IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 29, 2002

ETHEL CARMICAL, ET AL. v. MARY JANE KILPATRICK

Appeal from the Chancery Court for Perry County
No. 4115 Russ Heldman, Chancellor

No. M2002-00346-COA-R3-CV - Filed December 23, 2002

The trial court found that a joint bank account was not held as a joint tenancy with right of survivorship under Tenn. Code Ann. § 45-2-703 and, therefore, was part of the decedent's estate and not the separate property of the decedent's daughter. The appellant, the daughter, appeals the trial court's order that she return to the decedent's estate the amount of $27,662.20 and also appeals the award of attorney's fees in the amount of $4,500 to the appellees. Because the appellant did not provide clear and convincing evidence to overcome the statutory presumption against a joint tenancy with right of survivorship, we affirm the trial court's judgment regarding the account. Because there is not a statutory or contractual basis for the award of attorney's fees in this case, we reverse the award of attorney's fees.

Tenn R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Melanie Totty Cagle, Centerville, Tennessee, for the appellant, Mary Jane Kilpatrick, Individually, and as Co-Administratrix of the Estate of Lula McCoy.

Dan R. Bradley, Waverly, Tennessee, for the appellees, Ethel Carmical and Jesse McCoy.

OPINION

I. Facts

The parties in this lawsuit dispute the ownership of a bank account of the decedent, Mrs. Lula McCoy. Mary Jane Kilpatrick, the appellant, is the adult daughter of Mrs. McCoy, and Ethel

Carmical and Jesse McCoy, the appellees, are adult grandchildren of the decedent.[1] Mrs. McCoy had a bank account at the Bank of Perry County in Lobelville, Tennessee. Mrs. McCoy maintained the bank account for many years, having shared it with her husband as a joint account until his death. After her husband's death, the bank account was solely in Mrs. McCoy's name until June 4, 1992. On this date, Mrs. McCoy decided to add the name of her daughter, Mary Jane Kilpatrick, to the account, and the bank account was altered to show that the account was in the names of "Lula McCoy or Mary Jane Kilpatrick." Both Mrs. McCoy and Mrs. Kilpatrick signed the signature card containing the terms of the banking account.

Mrs. Kilpatrick testified that she had been writing checks at both her father's and mother's direction on the bank account since the 1970's, that this practice had continued unabated since that time, and became more frequent and necessary after Mrs. McCoy suffered a stroke in May of 1989. Ms. Johnnia Clark, the head cashier of the Bank of Perry County, testified that the bank's policy is to allow adult children of account holders to write checks on their parents' accounts without making any formal changes to the account.

It is undisputed that Mrs. McCoy and her daughter, Mrs. Kilpatrick, enjoyed a very close relationship. In fact, after Mrs. McCoy's stroke Mrs. Kilpatrick stayed with her mother during her entire hospital stay, and after she was released from the hospital, took her into her own home and provided full-time care for her for over five months. She drove her mother to rehabilitation therapy two to three times a week in Nashville and Dickson, managed her financial affairs and ran errands including picking up prescriptions, taking her to doctor's appointments and checking in on her several times a day after Mrs. McCoy was well enough to resume living in her own home.

Mrs. McCoy made virtually a full recovery and lived nearly nine years after her stroke until her death on April 14, 1998. Shortly thereafter, Mrs. Kilpatrick wrote a check from the bank account in the amount of $6,800 for Mrs. McCoy's funeral. This amount was paid from the account, leaving a balance of $27,662.20. Mrs. Kilpatrick then transferred this amount into a separate account in her name at the bank, where the full amount remains intact and is currently drawing interest.

On September 18, 1998, Ethel Carmical and Jesse McCoy, the appellees in the present case, filed suit against Mrs. Kilpatrick, alleging that she wrongfully converted funds from the account of Mrs. McCoy. The original petition was filed as part of the probate proceeding of the decedent. Additionally, the appellees sought the removal of Mrs. Kilpatrick as the Co-Administratrix of the estate of decedent. The attorney for the estate moved the trial court to dismiss the petition for lack of jurisdiction and/or failure to state a claim upon which relief could be granted. A consent order was entered, whereby the parties agreed the Clerk and Master would issue a new case number and separate case file for the petition to keep it separate from the probate proceedings. This procedure was accomplished.

[1] Mrs. McCoy had four living children at the time of her death, James, John, Ruth and Mary Jane. Ethel Carmical and Jesse McCoy are the heirs of Mrs. McCoy's now deceased son, James McCoy.

