

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE ESTATE OF : CIVIL ACTION  
NORMAN A. HELFANT LITIGATION :  
 :  
 v. :  
 : Nos. 99-CV-6642  
 CLARK CAPITAL MANAGEMENT :  
 GROUP, Inc. :  
 Harry J. Clark : CIVIL ACTION  
  
 Clark Capital Management :  
 Group, Inc. : No. 00-1026  
 :  
 v. :  
 :  
 Estate of Norman Helfant :

**MEMORANDUM**

Giles, C.J.

October \_\_, 2000

**Introduction**

The Estate of Norman A. Helfant brings this action for money damages against Clark Capital Management Group under theories of breach of contract, conversion, fraud, and civil conspiracy and under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 PA. STAT. ANN. § 201-1.

The court has jurisdiction over the parties to this action by virtue of diversity of citizenship, 28 U.S.C. § 1332(c)(2) and the jurisdictional amount is satisfied, 28 U.S.C. § 1332(b).

The present controversy, herein addressed, involves conflicting claims within the plaintiffs' group as to who is the proper representative of the Estate of Norman A. Helfant as of this time. George Vishnesky, the executor of the estate under

the will, contends that a document granting an alleged irrevocable power of attorney to a third person, as well as other documents, purportedly derived from that original 1999 power of attorney, including a retainer agreement with an attorney, are all null and void and must be declared revoked by this court. For the reasons that follow, the court agrees.

George Vishnesky has filed motions to revoke (a) an August 11, 1999 Power of Attorney to Agata Saczuk-Chmielewski; (b) a Legal Representation Agreement executed on or about December 28, 1999 by Henry and Agatha Chmielewski, George Vishnesky, and Douglas Lally, Esquire, and (c) a subsequent Irrevocable Assignment, Release of Claims and Irrevocable Power of Attorney signed by Henry Chmielewski, Agatha Saczuk-Chmielewski, and George Vishnesky.

A hearing was held on June 20, 2000 where testimony was taken. Briefs were subsequently filed along with a transcript of the proceedings, and videotapes and the transcripts of testimony of several witnesses who could not attend the hearing. The parties agree that the questions presented are matters of equity committed to the sound discretion of the court.

#### **Findings of Fact**

The court makes the following findings of fact:

1. Norman Helfant ("Helfant") once worked for Clark Capital Management ("Clark Capital"), an investment management firm,

- and received 110 shares of Clark Capital shares as part of his compensation. (Stock Certificates, Exhibits in Connection with June 20, 2000 Hearing ("Exs.") Tab 2).
2. In early October 1997, Helfant was found dead from a bullet wound to the head, an act that was treated by the authorities as a suicide. (Helfant Obituary, Exs. Tab 4).
  3. George Vishnesky ("Vishnesky"), a long time friend of Helfant, was appointed executor of the Helfant Estate pursuant to Helfant's Last Will and Testament dated January 8, 1997. (Helfant's Will, Exs. Tab 5 at 5).
  4. Helfant's will was executed in New Jersey and his estate was probated in New Jersey. (Surrogate's Letter, Exs. Tab 5 at 1).
  5. Helfant's will left several specific bequests to various individuals and named Vishnesky and David Fox ("Fox"), Helfant's companion, residual beneficiaries. (Helfant's Will, Exs. Tab 5 at ¶ 8).
  6. Vishnesky distributed the assets of Helfant's estate according to the terms of Helfant's will; however, Helfant's Clark Capital stock was not distributed during the liquidation of the estate. (Vishnesky Tr. at 17).
  7. Henry Chmielewski had been a salesman in a European office of Clark Capital and knew Norman Helfant through their mutual employment at Clark Capital. (Vishnesky Tr. at 15).

Chmielewsky had bitter feelings toward Harry Clark, the founder and Chief Executive Officer (CEO) of Clark Capital, and wanted to take control of Clark Capital. (Id. at 15-16).

