found that the charges up to and including March 24, 2005, were to be paid by

the trust because the expenses were related to the guardianship actions or the trust. However, as of March 25, 2005, the court determined that

> the interests of Anne Dishman are beginning to be considered, and while this does not exclude the possibility that future attorney fees may properly have been spent for services that were designed to benefit Mr. Dishman, or his interest in the Trust, it makes it nearly impossible, based on the invoices, for the Court to determine that those charges are for services that *solely* were intended to benefit the Trust. [Emphasis in original.]

Therefore, the court found that charges from the second invoice from March 24 through March 31, 2005, totaling $15,310.00, and the new charges on the third invoice totaling $16,187.08, were not appropriate for payment by the trust. In sum, the court held that Susan was not entitled to recover any money from Anne and that Anne was entitled to recover $63,470.92 from Susan.

Anne filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter or amend the court's order to hold that she was entitled to recover the full amount of attorney fees she claimed and that she was entitled to prejudgment interest. Susan also filed a CR 52.02 motion for the court to make additional findings and amend its findings as well as a CR 59.05 motion to alter, amend, or vacate. In addition, Anne moved for an award of attorney fees and costs in the amounts of $310,609.40 and $10,523.65, respectively.[3] Susan objected to Anne's motions, arguing that Anne could only have asserted her claim for attorney fees and costs

[3] We note that this is more than three times the amount of damages Anne was seeking in her counterclaim and well in excess of the total amount of fees at issue in both Susan's claim and her counterclaim.

against the trust or its representatives, who were never parties to the case. In reply, Anne argued that the trust had been properly before the court since the case was filed in 2005 because she had been sued both individually and in her capacity as trustee.

On December 10, 2012, and in response to Susan's response above, Anne filed a motion for leave to file a third amended answer and counterclaim to join Susan, as trustee, both as a plaintiff and as a defendant to her counterclaim. Counsel moved to make a special appearance on behalf of Susan in her capacity as trustee in order to respond and object to Anne's motion.

The court entered two orders on February 18, 2013, ruling on the pending motions. In the first order, the court denied both parties' motions to alter, amend, or vacate, and declined to award prejudgment interest. In the second order, the court considered Anne's motions for an award of attorney fees and costs and for leave to file a third amended answer and counterclaim. The court was unable to find any authority holding that attorney fees incurred by the former trustee after removal as a trustee are payable by the trust. The court concluded that "any attorney fees expended in the process of pursuing her counterclaim were not incurred for the benefit of the Trust, but were for the benefit of the Defendant personally." The court also concluded that amendment of the answer and counterclaim to add the trust or the successor trustee would be futile. The court went on to consider whether it could nevertheless equitably award Anne attorney

fees payable by Susan. It ultimately declined to award any attorney fees to Anne and denied both pending motions. This appeal and cross-appeal now follow.

In her direct appeal, Anne contends that the circuit court erred in denying her motion for attorney fees and costs and that she is entitled to the full amount of her counterclaim rather than just a portion of it. In her cross-appeal, Susan contends that the circuit court's summary judgment should be reversed and the judgment vacated because the POA did not authorize the creation of the Dishman Trust, that the creation of the Dishman Trust breached the Antenuptial Agreement, that Anne failed to present her claim within six months, that Anne failed to timely revive her counterclaim, and that Anne breached her fiduciary duties as attorney-in-fact and as a trustee of the Dishman Trust. Before we reach Anne's direct appeal, we must first address Susan's cross-appeal.

The first issue we shall address is whether the POA authorized the creation of the Dishman Trust. Susan contends it does not, while Anne contends that it does. Because we agree with Susan that the POA did not specifically authorize Anne to create a trust as attorney-in-fact, when considered in conjunction with the terms of the Antenuptial Agreement that specifically kept their assets separate, we must reverse the summary judgment.

An appellate court's standard of review from a summary judgment is well settled in the Commonwealth:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine

> issues as to any material fact and that the moving party was entitled to judgment as a matter of law." . . . Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (footnotes omitted).

As a general rule, a party may not appeal from an order denying a motion for summary judgment because such orders are inherently interlocutory. However, there is an exception to this rule, as this Court explained in *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004):

> It is well settled in this Commonwealth that the denial of a motion for summary judgment is interlocutory and is not appealable. In [*Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave*, 751 S.W.2d 36 (Ky. App. 1988)], this Court held: "The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact." There is, however, an exception to this general rule, which was also addressed in *Leneave*: "The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom." [Footnotes omitted.]

