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Re: *Mack v. Mack*
C.A. No. 4240-VCN
Date Submitted: March 22, 2013

Dear Counsel:

A mother funds a joint tenancy bank account with her daughter. Sometime later, the two have a falling out. The daughter then withdraws more than \$100,000 from the account. The mother, claiming that it was her money and that it was deposited into a joint account only for emergency purposes, has sued her daughter for return of the funds. The daughter has moved for summary judgment.

* * *

In November 1979, William Harold Mack, the husband of Plaintiff Elaine Mack (“Elaine”) and the father of Defendant Beverly Mack (“Beverly”), then twenty-three years of age, was killed in an accident.¹ Less than three weeks later, Elaine opened a checking account and a savings account with Beverly at the First National Bank of Wyoming (the “Bank”) as joint tenants with right of survivorship. The funds that were then deposited were Elaine’s; the funds had belonged to her husband. Elaine told Beverly that her name was being put on the accounts in case of emergency—as a convenience account.² Over the next twenty-five years, Elaine made all of the deposits and either made the withdrawals or authorized Beverly to make withdrawals from the accounts. Elaine paid the income taxes attributable to the interest paid on the accounts. Also, Elaine treated

¹ Elaine has a son who is Beverly’s brother.

² “A convenience account is one that is created by the true owner of the funds by the addition of one or more other names so that each person named on the account will have access to the funds on deposit in the event that the true owner is incapacitated and the funds are needed for his or her benefit.” *In the Matter of the Estate of Barnes*, 1998 WL 326674, at *2 (Del Ch. June 18, 1998).

the funds as if they were her own and told others that the funds in the joint accounts were hers.³

Until 2006, the relationship between Elaine and Beverly was a typical, stable mother-daughter relationship. Unfortunately, that relationship deteriorated and, in August and September, unknown to Elaine, Beverly exercised her powers as a joint tenant to remove in excess of \$100,000 for her benefit. Despite Elaine's request, Beverly refused to return the funds that she took and this litigation ensued.

When the joint accounts were established in 1979, Elaine and Beverly both executed the Bank's account agreement which, in pertinent part, provided:

It is agreed and understood that any and all sums that may from time to time stand on this account to the credit of the undersigned depositors, shall be taken and deemed to belong to them as joint tenants and not as tenants in common: while both joint tenants are living either may draw and in case of death of either, this Bank is hereby authorized and directed to deal with the survivor as the sole and absolute owner thereof.⁴

In 1979, Elaine was not dependent on (or dominated by) Beverly; she was not impaired. Instead, she was fully and fairly able to exercise her judgment and

³ The one exception involved rental income from a farm owned by Beverly and her brother. Elaine received the rent, deposited the rent into the account, paid the taxes, and then disbursed the remainder in equal shares to Beverly and her brother.

⁴ App'x to Br. in Supp. of Mot. for Summ. J. on Behalf of Def. Beverly Mack, Ex. D.

make decisions without any pressure or control by Beverly. By 2006, however, she was suffering from a brain tumor which had adverse consequences for her capacity to act on her own.

* * *

Beverly has moved for summary judgment to confirm that the funds are solely hers. To earn summary judgment, she, of course, must establish that there are no material facts in dispute and that she is entitled to judgment as a matter of law.⁵

* * *

Beverly points to the text of the Bank's account agreement which authorizes her "to draw" funds from the joint account. With the right to withdraw the funds, her taking of the funds, according to her, converted them from jointly-held funds to her own funds, free and clear of any claim by Elaine. Beverly relies upon *Walsh v. Bailey*,⁶ which held, for a joint bank account established under language virtually the same as the Bank's account agreement, that, on the death of one joint tenant, the surviving joint tenant became the sole owner of the funds. The Court

⁵ Ct. Ch. R. 56(c).