8. Henry Chmielewski's wife, Agata Saczuk-Chmielewski, is a citizen of Eastern Europe who speaks conversational English only haltingly. (Douglas Lally, Esq. Tr. at 12). Both attorneys who dealt with her, Mark Sheppard, Esq. ("Sheppard") and Douglas Lally, Esq. ("Lally") questioned her English proficiency. Sheppard stated that he "didn't get the impression that she understood much of what Henry [Chmielewski] and I were discussing. It was clear that he took the lead." (Hr'g Tr. at 30). Lally noted that she does obviously pause for word choice. (Lally Tr. at 12).
9. On August 11, 1999, Henry Chmielewski convinced Vishnesky to sign a power of attorney which he drafted, that assigned to his wife, Agata Saczuk-Chmielewski, "full and complete power and authority to act" on behalf of the Helfant Estate as to:  
(a) Helfant's securities in Clark Capital; (b) any obligations of Clark Capital owed to the Helfant Estate; (c) any claims or causes of action that the Estate may have against Clark Capital. (Power of Attorney, Exs. Tab 6).
10. Henry Chmielewski further convinced Mr. Vishnesky in August and September 1999 to spend \$5,000 on various lawyers to

investigate claims against Clark Capital. (Copies of Checks, Exs. Tab 7).

11. Around August or September 1999, Henry Chmielewski, without Vishnesky's permission, took the Clark Capital stock certificates from Helfant's former house and still has control over them. (Vishnesky Tr. at 16-17).
12. On October 21, 1999, Vishnesky suffered a severe cerebella hemorrhage, a type of "stroke". (Richman Tr. at 11). Dr. Mitchell Richman, ("Dr. Richman"),<sup>1</sup> Vishensky's current treating physician, gave an uncontradicted medical opinion as to the nature, effect, and duration of the stroke and stroke sequella. The court credits that testimony in its entirety.
13. Vishnesky was hospitalized between October 21, 1999, and October 30, 1999 for acute care related to his cerebral hemorrhage. (Cheney Tr. at 7).
14. From October 31, 2000, until December 3, 2000, Vishnesky received rehabilitative care secondary to his stroke. (Id. at 8-9).

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<sup>1</sup> Dr. Richman received his M.D. in 1982 from the State University of New York. Dr. Richman did his three-year family practice residency at John F. Kennedy Medical Center in Edison, New Jersey, serving as chief resident for one year. This residency included rotations in psychiatry and mental health, including treatment of outpatients who have psychiatric, psychologic, and mental health problems. Dr. Richman has been a practicing family physician for fifteen years. He is Board certified by the American Board of Family Practice and is a member of the American Academy of Family Physicians, the New Jersey Academy of Family Physicians, New Jersey Medical Society, and the Burlington County Medical Society. (Richman Tr. at 6,9).

15. On December 3, 2000, Vishnesky returned to his home where he was cared for by his companion, Richard Cheney ("Cheney").
16. In December when Vishnesky returned home, his attention span was extremely short, he would forget that he was holding a piece of paper, and he could not balance a checkbook.  
(Cheney Tr. at 14, 34; Vishnesky Tr. at 25).
17. Dr. Richman began treating Vishnesky on December 9, 1999, and also examined Vishnesky on or around the following dates: January 10, 2000; January 18, 2000; late January, 2000; February 11, 2000; early March, 2000; March 15, 2000; April 5, 2000; May 18, 2000; May 22, 2000; June 7, 2000.  
(Richman Tr. at 19-21).
18. Dr. Richman also had telephone conversations with Vishnesky between December 9, 1999, and January 10, 2000, to adjust his medication. (Id. at 20).
19. In addition, Dr. Richman was familiar with all medical records pertaining to Vishnesky's hospitalization and discharge. (Id. at 12-13).
20. Dr. Richman testified competently to the severity of Vishnesky's stroke. The doctor opined that in the case of an intercerebral hemorrhage, such as the one that Vishnesky suffered, blood escapes from a blood vessel and bleeds into the brain itself. A CAT scan indicated that in Vishnesky's case the bleeding was large. (Id. at 16). Dr. Richman

pointed out that the hospital records showed an accumulation of blood in the brain, evidenced by a "right upward gaze." (Id.).

