

MEMO



APR 05 2011

Senate of Pennsylvania

April 4, 2011

TO: ALL SENATORS

FROM: Stewart J. Greenleaf *SGW*

SUBJECT: Cosponsorship – Third party reliance on powers of attorney

I am introducing legislation to address the State Supreme Court decision in Vine v. Commonwealth, 9 A.3d 1150 (Pa. 2010). The case involves the statutory immunity afforded to third parties that act on the instructions of an attorney-in-fact pursuant to a facially valid power of attorney. The Vine case has caused great concern among attorneys who advise clients about and draft powers of attorney and third parties, primarily financial institutions that rely on the validity of the powers of attorney that are presented to them.

In Vine a woman suffered a stroke following an automobile accident and was unable to speak or comprehend. She had no memory of the accident and for several weeks after the accident she was unable to respond to family members who visited her. However, four days after the stroke she purportedly executed a power of attorney in favor of her then-husband. Her signature on the power of attorney consisted of an "X" marked on the appropriate line. A nurse at the hospital signed as a witness and it was notarized.

A few weeks later the woman retired and her husband, as her attorney-in-fact, selected a retirement option for her that allowed him to make withdrawals but which paid her less than the disability retirement option. If he had selected the disability option, the woman's monthly benefits would have been greater but her accumulated deductions would not have been available to her husband for withdrawal.

A few years later, the woman's husband filed for divorce and she discovered that she had not been retired on disability. She asked the retirement system to change her election to the disability option but was denied because the retirement system had relied in good faith on what looked to be a valid power of attorney. Eventually the case made it to the Supreme Court which ruled that section 5608 of the Probate, Estates and Fiduciaries Code (Title 20) did not protect the retirement system from liability because the woman had lacked capacity to execute the power of attorney and, as a result, the power of attorney was not valid. The Court stated that if the General Assembly had intended broader third party protection, it could have indicated as much by specifying that the protections in section 5608 extended to circumstances where the document in question had the indicia of validity regardless of its actual validity.

While anyone reading the difficult facts of the Vine case would sympathize with the woman, the Court's opinion appears to remove the immunity third parties have had for decades in relying on facially valid powers of attorney. Third parties will now be put in a position of having to investigate the circumstances surrounding the execution of a power of attorney. Instead of routinely relying on the validity of a power of attorney, they may have to seek the principal's ratification before acting. And, in turn, if the third party questions the power of attorney and does not comply with the instructions of the attorney-in-fact, the third party could find itself subject to liability for failing to comply with an agent's instructions.

In response to the Vine case, my legislation will make absolutely clear that the immunity under section 5608 applies to third parties that in good faith accept a facially valid power of attorney.

If you would like to cosponsor this legislation, please contact Pat Snively of my office by e-mailing her at psnively@pasen.gov.