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COURT OF APPEALS  
DIVISION II

2017 MAY -4 AM 11:19

STATE OF WASHINGTON

BY

No. 49723-1-11

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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**JEFFERY EUSSEN, Personal Representative of the Estate of Myurlin J.  
Eussen, Appellant,**

v.

**JANICE PARKER, Respondent.**

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

As noted in the Petition, this matter addresses a narrow issue of law: what constitutes a joint account with survivorship rights rather than a joint account? Pursuant to Washington law, the determining factor is the intent of the parties at the time the account was opened. It is not dispositive whether the bank or its employees believed the account was joint with survivorship rights. Accordingly, is not relevant whether bank employee Karen Dole believed the account in question was joint with survivorship rights. Only the intent of the parties at the time of the creation of the account discloses whether survivorship rights were contemplated.

The intent of the parties opening the account is reflected in the documents used to establish the account, which are signed and acknowledged by the parties. Those documents establish irrefutable contemporaneous evidence of that intent. With regard to the account in question, it was possible for the parties to select “**Joint with Survivorship Rights**”, however, they chose not to do so. Instead, the election made by the parties in October 2005 was “JOINT.” The Respondent’s testimony that the account was intended to include survivorship rights is disputed by the agreement signed by the parties in October, 2005.

The trial court erred in denying the Petitioner's Motion where there is no credible evidence to establish a basis for ruling that the bank account was not a probate asset and where the evidence irrefutably establishes that the account was joint without survivorship rights.

## II. ARGUMENT

A. The testimony of the bank employee is not dispositive nor is it corroborative of the parties' intent since she had no personal knowledge.

The Respondent argues that the testimony of Karen Dole, the bank employee, is determinative of the intent to create a joint account with survivorship rights; however, that is impossible. Ms. Dole admitted under oath that she had no personal knowledge of the bank documents about which she was questioned or the procedures of the bank at that time. Ms. Dole conceded that she was not working for KeyBank nor was she at the branch where the account was opened at that time. *See CP. 86; see also CP. 83.* She further stated unequivocally that she had no idea what the parties who opened the account intended, because she simply was not there. *See id.* Accordingly, her testimony cannot be relevant to the issue of whether the parties intended the account to include survivorship rights.

Furthermore, Ms. Dole's testimony, even if admitted, is not helpful to the Respondent's argument. She testified that the Certificate of Deposit document with the faint "✓" on it (the only document where the words

“JOINT WITH RIGHT OF SURVIVORSHIP” appear) is not part of the signature card. *See CP. 85.* In other words, it is not part of the documentation that defines the nature of the account. *See id.* (“***This is not part of the signature card.***”). In fact, Ms. Dole’s testimony supports the Petitioner’s position that the account, as opened, did not include survivorship rights.

The Respondent notes that the bank records involving this account were records kept in the regular course of business; however, that fact does not make Ms. Dole’s testimony relevant concerning the intent of the parties. Ms. Dole does not testify that she was present at the time the account was open, or that she was aware of the decedent’s intent – she could not have been, since she was not even working at the bank at the time.

The Respondent further points out (several times) that the Appellant was not present and has no personal knowledge of the intent of the parties – which is true. However, this fact is also irrelevant. The fact that the Petitioner has no personal knowledge of the intent of the parties at the time the account opened does not change the analysis. Regardless of what the Petitioner knew or did not know, what is evidenced is clear from the agreement signed by the parties in October, 2005, which established an account without survivorship rights. What is fatal to the Respondent’s

argument is that the bank agreement forms fail to reflect an intent by the parties to provide for survivorship rights.

B. The nature of the distribution of the bank account assets by the Respondent is not relevant to the determination of whether the funds were estate assets.

The Respondent argues that her disbursements of the funds from the account were selfless and reflected her mother's wishes, upon prayer. However, the Respondent's intentions with regard to the funds, well intentioned or otherwise, do not change the fact that the funds were not hers to disburse. The funds became estate assets upon the death of her mother. At that point, the Respondent had no authority to disburse the funds in any fashion.

The Respondent's use of the account funds after her mother's death is irrelevant with regard to the nature of the account itself. In fact, the only relevance this has is to the issue of constructive trust (i.e., use of funds that were not hers to distribute). The fact that she prayed on the distribution of funds and gave funds to family members does not alter the fact that the funds were probate assets and did not belong to the Respondent. The funds were simply not hers to distribute. Additionally, the funds she unilaterally chose to appropriate were not insignificant – she admits that after finalizing her mother's affairs the account held \$126,152.22.

The Respondent further raises the issue that the Petitioner failed to file a probate promptly upon the death of their mother. The same argument could be said of the Respondent, of course. Nonetheless, the issue is irrelevant to the designation of the funds as probate assets; however, the Petitioner expected the Respondent to file a probate and distribute assets pursuant to the intestate laws of the State of Washington. When the Petitioner received a check from the Respondent which had clearly come from their mother's money, the Petitioner realized the Respondent had no intention of filing a probate. At that time, the Petitioner did so, to ensure that the probate assets would be distributed in accordance with the law.

The Respondent suggests that the estate was insolvent, rather than solvent as indicated by the Petitioner. However, the estate was solvent based upon the deceased's funds, which were misappropriated by the Respondent. Instead of filing a probate, as she should have done, the Respondent substituted her own decisions with regard to the estate assets, rather than that of the Court. The Petitioner filed a probate to seek Court supervision over the estate and the distribution of the estate assets, which had not occurred previously.

