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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002049-MR

JANNIS SUE WELLS — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
CIVIL ACTION NO. 03-CI-01000

CALLIE SALYERS — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: STUMBO, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.[1]

HUDDLESTON, SENIOR JUDGE: Jannis Sue Wells appeals from a Floyd Circuit Court judgment granting partial summary judgment to Callie Salyers by adjudging the latter to be the owner of the proceeds of a certificate of deposit issued by First Commonwealth Bank and registered in the name of Jannis Sue Wells. Wells contends that Salyers was not entitled to summary judgment because there are material facts in dispute, especially

[1] Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

concerning Salyers' intent to make a gift to her of the proceeds of a prior derivative certificate of deposit.

In May 1995, Salyers purchased a six-month certificate of deposit in the amount of $100,000.00 as the sole individual owner but designating Wells, who is his daughter and only child, as the pay-on-death (P.O.D) beneficiary. This certificate of deposit was automatically renewed until November 19, 1996, when it was allowed to expire and the principal was transferred into a new six-month certificate of deposit in the amount of $100,000.00. The November 1996 certificate of deposit differed from the original in that it was designated a joint account listing Callie Salyers and Jannis Wells as the account owners with a right of survivorship and omitting the P.O.D. designation. Both Salyers and Wells provided signatures for the account, so under the terms of the certificate, either could withdraw all or any part of the funds with a single signature, and it was automatically renewable. The quarterly interest earned on both of these certificates was automatically deposited into Salyers' checking account with the bank.

The November 1996 certificate of deposit was automatically renewed until it expired on November 19, 2000, and Salyers purchased a new twelve-month certificate of deposit in the amount of $100,000.00. This certificate was similar to the 1996 certificate in that it was a joint-with-survivorship account listing Salyers and Wells as owners with no P.O.D. designation, and it was automatically renewable. As with the prior certificates, the quarterly interest earned on this certificate was deposited automatically into Salyers' checking account.

The November 2000 certificate of deposit was automatically renewed until August 2003, when on August 1, 2003, Wells acting alone closed the account after withdrawing all of the funds in the account, $101,321.91. She immediately purchased a new twelve-month certificate of deposit with First Commonwealth Bank in the amount of $101,321.91, listing herself as the sole owner and designating her son, Mark Alan Wells, as the P.O.D. beneficiary.

On September 9, 2003, Salyers filed suit against Wells alleging intentional and wrongful conversion of the proceeds from the certificate of deposit for her own personal use.[2] During discovery, the parties took the depositions of Salyers, Wells, and LaDonna Arms, a Customer Service Coordinator at First Commonwealth Bank. On July 12, 2005, Salyers moved for summary judgment pursuant to Kentucky Rules of Civil Procedure (CR) 56 on the issue of ownership of the August 2003 certificate of deposit. On September 27, 2005, the circuit court granted Salyers' motion holding that Salyers was the owner of the proceeds making up the August 2003 certificate of deposit. The court ordered First Commonwealth Bank to deliver the proceeds from the certificate to Salyers. Wells appeals from this judgment.

Wells maintains that the circuit court erred when it prematurely granted summary judgment to Salyers. The standard of review on appeal when a trial court grants a motion for summary judgment is whether the court correctly found there was no genuine issue as to any material fact and that the moving part was entitled to judgment as

[2] Salyers had earlier filed a criminal complaint for theft by unlawful taking under KRS 514.030. The complaint was dismissed upon Salyers' request, and the grand jury declined to return an indictment because of the pending civil action.

a matter of law.[3] The movant (Salyers) bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment (Wells) to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[4] "The party opposing summary judgment cannot rely on [her] own claims or arguments without significant evidence in order to prevent a summary judgment."[5] The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor.[6] Summary judgment is not considered a substitute for a trial, so the trial court must review the evidentiary record not to decide any issue of fact, but to determine if any real factual issue exists and whether the nonmovant cannot prevail under any circumstances.[7] "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial."[8] We need not defer to the trial

[3] *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 366 (Ky. 2005); *Stewart v. University of Louisville*, 65 S.W.3d 536, 540 (Ky. App. 2001); Ky. R. Civ. Proc. (CR) 56.03.

[4] *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). *See also City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001); *Roberts v. Fayette County Bd. of Educ.*, 173 S.W.3d 918, 923 (Ky. App. 2005).