Susan's cross-appeal from the order denying its motion for summary judgment on whether the POA authorized the creation of a trust meets this exception and is properly before this Court for review. The facts are not in dispute, the basis for the circuit court's ruling was an issue of law, Susan's motion was denied, and a final judgment has been entered from which both Susan and Anne have appealed. We

specifically reject Anne's argument that the circuit court's summary judgment order is not reviewable.

Susan contends that the plain language of the POA did not authorize the creation of a trust and that therefore the Dishman Trust is void. She asserts that the circuit court erred in its ruling otherwise and in its failure to rely upon precedents from foreign jurisdictions. As Susan correctly states in her brief, the construction of a power of attorney is a question of law for the court to decide. *See Clinton v. Hibbs' Ex'x*, 259 S.W. 356, 357 (Ky. 1924) ("It was therefore the exclusive province of the court in this case to construe the power of attorney and to determine therefrom the extent of the authority of the attorney in fact[.]").

KRS 386.093 provides the statutory definition of a durable power of attorney:

> (1) As used in this section, "durable power of attorney" means a power of attorney by which a principal designates another as the principal's attorney in fact in writing and the writing contains the words, "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time", or "This power of attorney shall become effective upon the disability or incapacity of the principal", or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.
>
> (2) All acts done by an attorney in fact under a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal were competent

and not disabled. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.

(3) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(4) The disability or incapacity of the principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(5) If the power of attorney is to become effective upon the disability or incapacity of the principal, the principal may specify the conditions under which the power is to become effective and may designate the person, persons, or institution responsible for making the determination of disability or incapacity. If the principal fails to so specify, the power shall become effective upon a written determination by two (2) physicians that the principal is unable, by reason of physical or mental disability, to prudently manage or care for the principal's person or property, which written determination shall be conclusive proof of the attorney in fact's power to act pursuant to the power of attorney. The two (2) physicians making the determination shall be licensed to practice medicine.

(6) Notwithstanding any provision of law to the contrary, a durable power of attorney may authorize an attorney in fact to make a gift of the principal's real or personal property to the attorney in fact or to others if the intent of

> the principal to do so is unambiguously stated on the face of the instrument.

To support her argument that the plain language of the POA did not expressly authorize the creation of a trust, but rather only specifically authorized the funding of a trust, Susan relies on case law from both within and outside of the Commonwealth. In *Ingram v. Cates*, 74 S.W.3d 783, 787-88 (Ky. App. 2002), this Court examined the construction of powers of attorney specifically in relation to gifts:

> In *Wabner v. Black*, the court refused to adopt a strict rule of law prohibiting attorneys-in-fact from making gifts to themselves without explicit written authorization by the grantor pursuant to a durable power of attorney. Instead, the court adopted an "utmost good faith" standard to be used to judge the acts of the attorney-in-fact. If determined to be within the exercise of authority granted by the power of attorney, then whether the attorney-in-fact acted with utmost good faith becomes a jury question.
>
> The power of attorney in *Wabner* contained a specific provision giving the attorney-in-fact power "to cash any certificate of deposits which I own or to change and redesignate the ownership thereof in his [her] sole discretion." Thus, the court held, the transfer of assets by the attorney-in-fact into an account, naming herself and the grantor as joint owners, was clearly within the grant of authority. Cates contends, and the trial court apparently agreed, that the *Wabner* case is distinguishable from the present case and that no jury question is presented.
>
> The construction of a power of attorney is a question of law for the court. Here, the power of attorney is not as specific as that in *Wabner*. It instead grants a general power to Dr. Ingram to "convey any personal property that I now or hereafter own...." It is an

unlimited power of attorney authorizing Dr. Ingram to make any conveyance of personal property. It is undeniable that the power of attorney did not specifically bestow upon Dr. Ingram the power to make a gift to himself or to another. Even so, it is clear that the general power to convey any personal property, if done in utmost good faith, permits these specific transfers. We know of no rule of law requiring that a power of attorney specifically delineate each and every transaction the attorney-in-fact is authorized to perform.

