DIVISION II
ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

CA06-217

November 8, 2006

BERNICE SWINDLE APPELLANT	AN APPEAL FROM MONROE COUNTY CIRCUIT COURT [No. PR-2004-34-03]
v.	HONORABLE BENTLEY STORY, CIRCUIT JUDGE
CLAY SWINDLE and JOE DEAN SWINDLE APPELLEES	AFFIRMED IN PART; REVERSED and REMANDED IN PART

This appeal from the Monroe County Circuit Court's probate division involves a dispute over the decedent's property between the widow and the decedent's sons by a previous marriage. Joe Swindle died at the age of sixty-eight on July 18, 2004, survived by his widow, appellant Bernice Swindle, and his two adult sons, appellees Clay Swindle and Joe Swindle, Jr. (Joey).

Joe and appellant were married in 1996. They maintained separate checking accounts. They were listed as joint owners of another checking account with the Bank of Brinkley, No. 01-904410-01, with appellant's son by a previous marriage, Russell Teal. Russell died in November 2001. On January 18, 2002, Joe and appellant went to an equipment dealer to purchase a bulldozer. Joe signed check number 564 on account No. 01-904410-01, in the

amount of $9,500, to McMullin Equipment Company for the purchase. Although a stop payment was issued on that check, appellant added her signature to it, and it was ultimately paid. According to appellant, the money in this account belonged to her, and Joe promised her that he would pay her back, although he never did. She also contends that she telephoned the bank to have that checking account changed to an individual account in her name only on January 13, 2002. However, the bank's records noted this change as being made on February 13, 2002.

Joe was injured in an auto accident, and Northland Insurance Company issued a $50,000 check to "Joe Swindle & Bernice Swindle, Individually and as Husband and Wife and Their Attorney B. Michael Easley" on January 20, 2004. After Mr. Easley deducted his fees and costs, he issued a $31,111.49 check payable only to Joe. Appellant opened another joint account with Joe, No. 02-898128-01, at the Bank of Brinkley on January 21, 2004. Appellant signed Joe's name on the signature card. On February 3, 2004, she endorsed the settlement check by signing Joe's name and deposited it in the new joint account. Appellant withdrew all of the money and closed the account on February 5, 2004.

As mentioned above, Joe died on July 18, 2004. Appellant filed a petition for probate of Joe's holographic will and for appointment as personal representative on July 30, 2004. Joe's will, dated April 24, 2004, stated: "I, Joe Swindle, being of sound mind do herby [sic] bequeath to my wife, Bernice Swindle our new house, ½ acre on witch [sic] it sits." The probate court admitted this will to probate and appointed appellant as personal representative on August 11, 2004. Appellees entered their appearances and requested notice of hearings

on August 16, 2004. They filed a contest of the will on November 5, 2004, asserting that the will was invalid because the entire document was not in the decedent's handwriting. In the inventory that appellant filed on January 10, 2005, she listed the homestead, with a net value of $167,000; a 960 John Deere tractor, valued at $25,000; and a Nortrack dozer, with a value of $10,000. She also listed a 2002 Chevrolet pick-up truck claimed by Joey Swindle and a John Deere 450B dozer claimed by appellant; for both items, she stated that the ownership was in question. Appellees objected to the inventory on the grounds that it failed to include the personal-injury settlement, jewelry that had belonged to appellees' mother, and various personal property removed by appellant's son.

The dispute was tried on August 16, 2005. Appellant testified that, while Joe was in the hospital, he told her to keep the settlement money because she would need it if he died and not to tell anyone about it; she said that she set up the new account and endorsed the check at his direction. Joey, however, testified that, when Joe was in the hospital, Joe did not know about the settlement; that Joe took Joey's and appellant's hands and told them that, if he received a settlement, he wanted it split between Joey, Clay, and appellant; and that, later at home, Joe told appellant and Joey that he wished Joey and appellant would stop bickering and that he wanted her to have the house and one-half acre and that he wanted all of the equipment to go to Joey and Clay.

The circuit judge entered the following letter opinion on November 11, 2005:

> There are two issues, namely the ownership [sic] $31,111.49 tort settlement and the ownership of the bulldozer purchased by the decedent.
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> ....

6. In 2001, Mr. Swindle sold part of his farm for $300,000.00. He did not put the proceeds from the sale into a joint bank account.

