NO. COA01-1302

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

BETTY PRESSLEY LAUGHTER,
CAROLYN PRESSLEY DAVIS,
FRANK L. SCHRIMSHER,
Administrator, CTA of the Estate
of Morris C. Pressley, Deceased
Plaintiffs,

v.

Mecklenburg County
No. 99 CVS 14564

SARA F. SHIELDS,
Defendant.

Appeal by defendant from judgment entered 30 July 2001 by Judge Ola M. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 June 2002.

John A. Mraz, P.A., by John A. Mraz, for plaintiff appellee.

Richard H. Tomberlin for defendant appellant.

McCULLOUGH, Judge.

Defendant Sara Shields appeals from an order granting partial summary judgment to plaintiff Frank Schrimsher, Administrator CTA of the Estate of Morris Pressley, deceased, entered on 30 July 2001 by the Honorable Ola M. Lewis during the 30 July 2001 Civil Non-jury Session of Mecklenburg County Superior Court.

The evidence before the court tended to show that Morris Pressley was born on 26 March 1912. On 22 October 1985, decedent

executed a will that left the residuary of his estate to his spouse, provided that she survive him. In the event that his wife did not survive him, then his three daughters, Betty, Carolyn and Sara, were to share equally. Decedent's spouse passed away on 6 October 1991. Soon after in November of 1991, decedent's eldest daughter, defendant, moved in with decedent. She had recently separated from her husband, so the move was convenient for both as decedent needed daily assistance.

Defendant took care of decedent's daily necessities. Of particular importance on appeal, she took control of the management of decedent's financial affairs. On 29 January 1992, decedent signed a signature card for his account at United Carolina Bank (UCB). The card as changed included defendant as a joint owner with a right of survivorship. Evidence showed that decedent also had certificates of deposit (CDs) invested at UCB. Defendant testified that she has been aware of the CDs as long as her parents have owned them. She was also aware that the certificates were continually reinvested.

At some point between 1992 and July of 1996, decedent amended the CDs to show that defendant was a joint owner with a right of survivorship. On 31 July 1996, another of decedent's daughters, plaintiff Carolyn Davis, took decedent to UCB to examine his accounts. It is then that Davis learned that some of decedent's CDs had been changed to include defendant as a joint owner with right of survivorship. At this point, decedent had all the CDs changed back to his individual ownership. The value of the CDs at

this point was approximately $170,000.

Defendant learned that she was no longer a joint owner with right of survivorship in September of 1996. On 19 September 1996, defendant purchased a "Power of Attorney" form, which she filled out, naming herself as attorney in fact, and had her father sign it before a notary public. On 24 September 1996, five days later, defendant and decedent went back down to the bank. During this trip, all of the CDs were amended to again reflect that defendant was a joint owner with right of survivorship.

> Q. And so at some time after you learned this, about September 24, 1996, the CDs were again changed so that you were again the joint owner of them?
>
> A. Yes.
>
> Q. Your father made those changes on the paperwork, or at least it appeared -- the paperwork would appear that he made those changes?
>
> A. Yes.

The general power of attorney was filed in the Mecklenburg County public registry on 4 November 1996.

Sometime in October of 1997, or at least after she had been named attorney in fact for decedent, defendant cashed in the CDs. Defendant received a check from the bank, payable to her only. Defendant promptly invested the money in her brokerage account firm in her name only. After this, defendant testified that she had the "legal and soul [sic] control of that money[.]"

Decedent passed away on 9 June 1998 at the age of 86. The plaintiff sisters filed suit against defendant Shields on 24

September 1999 to recover the money from the CDs that passed outside of decedent's will. Defendant, who had been executrix of decedent's estate, resigned on 29 November 1999. The clerk of superior court appointed plaintiff Frank Schrimsher as personal representative of the estate. After concluding that the estate had valid claims against defendant, he filed suit on 1 December 2000. On 6 July 2001, plaintiff Schrimsher made a motion for partial summary judgment on his claims of conversion and breach of fiduciary relationship and damages. This motion was granted on 30 July 2001. Defendant appeals.

Defendant makes the following assignment of error: The trial court committed reversible error by granting plaintiff's motion for summary judgment.

I.

The resolution of this case focuses on the transaction in October of 1997 when defendant cashed in the CDs.

Plaintiff argues that defendant owed decedent a fiduciary duty and that she breached that duty by cashing in the CDs, converting them to her own use and benefit. Plaintiff contends that defendant had no right as joint owner of the CDs to withdraw the funds, and further that defendant had no authority under her power of attorney to bestow a gift upon herself. We agree.

