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.

INITIAL BRIEF OF PETITIONERS

CASE NO. 78,348

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

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PRELIMINARY STATEMENT

The Petitioners, LINDA RAE FARMER and RAYMOND GROVER COMBEE, JR., the Appellees in the District Court of Appeal and Petitioners in the trial court, will be referred to collectively as "PETITIONERS" or "FARMER". The Respondents, IRMA A. WALKER and DOROTHY I. COLLINS, the Appellants in the District Court of Appeal and Respondents in the trial court, will be referred to as "WALKER" and "COLLINS" respectively or as "RESPONDENTS" collectively. JERRY E. REYNOLDS will be referred to as "REYNOLDS" and DOLLIE SMITH will be referred to as "SMITH". LETTIE V. COMBEE, deceased, will be referred to as "COMBEE".

References to the transcript of the trial court are designated by the prefix "T". References to the record on appeal are designated by the prefix "R".

STATEMENT OF THE CASE

The Petitioners, LINDA RAE FARMER and RAYMOND GROVER COMBEE, JR., are the sole beneficiaries of a testamentary trust established under the Last Will and Testament of COMBEE (R88-97). The Petitioners filed a Petition to Determine Estate Assets on July 13, 1990 (R42-73). An evidentiary hearing as to the Petition to Determine Estate Assets was held on August 29, 1990 (T1). On September 14, 1990, the trial court determined two bank accounts which were held as joint tenants with rights of survivorship between the decedent, COMBEE, and WALKER and COLLINS, were assets of the estate of COMBEE (R74-75).

WALKER and COLLINS filed an appeal with the District Court of Appeal, Second District of Florida and argued the trial court erred in determining that there was sufficient clear and convincing evidence to overcome the legislative presumption that title in a joint account with right of survivorship vests in the surviving account holders.

On June 28, 1991, the District Court of Appeal reversed the trial court and held there was insufficient evidence to overcome the presumption that the joint survivor accounts of COMBEE had passed to the joint tenants, WALKER and COLLINS upon COMBEE'S death In re: Estate of Lettie V. Combee, 583 So.2d 708 (Fla. 2nd DCA 1991).

The Petitioners filed a Petition for Certiorari Review by this Court of the decision of the Appellant Court in Combee, supra, as

being in conflict with the decision of the First District Court of Appeal in the case of In re: ESTATE OF ALMA S. GAINER, 579 So. 2d 739 (Fla. 1st DCA 1991). This court exercised jurisdiction on November 5, 1991.

STATEMENT OF THE FACTS

On December 4, 1984, COMBEE, a widow, established account no. 01054104 (R76), a joint money market account with REYNOLDS, her nephew (T19) and SMITH, her sister (T33). On the same date, COMBEE also changed the status of her checking account no. 927-562 by adding REYNOLDS and SMITH as signatories (R80) and her savings account (T6) to a joint account with rights of survivorship with REYNOLDS and SMITH by adding their names to the account. The changes in these accounts by COMBEE, coincided with the execution of the Last Will and Testament of COMBEE naming REYNOLDS and SMITH as her co-personal representatives and co-trustees. The Last Will and Testament of COMBEE was executed December 5, 1984 (R81-87).

REYNOLDS AND SMITH were added as signatories to the checking account and became joint on her money market and savings account and were named as co-personal representatives and co-trustees in the COMBEE will in order to assist COMBEE with her personal affairs during her remaining years and to carry out the instructions as set forth in her will and testamentary trust (T23).

In late 1986 and early 1987, SMITH and REYNOLDS requested COMBEE remove them as co-personal representatives and co-trustees because they were no longer able to serve as fiduciaries to COMBEE when SMITH had become ill and REYNOLDS had increasing demands on his time from his job as finance director for the City of Lakeland (T24,26,61).