Cates points out the general rule of construction that when a power of attorney delegates authority to perform specific acts and also contains general words, the powers of attorney are limited to the particular acts authorized. In this case, however, the power of attorney contained general terms without limitation and the obvious purpose was to give Dr. Ingram authority to handle and transact all financial affairs as agent for Mr. Ingram.

Citing *Deaton v. Hale*, the court in *Wabner* explained the burden on the attorney-in-fact:

> An attorney-in-fact, one acting under a Power of Attorney, must account for any and all property, real or personal, that is received by him from or for his principal. The accounting must be for all property that is received by him while acting in his official capacity or otherwise. We do not mean to say, and we do not hold, that an agent operating in a fiduciary capacity, such as in the instant case, is liable for restoration or reimbursement for all properties received by him from the principal or from whatever source. What we are saying is that the agent does have the responsibility of explaining to the satisfaction of the Court what disposition was made of the properties. The agent is required to go forward with an explanation when proof is introduced showing that the property was in the hands of the agent. The burden of going forward with the proof so as to explain the disposition of any and all

> properties received by the agent is then with him. The issue thereby presented is one of fact to be decided by the court or by a jury, as the case may be.

Ingram, 74 S.W.3d at 787-88 (footnotes omitted). *See also Thiel Detective Serv. Co. v. McClure*, 142 F. 952, 955 (6th Cir. 1906) ("The transaction does not come under any of the specific powers granted, and there is no authority which can rightfully extend the power which Mrs. McClure so specifically defined.").

In *Hackworth v. Hastings Indus. Co.*, 142 S.W. 681, 682 (Ky. 1912), the former Court of Appeals addressed whether an agent exceeded his authority under a written power of attorney, relying upon Minnesota and New York authorities holding that powers of attorney require strict interpretation:

> In *Gilbert v. How*, 45 Minn. 121, 47 N. W. 643, 22 Am. St. Rep. 724, the court said: "All powers of attorney receive a strict interpretation, and the authority is never extended by intendment, or construction, beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued. (Authorities cited.) And a party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and must interpret it at his own peril. *Sandford v. Hendy*, 23 Wend. [N. Y.] 260; *Nixon v. Hyserott*, 5 Johns. [N.Y.] 58."
>
> In speaking of powers of attorney, in *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150, the New York Court of Appeals said: "They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions, which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations. *Wood v. Goodridge*, 6

> Cush. [Mass.] 117, 52 Am. Dec. 771; *Attwood v. Munnings*, 7 B. & C. 278; *Hubbard v. Elmer*, 7 Wend. 446, 22 Am. Dec. 590; *Hodge v. Combs*, 1 Black, 192 [17 L. Ed. 157]."

The *Hackworth* Court held that because the power of attorney was "special in its terms" and authorized the agent to subscribe for two shares of stock in a corporation, the agent's entry into a contract related to the construction of a building exceeded his authority. *Id*.

Similarly, the former Court of Appeals held in *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429, 431 (Ky. 1924):

> It is the general rule that such instruments are to be strictly construed in conformity to the controlling purpose in view, and that—
>
> > "Powers of attorney delegating authority to perform specific acts, and also containing general words, are limited to the particular acts authorized." *U. S. Fidelity Co. v. McGinnis*, 147 Ky. 781, 145 S. W. 1112; *Gouldy v. Metcalf*, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831.
> >
> > "Formal instruments conferring power, are, as will be seen, ordinarily, subject to a strict construction. Words used will be presumed to have their ordinary meaning, and the authority itself will be confined to the plain import of the language, and will not be extended by mere construction to embrace that which is not fairly included within the terms of the instrument." Mechem on Agency (2d Ed.) § 779.
>
> In *White v. Young*, 122 Ga. 830, 51 S. E. 28, an agent was given power to institute suit to recover land and sought to defend a similar action in regard to the

same land, but the court held the instrument could not be so construed, saying:

> "This was a formal power of attorney, apparently deliberately executed, attested, and recorded. It will therefore be strictly construed and in view of the controlling purpose, and the addition of general words will not be construed to extend the authority so as to add new and distinct powers different from those expressly delegated."

