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Probate Law

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PROBATE LAW

I. Court of Appeals Considers Joint Accounts Under the New South Carolina Probate Code and Reaffirms Rule That Agent May Not Make Gifts to Himself Absent a Writing Evidencing the Principal's Intent

In *McCarter v. Willis*[1] the South Carolina Court of Appeals affirmed the well-settled rule in South Carolina that under the provisions in the South Carolina Probate Code[2] that concern multiple-party accounts, particularly joint accounts, agents may not make gifts to themselves without a writing that shows the principal's intent.[3] The plaintiff in *McCarter* claimed breach of fiduciary duty and conversion in the defendant's creation and use of two multiple-party accounts. The court of appeals reversed the trial court which had granted a directed verdict based solely on a provision in the Probate Code which states that joint accounts belong to the survivor at death.[4]

Lois Barker McCarter, personal representative for her father's estate, sued J. Paul Willis, her father's attorney in fact,[5] for breach of fiduciary duty, conversion, and an accounting.[6] McCarter claimed that Willis withdrew money from her father's bank accounts and claimed that these accounts rightfully belonged to her father's estate and should have passed under his will.[7]

Willis managed Barker's financial affairs from 1981 until Barker's death in 1986. Willis's managerial responsibilities included signatory authority over Barker's bank accounts and payment authority for

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1. 299 S.C. 198, 383 S.E.2d 252 (Ct. App. 1989).

2. S.C. Code Ann. § 62-6-101 (Law. Co-op. 1987). A joint account is "payable on request to one or more of two or more parties . . . whether or not mention is made of any right of survivorship." *Id.* § 62-6-101(4).

3. 299 S.C. at 200, 383 S.E.2d at 253.

4. *Id.*, 383 S.E.2d at 253-54.

5. An attorney in fact is:

> A private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general, not of a legal character. This authority is conferred by an instrument in writing called a "letter of attorney" or more commonly a "power of attorney."

Black's Law Dictionary 118 (5th ed. 1979).

6. *McCarter*, 299 S.C. at 199, 383 S.E.2d at 253.

7. *See id.*

Barker's expenses.[8] Although Willis and Barker did not reduce their initial agreement to writing, in 1984 Barker executed a power of attorney in favor of Willis.[9]

Prior to the execution of the power of attorney, however, Willis took funds from Barker's bank account and opened joint accounts with rights of survivorship at First National Bank. These accounts consisted of two certificates of deposit that Willis and Barker jointly held.[10] Willis cashed one certificate of deposit two days before Barker's death and deposited the proceeds into a personal account. Willis cashed the second certificate of deposit three weeks after Barker's death.[11]

When McCarter sued Willis and claimed that the joint accounts belonged to Barker's estate, Willis relied on the joint accounts provisions of the South Carolina Probate Code[12] to defend against McCarter's claim. According to section 62-6-104(a) of the South Carolina Probate Code "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is a writing filed with the financial institution . . . which indicates a different intention."[13]

By enacting section 62-6-104(a) of the South Carolina Probate Code, the General Assembly adopted section 6-104(e) of the Uniform Probate Code. Section 104(e) provides that "[a] right of survivorship arising from the express terms of the account . . . cannot be changed by will."[14] The South Carolina General Assembly, however, made a significant addition to the uniform section: "however, a party who owns an account under the provisions of § 62-6-103(a) may effect such change by will to the extent of his ownership if the will contains clear and convincing evidence of his intent to do so."[15] Section 62-6-103(a)

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8. *Id.*

9. *Id.*

10. *See id.*

11. *Id.*

12. S.C. CODE ANN. § 62-6-101 to -113 (Law. Co-op. 1987 & Supp. 1989).

13. *Id.* § 62-6-104(a) (Law. Co-op. 1987). Section 62-6-104(f) states that sections 62-6-104(a), (b), and (c) affect transactions made prior to July 1, 1987, with the following conditions:

> The provisions of § 62-6-104(a), (b), and (c) are applicable to all multiple-party accounts created subsequent to the effective date of this section, [July 1, 1987] and unless there is clear and convincing evidence of a different intention at the time the account was created, to all multiple-party accounts created prior to the effective date of this section.

Id. § 62-6-104(f) (Law. Co-op. Supp. 1989). *See also id.* § 62-1-100(b) (code provisions apply to multiple-party accounts opened before July, 1, 1987, unless a contrary intent exists).

14. UNIF. PROBATE CODE § 6-104(e), 8 U.L.A. 526 (1983).

15. S.C. CODE ANN. § 62-6-104(e) (Law. Co-op. 1987).

simply provides that during the lifetime of the parties, the joint account belongs to each party according to the net contributions of each party to the account unless one party can demonstrate a different intent through clear and convincing evidence.[16] A party to a joint account may be able to prevent the operation of the right of survivorship for that party's net contributions to the joint account if the evidence is clear and convincing in the will.

Under prior South Carolina law, the courts recognized a rebuttable presumption that the parties to a joint account with rights of survivorship intended the survivor to obtain full ownership of the account.[17] In *Johnson v. Herrin*[18] the South Carolina Supreme Court stated that the presumption of a gift to the survivor of a joint account owner originated in a statute which the legislature enacted to protect financial institutions.[19] The court asserted, however, that "this presumption may be rebutted by evidence which would negate the donative intention of the deceased."[20]

Although South Carolina courts created this rebuttable presumption to determine the intent of the parties when the parties have created joint accounts with rights of survivorship, the South Carolina Probate Code states that the parties cannot change this presumption of survivor ownership by will unless clear and convincing evidence shows otherwise.[21] Even then, the testator can change the presumption only to the extent of the testator's net contributions to the account.[22] Thus, an examination of circumstances surrounding the creation of the joint account and the will, as in the *Herrin* case, would probably not occur today since section 62-6-104(e) requires clear and convincing evidence to defeat the presumption of survivor ownership.