On January 20, 1987, COMBEE substituted her nieces COLLINS and

WALKER (T28,57) for REYNOLDS and SMITH as signatories on checking account number 927-562 (T5,6). On February 2, 1987 COMBEE executed a new Last Will and Testament naming WALKER and COLLINS as co-personal representatives of her estate and co-trustees of the testamentary trust established in the will (R3-9). On February 9, 1987 COMBEE transferred funds from the two remaining joint accounts which were held with REYNOLDS and SMITH to accounts held jointly with COLLINS and WALKER. Specifically, COMBEE transferred the savings account for which no signature card was found (T6) and the money market account which previously was number 01054104 (R76) and which subsequently became money market account number 1075772 (T5). According to the testimony of WALKER, she and COLLINS simply stepped into the shoes of REYNOLDS and SMITH (T64,65)

On August 21, 1988, COMBEE died leaving all of her assets in trust for the Petitioners (R98-99). A Petition for Administration of COMBEE'S Estate was filed by WALKER and COLLINS on September 28, 1988 (R1). COMBEE'S checking account, money market account and savings account were not listed as assets on the estate inventory which was filed by WALKER and COLLINS on January 11, 1989 (R98-99). However, on the amended estate accounting which was filed on August 22, 1989 the checking account of COMBEE, containing eight hundred forty four and 01/00 dollars ($844.01) was listed as an asset of the estate (R25-27). WALKER and COLLINS testified they decided to include the checking account on the accounting because all of the bills incurred by COMBEE during her lifetime were paid out of that account (T78). WALKER and COLLINS failed to place the

money market and savings accounts into the estate but testified they paid a portion of the funeral bill of COMBEE out of the money market account even though the account was jointly held and was not property of the estate (T-78). The money market and savings accounts are the subject of this appeal.

According to the testimony of WALKER and COLLINS, COMBEE created the joint accounts so that they could assist COMBEE in paying her bills (T68), writing her checks (T34), taking care of her business (T34), caring for her personal needs (T37) and seeing that she received what she needed in life (T68). All of the money deposited in the joint accounts belonged to COMBEE (T35). The understanding of COLLINS and WALKER of the purpose for which they were added as joint account holders on COMBEE'S accounts is in accordance with the understanding of REYNOLDS of the purpose for which he had been added as a joint account holder in 1984 (T23).

WALKER and COLLINS not only believed they were entitled to the funds in COMBEE'S money market and savings accounts, they also believed they were entitled to COMBEE'S personal property. COMBEE'S personal property consisting of a television, sewing machine and victrola were taken by COLLINS and placed in her home (T49). Additionally, COMBEE had a safe deposit box containing several silver dollars and wooden coins (T89). When WALKER and COLLINS opened the box at the bank, they decided to keep the contents and split it between themselves (T89-90).

COLLINS testified that COMBEE never told her she would be entitled to the money in the joint accounts (T-40). COLLINS

testified COMBEE told her only that she and WALKER would be well compensated for their efforts and the courts would see to it that they would get a percentage of the estate (T40). WALKER testified she believes she is entitled to the money in the joint accounts, not because she is a joint account holder but only because she assisted COMBEE with her affairs during her final years (T81,82). WALKER also testified that her sister, COLLINS, is not entitled to one-half of the money in the joint accounts, because COLLINS did not assist COMBEE as much as WALKER had (T82).

COLLINS testified the PETITIONERS were not entitled to any of the funds in the joint accounts because they received their father's social security and that sum was the amount COMBEE wanted the children to live on until they were 19 years old (T42). COLLINS also testified that had the PETITIONERS been present at COMBEE'S home to assist in taking care of COMBEE during her last days the PETITIONERS would have been entitled to the funds in the joint account (T43). COLLINS testified she did not know the significance of a joint survivorship account until two weeks prior to the trial in this case when she conferred with her attorney (T53). Finally, WALKER testified that she and COLLINS did not withdraw any money from the joint accounts which are the subject of this appeal until told to do so by their attorney at which time WALKER closed the money market account and deposited all the money in that account in an account in her individual name and closed the savings account and split the proceeds with COLLINS (T75-77).

ISSUES ON APPEAL

I. Whether 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 is rebutted by clear and convincing evidence.

II. Whether the Second District Court of Appeal erred in reversing the trial court's determination the Petitioners had successfully rebutted the statutory presumption of the decedent's intent to create a joint and survivor account by clear and convincing evidence.

SUMMARY OF ARGUMENT

There are two points on appeal in this case. The first point is the Appellate Court has taken a position in this case which conflicts with previous decisions of this Court and with previous decisions of the First District Court of Appeal regarding the appropriate theory of law applicable in cases involving joint accounts with rights of survivorship. The Appellate Court in this case held that the appropriate theory of law in cases involving joint accounts was that of contract theory. This Court has previously held that the determination of the intent of a decedent in creating a joint account requires an inter vivos gift or donative intent analysis. Similarly, the decisions of this Court have been applied by the First District Court of Appeal in its decisions relating to joint survivorship accounts. Consequently, a conflict now exists between the decisions of this Court and the First District Court of Appeal and the decision of the Second District Court of Appeal.

