Commonwealth of Kentucky
Supreme Court of Kentucky
2008-SC-000191-DG

LILA FAYE SPENCER — MOVANT

V. Appeal from the Kentucky Court of Appeals
Action No. 2007-CA-000277-MR
McCracken County Circuit Court
Action No. 06-CI-00396

ESTATE OF CHARLES SPENCER — RESPONDENT

CORRECTED BRIEF FOR APPELLANT, LILA FAYE SPENCER

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CERTIFICATE OF SERVICE

This is to certify that the original and ten copies of the following Brief for Appellant, Lila Faye Spencer, were this day sent, via Registered Mail, to the **Clerk of the Kentucky Supreme Court**, 700 Capitol Avenue, Room 235, Frankfort, KY 40601-3415, and a true and accurate copy of the same was served upon the following by mailing to: **Kentucky Court of Appeals,** Samuel Givens, Jr., Clerk, 360 Democrat Drive, Frankfort, KY 40602-9229; **Hon. R. Jeffrey Hines, McCracken Circuit Court Judge,** P.O. Box 1455, Paducah, KY 42002-1455; **Clerk, McCracken Circuit Court,** P.O. Box 1455, Paducah, KY 42002-1455; **Hon. Mark L. Ashburn,** P.O. Box 268, Paducah, KY, 42002-0268; on this 21st day of April, 2009.

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I INTRODUCTION

Appellant Lila Fay Spencer and the Decedent Charles Spencer entered into an antenuptial agreement (hereinafter the "Agreement") prior to their marriage. The Agreement contained a number of provisions dealing with the disposition of property following the death of either. Nothing in The Agreement prevented one from making inter vivos gifts to the other. At dispute are the ownership rights to an Edward Jones brokerage account (hereinafter the "Account"). There is no question that this Account was a joint account, between Appellant and Decedent, with right of survivorship. The trial court properly granted summary judgment, finding that Appellant became owner of the Account at Decedent's death. The Court of Appeals reversed, finding that the Account was a tenancy in common not a joint tenancy with right of survivorship. The Court of Appeals decision has far reaching and illogical implications and should be reversed.

II STATEMENT CONCERNING ORAL ARGUMENT

Appellant respectfully requests the opportunity to be heard and believes oral argument would be helpful to assist the Court in determining an issue of first impression and in distinguishing this case from ones upon which the Court of Appeals mistakenly relied.

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STATEMENT OF THE CASE

The following facts are uncontroverted:

1. Decedent and Appellant signed an antenuptial agreement (hereinafter the "Agreement") on October 23, 1995.

2. There is nothing in the Agreement that prevented the parties from making gifts or transferring property to one another.

3. Decedent executed a letter of authorization to change registration of his assets with Edward Jones on October 24, 2005.

4. The letter of authorization changed Decedent's account, numbered 424-03427-1-9, from an individual account to a joint account with right of survivorship with Appellant, and numbered 424-08695-1-3 (the "Account).

5. Every monthly statement that Decedent and Appellant received from the time the Account was opened until Decedent's death clearly indicated the Account as one of "joint tenants with right of survivorship."

6. Decedent's family filed a Complaint in McCracken Circuit Court on April 17, 2006. Both Appellant and Appellee the Estate of Decedent filed Motions for Summary Judgment on December 21, 2006.

7. Subsequently, the Appellee filed a Motion to Alter, Amend, or Vacate on December 27, 2006. A hearing on this Motion was held January 9, 2007.

8. At that hearing, the Circuit Court affirmed its decision to grant summary judgment in favor of Appellant. In particular, the Circuit Court adopted Findings of Fact and Conclusions of Law that stated, in part, that Appellant became the owner of the Account with right of survivorship upon Decedent's death.

9. The Appellee appealed the decision of the Circuit Court to the Kentucky Court of Appeals, presenting a number of issues. The most important being whether the Account registered in the names of both Decedent and Appellant was a joint account with right of survivorship.

