DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2008

MICHELLE A. JULIA,
Appellant,

v.

RONALD A. RUSSO, as Personal Representative of the Estate of John J. Russo,
Appellee.

No. 4D07-2271

[April 30, 2008]

PER CURIAM.

In this probate action, appellant, Michelle Julia, filed a motion to withdraw funds from a bank account and an investment account in which she and the decedent, John Russo, were joint tenants with right of survivorship. The trial court denied the motion to withdraw funds and granted the Estate access to the accounts. We affirm the former and reverse the latter.

On March 9, 2006, the decedent opened an investment account in his name at Charles Schwab using only his funds. On April 26, 2006, the decedent added appellant's name to the Schwab account as a joint tenant with right of survivorship. The decedent added appellant's name to the Schwab account because he trusted her not to steal any of the money from the account. She did not contribute any funds to the Schwab account and she never withdrew any funds from it. She accessed the Schwab account only at the behest of the decedent.

On June 28, 2005, the decedent opened a bank account in his name at Bank of America. The decedent added appellant to the bank account as a joint tenant with right of survivorship on July 12, 2005. Neither appellant's nor the decedent's assets were commingled in the accounts and all of the assets were personal property.

The parties were never married but were together for a number of years. On May 19, 2006, the decedent was shot to death by appellant.

In her motion to withdraw funds from these accounts, appellant argues that she was entitled to at least half of the funds in the accounts even if, as the Estate alleges, appellant is not entitled to all of the funds pursuant to Florida's Slayer Statute, section 732.802(2), Florida Statutes (2006).[1] If the Slayer Statute is applied, appellant's right of survivorship is extinguished and the accounts became tenancies in common at the time the decedent died. *See Capoccia v. Capoccia*, 505 So. 2d 624 (Fla. 3d DCA 1987). In the order denying appellant's motion, the trial court found that between unmarried tenants in common, there is no presumption of a gift of personal property citing *Grieco v. Grieco*, 917 So. 2d 1052 (Fla. 2d DCA 2006), and *Crouch v. Crouch*, 898 So. 2d 177 (Fla. 5th DCA 2005). It concluded that appellant did not establish that the decedent had gifted either account to her and that they should be divided according to the contribution of each person. As appellant did not contribute any money to the accounts, she was not entitled to any portion of either account.

On appeal, appellant argues that the trial court erred in finding that there was no presumption of a gift of personal property because Florida law provides that when a joint bank account is created with the funds of one person, there is a presumption of a gift to the other person which may be rebutted only by clear and convincing evidence to the contrary. We affirm the decision of the trial court but not under the application of the principles in *Crouch* and *Grieco* as the trial court did. *See Arthur v. Milstein*, 949 So. 2d 1163, 1166 (Fla. 4th DCA 2007) (quoting *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002)) ("'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record'").

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[1] Section 732.802(2), Florida Statutes (2005), provides:

> (2) Any joint tenant who unlawfully and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights of survivorship. This provision applies to joint tenancies with right of survivorship and tenancies by the entirety in real and personal property; joint and multiple-party accounts in banks, savings and loan associations, credit unions, and other institutions; and any other form of coownership with survivorship incidents.

In *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45 (Fla. 2001), the supreme court defined the forms of ownership of property in Florida:

> Property held as a tenancy by the entireties possesses six characteristics: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names).

Id. at 52 (footnote omitted). Using these "unities," the supreme court then defines tenancies in common as well as joint tenancies with right of survivorship:

> Tenancies in common, joint tenancies, and tenancies by the entireties all share the characteristic of unity of possession; **however, tenancies in common do not share the other characteristics or unities**. Joint tenancies and tenancies by the entireties share the characteristic of survivorship and three additional unities of interest, title, and time. In other words, for both joint tenancies and tenancies by the entireties, the owners' interests in the property must be identical, the interests must have originated in the identical conveyance, and the interests must have commenced simultaneously.

Id. at 53 (citations omitted) (emphasis added). Therefore, interests held by co-tenants in property, whether real or personal, do not have to be identical. However, "[i]n absence of evidence to the contrary, co-tenants are presumed to owe [sic] equal undivided interests." *Levy v. Docktor*, 185 B.R. 378, 381 (S.D. Fla. 1995). "[U]pon the death of a cotenant, the deceased cotenant's interest in the property subject to the tenancy in common passes to his or her heirs, and not to the surviving cotenant." 12 Fla. Jur. 2d *Cotenancy and Partition* § 4 (1998). *See*, *e.g.*, *Reinhardt v. Diedricks*, 439 So. 2d 936, 937 (Fla. 3d DCA 1983).

The "equal share presumption" applied to tenancies in common may be rebutted by proof of unequal contribution and the absence of intent to confer a gift. *See Estate of Dern Family Trust*, 928 P.2d 123, 131-32 (Mont. 1996).

As found by the trial court, appellant did not contribute any of her own funds to the accounts at issue and the decedent trusted her not to steal from him. Appellant accessed the accounts only at the behest of the decedent. The trial court specifically concluded that the decedent did not intend to make a gift to appellant of any of the money in either account.

This evidence clearly rebuts the presumption of equal contribution and the trial court correctly concluded that appellant was not entitled to any portion of the two accounts assuming the application of the Slayer Statute. However, the trial court erred in granting the Estate access to the account. For purposes of ruling on appellant's motion, the Slayer Statute was assumed to apply. There has yet to be an evidentiary hearing or any fact finding determination that appellant unlawfully and intentionally killed John Russo. Should there be such a factual determination, then and only then, would these assets pass to the Estate.

Affirmed in Part; Reversed in Part.

SHAHOOD, C.J., HAZOURI and DAMOORGIAN, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Mark A. Speiser, Judge; L.T. Case No. 06-02804 62.

William Jay Palmer of Shutts & Bowen, LLP, Miami, for appellant.

Curtis Alva, Fabienne E. Fahnestock and Jamie B. Schwinghamer of Gunster, Yoakley & Stewart, P.A., Fort Lauderdale, for appellee.

Not final until disposition of timely filed motion for rehearing