[5] *Wymer v. JH Properties, Inc*., 50 S.W.3d 195, 199 (Ky. 2001) (citing *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226 (Ky. 1984)).

[6] *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003); *Lipsteuer v. CSX Transportation, Inc*., 37 S.W.3d 732, 736 (Ky. 2000); *Commonwealth, Natural Resources and Environmental Protection Cabinet v. Neace*, 14 S.W.3d 15, 19 (Ky. 2000).

[7] *Steelvest*, *supra*, note 4 at 480; *Chipman*, *supra*, note 4 at 390; *Barnette v. Hospital of Louisa, Inc*., 64 S.W.3d 828, 829 (Ky. App. 2002).

[8] *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999); *See also Murphy v. Second Street Corp*., 48 S.W.3d 571, 573 (Ky. App. 2001).

court's decision on summary judgment and review the issue *de novo* because only legal questions and no factual findings are involved.[9]

Wells contends that there are sufficient material factual issues in dispute to militate against summary judgment in favor of Salyers. Salyers' claim of ownership relies in large part on Kentucky Revised Statutes (KRS) 391.310, which provides that

> (1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
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> (2) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two (2) or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (1) of this section.[10]

There is no dispute that Salyers alone contributed the entire $100,000.00 principal amount used to purchase the various certificates of deposit. However, this statute merely creates a presumption of ownership in the contributing party that is subject to rebuttal by clear and convincing evidence.

Wells asserts that there is evidence creating a genuine dispute as to whether Salyers intended to relinquish ownership rights in the proceeds of the certificate(s) to her. She points to the fact that Salyers modified the terms of the account when he allowed the first (1995) certificate that listed him as the sole owner with Wells as the P.O.D.

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[9] *See 3D Enterprises Contracting Corp. v. Louisville and Jefferson Co. Metropolitan Sewer Dist.,* 174 S.W.3d 440, 445 (Ky. 2005); *Gainsco Companies v. Gentry*, 191 S.W.3d 633, 638 (Ky. 2006); *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001).

[10] This statute is based on the Uniform Probate Code § 6-103.

beneficiary, and purchased the second (1996) certificate that listed both him and her as joint owners, and gave her the authority to withdraw any or all of the proceeds from the account. Salyers counters that he modified the terms of the certificate merely to allow her access to the funds and he did not intend to relinquish ownership. Salyers testified in his deposition that the funds were generally to be used for his needs as he grew older.

We agree with Salyers that the modification of the certificate associated with a joint account *alone* does not constitute "clear and convincing" evidence of intent to relinquish ownership in the funds.[11] The terms of the certificate allowing Wells to withdraw a portion or even the entire amount of the funds represented a contractual relationship between Salyers and the bank, and did not modify legal ownership rights between Salyers and Wells.[12] The existence of a joint account necessarily contemplates access to funds by multiple parties. KRS 391.310 is intended to clarify the legal ownership rights to the funds based on the contributions of the parties while maintaining the ability of the parties to accommodate use of the funds and protect financial institutions through access to the funds by non-legal owners.

However, Wells contends that the modification of terms of the certificates, along with other evidence, constituted an *inter vivos* gift of the certificate proceeds. An *inter vivos* gift is a gift or transfer of property between living persons without valuable

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[11] *See, e.g.*, 38 AM. JUR. 2d *Gifts* § 65 at 762 (1999) ("Although the creation of a joint account conclusively establishes rights as between a joint tenant and the bank, the estate of deceased joint tenant may seek to prove there was no intention to create a gift to the surviving tenant.").

[12] *See, e.g., Erhardt v. Leonard*, 104 Id. 197, 657 P.2d 494 (Idaho App. 1983).

consideration, which is perfected and becomes absolute during the lifetime of the parties.[13] The elements of a valid *inter vivos* gift include: "'(a) a competent donor; (b) an intention on his part to make the gift; (c) a donee capable to take it; (d) the gift must be complete, with nothing left undone; (e) the property must be delivered and go into effect at once; and (f) the gift must be irrevocable.'"[14] In addition, since claims of *inter vivos* gifts are susceptible to fraud, the party claiming such a gift bears the burden of establishing all of the elements by clear and convincing evidence.[15] The principles applicable to *inter vivos* gifts in general apply as well to purported gifts of certificates of deposit.[16]