⁶ 197 A.2d 331 (Del. 1964).

concluded that the portion of the agreement before it was unambiguous—the bank was to treat the survivor “as the sole and absolute owner” and the terms were binding upon the joint tenants’ “heirs and personal representatives.”⁷ Ownership of the funds on the death of one joint tenant was unambiguously resolved by the account agreement, and, with an unambiguous agreement, no other evidence was considered.

With both joint tenants alive, the language of the Bank’s account agreement does not unambiguously resolve the question of ownership following withdrawal. There is no doubt that Beverly was authorized to withdraw funds from the joint account (and the Bank was not exposed to any liability for allowing the withdrawal), but the account agreement is silent as to post-withdrawal ownership rights. That is in marked contrast with the post-death ownership: the account statement recites that the surviving joint tenant is to be dealt with as the sole owner. That may leave the question of legal title to the law. A joint bank account may warrant legal treatment different from that of a joint tenancy in other forms of property, especially in the case where, as here, one joint tenant has

⁷ *Id.* at 332-33.

disproportionately converted the funds in the account. There is some authority that the drawer on a joint account becomes the sole owner of the funds, effectively destroying the interest of the other joint tenant.⁸ Conversely, under New York law, “each joint tenant has the right as a joint owner of the bank account, to withdraw a moiety (half), or less than a moiety, for his or her own use and thus destroy the joint tenancy as to such withdrawals.”⁹ Indeed, other courts, recognizing the unique nature of joint bank accounts, have held that ownership of the funds is ultimately determined by the parties’ intent, notwithstanding the creation of a joint tenancy.¹⁰

⁸ See, e.g., *Casagranda v. Donahue*, 585 P.2d 1286, 1288 (Mont. 1978) (“A joint bank account has a special attribute which allows either joint owner, by virtue of the contract with the bank, to acquire dominion over the entire account by drawing a proper order on the bank. Nevertheless, a joint bank account is otherwise subject to the same rules as other joint tenancies. Either party can acquire the whole account either by withdrawing it during the lifetime of the co-owners or by survivorship.”) (citation omitted); *In re Estate of Vogel*, 684 N.E.2d 1035 (Ill. App. 1997) (allowing one joint tenant to withdraw funds from joint bank account and keep for own purposes); but see W.W. Allen, Annotation, *Power of One Party to Joint Bank Account to Terminate the Interests of the Other*, 161 A.L.R. 71 (1946, rev. weekly); *Anderson v. Baker*, 641 P.2d 1035, 1038 (Mont. 1982) (“We therefore hold that where, as here, a depositor during his or her lifetime raises the issue of ownership of funds in a joint tenancy account, the statements on the signature card are not conclusive and additional evidence may be examined to ascertain the true intent of the parties.”).

⁹ *In re Enis’ Estate*, 265 N.Y.S. 2d 506, 508-09 (Sur. Ct. 1965); see also *In re Suter’s Estate*, 258 N.Y. 104, 106 (1932).

¹⁰ See, e.g., *Fecteau v. Cleveland Trust Co.*, 167 N.E. 2d 890, 893 (Ohio 1960) (“Under the Ohio rule the creation of a joint and survivorship bank account is a contractual matter, and, where a

Even if Beverly should be deemed to have legal title to the funds, there may, nonetheless, be “a supervening understanding or agreement” that establishes a different entitlement.¹¹ Elaine has proffered evidence to support an understanding that may be enforced in equity to the derogation of a raw legal right. That includes Elaine’s assertion that she told Beverly that her name was placed on the accounts for emergency purposes.¹² Perhaps Elaine will be unable to prove that there was such an understanding, but the Court cannot reject, on the record at this stage, Elaine’s contentions.

contest arises as to the ownership of funds in an account, carried in the joint names of two people, and one of them has wholly withdrawn and appropriated such funds to his own use, such case is to be decided on its own facts. The form of the deposit is not conclusive, and the circumstance that by the terms of the deposit either person may withdraw the whole amount is not always dispositive of the issue of ownership.”); *see also* Allen, *supra*, note 8 (“The existence of power and right to appropriate depends upon the intent of the parties; and upon what is frequently referred to as ‘the realities of ownership.’ In general the cases agree that the form of the account is not necessarily determinative of the ownership and right . . .”).