The second point on appeal is that the Second District Court of Appeal substituted its judgment for that of the trial court by holding that the Petitioners did not successfully rebut the statutory presumption that joint accounts vest in the survivor. The record and transcript reveal that COMBEE established joint accounts for the purpose of convenience and not for the purpose of gifting the proceeds of the accounts to WALKER and COLLINS. This point is emphasized by the fact that COMBEE originally named her sister and nephew to the joint accounts, SMITH and REYNOLDS, and

later at the request of SMITH and REYNOLDS, replaced them with WALKER and COLLINS. This substitution of joint account holders by COMBEE for the purpose of assisting her in paying her bills leads one to conclude that her intent was not to give the accounts to the joint account holders but to avail herself of the assistance of her nieces, WALKER and COLLINS, during lifetime and to have them carry out her wishes at death. The evidence at trial was sufficient for the trial judge to hold that the presumption that proceeds of joint accounts vest in the survivors was overcome by clear and convincing proof of contrary intent after considering all of the testimony. This decision was overturned by the Second District Court of Appeal. And now, this Court should reverse the Appellate Court and reinstate the trial court's holding.

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 decedents is rebutted by clear and convincing evidence.

The Second District Court of Appeal (hereinafter "Appellate Court") held the Petitioners did not overcome the rebuttable presumption by clear and convincing evidence that the decedent, COMBEE, had a contrary intent with regard to the two bank accounts held jointly with the Respondents, other than that expressed on the bank account cards. The Appellate Court reversed the trial court's decision and held that the legislature intended for joint survivorship accounts to be decided under a "contract theory as opposed to the earlier gift or tenancy theories" Combee, supra, at 711.

The Appellate Court is required to begin with the premise that the decision of the trial court is clothed with the presumption of correctness. Mills v. Heenan, 382 So. 2d 1317 (Fla. 5th DCA 1980); Appleget v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979). Further, the burden is then on the Respondent to make reversible error appear. Pan American Metal Products, Co. v. Healy, 138 So. 2d 96 (Fla. 3rd DCA 1962). In the instant case, the Respondent's failed to demonstrate reversible error and the Appellate Court erred by applying the wrong legal theory and by failing to accept the factual determination by the trial court that the evidence was sufficient to overcome the rebuttable presumption

of survivorship.

The Respondents appealed the order of the trial court which found the presumption of survivorship regarding the joint accounts had been overcome by sufficient clear convincing evidence and argued the intent of COMBEE was expressed on the signature cards which WALKER and COLLINS alleged were clear and unambiguous. There is no doubt the signature cards created a presumption that COMBEE intended to create joint accounts with survivorship vesting in WALKER and COLLINS. This is the effect of Section 658.56(1), Fla. Stat. (1987)[1] which provides for a statutory presumption that a depositor who creates a joint survivor account intended that upon the depositor's death title to the account would vest in the survivors.

However, the trial court, after hearing the testimony of the witnesses and observing their demeanor and mannerisms, concluded it was not COMBEE'S intent to create joint survivorship accounts with WALKER and COLLINS, despite having executed the joint account cards. The evidence which supported the conclusion of the trial

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[1] Florida Statutes Section 658.56(1) provides: (1) unless otherwise expressly provided in the signature contract card or other in similar instrument delivered to and accepted by a bank in connection with the opening or maintenance of an account, including a certificate of deposit in the names of two or more persons, whether minor or adult, payable to or on the order of one of more of them or the surviving account holder or holders, all such persons and each person depositing funds in any such account shall be presumed to have intended that upon the death of any such person all rights, title, interest and claim in, to and in respect of such deposits and account and the additions thereto and the obligation of the bank created thereby, less all proper set offs and charges in favor of the bank, shall vest in the surviving account holder or holders.

court was substantial, clear and convincing and was similar to the evidence which has substantiated similar findings by this Court and other District Courts of Appeal applying the correct legal theory of inter vivos gift or donative intent to decide whether the presumption of joint survivorship was rebutted by evidence of contrary intent.