10. The Court of Appeals concluded that the Account was a tenancy in common, not a joint tenancy with right of survivorship.

11. In reaching this decision, the Court of Appeals first concluded that the statutory provisions concerning multiple party accounts, such as joint accounts with the right of survivorship, do not apply to brokerage accounts - a question of first impression in the Commonwealth.

12. Second, the Court of Appeals determined that the Uniform Transfer of Death Security Registration Act (hereinafter

"TOD") precludes the application of the multiple party account statute to brokerage accounts.

13. And, lastly, the Court of Appeals concluded that any multiple party brokerage account created with the conjunctive "and" is a tenancy in common and any such account created with the conjunctive "or" is a joint tenancy with right of survivorship.

14. On March 14, 2008 Appellant filed a Petition for Discretionary Review as to the issues noted above.

15. On February 11, 2009, this Court granted Appellant's Petition (2008-SC-000191-DG).

III ARGUMENT

A. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE MULTIPLE PARTY ACCOUNTS STATUTE, CONTAINED IN K.R.S. §§ 391.300-360, DOES NOT APLY TO BROKERAGE ACCOUNTS.

This Court should make clear that the Multiple Party Accounts statute, contained in KRS 391.300-360, is broad enough to include brokerage accounts. The Court of Appeals erroneously decided that the provisions of the statute do not apply to joint accounts with right of survivorship like the Account maintained by Decedent and Appellant at Edward Jones.

The Multiple Party Accounts statute reads,

> Sums 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 unless there is clear and convincing written evidence of a different intention at the time the account is created.

K.R.S. § 391.315(a). In order to determine the reach of this account, it is necessary to examine the definitions of both "account" and "financial institution." K.R.S. § 391.300(1) defines "account" as 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." Id.

The Court of Appeals notes that whether a brokerage account is included within the definition of "account" has yet to be addressed in the Commonwealth. Estate of Spencer v. Spencer, ____ S.W.3d ____ (Ky. App. 2008), 2007-CA-000277-MR, 2008 Ky. App. LEXIS 37, *8. In deciding that it does not, the Court of Appeals relied upon two cases from Idaho and Minnesota. Id. at *9. Citing extensively from In re Bogert's Estate, the Court Appeals found that an individual who invests in stocks through the means of a stock broker, whether held in the name of the investor or stock brokerage firm, are not the "deposit of funds" in a "financial institution" as contemplated in the Multiple Party Accounts statute. Id., citing In re Bogert's Estate, 531

P.2d 1167 (Idaho 1975) and Berg v. D.D.M., 603 N.W.2d 361 (Minn. App. 1999).

This issue is rarely addressed in any jurisdiction, but a few have done so. The Court of Appeals chooses to rely on In re Bogert's Estate and Berg while ignoring cases from other jurisdictions that have decided the opposite. Indeed, as recent as 2004, the Supreme Court of Pennsylvania decided that a brokerage account was an "account" as defined in its Multiple Party Accounts Act. Deutsch, Larrimore & Farnish v. Johnson, 848 A.2d 137, 141 (Pa. 2004).

In Deutsch the Pennsylvania Supreme Court focused on the language within the Multiple Party Account Act, defining "account" to include "share accounts, and other like arrangements" - language identical to that in Kentucky's Multiple Party Accounts Act. Id. Deutsch finds that brokerage accounts are "encompassed within the purview of 'share accounts, and other like arrangements." Id. It notes that "share accounts are commonly a form of investment in savings and loans and in credit unions[, making them] . . . a hybrid security." Id.

The Pennsylvania Supreme Court further notes that share accounts are "transferable by assignment" and "invested in mortgages," thus resembling an "investment pool" Id. It further noted that, "[s]hare account holders retain all rights

of corporate stockholders, and dividends on share accounts are treated like interest on bank accounts for purposes of deductibility." Id.(internal citations omitted). Accordingly, the Pennsylvania Supreme Court found "share accounts" and "brokerage accounts" too similar not to bring "brokerage accounts," at a minimum, "within the authority of other like arrangements." Id. citing Balazick v. Ireton, 541 A.2d 1130 (Pa. 1988).

