DIVISION ONE
FILED: 12/21/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT THOMPSON, personal representative of the Estate of Billy J. Alexander, Plaintiff/Counterdefendant/Appellant, v. PAULINE ALEXANDER, Third-Party Plaintiff/Appellee.	1 CA-CV 10-0057 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200900438

The Honorable Mark W. Reeves, Judge

AFFIRMED

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And
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W I N T H R O P, Judge

¶1 Robert Thompson, personal representative of the estate of Billy J. Alexander ("the Estate") and Pauline Alexander, the decedent's wife ("Wife") dispute entitlement to an investment account the decedent, Bill Alexander ("Husband") and Wife held at Edward Jones. The trial court granted summary judgment in favor of Wife. The Estate appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Husband and Wife opened two certificates of deposit ("CDs") in 2005 at Foothills Bank. Both CDs were designated "Multiple-Party with Right of Survivorship" accounts. The two CDs were later combined into a single CD, also designated a "Multiple-Party with Right of Survivorship" account.

¶3 Approximately three years later, Husband and Wife met with a customer service representative at Foothills Bank and stated that they wanted additional deposit insurance protection for the CD due to the state of the financial markets. They wanted to redeem the CD so they could deposit the funds in an institution providing greater deposit insurance. Foothills Bank issued a check to "Bill J and Pauline Alexander" in the amount of $725,983.51, the balance in the CD account. Two days later, Husband and Wife opened an account at Edward Jones, depositing the entire check from Foothills Bank.

¶4 The financial advisor at Edward Jones provided Husband and Wife with an Account Authorization and Acknowledgement Form. On this form, the financial advisor designated the account as "02-Joint." Husband and Wife signed this form indicating that they were opening a joint account. At his deposition, the financial advisor testified that he added a "W" to the computer screen to reflect that the account was joint with right of survivorship. He also testified that he had explained to Wife that the Edward Jones account would have to be held in the same form as the parties' previous CD account at Foothills Bank, i.e., joint account with right of survivorship.

¶5 On October 14, 2008, Edward Jones sent a confirmation letter to Husband and Wife indicating that the account was joint with right of survivorship. This letter asked Husband and Wife to notify Edward Jones of any incorrect information regarding the account. Neither party made any corrections. Husband died four days later on October 18, 2008.

¶6 The Estate then filed an action against Edward Jones to recover the funds in this account. Wife also asserted an interest in the funds. Edward Jones filed an interpleader action, deposited the funds with the court, and was dismissed. Wife and the Estate filed motions for summary judgment regarding their competing claims to the funds. After oral argument, the

trial court ruled that Wife was entitled to the funds because the Edward Jones account was a joint account with right of survivorship. Alternatively, the court concluded that Wife was entitled to the funds under Arizona Revised Statutes ("A.R.S.") section 14-6212(A) (2005).

¶7 The Estate filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. section 12-2101(B) (2003).

DISCUSSION

I. Standard of Review

¶8 Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is "entitled to judgment as a matter of law." *Orme School v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In reviewing a trial court's rulings on cross-motions for summary judgment, we review questions of law *de novo*, but view the facts in the light most favorable to the losing party. *See Nelson v. Phoenix Resort Corp.,* 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994) (citing *Wagner v. City of Globe,* 150 Ariz. 82, 83, 722 P.2d 250, 251 (1986) (overruled on other grounds)).

II. Probate Statutes Apply

¶9 The trial court found that even if the account were a joint account and not a joint tenancy account with right of survivorship, Wife would be entitled to the funds pursuant to

A.R.S. § 14-6212(A). Implicit in this holding is the conclusion that the Edward Jones account falls within the definition of "account" in the probate code. The Estate argues, however, that the Edward Jones account does not fit within the statutory definition of "account," so the probate statutes do not apply. *See* A.R.S. § 14-6201(1) (2005). Section 14-6201(1) defines an "[a]ccount" as "a contract of deposit between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit and share account." The Estate contends that, because Edward Jones is not a "financial institution," the account at issue does not constitute an "[a]ccount" pursuant to section 14-6201(1), and the probate statutes do not apply.

¶10 A "[f]inancial [i]nstitution" is defined as "an organization authorized to do business under state or federal laws relating to financial institutions and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association and credit union." A.R.S. § 14-6201(4). The Estate argues that Edward Jones is a stock brokerage investment firm and not a bank. Wife contends that the definition of "[f]inancial [i]nstitution" is broad enough to encompass Edward Jones, which is licensed under Arizona law as a financial institution.