Turning to authority outside of Kentucky, in *Stafford v. Crane*, 382 F.3d 1175, 1183-85 (10th Cir. 2004), the Tenth Circuit Court of Appeals addressed the validity of an irrevocable trust created pursuant to a durable power of attorney, construing Oklahoma and Nebraska law. While the power of attorney authorized Mr. Stafford's attorneys-in-fact to manage his property, it did not expressly grant the authority to them to create, amend, or revoke a trust.

> Under Oklahoma law, "the instrument creating the special [power-of-attorney] agency will be strictly construed." *In re Rolater's Estate*, 542 P.2d 219, 223 (Okla. App. 1975). Additionally, "[i]n exercising granted powers, the attorney is bound to act for the benefit of his principal avoiding where possible that which is detrimental unless expressly authorized." *Id.*; *Bank IV, Olathe v. Capitol Fed. Sav. & Loan Ass'n.*, 250 Kan. 541, 828 P.2d 355, 361 (1992) ("[A]s a general rule, powers of attorney are to be strictly construed."). The power-of-attorney designating Billie Jo Stafford as Mr. Stafford's attorney-in-fact is broad and grants her authority to perform most actions with regard to Mr. Stafford's property and finances. However, it does not expressly grant her the authority to create, modify, or revoke trusts.
>
> The general weight of authority suggests that the power to create, modify, or revoke a trust is personal and non-delegable to an attorney-in-fact unless expressly granted in the power-of-attorney. *See* Carolyn L. Dessin,

Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role, 75 Neb. L.Rev. 574, 582 & n.38 (1996) (observing that "there are a few restrictions on the acts that can be delegated to agents under durable powers of attorney," but "noting the following powers are frequently non-delegable:" ... funding a trust) (citing Paul L. Sturgul, *Financial Durable Powers of Attorney*, 41 No. 5 Prac. Law. 21, 29–30 (July 1995)). Several states have codified this rule.[4] The Uniform Trust Code, promulgated by the National Conference of Commissioners on Uniform State Laws in 2000, takes the same position. *See* UNIF. TRUST CODEE § 602(e), *available at http://www.law.upenn.edu/bll/ulc/uta/2001final.htm* ("A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the

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[4] *See* CAL. PROB. CODE § 4264 ("A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power-of-attorney: (a) Create, modify, or revoke a trust."); FLA. STAT. ch. 709.08(7)(b) 5 ("[A]n attorney in fact may not ... [c]reate, 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."); MO.REV.STAT. § 404.710(6) ("Any power of attorney, whether durable or not durable, and whether or not it grants general powers for all subjects and purposes or with respect to express subjects or purposes ... may grant power of authority to an attorney in fact to carry out any of the following if the actions are expressly authorized in the power of attorney: To execute, amend or revoke any trust agreement[.]"); NEB. REV. STAT. § 30–3854(e) ("A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power."); UTAH CODE ANN. § 75–5–503 ("A power of attorney may not be construed to grant authority to an attorney-in-fact or agent to perform any of the following, unless expressly authorized in the power of attorney: (1) create, modify, or revoke an inter vivos revocable trust created by the principal; (2) fund, with the principal's property, a trust not created by the principal or by a person authorized to create a trust on behalf of the principal; (3) make or revoke a gift of the principal's property, in trust or otherwise[.]"); WASH. REV.CODEE § 11.94.050 ("Although a designated attorney in fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney in fact or agent shall have all the powers the principal would have if alive and competent, the attorney in fact ... shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's ... trust agreements."). *See also* Lisa H. Jamieson, *Marital Property Issues in the Modern Estate Plan*, 49 BAYLOR L.REV. 391, 411 (1997) (suggesting that under the Texas probate code "an agent does not have the power to create a trust on behalf of the principal, only the right to fund a trust already created by the principal"). [Footnote 2 in original.]

power.").

The *Restatement (Third) of Trusts* also supports this narrow construction of the power-of-attorney. Although it states that "[u]nder some circumstances, an agent under a durable power-of-attorney or the legal representative of a property owner who is under disability may create a trust on behalf of the property owner," *Restatement (Third) of Trusts* § 11(5), the commentary to this section indicates that this is only appropriate when the property owner is legally incompetent. *Id*. at cmt. f ("Transfers of property belonging to ... legally incompetent adults may be made in the course of managing their financial affairs ... by the agent (attorney in fact) of an incompetent adult appointed and acting under a durable power of attorney executed before the principal's incapacity."). As Mr. Stafford was judged to be competent by the Baca County, Colorado District Court, this provision does not support Ms. Crane's actions.