The Court of Appeals also found that a brokerage account does not fit within the definition of "financial institution." Spencer at *9. In so doing, the Court of Appeals fails to cite case law for this proposition. Id. Rather it argues that within the Kentucky Revised Code "brokerage firm" is never included in the definition of "financial institution." Id. at *10. The Pennsylvania Supreme Court in Deutsch turns to Black's Law Dictionary for a definition of "financial institution." Deutsch at 142. There "financial institution" is defined as "an insured bank . . . a thrift institution . . . a broker or dealer registered with the Securities and Exchange Commission . . . an investment banker or investment company . . ." Black's Law Dictionary 630 (6th Ed.).

Additionally, Deutsch notes that federal statutes define "financial institution" broadly enough to include a brokerage firm. Deutsch at 142. The concurring opinion in Deutsch

likewise finds "financial institution" to include within its definition a "brokerage firm" because the language of the statute explicitly states that it is "without limitation." This is true of the Kentucky statute as well, defining "financial institution" as "**any** organization authorized to do business under state or federal laws relating to financial institutions, **without limitation**, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions." K.R.S. § 391.300(3) (emphasis added). The concurrence in Deutsch also opines that the financial services industry has rapidly and significantly changed in recent years. Deutsch at 145. Indeed the drafters of the 1989 amendments to the Uniform Probate code (from which Kentucky's Multiple Party Account Act derived) recognized that the differences between traditional bank accounts and securities had and continued to blur. Uniform Probate Code art. VI, prefatory note (revised 1989 version), 8 U.L.A. 428 (1997).

In addition to its misinterpretation of the relevant statutory provisions, the rationale for the Court of Appeals opinion in this case is inconsistent and without merit. The Court erroneously concluded that, ". . . there is no contract of deposit of funds between the brokerage firm and the account owner." Spencer at *8. There is absolutely no support for that assertion. First, the letter of authorization to change

registration of assets is clearly an agreement between the depositor and the brokerage firm. Second, the statement outlined above contradicts several previous Court of Appeals decisions. In *Hensley v. Ball*, 380 S.W.2d 279, 283 (Ky. Ct. App. 1964), the Kentucky Court of Appeals stated,

> **Stock certificates, notes, bonds, and cashier's checks are basically alike in that each is evidence of contract rights held by the owner or payee against the signatory institution or party.** When one person causes such a document to be issued by a second person in favor of another, individually or jointly, the latter becomes a third party beneficiary of the transaction, and is vested with the rights evidenced by the instrument, which is no less a contract simply because it may generally and more familiarly be regarded as a title document.

Id (emphasis added). A review of the above language makes it clear that the Court of Appeals previously concluded that stock certificates are evidence of a contract that exists between an investor and a brokerage firm.

Further support for the Appellant's argument can be found in other case law and the Account documents themselves. The Court of Appeals discussed the reach of the Multiple Party Account statute in *Herren v. Cochran*, 697 S.W.2d 149, 152 (Ky. Ct. App. 1985). The Kentucky Court of Appeals stated,

> The term "joint account" means an account payable on request to one or more of two parties who have an ownership in the account, whether or not mention is made of

> any right of survivorship. During the lifetime of the parties, a joint account belongs to all parties in proportion to their net contributions. However, when one party dies, sums remaining on deposit belong to the surviving party or parties on as against the Estate of the decedent unless there is clear and convincing evidence that something else was intended at the time the account was created.

Id. (internal citations omitted).

The law on this topic is straightforward: the money in a joint account belongs to the survivor. There is no language stating the statute does not apply to brokerage accounts. To determine the applicability of the above law to the matter currently before the Court, it is now necessary to examine a number of documents.