A final hearing was conducted on March 26, 2001, whereupon the Chancellor held that pursuant to Tenn. Code Ann. § 45-2-703, the account in question did not pass to Mrs. Kilpatrick and was, therefore, an asset of Mrs. McCoy's estate. The trial court accordingly ordered Mrs. Kilpatrick to return the $27,662.20.[2] Further, after considering two post trial briefs filed by the attorneys of record, the trial court ordered Mrs. Kilpatrick to pay $4,500 of the appellees' attorney's fee. Mrs. Kilpatrick appeals the trial court's decision.

II. Tennessee Code Annotated § 45-2-703

According to the signature card, Mary Jane Kilpatrick's name was added to her mother's bank account on June 4, 1992, after the effective date of the 1989 amendment to Tenn. Code Ann. § 45-2-703. Thus, the provisions of that revision are applicable to this account. *In re Estate of Nichols*, 856 S.W.2d 397, 398 (Tenn. 1993); *In re Verkstrom*, No. 03A01-9808-CH-00267, 1999 Tenn. App. LEXIS 63, at *4 (Tenn. Ct. App. Jan. 28, 1999) (no Tenn. R. App. P. 11 application filed).

Essentially, if a multi-party account clearly states that a right of survivorship is intended, then upon the death of one of the account holders the account passes directly to the survivor(s) and is not included in the deceased's estate. Tenn. Code Ann. § 45-2-703(f)(1); *see also In re Estate of Nichols*, 856 S.W.2d at 400-401. On the other hand, if the account does not clearly provide for a right of survivorship and the survivor fails to carry the burden of proving that such a right was intended, then the account becomes the property of the deceased's estate and will be distributed according to the decedent's will, or in the case of an intestate decedent through intestacy statutes to the decedent's heirs. Tenn. Code Ann. §§ 45-2-703(e)(2) and (f)(2).

In pertinent part, Tenn. Code Ann. § 45-2-703(e)(4) provides that in accounts described in § 45-2-703(c) (defining multiple-party accounts) the following interests are established:

> (4) In the absence of any specific designation in accordance with subsection (d), property held under the title, tenancy by the entireties, carries a right of survivorship; **property held under the title, joint tenancy, carries no right of survivorship unless a contrary intention is expressly stated**. Any other person to whose order the accounts or certificate of deposit is subject shall be presumed to have power of attorney with respect thereto and not to be an owner thereof. Such presumptions may be rebutted by clear and convincing evidence presented in the course of legal or equitable proceedings. . . .

Tenn. Code Ann. § 45-2-703(e)(4) (emphasis added). Thus, the presence or absence of a specific designation is critical. In addition, Tenn. Code Ann. § 45-2-703(d) provides the procedure for making such a designation and requires that:

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[2]The appellees did not seek the recovery of the $6,800 paid out of the account for Mrs. McCoy's funeral, as this amount would have been paid from Mrs. McCoy's estate anyway.

> (d)(1) When opening a multiple-party deposit account, or amending an existing deposit account so as to create a multiple party deposit account, each bank shall utilize account documents which enable the depositor to designate ownership interest therein in terms substantially similar to the following:
>
> (A) Joint tenants with right of survivorship;
>
> (B) Additional authorized signatory; and
>
> (C) Such other deposit designation as may be acceptable to the bank.
>
> (2) Account documents which enable the depositor to indicate his intent of the ownership interest in any multiple-party deposit account may include any of the following:
>
> (A) The signature card;
>
> (B) The deposit agreement;
>
> (C) A certificate of deposit;
>
> (D) A document confirming purchase of a certificate of deposit; or
>
> (E) Such other document provided by the bank or deposit institution which indicates the intent of the depositor.

Tenn. Code Ann. § 45-2-703(d).

Pursuant to this act, the Bank of Perry County had Mrs. McCoy and Mrs. Kilpatrick sign a signature card when the existing bank account, in Mrs. McCoy's name, was amended to add Mrs. Kilpatrick's name. On the signature card, under a heading that read, "Type of Account-personal," several categories of account designations are found with boxes for the depositor to check to indicate the type of account she wished to create. One box is located next to the words "joint - with survivorship," and another box is provided if the depositor wants an account to be "joint - no survivorship." Unfortunately, Mrs. McCoy failed to check either box or write anything on the signature card that would have expressly indicated her intention with regard to Mrs. Kilpatrick's interest in the account.