While the creation of a joint account alone is insufficient to conclusively prove intent to make an *inter vivos* gift, Wells testified in her deposition that on several occasions, Salyers told her that he wanted her to have the funds in the certificate account. In addition, although she was uncertain of the precise date, Wells testified that during the year 2000, Salyers handed her the certificate of deposit document and told her that "he wanted me to have it." She said that she took the document and put it in her lock box until August 2003 when she took it to the bank to redeem the certificate and close out the account. LaDonna Arms testified that Wells did indeed have possession of the certificate

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[13] *See Howell v. Herald*, 197 S.W.3d 505, 507 (Ky. 2006); *Cochran's Adm'x v. Cochran*, 273 Ky. 1, 115 S.W.2d 376, 383 (1938).

[14] *Howell, supra*, note 13, 507 (quoting *Gernert v. Liberty Nat'l Bank & Trust Co. of Louisville*, 284 Ky. 575, 145 S.W.2d 522, 525 (1940)). *See also Bryant's Adm'r v. Bryant*, 269 S.W.2d 219, 221 (Ky. 1954); *Hurley v. Schuler,* 296 Ky. 118, 176 S.W.2d 275, 276 (1943).

[15] *Howell, supra*, note 13 at 507; *Knox v. Trimble*, 324 S.W.2d 130, 132 (Ky. 1959).

[16] *See* 38 Am. JUR. 2d *Gifts* § 67 (1999); *Rose v. Rose*, 849 P.2d 1321, 1324 (Wyo. 1993).

and gave it to her when she closed the account and purchased the new certificate of deposit in her name alone.

With respect to the elements for an *inter vivos* gift, there is little dispute that Salyers was mentally competent to make a gift of the certificate to Wells, and that in turn she was competent to accept it. The remaining elements are in controversy. First, Salyers adamantly denied that he physically gave Wells the certificate and suggests that she may have taken it surreptitiously from his safe without his knowledge. The evidence indicates that Wells moved onto the property given to her and her father by Salyers' parents in order to help take care of him. She cleaned his house, helped prepare meals, and provided general assistance with his health care and medications. Salyers admitted giving Wells access to his safe, as well as giving her authority to write checks on his checking account, although she apparently never exercised that authority.

Salyers argues that there is insufficient evidence to establish several of the elements for an *inter vivos* gift including intent to make a gift and the existence of a completed irrevocable gift that was to go into effect at once. Salyers maintains that he retained some control over the funds[17] and the parties understood that the money was to be used for his benefit in the future.

In *Howell v. Herald,*[18] the Kentucky Supreme Court noted that Kentucky case law dealing with *inter vivos* gifts is sometimes conflicting and there has been a more

[17] *See Pikeville Nat'l Bank & Trust Co. v. Shirley*, 281 Ky. 150, 135 S.W.2d 426 (1939) (stating that an *inter vivos* gift requires immediate relinquishment of dominion and control over the gift).

[18] *Supra*, note 13.

modern movement away from the rigidity of the older dogma of gift law to a more flexible approach designed to focus on the intent of the donor on a case-by-case basis.[19] The Court also noted that completeness, delivery and irrevocability are often interwoven and reflective of the overriding issue of intent to make a present gift.[20]

An owner can transfer dominion and control over a gift by delivery of the item. While actual delivery is preferred, courts have recognized constructive or symbolic delivery may be adequate depending on the circumstances.[21]

> "A delivery is symbolic, when instead of the thing itself, some other object is handed over in its name and stead. A delivery is constructive, when in place of actual manual transfer the donor delivers to the donee the means of obtaining possession and control of the subject matter, or in some other manner relinquishes to the donee power and dominion over it."[22]

The current case involves constructive, rather than actual, delivery of the $100,000.00 and symbolic delivery through a certificate of deposit. "[W]hen a gift is constructively

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[19] *See, e.g.*, *id* at 511 ("These cases coupled with many others, show a clear and persistent pattern of this Court to balance the historical rigidity of delivery in gift law against the more practical realization that in certain cases intent should control. We are under no illusion that Kentucky case law is without conflict and that persuasive arguments can be made on the other side of this debate. Furthermore, we recognize that 'intention alone will not constitute delivery.'").

[20] *Id*. at 508.

[21] *Id*. (citing Caryl A. Yzenboard, *Kentucky Intestacy, Wills and Probate* § 6:ll (2004)); *Pikeville Nat'l Bank, supra*, note 17 at 430.

