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JAN 16 1992

SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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

LINDA RAE FARMER, ET AL.,)

Petitioners,)

vs.)

IRMA A. WALKER, ET AL.,)

Respondents.)

REPLY 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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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 position of the Respondents in their Answer Brief is the legislature rejected the use of inter vivos gift theory advanced in Spark v. Canny, 88 So. 2d 307 (Fla. 1956), when the legislature adopted Section 658.56 Fla. Stat. However, the Respondents provided no authority for their position and their statement is contrary to the case law examining such issues. The case law which was stated by this court in Spark Supra., and which said case law was in accord with the common law regarding inter vivos gift analysis of joint accounts was not rejected by the legislature when the legislature adopted Section 658.56 Florida Statutes.

This court stated in Jones, Varnum & Co. v. Townsend, 23 Fla. 355, 2 So. 612, 613 (Fla. 1887)

statutes are to be construed in reference to the principals of common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act [of the legislature] did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the parliament had that design, it is naturally said they would have expressed it. Citing, Potter's Dwar. St. 185. See also Ellis v. Brown, 77 So. 2d 845 (Fla. 1955)

Therefore, the Respondents argument that the legislature passed Section 658.56 Fla. Stat. in order to eliminate inter vivos

gift theory analysis for determining the issue of survivors' right to joint accounts and instead adopt a contract theory analysis must fail since the legislature did not expressly state that was their intent. Further, the legislature did not preclude the use of evidence to rebut the presumption that accounts vest in the surviving account holders upon the death of the depositor, thus making the presumption conclusive. Since the legislature allowed for the presumption to be rebutted by clear and convincing evidence of contrary intent by the depositor, the result is the review of the case by the appellate court must be made in accord with the stated case law requirements of the inter vivos gift analysis.

II. SECOND ISSUE

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).

Respondents begin their argument on the second issue by raising matters which are not on appeal, to wit: whether the parol evidence rule should have blocked parol evidence elicited at trial. (Respondents Brief at Page 11). These comments should be ignored by this court.

Next, Respondents argue JERRY REYNOLDS and NELLIE SMITH were deleted from COMBEE'S accounts on the dates highlighted by the Respondents on the account cards attached to the Respondents' appendix.

Petitioners strongly object to the Respondents attempt to influence this court by highlighting portions of the account card for which no testimony or explanation was received by the trial court. The testimony of JERRY REYNOLDS and the statement of the Respondent's trial counsel show the parties acknowledged and agreed that REYNOLDS and SMITH remained on the accounts until early 1987. JERRY REYNOLDS testified he was taken off the checking account, savings account and bank accounts as well as being replaced as trustee and personal representative in 1987 (T24). Mr. Craig Massey, attorney for Respondents, asked JERRY REYNOLDS at trial:

Mr. Reynolds, just briefly, between December of 1984 and the 1987 date when you were removed from the accounts, can you tell me approximately how many times you saw LETTIE COMBEE? (T25).

Mr. REYNOLDS testified and counsel for the Respondents questioned him regarding his being added on to COMBEE'S accounts in 1984 and taken off COMBEE'S accounts in 1987. At no time did counsel for the Respondents inquire of any bank representative as to the December 13, 1984 notations on the account cards nor did counsel for the Respondents inquire of any witness who testified as to the meaning of those notations. It is extremely unfair and improper for the Respondents to raise the issue of the unexplained notations on the account cards at this late date. This is especially so in light of the testimony and acknowledgments which are inopposite of the Respondents position.

The Petitioners stated in their Initial Brief the appellate court erred when it concluded Mr. REYNOLDS has been on COMBEE'S

accounts for approximately nine days because there was no evidence to support that contention. The appellate court ignored the testimony and acknowledgement in the record that 1987 was the time that REYNOLDS and SMITH were removed from the accounts. The 1987 time frame for REYNOLDS and SMITH'S removal from COMBEE'S accounts was further supported by the Respondents' testimony that they "stepped into the shoes" of REYNOLDS and SMITH on COMBEE'S accounts (T64-65). It would be illogical for the Respondents to believe they stepped into REYNOLDS and SMITH'S shoes on COMBEE'S accounts if REYNOLDS and SMITH had not been on the accounts for more than two years as the Respondents would argue. Finally, it is not the role of the appellate court to assume, absent any testimony or evidence to support the assumption that COMBEE placed REYNOLDS and SMITH on her accounts on December 5, 1984 and removed them on December 13, 1984. There was no testimony to that effect.

