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SUPREME COURT

SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000196-DG
(2008-SC-000191-DG)

LILA FAYE SPENCER

MOVANT


VS.

RESPONDENT'S BRIEF

ESTATE OF CHARLES SPENCER

RESPONDENT

Appeal from McCracken Circuit Court
Division No. I
Civil Action NO. 06-CI-00396
AND
Kentucky Court of Appeals
Acton No. 2007-CA-000277-MR

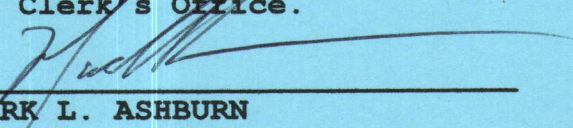


MARK L. ASHBURN
ATTORNEY FOR APPELLANT
P. O. BOX 268
PADUCAH, KY 42002-0268
(270) 444-0433

CERTIFICATE

I hereby certify that I have served copies of this Brief in accordance with CR 76.13, by mailing copies thereof to: Hon. Judge Jeffrey Hines, McCracken County Courthouse, Paducah, KY 42003; and to Hon. Rick Walter, 410 Broadway, Paducah, KY 42001: Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Ky 40602-9229 on this the 15th day of June, 2009.

I further certify that I did not remove the record from the McCracken Circuit Court Clerk's Office.



MARK L. ASHBURN

INTRODUCTION

This an appeal from the McCracken Circuit Court, Division I. The case before the Court is in the nature of enforcement of a Ante-Nuptial Agreement and an ancillary issue of whether a brokerage account is covered by KRS 391.310. The Court of Appeals decided the case, and rejected the claim that the Ante-Nuptial Agreement prevented a transfer to Faye Spencer, which did not comply with the requirements of said Agreement. The Estate of Charles Spencer has asked for Discretionary Review. The Court of Appeals additionally found that Brokerage Accounts are not covered by KRS 391.310, and the common law interpretation of "and" created a tenancy in common. Which the Faye Spencer has sought Discretionary Reveiw.

STATEMENT CONCERNING ORAL ARGUMENTS

The Appellant does believe oral arguments would assist the Court in understanding this matter.

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COUNTER STATEMENT OF THE CASE

Charles Spencer and Lila Faye Hughes were married to one another on October 30, 1995. Prior to the marriage and after a full disclosure of assets the two of them entered into a Ante-nuptial Agreement on October 29, 1995. The bulk of Mr. Spencer's assets were inherited from his first wife, Jesse Bracken Spencer, and the mother of his children and beneficiaries of his estate. Included in this was a brokerage account, with stocks, bonds and money market funds. In said Agreement, the Faye agreed to waive any interest in these accounts and before anything could be claimed to be gift a written memorandum would be executed and attached to the Agreement.

On August 24, 2006, Mr. Spencer changed brokerage houses to "Edward Jones" and on the form (which was incorrectly admitted into evidence" listed under "Name" was "Charles F. Spencer & L. Faye Spencer". Attached to the form, was a list of the assets of the Fund which included stocks, bonds, and money market funds. Charles Spencer died on February 10, 2006. The Estate through its attorney made demands that the assets listed in the Ante-nuptial Agreement be turned over to the Estate, and for a statement of the assets which the parties acquired together

during the marriage. Faye denied this request, and the Estate filed suit requesting the return of assets listed in the Ante-nuptial Agreement including but not limited to the Edward Jones Account and for a declaratory judgment, which defined the assets acquired during the marriage. The Estate took the deposition of Faye Spencer, in which she admitted that she had signed the Ante-nuptial Agreement and understood its provisions. She acknowledged that the Edward Jones Account was specifically derived from funds listed in the ante-nuptial agreement and that the provisions for the account to be considered a gift were not met. The Estate filed a motion for partial summary judgment concerning the issue of Edward Jones Account. Faye countered with a motion for summary judgment.

The Court entered an Order granting the motion for summary judgment in favor of the Faye on December 21, 2006. Said Order contained no finding and no conclusions of law. The Appellant filed a motion to alter, amend, or vacate said Order, and the Court held a brief hearing on the issue, on January 12, 2007. During his Dicta in the hearing, the Circuit Court acknowledged that other issues should have been litigated and advised Faye's attorney to prepare an Order with only a partial summary judgment on the Edward Jones account only. The Order that the Circuit Judge signed on January 12, 2007, however, continued to be a complete summary judgment. Said Order had limited finding:

the Ante-nuptial Agreement did not prohibit gifts or transfers of property, and since the money was a survivorship account it belonged to Fay, based upon KRS 391.315 and KRS 391.320. From this Order, the Estate appealed.

The Court of Appeals found that the changing of the brokerage account into their joint names was sufficient to prove a gift to meet the requirements of the Ante-nuptial Agreement but brokerage accounts were not subject to KRS 391.315 and that a common-law tenancy in common was created without survivorship. From this ruling both the Estate and Faye requested review by this Court.