21. As a further indication of the severity of the stroke, Dr. Richman noted that Vishnesky was admitted to the intensive care unit, with the attendance of a neurosurgeon who administered two intravenous medications to lower his blood pressure, and where he required artificial feeding tubes to compensate for his inability to swallow. (Id. at 16).
22. Dr. Richman recounted that when Vishnesky came under his care, his short-term memory was so impaired that the doctor had to rely on Cheney's recollection of what happened involving the stroke. (Id. at 18, 19).
23. Dr. Richman began treating Vishnesky on December 9, 1999. On that day, Vishnesky had no memory of anything that happened around the time of the stroke and totally depended on Cheney for all of his daily physical needs, such as feeding and medication administration. (Richman Tr. at 18-19). Dr. Richman, upon examination, found Vishnesky in the same condition on January 10, 2000. As of January 18, 2000, Vishnesky still required the assistance of a tube for feeding. (Id. at 20).
24. Dr. Richman opined that between December 3, 1999 and February 11, 2000, Vishnesky did not possess the mental

capacity to make an informed judgment about a legal document or to enter into a legally binding agreement due to the cerebral hemorrhage suffered on October 21, 1999.

(Richman Tr. at 24-25, 45).

25. Henry Chmielewski and Agata Saczuk-Chmielewski (collectively the "Chmielewski's") had actual knowledge of the fact of Vishnesky's stroke because they visited Vishnesky on several occasions and spoke frequently to Cheney about Vishnesky's condition. (Cheney Tr. 8-9; Vishnesky Tr. at 23). They may not have appreciated the severity of the stroke.
26. In the first or second week of October 1999, the Chmielewski's tried to retain Mark Sheppard, Esq. to pursue a claim against Clark Capital on the behalf of the Helfant Estate. (Hr'g Tr. at 28-29). In trying to retain Sheppard, Henry Chmielewski showed Sheppard the August 1999 Power of Attorney to Agata Saczuk-Chmielewski and the original share certificates for Helfant's Clark Capital stock. (Id. at 29, 33-34). Because the shares at issue belonged to the Helfant Estate, Sheppard requested that he meet with Vishnesky, the executor of the estate. After Henry Chmielewski denied Sheppard's several requests to meet with Vishnesky, Sheppard terminated his legal representation of the Helfant Estate in December, 1999. (Id. at 30-34).
27. On December 24, 1999, the Chmielewski's signed a Legal

- Representation Agreement (the "Representation Agreement") which purports to retain Douglas Lally, Esq. to represent the Helfant Estate without the legal consent of Vishnesky. (Legal Representation Agreement, Exs.8 at 3).
28. Agata Saczuk-Chmielewski's lack of capacity with the English language coupled with the fact that Henry Chmielewski took the lead in discussions about the case, should have put Lally on notice that she could not be the representative of the Helfant Estate. (Lally Tr. at 12, 26; Hr'g Tr. at 30).
  29. The Representation Agreement states that the Estate of Norman Helfant is Lally's client and obligates the estate to pay Lally's bills. (Legal Representation Agreement, Exs.8 at Introduction & section 2.1).
  30. The Representation Agreement was negotiated between Lally and the Chmielewski's allegedly on the behalf of the Helfant Estate. However, there was no communication between Lally and Vishnesky during the negotiation of the Representation Agreement or at anytime. (Lally Tr. at 13).
  31. The Representation Agreement obligates the Helfant Estate to pay Lally both on an hourly basis as well as a 20% contingency fee basis. (Legal Representation Agreement, Exs. Tab 8 at section 2.1).
  32. The Chmielewski's and Lally signed the Representation Agreement in Lally's office on December 24, 1999; Vishnesky

also signed the Representation Agreement at sometime between December 24 and 28, 1999, in his home, three weeks after Vishnesky's return to his home, when he was still incapacitated by the effects of the severe stroke. (Legal Representation Agreement, Exs. Tab 9 at Introduction & p. 3; Lally Tr. at 26, 50-51).