7. In 2001, Ms. Swindle's son, Russell Teal needed to borrow $125,000.00. He was in the National Guard and was covered by the National Guard's $200,000.00 death benefit insurance policy. He intended to borrow against that policy. Mr. Swindle suggested that he borrow the money from him instead. If Mr. Teal borrowed the money from Mr. Swindle, Mr. Swindle was to be made part beneficiary in the policy. The $125,000.00 was put into the bank with Ms. Swindle, Mr. Swindle, and Mr. Teal as signatories who could write checks on the account. At that time, Mr. Swindle and Ms. Swindle had separate checking accounts of their own. Mr. Teal wrote checks on this account for approximately three weeks and then became too weak to write checks. He died in November 2001. From November 2001, to January 2002, Ms. Swindle wrote checks on Mr. Teal's account. Mr. Swindle wrote a few checks on the account.

8. On January 18, 2002, Mr. Swindle asked Ms. Swindle for the Teal account checkbook. He wanted to purchase a bulldozer. He signed the check and paid for the bulldozer. When the check cleared the bank, Ms. Swindle signed the check also. Ms. Swindle testified that when Mr. Swindle purchased the bulldozer he promised to pay her back. According to Ms. Swindle, he never paid her back.

9. On February 13, 2002, Ms. Swindle changed the Teal account from a joint account to an individual account in her name only. She had called the bank in January to direct the bank to put the account in her name only. The January 2003 [sic] bank statement indicates this. She then wrote checks on this account. On February 7, 2002, she used $65,000.00 from the account to purchase three (3) certificates of deposit. Ms. Swindle testified that Mr. Swindle told her to keep the money and let no one know she had it because she would need the money.

10. On January 21, 2002 [sic], a new checking account was opened at the Bank of Brinkley. A signature card contains the purported signatures of both Mr. Swindle and Ms. Swindle. Ms. Swindle testified that she signed Mr. Swindle's name for him on January 21, 2004, because he could not go to the bank. According to Ms. Swindle, Mr. Swindle told her to sign his name. He was in the hospital at the time. Ms. Swindle did not have a power of attorney giving her authority to sign his name. According to Ms. Swindle, Mr. Swindle was weak but was cogent at this time. The account was opened with a $100.00 deposit. The next deposit was the $31,111.49 tort settlement on February 3, 2004.

11. The tort settlement regarding an injury to Mr. Swindle resulted in a net payment to him in the amount of $31,111.49. A deposit of $31,111.49 was made into

the joint checking account on February 3, 2004. This is the account Ms. Swindle opened on January 21, 2002. [sic] On February 5, 2002, [sic] Ms. Swindle moved the $31,211.49 from this account to her sole individual account. Ms. Swindle claims the $31,211.49 as her own. She testified that Mr. Swindle told her to keep the money secret and tell no one.

12. According to Ms. Swindle, when the house was being built, she used her account to pay for part of the construction and Mr. Swindle used his account to pay for part of the construction. She testified that she used $100,000.00 of her money and Mr. Swindle used $39,000.00 of his money.

13. Mr. Clay Swindle[1] testified that his father did not know of the tort settlement. According to Clay Swindle, Mr. Swindle told him that the settlement should be split equally between them. Clay Swindle also testified that Mr. Swindle told Ms. Swindle and him at their home that he wanted Ms. Swindle to have the house and his sons to have all the equipment.

14. The case of *Martindale v. Estate of Martindale*, 82 Ark. App. 21, 110 S.W.3d 319 (2003) holds on page 3 that:

> A party can destroy the nonmarital status of property by placing it in an account held jointly with a spouse. *McKay v. McKay*, 66 Ark. App. 268, 989 S.W.[2d] 560 (1999) [*aff'd in part*, *rev'd in part*, *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000)]. A presumption arises that a spouse placing money in a joint account intended to make a gift of an interest in this money to the other spouse. Once property, whether personal or real, is placed in the names of person [sic] who are husband and wife, without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety and it takes clear and convincing evidence to overcome that presumption.

15. Based on the above law and facts in this case, this court finds that the evidence does <u>not</u> support a finding that the presumption of a gift by Mr. Swindle to Ms. Swindle has been overcome by clear and convincing evidence. The $31,211.49 is the sole property of Ms. Swindle. Once the tort settlement proceeds were placed in a joint account, both parties equally owned the money. Either could have removed the money from the account and placed in his or her own separate account. That is what Ms. Swindle did in this case. The case law is clear.

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[1]Actually, Joey, not Clay, testified.