This Court held in the case of Spark v. Canny, 88 So. 2d 307 (Fla. 1956), that the legal theory of donative intent is the proper analysis is to determine the issue of ownership of joint accounts created by one prior to their death. Additionally, this Court examined the federal court's position on this issue in Murray v. Gadsden, 197 F.2d 194 (D.C.Cir. 1952) and adopted the reasoning of the Murray court which

> discarded the contract theory and held that a joint estate in a bank account is not established unless it is the result of a gift or a trust as a condition precedent. Spark, supra, at 311.

The court went on to say the reasoning of the Murray court provides a

> sounder and more logical rule than the contract theory and one which is entirely in accord with the previous decisions of this court respecting joint bank accounts with right of survivorship. Id. at 311.

The Appellate Court, has departed from the gift or donative intent analysis and has taken a position which is contrary to the previous rulings of this Court and contrary to the rulings of the First District Court of Appeal. See Gentzel v. Estate of Buchanan, 419 So. 2d 366 (Fla. 1st DCA 1982), Rev. Den., 426 So.2d 26 (Fla.

1983), 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 Appellate Court in the instant case, after reviewing the applicable statute, Section 658.56(1), (2), (1987), concluded

> The legislature intends for this problem [of surviving account holders entitlement to funds in a joint account established by the decedent] to be solved under a contract theory as opposed to the earlier gift or tenancy theories. Combee, supra, at 711.

The Appellate Court applied the wrong theory of law as had been established by this Court. As a result of the Appellate Court applying contract theory rather than donative intent, the Court justified ignoring the evidence in the instant case and concluded that the Petitioner's failed to prove that COMBEE had intended other than that which was expressed on the account card printed by the bank and required by the bank to open the account.

The evidence at the trial court showed by testimony of the Respondent's that COMBEE had established joint accounts with her nephew, REYNOLDS, and her sister, SMITH, for the purposes of convenience. REYNOLD'S testified that during the three years that he was a joint account holder and was named as co-personal representative and co-trustee in COMBEE'S will, his appointment was for the purposes of assisting COMBEE with her personal affairs during her remaining years and to carry out her instructions as set forth in her Last Will and Testament (T23).

WALKER and COLLINS were substituted for and stepped into the

shoes of REYNOLDS and SMITH as joint account holders, and as co-personal representative and co-trustee designates in the Last Will and Testament executed by COMBEE in 1987 (T64-66). The testimony of COLLINS and WALKER, in total, showed that COMBEE executed the account cards adding them as joint account holders for COMBEE'S convenience.

Even under the misapplied theory of the Appellate Court, the facts show the decedent received no consideration for the execution of the account cards and thus no contract came into being. At most, if one accepted the self-serving testimony of WALKER and COLLINS, COMBEE may have only intended to create a testamentary devise. Under the testamentary devise theory, the claim of joint accounts in this case must also fail since the joint account is not a properly executed testamentary devise under Section 732.502, 732.504 Fla. Stat.(1987).

WALKER testified COMBEE told her COMBEE wanted the Respondents to pay all the bills of COMBEE and to take care of her during her lifetime. WALKER further testified that COMBEE told her that upon the death of COMBEE, WALKER and COLLINS would be paid for the work they had done (T68,71). According to COLLINS, COMBEE never told her the Respondents would be compensated from the money in the joint bank accounts, rather, COLLINS was told that the Respondents would be well compensated by the courts for their taking care of COMBEE (T40).

Therefore, even though the Appellate Court used the improper contract theory of law, even under that theory, the Respondents

failed to meet their burden to show reversible error by the trial court since the evidence showed that even under the contract theory, the statutory presumption was rebutted.

This Court should reverse the application of contract theory to this type of case as applied by the Appellate Court because it disregards the previous position of this Court that the donative intent or inter vivos gift theories are the better reasoned theories. If the legislature intended to create a review of issues such as the present one under contract instead of gift theory, it could have expressed its intention by clearly and succinctly drafting Section 658.56(1) Fla. Stat.(1987) to so indicate. The legislature could have also removed the opportunity to rebut the presumption. It did not however, and therefore the legislature must have considered this Court's donative intent and inter vivos theories when inserting the language allowing one to overcome the presumption. If the contract theory espoused by the Appellate Court is upheld in this case, one would find it difficult to overcome the presumption. This is not the law in Florida and this Court should so state.

