RENDERED: JUNE 29, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000731-MR

BONNIE S. COE AND JENNIE B. COE — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 14-CI-00140

WILLIAM J. SCHICK III — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON AND JONES, JUDGES.

ACREE, JUDGE: This matter involves the disposition of a certificate of deposit (CD) and a checking account. The Kenton Circuit Court ruled that the funds from the redemption of the CD and the checking account are the sole property of a trust

and shall be divided pursuant to the trust's terms. We affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURE

Appellee, William J. Schick, III (Bill) and Appellant, Bonnie S. Coe are brother and sister, and the only surviving children of William J. Schick, Jr. (William). Appellant Jennie B. Coe is Bonnie's daughter.

In 1998, William executed a revocable living trust naming himself as the initial Trustee. He funded the trust by titling various assets in the name of "William J. Schick, Jr. Trust" or some variation thereof.

William modified the Trust only once. The amended Trust stated William was to have complete control of his assets until his death, after which the trust corpus would be distributed outright to Bill and Bonnie.

Two months later, the Trust, utilizing Trust funds, purchased a twenty-four-month CD from Fifth Third Bank in the amount of $99,999.00 payable to "William J. Schick, Jr., Trust or Jennie Blair Coe." (CD 1). The Trust subsequently purchased another twenty-four-month CD from Fifth Third Bank, again in the amount of $99,999.00, payable this time to "William J. Schick, Jr., Trust or William J. Schick, III." (CD 2). Monthly interest payments generated from the CDs were paid into Fifth Third Bank checking account number 7480232664. The Trust owned that account and William signed the signature card

as the trustee. Notwithstanding that the account owner was a trust and not William himself, William designated Jennie as the "payable on death beneficiary."

William died on January 5, 2010. He left a "pour-over" Last Will and Testament that also funded the Trust.

The Trust named Fifth Third Bank as first successor trustee. Shortly after William's death, the Bank negotiated both CDs, converting them to cash. It marshalled the proceeds from the CDs and the balance of the Fifth Third checking account, along with other Trust assets, into a single trust account.

The Bank resigned as trustee and declined appointment as executor of William's estate. Bill and Bonnie were named second successor co-trustees of the Trust and co-executors of his estate.

On August 5, 2010, Jennie filed a "Notice of Claim on Estate of William Schick, Jr" in the probate case, arguing that the funds generated from CD 1 and the checking account should have been paid directly to her and in error were claimed to be part of the Estate of William Schick, Jr. and/or the William J. Schick Jr., Trust. Bill and Bonnie disallowed Jennie's claim.

On March 7, 2012, an Order Confirming Final Settlement, Discharging Co-Executors, and Relieving Sureties was entered, closing out William's estate.

The next year, on December 16, 2013, Bonnie filed a "Motion for Estate to be Reopened to Deal with the Claim of Jennie Blair Coe" requesting that the claim Bonnie and Bill had previously disallowed be addressed by the district court and held invalid. Bill opposed the motion, and contemporaneously filed a declaratory judgment action in Kenton Circuit Court seeking a ruling on the ownership of both CDs and the checking account. The district court held the motion to re-open in abeyance pending resolution of Bill's circuit court matter.

Back in circuit court, the parties filed cross-motions for summary judgment. On September 17, 2014, the circuit court partially granted summary judgment in favor of Bill as to the Fifth Third checking account. It ruled the Trust was and remains the owner of that account. It reasoned:

> The checking account was not a multi-party account as defined in KRS 391.300(5) since it is an account controlled by a trustee for a trust account where the relationship is established other than by deposit agreement, but became a multi-party account under that definition upon the addition of the payable on death beneficiary. It is not a trust account as defined in KRS 391.300(14) since it is an account owned by a trust which has significance apart from the account, so the survivorship right of KRS 391.315(3) does not apply. As in any case where the court is called upon to interpret a document, the first and most important guide is the plain language of the instrument. *Benjamin v. JP Morgan Chase Bank*, 305 S.W.3d 446, 451 (Ky. App. 2010), citing *Linton v. Hail*, 201 Ky. 698, 258 S.W.111, 112 (1924). The checking account belongs to the Trust alone and naming a payable on death beneficiary was ineffective as a trust does not die.

(R. 116-17). It ordered that the funds that were in the Fifth Third checking account be distributed equally to Bill and Bonnie pursuant to the Trust's terms. The circuit court further found that a genuine issue remained as to William's intent when, a little more than a month after revising the Trust's terms, the Trust purchased CD 1 naming the Trust and Jennie as co-owners. For that reason, it declined to grant summary judgment as to the CDs.