33. In connection with the Representation Agreement, Henry Chmielewski caused Vishnesky to draft a check for \$6,000 payable to Lally on December 12, 1999. (Copies of Checks, Exs. Tab 7).
34. On January 17, 2000, Vishnesky signed another document presented by Henry Chmielewski, entitled "Irrevocable Assignment, Release of Claims and Irrevocable Power of Attorney," ("Irrevocable Assignment"). This purports to sell the rights to any proceeds from the Helfant Estate's litigation against Clark Capital to the Chmielewski's for \$1.00 and "other good and valuable consideration." (Irrevocable Assignment, Exs. Tab 12 at 1).
35. On January 17, 2000, when Agata Saczuk-Chmielewski entered into the Irrevocable Assignment that conveyed the rights to the Helfant stock to herself and her husband, she was under the impression that she was the attorney in fact for the Helfant Estate with regard to the Estate's action against Clark Capital. (August 1999 Power of Attorney, Exs. Tab 6).

36. Because the Irrevocable Assignment did nothing to alter the Representation Agreement, its effect was to obligate the estate to pay all litigation expenses while entitling the Chmielewski's to receive any and all proceeds resulting from successful litigation of the action. (Lally Tr. 71-74; Irrevocable Assignment, Exs. Tab 12).
37. On April 14, 2000, pursuant to a notarized Revocation of Power of Attorney, Vishnesky rescinded Agata Saczuk-Chmielewski's power of attorney and Lally's legal representation of the Helfant Estate. (Revocation of Power of Attorney, Exs. Tab 15).

#### **Conclusions of Law**

The August 1999 Power of Attorney to Agata Saczuk-Chmielewski

1. The August 1999 Power of Attorney to Agata Saczuk-Chmielewski is void ab initio. Vishnesky, through counsel, contends that Agata Saczuk-Chmielewski's power of attorney is void ab initio because executors of estates lack the capacity to confer to someone else the authority to bring a lawsuit in the name of the estate. (Robert LaRocca's Proposed Findings of Fact and Conclusions of Law at 30-1). New Jersey law, not Pennsylvania law, governs the validity of the August 1999 Power of Attorney. However, because both states' laws produce the same result, a choice of law analysis is not necessary or relevant. The choice of law is

not outcome determinative. See Melville v. American Assurance Co., 84 F.2d 1306, 1308 (3d Cir. 1978). Although there was no discussion in either party's brief about whether Pennsylvania law can apply and although the brief submitted by Charles Resnick, Esq., attorney for the Chmielewski's, did not address whether under New Jersey law an executor can confer complete discretionary authority to another person to bring a suit in the name of the estate, it may be instructive to note how the court arrived at its conclusion that New Jersey law applies.

2. The 1999 Power of Attorney purports to confer full and complete control over any claims the Helfant Estate had against Clark Capital to Agata Saczuk-Chmielewski to pursue or not pursue at her sole discretion. (Power of Attorney, Exs. Tab 6). The power of attorney states that it is governed by Pennsylvania law. (Power of Attorney, Exs. Tab 6). Despite a choice of law provision in a power of attorney, the court has to determine if the authority purported to be conveyed is consistent with the law of the state of appointment as discussed in Restatement of Law Second (Conflict of Laws) which states that the "duties of an executor or administrator with regard to the conduct of the administration are usually determined by the local law of the state of appointment." RESTATEMENT (SECOND) OF CONFLICTS

OF LAW § 316 (1969).