¶11 The trial court relied on the Edward Jones financial advisor's testimony that Edward Jones is a full-service financial institution that is licensed by Arizona as a financial institution and regulated by the federal government as such. The Estate argues that the Edward Jones advisor was not qualified to offer an opinion on this legal question and, accordingly, this testimony lacked foundation and was improper. The Estate also claims that the letter from Edward Jones advising Husband and Wife regarding their "investment strategies" supports its claim that Edward Jones is not a financial institution.

¶12 The Estate did not question or otherwise challenge the financial advisor regarding his knowledge as to what federal and state laws governed Edward Jones. There is no evidence that he did not know which laws governed his employer or that his testimony was untrue. Absent such controverting evidence, the trial court properly accepted the financial advisor's testimony on this issue. *See* Ariz. R. Civ. P. 56(e) (when a motion for summary judgment is supported by affidavits or deposition testimony, the opposing party may not rest on "mere allegations or denials," but must, "by affidavits or as otherwise provided . . . set forth specific facts showing that there is a genuine issue for trial."); *see also GM Development Corp. v. Community*

American Mortg. Corp., 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) (holding that if a party opposing a motion for summary judgment fails to present, either by affidavit or other competent evidence, facts that controvert the moving party's proof, the facts alleged by the moving party may be considered as true).

¶13 The financial advisor's concession that Edward Jones is not a "bank" is not dispositive of the issue. The definition of "[f]inancial [i]nstitution" is not limited to banks; rather, it lists several types of organizations, including banks. *See* A.R.S. § 14-6201(4). The word "includ[ing]" is "ordinarily a term of enlargement, not of limitation." *Sec. Sav. & Loan Ass'n v. Milton,* 171 Ariz. 75, 77, 828 P.2d 1216, 1218 (App. 1991). "[I]t is generally improper to . . . conclude that items not specifically enumerated are excluded." *Id.* The list of organizations in section 14-6201(4) is not exhaustive. Other organizations that are authorized and regulated by state and federal law as financial institutions, like Edward Jones, may constitute "[f]inancial [i]nstitution[s]" although they are not specifically listed.

¶14 The trial court cited *Deutsch, Larrimore & Farnish, P.C., v. Johnson,* 848 A.2d 137, 145 (Pa. 2004), in implicitly recognizing Edward Jones as a financial institution whose

account is subject to the probate code. The Estate attempts to distinguish *Deutsch* on the basis that Pennsylvania's definition of "financial institution" is broader than Arizona's. As noted above, the list of organizations in section 14-6201(4) is not exhaustive. *See Sec. Sav. & Loan Ass'n,* 171 Ariz. at 77, 828 P.2d at 1218. Therefore, like the court in *Deutsch*, we agree that the term "[f]inancial [i]nstitution" is defined broadly enough to include investment banking firms like Edward Jones, at least on this record.

¶15 The Estate identifies other states that have held that stock brokerages are not "financial institutions" under probate statutes. *See In re Estate of Ashe,* 787 P.2d 252 (Idaho 1990); *In re Estate of Palmer,* 187 P.3d 758 (Wash. Ct. App. 2008); *In re Estate of Hayes,* 941 S.W.2d 630 (Mo. Ct. App. 1997). We find these cases to be distinguishable.

¶16 In *Ashe,* 787 P.2d at 254, the Idaho court considered whether Merrill Lynch constituted a "financial institution." Idaho's statutory definition of "[f]inancial [i]nstitution" is nearly identical to A.R.S. § 14-6201(4). *See* Idaho Code Ann. § 15-6-101(3) (2010) (defining "Financial Institution" 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."). The court concluded that the evidence in the record did not establish the nature of the account or which, if any, state and federal laws related to Merrill Lynch. *Ashe*, 787 P.2d at 254. For this reason alone, the court held it could not conclude that Merrill Lynch was a financial institution. *Id.*

¶17 Wife argues that *Ashe* is of no support to the Estate because the court expressly limited its holding to the record before it. We agree. Unlike *Ashe*, the record in this case established that Edward Jones was a "[f]inancial [i]nstitution" pursuant to section 14-6201(4).