A bench trial was held on February 6, 2015, to resolve ownership of both CDs. Bill also requested attorney's fees. The circuit court found that the funds from redeeming the CDs are the sole property of the Trust and, by the Trust's terms, are to be divided equally between Bill and Bonnie. It stated:

> The proceeds from the two CD's are now the only assets remaining in the Trust. The CD's are accounts as defined in KRS 391.300(1) and multi-party accounts as defined in KRS 391.300(5) and are also negotiable instruments and notes of the bank as defined in KRS 355.3-104(10). If an instrument is payable to two or more persons alternatively it is payable to any of them and may be negotiated by any of them in possession pursuant to KRS 355.3-110(4) and a payee in possession may negotiate it even to the detriment of the other payee. *Farmers Bank & Trust Co. v. Brazell*, 902 S.W.2d 830 (Ky. App. 1995). However, this provision of the Uniform Commercial Code speaks only as to who may negotiate the instrument and does not designate the ownership of the instrument or the funds it represents. *Raichel v. Raichel*, 65 S.W.3d 497 (Ky. 2001). The relative rights of the parties are determined by the agreement of the parties and absent evidence to the contrary it is generally presumed to be that they are tenants in common. Hawkland, *Uniform*

> *Commercial Code Series*, §3-110:2 (revised 2004). However the evidence in the record herein rebuts the presumption: the CD's were purchased with trust funds, the interest was paid into trust accounts, and the individuals named as co-owners of the CD's did nothing to exercise any control over the funds. From all of the evidence in the record the most likely interpretation of the addition of alternative payees was that it was done in an overabundance of caution so that should anything cause the trust to be dissolved the funds would revert to a family member; it was not intended as an inter vivos transfer or even a testamentary one to the named individuals.

(R. 185-86).

The circuit court also took up the issue of attorney's fees. It reviewed detailed billing statements submitted by Bill's attorney, which revealed that Bill personally paid $65,412.23 in attorney's fees. Of this amount, the circuit court found $26,357.00 "was clearly for the representation of the trust and estate: Bonnie S. Coe shall pay to [Bill] the sum of $13,178.50 as her share of that fee." Of the remaining $39,055.23, which represented fees paid by Bill for representation of himself personally, the circuit court ruled that justice required that Bonnie and Jennie be personally and severally liable for two-thirds of those fees, or $26,036.82. It reasoned:

> The Court finds that the majority [of the remaining $39,055.23 in attorney's fees] would not have been required but for the actions of Bonnie S. Coe and Jennie B. Coe in their opposition to the attempts at mediation of the division of the Trust assets. At the trial of this matter, the Defendants essentially conceded to the division of the

> CD's as it was sought by Plaintiff, and also agreed that Bonnie S. Coe would step aside as co-trustee; had Defendants come to this position a bit sooner this entire case could have been avoided and [Bill] would not have had to pay out the majority of these fees. While generally attorney fees are not awarded in the absence of a statute or contract expressly providing therefor, this rule does not abolish the equitable principle that an award of fees is within the discretion of the court depending on each particular case. *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998), citing *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754, 755 (Ky. App. 1984).

(R. 186). From these orders, Bonnie and Jennie appealed.

ANALYSIS

Bonnie and Jennie argue that the circuit court erred in finding Jennie not entitled to the funds generated by CD 1 or originally contained in the Fifth Third checking account. They also claim the circuit court abused its discretion in awarding Bill attorney's fees.

A. CD 1

Appellants first argue that Jennie, not the Trust, is the rightful owner of CD 1 because the legal presumption is that "[s]ums remaining on deposit *at the death of a party to a joint account belong to the surviving party* or parties to the account as against the Estate of the decedent[.]" KRS 391.315(1) (emphasis added). They claim the circuit court erroneously concluded that the funds generated from the negotiation of CD 1 belonged to the Trust.

The circuit court reached its decision following a bench trial. CR[1] 52.01. We will not disturb the circuit court's specific findings of fact unless they are clearly erroneous; that is, they are not supported by substantial evidence. *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016). We review *de novo* the circuit court's legal determinations and its application of the law to those facts. *Id.*; *Sawyers v. Beller*, 384 S.W.3d 107, 110 (Ky. 2012).

For Appellants' argument to be true, CD 1 must first be a joint account. We find that it is. We begin with KRS[2] 391.300, for it defines several key statutory terms. An "account" is "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, *certificate of deposit*, share account and other like arrangement." KRS 391.300(1) (emphasis added). Additionally, a "joint account" is "an account payable on request to one (1) or more of two (2) or more parties whether or not mention is made of any right of survivorship[.]" KRS 391.300(4).