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 the property of the Appellees under Section 658.56(1), Fla. Stat. (1987).

Florida Statute Section 658. 56(2), 1987 provides an opportunity for the heirs of COMBEE to prove by clear and

convincing evidence that the decedent did not intend to create joint survivorship accounts, thus rebutting the statutory presumption. The facts which were introduced at trial are very similar to the facts of Gentzel, supra.

In Gentzel, the trial court found the statutory presumption was rebutted by evidence which showed the joint accounts between a mother and daughter were probatable assets of the decedent's mother which passed under the decedent's will rather than to the daughter as the surviving account holder. The court found the presumption in the law favoring the daughter as the surviving account holder was rebutted by the daughters own testimony that the money in the account was her mother's money

> It was not until after [the daughter] talked to her lawyer after her mother's death that the daughter considered the funds in these accounts to be hers. The money in the four accounts in question came solely from the decedent's assets and the daughter did not deposit any of her own money there. Money was expended from the accounts for the decedent. Id. at 367.

The Gentzel court stated

> the facts of this case clearly show the trial court to be correct in finding the presumption of right of survivorship overcome by clear and convincing proof of contrary intent. Id. at 368.

The Gentzel court approved the decision of the trial court and held that a joint account with right of survivorship between the daughter and her deceased mother never came into existence.

Another case which found evidence sufficient to overcome the statutory presumption is the King, supra. In King, at a hearing

to determine whether certain joint accounts were property of the estate, the court held that the statutory presumption was rebutted by clear and convincing proof of a contrary intent. The evidence showed the decedent was an astute businessman who had become ill and was concerned about his ability to manage his own affairs. The decedent asked his son to assist him by signing checks, etc. The court stated:

> [the decedent's son] agreed to sign the decedent's checks, and they went to the bank together to complete the necessary paperwork. The two disputed accounts, which had been maintained in the decedent's name alone, were then written in the name of the decedent [or his son]. [The decedent's son] testified that when he inquired [of his father] as they left the bank the decedent acknowledged that he had created joint accounts. [The decedent's son] thereafter sometimes wrote checks for the decedent, and sometimes signed checks which the decedent had written. The only money put into these accounts came from the decedent's funds, and the checking account was used solely for disbursement by the decedent. [The daughters of the decedent] indicated the decedent never expressed an intention to give [the decedent's son] any interest in the two bank accounts. Id. at 601.

There is an additional fact in King which is not present in the instant case, that being the decedent made a list of his assets shortly before his death. The list included the two bank accounts in dispute. The King court stated:

> the evidence presented was sufficient to permit the court to determine that there was clear and convincing proof that the decedent sought to create a joint account for the purpose of convenience, without any intent to transfer a survivorship interest to [the decedent's son]. The court was thus entitled to find that the statutory presumption does not apply, and that the two bank accounts do

> not pass by survivorship but rather are assets of the decedent's estate.

More recently, in Gainer, supra, the First District Court of Appeal reversed the trial court's determination that certain joint survivorship accounts were the property of the survivor of the account holders and held that the evidence produced at trial was sufficient to overcome the rebuttable presumption. The First District Court of Appeal reported the following facts:

> Shirley Davis [one of the co-joint account holders] testified that neither she nor her husband deposited or withdrew money from these accounts prior to the death of Mrs. Gainer. She further testified that the only money deposited in these accounts came from Mrs. Gainer's funds; that disbursements were used solely for the benefit of Mrs. Gainer; and that the money was Mrs. Gainer's as long as she lived. Furthermore, Mrs. Davis testified she would not have made a claim if Mrs. Gainer had withdrawn the money during her lifetime. On January 10, 1984 Mrs. Davis closed the accounts 587 and 046 on the advice of counsel. Id. at 741.

The appellate court stated that the testimony of Mrs. Davis was

> inconsistent with, and contrary to a completed inter vivos gift in the joint accounts. This testimony is essentially uncontradicted and reveals that a present interest in the contested accounts was not created. The evidence also shows there was no acceptance of the inter vivos gifts. Clear and convincing evidence supports the finding that survivorship accounts were not created. Therefore, we must reverse the trial court's order designating the accounts as non-estate assets. Id. at 741 (footnotes omitted), citing Gentzel,supra and King,supra.

