FILED
SEP 2 8 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM NELSON, JUDY DAVISON, VIRGINIA CALTRIDER, JAMES NELSON, CONNIE CHARRON, CAROL CHRISTENSEN, and **SHIRLEY CLINE,**	
Petitioners-Appellees,	234
MARJORIE NELSON, WAYNE O'BRIEN, Individually; **WAYNE O'BRIEN** as Attorney in Fact for **MARJORIE NELSON,**	
Respondents-Appellants,	
WAYNE O'OBRIEN as Attorney in Fact for **ROY O. NELSON; WAYNE O'BRIEN** as Executor of the Estate of **ROY O NELSON,** Deceased,	8-294 87-1367
Respondents.	

Appeal from the Iowa District Court for Guthrie County (No. 11000) - M. C. Herrick, Judge.

Respondents appeal a declaratory decree by the district court. **AFFIRMED.**

Emil Trott, Jr., of Barrett & Trott, Des Moines, for respondents-appellants.

Martin L. Fisher of Fisher, Fisher & Fisher, Adair, for petitioners-appellees.

Considered by Oxberger, C.J., Sackett and Habhab, JJ.

SACKETT, J. 225

The primary question in this appeal is whether an attorney in fact is authorized to place funds of his or her principal in a joint tenancy account which gives a right of survivorship to another person. The issue we address is whether certificates of deposit established in the names of Marjorie Nelson and decedent Roy Nelson, Marjorie's second husband, as joint tenants with full right of survivorship passed on Roy's death to Marjorie, a respondent-appellant, or whether they were part of decedent's estate and by virtue of decedent's will would pass to issue of decedent's first marriage Petitioners-Appellees William Nelson, Judy Davison, Virginia Caltrider, James Nelson, Connie Charron, Carol Christensen and Shirley Cline. The deposits in question were made for decedent by Respondent Wayne O'Brien after decedent had given an all-inclusive power of attorney to Wayne. Wayne is the husband of Respondent-Appellant Marjorie Nelson's only child, now deceased. Wayne's children are Marjorie's only heirs at law. Roy was mentally competent when the power of attorney was given and the power of attorney provided it should continue in the event of mental disability.

The trial court found when Wayne established the certificates of deposit he made gifts to Marjorie and the power of attorney did not explicitly give Wayne the authority to make gifts nor did decedent authorize or

ratify the gifts. The court determined the full amount of the certificates should be included in decedent's estate. Appellants appeal that determination. The parties agree our review is de novo. We determine this to be a declaratory judgment action and agree with the parties we have de novo review. Iowa R. App. P. 4.

I.

Appellants contend the power of attorney gave Wayne the authority to place decedent's funds in a joint tenancy account. The power of attorney gave the attorney-in-fact broad powers and included the following language:

> Know All Men by These Presents: That the undersigned Roy O. Nelson also known as R.O. Nelson residing at Menlo, State of Iowa, United States of America, have made, constituted and appointed, and do by these presents make, constitute and appoint Wayne O'Brien of Guthrie County, Iowa, with full power of substitution, the true and lawful Attorney-In-Fact of us and each of us, hereby revoking any and all powers of attorney that may have been heretofore executed by the undersigned, with full power and authority for us in our names, place and stead, to act in, manage, and conduct all our affairs, and for the purpose for us and in our names, place, and stead, and for our use and benefit, and as our acts and deeds, to do, and execute, or to concur with persons and/or other legal entities jointly interested with ourselves therein in the doing or executing of all or any of the following act, deeds, and things, that is to say:
>
> (1) TO BUY, ACQUIRE, OBTAIN, TAKE OR HOLD POSSESSION of any property or property rights of or for the undersigned whatsoever, whether real, personal or mixed; and to retain such property as long as said Attorney-in-Fact shall deem it wise; * * * (2) TO SELL, CONVEY (either with or without covenants of warranty), LEASE, MANAGE, CARE FOR, PRESERVE, PROTECT, INSURE, IMPROVE, CONTROL, STORE, transport, maintain, repair, remodel, rebuild and in every way deal in and with any property or property rights of the

undersigned, now or hereafter owned by them, * * * (3) TO BORROW MONEY, MORTGAGE PROPERTY or to complete, extend, modify or renew any obligations, * * * (4) TO OPEN, MAINTAIN OR TO CLOSE BANK ACCOUNTS, savings or checking, or to do any business with any banking or lending institution, including any savings and loan association, or any insurance company, in regard to any savings or checking account of the undersigned; to make deposits and withdrawals, obtain bank statements, and passbooks, to collect or receive funds, to sign, endorse or execute checks, drafts, money orders, warrants, certificates or vouchers payable to the undersigned, by any person, firm or corporation, including political corporations, and including the United States of America, * * * (7) TO INVEST AND RE-INVEST, or exchange any existing assets, including but not restricted to common stocks, annuities, life insurance, or in any other income-producing contracts or property or securities, real or personal; and, not limited by the generality of the foregoing to take out life insurance upon the life of the undersigned or upon the life of anyone else in whom the undersigned has a beneficial interest, naming as beneficiary either the undersigned, or the insured or the estate of any insured; and to pay the premiums; assessments and proper charges for such investments or to continue any existing plan of insurance or investment; . . . .