Moreover, several state courts have held that, in the absence of an express grant of authority, an attorney-in-fact does not have the power to create a trust on behalf of her principal. The reasoning of these decisions undermines Ms. Crane's argument here. *See*, *e.g.*, *In re Trust of Jameison*, 300 Mont. 418, 8 P.3d 83, 87 (2000) (noting that "[t]he Power of Attorney [did] not specifically grant the authority to create a trust, reflect [the beneficiary's] intent to create a trust, or even mention a trust" and that, as a result, "the Power of Attorney [did] not authorize [the purported trustee] to transfer ... property to herself as trustee and, as a result, [the trust] was not properly created"); *Kotsch v. Kotsch*, 608 So.2d 879 (Fla. Dist. Ct. App. 1992) (strictly construing a power of attorney and concluding that although the power of attorney granted authority to a son to manage the father's property during his lifetime, it did not authorize the disposition of the father's property by means of a trust).

Similarly, we find persuasive the reasoning of courts that have addressed the analogous powers of

> attorneys-in-fact to revoke trusts created by the principal and to make gifts of the principal's property. These courts have also held that an attorney-in-fact must be limited to performing only the powers that are expressly granted in the power-of-attorney. *See In re Guardianship of Lee*, 982 P.2d 539, 541–42 (Okla. Civ. App. 1999) (holding that an attorney-in-fact did not have power to revoke his principal's revocable living trust when the power to revoke had been specifically reserved to the principal in the trust instrument and not specifically granted to the attorney-in-fact in the power-of-attorney); *Muller v. Bank of Am.*, 28 Kan.App.2d 136, 12 P.3d 899, 904 (2000), (holding that "unless the settlor expressly states otherwise in the trust document or the power of attorney, the power to revoke a trust is personal to the settlor and is nondelegable"); *In re Rolater's Estate*, 542 P.2d at 223 (holding that a general power-of-attorney "carries with it no authority to make a gift of the principal's property in the absence of an explicit direction").
>
> In conclusion, we hold that the Kansas and Oklahoma state courts would follow the general weight of authority, strictly construing the power-of-attorney and deeming the power to create trusts non-delegable in the absence of an express grant of authority.

Stafford, 382 F.3d at 1183-85. The *Stafford* Court held that because the power of attorney did not expressly authorize Billie Jo Stafford to create a trust on behalf of Mr. Stafford, she did not have the authority to do so. Therefore, the Court held that the trust was void *ab initio*.

In *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 654 N.E.2d 54 (1995), the Appeals Court of Massachusetts addressed a situation where a landowner's daughter, who was his attorney-in-fact pursuant to a durable power of attorney and had the authority to add or withdraw property from any trust of which he (the

father) was the grantor or beneficiary, created an irrevocable trust with herself named as trustee and her father named as the primary beneficiary. The daughter conveyed her father's Shelburne farm property into the irrevocable trust pursuant to the terms of the power of attorney, despite the fact that her father was under contract to sell that property. Once he found out about the conveyance, the father demanded that the daughter return the property to him. Under agency principles, the Appeals Court reversed the lower court's ruling upholding the transfer, holding that her conduct was "inconsistent with well established doctrines of the law of agency that require her to undo the challenged transaction[,]" *id*. at 59, including breaching her fiduciary duty of loyalty under the power of attorney. The Court noted, "[t]he fact that Joan was expressly authorized by the power of attorney to place Gagnon's property in a trust of which he was beneficiary is irrelevant if the authorized act was done for an improper purpose that constituted a breach of her duty of loyalty. *See Restatement (Second) of Agency* § 39, § 381 & comment a, § 385, § 387 & comment a, § 389 & comment a, § 393 & comment b." *Id*. at 61 n.11.

In *Kotsch v. Kotsch*, 608 So.2d 879 (Fla. 2d DCA 1992), a Florida appellate court examined the validity of a trust created by the beneficiary's son pursuant to a durable power of attorney.