3. George Vishnesky was appointed executor in New Jersey. (Surrogate's Letter, Exs. Tab 5 at 1). By naming Vishnesky his executor, Helfant elected Vishnesky to a position of trust and confidence where he had discretion to act in Helfant's interest. Helfant did not state in his will that Vishnesky could substitute anyone else to use his or her judgment to act in Helfant's interest. (Helfant's Will, Exs. Tab 5 at ¶ 13). The 1999 Power of Attorney purported to take decision making away from Helfant's appointed trustee, Vishnesky, and to give unbridled discretion to Agata Saczuk-Chmielewski. This was an impermissible abdication of the executor's function.
4. New Jersey law follows the fundamental agency principle that an agent cannot delegate discretionary duty. "It is a general rule that in all cases of delegated authority where personal trust or confidence is reposed in the agent, and especially where the exercise and application of the powers are subject to his judgment and discretion, such authority cannot be delegated unless there is a special power of substitution." Rosenthal v. Art Metal, Inc., 229 A.2d 676, 679 (N.J. Super. Ct. Law Div. 1967); Titus v. Miller, 29 A.2d 550, 551 (N.J. Ch. 1942) (holding that the duties of a relationship of personal trust and confidence cannot be

delegated).<sup>2</sup>

5. Secondly, even if the 1999 Power of Attorney were not void ab initio, the power of attorney is voidable by the executor at anytime, and Vishnesky revoked the power of attorney on April 14, 2000. (Revocation of Power of Attorney, Exs. Tab 15). New Jersey follows the general rule that a power of attorney may be revoked at the will of the principal unless it is coupled with an interest. A basic concept in the law of agency is the right of a principal to select his own alter ego. See Sarokhan v. Fair Lawn Memorial Hospital, Inc., 199 A.2d 52, 55-56 (N.J. Super. Ct. App. Div. 1964) (stating that courts rarely force a principal to keep an agent against his will "because the law has allowed every principal a power to revoke his deputation at any time"). The following are examples of where New Jersey courts have recognized an agency coupled with an interest. A borrower gave a lender a power of attorney to sell a vessel, with authority to deduct from the proceeds the balance due on the loan and turn over the residue to the borrower. The court found that this power of attorney was irrevocable as an agency coupled with an interest. The court concluded that if the agency is given as a security for a debt or

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<sup>2</sup> Although New Jersey law controls, similarly, under Pennsylvania law, a fiduciary may not delegate to another the performance of a duty involving discretion and judgment. See Estate of Quinlan, 273 A.2d 340, 342 (Pa. 1971).

obligation, it is regarded as an agency coupled with an interest. See Sarokhan, 199 A.2d at 56-7 citing Hunt v. Rousmanier, 5 L.Ed. 589 (1823). In a case where a management contract and agency were tied to a purchase of a large amount of stock, the court reasoned that plaintiff had an interest in the subject matter, ownership of stock in the company, and the power of attorney was necessary to preserve that property interest. See Sarokhan, 199 A.2d at 56-7 citing Buck Creek Cotton Mills v. Stokely, 181 So. 100 (Ala. Super. Ct. 1938). This result follows the American Jurisprudence Second (Agency) formulation that "in order that a power may be irrevocable because coupled with an interest, it is necessary that the interest shall be in the subject matter of the power, and not in the proceeds which will arise from the exercise of power." 3 AM. JUR. 2D Agency § 65 (1986).

6. In this case, the August 1999 Power of Attorney was not an agency coupled with an interest. Although the Chmielewski's have an "interest" in a colloquial sense in an agency arrangement that would allow them to bring a suit against Clark Capital, they do not have an "interest" in a legal sense as it has been recognized under New Jersey law. In the 1999 Power of Attorney, Vishnesky only delegated the "power of attorney" to Agata Saczuk-Chmielewski, without any

corresponding property interest in any part of the Clark Capital stock. Accordingly, Agata Saczuk-Chmielewski cannot claim to have any sort of interest that prevents the power of attorney from being revoked.