¶18 In *Hayes,* 941 S.W.2d at 631-33, a joint owner of an Edward Jones account argued that he was entitled to the balance of the account upon the death of the other joint owner pursuant to a Missouri probate statute. The Missouri statute provided that "deposits made with banks and trust companies made in the name of the depositor and one or more other persons shall become the property of [the surviving owner(s)] after the death of any one of the joint tenants." *Id.* at 633 (citing Mo. Rev. Stat. § 362.470.1 (1994)). The court in *Hayes* held that Edward Jones was not a "bank," which the applicable Missouri statute defined as "'any corporation soliciting, receiving, or accepting money,

or its equivalent, on deposit as a business.'" *Id.* (quoting Mo. Rev. Stat. § 362.010.3 (1994)). The court found Edward Jones did not accept deposits, but instead, sold stocks and instruments. *Id.* Therefore, *Hayes* held that Edward Jones was not a bank whose accounts were subject to the probate statutes. *Id.*

¶19 *Hayes* is distinguishable because the Missouri statute in question applied to banks and trust companies only, not the broader term "financial institutions." As noted above, Arizona's definition of "[f]inancial [i]nstitution" is broader than Missouri's definition of "bank." Based upon the record in this case, Edward Jones falls within Arizona's definition of a "[f]inancial [i]nstitution."

¶20 Finally, Husband relies on *Palmer,* 187 P.3d at 765, ¶ 26. *Palmer* held that Edward Jones, as a stock brokerage firm, did not fall under the Washington probate code definition of "financial institution." *Id.* The Washington statute specifically limits the definition of "financial institution" to five specific types of institutions: bank, trust company, mutual savings bank, savings and loan association, or credit union. *See Palmer*, 187 P.3d at 765 n.7, ¶ 26 (citing Wash. Rev. Code § 30.22.040(12)). Arizona's statute, on the other hand, is inclusive, and does not limit the type of institution that

may qualify as a "[f]inancial [i]nstitution" to those listed. *See Sec. Sav. & Loan Ass'n,* 171 Ariz. at 77, 828 P.2d at 1218.

¶21 The record below established that Edward Jones was a "[f]inancial [i]nstitution" as defined by A.R.S. § 14-6201(4). Thus, we conclude that the trial court properly considered application of the probate statutes.

III. Wife Is Entitled to the Account

¶22 The Estate argues that the trial court erred in its application of the probate statutes. The trial court concluded that Wife was entitled to the funds pursuant to A.R.S. § 14-6212(A), which provides:

> Except as otherwise provided in this section, on the death of a party, sums on deposit in a multiple party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under § 14-6211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under § 14-6211 belongs to the surviving parties in equal shares and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under § 14-6211. The right of survivorship continues between the surviving parties.

¶23 Wife argues that the first sentence of this section supports the trial court's decision. The Estate contends that

A.R.S. § 14-6212(A) "only applies to an account involving two or more surviving parties, which is certainly not the case here." To the contrary, a multiple party account consists of at least *two* parties. *See* A.R.S. § 14-6201(5). The first sentence of section 14-6212(A) clearly applies to multiple party accounts with just two owners when one of the two owners dies. Where more than one owner survives, the remainder of section 14-6212(A) details how the remaining owners hold the funds. These later provisions do not apply in this case because Wife was the only surviving party. Thus, only the first sentence applies.

¶24 The trial court concluded that under section 14-6212(A), a multiple party account, whether joint or joint tenancy with right of survivorship, goes to the surviving party. Applying section 14-6212(A) to this case, Wife as the surviving party of the two-party multiple party account is entitled to the funds on deposit. The Estate argues that this statute does not give multiple party accounts an automatic right of survivorship. We disagree.

¶25 The first sentence states: "[e]xcept as otherwise provided in this section, on the death of a party, sums on deposit *in a multiple party account belong to the surviving party or parties.*" A.R.S. § 14-6212(A) (emphasis added). The statute does not require that a multiple party account contain

specific language regarding the right of survivorship for the surviving party to receive the funds. A multiple party account is defined as "an account payable on request to one or more of two or more parties, *whether or not a right of survivorship is mentioned.*" A.R.S. § 14-6201(5) (emphasis added). Given this definition of "multiple party account," we presume the legislature was aware that using the general term "multiple party account" in section 14-6212(A) would give rise to automatic rights of survivorship whether or not such rights were expressly provided in the account language. *See McCandless v. United Southern Assur. Co.,* 191 Ariz. 167, 174, 953 P.2d 911, 918 (App. 1997) (stating that "[the courts] regularly presume the legislature knows its own laws.").

¶26 Other statutes in this article of the probate code also recognize that section 14-6212(A) creates a right of survivorship. For example, A.R.S. section 14-6213(B) (2005) states that a right to survivorship can arise pursuant to: (1) the express terms of the account; (2) section 14-6212; or (3) a pay on death designation. A.R.S. section 14-6216(B) (2005) also recognizes "[a] right of survivorship between parties married to each other arising from the express terms of the account or § 14-6212 may not be altered by will."