[22] *Id*. (quoting 2 *Thompson on Real Property* § 13.04 (a)(2)(i) (David A. Thomas ed., 2d ed. 2000).

delivered, the intent of the grantor to part with dominion and control is the ultimate factor in determining whether the gift was complete."[23]

In *Aubrey's Adm'x v. Kent*,[24] the Court held there was sufficient evidence to create a jury question as to an *inter vivos* gift involving funds in a bank savings account. The Court noted that in order to perfect an *inter vivos* gift, there must be delivery of possession, actual, constructive, or symbolic, with the intent to transfer title permanently.[25] The Court said that "[t]he delivery of a savings account passbook consummates its gift and transfers the money on deposit to the donee if that was the intension and purpose of the donor. This, it is generally said, is because such book is equivalent to a certificate of deposit, the presentation of which authorizes withdrawal of the funds."[26] In order to constitute a valid *inter vivos* gift of a certificate of deposit, there must be a delivery of the certificate and the donor must intend that title pass immediately.[27]

In the current case, the evidence includes the fact that Salyers affirmatively altered the terms of ownership of the various certificates by making Wells a joint owner

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[23] *Id*. at 509.

[24] 292 Ky. 740, 167 S.W.2d 831 (1942).

[25] *Id*. at 863.

[26] *Id*. (citations omitted). *Cf. Pikeville Nat'l Bank, supra*, note 17, where the Court applied a more rigid approach in rejecting a claim of an *inter vivos* gift where savings account passbook placed with a letter to the bank prior to the donor's suicide directing bank to transfer funds to the claimant was held to be insufficient because there was no delivery of the letter until after the death of the donor).

[27] *See Bishop v. Bishop*, 60 Ark. App. 164, 961 S.W.2d 770, 774 (1998); *Trevathan's Ex'r v. Dees' Ex'rs*, 221 Ky. 396, 298 S.W. 975, 980 (1927).

as opposed to a P.O.D. beneficiary. This modification allowing Wells immediate access to the funds and authorizing her to act alone to withdraw the entire proceeds at any time arguably is some evidence of a donative intent. Other facts of delivery suggesting intent to immediately pass title is Wells' testimony that Salyers physically handed her the certificate of deposit and said he wanted her to have it. Wells did have possession of the certificate when she closed out the account. Retention of the interest earned on the certificates by Salyers through deposit of the interest into his checking account did not necessarily defeat the existence of a gift.[28] Underlying this direct evidence is the fact that Wells is Salyers' only child and they had a fairly close relationship with Wells helping to care for him after his wife's death. The record indicates that their relationship deteriorated and friction developed when Salyers developed a romantic relationship with a woman who he eventually married in 2004.

Determination of intent constituting a state of mind is an issue normally not appropriate for summary judgment because it requires drawing factual inferences from various sources susceptible to differing interpretations.[29] There are numerous disputed facts involving the delivery of the certificate and the overriding intent of Salyers to make an *inter vivos* gift. Salyers is free to argue that the renewed certificate was changed to a joint account merely out of convenience to provide greater access to the funds for his sole benefit and that he did not deliver the certificate to Wells or explicitly express an intent to

[28] *See* 38 AM. JUR. 2d *Gifts* § 31 at 730 ("A reservation by the donor, for his or her lifetime, of the right to any income generated by the property which is the subject of a gift does not necessarily defeat the gift.").

[29] *See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co*., 814 S.W.2d 273, 276 (Ky. 1991); *Perry v. Motorists Mut. Ins. Co*., 860 S.W.2d 762, 764 (Ky. 1993).

give her the certificate, but these issues are more appropriately addressed to a jury rather than the circuit court ruling on a motion for summary judgment. We believe that there is sufficient evidence when viewed in a light most favorable to Wells to preclude summary judgment at this time. Salyers has failed to establish that there are no genuine issues of material facts in dispute or that he is entitled to judgment as a matter of law.

