RENDERED: MAY 22, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000455-MR

MICHAEL L. WALDEN, INDIVIDUALLY
AND AS EXECUTOR OF THE
ESTATE OF JOE WALDEN, JR.,
DECEASED — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN L. WILSON, JUDGE
ACTION NO. 11-CI-00864

GERMAN AMERICAN FINANCIAL
ADVISORS AND TRUST CO.,
CONSERVATOR FOR MARY PEARL
WALDEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND THOMPSON, JUDGES.

KRAMER, JUDGE: Michael L. Walden, as executor of the Estate of Joe Walden, Jr., appeals a judgment and series of orders entered by the Henderson Circuit Court

directing the Estate to disgorge approximately $75,000 to German American Financial Advisors and Trust Co., conservator for Joe Walden's widow, Mary Pearl Walden. Upon review, we affirm.

On December 19, 2011, German American, as conservator for Mary Pearl Walden, filed suit in Henderson Circuit Court against Mary's son, Michael Walden, and Michael's wife, Reva Walden. German American sought to rescind certain transfers of real property from Mary to Michael, arguing that Mary's advanced age and mental state at the time of the transfers rendered the transfers invalid. Thereafter, Joe Walden, Jr., (Mary's husband and Michael's father) intervened to assert a claim against Mary which is the focus of this appeal.

At the time, Joe was living apart from Mary in a nursing facility. Joe alleged in his suit that Mary or someone acting on her behalf had been rapidly depleting several of their joint banking accounts, and that only two of their joint accounts still retained funds (*i.e.*, an approximately $33,000 account administered by Hilliard-Lyons and an approximately $83,000 account administered by Prudential). He asked the circuit court to declare that these remaining accounts should be closed and to divide the funds equally between him and Mary.

Due to the nature of Joe's suit, Hilliard-Lyons and Prudential elected to freeze the joint accounts they were administering for Joe and Mary pending a court order or agreement of the parties to the contrary. On November 30, 2012, Joe asked the circuit court for such an order. In particular, he represented that he had exhausted all other funds; that without access to the Hilliard-Lyons and

Prudential accounts, he "lack[ed] the necessary resources to pay his medical expenses, including his monthly nursing home and pharmacy bills"; and, he "pray[ed] for an appropriate order of the court establishing the means by which [his] expenses [could] be paid while this matter remain[ed] pending before the court."

By and through a January 8, 2013 order, the circuit court granted Joe's motion stating with regard to both of the aforementioned accounts that any administrative freeze should be "released so as to permit Michael L. Walden in his capacity as Attorney In Fact for Joe Walden, Jr., to withdraw funds from said account to pay the normal and necessary expenses of . . . Joe Walden, Jr." The circuit court then added in a separate order entered the next day that

> Michael L. Walden shall be permitted to withdraw sums from the aforesaid accounts solely for the purposes of paying the reasonable and necessary expenses of Joe Walden, Jr. and in doing so, shall keep an accurate and timely accounting of all expenditures supported by appropriate documentation and detail. Pending further order of this court, the Defendant, Michael L. Walden, shall render an accounting of his receipt and expenditure of these funds no less than annually and at such other times as the court may hereafter order.

Rather than making withdrawals from the two accounts to pay Joe's reasonable and necessary expenses as they arose, Michael (on behalf of Joe) instead withdrew the balances of both accounts and deposited them into a separate account in Joe's name only. Without informing the circuit court, the parties apparently agreed upon this arrangement as what they perceived at the time was a

convenient way to address Joe's continuing reasonable and necessary expenses; they anticipated that all of these funds would eventually be dissipated for that purpose and in a relatively short amount of time. What the parties did not anticipate was that Joe would pass away shortly thereafter in July 2013, leaving behind an account in his individual name with over $75,000. As an aside, the parties agree that the Hilliard-Lyons funds were entirely depleted and this remaining amount consisted exclusively of monies from Joe's and Mary's joint account with Prudential.

With that said, Joe's estate chose not to continue prosecuting Joe's original claim regarding the Hilliard-Lyons and Prudential account funds, and it never asserted any claim of entitlement to those funds in its own right. To the contrary, in response to German American's motion for summary judgment (which asserted that Mary was entitled to the entirety of those funds) Joe's estate merely responded that it intended to file an amended answer and counterclaim "omit[ting] any further claim to said funds which would render [German American's] motion moot." Shortly thereafter, the dispute regarding the Hilliard-Lyons and Prudential accounts ended; due to Mary's right of survivorship, the circuit court granted German American's motion and dismissed as moot Joe's claims to the funds from those accounts on October 9, 2013. *See* Kentucky Revised Statute (KRS) 391.315(1)(a).[1]

[1] 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

Nevertheless, Joe's estate refused to give Mary the approximately $75,000 still in its possession. Joe's estate contended that because Joe had deposited these former joint account funds into an account listed in his name only and with the agreement of the parties, they were no longer subject to Mary's right of survivorship; no longer contemplated in the circuit court's judgment; and were instead an asset of the estate subject to probate.

Subsequently, German American moved to compel Joe's estate to disgorge the approximately $75,000. During an October 14, 2013 hearing on the motion, the circuit court reminded the parties that this further complication would never have arisen if the parties had simply obeyed the court's order. Nevertheless, at the conclusion of oral arguments the circuit court stated that its January 2013 orders unambiguously indicated the Prudential and Hilliard-Lyons funds were never intended to lose their character as joint survivorship funds. On October 30, 2013, the circuit court entered another order reiterating that "the intention of the Court's order of January 8, 2013, was that funds could be withdrawn from Joe and Mary Pearl's joint accounts as necessary, not that any of Mary Pearl Walden's right to jointly held funds be removed from her possession." The circuit court's

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> time the account is created. If there are two or more surviving parties their respective ownerships during lifetime shall be in proportion to their previous ownership interests under KRS 391.310 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

order further directed the funds to be turned over to Mary "after Joe Walden, Jr.'s final normal and necessary expenses are paid and accounted for."