ARGUMENT

ARGUMENT I: DID THE COURT OF APPEALS ERR IN DETERMINING THAT THE MULTIPLE PARTY ACCOUNTS STATUTE IN K.R.S. CHAPTER 391 DOES NOT APPLY TO BROKERAGE ACCOUNTS

It is important to stress that the legislature could have easily added brokerage firms in their definition of "financial institutions" and brokerage accounts in the definition of "account" in KRS 391.300, which they did not do.

As the Court of Appeals noted, that the issue of brokerage accounts being included in the multi-party accounts statute is one of first impression; possibly because the clear language of the statute does not include brokerage accounts.

The Movant and the Court of Appeals acknowledge that the states of Minnesota and Idaho have rejected the inclusion of brokerage accounts inclusion in their similar multi-party accounts statute see 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). Missouri has similarly ruled that their multi-party accounts do not apply to Brokerage firms in the case of In Re Estate of Hayes v. Weis, 941 S.W.2d 630 (Mo. Ct. of App. 1997).

The Movant relies heavily on the Pennsylvania case of Deutsch, Larrimore & Farnish v. Johnson, 848 A. 2d 137 (Pa. 2004), wherein Pennsylvania has stretched their multi-party accounts to include brokerage accounts. The Deutsch case, supra,

while having the language that might be favorable to the Movant, dealt not with survivorship, but dealt with the ownership rights of the parties, being based upon their respective contribution. Pennsylvania has a statute that specifically includes stock brokers in their definition "However, pursuant to the Insurance Code, an "organization" means "(a)ny bank, savings and loan association, credit union, mutual fund, money market fund, stock prober or other similar financial institution, (See Desutch, supra, at page 645). Indeed the Desutch case, supra, favors the Respondent in the companion appeal on the issue of whether the placing of another person's name on an account is evidence of a gift, stating "The Pennsylvania legislature enacted the MPAA on the assumption 'a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he [or she] usually intends no present change of beneficial ownership.", (Deutsch case supra at page 647).

The Movant cites the case of Herren v. Cochran, 697 S.W.2d 149 (Ky Ct. App. 1985 at page 152), which states:

K.R.S. 391.300 defines the terms "account" to mean any contract of deposit with a financial institution including such things as checking accounts, savings accounts, certificates of deposit, share accounts, and other like arrangements. 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 as against the estate at the time of the decedent unless there is clear and convincing evidence that something else was intended at the time the account was created.

That case dealt with banking accounts not a brokerage account. This case also differs in that there is clear and convincing evidence in the case at bar, i.e. that the Ante-nuptial Agreement existed, which called for a written expression of the gift intent. It is further interesting to note that in the Herron case, supra, the Court upheld the enforcement of the Ante-nuptial Agreement.

ARGUMENT II: DID THE COURT OF APPEALS ERR IN RELIANCE ON K.R.S. CHAPTER 225, IN RULING THAT BROKERAGE ACCOUNTS WERE NOT INCLUDED IN K.R.S CHAPTER 391

The Movant misstates the conclusion of the Court of Appeals. The Court of Appeals merely used the provisions of the K.R.S. Chapter 225, to show that the legislature has enacted laws specifically dealing with brokerage accounts and how they are handled upon the death an owner. That Court logically found that should the legislature's intent to make co-owners have the right of survivorship they could have adopted that. If the legislature intended Brokerage accounts to be included in K.R.S.


Chapter 391, they could have drafted the language to include brokerage accounts. As quoted by the Movant, the case of Johnson v. Frankfort & Cincinnati R.R., 197 S.W. 2d 432 (Ky Ct of App. 1946) states "if there is any doubt **from the language employed** (emphasis added) as to the intent and purpose of the Legislature..." then the Court should logically interpret the statute from the entire statute. The Legislature purposely did not "**employ language**" dealing with brokerage accounts in these statutes, for this Court to add them would be illogical, and a violation of the separation of powers set forth by our constitution.

ARGUMENT III: DOES THE COURT OF APPEALS INTERPRETATION VIOLATE THE UNITED STATES OR THE KENTUCKY CONSTITUTION

The Movant argues that the Court of Appeals application of the common law to the brokerage contract is an unconstitutional interference with the contract rights of individuals. Laws are enacted constantly that affect contracts. Given the Movant's failed logic, the State of Kentucky could not have adopted the uniform commercial code, because it would and did alter, or to use the Movant's word "impair", contracts already in existence. The necessity of the state to regulate and interpret contracts is undisputable.

CONCLUSION

The Court of Appeals properly determined that the brokerage account, under Kentucky law, was tenancy in common.



MARK L. ASHBURN
ATTORNEY FOR RESPONDENT
P. O. BOX 268
PADUCAH, KY 42002-0268
(270) 444-0433
ashburn@paducah.com