As an alternative ground for granting summary judgment, the circuit court held that even if Salyers intended to make an *inter vivos* gift, the conveyance was a gift *causa mortis* that was automatically revoked. A gift *causa mortis* is a gift of personal property made to a person in expectation of imminent death with the condition that the property shall belong fully to the donee if the donor dies as anticipated if the gift is not revoked in the meantime.[30] As with an *inter vivos* gift, a gift *causa mortis* requires a manifest intention to surrender property during the donor's life and delivery of the property, either actual, constructive or symbolic.[31] However, unlike an *inter vivos* gift, with a gift *causa mortis* delivery is conditional subject to being revoked.[32] Another essential element of a gift *causa mortis* is that the gift be made in expectation of

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[30] *Scherzinger v. Scherzinger*, 280 Ky. 44, 132 S.W.2d 537, 539 (1939) (involving a certificate of deposit); *Adcock v. Bishop*, 309 Ky. 502, 218 S.W. 2d 52, 52 (1949).

[31] *See Dickerson v. Snyder*, 209 Ky. 212, 272 S.W. 384, 385 (1925); *Compton v. Compton*, 435 S.W.2d 76, 77 (Ky. 1968); *Harrel's Adm'r vs. Harrel*, 232 Ky. 469, 23 S.W.2d 922, 925-26 (1930) (stating the distinguishing characteristic between a gift *causa mortis* and a testamentary legacy is that with the former there must be a manifest intention to surrender property and consummation with delivery during the donor's life; whereas, a legacy involves an intention to pass title and take effect only after the maker's death).

[32] *Id*.

imminent death from disease or impending peril.[33] A gift *causa mortis* may be automatically revoked by operation of law upon the donor's recovery from the impending affliction or peril.[34]

The circuit court agreed with Salyers that even if there was sufficient evidence to establish he intended to make a gift and there was sufficient delivery of the certificate to Wells, the gift "was automatically revoked upon his recovery from the sickness or illness which may have triggered his alleged delivery of the certificate of deposit to the Defendant [Wells]." Unfortunately, the circuit court failed to identify the sickness or illness that afflicted Salyers sufficiently to support establishment of a gift *causa mortis*.

Salyers asserts in his appellate brief that he felt an emotional drain when his beloved wife of over fifty years passed away and experienced a new realization of his own mortality as he adjusted to life as a widower. Salyers points to testimony by Wells that Salyers told her on several occasions he wanted her to have the certificate of deposit because "he wasn't going to live long."[35] At the same time, Salyers contends that a few months after he purchased the new certificate with joint ownership without the P.O.D. designation, he met Doris Jackson and developed a steady relationship that caused him to experience a rejuvenation of his health and a new vitality for life. Salyers insists that "any feelings of imminent peril or death Callie Salyers felt, which may have triggered

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[33] *Pikeville Nat'l Bank, supra*, note 17 at 429; *Adcock, supra*, note 30 at 52.

[34] *See Dickerson, supra*, note 31 at 385; 38 AM. JUR. 2d *Gifts* § 79.

[35] Salyers was born in 1922.

any desire to make a gift of the foregoing certificate of deposit to his daughter, was quenched soon after he began a relationship with his current wife, and would serve to renounce any alleged '*inter vivos*' gift allegedly made by the Appellee to the Appellant." We note that Salyers personally purchased the new certificate listing Wells as a joint owner in 2000 and Wells testified that he personally gave her the certificate shortly thereafter, several years after meeting Doris Jackson.

There is insufficient evidence in the record to support the existence of a gift *causa mortis*. General feelings of depression over a lost spouse or one's recognition of mortality with advanced age do not qualify as a disease, sickness, or impending peril. Similarly any expectation of death must be imminent. Salyers has not presented evidence that he was suffering from a disease or sickness or that he expected to die from such an illness in the very near future. Consequently, he has not demonstrated that any "recovery" from his condition would serve to automatically revoke a completed *inter vivos* gift. Absent additional evidence to support this claim, Salyers was not entitled to summary judgment on this basis.

In conclusion, we hold that there are genuine issues of material facts in dispute and that Salyers has failed to establish that he was entitled to summary judgment as a matter of law. Therefore, the judgment is vacated and this case is remanded to Floyd Circuit Court for further proceedings consistent with this opinion.

STUMBO, JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, DISSENTS.

PAISLEY, SENIOR JUDGE, DISSENTING. I respectfully dissent. The burden of proving that her father made an *inter vivos* gift of the CD to her is on the Appellant. Further, under these circumstances, she must prove the gift by clear and convincing evidence. KRS 391.310. Although there is certainly some conflicting evidence, based on the record before us, I believe it would be impossible for her to satisfy that burden. I would affirm the judgment of the trial court.

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BRIEF FOR APPELLEE:

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