With the exception of a written statement of assets by the decedent in King, and a statement contained in Gainer's will that

one of the two accounts under review were designated as part of a trust, the facts in Gentzel, King and Gainer are very similar to the facts in the instant case.

The evidence in the instant case showed clearly and convincingly COMBEE did not intend to create joint survivor accounts with WALKER and COLLINS. The evidence showed:

1. COMBEE was an elderly widow (R2).

2. COMBEE established a will which contained a testamentary trust, the beneficiaries of which were the minor children of her deceased son (R3-9);

3. Aside from the $45,000 in the two joint accounts, the Estate of COMBEE consisted only of 100 acres of real property (T44,60);

4. The testamentary trust provided for the trust to pay $500 per month to the grandchildren after they attain the age of 19; however, without the money in the joint accounts, the assets of the estate would be insufficient to pay the required distributions (T51);

5. All the money deposited into the joint accounts was COMBEE'S (T35);

6. When REYNOLDS and SMITH were removed from the joint accounts and WALKER and COLLINS added, WALKER and COLLINS simply stepped into the shoes of REYNOLDS and SMITH (T64,65,66);

7. WALKER and COLLINS understanding of the purpose for which they were added as signatories to COMBEE'S accounts (to assist COMBEE with COMBEE'S business affairs) is in accordance with

the understanding of the purpose for which REYNOLDS testified that he was a signatory to the accounts prior to 1987 (T-23,68,71);

8. WALKER and COLLINS failed to list on the estate inventory certain personal property of COMBEE consisting of a television, sewing machine, and victrola, which were placed in COLLINS home and the contents of COMBEE'S safe deposit box (R25-27)(T49);

9. COLLINS did not understand the definition of joint account and what survivorship meant until only weeks prior to trial after she spoke with her attorney (T53);

10. COMBEE never told COLLINS she would be entitled to all the money in the joint accounts and COMBEE told COLLINS only that COLLINS would be well compensated for her efforts and that the courts would see to it that she would get a percentage of the estate (T40)(emphasis supplied);

11. WALKER believes she is entitled to the money in the joint accounts because she assisted COMBEE with her affairs during her final years (T81,82);

12. WALKER also believes COLLINS is not entitled to one-half of the money in the joint accounts because COLLINS did not assist COMBEE as much as WALKER had (T82); and

13. COLLINS testified the Petitioners would be entitled to share in the joint account if they had come to Lakeland and assisted COMBEE prior to her death (T43).

14. 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).

In addition to overlooking the clear and convincing evidence rebutting the presumption, the Appellate Court misread important facts in making their decision. The Appellate Court reported REYNOLD had been added to COMBEE'S accounts on December 4, 1984 and removed on December 12, 1984. Thus, the Court concluded from REYNOLD'S testimony that he had no expectation of receiving any monies from the joint accounts he had held with COMBEE during his tenure as co-personal representative and co-trustee was consistent with the documents. Combee at 712. The correct facts are REYNOLDS was added to COMBEE'S accounts as a joint account holder in 1984 and remained on those accounts until late January, 1987 or early February of 1987, at which time he and SMITH were removed as joint account holders and as co-personal representative and co-trustee designees at their request, and COLLINS and WALKER were added to the joint accounts and named in the new will as substitutes for REYNOLDS and SMITH.

The correct theory for the Court to utilize when determining whether joint accounts with survivorship established by decedents are probatable estate assets or pass to the surviving joint account holders is the donative intent or inter vivos gift theories. The test is whether the statutory presumption can be rebutted by clear and convincing proof of contrary intent by the decedent. The elements of donative intent and inter vivos gift theories should be

applied to the instant case as required by Sparks, supra and the line of opinions from the First District Court of Appeals which began with Gentzel, supra.

This Court has previously stated that deference should be given to the decisions of trial courts which are being reviewed. This Court, in the case of In re: Baldridge's Estate, 74 So.2d 658,659,660 (Fla. 1954) stated the trial court judge below, who was

> the trier of facts under the law, had the witnesses before him; he had the opportunity of observing them on the stand, of noting the inflections of their voices, of seeing their facial expressions, and of perceiving their promptness or hesitancy in their answers to questions, their sincerity or lack of sincerity, and untold other matters which cannot be included in a record in an appellate court. Every judge knows that these intangible and sometimes elusive factors are as essential to the determination of truth as the spoken word. All of these factors are fed into the trained mind of a trial judge and his conclusions are the essence thereof. Appellate courts simply don't have the same material to deal with in respect to evidence as does the trial court and that is the reason that this Court has said on innumerable occasions that neither we nor the other appellate courts have the right to interfere with the findings of fact of the trial court unless there is an absence of substantial competent evidence to support such findings or the trial court has misapprehended the legal effect of such evidence as a whole.

