IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JEANNE M. GILLIA, ADMRX. OF THE ESTATE OF JOSEPH DAVID GILLIA, DECEASED,	)	
Plaintiff/Appellant,	)	**Shelby Probate No. B-19925**
VS.	)	**Appeal No. 02A01-9411-PB-00250**
DOLLYE DUDLEY GILLIA,	)	
Defendant/Appellee.	)	

APPEAL FROM THE PROBATE COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE LEONARD PIEROTTI, JUDGE

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AFFIRMED IN PART, REVERSED IN PART AND REMANDED

ALAN E. HIGHERS, JUDGE

CONCUR:

W. FRANK CRAWFORD, JUDGE

DAVID R. FARMER, JUDGE

Joseph David Gillia (Decedent) died in May 1992. His widow, Jeanne M. Gillia

(Appellant), was appointed as administratrix of his estate. Decedent's mother, Dollye Dudley Gillia (Appellee), filed a claim against the estate in the amount of $61,460.00, seeking the return of an alleged loan of $50,000 and a diamond ring allegedly loaned to decedent worth $11,460. The court below entered judgment against appellant, individually and as administratrix, holding that appellee's allegations were supported by sufficient and competent evidence that proved that both transfers were loans, rather than gifts. For the reasons discussed herein, we affirm the trial court's judgment in part and reverse in part.

On August 6, 1991, appellee gave the decedent a check for $50,000. Appellee testified that she loaned the money to the decedent to enable him to buy into a business opportunity. The decedent deposited the check into a joint savings account that he opened with his wife, appellant. The terms of the account provided that appellant and the decedent held the account as joint tenants with the right of survivorship.

The subject ring is a man's 14-carat yellow gold and diamond ring that belonged to appellee's husband, who died in 1981. Appellee testified that she loaned the ring to the decedent to wear.

At the hearing on this matter, the sole witnesses were appellant and appellee. Opposing counsel made numerous and repeated objections to appellee's testimony based upon the prohibitions of the Dead Man's Statute. T.C.A. § 24-1-203. The trial judge sustained most of these objections and instructed appellee that her testimony could not relate to any conversations with the decedent. Although the trial judge did not allow appellee to testify that she told the decedent that the ring was on loan, appellee was permitted to testify that her intent was only to allow the decedent to wear the ring. The trial judge disallowed any testimony relating to communications between both the appellee and the decedent and between the appellant and the decedent on the matter of the $50,000 transfer. In addition, a letter written by the appellee outlining the terms and conditions of the loan was held incompetent and inadmissible under the Dead Man's Statute.

Nevertheless, after finding that all of the above testimony was inadmissible, the trial court held that there was sufficient evidence to support appellee's contention that the $50,000 and the ring were loans, rather than gifts. The trial judge found that appellee met her burden of establishing a *prima facie* case and, therefore, the burden shifted to appellant to prove that the money and the ring were gifts. According to the trial court, appellant did not present any evidence to show that the loan and ring were intended as gifts, and thus, appellant failed to carry her burden of proof. Accordingly, judgment was entered against the appellant, both individually and as administratrix of the estate, for the ring and for $50,000 plus post-judgment interest. Following a rehearing on the matter, the trial court affirmed its decision.

The crux of this appeal is whether there existed sufficient, competent evidence to prove that the $50,000 transfer and the ring were loans, rather than gifts.

Because this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings or there has been an error of law, we must affirm. T.R.A.P. 13(d). Upon review of the record, we hold that the evidence does not preponderate against the trial court's finding that appellee made a $50,000 loan to the decedent.

Appellant argues that the burden of proof was on the appellee to prove that the $50,000 transfer was a loan. Appellant contends that appellee failed to meet her burden because appellee relied solely upon her own testimony to establish her claim, and such testimony was incompetent under the Dead Man's Statute.

Appellant is correct in that ordinarily, the burden of proof is on the party having the affirmative of an issue to prove both the elements of her theory of recovery and the facts that she alleges in her complaint. Big Fork Mining Co. v. Tennessee Water Quality Control Board, 620 S.W.2d 515, 520 (Tenn. App. 1981). The general rule is that the burden of

proof rests on him who affirms, not on him who denies, and this burden never shifts. Freeman v. Felts, 344 S.W.2d 550, 554 (Tenn. 1961); Leonard v. Gilreath, 625 S.W.2d 722, 724 (Tenn. App.1981); Galbreath v. Nolan, 429 S.W.2d 447, 450 (1967).