There is no question that the Decedent intended to create a joint account with right of survivorship. On August 24, 2005, Decedent executed a document titled, "Letter of Authorization to Change Registration or Transfer Assets." The letter authorized Edward Jones to transfer the bulk of the assets from Decedent's individual account, numbered 424-03427-1-9, to a joint account in the names of Decedent and Appellant. The joint account, numbered 424-08695-1-3, was established on August 24, 2005. A quick examination of the Account documents reveals that the assets in the Account became the property of Appellant on the date of Decedent's death. In addition to the documents

described above, every monthly statement that Decedent and Appellant received from the time the Account was opened until Decedent's death clearly indicated they were "joint tenants with right of survivorship." [Appellant's Motion for Discretionary Review, Appendix Item No. 7].

Because these assets rightfully belong to Appellant and because the Court of Appeals failed to properly define "account" and "financial institution" under Kentucky's Multiple Party Accounts Act, the decision of the Court of Appeals should be reversed.

B. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT THE UNIFORM TOD SECURITY REGISTRATION ACT, CONTAINED IN K.R.S. §§ 292.6501-6512, PRECLUDES THE APPLICATION OF OTHER MULTIPLE ACCOUNT STATUTES TO BROKERAGE ACCOUNTS.

This Court should make it clear that the language of the Uniform TOD Security Registration Act does not preclude the application of other multiple account statutes to brokerage accounts. The Court of Appeals mistakenly concluded that brokerage accounts are specifically precluded from the multiple party account statute because there is no reference to them in the TOD Security Registration Act. Spencer at *10. In addition to its misinterpretation of the statute, the Court of Appeals erred when it based its decision on this particular issue because it was not raised by the Appellee in its brief;

moreover, Appellant was not provided with the opportunity to address this issue or to rebut it prior to the oral argument.

The Court of Appeals is incorrect in its assertion that the Uniform Transfer on Death Security Registration precludes the application of the Multiple Party Account statute to brokerage accounts. The Court of Appeals relied on a number of flawed assumptions when it made this decision. First, it concluded that because there is a definition of "security account" in KRS 292.6501(10)(a) that the Uniform Transfer on Death Security Registration Act alone governs joint brokerage accounts. Spencer at *10. And it reasoned that because there is no reference to the multiple party account statute in the Uniform Transfer on Death Security Registration Act that it is no longer applicable to brokerage accounts, such as the one that Decedent and Appellant maintained with Edward Jones. Id.

The Court does not need to look any further than the other provisions of the Uniform TOD Security Registration Act to conclude that the Court of Appeals is wrong. KRS 292.6508(1) states,

> **A registering entity is not required to offer or to accept a request for security registration in beneficiary form.** If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by KRS 292.6501 to 292.6512.

Id (emphasis added). Based on a review of the above statute, it is apparent that brokerage firms, such as Edward Jones, are not even required to provide investors with security registration in beneficiary form. As that is the case, it is difficult to believe that the Court of Appeals actually intends to prevent investors who desire to own securities as joint tenants with right of survivorship from doing so because of the language of a statute with which brokerage firms are not even obligated to comply. The absurdity of this result is even more apparent after reviewing the language of KRS 292.6512. It states, "[U]nless displaced by the particular provisions of KRS 292.6501 to 292.6512, the principles of law and equity supplement its provisions." Id.

In other words, the Uniform TOD Security Registration Act itself makes it clear that it is not intended to limit other legal rights that investors enjoy. Quite the contrary, it specifically states that other existing legal principles should serve as a supplement to its provisions. There TOD Security Registration Act that prevents the continued application of the Multiple Party Account statute to brokerage accounts as the Court of Appeals contends.

The Court of Appeals could have avoided this result if Kentucky precedent regarding statutory construction had been

followed. In Johnson v. Frankfort & Cincinnati R.R., 197 S.W. 2d 432, 434-435 (Ky. Ct. App. 1946) the Court of Appeals stated,

> A cardinal rule for the interpretation of statutes – if there is any doubt from the language employed as to the intent and purpose of the Legislature in enacting it – is that courts should avoid adopting a construction which would be unreasonable and absurd in preference to one that is reasonable, rational, sensible and intelligent. . .