CD 1, a certificate of deposit, was issued to "William J. Schick, Jr. Trust or Jennie Blair Coe," alternatively. It was payable on request to either of them. *Farmers Bank & Trust Co. v. Brazell*, 902 S.W.2d 830, 831 (Ky. App.

[1] Kentucky Rules of Civil Procedure.
[2] Kentucky Revised Statute.

1995) (a certificate of deposit is payable in the alternative if it includes "or" on its face). CD 1 meets the statutory definition of a joint account. KRS 391.300(4).

Beyond this, Appellants' argument loses steam. KRS 391.315(1)(a) provides the funds remaining in a joint account *at the death of a party* belong to the surviving party. KRS 391.315(1)(a); *Brazell*, 902 S.W.2d at 832. Had CD 1 been issued to William or Jennie, upon William's death it would have belonged outright to Jennie. *See Brazell*, 902 S.W.2d at 832 (noting, upon decedent's death, certificates of deposit owned alternatively by the decedent and a surviving party would have automatically belonged to the surviving party). But CD 1 was not owned by William or Jennie. It was owned by the Trust or Jennie. And neither has died.

Bonnie and Jennie take issue with the circuit court's logic that a trust can never "die." They claim the Trust terminated upon William's death; therefore, for all practical purposes, the Trust "died" when William died. But the fact remains that this Trust did survive William's death. First successor and second successor trustees have been appointed, and those trustees have continued to care for the Trust and its corpus. Both the Trust and Jennie endure. Accordingly, KRS 391.315(1) does not come into play.

There is another reason Jennie is not entitled to the funds redeemed from CD 1. KRS 355.3-110(4) provides that, "[i]f an instrument is payable to two

(2) or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument."[3] "Joint accounts payable in the alternative, [such as the CDs at issue here,] give the party who has possession or the freedom to negotiate them, even to the detriment of the other party." *Brazell*, 902 S.W.2d at 832-33.

In this case, Fifth Third Bank, as successor trustee, negotiated both CDs and placed the funds in a separate account for the benefit of the Trust and its beneficiaries. It was proper for the trustee to dispose of the CDs in this manner, even without Jennie's authorization or knowledge.

It is possible for joint or alternative owners to craft an agreement as to the ownership of funds held in an account or instrument that deviates from how the account or instrument is held by the bank. 6B Part I Anderson U.C.C. § 3-110:15 [Rev] (3d. ed.) ("The rights of the joint or alterative parties, as between themselves, are determined by any agreement they may have between themselves."); 5 Hawkland UCC Series § 3-110:2 [Rev] (2004) ("The relative [ownership] rights of the parties inter se are determined by any agreement between the parties."). But there is no evidence of any such agreement in this case. Indeed,

[3] While KRS 391.300(1) includes certificates of deposit in its definition of "account," KRS 355.3-104(10) also defines a certificate of deposit as "an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money."

the circuit court found that the evidence presented at trial – including that the CDs were purchased with trust funds and the interest paid into an account owned by the Trust – indicated that the funds generated by the CDs belonged to the Trust, not the alternative payees.

The circuit court's factual findings are supported by the evidence presented at trial and we see no reason to disturb the circuit court's legal conclusion that the funds from the negotiation of the CDs are the sole property of the Trust and are to be distributed by the Trust's terms. On this issue, we affirm.

B. Fifth Third Checking Account

Bonnie and Jennie next argue that the circuit court erred in finding the sums in the Fifth Third checking account belonged to the Trust. They argue the funds should have been paid directly to Jennie, the account's "pay on death" beneficiary when William died. They point out that William took specific, deliberate steps to ensure the checking account was payable to Jennie upon his death and fault the circuit court for ignoring William's clear intent.

The circuit court issued its ruling by way of partial summary judgment in Bill's favor. "The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012).

A checking account, like a CD, constitutes a statutorily defined account. KRS 391.300(1). But the Fifth Third checking account in this case is not a joint account. It was not jointly owned by the Trust and Jennie, and not payable on request to one or more parties. *See* KRS 391.300(4) (defining joint account). The Trust wholly owned the account, and Jennie was identified as the "pay on death" (P.O.D.) payee, meaning "an account payable on request to one (1) person during lifetime and on his death to one (1) or more P.O.D. payees[.]" KRS 391.300(10). We agree with Appellants that Jennie, as P.O.D. payee, will not benefit until the death of the original payee, in this case a trust. KRS 391.315(2) (with a "P.O.D. account, on death of the original payee . . . , any sums remaining on deposit belong to the P.O.D. payee"). Jennie's designation was meaningless given that trusts do not die. We agree with the circuit court that those funds should not pass directly to Jennie pursuant to the P.O.D. clause, but be distributed equally to Bonnie and Bill according to the Trust's terms. Again, we affirm.

