

285 S.C. 260  
Supreme Court of South Carolina.

Preston B. FENDER, Cecil Fender,  
Glennie L. Fender, Harold Fender,  
Russell Fender, Darthy D. Fender,  
Johnnie E. Fender, and Virginia F.  
Prevatte, Respondents,  
v.  
James E. FENDER, Appellant.

No. 22291.  
|  
Heard March 27, 1985.  
|  
Decided April 22, 1985.

### Synopsis

Devises and legatees under decedent's will brought action to recover money and property transferred by decedent's attorney in fact to himself. The Common Pleas Court, Colleton County, Luke N. Brown, Jr., J., granted plaintiffs' motion for summary judgment, and appeal was taken. The Supreme Court, Gregory, J., held that: (1) any purported oral authorization of transfers by principal was ineffective, and (2) in order to avoid fraud and abuse, gift by an attorney in fact to himself or a third party is barred absent a clear intent to the contrary evidenced in writing.

Affirmed.

**Procedural Posture(s):** Motion for Summary Judgment.

### Attorneys and Law Firms

**\*261 \*\*430** Wendell O. Adams, Walterboro, and James B. Richardson, Jr., Columbia, for appellant.

**\*\*431** John E. Parker, Hampton, for respondents.

### Opinion

GREGORY, Justice:

James E. Fender appeals from an order for rescission of a deed to real property, and restitution of money and personal property transferred by appellant to himself as attorney in fact of the late Leroy Fender. We affirm.

**\*262** Appellant was granted a general power of attorney in an instrument executed by Mr. Fender dated February 2, 1982. Three weeks later, appellant transferred 37.4 acres of real estate and a car, both owned by Leroy Fender, to himself. He also transferred monies in two bank accounts<sup>1</sup> to himself.

Respondents, devisees and legatees under Leroy Fender's will, brought this action to recover the money and property. The trial judge granted their motion for summary judgment regarding the land, car, and one bank account, ruling appellant was without authority to effectuate the disputed transfers. We agree.

Absent intention to the contrary, an agent must further the principal's interests. He may not use his authority in a manner hostile to the principal for the benefit of himself or a third party. *2A C.J.S. Agency*, § 151, p. 773. It is incumbent upon the agent to act with the utmost good faith and loyalty. *3 C.J.S. Agency*, § 271, p. 31. Effectively, absent express intention, an agent may not utilize his position for his or a third party's personal benefit in a substantially gratuitous transfer. See *Estate of Rolater*, 542 P.2d 219 (Okla.App.1975); *Thompson v. Thompson*, 190 Ga. 264, 9 S.E.2d 80 (1940); See also *Aiello v. Clark*, 680 P.2d 1162 (Alaska 1984).

Appellant seeks to remove himself from the operation of the general rule. He contends that Mr. Fender orally authorized the transfers.<sup>2</sup> Notwithstanding such a claim, we hold today that any purported oral authorization was ineffective. The power to make any gift must be expressly granted in the instrument itself.<sup>3</sup>

"It is for the common security of mankind ... 'that gifts procured by agents ... from their principals, should be scrutinized with a close and vigilant suspicion.' " *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214, 218 (1958). Therefore, in order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing.

**\*263 AFFIRMED.**<sup>4</sup>

LITTLEJOHN, C.J., and NESS, HARWELL and CHANDLER, JJ., concur.

### All Citations

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- 1 Only one bank account is at issue in this appeal.
- 2 Mr. Fender's competency is not at issue, and there is no contention that he was incompetent when the transfers were made.
- 3 *Cf.* 73 A.L.R. 884 (regarding the grant of a power to sell and convey, and its effect upon a subsequent gift).
- 4 Appellant's exception to the exclusion of testimony is mooted by our opinion.