16. The bulldozer belongs to the two sons of Mr. Swindle. Ms. Swindle testified that she expected Mr. Swindle to pay her back for the purchase of the bulldozer. This testimony proves that she asserted no ownership interest over the bulldozer. Had she done so, she would not have expected repayment by Mr. Swindle to the checking account from which the proceeds to purchase the bulldozer originated. Mr. Clay Swindle testified that Mr. Swindle told Ms. Swindle and him that Ms. Swindle was to receive the house and his sons were to receive the equipment. The court finds that the bulldozer is the property of Mr. Swindle's two sons.

The decree incorporating the letter opinion was entered on November 22, 2005. Appellees moved for a new trial on November 22, 2005. Appellant filed a motion for new trial on November 23, 2005.

In a letter opinion filed on December 14, 2005, the trial judge modified his prior rulings and held:

1. **The $31,111.49 tort settlement check:** The tort settlement check was made payable to "Joe Swindle & Bernice Swindle, Individually and as Husband and Wife, and their attorney, B. Michael Easley." On January 21, 2004, Ms. Swindle opened a new checking account in the amount of $100 and placed her name and Mr. Swindle's name on the account. Ms. Swindle signed Mr. Swindle's name to the account as a signatory. Mr. Swindle did not open the account nor did he sign the signatory card. Mr. Swindle did not grant a power of attorney to Ms. Swindle to open the account or sign his name in any fashion or manner. On February 4, 2004, Ms. Swindle deposited the $31,111.49 check into this joint checking account with right of survivorship. On February 5, 2004, the day after she deposited the $31,111.49 into the joint account, Ms. Swindle withdrew all the money in the account and deposited it in her sole and separate checking account.

1.1 The tort settlement check was made payable to both Mr. Swindle and Ms. Swindle. The settlement did not distinguish as to what amount was attributable to each for personal injury, pain and suffering, and loss of consortium. Ms. Swindle did not have the authority to negotiate the $31,111.49 settlement check for Mr. Swindle. Mr. Swindle had not given her a power of attorney to negotiate this check. She did so without proper authority. See *Pollack v. Pulaski Bank & Trust Co.*, 30 Ark. App. 20, 781 S.W.2d 497 (1989).

1.2. The court was incorrect in its initial ruling that the $31,111.49 was the sole property of Ms. Swindle. The court concentrated on the fact that the money was placed in a joint account. The court did not concentrate on the fact that Ms. Swindle created that account without Mr. Swindle's signature, that she then deposited the tort settlement check into a joint account without approval, and that she then immediately removed the money and placed it in her sole account. The net effect of Ms. Swindle's actions is that she disposed of all of Mr. Swindle's interest in the tort settlement without his authority.

1.3. The court is of the opinion (1) that Ms. Swindle had no legal authority to deposit the $31,111.49 check into any account, (2) that the settlement amount will have to be litigated to determine what amount should have been attributed to personal injury, pain and suffering, and loss of consortium, (3) that Ms. Swindle is entitled to only that portion attributable to loss of consortium, (4) that Ms. Swindle's estate [sic] is entitled to that portion attributable to personal injury and pain and suffering, and (5) that this unusual requirement is made necessary by the action of Ms. Swindle.

2. **The John Deere Bulldozer:** The court has previously found that Mr. Swindle wanted to purchase the bulldozer, that he signed the check to purchase it, that Ms. Swindle expected him to pay her back for the purchase price, and that Ms. Swindle's testimony proved that she asserted no ownership interest in the bulldozer. The court's findings of fact still stand.

2.1. However, the court was incorrect in its initial ruling that the bulldozer was the separate property of Mr. Swindle's two sons. The bulldozer was the sole property of Mr. Swindle. At his death, the bulldozer became an asset of the estate. As an asset of the estate, it is subject to probate for purposes of distribution or paying estate debts from its forced sale.

In the decree filed on January 4, 2006, the trial judge concluded that the ownership of the $31,111.49 proceeds of the tort settlement would have to be litigated to determine the amount to be attributed to each party to the settlement. Finding that "the estate cannot be closed until after the issues that have been decided herein have been finally resolved," the court included a certificate for an interlocutory appeal pursuant to Ark. R. Civ. P. 54(b). Appellant then pursued this appeal.

We will reverse the circuit court's findings of fact if they are clearly erroneous or clearly against the preponderance of the evidence. *Mathews v. Mathews*, __ Ark. App. __, __ S.W.3d __ (Sept. 21, 2006). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id*. We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Id*. A trial court's conclusions of law, however, are given no deference on appeal. *Id*.

Appellant challenges the trial judge's findings as to the ownership of the bulldozer and the proceeds of the tort settlement.