¹¹ *Dillon v. Dillon*, 1987 WL 11282, at *3 (Del. Ch. May 19, 1987); *see also Messersmith v. Delaware Trust Co.*, 215 A.2d 721 (Del. Ch. 1965) (subject to oral trust agreement). Even if the Bank’s account agreement is deemed unambiguous in these circumstances, *Dillon* explains why the Court may nonetheless look to Elaine’s intent by consideration of matters beyond the text of the account agreement.

¹² Aff. of Pl. Elaine Mack Ex. A ¶ 2. This is consistent with Elaine’s control of the accounts for more than two decades. In *Barnes*, the Court recognized that “with[holding] the property [*i.e.*, the bank account] from the ‘co-tenant’ in some significant way . . . negate[s] the idea that there was an intention to create a joint tenancy by making a present gift to the new co-owner.” 1998 WL 326674, at *4. The control exercised by Elaine over the joint accounts for more than two decades might satisfy this standard as well.

This is not a judicial effort “to vary the terms of the contractual deposit relationship formed among the depositors and the depository institution.”¹³ Instead, it is the recognition that the Court may not, under these circumstances, exclude the possibility of a supervening equitable obligation that limits Beverly’s rights as to the funds withdrawn from the joint account.¹⁴

Accordingly, Beverly’s motion for summary judgment, except for Count I of the Complaint, is denied.¹⁵

* * *

Elaine has moved to amend her complaint to add a claim for waste. Elaine and Beverly share an interest in a farmhouse near Canterbury, Delaware. Beverly, in her counterclaim filed several years ago, accused Elaine of being responsible for damages to the farmhouse, including the furnace, the well, windows, and water pipes.

¹³ *Dillon*, 1987 WL 11282, at *4.

¹⁴ For this reason, Beverly’s motion to strike evidence presented by Elaine because it would be inconsistent with the terms of the Bank account agreements must be denied. *See id.*

¹⁵ Elaine maintains that when Beverly became a joint tenant she was burdened by general fiduciary duties owed to her as her mother. Elaine has not established those fiduciary duties. Such duties do not necessarily arise from the mother-daughter relationship, especially in the absence of impairment, dependence, or the like. Count I of the Complaint is dependent exclusively upon the existence of a fiduciary duty. Thus, it must be dismissed.

Although leave to amend is “freely” granted “when justice so requires,”¹⁶ with trial scheduled soon and with Elaine’s knowledge of her waste claims for several years, her motion would ordinarily be denied because of dilatory conduct and prejudice to the non-moving party.¹⁷ However, it appears that the waste claims that Elaine now seeks permission to pursue are largely “mirror images” of the claims made by Beverly. Thus, there is little in Elaine’s waste claims that either is new to Beverly or will require any significant refocusing of trial effort. If the damages occurred, it is likely that they are fairly chargeable to either Beverly or Elaine. There is no reason simply to try one-half of this debate; accordingly, Elaine’s motion to amend to add waste claims is granted.¹⁸

Beverly understandably objects to the potential impact of this amendment on her trial preparation. Indeed, Elaine’s counsel has conceded that additional time would be appropriate. Therefore, the current trial date will be continued for a

¹⁶ Ct. Ch. R. 15.

¹⁷ See, e.g., *U.S. Bank N.A. v. U.S. Timberlands Klamath Falls, L.L.C.*, 2005 WL 2093694, at *1-2 (Del. Ch. Mar. 30, 2005).

¹⁸ For the reasons set forth above, Elaine’s efforts to revise her claims asserting breach of fiduciary duty are futile, and her motion to amend Count I of the Complaint is denied. The proposed amendment also addresses typographical matters; to that extent, the motion to amend is granted.

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period of at least sixty days. Counsel are requested to confer about when they expect this matter to be ready for trial and then to apply for a new trial date.

* * *

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K