The court continued,

> It is also a general rule – too familiar to require the citation to authorities – that the intent of the legislature, as gathered from all parts of the statute, should be the one to be administered.

Id. In other words, the Court should avoid interpreting a statute in a manner that calls for an illogical conclusion, which is exactly what the Court of Appeals did in this case.

C. THE COURT OF APPEALS' UNILATERAL DECISION TO RECLASSIFY ALL JOINT ACCOUNTS HELD AT BROKERAGE FIRMS THAT ARE ESTABLISHED WITH THE CONDJUNCTIVE "AND" AS TENANCIES IN COMMON VIOLATES THE PROVISIONS OF BOTH THE UNITED STATES AND KENTUCKY CONSTITUTIONS FORBIDDING THE IMPAIRMENT OF PRIVATE CONTRACTS.

This Court should reverse the Court of Appeals decision because it constitutes a restraint on private contract in violation of both the United States and Kentucky Constitutions. The Court of Appeals erroneously concluded that despite Decedent and Appellant's stated intention to create a joint account with

right of survivorship that the use of the conjunctive "and" created a tenancy in common. Spencer at *11. The Court of Appeals unilaterally decided to rewrite the Agreement. The Court of Appeal's decision has ramifications far beyond this case. In essence, it retroactively modifies the contract that every investor who maintains an account as a joint tenant with right of survivorship has with their brokerage firm.

Both the United States and Kentucky Constitutions strictly forbid laws that impair private contracts. Article I, Section 10, Clause 1 of the United States Constitution states,

> **No State shall** enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post fact Law, or **Law impairing the Obligation of Contracts**, or grant any Title of Nobility.

Id (emphasis added). Article 19, Section 1 of the Kentucky Constitution contains a virtually identical provision. It states, [n]o ex post facto law, nor any law impairing the obligation of contracts, shall be enacted. Id.

Based on a review of the above constitutional provisions, it is apparent that it is only necessary to prove two factors in order for either of them to apply. First, there must be a valid contractual arrangement. Also, there must be a law that impairs

private contracts. The Appellant has no trouble proving these elements and each will be addressed separately below.

There is no question that a contractual relationship exists between a brokerage firm and investors, such as that between Decedent and Appellant at Edward Jones. The Court does not need to look any further than the case law to make this determination. In Saylor v. Saylor, 389 S.W.2d 904, 905 (Ky. Ct. App. 1965). The Court of Appeals stated,

> **As in the case of other intangibles such as bonds or stock certificates, the right gratuitously conferred on the other party is recognized and is enforceable on the theory of third party beneficiary contract.** It is not necessary that such a contract be supported by a consideration moving from the beneficiary, and it is not necessary that a "gift" be proved.

Id (emphasis added). The Court of Appeals has already concluded that brokerage accounts represent a contractual relationship between the investor and the brokerage firm.

There is also no question that the Court of Appeals decision will profoundly impair the contracts that currently exist between thousands of investors and their brokerage houses. Whether it intended to, the Court of Appeals unilaterally rewrote large numbers of contracts when it concluded that joint brokerage accounts with right of survivorship no longer exist for investors in the Commonwealth if the creation of the account was accomplished through the use of the conjunctive "and." By

so holding, the Court of Appeals chose to completely ignore the clear intention of account holders, such as Decedent and Appellant. The Court is converting thousands of brokerage accounts from joint accounts with right of survivorship to tenancies in common. This is clearly not what the creators of these joint accounts with right of survivorship, such as Decedent and Appellant, intended and it could have major ramifications on the unsuspecting who were relying on this as a relatively simple and straight forward form of estate planning.

IV CONCLUSION

The decision of the Court of Appeals should be reversed and the decision of the McCracken Circuit Court should be reinstated with full force and effect.

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