The Bulldozer

Appellant argues that, under either of two different theories, she is the sole owner of the bulldozer. First, she argues, the bank account on which Joe wrote the check for the bulldozer had been changed to an individual account when that check was written and, therefore, a resulting trust in favor of appellant was created when title to the bulldozer was acquired with her funds. Pointing out the January 23, 2002, bank statement reflecting her sole ownership of the account, she asserts that, when Joe wrote the check for the bulldozer on January 18, 2002, she had already changed the account to an individual account, even though the signature card indicated that it was changed on February 13, 2002.

A resulting trust may be created when property is paid for with one person's money and title is taken in the name of another; the person furnishing the consideration for the purchase is said to have all of the beneficial or equitable interest in the property, and the person into

whose name the property was transferred has only bare, legal title. *First Nat'l Bank of Roland v. Rush*, 30 Ark. App. 272, 785 S.W.2d 474 (1990). The theory of a resulting trust is that grantors expect something for their money, and, when they pay the purchase price but direct that the property be conveyed to a third party who is a stranger, the presumption is that there has been no gift to the third party but a conveyance of the property to be held in trust for the party who paid the purchase price. *Edwards v. Edwards*, 311 Ark. 339, 843 S.W.2d 846 (1992). However, this is not the case when one spouse provides the money for a transfer of property to the other spouse; in that case, a gift is presumed, and this presumption can only be rebutted by clear and convincing evidence. *Id*. In general, a resulting trust must also be proven by clear and convincing evidence. *Id.*; *see also Ramsey v. Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975).

Based on these principles of law, even if appellant had changed the account to one only in her name by January 18, 2002, the result would not be different. The trial judge found that appellant never asserted an interest in the bulldozer, and that finding is not clearly erroneous. Therefore, there was a legal presumption that appellant made a gift of the bulldozer to Joe. This presumption was not rebutted by clear and convincing evidence.

Appellant's second argument on this issue is that, if account number 01-904410-01 was a joint account with Joe when check number 564 was written, the funds were owned by appellant and Joe as tenants by the entirety; they retained their character as entireties property when given for the bulldozer; and the bulldozer became appellant's property when Joe died. Once property is owned by a husband and wife as tenants by the entirety, it retains its character

of being entirety property even though the form of the asset may change. *Martindale v. Estate of Martindale*, 82 Ark. App. 22, 110 S.W.3d 319 (2003).

Appellees respond that "purchases from that account can be deemed to be solely owned by one spouse and not as tenants by the entirety," citing *McGuire v. Benton State Bank*, 232 Ark. 1008, 342 S.W.2d 77 (1961); *Black v. Black*, 199 Ark. 609, 135 S.W.2d 837 (1940); and *Dickson v. Jonesboro Trust Co.*, 154 Ark. 155, 242 S.W. 57 (1922). As to this case, where the bank is not involved, we disagree with appellees. In *Lofton v. Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988), we discussed those cases and explained the fallacy of appellees' reasoning:

> It is also clear that an estate by the entirety may be created in personal property. *Ramsey*, *supra*; *Black v. Black*, 199 Ark. 609, 135 S.W.2d 837 (1940); *Union & Mercantile Trust Co. v. Hudson*, 147 Ark. 7, 227 S.W. 1 (1921).
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> One of the questions involved in *Black v. Black, supra*, was whether Mr. Black, by changing a bank checking account from his individual name to the names of "Mr. and Mrs. W. G. Black," had created an estate by the entirety in the bank deposit. The appellate court said the question depended upon Mr. Black's intention in opening and carrying his checking account in the names of himself and his wife and affirmed the trial court's holding that an estate by the entirety had been created. The court also said that this estate would have continued only in so much of the account as had not been withdrawn by one spouse or the other. However, the court relied upon *Dickson v. Jonesboro Trust Co.*, 154 Ark. 155, 242 S.W. 57 (1922), for this statement, and in discussing *Dickson*, the court in *Black* said that the husband in *Dickson* had withdrawn portions of the deposit "with the wife's consent." We think that *Black* and *McEntire v. McEntire*, 267 Ark. 169, 590 S.W.2d 241 (1979), both stand for the proposition that neither spouse can destroy the estate by the entirety without the other's consent, although as far as the bank is concerned payment to either relieves the bank of liability. *See also Union & Mercantile Trust Co. v. Hudson, supra*, for the rule that withdrawal of the funds by one tenant does not mean that tenant thereby acquires sole ownership as against the other.
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> While the withdrawal of the funds by one spouse without the consent of the other is not involved in the present case, we think it important to note that the winner