Even so, as of January 2014 (and despite a motion to show cause from German American), Joe's estate had yet to return any of the approximately $75,000 to Mary. As to why, Joe's estate explained that it understood the phrase "Joe Walden, Jr.'s final and necessary expenses," as used in the circuit court's order, to include post-death estate expenses. In response, the circuit court entered another order on January 21, 2014; it did not find Joe's estate in contempt, but directed Joe's estate, once more, to "turn over the remainder of the funds traceable to the parties' joint account at Prudential (less the final normal and necessary expenses paid for Joe Walden, Jr.[2]), over to the survivor Mary Pearl Walden within sixty (60) days . . ."

On February 4, 2014, Joe's estate then filed a motion under the purview of Kentucky Civil Rule (CR) 59.05. The purpose of its motion was, again, for the court to clarify the meaning of the phrase "Joe Walden, Jr.'s final normal and necessary expenses." On February 14, 2014, the circuit court responded as follows in its final order under review in this matter:

> [T]he court's prior Order is intended to permit the expenditure of funds for pre-death debts or liabilities of Joe Walden, Jr. and does not permit the expenditure of funds for any estate-oriented expenses, including by way

[2] Elsewhere in the circuit court's order, the final normal and necessary expenses to be paid for Joe Walden, Jr., are specifically described as follows: "[C]ounsel for the estate advised there was one more hospital bill for Joe Walden, Jr., which had not been paid but should be paid within thirty days."

> of example but not limitation, such things as probate court costs, executor's fees, attorney fees and accountant fees. THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.[3]

Now on appeal, Joe's estate does not argue as it did below that it should be allowed to deduct its attorney's, accountant's, or executor's fees from the approximately $75,000 as "Joe Walden, Jr.'s final and necessary expenses" within the meaning of the circuit court's various orders. Joe's estate does not even assert that any particular expenses of Joe Walden, Jr., remain outstanding. Rather, Joe's estate now argues that it is entitled to all of the funds at issue in this matter because the circuit court's January 2013 orders did not require any funds withdrawn by Joe to be deposited into another joint survivorship account with Mary and because Joe deposited the subject funds into his own individual account with the agreement of all parties concerned in this litigation. According to Joe's estate, this is "clear and convincing evidence," per KRS 391.315(1)(a), that the money Joe deposited into his individual account was intended to belong only to Joe and was no longer subject to a joint tenancy with Mary.

[3] As noted, German American asserted a claim against Michael and Reva regarding Mary's transfer of certain real property to Michael. That separate matter remains pending. Therefore, the "final and appealable order and there is no just cause for delay" language used in the circuit court's February 14, 2014 order was necessary to invoke our jurisdiction to review the circuit court's decision to dismiss Joe's counterclaim and the circuit court's accompanying exercise of its enforcement jurisdiction to direct Joe's estate to disgorge the disputed account funds of approximately $75,000 to Mary. *See* CR 54.02. We find it necessary to address this point because, by separate order, we have denied a motion from German American to dismiss this appeal; German American's motion was, as our discussion would indicate, based upon the premise that this matter remained interlocutory because its aforementioned claim has not yet been finally adjudicated.

If the estate intended to contest the ownership of the funds at issue in this matter, it should have done so after it substituted itself for Joe to represent Joe's interests—prior to when the circuit court dismissed Joe's claim to those funds on the basis of Mary's joint survivorship interest. The estate not only failed to do so; as noted, it represented in response to German American's motion for summary judgment regarding those funds that it intended to file an amended answer and counterclaim "omit[ting] any further claim to said funds which would render [German American's] motion moot." In short, Joe's estate fed one can of worms to the trial judge and is now attempting to feed another to us. Doing so is impermissible, and the estate's argument regarding its entitlement to the funds at issue in this matter is accordingly unpreserved. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010) (internal citations omitted).

Moreover, in making this argument Joe's estate ignores that the circuit court's January 2013 orders did not permit Joe to *deposit* those funds anywhere; it only allowed Joe to withdraw funds from those accounts to *pay* his necessary and reasonable expenses during the pendency of his claim. And, while Joe ignored the circuit court's directive and deposited those funds into an individual bank account —apparently pursuant to an agreement with Mary and her representatives (which was never made a part of the record)—Joe's estate presents nothing demonstrating the specifics of that agreement, or whether, pursuant to the agreement, Mary waived her right of joint ownership in those funds in the event of Joe's death. At

best, and in light of Mary's vigorous efforts to recoup those unspent funds, the record merely reflects that Mary, like the circuit court, permitted and only intended for Joe to have access to the funds during his lifetime to satisfy his pre-death debts and liabilities.

In short, Joe's estate cannot argue it is entitled to the funds at issue in this matter, and it has otherwise failed to demonstrate that the circuit court acted erroneously in any way. Indeed, the mere fact that Joe decided to deposit those funds into an individual account rather than into another joint account with Mary did not change their character as joint survivorship funds or otherwise prohibit the circuit court from tracing those funds back to their source, imposing a constructive trust upon them, and compelling Joe's estate to disgorge them to Mary, which is essentially what occurred in this case. *See Smith v. Bear, Inc.*, 419 S.W.3d 49, 58 (Ky. App. 2013).

In light of the foregoing, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Charles Edward Clem Henderson, Kentucky	Harry L. Mathison Henderson, Kentucky