



A daughter is seeking to remove her brother as attorney-in-fact for their elderly mother for alleged violations of Delaware’s Durable Power of Attorney Act and common law principles of fiduciary duty. The daughter seeks an accounting from her brother and to be appointed as their mother’s agent in her brother’s stead. Her brother has moved to dismiss the petition, arguing that the Delaware statute does not apply to his Connecticut statutory power of attorney, and that his sister lacks standing to bring this petition. For the following reasons, I recommend that the daughter’s petition be dismissed.

## **I. Background**

On July 26, 2016, Petitioner Cynthia Mascari filed a Verified Petition for Removal of Power of Attorney against Respondent David Schmidt, in his individual capacity and as the purported attorney-in-fact for Helen Bernice Schmidt (“Mrs. Schmidt”).<sup>1</sup> The parties are the children of Mrs. Schmidt, a 96-year old woman who lives in Milton, Delaware.<sup>2</sup> Respondent resides in New Jersey and serves as Mrs. Schmidt’s agent under a statutory power of attorney (“Power of Attorney”) executed on March 29, 2011, pursuant to Connecticut law. Petitioner, who resides in Lewes, Delaware, was designated as Mrs. Schmidt’s agent under an advanced healthcare directive.

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<sup>1</sup> Docket Item (“DI”) 1.

<sup>2</sup> Mrs. Schmidt has a third child, Jonathan Schmidt, who currently resides in Colorado.

Petitioner accuses her brother of mismanaging their mother's assets by refusing to pay for her basic needs, including adequate care and necessary home repairs and maintenance. Petitioner also accuses Respondent of restricting access to Mrs. Schmidt by her family members and friends, preventing Petitioner from obtaining any medical information from her mother's medical professionals, thwarting Petitioner's efforts to schedule Mrs. Schmidt's doctor's appointments, refusing to allow Petitioner to obtain a hospital bed, new wheelchair and other accommodations that would make Mrs. Schmidt's home more accessible, and refusing to provide Petitioner with any information regarding Mrs. Schmidt's finances or medical condition.

Citing the Durable Personal Power of Attorney Act, Title 12, Chapter 49A of the Delaware Code ("the Delaware Act"), Petitioner alleges that she has standing to petition the Court to suspend the powers of the primary agent, compel an accounting, and determine Respondent's liability for violations of the Delaware Act. Petitioner asks the Court to remove Respondent as their mother's agent under the power of attorney, and to designate Petitioner as agent to handle Mrs. Schmidt's financial affairs.

In his Answer filed on August 16, 2016,<sup>3</sup> Respondent admitted that he was appointed as Mrs. Schmidt's attorney-in-fact under the Connecticut Power of Attorney, but denied the allegations of wrongdoing. Respondent raised several

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<sup>3</sup> DI 5.

affirmative defenses in his Answer, including that the Delaware Act was inapplicable and Petitioner lacked standing to petition the Court.

On September 7, 2016, Petitioner moved for leave to file an amended petition.<sup>4</sup> On October 4, Respondent filed a motion to dismiss under Court of Chancery Rule 12(b)(6) and a motion for protective order.<sup>5</sup> On October 19, Petitioner filed a motion to compel and a motion to allow discovery under Rule 56(f) in connection with Respondent's motion to dismiss.<sup>6</sup> On November 1, 2016, Master Ayvazian granted Petitioner's motion for leave to file an amended petition.<sup>7</sup> Petitioner filed her First Amended Verified Petition ("Amended Petition") the next day.<sup>8</sup>

The Amended Petition alleges Petitioner has standing under the Delaware Act to petition the Court to suspend the Respondent's powers, compel an accounting, and "determine Respondent's liability for violation of the [Delaware] Act."<sup>9</sup> The Amended Petition also asks the Court to remove or limit the Respondent's power due to the Respondent's violation of his fiduciary duties, "[n]otwithstanding the applicability [sic] of the [Delaware] Act."<sup>10</sup> Respondent renewed his motion to dismiss.<sup>11</sup> Petitioner did not respond.

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<sup>4</sup> DI 7.

<sup>5</sup> DI 8, 9.

<sup>6</sup> DI 12, 13.

<sup>7</sup> DI 17.