C. The statutory authority cited by the Respondent fails to support the analysis presented by the Respondent and is misleading.

The Respondent states that RCW 30A.22.170 provides a shield to banks with regard to disbursement of funds, and then states that if the bank is protected, then the Respondent also should be protected for her unauthorized and wrongful disbursement of funds in her deceased mother's account. However, the statute referenced in the Respondent's brief does not provide authority for such an argument.

As well as outlining the protection granted to banks, RCW 30A.22.170 also discusses the authority of any agent of a depositor. In this instance, it is undisputed that the depositor was Myurlin Eussen. The Respondent, therefore, would be an agent of the depositor. The statute states that the authority of an agent to receive payments or make withdrawals from an account terminates with the death of the agent's principal. *See RCW 30A.22.170.* In this case, the Respondent's authority terminated upon the death of her mother. The use of the account funds after her mother's death was unauthorized and amounted to a misappropriation of the estate assets. The cited statutory authority does not support the Respondent's argument.

The Respondent further cites to RCW 30A.22.100, indicating that the Respondent is and was entitled to use the "joint account with right of

survivorship” on the death of her mother unless there is presented a clear and convincing evidence of a contrary intent. However, this statement assumes that the account held survivorship rights – which is the issue on appeal. The Respondent’s actions were only permissible if the account is an account with right of survivorship – which is the issue before the Court concerning the account in question.

RCW 30A.22.100 addresses the ownership of funds after death of a depositor. RCW 30A.22.100(2) states that funds belonging to a deceased depositor which remain on deposit in a joint account without right of survivorship belong to the depositor’s estate. *See RCW 30A.22.100(2)*. The account in question is a joint account – but, as the evidence shows, not a joint account with right of survivorship. Before the Respondent is entitled to the funds in the account, the issue of whether the account was a joint account with survivorship rights must be determined.

RCW 30A.22.100(2) also provides that an agent may have access to the funds belonging to a deceased depositor if that agent is designated through a trust or “pay on death” account beneficiary designation. *See id.* However, this is of no apparent assistance to the Respondent, since there has been no evidence of an existing beneficiary designation or any other designation that would grant the Respondent rights to the account.

The Respondent also cites to RCW 11.48.010 and RCW 11.18.200; however, this statutory authority, which discusses non-probate assets, is not relevant to this dispute, since the issue before the Court is whether, in fact, the funds in the account are probate assets. The statute referenced assumes the funds are non-probate assets.

Furthermore, the Respondent's citations to RCW 11.24.010 and RCW 11.24.050 are not helpful to her argument since these authorities address a will contest and situations involving the revocation of probate or the annulment of a will. None of these situations are before the Court.

D. The Respondent's appropriation of assets that belong to the estate support the establishment of a constructive trust.

The Respondent argues against the imposition of a constructive trust with regard to the account funds, based upon her assertion (unsubstantiated by the evidence) that the account was with survivorship rights. The Respondent admits that she unilaterally accessed and disbursed the funds held in the account opened with her mother. She further admits that she unilaterally decided upon the disbursement of the funds in Myurlin's account. She admits to being the only person who had input as to how the money would be disbursed. By removing and disbursing the funds as she desired, the Respondent deprived the estate of its most significant asset.

Once again, the Respondent's allegedly altruistic motives in disbursing the funds is not relevant to a determination as to whether a constructive trust should be imposed. The issue is whether the Respondent disposed of funds without authority to do so and whether those funds were, in fact, estate assets.

Whether or not the Respondent kept the funds or disbursed them, it is undisputed that she took control over the funds. Since the funds were rightfully estate assets, the Respondent was unjustly enriched by appropriating funds that were not rightfully her. Her motivation is not dispositive as to whether a constructive trust is appropriate. In fact, imposition of a constructive trust does not require a finding of fraud or undue influence. See *Baker v. Leonard*, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993). In cases where there has been no evidence of fraud or wrongdoing, the courts have imposed constructive trusts when the evidence established the decedent's intent that the legal title holder was not the intended beneficiary. See *Mehelich v. Mehelich*, 7 Wn.App. 545, 500 P.2d 779 (1972). Again, there is no evidence that the Respondent was the intended beneficiary. There was no beneficiary designation on the account, and no will.

E. Eussen should be awarded his reasonable attorneys' fees and costs, jointly and severally against the estate and the Respondent.

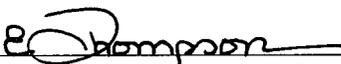
The Respondent acknowledges that the courts have considerable discretion with regard to determining fee awards. The motion brought at the trial court level by the Petitioner was brought in good faith and was based upon the clear evidence, through the bank agreement documents, that the account was not established with survivorship rights. The decision of the trial court flies in the face of the evidence that the account established was without survivorship rights. Since the evidence established the facts as alleged, the Petitioner should have been awarded his reasonable attorneys' fees and costs jointly and severally against the estate and the Respondent.

### III. CONCLUSION

The trial court's denial of the Petitioner's Motion was erroneous and the Petitioner hereby respectfully requests that the Court reverse the trial court's decision with regard to the accounts in question, regarding the establishment of a constructive trust, and concerning the award of attorneys' fees and costs.

Respectfully submitted this 3rd day of May, 2017.

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I, the undersigned, hereby certify under penalty of perjury of the laws  
of the State of Washington that I caused the foregoing Reply Brief of  
Appellant to be served upon:

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DEPUTY

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DATED this 3<sup>rd</sup> day of May, 2017 at Tacoma, Washington.

  
Name: TERRELL L. BECKER