[J-35-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: MARJORIE H. WEIDNER A/K/A MARJORIE H. ROSS, DECEASED	: No. 98 MAP 2006
	: Appeal from the Order of the Superior
	: Court entered February 8, 2006, at No.
APPEAL OF: SUSAN L. RHODES, CAROL A. DOERSOM, JANE KABAI, DONALD E. ROSS AND ELIZABETH TICKNER	: 921 MDA 2005. which reversed the order of the Court of Common Pleas of Lancaster County, Orphan's Court Division, entered May 11, 2005 at 6½ of 2004
	ARGUED: May 14, 2007

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 27, 2007**

I join the majority opinion reluctantly, based solely upon the precedent of In re Estate of Reifsneider, 531 Pa. 19, 610 A.2d 958 (1992), wherein this Court determined that a general power of attorney may be sufficient to authorize an attorney-in-fact's exercise of at least certain of the special powers enumerated in Section 5602(a) of the Probate, Estates and Fiduciaries Code, 20 Pa.C.S. §5602(a). I would have reached the opposite conclusion in Reifsneider, as I believe that Section 5602(a) either speaks directly to the contrary or is at least ambiguous in this regard. To the degree that the statute is ambiguous, strong policy considerations militate in favor of an interpretation requiring express language to be included within a power of attorney to support the exercise of the powers that the Legislature had deemed to be special ones. In this regard, it seems clear to me that the statute is facially designed to require specific notice to and assent by a principal relative to the authorization of vicarious consent to

the series of important life choices that are set forth in Section 5602(a). See 20 Pa.C.S. §5602(a) (setting forth as special powers, inter alia, the ability to make limited gifts, renounce fiduciary positions, authorize surgical procedures, engage in real property transactions, borrow money, enter safe deposit boxes, and commit the principal as an organ donor). Indeed, as the majority notes, as to one of those choices, gifting, the Legislature has undertaken to specifically overrule Reifsneider.[1]

Although I believe that Reifsneider was wrongly decided, it is not as critical for this Court to revisit its past rulings on matters of statutory construction, since the General Assembly is free to clarify its intent in the aftermath of judicial construction.[2] Again, in the present case, it is significant to me that the Legislature has done just that

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[1] The General Assembly's response to Reifsneider, as well as the conclusion that Section 5602 initially reflected the notion that public policy favors express authorization to support lawful gifting by fiduciaries (particularly where self-dealing may be involved), is supported by a large body of decisions from other jurisdictions. See, e.g., Estate of Casey v. Comm'r, 948 F.2d 895, 898 (4th Cir. 1991) ("When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney -- of which outright transfers for less than value to the attorney-in-fact herself are the most obvious -- the justification for such a flat rule is apparent. And its justification is made even more apparent when one considers the ease with which such a rule can be accommodated by principals and their draftsmen."); Praefke v. American Enterprise Life Ins., 655 N.W.2d 456, 459 (Wis. 2002) (explaining that "unless the power of attorney specifically allows the agent to gift property to himself or herself, or contains an 'unlimited or unbridled' gifting power, the agent lacks authority to make gratuitous transfers"). See generally Wendy M. Goode, Gifts and POAs: Authorizing an Agent to Give Your Money Away, 88 Ill. B.J. 100 (2000) ("Throughout the country, courts have found that the POAs must expressly grant gifting power or the gifts are not complete.").

[2] This can be contrasted with matters of constitutional interpretation, as to which the courts' decisions are more final. See Shambach v. Bickhart , 577 Pa. 384, 406, 845 A.2d 793, 807 (2004) (Saylor, J., concurring) (explaining that stare decisis has "special force" in matters of statutory, as opposed to constitutional, construction (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73, 109 S. Ct. 2363, 2370 (1989))).

with respect to one special power enumerated in Section 5602(a). Since the General Assembly is acutely aware of the Reifsneider ruling, but has not acted otherwise to curtail its impact relative to the balance of Section 5602(a), I agree with the majority's present reasoning that Reifsneider continues to support the notion that the Legislature's allowance for the use of "language showing a similar intent" to authorize the exercise by an attorney-in-fact of the special powers subsumes the use of indirect language, such as that of incorporation by reference.

Mr. Justice Castille joins this concurring opinion.