Defendant was clearly in a fiduciary relationship with decedent in October of 1997. *See Hinson v. Hinson*, 80 N.C. App. 561, 571, 343 S.E.2d 266, 272 (1986); *Curl v. Key*, 311 N.C. 259, 261, 316 S.E.2d 272, 274 (1984); *McNeill v. McNeill*, 223 N.C. 178,

181, 25 S.E.2d 615, 616-17 (1943). The record is full of examples of how defendant took care of decedent, both financially and in general. Thus, defendant wore two hats in 1997: she was a joint owner with right of survivorship (after having been restored by decedent on 24 September 1996), and she had power of attorney from decedent, who was the other joint owner. We now must determine if either of these titles/positions allowed her to totally withdraw the cash and give it to herself.

N.C. Gen. Stat. § 41-2.1 (2001), titled "Right of survivorship in bank deposits created by written agreement" allows for the creation of a right of survivorship in CDs. *O'Brien v. Reece*, 45 N.C. App. 610, 617, 263 S.E.2d 817, 821 (1980); N.C. Gen. Stat. § 41-2.1(e)(2) (2001). It states:

> (b) A deposit account . . . shall have the following incidents:
>
> (1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.

N.C. Gen. Stat. § 41-2.1(b)(1) (2001). The meaning of this section has been clarified by this Court in *Myers v. Myers*, 68 N.C. App. 177, 314 S.E.2d 809 (1984), which involved an account between a husband and wife which was started and funded by the wife. The husband argued that N.C. Gen. Stat. § 41-2.1(b)(1) allowed him to "withdraw the entire amount in the certificates of deposit; and that he thus cannot be held liable in conversion." *Myers*, 68 N.C.

App. at 180, 314 S.E.2d at 812. However, the *Myers* Court stated that N.C. Gen. Stat. § 41-2.1 only served to release the banking institution from liability, and "do[es] not release one depositor to a joint account from liability to another for withdrawal which constitutes wrongful conversion." *Myers*, 68 N.C. App. at 180, 314 S.E.2d at 812. In addition, the *Myers* Court also noted that

> a deposit by one spouse into an account in the names of both, standing alone, does not constitute a gift to the other. The depositor is still deemed to be the owner of the funds. For a deposit by one spouse to constitute a gift to the other, there must be donative intent coupled with loss of dominion over the property. The donor must divest himself of all right and title to, and control of, the gift.

Id. at 180-81, 314 S.E.2d at 812. The *Myers* Court found no donative intent and that the wife retained dominion over the funds. Therefore the wife was still the owner of the funds. *Id.* at 181, 314 S.E.2d at 813; *see Smith v. Smith*, 255 N.C. 152, 120 S.E.2d 575 (1961). Thus, in rejecting the husband's argument that he could not be liable for conversion from the joint account, this Court held that "[t]he depositing spouse, as principal, thus may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent." *Id.* at 181, 314 S.E.2d at 813.

These principles have been applied to a non-spousal situation, similar to the present situation, in *Hutchins v. Dowell*, 138 N.C. App. 673, 531 S.E.2d 900 (2000). The *Dowell* case involved a stepdaughter who had been given a general power of attorney by her

stepfather, and was joint owner of bank accounts with him, also with rights of survivorship. The stepdaughter made withdrawals out of these accounts without the consent of her stepfather. In rejecting the same argument by stepdaughter based on N.C. Gen. Stat. § 41-2.1, this Court noted that no evidence suggested that she was the owner of the funds. Specific note was made as to the fact that the evidence showed that the stepdaughter never deposited any money in those accounts. As in *Myers*, it was noted that "a deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other. In order for the exchange of property to constitute a gift, there must be donative intent coupled with loss of dominion over the property." *Dowell*, 138 N.C. App. at 678, 531 S.E.2d at 903. The stepfather, before he died, filed a verified complaint in which he specifically alleged that the stepdaughter was not allowed to withdraw the funds. The Court thus found that there was no donative intent and affirmed the granting of summary judgment in favor of the stepfather.

Here too, the evidence reveals that defendant never made any monetary contribution to the CDs. Further, there is no evidence of the necessary donative intent coupled with the loss of dominion over the property.

The defendant may not rely on her position as attorney-in-fact to decedent to withdraw the money, as it is clear that she would be in violation of N.C. Gen. Stat. § 32A-14.1(b) (2001). That statute reads:

> [U]nless gifts are expressly authorized by the

> power of attorney, a power described in subsection (a) of this section [power to make gifts in accordance with the principal's personal history of making gifts] may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

N.C. Gen. Stat. § 32A-14.1(b) (2001); *see Hutchins*, 138 N.C. App. at 676-77, 531 S.E.2d at 902-03. The power of attorney in the present case grants no specific authority to defendant to make gifts to herself. Thus, her act was a violation of this statute. As defendant had no right to withdraw the funds under either instrument, partial summary judgment was proper on this point.

Affirmed.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).