GIVING AND GRANTING unto said Attorney-in-Fact full power and authority to do and perform each and every act, deed, matter and thing whatsoever in and about our property, and affairs, as fully and effectually to all intents and purposes as we might or could do in our own proper person if personally present; hereby ratifying all that said Attorney-in-Fact shall lawfully do or cause to be done by virtue thereof; **PROVIDED, HOWEVER,** that nothing herein shall give or grant the power to execute a will or change a will or other testamentary instrument.

CONSTRUCTION: The Attorney-in-Fact may do all acts which shall be necessary, proper and incidental for carrying into execution the foregoing powers. The terms and provisions of this Power of Attorney are intended to be and shall be so construed as to give the Attorney-in-Fact herein the right and power to act in connection with the property, property rights, options, exemptions, immunities, powers, duties, discretions and liabilities of either or both of

> us. * * * Each of the numbered powers of this Power of Attorney shall be construed as separate and independent powers, but aided and implemented by all other powers herein.

The instrument does not specifically include the power to make gifts. Appellant argues it is included in the broad language of the instrument. In Welke v. Wackershauser, 143 Iowa 107, 109, 120 N.W. 77, 78 (1909), the attorney-in-fact was authorized

> to make leases, sales and execute conveyances for any and all property, real and personal, owned by me, and manage and control said property in all things and for all purposes as fully as I myself might do, giving and granting unto my said attorney full power and authority to do and perform all, and every act and thing whatsoever required and necessary to be done in and about the premises as fully as I might or could do it if personally present.

The court determined under said authority the attorney-in-fact was not authorized to execute a quit claim deed conveying the deed to another without valuable consideration, and held under authority to convey an agent cannot sell otherwise than for cash, unless specifically authorized, nor can he make conveyance by way of gift. Welke, 143 Iowa at 109, 120 N.W. at 78.

The power of attorney did not authorize the transfer of decedent's money to a joint tenancy account in the name of Marjorie Nelson or to make gifts to Marjorie. Generally a power of attorney, although granting broad powers, does not authorize the attorney-in-fact to make a gift or convey without present consideration inuring to the principal

absent a specific authorization for the attorney-in-fact to make the gift. Aiello v. Clark, 680 P.2d 1162, 1165-1166 (Alaska 1984). Hanrick v. Patrick, 119 U.S. 156, 30 L. Ed. 396, 7 S. Ct. 147 (1886); Huntsman v. Huntsman, 56 Utah 609, 614, 192 Pac. 368, 370 (1920); Campbell v. Campbell, 57 Wisc. 288, 290, 15 N.W. 138, 139 (1883); Dupont v. Wertherman, 10 Cal. 354, 356 (1858); Annot., 73 A.L.R. 884 (1931). And the attorney-in-fact is subject to the limitation that the agency cannot be used for the benefit of any person other than the principal in the absence of an agreement that it may be so used. Estate of Rolater, 542 P.2d 219, 223-24 (Okla. Ct. App. 1975); Brown v. Hotston, 227 Ala. 225, 226, 149 So. 690, 691 (1933); Kamins v. Aetna Life Ins.Co., 258 Mich. 419, 422, 242 N.W. 775, 776 (1932).

The transfer of Roy's funds to a joint tenancy account in Marjorie's name resulted in a transfer of the funds for the benefit of a person other than Roy and consequently a gift was made to Marjorie. There was no specific authorization for Wayne to make gifts of property. The transfer to the joint tenancy account was not authorized. We affirm the trial court on this issue.

II.

Appellants next contend the gifts were ratified by Roy. The trial court after hearing the evidence determined Roy did not ratify the gifts. We give weight to the trial court's finding of fact especially when considering the

credibility of witnesses but are not bound by them. Iowa R. App. P. 14(f)(7). Ratification is affirmance by a person of a prior act which did not bind him but was done on his account and is given effect as if originally authorized by him. See Shannon v. Goar, 234 Iowa 1360, 1362, 15 N.W.2d 257, 258 (1944).

In order to show Roy ratified the transfers it is necessary to show he intended to ratify the act and he had knowledge of the material facts surrounding the transaction to be ratified. See Pillsbury v. Ward, 250 N.W.2d 35, 39 (Iowa 1977). We find the facts do not show Roy understood the implications of his money being put in a joint tenancy with right of survivorship account with Marjorie. We note too in assessing Wayne's actions in putting the accounts in joint tenancy with Marjorie he obtained a result which, in all probability, will favor his children as heirs of Marjorie's over decedent's heirs, these appellees. An attorney-in-fact is a fiduciary with respect to matters within the scope of his authority. See Cole v. Hartford Accident & Indemnity Co., 242 Iowa 416, 423-24, 46 N.W.2d 811, 817 (1951). We must scrutinize his or her actions when there is a question of those actions benefiting the interests of an attorney-in-fact. Fowler v. Berry Seed Co., 248 Iowa 1158, 1163, 84 N.W.2d 412, 416 (1957).

We affirm the trial court.

AFFIRMED.