#### The Legal Representation Agreement

7. Any difference between New Jersey and Pennsylvania standards for competency to execute an agreement does not have a significant effect on the outcome of this motion; thus, the court does not undertake a choice of law analysis.
8. The Representation Agreement of December 1999 is also void ab initio. As drafted, the Representation Agreement required Vishnesky's valid signature but Vishnesky was incompetent at the time that he signed the document. Douglas Lally intended and understood that the Representation Agreement only went into effect after Vishnesky signed it. In his deposition, Lally stated, "as the agreement says, it doesn't begin until I've received a signed copy of this agreement from client. And the client is obviously Helfant. And when I received it on the 28<sup>th</sup> ...I signed it. At that point it became operative." (Lally Tr. at 50). Furthermore, this court concludes that it was clear from Lally's deposition for the June 20, 1999 hearing that Lally required Vishensky's signature because Lally doubted the legitimacy of Agata Saczuk-Chmielewski's power

of attorney and the enforceability of documents with her signature in lieu of Vishnesky's signature. In order to ensure acceptance of the Representation Agreement, Lally required Vishnesky's signature. Lally stated at the evidentiary hearing, "my Legal Representation Agreement was signed by him as a verification for me that the attached power of attorney which he'd executed in August was still valid." (Hr'g, Tr. at 43). There is no dispute that, as drafted, the Representation Agreement required Vishnesky's valid signature to become operative.

9. Vishnesky was not competent at the time he signed the Representation Agreement. Therefore, the Representation Agreement never received a necessary valid signature, and therefore, is invalid.
10. Under New Jersey law, "[W]here there is not the mental capacity to comprehend and understand, there is not the capacity to make a valid contract." Wolkoff v. Villane, 672 A.2d 242, 244 (N.J. Super. Ct. App. Div. 1996); see also DeMedio v. DeMedio, 257 A.2d 290, 300 (Pa. Super. Ct. 1969) (same). The test of capacity to make an agreement ... is that "a man shall have the ability to understand the nature and effect of the act in which he is engaged, and the business he is transacting.... [I]f the mind be so clouded or perverted by age, disease, or affliction, that he cannot

comprehend the business in which he is engaging, then the writing is not his deed." Wolkoff, 672 A.2d at 245.

11. Similarly, under Pennsylvania law, the standard for mental capacity to contract is whether a person has sufficient intelligence to comprehend the nature and character of the transaction. Law v. Mackie, 95 A.2d 656, 663 (Pa. 1953); Taylor v. Avi, 415 A.2d 894, 897 (Pa. Super. Ct. 1979) (stating that the capability to understand the nature and character of business transactions is the standard to evaluate competency to contract).
12. When, still incapacitated from a severe stroke, Vishnesky signed the Representation Agreement, he could not understand the nature and effect of the business in which he was engaging because of the stroke effects. Vishnesky only returned home December 3, 1999, and as he and his caregiver testified, Visknesky's attention span was extremely short, he would forget that he was holding a piece of paper, and he could not balance a checkbook. (Cheney Tr. at 14, 34; Vishnesky Tr. at 25). On December 9, 1999, the day that Dr. Richman started treating Vishnesky and only two weeks before Vishneky signed the Representation Agreement, Vishnesky still had no memory of anything that had happened around the time of the stroke and totally depended on Mr. Cheney for all of his daily physical needs, such as feeding and

medication administration. (Richman Tr. at 18-19). Dr. Richman testified that Vishnesky was in this same condition on January 10, 2000, after the date on which he executed the Representation Agreement. (Id. at 20). Dr. Richman, whose testimony the court credits, gave uncontradicted medical testimony that given the nature of Vishnesky's stroke, Vishnesky would not have the capacity to understand the ramifications of what he was doing from December 3, 1999 through February 11, 2000 even if he appeared to be able to sign a document. Dr. Richman further explained that Vishnesky would not have been able to determine whether it was in his best interest to execute a document. (Richman Tr. at 24-25, 35-36, 45, 48-50).