> We find that the durable power of attorney, upon which the son relies for power to create the trust, confers no power of disposition over the father's property. A power of attorney creates the relationship of principal and agent between the one who gives the power and the

> one who holds it. *Hodges v. Surratt*, 366 So.2d 768, 773 (Fla. 2d DCA 1979). Powers of attorney are strictly construed. *Falls at Naples, Ltd. v. Barnett Bank of Naples, N.A.*, 603 So.2d 100 (Fla. 2d DCA 1992) (Altenbernd, J., concurring). They will be held to grant only those powers that are specified and will be closely examined in order to ascertain the intent of the principal. *Id*. In the case of a durable power of attorney it is terminated only by revocation by a competent principal, by an adjudication of incompetence, or by the principal's death. § 709.08(2), Fla. Stat. (1985).
>
> The clearly implied and expressed intent of the durable power of attorney is to provide for the father's maintenance and care. It does not authorize the son to create any other beneficial interests in the father's property. It grants only a power of sale which implies the sale will be for the benefit of the principal. *Johnson v. Fraccacreta*, 348 So.2d 570, 572 (Fla. 4th DCA 1977). A power to sell for such amount and on terms that seem proper does not confer a power to make a gift of the property or to transfer or convey it without present consideration inuring to the principal. *Id*.

Kotsch, 608 So.2d at 880. The Court held that the son exceeded the scope of his power under the power of attorney by divesting his father of legal title and breached his fiduciary duties in transferring the assets to the trust. In declaring the trust void, the Court stated, "[n]ot only did the son have no power to transfer the beneficial interest in the father's property, he had no power to convey legal title to himself as trustee. A power of attorney confers no authority to transfer the principal's property to the agent himself." *Id*. at 881, citing *Tanner v. Robinson*, 411 So.2d 240, 241 n.2 (Fla. 3d DCA 1982).

The Supreme Court of Montana, in *In re Trust of Jameison*, 300 Mont. 418, 8 P.3d 83 (2000), concluded that the power of attorney did not

authorize the attorney-in-fact to transfer property to herself as a trustee and observed that the power of attorney,

> grants her broad, but general, powers to act for Jameison in all matters affecting Jameison's business or property, including such powers as acting on Jameison's behalf in all past or current business, and executing and acknowledging contracts, deeds and writings. The Power of Attorney does not specifically grant the authority to create a trust, reflect Jameison's intent to create a trust, or even mention a trust. Therefore, Bolich's transfer of Jameison's property to herself as trustee for purposes of creating a trust pursuant to § 72-33-201(2), MCA, is not warranted by the terms actually used in the Power of Attorney or as a necessary means of executing other authority.

Id. at 87.

Finally, the Court of Appeal of Louisiana held, "[t]he power of attorney failed to grant Ms. Lansou express authority to create the Trust because it lacked express authority for Ms. Lansou to make inter vivos donations." *In re Succession of Gore*, 2005-0549 (La. App. 4 Cir. 5/10/06), 931 So.2d 1150,1155, (La. Ct. App.) writ denied, 2006-1448 (La. 9/22/06), 937 So.2d 394.

However, in *In re Estate of Kurrelmeyer*, 179 Vt. 359, 895 A.2d 207, 211 (2006), the Supreme Court of Vermont reached a different conclusion and declined to strictly construe the terms of the power of attorney, but rather construed its terms "to effect the principal's intent[.]" The Court went on to hold:

> We conclude that the express terms of the power of attorney unambiguously grant the attorney-in-fact the authority to create a trust and to add assets to a trust to accomplish estate planning objectives. The first subsection, empowering the attorney to add any and all

> assets to a trust of which he is the donor, does refer to a trust already in existence, but does not suggest lack of authority to create a new trust when considered together with the second subsection—granting the power "to execute and deliver ... trust instruments" expressly in *addition to* adding assets to existing trusts. The phrase "trust instrument" is commonly understood to refer to the document that brings the trust into existence. *See* Black's Law Dictionary 437 (8th ed. 2004) (defining a "declaration of trust" in part as "the instrument that creates a trust," also termed "trust instrument"). Just as a subsequent provision authorizes the attorney-in-fact to "execut[e] ... deeds" and "easements," which we commonly read to include granting and conveying lands and creating rights of way, so too may the attorney-in-fact create a trust under the provision authorizing the attorney to "execute ... trust instruments." Where a power is broadly drawn to include the authority to transact all business on behalf of the principal and delineates a variety of general acts, each particular task within the grant of authority need not be spelled out in exacting detail. *Schall*, 169 Vt. at 630, 741 A.2d at 289 (holding that authority to withdraw certificates of deposit at a particular bank need not be expressly delineated where power of attorney entrusted agent to make real estate decisions, enter contracts, and draw funds against principal's account). Given the express language granting the authority to execute trust instruments, particularly in the context of the breadth of the attorney's other express powers, including, ultimately, her authority to fully substitute herself for the principal to do all things "whatsoever necessary ... to all intents and purposes" as the principal "might or could do if personally present," we find that the agent's authority under this power of attorney includes the authority to create a trust on the principal's behalf.