C. Attorney's Fees

Finally, Bonnie and Jennie claim the circuit court abused its discretion in ordering them to pay a portion of Bill's attorney's fees. We find merit here.

"The general rule in Kentucky is that attorney's fees are not allowable as costs in absence of statute or contract expressly providing therefore [sic]." *Chin v. Chin*, 494 S.W.3d 517, 524 (Ky. App. 2016) (citation and internal quotation

marks omitted). As is often the case with most general rules, there is an exception. The "American Rule" followed in Kentucky does not "abolish the equitable rule that an award of counsel fees is within the discretion of the court depending on the circumstances of each particular case." *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998) (quoting *Kentucky State Bank*, 663 S.W.2d at 755).

When reviewing an equitable award of attorney's fees, we defer to the circuit court and will not disturb its decision absent a finding that the award was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Smith v. Bear, Inc.*, 419 S.W.3d 49, 59 (Ky. App. 2013) (citation omitted).

The circuit court's attorney's fee award has two components: attorney's fees related to the administration of William's estate or the Trust, and attorney's fees related to the representation of Bill personally. We address each separately.

The circuit court first found that Bill paid $26,357.00 in attorney's fees for work related to the administration of William's estate and/or the Trust. The circuit court determined that these fees should have been paid by the estate or Trust, not by Bill personally, and because the Trust is to be divided equally between Bill and Bonnie, Bonnie should reimburse Bill the sum of $13,178.50 as her share of that fee.

While we agree that these fees should be paid by the estate or Trust, we disagree that Bonnie should reimburse Bill outright. Our reasoning is two-fold.

First, Bill testified at the bench trial that Bonnie has retained her own attorney since the inception of the probate case in district court. Equity does not require that Bonnie reimburse Bill for his attorney's fees that should be paid out of the estate or Trust unless Bill is similarly required to reimburse Bonnie.

Second, the circuit court found these fees should be paid by the estate or the Trust. Funds remain in the Trust. The Trust, not Bonnie, should, and can, reimburse Bill (and Bonnie) for those attorney's fees related to the administration of the estate and/or Trust. In light of the circuit court's conclusion that these fees should be paid out of the estate or Trust, logic dictates that the payment of such fees come from the Trust corpus before final distribution is made to Bill and Bonnie.

The circuit court also found that Bill paid $39,055.23 in attorney's fees for his own personal representation. It ordered Bonnie and Jennie to pay two-thirds of those fees. It found the majority of this amount would not have been required except for Bonnie's and Jennie's refusal to mediate. This fact is not borne out in the record. The circuit court made no such factual finding in its order, and our review of the bench trial reveals nothing to support that finding. *Anderson v. Johnson*, 350 S.W.3d 453, 457 (Ky. 2011) (In an action tried upon the facts

without a jury, CR 52.01 demands the circuit court make specific findings of fact.). Indeed, appellants' counsel stated numerous times at the bench trial that Bonnie and Jennie wished to mediate the matter and simply wanted to "get this done." The record also reflects that Bill opposed Bonnie's and Jennie's motion to mediate filed shortly after Bill initiated this declaratory judgment action. We were directed to no evidence in the record, nor did our independent search reveal proof, that Bonnie and Jennie refused to mediate.

The circuit court also found that Bonnie and Jennie essentially conceded to the division of the CDs and, had they "come to this position a bit sooner, this entire case could have been avoided[.]" (R. 186). Appellees, through counsel, stated at trial that they only recently became aware of CD 2 and, had they known of it sooner, their approach would have been different. Bonnie's and Jennie's "concession" was shaped by the recent revelation of CD 2. One can hardly fault them for failing to reach this position "a bit sooner."

The circuit court's factual findings underlying its decision to award attorney's fees as related to Bill's personal representation are unsupported by the evidence presented at the bench trial and the record as a whole. Accordingly, we find the circuit court abused its discretion in ordering Bonnie and Jennie to pay two-thirds of Bill's remaining attorney's fees.

CONCLUSION

We affirm the circuit court's orders declaring the Trust the owner of the funds originally contained in the Fifth Third checking account and generated from the redemption of the CDs. We reverse the circuit court's award of attorney's fees and remand for additional proceedings. On remand, we direct the circuit court to order that those attorney's fees related to the administration of the estate and/or Trust be paid out of Trust corpus prior to it being distributed to Bill and Bonnie. The circuit court shall also reconsider its attorney's fees decision as to those fees paid by Bill for personal representation. Nothing in this Opinion shall prohibit the circuit court from again awarding Bill these attorney's fees provided the circuit court's factual findings are fully supported by substantial evidence in the record and the award equitably warranted.

ALL CONCUR.

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