13. The court finds that Vishnesky has met his burden of proof under New Jersey and Pennsylvania law that he lacked the capacity to execute competently the Representation Agreement and the Irrevocable Assignment.
14. Vishnesky has met his burden to prove his legal incapacity under New Jersey law "on the basis of relevant, competent evidence." Wolkoff, 672 A.2d at 247. Dr. Richman's uncontradicted medical testimony, corroborated by Vishnesky and Cheney, constitutes "clear, precise, and convincing" evidence so as to meet Pennsylvania's standards if that state's law is applicable. Elliott v. Clawson, 204 A.2d

272, 273 (Pa. 1964).

15. Lally does not have an agreement by which he can enforce against the Helfant Estate or Vishnesky claims for legal work he may have completed to date. Henry Chmielewski, who is not an authorized representative of the Helfant Estate, hired Lally. Therefore, if there is a client, he is it. Lally negotiated and contracted with Henry Chmielewski as if Henry Chmielewski could represent the estate even though Lally knew absolutely that Henry Chmielewski did not lawfully possess such authority. When asked whether Lally had any discussions at all with Agata Saczuk-Chmielewski concerning the Representation Agreement, Lally said that "she allowed Henry to do a lot of the foot work," (Lally Tr. at 30-31), and "Henry as I mentioned earlier, was the primary speaker." (Lally Tr. at 51). Lally knew that only Agata Saczuk-Chmielewski had a power of attorney and that power of attorney only appointed her and did not give her the power to appoint someone else.
16. Agata Saczuk-Chmielewski did not have actual authority to retain Lally and she had no apparent authority to do so. It had to have been obvious to Lally that she was not a true fiduciary for the estate but rather her power of attorney was being used impermissibly by Henry Chmielewski.
17. Finally, even if Lally did not know that Agata Saczuk-

Chmielewski lacked valid authority to represent the estate, he was on notice by the circumstances that he should investigate the validity of her power of attorney. Although Lally claims that he did not know that Vishnesky had a severe stroke right around the time that the Representation Agreement was executed, Lally admits that he knew Vishnesky "was at home convalescing." (Lally Tr. at 37). In addition, Lally admits that he knew Vishnesky "was in bed a lot, that he did not walk around a lot and he didn't leave the house...Obviously he had a medical condition...that he was medically at home." (Lally Tr. at 38). The circumstances imposed a duty of investigation. His failure to ascertain Vishnesky's lack of capacity cannot be the financial responsibility of the estate. Therefore, he cannot recover against the estate or Vishnesky for attorney's fees and costs.

#### Irrevocable Assignment

18. As discussed above, a choice of law analysis is not necessary if the choice of law is not outcome determinative. The court finds that as a matter of law, the Irrevocable Assignment is invalid under both Pennsylvania and New Jersey law for each of the following reasons.
19. First, on January 17, 2000, Vishnesky signed an agreement that purported to assign irrevocably the rights to the

proceeds from the Helfant Estate's litigation against Clark Capital to the Chmielewski's. The Irrevocable Assignment is void ab initio because, at the time that Vishnesky signed the document, he lacked the requisite mental capacity to execute any binding document, much less one that adversely affected his rights as well as the rights of David Fox, the other residual beneficiary. As detailed in Dr. Richman's testimony, Vishnesky signed the Irrevocable Assignment at a time when he did not have the mental capacity to execute a binding contract. (Richman Tr. at 45). In fact, on January 18, 2000, the day after Vishnesky signed the Irrevocable Assignment, he still required tube feedings. (Id. at 20). Furthermore, in addition to his own diminished mental capacity, Vishnesky never learned the significance of what he signed from the Chmielewski's or from a lawyer, despite statements to the contrary on the face of the document. (Vishnesky Tr. at 33).

