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SUPREME COURT OF FLORIDA

IN RE: ESTATE OF LETTIE V. COMBEE, deceased.

LINDA RAE FARMER, ET AL.,

Petitioners,

vs.

IRMA A. WALKER, ET AL.,

Respondents.

PETITIONERS REPLY TO AMICUS CURIAE BRIEF

CASE NO. 78,348

ON APPEAL FROM THE DISTRICT COURT OF APPEAL SECOND DISTRICT OF FLORIDA
No. 90-02971

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ARGUMENT

I. The Second District Court of Appeal erred in applying a contract theory of law as opposed to an inter vivos gift theory of law in determining whether the statutory presumption of joint accounts established by a decedent is rebutted by clear and convincing evidence

The bottom line of the position advocated by Professor David T. Smith in his article Joint Accounts in Financial Institutions or the Case of "Surviving Party v. Personal Representative": a View for 1992, Florida Bar Journal, March, April 1992, is the Courts should seek to achieve efficiency and speed at the expense of justice.

Professor Smith argues the legislature has created the statutory tools for the Courts to rule that no estate or beneficiary can challenge a survivor's right to joint account funds upon the depositors death, unless there exists direct evidence of a contrary intent which clearly and convincingly rebuts the statutory presumption that the depositor/decedent intended the title of the funds to vest in the joint accounts survivors upon the depositor's death. The position advanced by Professor Smith is one, which if adopted by this Court, would create an evidentiary burden beyond that required in the case law or in the statute which codified the case law, and would result in parties claims being adjudicated only in those rare occasions where direct evidence, as opposed to circumstantial evidence, is available to rebut the presumption.

The legislature's creation of Florida Statute 658.56 is a codification of the common law and prior case rulings by this Court as established in the case of Spark v. Canny, 88 So. 2d 307 (Fla. 1956). In Spark, this Court stated

> We hold, therefore, that where a joint bank account with right of survivorship is established with funds of one person, as here, a gift of the funds remaining in the account at the death of the creator of the joint account is presumed; but such presumption is rebuttable and may be overcome by clear and convincing evidence to the contrary. P311-312.

Florida Statutes Section 658.56 codifies into legislation substantially the statement by the Supreme Court referenced above in Spark. Paraphrasing, Section 658.56 provides that when opening a joint account at a bank, all persons who are on the account are presumed to have intended that upon the death of any joint account holder the lawful ownership of the account shall vest in the surviving account holders. However, the presumption is rebuttable and may be overcome by, among other things, clear and convincing proof of a contrary intent by the depositor. Thus, the legislature has codified the clear meaning of the Supreme Court in stating the common law in the case of Spark.

Professor Smith adopts the reasoning of the Appellate Court below that the language as set forth in Florida Statutes Section 658.56, creates a contract between the depositor and surviving account holders and thus should be determined under a contract analysis using the account card provided by the bank and the language contained therein as the contract. The argument advanced

by Professor Smith, and the position taken by the Appellate Court in the instant case, must fail because, when a contract analysis is applied to examine the relationship between the depositor and the survivors, the result is a contract which never came into being.

Basic, fundamental, elementary contract law illustrates that the joint account card used by most banks to create a joint account does not operate as a contract between the joint account holders. "Contract" has been defined by this Court in Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957) as a legal relationship which "contemplates an agreement enforceable at law between two or more parties for the doing or not doing of some specific thing. A contract must create legal obligations" at 515. Another definition of contract is that a contract is an "agreement creating obligation, in which there must be competent parties, a subject-matter, a legal consideration, mutuality of agreement, and mutuality of obligation..." H. Liebes & Co. v. Klengerrberg, 23 F. 2d 611, 612 (9th Cir. 1928).

The relationship created by the joint account cards in the case at hand, between COMBEE and IRMA WALKER and DOROTHY COLLINS demonstrates there was no mutuality of remedy, meeting of the minds, assent to contract, obligation, consideration, or enforceable rights between the depositor and joint account holders. COLLINS and WALKER could have done nothing if COMBEE had closed the account and withdrawn the money prior to her death. There was no consideration as WALKER and COLLINS gave nothing to COMBEE for her placing them on her accounts. There was no contractual agreement established since COLLINS was never told or understood that COMBEE

was leaving the money to them upon her death. Additionally, COLLINS did not understand the significance of a joint account until two weeks prior to the trial when her attorney explained it to her. Neither COLLINS nor WALKER believed they could withdraw funds for their own use from COMBEE'S account while COMBEE was alive. In fact, both WALKER and COLLINS testified COMBEE told them only that they would be well compensated for their efforts after her death and the courts would see to it that they would get a percentage of the estate. Finally, both WALKER and COLLINS admitted they were placed on the accounts of COMBEE to assist her in paying her bills, etc. The flaws of contract analysis to this issue are obvious and were recognized by this Court in Spark.