¶27 The Estate argues that this automatic right of survivorship is contrary to the caselaw requiring clear evidence that the parties agreed to a joint tenancy with right of survivorship. The Estate contends the joint account does not give rise to a right of survivorship unless Wife can establish by clear evidence that Husband agreed to and knew the account had such a right.

¶28 The cases the Estate cites requiring proof that the parties intended to hold an account as joint tenants are not inconsistent with the right of survivorship granted in A.R.S. § 14-6212(A). *See Smith v. Tang,* 100 Ariz. 196, 204-05, 412 P.2d 697, 703 (1966) (holding that "proceeds from sale of real property held in joint tenancy are not subject to survivorship absent an intent indicated by the contract of sale to take the proceeds as joint tenants."); *In re Baldwin's Estate,* 50 Ariz. 265, 275, 71 P.2d 791, 795 (1937) (holding that "the party who relies on a joint tenancy clause in a deed should bear the burden of showing that the spouse whose property he claims is governed thereby knew that the deed so provided."); *Bostwick v. Jasin,* 170 Ariz. 15, 17, 821 P.2d 282, 284 (App. 1991) (noting that "a joint tenancy is not created in Arizona unless it clearly appears that the grantees have agreed to accept the

conveyance as joint tenants.") (citing *Collier v. Collier,* 73 Ariz. 405, 242 P.2d 537 (1952)).

¶29 First, we note that each of these cases involve real property. The applicable statute governing transfer of real property requires language expressly stating that a grant to two or more persons is with a right of survivorship in order for such a right to exist. *See* A.R.S. § 33-431 (2007). This is contrary to the language in section 14-6212(A). Further, the language in section 14-6212(A) is also consistent with the general understanding of a joint tenancy: that each joint tenant "owns an individual whole and if any tenant dies, the other remaining survivors hold the totality as before." *Graham v. Allen,* 11 Ariz. App. 207, 208, 463 P.2d 102, 103 (1970); *see also* 4 Ariz. Prac. *Community Property Law* § 4.4 (3d ed.) (West 2010) ("The principal feature of joint tenancy is the right of survivorship."); 9 C.J.S. *Banks & Banking* § 294 (West 2010) ("There is a rebuttable presumption that a party to a joint account has survivorship rights."); 48A C.J.S. *Joint Tenancy* § 3 (West 2010) ("Generally, the surviving joint tenant of a bank account held in joint tenancy takes the entire account.").

¶30 Further, this court in *Safley v. Bates,* 26 Ariz. App. 318, 320, 548 P.2d 31, 33 (1976), recognized that, pursuant to A.R.S. section 14-6104(A) (1973), a predecessor to section 14-

6212, "the sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." *See also* 10 Am. Jur. 2d *Banks & Financial Institutions* § 667 (West 2010) ("In creating a joint bank account with right of survivorship, it is a matter of no importance that the particular terms 'joint ownership' and 'joint account' are not used;" the determinative factor is the intent of the parties opening the account). Thus, the Estate bears the burden of proving that Husband intended to create something other than a joint account.[1]

¶31 We agree with the trial court that the evidence clearly established the parties' intent to hold a joint account at Edward Jones. It was undisputed that the funds in the Foothills Bank were held in joint tenancy with right of survivorship. The trial court found that the cashier's check from Foothills Bank did not negate the joint tenancy with right of survivorship because the transaction never severed the unities required to create and maintain joint tenancy. *See*

[1] For this reason, we need not address the Estate's argument that the trial court applied an improper burden of proof by allowing Wife to prove Husband's intent by "substantial evidence."

Smith, 100 Ariz. at 204, 412 P.2d at 703. The court found no intent to sever the joint tenancy with right of survivorship based on (1) the affidavit from the Foothills Bank representative that the parties were moving the funds to obtain more deposit protection; (2) testimony from the Edward Jones advisor that he had to place the funds in an account with the same designation as the account at the Foothills Bank (i.e., joint tenancy with right of survivorship); (3) the account class code designation of joint with right of survivorship; and (4) the letter asking Husband and Wife to correct any account errors which went unanswered.[2] We conclude that the actions of the parties, the evidence of their reason for redeeming the CD, and the financial advisor's testimony that the account would be held in the same form sufficiently established an intent to continue to hold the funds as joint tenants.