The failure of Mrs. McCoy to indicate that her intent was to create a right of survivorship by either checking the box marked "joint-with survivorship" or by expressly stating such an intent in some other fashion, leaves us with no choice but to apply the statutory presumption established by the General Assembly in Tenn. Code Ann. § 45-2-703(e)(4) against Mrs. Kilpatrick. This section provides that "[I]n the absence of any specific designation in accordance with subsection (d), . . .

property held under the title joint tenancy, carries no right of survivorship unless a contrary intention is **expressly stated**." (Emphasis added). In addition, the presumption may be overcome only by clear and convincing evidence. Tenn. Code Ann. § 45-2-703(e)(4).

III. The Evidence

Mrs. Kilpatrick argues that Mrs. McCoy's intent may be gleaned from: (1) the stated policy of the bank personnel in using the word "or" between the names on the account to indicate right of survivorship; (2) the fact that Mrs. Kilpatrick had long been able to sign checks for her mother on the account and, thus, there was no practical reason to change the name of the account to give Mrs. Kilpatrick mere check signing authority; and (3) the close relationship between Mrs. McCoy and her youngest daughter. The statute, however, does not allow circumstantial evidence of intent to rebut the presumption against a right of survivorship. Instead, it requires that the intent to create a right of survivorship be expressly stated.

According to the testimony of Mr. John Will Bates, the president of the bank and Ms. Clark, the head cashier, the policy of the Bank of Perry County is to simply use the word "or" between the names on a joint account if the parties want the account to have a right of survivorship, and, alternatively, if the parties do not intend a right of survivorship and intend only to give one party check signing authority or power of attorney, then that person's name is "designated on the card that it was signature only; and it wasn't added . . . not actually added to the account itself." Mr. Bates and Ms. Clark testified that this is the current practice of the bank and was the practice of the bank in 1992 when Mrs. McCoy amended the account to add Mrs. Kilpatrick's name. They also testified that this is how tellers employed at the bank, including Ms. Dorothy Cotton, the teller who assisted Mrs. McCoy and Mrs. Kilpatrick on June 4, 1992, were instructed to indicate that a joint account has right of survivorship.[3]

The testimony of Mr. Bates and Ms. Clark regarding the bank's policy in using the word "or" to indicate right of survivorship does not assist Mrs. Kilpatrick in overcoming the statutory presumption against such a right. That is because the bank employees' understanding of the policy is not evidence that Mrs. McCoy expressly stated this intent. Mrs. Kilpatrick has presented no evidence that Mrs. McCoy expressly stated an intent to create a right of survivorship by adding Mrs. Kilpatrick's name to her account.[4]

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[3]Mr. Bates and Ms. Clark testified that they did not really understand the legal significance of the term "right of survivorship," however, they testified that they understood the word "or" to mean that if one of the persons named on a joint account dies the account goes to the survivor.

[4]Mrs. Kilpatrick made an offer of proof regarding her recollection of the conversation between herself, her mother, and the bank teller who assisted them with changing the signature card. The trial court excluded this testimony under Tenn. Code Ann. § 24-1-203, the Dead Man's Statute, based on Mrs. Kilpatrick's status as Co-Administratrix of her mother's estate. Mrs. Kilpatrick does not appeal the decision of the trial court on this issue. Ms. Cotton, the bank teller, was unable to testify due to illness.

In *In re Verkstrom*, 1999 Tenn. App. LEXIS 63, this court did not find a right of survivorship under facts similar to those in the present case. In that case, Ms. Verkstrom added her sister's name to her bank account so that the account was titled in the names of Mildred M. Verkstrom or Edna Godwin. *Id*. at *3. As in the present case, Ms. Verkstrom did not mark the place on the signature card that would have indicated that the account was to be held as joint tenants with right of survivorship. *Id*. However, on the back of the signature card was an explanation that the purpose of the new card was to change the name title, saying nothing about survivorship. *Id*.

At trial to determine ownership of the bank account after the death of Ms. Verkstrom, Ms. Godwin attempted to rely on evidence that the bank had "classified the account in its records as a joint account with right of survivorship" to support her claim that her sister had intended for the account to have a right of survivorship. *Id*. at *4. The bank teller who assisted the deceased with the signature card testified that "she had been instructed by the bank to only put both names in the account title if it was to be a right of survivorship account," but was unable to recall the deceased's actual intent. *Id*. at *5. This court held that the trial court properly rejected the bank's treatment of the account as controlling, and held that Ms. Goodwin failed to provide the clear and convincing evidence necessary to rebut the presumption established in Tenn. Code Ann. § 45-2-703. *Id*. at *6.