The trial court in *McCarter* recognized that Barker's will did not contain clear and convincing evidence, which section 62-6-104(e) re-

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16. *Id.* § 62-6-103(a).

17. *See* Carolina Prods. Credit Ass'n v. Rogers, 282 S.C. 184, 187, 318 S.E.2d 357, 358 (1984) (factors listed to consider in analysis of rebuttable presumption that funds from joint account become payable to survivor); Gilford v. South Carolina Nat'l Bank, 257 S.C. 374, 382, 186 S.E.2d 258, 262 (1972) (heirs failed to rebut presumption of intent of survivor ownership when account card contained the signatures of both parties).

18. 272 S.C. 224, 250 S.E.2d 334 (1978).

19. *See id.* at 227-28, 250 S.E.2d at 336 (discussing S.C. CODE ANN. § 34-11-10 (Law. Co-op. 1976)).

20. *Id.* at 228, 250 S.E.2d at 336; *see also*, Medlin, *Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law*, 38 S.C.L. REV. 611, 665-70 (1987) (analysis of multiple-party accounts under the South Carolina Probate Code).

21. S.C. CODE ANN. § 62-6-104(e) (Law. Co-op. 1987).

22. *Id.*

quires, and directed a verdict for Willis based solely upon this issue.[23] The court of appeals, however, recognized that the central issues in this case were breach of fiduciary duty and conversion, issues that the trial court did not address.[24]

Willis agreed in trial testimony that Barker had entrusted him with Barker's accounts so that Willis would manage Barker's affairs. Willis admitted that the power of attorney formalized their relationship.[25] Under South Carolina agency law, this type of property entrustment creates a fiduciary relationship, and the agent becomes liable for conversion if the agent uses the property for the agent's own purpose.[26]

An agent's abililty to make a gift to himself is well established in South Carolina law. In *Fender v. Fender*[27] the South Carolina Supreme Court adopted the "rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing."[28] Moreover, the court held that "oral authorization [is] ineffective . . . [and] [t]he power to make any gift must be expressly granted in the instrument itself."[29] In *Loftis v. Eck*[30] the South Carolina Court of Appeals reaffirmed the rule that "[a]n agent acting for a principal pursuant to a power of attorney may not make a substantially gratuitous conveyance of the property of the principal to himself unless the power to do so is expressly granted by the instrument itself."[31]

McCarter claimed that Willis had no written authorization for his actions and, therefore, breached a fiduciary duty to Barker when Willis opened the joint accounts. In addition she asserted that Willis converted Barker's funds when he later cashed the certificates of deposit, and that Willis also wrongfully converted Barker's television. In his defense, Willis stated that he acted on Barker's direction when he opened the joint accounts, cashed the first certificate of deposit in order to pay Barker's expenses, and received the television set as a gift for his wife from Barker.[32]

Because the trial court did not consider evidence on the breach of fiduciary duty and conversion claims, the court of appeals determined that the trial court erred in directing a verdict for Willis when evidence

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23. *McCarter*, 299 S.C. at 199-200, 383 S.E.2d at 253.
24. *Id.*, 383 S.E.2d at 253-54.
25. *Id.* at 199, 383 S.E.2d at 253.
26. *See, e.g.*, International Agric. Corp. v. Lockhart Power Co., 181 S.C. 501, 506, 188 S.E. 243, 246 (1936) (entrustment of property to a fiduciary for a purpose).
27. 285 S.C. 260, 329 S.E.2d 430 (1985).
28. *Id.* at 262, 329 S.E.2d at 431.
29. *Id.*
30. 288 S.C. 154, 341 S.E.2d 641 (Ct. App. 1986).
31. *Id.* at 157, 341 S.E.2d at 642.
32. *McCarter*, 299 S.C. at 199-200, 383 S.E.2d at 253-54.

existed to support McCarter's causes of action.[33] In remanding the case to the trial court, the court of appeals emphasized South Carolina's strict view of a fiduciary's standard of behavior adopted by the South Carolina courts from Justice Cardozo's opinion in *Meinhard v. Salmon*:[34] "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[35]

The trial court ruled solely on the provisions of the South Carolina Probate Code concerning joint accounts with rights of survivorship. The court of appeals found that the basis of the claims between the two parties centered upon the fiduciary duties of an attorney in fact to the principal. The trial court ignored these issues in favor of a strict statutory interpretation of a non-testamentary transfer.

Although the trial court's examination of the effect of a will provision on the joint account provisions of section 62-6-104(e) of the South Carolina Probate Code proved interesting, the court of appeals recognized the essential issues in the case, applied well-established South Carolina law which forbids gifts to agents without written authorization, and remanded the case for a decision based on these issues.

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33. *Id.* at 200, 383 S.E.2d at 254.

34. 249 N.Y. 458, 164 N.E. 545 (1928).

35. *Id.* at 464, 164 N.E. at 546 (quoted in *McCarter*, 299 S.C. at 200, 383 S.E.2d at 253).