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FEBRUARY 11, 2009
(FILE NO. 2008-SC-0196-DG)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000277-MR

ESTATE OF CHARLES SPENCER — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 06-CI-00396

LILA FAYE SPENCER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Charles Spencer and Lila Faye Spencer (Faye) were married on November 4, 1995. Both parties had been previously married, with children and premarital property. The majority of Charles' assets were inherited from his first wife. To provide for the disposition of their respective property upon the termination of their pending marriage either by dissolution or death, prior to their marriage, Charles and Faye executed a document entitled "Antenuptial Agreement." Charles' estate

argues that the agreement prevails over Faye's interest in an Edward Jones brokerage account registered as a joint account in Charles' and Faye's names. We agree with the circuit court's finding that the antenuptial agreement did not preclude Charles from giving Faye an interest in the account; however, we disagree that a joint account with a right of survivorship was created. We, therefore, reverse and remand.

In August 2004, Charles executed a "Letter of Authorization to Change Registration or Transfer Assets" which transferred stocks, bonds, and money market funds held in Charles' individual account to a new joint account at Edward Jones listing the owners as "Charles F. Spencer and L. Faye Spencer" with no mention of survivorship. Following Charles' death on February 10, 2006, his estate demanded that Faye release the assets listed as Charles' in the antenuptial agreement which included those held in the Edward Jones account. After Faye refused to comply with the request, the estate filed the present action.

Both parties moved for summary judgment. The circuit court held that based on Kentucky Revised Statutes (KRS) 391.315 and KRS 391.320, Faye became the owner of the Edward Jones account on the date of Charles' death and sustained Faye's motion for summary judgment. We hold that the account is not a joint account as used in the statutes; therefore, under common law, the use of the conjunctive "and" created a tenancy in common and, upon Charles' death, one-half of the account passed to Faye and the other one-half to the estate.

As a preliminary issue, we address the estate's challenge to the court's consideration of the Edward Jones records. With her summary judgment motion, Faye attached the Edward Jones letter of authorization and an "Account Authorization and Acknowledgment Form" signed by Charles and Faye. Without citation to authority, the estate contends that the documents were improperly considered by the circuit court because they were not properly introduced pursuant to the business record exception to the hearsay rule.

A court can properly consider extraneous material when deciding whether to grant or deny a summary judgment motion. *Gevedon v. Grigsby*, 303 S.W.2d 282, 284 (Ky. 1957). The documents in this case were properly introduced as a business record and properly authenticated pursuant to Ky. R. Evid. (KRE) 902(11). The documents were executed on the date that Charles transferred the assets into the joint account and were kept in the ordinary course of business by Edward Jones. Furthermore, the authenticity of the documents was attested by Anthony Whitehead, a legal assistant from Edward Jones.

Because there was no error in the circuit court's reliance on the Edward Jones documents, we address the substantive issues raised by the estate.

The parties agree the antenuptial agreement was voluntarily and freely executed after a full disclosure of assets and with the intent to dispose of the property upon termination of the marriage, either by death or dissolution. The parties do not contest that such agreements are valid and

enforceable. *Gentry v. Gentry*, 798 S.W.2d 928, 934-935 (Ky. 1990). In reliance on the terms of the agreement, the estate contends that regardless of the registration of the brokerage account in the names of Charles and Faye, the terms of the antenuptial agreement preclude her from ownership of Charles' premarital property.

When a person confers an interest in his intangible property and thereby creates the equivalent of a tenancy in common or a tenancy by the entirety, it is not necessary to establish the elements of a "gift."

> It is recognized in this state that a person may by depositing his own money in the names of himself and another create the equivalent of a tenancy in common or a tenancy by the entirety, depending upon his intent. *Gellert v. Busman's Adm'r,* 239 Ky. 328, 39 S.W.2d 511 (1931); *Armstrong's Ex'r v. Morris Plan Industrial Bank,* 282 Ky. 192, 138 S.W.2d 359 (1940); *Bishop v. Bishop's Ex'x*, 293 Ky. 652, 170 S.W.2d 1 (1943). As in the case of other intangibles such as bonds or stock certificates, the right gratuitously conferred on the other party is recognized and is enforceable on the theory of third party beneficiary contract. It is not necessary that such a contract be supported by a consideration moving from the beneficiary, and it is not necessary that a 'gift' be proved.

Saylor v. Saylor, 389 S.W.2d 904, 905 (Ky. 1965).

The estate contends that the antenuptial agreement prohibited any transfer of assets by Charles to Faye without compliance with the conditions contained in paragraph twelve of the agreement which relates to gifts received and made by the parties during the marriage. It states in part:

> Any gifts made by the parties to each other during the marriage shall be subjects of memorandum executed by the parties in duplicate and attached to the duplicate originals of this agreement.

The agreement contains no provision which precluded Charles from giving any or all of his premarital assets to Faye. To the contrary, the "gift" provision evidences that the parties to the agreement anticipated that such gratuitous acts would occur during the marriage. The estate, however, places much emphasis on the lack of a memorandum attached to the antenuptial agreement which, it argues, nullifies any attempt by Charles to convey a gift to Faye. We hold that the letter of authorization satisfies the gift clause of the agreement in that it clearly expressed his desire to give Faye an interest in the brokerage account. Charles deliberately changed the status of his individual account which was subject to the premarital property provision of the agreement to a joint account. The failure to attach the letter to the antenuptial agreement is not so significant that Charles' clear intent should be ignored. *See Collins v. Bauman*, 31 Ky.L.Rptr. 455, 102 S.W. 815, 816 (1907).

By changing the account to a joint account, Charles gave Faye an interest in the account. The question arises, however, whether a tenancy in common was created or, as found by the trial court, a tenancy in the entirety.