II. The Second District Court of Appeal erred in reversing the trial court's determination the Appellants had overcome the rebuttable presumption by sufficient clear and convincing evidence that the two joint accounts were property of the Appellees under Section 658.56(1), Fla. Stat. (1987).

It is important when looking at circumstantial evidence of a depositor's contrary intent to consider the background, circumstances, philosophies, and attitudes that one was known to possess when trying to determine whether they intended to open a joint account or merely a convenience account. In the instant case, the record is replete with examples of COMBEE'S frugality. Her home and furnishings were extremely modest, she was not known to give large sums of money to anyone, and in fact did not even use

her own hot water heater because she did not wish to pay the added utility costs for having hot water at her disposal for bathing, washing, etc. It is illogical to think that a woman of this frugal lifestyle would one day simply throw open her bank accounts to her two nieces and reward them so handsomely for their care for COMBEE during the last 18 months of her life.

The facts referred to by Professor Smith on page 12 of his Brief were gleaned from his subjective reading of the COMBEE opinion and were without the aide of a transcript. As a result, Professor Smith's comments regarding circumstantial evidence presented at trial being inadequate to overcome the rebuttable presumption by meeting the clear and convincing evidence standard, are without merit. The facts which the trial court relied on and which were sufficient to overcome the presumption by clear and convincing evidence are as follows:

The evidence showed COMBEE desired to accomplish two objectives by establishing joint accounts and appointing the Respondents as co-personal representatives and co-trustees. First, COMBEE wanted to ensure that she had assistance in her old age to pay her bills and obtain the care she needed. Second, COMBEE wanted to ensure that the heirs of her estate, two minor grandchildren, were cared for and received her assets in accordance with the testamentary trust which she established. In order to accomplish these objectives, COMBEE initially solicited the assistance of her sister, SMITH, and her nephew, REYNOLDS, by adding them to her accounts and naming them fiduciaries in her Last Will and

Testament. These fiduciaries remained on the accounts and in the will for three years until, due to illness and job demands, neither of them were able to continue (T24-26).

In early 1987, COMBEE replaced SMITH and REYNOLDS as fiduciaries and named WALKER and COLLINS, her nieces (T33)(R76,77). WALKER and COLLINS stepped into the shoes of SMITH and REYNOLDS as substitute joint account holders and fiduciary designates in the Last Will and Testament of COMBEE (T66). WALKER and COLLINS never placed any of their own money into the accounts of COMBEE (T35,67). WALKER and COLLINS never withdrew any money from the accounts for themselves while COMBEE was alive (T35). COLLINS did not believe she could withdraw funds for her personal use from the accounts (T36). WALKER and COLLINS understood they were placed on the accounts of COMBEE to assist COMBEE in paying her bills (T37,68). COMBEE told COLLINS she would be well compensated for her efforts but not that she was entitled to the funds in the joint accounts (T38,40). Further, WALKER believes she is entitled to the money on the joint accounts because she assisted COMBEE with her affairs during her final years (T81,82). Additionally, WALKER does not believe COLLINS is entitled to one-half of the money in the joint accounts because COLLINS did not assist COMBEE as much as WALKER. (T82). COLLINS, on the other hand believes the Petitioners would be entitled to share in the joint account if they had come to Lakeland and assisted COMBEE prior to her death, the Petitioners' being of minor age notwithstanding (T47). The sole rebuttal witness for the Respondents, LUCY NILES, was told by COMBEE that

COMBEE had placed WALKER and COLLINS on the joint accounts because COMBEE felt more secure with the Respondents on the accounts; however, COMBEE never stated that she intended for the Respondents to receive the money (T116). Therefore, the aforementioned facts show clearly and convincingly, despite the fact that they are circumstantial and not direct evidence of COMBEE'S intent, that COMBEE had an intent other than that which was expressed in the bank account cards.

The correct legal analysis for the courts to employ is the inter vivos gift analysis as stated by this Court in Spark, and as adopted and utilized by the First District Court of Appeal in Gentzel v. Buchanan, 419 So. 2d 366 (Fla. 1st DCA 1982); King v. Estate of King, 554 So. 2d 600 (Fla. 1st DCA 1989); Rev. Den. 564 So. 2d 487 (Fla. 1990); and In re: Estate of Alma S. Gainer, 579 So. 2d. 739 (Fla. 1st DCA 1991). The facts of Spark, and the facts of the three First District Court of Appeal cases, Gentzel, King, and Gainer, are quite similar to the facts of the instant case. All cases involved entitlement of survivors to bank accounts created by an elderly depositor with one or more close friends or relatives for the purpose of assisting the elderly depositor with paying bills, caring for needs and making investments. The creation of these accounts under these circumstances occurs in our state many times each day, given our large and ever expanding elderly population. Because the instant case involved essentially the same facts as the Spark, Gentzel, King and Gainer cases, prior precedent dictates a similar result. The Combee accounts are the

property of the estate because the evidence shows clearly and convincingly Combee had an intent different than that expressed in the account cards, thus the presumption that the accounts vested in the survivors, COLLINS AND WALKER, has been rebutted, and this Court should so hold.