<sup>8</sup> DI 18.

<sup>9</sup> *Id.* ¶¶ 17-18.

<sup>10</sup> *Id.* ¶¶ 19-20.

<sup>11</sup> DI 19.

In a draft report dated January 31, 2017, Master Ayvazian recommended the Court dismiss the Petition. She concluded the Amended Petition's allegations that Respondent violated the Delaware Act failed to state a claim because the Power of Attorney was created pursuant to Connecticut law, not Delaware law.<sup>12</sup> She also concluded Petitioner lacked standing to bring a common law breach of fiduciary duty claim against Respondent because Petitioner failed to allege she suffered any injury in fact.<sup>13</sup>

Petitioner filed a timely notice of exceptions, and the parties briefed those exceptions. The case was reassigned to me after Master Ayvazian retired. This is my final report.

## **II. Analysis**

Petitioner's exceptions are both procedural and substantive. Procedurally, Petitioner asserts the draft report erroneously ruled on the motion to dismiss before Petitioner responded. Petitioner asserts on exception that she expected the Court to rule on her pending Rule 56(f) motion, and that if the Court had denied that motion, Petitioner would then have filed an answering brief in response to the motion to dismiss. Respondent argues Petitioner forewent her opportunity to respond. Given the numerous motions that were copending with the motion to dismiss, the fact that I

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<sup>12</sup> DI 20 7-8.

<sup>13</sup> *Id.* at 8-9.

lack Master Ayvazian’s thoughts on her docket, and this Court’s preference for adjudicating matters on the merits, I will address Petitioner’s substantive exceptions.

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, dismissal is appropriate where “it appears with reasonable certainty that the [petitioner] could not prevail on any set of facts that can be inferred from the pleadings.” The Court may consider the content of documents that are integral to the complaint, and may dismiss a complaint where the unambiguous language of documents upon which the claims are based contradict the complaint’s allegations.<sup>14</sup>

Petitioner first asserts that the Connecticut Uniform Power of Attorney Act (“the Connecticut Uniform Act”) governs the Power of Attorney, and that the Connecticut Uniform Act gives Petitioner standing to petition this Court to review and remedy Respondent’s conduct under the Power of Attorney. Petitioner asserts the draft report fell short of analyzing Petitioner’s standing under the Connecticut Uniform Act. Respondent contends the draft report was properly confined to Delaware law because the Amended Petition invoked Delaware law, not Connecticut law.

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<sup>14</sup> *Werner v. Miller Tech. Mgmt, L.P.*, 831 A.2d 318, 327 (Del. Ch. 2003).

The Amended Petition claims Respondent’s actions under the Power of Attorney violated the Delaware Act.<sup>15</sup> The Power of Attorney was created pursuant to the Connecticut Statutory Short Form Power of Attorney Act (“Connecticut Short Form Act”).<sup>16</sup> Section 49A-103(a) of the Delaware Act provides:

(a) This chapter shall not apply to any of the following powers of attorney which, if durable, shall be governed by Chapter 49 of this title, to the extent applicable, or by another applicable chapter of by the common law of this State:

...

(15) A power of attorney created pursuant to authorization provided by a federal or state statute, other than this chapter, that specifically contemplates creation of the power.

...

(c) A power of attorney excepted from this chapter pursuant to subsection (a) of this section that was granted in compliance with the laws of the jurisdiction governing such power of attorney will be recognized and enforceable under the laws of the State of Delaware in accordance with its terms.

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<sup>15</sup> DI 18, ¶¶ 17-18, 20.

<sup>16</sup> Resp’t Mot. to Dismiss Ex. C at 1 (citing CONN. GEN. STAT. § 1-43); *id.* at 3 (“This power of attorney shall be governed by Connecticut law, although I request that it be honored in any state or other location in which I or my property may be found.”). The draft report considered the Power of Attorney as integral to the complaint, and no party took exception. I do the same in this final report.

