

STANDARD NO. 405

405. Self-dealing fiduciaries

PROBLEM:

Should the examiner certify title where the record discloses a conveyance by a fiduciary to himself or herself in an individual capacity; to the fiduciary's spouse, domestic partner, descendants, siblings or parents or their spouses; to an agent or attorney of the fiduciary; or to a corporation, trust or other person or enterprise in which the fiduciary or a person owning a significant interest in the fiduciary has an interest?

RECOMMENDATIONS:

- A. Such deeds of sale or distribution or mortgage from a Trustee, Personal Representative or Agent under a Power of Attorney should be accepted unless there is actual knowledge of impropriety or of a pending action to void the transfer.
- B. Such conveyances from a Conservator should not be accepted unless there is Probate Court approval for the transaction.
- C. Even if there is actual knowledge of impropriety for any conveyance made over twenty-five years prior to the search the possibility of a question arising as to the validity of the conveyance should be considered too remote unless the examiner has notice of some adverse claim. An applicable statute of limitation may shorten this period.
- D. A showing of the fiduciary's self-dealing authority in the form of a certification pursuant to 18-C M.R.S. §5-951 (formerly 18-A M.R.S. §5-951, repealed September 1, 2019) for Agents under a Power of Attorney and 18-B M.R.S. §1013 for Trustees should be obtained for a pending conveyance or mortgage but such certification need not be recorded.

DISCUSSION:

- A.
 - 1. Under the Probate Code improperly distributed property by the Personal Representative is liable for return by the distributee but only if the distributee has the property. 18-C M.R.S. §3-908 and §3-909 (formerly 18-A M.R.S. §3-908 and §3-909, repealed September 1, 2019). In addition, once a transfer for value has occurred, a purchaser or lender is protected. 18-C M.R.S. §3-910 (formerly 18-A M.R.S. §3-910, repealed September 1, 2019). Despite the potential for voidability, 18-C M.R.S. §3-714 (formerly 18-A M.R.S. §3-714, repealed September 1, 2019) provides protections to a grantee that in good faith either assists the Personal Representative or deals with the Personal Representative for value. Section 3-714 should be read to protect the title of a conveyance for value from the Personal Representative to any grantee, including one who is listed in Section 3-713. An examiner should rely on the traditional protection for

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bona fide purchasers for value, and the examiner should not raise an objection if evidence of a subsequent transfer for value is on the record including a stamp indicating "Transfer Tax Paid," in a fashion analogous to the prima facie effect of that stamp in 18-C M.R.S. §3-910 (formerly, 18-A M.R.S. §3-910, repealed September 1, 2019).

2. 18-B M.R.S. §1012 of the Trust Code protects third parties who in good faith deal with a trustee without knowledge of improper exercise. There is no duty to inquire as to the propriety of exercise of a trustee's powers. While a trust is revocable, the settlor may direct the trustee to act contrary to the terms of the Trust. 18-B M.R.S. §603(3). Therefore the trustees of a revocable trust who are also the settlors of the trust may convey property to themselves. An apparent distribution of the trust to a beneficiary should be accepted unless there is actual knowledge by the examiner of an improper distribution.
 3. The examiner should carefully review the recorded Power of Attorney and applicable statutes. Gifts require an express grant of authority by the principal. 18-C M.R.S. §5-931(1)(B) (formerly 18-A M.R.S. §5-931(a)(2), repealed September 1, 2019). 18-C M.R.S. §5-919(3) (formerly 18-A M.R.S. §5-919(c) effective July 1, 2011, repealed September 1, 2019) authorizes good faith acceptance of a power of attorney. Good faith is defined as honesty in fact, 18-C M.R.S. §5-902(4) (formerly 18-A M.R.S. §5-902(d), repealed September 1, 2019).
- B. Because Conservators are by definition acting for incompetent persons and since many probate courts require approval of any real estate sales, the examiner should require probate court approval whenever possible for current transactions involving apparent improper distributions or sales. Further, 18-C M.R.S. §5-425 (formerly 18-A M.R.S. Section 5-422, repealed September 1, 2019), requires probate court approval for any sale or encumbrance to a Conservator, an individual with whom the conservator resides, the spouse, domestic partner, descendant, sibling, agent or attorney of the conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.