In re Estate of Kurrelmeyer, 2006 VT 19, ¶ 11, 179 Vt. 359, 366, 895 A.2d 207, 212-13 (2006).

Anne, in her response brief, cites to *Ingram v. Cates*, 74 S.W.3d at 787-88, for the propositions that, "[w]e know of no rule of law requiring that a power of attorney specifically delineate each and every transaction the attorney-in-fact is authorized to perform" and that because the power of attorney "contained general terms without limitation[,]" its intent was to give the attorney-in-fact the "authority to handle and transact all financial affairs as agent for Mr. Ingram." She also cites to *Smith v. Snow*, 106 S.W.3d 467, 470 (Ky. App. 2002), for the proposition that designating a power of attorney to make a will is not permitted in the Commonwealth, which she asserts is the "only identifiable limitation on a power-of-attorney in Kentucky[.]" Anne attempts to distinguish the extra-jurisdictional cases Susan cites in light of what she describes as the express authorization to create a trust in the POA at issue. We disagree with Anne that the POA expressly authorized the creation of a trust.

We are persuaded by the authority cited by Susan, and we hold that in order for an attorney-in-fact to create a trust pursuant to a POA, this authority must be expressly provided for in the instrument if it contains a specific provision related to trusts. Here, Paragraph 9 of the POA only permitted Anne to "[c]onvey any real or personal property to the Trustee of any trust agreement between me and said Trustee and entered into either before or after the date of this instrument[.]" While it permitted the trustee to convey property into a trust, there is nothing in the POA permitting Anne to actually create a trust, let alone name herself as trustee. We disagree with Anne's argument that Paragraph 1 of the POA, which permitted

Anne to "[d]raw, make and sign any and all checks, contracts or agreements[,]" provided the express authority to create a trust because of the limitation provided in Paragraph 9 that she could only convey property to a trust. There is no other mention of a trust in the POA. Furthermore, the Antenuptial Agreement very specifically and deliberately kept separate the assets both Anne and Charles brought into the marriage. Therefore, had Anne or Charles wanted the other to be able to create a trust via the POA, especially an irrevocable one, that might very well contain the assets they wished to keep separate, the POA should have explicitly included a statement to that effect.

In addition to the authority cited above, we liken this situation to the treatment of general and specific statutory provisions: "In the event two statutory provisions directly conflict, it has been long established the specific provision takes precedence over the general provision." *Porter v. Commonwealth*, 841 S.W.2d 166, 168-69 (Ky. 1992). *See also L.K. Comstock & Co. v. Becon Const. Co.*, 932 F. Supp. 948, 967 (E.D. Ky. 1994) ("'In the interpretation of a promise or agreement or a term thereof, ... specific terms and exact terms are given greater weight than general language; ... [and] separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.' *Restatement (Second) of Contracts* 203(c), (d) (1979)."). Unlike in *Ingram*, *supra*, the POA in this case did not merely include general terms; rather, it contained specific terms related to trusts, limiting the attorney-in-fact's authority to funding a trust.

Accordingly, we hold that the circuit court erred as a matter of law in determining that the POA provided Anne with the authority to create the Dishman Trust, reverse the summary judgment, and declare the Dishman Trust void *ab initio*. Based upon this holding, we need not address the remainder of Susan's arguments in her cross-appeal or the arguments in Anne's direct appeal.

For the foregoing reasons, the final judgment of the Jefferson Circuit Court is vacated, the summary judgment is reversed, and this matter is remanded for further proceedings in accordance with this opinion, including entry of summary judgment in favor of Susan awarding her the $81,133.43 in attorney fees sought in the complaint.

THOMPSON, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

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