If this Court eliminates the last avenue available to demonstrate the true intent of a depositor when creating a joint account by adopting an inflexible interpretation of Florida Statutes 658.56 and adopting a contract analysis theory for determining survivorship rights to joint accounts upon a depositor's death, a great hardship will result to the heirs of many of the millions of bank depositors in this state. This result would be especially inequitable to the heirs of elderly bank depositors in this state who rely on friends and family members to assist them in paying their bills and receiving care, just as COMBEE did in the instant case.

The banks can not be depended on to explain to their customers the legal significance and differences between adding someone as a signatory to an existing account, establishing a convenience account, creating a joint survivor account, or allowing one to access the account for the benefit of the depositor through a power of attorney. Banks do not give legal advice and do not voluntarily undertake the duty of explaining the legal ramifications and significant differences of each type of account. Professor Smith is wrong when he says by adopting a hard and fast rule it will reduce the amount of litigation over these type accounts. For as

Professor Smith himself states "intent will be a factor in each case; a factor in the nature of a swamp filled with quick sand necessitating the litigation of each and every case of significant value." Amicus Curiae Brief at page 18.

Even if this Court adopts the contract theory and holds only direct evidence of contrary intent will be considered by the courts when determining survivor's rights to joint accounts, those beneficiaries and personal representatives who have enough courage, resolve, or if the amount in controversy is sufficient, will continue to fight and bring litigation to prove a contrary intent by the depositor. The only difference is they will fight under a handicap burdened upon them by this court, resulting in the truth not even a consideration by the court where there exists sufficient circumstantial evidence, but not direct evidence of contrary intent.

The adoption of Professor Smith's view by this Court would place a more difficult evidentiary burden on the personal representatives and beneficiaries or heirs in a survivorship case than is placed on the state in a criminal prosecution. Even in criminal trials, with all the state and federal constitutional protections available to protect the life and liberty of the accused, the prosecution is able to prove its case with circumstantial evidence.

The Petitioners have met the evidentiary burden required of them to show clearly and convincingly LETTIE V. COMBEE did not intend to have the money in the two joint accounts vest in WALKER

and COLLINS. The trial court who heard the evidence and observed the demeanor of the witnesses has determined the accounts are estate assets. This Court should affirm the trial court's decision.

CONCLUSION

Professor Smith encourages the legislature to unify the statutes by adopting a conclusive presumption for bank accounts as the legislature has already done for joint accounts at savings and loans. Professor Smith also encourages lawyers to do a better job of advising their clients of the potential ramifications of joint accounts. Lastly, Professor Smith asks this court to adopt the Appellate Court's reasoning by creating more rigid rules governing the standard of evidence to rebut the presumption and to adopt the contract theory of analysis instead of the more flexible inter vivos gift analysis that is presently the law of this state as set forth in Spark.

These actions the Petitioners respectfully request the Court not take. Rather, the Petitioners request this Court stand firm and restate the holding of Spark as the proper way for the Courts to determine joint account survivorship rights to deposits. Further, the Court should hold the trial court was correct in that the evidence produced at trial was sufficient to meet the clear and convincing standard, thus enabling the trial court judge to find in favor of the Petitioners that the $45,000.00 which was in the two accounts under consideration here, are in fact the property of the estate of LETTIE V. COMBEE.

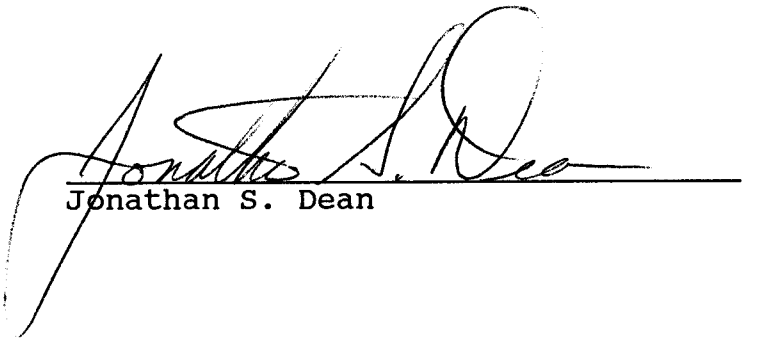
Respectfully submitted,

DEAN AND DEAN, P.A.

BY: Jonathan S. Dean

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by U.S. Mail to Jerry A. DeVane, Esquire, Post Office Box 1028, Lakeland, Florida 33802, attorney for Respondent, on this 9th day of April, 1992.



Jonathan S. Dean

PLD/COMBEE.REP