Petitioner’s reply brief concedes the Power of Attorney is governed by Connecticut law, and goes on: “[T]o the extent that a specific mention of the applicability of the Connecticut Uniform Power of Attorney Act is necessary, Petitioner requests that the Court construe Petitioner’s request under Connecticut law.” Pet’r Reply Br. 3 n.2. One way to interpret this sentence is as a request to amend the Amended Petition to seek relief under Connecticut law, rather than the Delaware Act. Such a request, made in a footnote to a reply brief on a motion to dismiss, cannot be granted. *See* Del. Ct. Ch. R. 15(aaa). Moreover, Respondent alleged in his Answer that the Power of Attorney was governed by Connecticut law and that the Delaware Act was inapplicable, but Petitioner maintained her claim under the Delaware Act in her subsequent Amended Petition. DI 5, ¶¶ 6, 17-18, 23.

The Delaware Act does not govern a power of attorney created pursuant to the laws of a different state. Regardless of whether Petitioner has standing under the Connecticut Act, Petitioner cannot state a claim for relief under the Delaware Act.

As Master Ayvazian phrased it:

To the extent that the First Amended Verified Petition alleges that Respondent violated the provisions of the [Delaware] Act, it fails to state a claim for which relief may be granted because Respondent's power of attorney was created pursuant to authorization provided by a Connecticut statute, and not under Chapter 49A of Title 12 of the Delaware Code. As a matter of law, the [Delaware] Act does not apply in this case and, to the extent that Petitioner's claims are based on alleged violations of the Act, they are contradicted by the unambiguous language of the power of attorney document and should be dismissed.<sup>17</sup>

Petitioner's exception regarding standing under Connecticut law does not change this conclusion. I recommend the Court dismiss Petitioner's claim that Respondent violated the Delaware Act.

Petitioner also took exception to the draft report's conclusion that she did not have standing to claim Respondent breached his fiduciary duties owed to Mrs. Schmidt. First, she asserts she has statutory standing under Connecticut law. Respondent does not address this contention.

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<sup>17</sup> DI 20 7-8.



The Power of Attorney was created pursuant to the Connecticut Short Form Act.<sup>18</sup> Connecticut courts have repeatedly found that because the Connecticut Short Form Act “contains not one provision holding an attorney in fact accountable to anyone other than his principal,” third parties lack standing to hold an agent accountable under a short form power of attorney.<sup>19</sup> Under Connecticut law, “the legal right to assert a claim for breach of a fiduciary duty arising out of the grant of a power of attorney vests solely in the grantor.”<sup>20</sup>

The Connecticut Short Form Act was repealed in 2016 and replaced by the Connecticut Uniform Power of Attorney Act (“Connecticut Uniform Act”), which specifies it does not cover acts by agents performed before October 1, 2016.<sup>21</sup> The Connecticut Short Form Act’s restrictions on who can sue an agent acting under a Connecticut Short Form Act power of attorney thus apply if that agent’s conduct predates October 1, 2016. In *Davison v. Latour*, a sibling of the agent claimed the agent acted improperly under their parent’s power of attorney created under the Connecticut Short Form Act.<sup>22</sup> Noting the Connecticut Short Form Act’s repeal, the

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<sup>18</sup> Resp’t Mot. to Dismiss Ex. C at 1 (citing CONN. GEN. STAT. § 1-43); see CONN. GEN. STAT. ANN. §§ 1-42 – 1-56 (repealed 2016).

<sup>19</sup> *Kindred Nursing Centers East, LLC v. Morin*, 7 A.3d 919, 923 (Conn. App. Ct. 2010); e.g., *Wild v. Cocivera*, 2016 WL 3912348, at \*3 (Conn. Super. Ct. June 16, 2016) (citing *Kindred* and its progeny).

<sup>20</sup> *Id.*

<sup>21</sup> CONN. GEN. STAT. ANN. § 1-353b(b) (West 2016); see *Craco v. Carlson*, 2017 WL 1024785, at \*4 n.4 (Conn. Super. Ct. Feb. 15, 2017); e.g., *Davison v. Latour*, 2017 WL 1433321, at \*1 n.1 (Conn. Super. Ct. Apr. 3, 2017).