Under this Commonwealth's common law, the conjunctive "and" creates the equivalent of a tenancy in common. *Saylor,* 389 S.W.2d at 906. This rule is in contradiction of the majority of states holding that such language creates a tenancy

by the entirety. *Id.* In 1976, when presented with the adoption of the uniform probate code, the legislature declined to conform Kentucky law to the majority view. Instead, it adopted only portions of the Code including KRS 391.315 and KRS 391.320 applicable to multiple-party accounts. KRS 391.315 (1)(a) provides:

> Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties to the account as against the estate of the decedent unless there is clear and convincing written evidence of a different intention at the time the account is created.

The right of survivorship is determined by the form of the account at the death of a party. KRS 391.320.

Under KRS 391.315, the distinction between the use of the conjunction "and" as opposed to the use of "or" is eliminated if the property is a joint "account." Regardless of the mention of survivorship, if the property is a joint "account" as used in KRS 391.315, upon the death of an owner of the account, it passes to the survivor(s) whose name or names appear on the account. The estate contends that the Edward Jones account is not an "account" as used in the multiple-party accounts act and, consequently, it is entitled to one-half of the account.

The definition of account is contained in KRS 391.300. "Account" is a "contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangement." KRS 391.300(1). Financial institution is

defined as "any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions." KRS 391.300(3).

The issue of whether a brokerage account is included within the purview of the multiple-party accounts act has yet to be addressed in this Commonwealth. However, two courts have interpreted language identical to KRS 391.300 and held that brokerage accounts are not accounts within the meaning of the multiple-party accounts act. The reasoning is based on the premise that there is no contract of deposit of funds between the brokerage firm and the account owner. The proponents of this view point out that the primary purpose of the account is to act as a conduit to purchase securities and not the deposit of funds. As explained in *In re Bogert's Estate*, 96 Idaho 522, 531 P.2d 1167 (1975):

> In [order] for there to be an 'account' there must be a 'deposit of funds between a depositor and a financial institution . . . .' A stock brokerage firm which is handling a brokerage account for a person investing in stocks cannot be fairly construed to be a 'financial institution' and the investor a 'depositor' of funds. In our view, investments in stocks through the means of a stock broker, regardless of whether or not the securities are held in the name of the investor or the stock brokerage firm, are not the 'deposit of funds' in a 'financial institution' contemplated in the definition of 'account'. . . .

Id. at 525-526, 531 P.2d at 1170 – 1171. *See also Berg v. D.D.M.*, 603 N.W.2d 361 (Minn.App. 1999).

A search of the terms as commonly used in our statutory scheme governing financial institutions reveals that brokerage accounts are not within our legislature's use of the terms "account" and "financial institution." *See e.g.* KRS 286.2-685 (prohibiting the use of a financial institution's trademark); KRS 367.393 (applicable to certificate of deposits).

Additionally, Kentucky has adopted the Uniform Transfer on Death Security Registration Act. KRS 292.6501 *et.seq.* Specifically, KRS 292.6501(10)(a) includes in its definition of "security account" an "account with a broker, cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account . . . ." The purpose of the act is to regulate the registration of securities for transfer on death. Omitted from its provisions is any reference to KRS 391.315 or multiple-party accounts.

We believe there is a distinction expressed in our statutes and in the common use of brokerage accounts and traditional bank accounts. Although brokerage firms are increasingly more diverse in the business of finance, they generally are not involved in loans, mortgages, or business practices ordinarily conducted by banks, credit unions, and savings and loan associations. Primarily, the traditional role of a brokerage firm is as an investment service business. We conclude that the phrase "other like arrangement" does not

include a brokerage account and "financial institution" does not include a brokerage firm.

Since we hold that the multiple-party accounts act is not applicable to the Edward Jones brokerage account, we are bound by the common law as expressed by our highest court in *Saylor*. In the absence of proof to the contrary, intangibles titled in two names joined by the word "or" creates a joint tenancy with right of survivorship. Because the account in this case was designated "Charles F. Spencer and L. Faye Spencer," a tenancy in common was created. One-half of the account, therefore, passed to Faye at the time of Charles' death and the remainder to the estate.

Our conclusion that Charles gave Faye a one-half interest in the brokerage account renders it unnecessary to engage in a lengthy analysis of the estate's contention the antenuptial agreement prohibits Faye from making a claim against the estate. By virtue of the tenancy in common created by Charles prior to his death, Faye's interest in the account passed to her at the time of his death and is not included in the estate.

Finally, the estate argues that the circuit court failed to make findings regarding its request for a declaratory judgment to "define the assets acquired during the marriage." Notably absent from the allegations in the complaint and in subsequent pleadings are the assets that the estate believes Faye wrongfully retained. Although Faye was deposed, there is no evidence that she has possession of property acquired during

the marriage to which the estate is entitled and no further motions for discovery were filed by the estate.

Confronted with the lack of sufficient pleadings to decide the basis for the estate's claim, or even an indicia of evidence indicating that Faye retained property to which the estate was entitled, the circuit court sustained Faye's motion for summary judgment in its entirety. At the post-judgment motion hearing, the estate proposed that the summary judgment be made final and appealable, apparently anticipating this Court would remand the case for further findings on the issue. We decline to take such action and hold that under the facts presented, the estate has failed to present any legally sound argument or evidence that Faye has possession of any property to which the estate is entitled.

Based on the foregoing, the summary judgment of the McCracken Circuit Court is reversed and the case remanded for the entry of a judgment awarding one-half of the Edward Jones brokerage account to Faye and one-half of the account to the estate.

ALL CONCUR.

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