> of the race to the bank does not determine ownership of the money withdrawn except in so far as the bank's liability is concerned. This is made clear by *McGuire v. Benton*, 232 Ark. 1008, 342 S.W.2d 77 (1961), where the trial court held that all the money originally in a joint savings account was estate-by-the-entirety property even though the wife had withdrawn most of it by the time of the final hearing in the case. As stated, this issue is not before us in the present case but we do have to decide whether the trial court was correct in holding that $12,500.00 of the money represented by the certificates of deposit belonged to the appellee as his separate property.
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> The ownership of property obviously depends upon the facts in each case. The rationale involved has not always been the same but a careful reading of our cases discloses that under the facts they have been decided correctly and in accordance with the above case law. For example, in *Hayse v. Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982), we held that the chancellor correctly found that the wife had not destroyed the nonmarital status of her inheritance. In that case she had purchased a money-market certificate in both her name and that of her husband "so if he ever needed to borrow money he would have collateral." However, when the certificate matured, and before any marital difficulties arose, she transferred the funds to another account held in her name and that of her daughter. At trial her husband testified that he was aware of his wife's inheritance and that they had discussed the purchase of the money-market certificate. However, he said he never saw the certificate and that he never claimed any ownership in it until the time of the divorce. In *McDonald v. McDonald*, 19 Ark. App. 75, 716 S.W.2d 788 (1986), we said Ark. Stat. Ann. 67-552(C) (Supp. 1985) provides that "if a certificate of deposit is in the names of persons who denominate themselves to the banking institution as husband and wife, then such certificate of deposit and all additions thereto shall be the property of such persons as tenants by the entirety." There was, however, no evidence mentioned that could have overcome the presumption that the certificate issued in both names created a tenancy by the entirety, and the statute, as we have already pointed out, was enacted for the protection of the bank in which the deposit was made and governs only the bank's relationship with its depositor. Thus, the result in *McDonald* does not conflict with the presumption relied upon in *Ramsey*.
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> The basic point involved is whether the spouse claiming the money must prove that separate property placed in the spouses' joint names constitutes a gift or whether there is a presumption that the property is owned by them as tenants by the entirety.

23 Ark. App. at 207-08, 745 S.W.2d at 638-39.

If the trial judge had found that this account was held by the parties as tenants by the entirety when the check was written on January 18, 2002, appellant could justifiably assert

ownership as the survivor. He did not, however, make such a finding; thus, we affirm the trial judge's decision on this point.

The Proceeds of the Tort Settlement

Appellant argues that she and Joe owned the tort settlement money as tenants by the entirety and, therefore, it became hers alone upon Joe's death. She points out that the settlement check was made payable jointly to "Joe and Bernice Swindle"; that she had a claim for loss of consortium; and that she signed a release and indemnity agreement in consideration for the settlement. She states that the lawyer's issuance of a settlement check, after deducting attorney's fees and costs, only to Joe, could not destroy the entireties character of the funds. Appellant concedes that she did not transform the settlement proceeds to her sole property by withdrawing it from the joint account and placing it into an account only in her name. She states that her "machinations ... in moving the settlement money around between accounts lost all meaning once the decedent passed, as it all became hers by operation of law as the surviving tenant by the entirety." It is true that, once property is placed in both spouses's names, there is a presumption, which can be overcome only by clear and convincing evidence, that the property is held in a tenancy by the entirety, *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000), and that such property retains its character of being entirety property even though the form of the asset may change. *Martindale v. Estate of Martindale, supra*. Once established, one spouse or the other lacks unilateral power to destroy the entirety. *Boggs v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1989); *Lofton v. Lofton, supra; see also Mathis v. Mathis*, 52 Ark. App. 155, 916 S.W.2d 131 (1996).

In response, appellees state that they "do not dispute that Appellant had some interest in the tort settlement" but argue that appellant and Joe did not own the settlement money as tenants by the entirety. They also argue that appellant had no authority to endorse the settlement check made payable only to Joe; to establish a new account that included her as an owner and a signatory; or to make withdrawals from that account.

The trial judge analyzed this issue incorrectly. There was a presumption that the settlement money was held by Joe and appellant as tenants by the entirety. However, this presumption could be rebutted by clear and convincing evidence that Joe and appellant actually held the property, as tenants in common, in proportion to their tort claims for personal injury and loss of consortium. This question can be addressed by the trial judge on remand from this interlocutory appeal.

Affirmed in part; reversed and remanded in part.

PITTMAN, C.J., and GRIFFEN, J., agree.