<sup>22</sup> *Id.*

Connecticut Superior Court found that such claims still “can only be brought by the grantor of the Power of Attorney or the grantor’s estate.”<sup>23</sup>

Mrs. Schmidt’s power of attorney was drafted pursuant to the Connecticut Short Form Act. Petitioner does not allege specific dates for Respondent’s challenged conduct, but that conduct necessarily predated October 1, 2016, as it was originally alleged in the July 2016 Petition and realleged in the November 2016 Amended Petition. Therefore, the Connecticut Short Form Act, not the Connecticut Uniform Act, governs Petitioner’s claims under Mrs. Schmidt’s Power of Attorney. Only Mrs. Schmidt and her estate have standing to claim Respondent acted improperly as Mrs. Schmidt’s agent before October 1, 2016.<sup>24</sup> I conclude that Petitioner does not have standing under Connecticut law to bring claims of wrongdoing by her mother’s agent based on conduct predating October 1, 2016. Analysis of Petitioner’s standing under Connecticut law does not affect the draft report’s recommendation to grant Respondent’s motion to dismiss.

Finally, Petitioner takes exception with the draft report’s conclusion that she failed to allege injury in fact and therefore lacks common law standing. The

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<sup>23</sup> *Id.* at \*1 n.1, \*6.

<sup>24</sup> The Connecticut Uniform Act provides that “[a] person authorized to make health care decisions for the principal” may petition a court to review an agent’s conduct under a power of attorney. CONN. GEN. STAT. ANN. § 1-350o(3) (West 2016). Petitioner is Mrs. Schmidt’s health care agent. Am. Pet. ¶ 7, Ex. A. Petitioner may have statutory standing under the Connecticut Uniform Act to seek review of any alleged wrongdoing by Respondent as Mrs. Schmidt’s agent that occurred after October 1, 2016.

Amended Petition alleged Respondent used his authority as agent to direct caregivers to thwart Petitioner's attempts to arrange Mrs. Schmidt's medical appointments, to restrict Petitioner's access to Mrs. Schmidt, and to compromise Petitioner's ability to make medical decisions for Mrs. Schmidt.<sup>25</sup> On exception, Petitioner asserts these allegations adequately plead injury in fact to Petitioner. Respondent argued that Petitioner's allegations are unproven and are therefore "unsupportive of standing."<sup>26</sup> Petitioner replied that at the motion to dismiss stage, the Court must take her well-pled factual allegations as true.<sup>27</sup>

As with Petitioner's assertion of statutory standing, Petitioner's assertion of common law standing fails under Connecticut law. Connecticut law providing that only the grantor of a power of attorney has standing to assert an agent breached his fiduciary duty before October 1, 2016, extends to common law standing.<sup>28</sup>

Allegations of injury in fact to the petitioner do not confer standing in this context.

Connecticut courts have found that siblings of agents who allege injury in fact to their inheritances, but who are not suing as executors of the principal's estate, lack

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<sup>25</sup> Am. Pet. ¶¶ 10-12, 16.

<sup>26</sup> Resp't Ans. Br. 9.

<sup>27</sup> Pet'r Reply Br. 5 (citing *Smith v. SPNV Holdings, Inc.*, 1989 WL 44049, at \*3 (Del. Ch. Apr. 26, 1989)).

<sup>28</sup> *Wild*, 2016 WL 3912348 at \*3.

standing.<sup>29</sup> Even assuming Petitioner alleged injury in fact, she would still lack standing under Connecticut law.

Because Petitioner fails to state a claim under which relief can be granted under the Delaware Act, and because Petitioner lacks standing under Connecticut law to assert Respondent committed wrongdoing under Mrs. Schmidt's Power of Attorney before October 1, 2016, I recommend the Court grant Respondent's motion to dismiss.

### **III. Conclusion**

For the reasons stated above, I recommend that the Court grant Respondent's motion to dismiss. I refer the parties to Rule 144 for the process of taking exception to a Master's Final Report.

Respectfully,

*/s/ Morgan T. Zurn*

Master in Chancery

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<sup>29</sup> *E.g., id.* at \*2-3; *Kudravy v. Kudravy*, 2014 WL 3511531, at \*4 (Conn. Super. Ct. June 6, 2014). In *Davison*, the agent's sibling was able to proceed with her claim only as an heir bringing a "derivative" action against the agent and executor relating to the principal's estate; she could not proceed with a direct claim that the agent and executor had harmed her share of the inheritance. 2017 WL 1433321 at \*6.