In the present case, Mrs. Kilpatrick likewise failed to offer the necessary clear and convincing proof of her mother's intent to create a right of survivorship. Thus, she failed to rebut the presumption created in Tenn. Code Ann. § 45-2-703. We affirm the trial court.

IV. Attorney's Fees

Mrs. Kilpatrick also appeals the award of $4,500 in attorney's fees to the appellees. Tennessee follows the American Rule requiring "litigants to pay their own attorney's fees in the absence of a statute or contractual provision otherwise." *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000); *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998). From the appellees' post-trial and appellate briefs it appears that they argue in support of an award of attorney's fees on two bases: (1) on a finding that Mrs. Kilpatrick wrongfully converted the funds from her mother's bank account; and, alternatively, (2) by proposing that the court view this case as analogous to a will construction case. We will consider each argument in turn.

Conversion is the appropriation of tangible property to a party's own use in exclusion or defiance of the owner's rights. *Barger v. Webb*, 216 Tenn. 275, 278, 391 S.W.2d 664, 665 (1965); *Lance Prods., Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 211 (Tenn. Ct. App. 1988). Conversion is an intentional tort, and a party seeking to make out a prima facie case of conversion must prove: (1) the appropriation of another's property to one's own use and benefit; (2) by the intentional exercise of dominion over it; and (3) in defiance of the true owner's rights. *Kinnard v. Shoney's, Inc.*, 100 F. Supp.2d 781, 797 (M.D. Tenn. 2000); *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977). "[T]o be liable, the defendant need only have an intent to exercise dominion and control over the property that is in fact inconsistent with the

plaintiff's rights, and do so; good faith is generally immaterial." *Mammoth Cave Prod. Credit Ass'n.*, 569 S.W.2d at 836.

The trial court found that the money was wrongfully converted by Mrs. Kilpatrick. Regardless of whether Mrs. Kilpatrick is liable for conversion, such a finding does not mean that, as a tortfeasor, she is liable for attorney's fees. The appellees cite the general rule for damages in an action for conversion stated in *Lance Prods.*, 764 S.W.2d 207, in support of the award of attorney's fees, as follows:

> plaintiff's damages in an action for conversion are measured by the sum necessary to compensate him for all actual losses or injuries sustained as a natural and proximate result of the defendant's wrong.

Lance Prods., 764 S.W.2d at 213.

The appellees argue that they should be awarded their attorney's fees on the theory that such fees are "actual losses" they sustained as a result of Mrs. Kilpatrick's conversion of the bank account. The portion of the *Lance Prods*. opinion quoted does not tell the whole story, however. The discussion of damages in that case involved the sufficiency of pleading and proof of consequential damages and special damages, including lost profits, injury to business, damage to reputation, and emotional distress. The issue of attorney's fees was not discussed, and apparently such fees were not requested.

Directly in opposition to the appellees' argument in *Glazer v. First Am. Nat'l Bank*, No. 02A01-9308-CH-00185, 1995 Tenn. App. LEXIS 348 (Tenn. Ct. App. May 25, 1995) (later reversed on different grounds by *Glazer v. First Am. Nat'l Bank*, 930 S.W.2d 546 (Tenn. 1996)), this court specifically held that the trial court's award of attorney's fees as part of a consequential damage award to the plaintiff in a conversion case was not appropriate. The court stated that:

> Because there has been no allegation of a statutory or contractual provision for attorney's fees here, we find that the trial court's inclusion of Plaintiff's attorney's fees in its award of damages was unwarranted.

Glazer, 1995 Tenn. App. LEXIS 348, at *15. This conclusion is consistent with Tennessee's adherence to the American Rule.

Tennessee courts have long rejected attempts to include attorney's fees as a part of damages, "concluding that an award of attorney's fees as part of the prevailing party's damages is contrary to public policy." *John Kohl & Co. P.C., v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998). In *John Kohl & Co*. the Supreme Court stated it was not persuaded that legal malpractice claims should be made an exception to the rule against awarding attorney's fees in the absence of an agreement or statute and held that attorney's fees in legal malpractice suits, "as in other litigation," may not be awarded. *Id.* No exception has been made for attorney's fees in conversion cases, either,

and we find no basis for creating one. Therefore, the appellees cannot recover their attorney's fees from Mrs. Kilpatrick based on a finding of conversion.