¶32 The Estate argues that under *Smith,* 100 Ariz. at 204-05, 412 P.2d at 703-04, the four unities creating a joint tenancy were destroyed once the funds were withdrawn from the Foothills Bank. Wife argues that there was no evidence that the parties' intended to sever the joint tenancy with right of survivorship by opening the Edward Jones account. We agree with

[2] We give this last factor little or no weight in light of the fact that it is unlikely that Husband ever saw this letter.

the trial court that the transactions must be viewed as a whole. The inquiry does not end with the withdrawal of funds from the Foothills Bank. The funds from the Foothills Bank were placed into a check made out to both parties and almost immediately deposited into the Edward Jones account which was listed both parties as "joint" owners. This evidence, taken in conjunction with the evidence regarding the reason for this transfer of funds, clearly established that there was no intent to sever the joint tenancy. *Compare Smith,* 100 Ariz. at 205, 412 P.2d at 703-04 (finding no intent to hold proceeds in joint tenancy where the husband deposited proceeds in his separate checking account).

¶33 The Estate also argues that, because the account was without an express right of survivorship, section A.R.S. § 14-6212(C) applies, rather than A.R.S. § 14-6212(A). Section 14-6212(C) states:

> Sums on deposit in a single party account without a pay on death designation or in a multiple party account that, by the terms of the account, is without right of survivorship, are not affected by the death of a party. However, the amount to which the decedent, immediately before death, was beneficially entitled under § 14-6211 is transferred as part of the decedent's estate. A pay on death designation in a multiple party account without right of survivorship is ineffective. For purposes of this subsection, designation of an

> account as a tenancy in common establishes that the account is without right of survivorship.

The Estate claims the trial court erred in concluding that A.R.S. § 14-6212(C) applies only to an account expressly designated as a tenancy in common. Wife argues that the account was not designated as a tenancy in common account, so section 14-6212(C) does not apply.

¶34 We conclude that section 14-6212(C) applies only to accounts that are expressly without rights of survivorship. The Edward Jones account was designated a "joint" account and not a "tenancy in common" account. Wife's right of survivorship in the joint account arose by operation of law pursuant to A.R.S. § 14-6212(A). To prevent Wife's claim to a right of survivorship, the account would have to be specifically designated as being held without such rights. *See* A.R.S. § 14-6212(C). Having decided that section 14-6212(C) does not apply, we need not reach the Estate's argument that it was entitled to the amount of funds to which Husband contributed pursuant to A.R.S. section 14-6211(A) (2005).

¶35 The Estate argues that because the account was established as a joint account, as opposed to an account held in joint tenancy with right of survivorship, and was never changed

in accordance with A.R.S. §§ 14-6216(A) or 14-6213(A),[3] it remained only a joint account. As discussed above, Wife was entitled to the funds whether or not the joint account expressly states "with right of survivorship." *See* A.R.S. § 14-6212(A); *see also* A.R.S. § 14-6213(B) (recognizing that a right of survivorship arises pursuant to A.R.S. § 14-6212).

IV. Attorneys' Fees on Appeal

¶36 Wife argues that this is a contract action and she is, therefore, entitled to an award of attorneys' fees on appeal pursuant to A.R.S. section 12-341.01(A) (2003) and Rule 21, ARCAP. She also requests an award of costs on appeal pursuant to A.R.S. section 12-331 (2003).

¶37 The Estate argues that this is not a contract action and Wife is not entitled to attorneys' fees pursuant to section 12-341.01(A). We agree with the Estate that the action between Wife and the Estate is not a contract matter. It is a dispute involving the interpretation of Arizona's probate statutes. Although the investment account was created by a contract, the contract itself is not central to the dispute between Wife and

[3] A.R.S. § 14-6213(A) states: "Rights at death under § 14-6212 are determined by the type of account at the death of a party. The type of account may be altered by written notice given by a party to the financial institution to change the type of account or to stop or vary payment under the terms of the account. The notice shall be signed by a party and received by the financial institution during the party's lifetime."

the Estate. *See Keystone Floor & More, LLC v. Ariz. Registrar of Contractors,* 223 Ariz. 27, 30, ¶¶ 11-12, 219 P.3d 237, 240 (App. 2009). Accordingly, we deny Wife's request for an award of attorneys' fees on appeal.

¶38 Wife, however, as the successful party on appeal, is entitled to her costs on appeal pursuant to A.R.S. § 12-341, not A.R.S. § 12-331.

CONCLUSION

¶39 For the reasons set forth above, we affirm the judgment in favor of Wife and award Wife her reasonable costs on appeal pursuant to A.R.S. § 12-341.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICK IRVINE, Judge

_____/S/_____
MARGARET H. DOWNIE, Judge