It appears that the Appellate Court failed to heed the warning of this Court as stated in Baldridge, supra, because the Appellate Court rejected the finding of the trial court and concluded the evidence did not meet the clear and convincing standard necessary to rebut the statutory presumption of contrary intent to create

joint accounts by the decedent, COMBEE under the contract theory.

The Petitioners, respectfully, but strongly disagree with the conclusion of the Appellate Court. The evidence adduced at trial shows by clear and convincing evidence that COMBEE never intended to create joint survivorship accounts which would vest $45,000 in COLLINS and WALKER.

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 testified she 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 testified that she did not believe she could withdraw funds for her personal use from the accounts (T36). WALKER and COLLINS testified they understood they were placed on the accounts of COMBEE to assist COMBEE in paying her bills (T37,68). COLLINS testified that COMBEE told her she would be well compensated for her efforts but not that she was entitled to the funds in the joint accounts (T38,40).

These facts alone are sufficient to rebut the statutory presumption that COMBEE intended to create an ownership interest in the joint accounts with WALKER and COLLINS. The facts in the this case are very similar to the facts in Gentzel, King and Gainer, supra. In these three cases, the First District Court of Appeal applied the theories of inter vivos gift and donative intent and held, under similar facts as in this case, that sufficient clear and convincing evidence existed to overcome the presumption that the joint accounts vested in the surviving account holder. In sum, the First District Court found the facts in the aforementioned case to show that the joint accounts were created for the convenience of the decedent.

Florida has a substantial retiree population, many of whom establish joint accounts with one of their children, friend or relatives. These accounts for the most part are established for convenience and to avoid the costly and time consuming process of guardianship should it become necessary. It should not be the

policy of the courts in this State to conclude that one who creates a joint account has contracted with the other joint account holders to vest the proceeds in the survivors. This position would make it extremely difficult for the depositor's estate to rebut the statutory presumption. In the case at hand, after considering all the evidence, the trial judge as the trier of fact concluded that the statutory presumption had been overcome. The Appellate Court applied the wrong theory, misinterpreted the facts presented at trial and came to the wrong conclusion in reversing him. This Court should reverse the Appellate Court and reestablish the findings of the trial court which concluded the accounts are estate assets.

CONCLUSION

After reviewing the briefs, transcript, record and applicable case law, this Court should conclude the Second District Court of Appeal has erred in its holding in the instant case. This Court should reverse the Appellate Court's decision, and reinstate the trial court's determination that the joint accounts established by COMBEE with her nieces, WALKER and COLLINS, are assets of the estate. This Court should conclude, as did the trial court, after having the benefit of hearing the live testimony of the witnesses and observing their demeanor that the true intent of COMBEE was that the money in the money market account and savings account were placed in joint names for the sake of convenience and are assets of the estate. This Court should conclude, as did the trial court, that the Petitioners successfully rebutted the statutory presumption that the decedent, COMBEE, intended to create joint accounts with her nieces and as a consequence benefit them by more than $45,000.00.

The law and analysis of this Court as stated in Spark and the analysis of the First District Court of Appeal in Gentzel, King and Gainer, supra, that inter vivos gift or donative intent theory of law is the proper theory to be applied is the theory which should have been utilized by the Appellate Court. This Court should conclude, the Appellate Court below erred in prescribing the applicable test for cases such as this, is based on contract theory law, instead of the inter vivos gift theory which has been prescribed by this Court and utilized by trial courts and appellate

courts in this state. Therefore, it is necessary for this Court to reverse the decision of the Second District Court of Appeal and affirm the decision of the trial court that the two accounts established as joint account by COMBEE with her nieces, WALKER and COLLINS, are probatable assets, and determine the Petitioners have successfully rebutted the statutory presumption of the decedent's intent in creating the joint accounts.

Respectfully submitted,

DEAN AND DEAN, P.A.

BY: Susan 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 30th day of November, 1991.

Susan E. Dean

PLD/COMBEE.BRF