20. Second, the Chimelewski's failed to satisfy an essential fiduciary duty to Vishnesky because, instead of protecting his interests during a time when he lacked the mental capacity to understand the nature of his actions, they caused him to sign a document that obligated the estate to pay legal fees while ensuring that the Chmielewski's would profit from any recovery. The Chmielewski's, as

fiduciaries, would have had an obligation to determine Vishnesky's mental and physical capacity before asking him to execute a legal document that adversely affected his interests. Under the circumstances, a reasonable person would have posed the question to the physician who was known to be still treating him for a severe stroke. They made no inquiry. At the time that they induced Vishnesky to sign the Irrevocable Assignment, Agata Saczuk-Chmielewski believed that she occupied a fiduciary role vis-a-vis Vishnesky through the August 1999 Power of Attorney. An agent is a fiduciary with respect to the matters within the scope of his agency. The very relationship implies that the principal has reposed trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal. Am.Jur.2d Agency § 210 (1986). See In re Shahan, 631 A.2d 1298, 1303 (Pa. Super. Ct. 1993); Hirsch v. Schwartz, 209 A.2d 635, 639 (N.J. Super. Ct. App. Div. 1965). Had the Chmielewski's consulted Vishnesky's treating physician, Dr. Richman, he would have told them that Vishnesky, while perhaps appearing to comprehend a legal document, in fact did not have the capacity to make informed decisions about legal matters. (Richman Tr. at 24-25, 48-50).

21. Third, the Irrevocable Assignment is both invalid and

voidable because Agata Saczuk-Chmielewski's actions, transferring the rights to the Clark Capital stock from the estate to herself, constitute impermissible fiduciary self-dealing. As of August 11, 1999, Agata Saczuk-Chmielewski believed she was attorney in fact for the estate, with a duty of absolute loyalty to the estate. Then, on January 17, 2000, she purported to transfer all of the estate's remaining assets to herself and her husband. This violates a central maxim of agency that it is forbidden for any one entrusted with the interests of others in any matter to make the business of the principal an object of personal interest to the agent. See Claughton v. Bear Sterns, 156 A.2d 314, 320 (Pa. 1959). The remedy for self-dealing is to void the self-interested transaction. See Warehime v. Warehime, 722 A.2d 1060, 1065 (Pa. Super. Ct. 1998) (holding that self-dealing by a fiduciary is a violation of the duty of loyalty and is voidable). Similarly, New Jersey law specifies that transactions involving fiduciary self-dealing are voidable. New Jersey's Administration of Estates' Statute states that "any transaction which is affected by a substantial conflict of interest on the part of the fiduciary, is voidable by any person interested in the estate." N.J. STAT. ANN § 3B:14-23.

22. Fourth, the Irrevocable Assignment is not a valid contract

as it is not supported by consideration. The purported consideration for the sale of the rights to the Clark Capital Stock to the Chmielewski's is that the estate will not be responsible for any legal expenses in pursuing the claim against Clark Capital. (Irrevocable Assignment, Exs. Tab 12 at ¶ 5). However, the Representation Agreement, which obligates the estate to pay all legal bills concerning the Clark Capital litigation, explicitly states that "the terms of this Agreement may only be modified in writing signed by both Client and Attorney." (Representation Agreement, Exs. Tab 8 at Art. V). Lally maintained in his deposition that the Irrevocable Assignment, which he did not agree to or sign, did not relieve the estate of paying for any Clark Capital litigation that he undertook. (Lally Tr. at 71-74). The court finds that, given the no-modification provision in the Representation Agreement, and given that the estate would remain obligated to pay Lally's legal charges, there is no consideration supporting the "Irrevocable Assignment."

#### **CONCLUSION**

An appropriate order follows.