We next address the appellees' argument that they are entitled to the award of attorney's fees because this case is analogous to a will construction case. Appellees cite *Marshall v. First National Bank of Lewisburg*, 622 S.W.2d 558 (Tenn. Ct. App. 1981), in support of this proposition. We find that the appellees' reliance on *Marshall* is misplaced. That case involved a request for attorney's fees for the plaintiff life income beneficiary who had successfully sued to have stock dividends paid to him as income of the trust. The beneficiary argued that attorney's fees were appropriate because the suit "took on the aspects of a will or trust instrument construction case." This court rejected that argument and instead held that while "[a]n allowance of attorney's fees is appropriate where the estate cannot be administered and the parties are at a loss as to their position without a judicial construction of the will. . . such is not the case here; the construction of the will is not the focal point of this suit." *Id*. 622 S.W.2d at 560.

Just as the court in *Marshall* declined to equate a will construction case to a case involving a dispute over payments from a trust, we likewise fail to find that the present dispute over ownership of a bank account is similar enough to a will construction case to warrant an award of attorney's fees on that basis. The *Marshall* court also found that because the award of attorney's fees is unusual, the plaintiff has the obligation of specially pleading a request for such fees as an item of special damages. *Id*. at 561. No such specific request was made in the pleadings herein, either against Mrs. Kilpatrick personally or against the estate.

Although not clearly argued as such, we think the appellees' position is more akin to a claim to attorney's fees under the "common fund doctrine." That doctrine is an exception to the American Rule and provides that a private plaintiff or the plaintiff's lawyer whose efforts create, discover, increase, or preserve a fund from which others may benefit is entitled to recover the costs of litigation, including attorney's fees, from the fund. *Roberts v. Sanders*, No. M1998-00957-COA-R3-CV, 2002 Tenn. App. LEXIS 140, at *36, (Tenn. Ct. App. Feb. 22, 2002) (no Tenn. R. App. P. 11 application filed); *Gilpin v. Burrage*, 188 Tenn. 80, 89, 216 S.W.2d 732, 736 (1948); *Hobson v. First State Bank*, 801 S.W.2d 807, 809 (Tenn. Ct. App. 1990). "It is an equitable vehicle for providing compensation for the legal work done to create the fund and for spreading the burden of the litigation expenses among those who have benefitted from the litigant's efforts." *Roberts*, 2002 Tenn. App. LEXIS at * 37.

The corpus of a decedent's estate can constitute a common fund, and the common fund doctrine has been applied in a case with facts similar to this one. In *In re Estate of McCrary v. McCrary*, No. 87-128-II, 1987 Tenn. App. LEXIS 2734, (Tenn. Ct. App. June 9, 1987) (no Tenn. R. App. P. 11 application filed), six of the eight children of the decedent sued to recover into the decedent's estate the funds from several bank accounts claimed as personal property by another of the decedent's children. The defendant son claimed the accounts had passed outside the estate to him as the survivor under a right of survivorship he alleged arose by virtue of the accounts being joint accounts held by the decedent and himself. *McCrary*, 1987 Tenn. App. LEXIS 2734 at *2.

This court held that five of the six accounts at issue were the property of the estate and ordered those funds returned to the estate, and further ordered that the plaintiffs were entitled to recover their attorney's fees from the corpus of the estate. *Id*. at *2-*5.

The common fund doctrine is based on the concept that the fees will be paid out of the fund. We find no authority for an award against an individual defendant based upon benefit to the common fund and the other beneficiaries of that fund. The trial court's order herein requires Mrs. Kilpatrick to pay directly to the plaintiffs $4500 as and for attorney's fees "which were required to force the Defendant to return the funds mentioned above to the estate."[5]

Accordingly, we must reverse the trial court's award of attorney's fees to the appellees.

V. Conclusion

For the reasons herein, we affirm in part, reverse in part and remand to the trial court for further proceedings consistent with this opinion should any be necessary. The costs of appeal are taxed equally against the appellant, Mary J. Kilpatrick, and the appellees, Ethel Carmical and Jesse McCoy, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE

[5]The parties agreed to take this dispute out of the probate proceedings. As a consequence, the trial court herein had no jurisdiction to remove Mrs. Kilpatrick as Co-Administratrix, relief which had been sought in the probate matter, and of course the trial court did not address that request for relief. That leaves in question the plaintiffs' attempt to sue Mrs. Kilpatrick in her capacity as Co-Administratrix, and we conclude that in the present action for conversion and return of the money she was sued only individually.