

1982 WL 189362 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 12, 1982

**\*1 SUBJECT: Taxation, Estate and Gift, Powers of Attorney**

1. An attorney-in-fact cannot make a gift of his principal's interest in property where such authority is not expressly given.
2. Where an attorney-in-fact has made a gift of his principal's property without authority, it is the opinion of this office the transaction is void.

Mr. William R. Geddings, Jr.  
Director  
Estate and Gift Tax Division

**QUESTIONS:**

1. Can an attorney-in-fact make a gift of his principal's interest in property where such authority is not expressly given?
2. Where an attorney-in-fact has made a gift of his principal's property without authority, what validity is afforded the transaction?

**DISCUSSION:**

1. A power of attorney is an instrument in writing by which an individual, as principal, appoints another as his agent. The principal confers upon his attorney-in-fact the authority to perform certain specified acts or kinds of acts, [Smith v. United States, \(D.C. Hawaii\) 113 F. Supp. 702](#) and [94 A.L.R. 826](#). The authority, of the attorney-in-fact is the very essence, the sine qua non, of the principal and agent relationship, [Stevens v. Frost, 140 Me. 1, 32 A 2d 164](#). This authority, unless otherwise agreed, includes only authority to act for the principal's benefit, [Restatement, Agency](#) (2d ed.), § 39.

The power of attorney in question gives the attorney-in-fact the following powers:

'(d) To lease, bargain, transfer, convey, grant and mortgage all lands, tenements and hereditaments upon such terms, conditions and covenants as they may think proper; and

(e) To buy, sell, mortgage, hypothecate and, in every way and manner, deal in and with goods, wares and merchandise and choses of actions; and

(f) To engage in, do and transact all and every kind of business that they may think proper \* \* \*.'

Thus, the attorney-in-fact was not specifically authorized to make a gift of the principal's property. Hence, the question is whether an agent with a power to sell and convey the property of his principal may make a gift of the property. It appears that there is no South Carolina case law directly on point, the general rule as announced in other jurisdictions is set forth in [73 A.L.R. 884](#) as follows:

‘A general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.’

Therefore, since the attorney-in-fact here was not expressly authorized to gift the property, he was without authority to do so. Since to make such a gift would effectuate a transfer where no benefit inured to the principal.

2. As to the validity of such, a transfer in [Shields v. Shields](#), 19 Cal. Rptr. 29, 131 (1962), 200 Cal. App. 2d 99, the court ruled: \*2 ‘A power of attorney conferring authority to sell, exchange, transfer or convey real property for the benefit of the principal does not authorize a conveyance as a gift or without a substantial consideration (citations omitted); and a conveyance without the scope of the power conferred is void.’

This issue was not specifically addressed in 73 A.L.R. 884. However, in the majority of the cases therein it was held the transactions were void where the attorneys-in-fact acted without authority.

#### CONCLUSIONS:

1. An attorney-in-fact cannot make a gift of his principal's interest in property where such authority is not expressly given.
2. Where an attorney-in-fact has made a gift of his principal's property without authority, it is the opinion of this office the transaction is void.

Harry T. Cooper, Jr.  
Assistant Attorney General

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