

James LITVINKO *v.* Richard E. DOWNING  
and John E. ROUSSOS

76-225

545 S.W. 2d 616

Opinion delivered January 17, 1977  
(Division I)

1. PRINCIPAL AND AGENT — POWER OF ATTORNEY — FIDUCIARY DUTY, VIOLATION OF. — Where a terminally-ill wife executed a general power of attorney in favor of her husband, authorizing him, as her agent, to manage her property, receive money on her behalf, deposit it to her account, and draw checks upon her account — all as might be necessary and expedient — the husband violated his fiduciary duty by cashing and depositing to his own account two \$5,000 certificates of deposit purchased by his wife with her own money and made payable on her death to her two adult sons, particularly in view of the fact that there were other funds available to pay the expenses of the wife's last illness and funeral.
2. PRINCIPAL AND AGENT — BAD FAITH OF AGENT — EFFECT IN DETERMINING VIOLATION OF FIDUCIARY DUTY. — Although a different question might have been presented had the husband cashed the certificates and put the money in his wife's account in a good faith effort to shield her from hardship or suffering, thereafter claiming the money as the beneficiary of her will, what the chancellor found to have been done in bad faith cannot be condoned upon the supposition that a different course of conduct pursued in good faith might have led to the same final result.
3. PRINCIPAL AND AGENT — CONFLICT OF INTEREST, AVOIDANCE OF REQUIRED — FIDUCIARY DUTY, VIOLATION OF. — An agent's fiduciary duty requires him to avoid any possible conflict of in-

terest by acting solely in the best interest of his principal, and where the husband hastened to the bank as soon as he was given a power of attorney for his wife, cashed the certificates of deposit which she had purchased and made payable to her sons upon her death, and tried to make the proceeds his own, his motive was evidently to thwart his wife's wish that her sons have the certificates, and there is no doubt that he violated his fiduciary duty.

Appeal from Garland Chancery Court, *James W. Chesnutt*, Chancellor; affirmed.

*Ben J. Harrison*, for appellant.

*Glover, Sanders & Parkerson*, by: *J. E. Sanders*, for appellees.

GEORGE ROSE SMITH, Justice. The question here is whether James Litvinko is entitled to retain the proceeds of two \$5,000 certificates of deposit which belonged to his wife, payable on her death to her two adult sons, and which Litvinko, under a power of attorney, cashed during her terminal illness. The chancellor held that the money belongs to the two sons. Our statement of the case is greatly simplified by Litvinko's candid concession, through counsel, that he violated his fiduciary duty in the transaction.

Mrs. Litvinko had been successful as a business woman before she married Litvinko in about 1963. In February of 1974 they executed similar wills, each leaving his property to the other. About two months later Mrs. Litvinko used her own money to purchase the two certificates of deposit, each being payable on her death to one of her sons.

In May of 1975 Mrs. Litvinko was found to be terminally ill. When she became unable to write her name she executed a general power of attorney in favor of her husband. It authorized him, as her agent, to manage her property, receive money on her behalf, deposit it to her account, and draw checks upon her account — all as might be necessary and expedient. On the same day that the power of attorney was executed Litvinko took the two certificates from the couple's safety deposit box and cashed them, incurring a \$371 prepay-

ment penalty to the issuing bank. Litvinko deposited the money in his own bank account. Mrs. Litvinko died less than two months later. There were other funds available to pay the expenses of her last illness and funeral. This suit was brought by the two sons, for an accounting.

The appellant concedes, and there can be no doubt, that he violated his fiduciary duty, as an agent, in cashing the certificates and depositing the money in his own bank account. In Cardozo's often quoted words: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928). Litvinko's conduct fell far short of that standard.

It is argued, however, that Litvinko could, under the authority of the power of attorney, have cashed the certificates and deposited the proceeds to his wife's account. Upon her death he would have received the money as the beneficiary of her will. Hence, it is argued, the breach of duty makes no practical difference in the end.

What that argument disregards is the basic premise that an agent's fiduciary duty requires him to avoid any possible conflict of interest, by acting solely in the best interest of his principal. Had Litvinko cashed the certificates and put the money into his wife's account in a good faith effort to shield her from hardship or suffering, a different question might be presented. That is not what happened. To the contrary, Litvinko hastened to the bank, cashed the certificates, and tried to make the proceeds his own. His motive was evidently to thwart his wife's wish that her sons have the certificates. What the chancellor found to have been done in bad faith cannot be condoned upon the supposition that a different course of conduct, pursued in good faith, might have led to the same final result.

Affirmed.

We agree. HARRIS, C.J., and BYRD and HOLT, JJ.