The testimony showed COMBEE asked REYNOLDS and SMITH to serve as her fiduciaries, to be placed on her accounts to assist COMBEE for COMBEE'S convenience and to serve as COMBEE'S personal representatives and trustees after COMBEE'S death (T23). REYNOLDS and SMITH agreed and served in those capacities until REYNOLDS wrote COMBEE asking to be relieved of his duties and SMITH developed a brain tumor (T61). There was no evidence or testimony that these events took place in the eight days between the time the account cards reflect the accounts were opened and the time the account cards are alleged to reflect REYNOLDS and SMITH were removed from COMBEE'S accounts.

CONCLUSION

Respondents Answer Brief is unable to assist this court in analyzing the issues of this case. The Answer Brief concludes the legislature intended a contract theory analysis in order to eliminate the confusion which existed in the law prior to the enactment of the statute which resulted from various applications of common law theory such as inter vivos gift, contract, and testamentary devise. This was not the effect or intent of the legislature as the legislature's intent is not to be taken to be in derogation of the common law unless the legislature expressly provides and so states.

Further, the Answer Brief fails to analyze the facts which support the clear and convincing evidence standard which the trial court determined had been met by the Petitioners. Instead, the Answer Brief raises matter not on appeal such as the parol evidence rule and attempts to bring into issue the typed or handwritten dates which were on the account cards, and for which no testimony or evidence was given to determine the significance of said dates. This is particularly inappropriate in light of testimony received and acknowledgments from Respondents' trial counsel to the contrary.

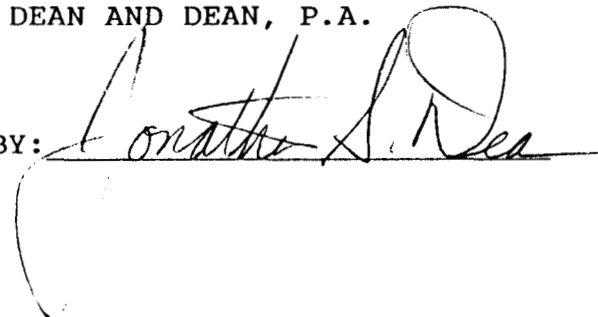
In summary, the arguments raised by the Respondents do little to assist the court in clarifying the issues and only serve to further cloud the issues before this court. For these reasons, it is respectfully suggested the court discount the value of the Answer Brief and grant the relief sought by the Petitioners. This

court should conclude the appellate court erred in utilizing the contract theory analysis instead of an inter vivos gift theory analysis in applying the law to the evidence and concluding the trial court erred in its determination that the Petitioners had shown by clear and convincing evidence that LETTIE COMBEE had a contrary intent other than that expressed in the account cards thereby successfully rebutting the presumption the joint accounts vested in the Respondents upon COMBEE'S death.

Respectfully submitted,

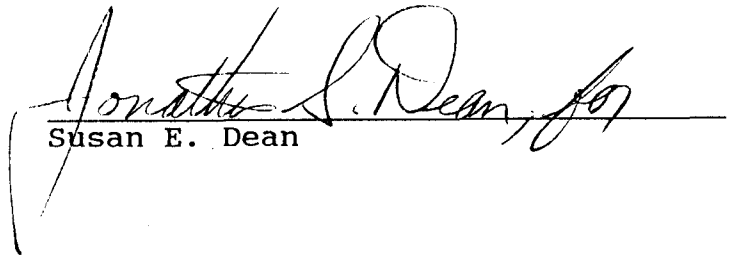
DEAN AND DEAN, P.A.

BY:

A handwritten signature in cursive script, appearing to read "Jonathan S. Dean", is written over a horizontal line. The signature is written in dark ink and is positioned to the right of the "BY:" label.

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 15th day of January, 1992.


Susan E. Dean

PLD/COMBEE.rep