However, when there exists a presumption that arises from a particular fact, the presumption may serve to establish plaintiff's *prima facie* case, thereby forcing a defendant to answer the *prima facie* case. Macon County v. Dixon, 100 S. W. 2d 5, 9 (Tenn. App. 1936).

Tennessee law has established that a presumption arises from the delivery of a check. That presumption is that the delivery of a check indicates that the check is intended as a loan, and not as a gift. Williams v. Frazier, 6 Tenn. App. 211, 218 (1927). Pioneer Bank v. Kelly, No. 03A01-9406-CH-00029, 1994 WL 577420 (Tenn. App. Oct. 21, 1994); Cleaves v. Schledwitz, No. 02A01-9112-CV-00310, 1992 WL 172645 (Tenn. App. July 24, 1992). As this Court stated in Williams v. Frazier,

> It is undoubtedly the general rule that in the absence of explanation the presumption arising from delivery of a check is that it was delivered in payment of a debt and not as a loan .... As between a loan and a gift the presumption from the delivery of a check is that it was intended as a loan and not a gift.

6 Tenn. App. at 218.

There is no dispute that appellee delivered the check to the decedent. Because the law presumes the delivery of a check is a loan and not a gift, appellee successfully made out a *prima facie* case of a loan.

This presumption caused the weight of the evidence to shift to the appellant. Macon County v. Dixon, 100 S.W.2d at 9; Shockley v. Morristown Produce & Ice Co., 11 S.W. 2d 900, 904 (Tenn. 1928); Whipple v. McKew, 60 S.W. 2d 1006 (Tenn. 1932); North Memphis Sav. Bank v. Union Bridge & Constr. Co., 138 Tenn. 161, 196 S.W. 492, 498 (1917). The appellant testified that she and the decedent received the $50,000 check as a gift. (R. 52) Appellant's claim that the loan was a gift is an affirmative defense. First Nat'l

Bank v. Howard, 302 S.W.2d 516, 519 (Tenn. App.. 1957). Thus, appellant had the burden of proving the essentials of an *inter vivos* gift, which are (1) an intention of the donor to give and (2) delivery of the subject of the gift. The burden is upon the donee to clearly prove both of these elements and any doubts should be resolved against the finding of a gift. Atchley v. Rimmer, 148 Tenn. 303, 255 S.W. 366 (1923); Pamplin v. Satterfield, 265 S.W.2d 886, 888 (Tenn. 1954).

The facts in the case at bar are similar to those addressed by this court in the unreported decision of Pioneer Bank v. Kelley, No. 03A01-9406-CH-00209, 1994 WL 577420 (Tenn. App. Oct. 21, 1994). In Pioneer Bank, the bank served as administrator of the decedent's estate. The bank brought an action to recover from the decedent's sister-in-law certain alleged loans made by the decedent to the sister-in-law. Id. at *1. The sister-in-law denied that the money was loaned to her by the decedent and contended instead that the money was a gift. The lower court held that the burden of proof was on the bank to prove that the transactions were loans.

This court reversed the lower court, holding that the burden was on the sister-in-law to prove that the transfers were gifts. We stated the general rule that the delivery of a check causes a presumption to arise that the check was intended as a loan, and not as a gift. Id. Because the bank proved delivery of the check and there is a presumption that the delivery of a check is a loan, we held that the bank made out a *prima facie* case of a loan. The defendant then had the burden of proving her affirmative defense that the money was a valid *inter vivos* gift from the decedent. Id. at *2. The defendant in Pioneer Bank did not offer sufficient proof to satisfy the essentials of an *inter vivos* gift. Therefore, this Court held that the subject transactions were loans and entered judgment for the bank accordingly. Id. at *3.

In the present case, we hold that there was a presumption that the $50,000 transfer was a loan. Thus, the burden of proof was on appellant to prove that it was a gift. In our opinion, the record does not contain the requisite proof to show that the $50,000 transfer

to the decedent was intended to be a gift. In fact, the sole evidence in the record to support such a contention is the testimony given by appellant that the decedent told her it was a gift. The trial judge properly ruled that this testimony was inadmissible under the Dead Man's Statute. Even if the judge had admitted the testimony, it would have been insufficient to prove the existence of a gift because the fact of a gift cannot be made out by the unsupported testimony of the donee alone. Atchley, 255 S.W. at 371. We therefore affirm the trial court's decision in entering judgment against the estate in the amount of $50,000.

The account into which the $50,000 was initially deposited was accompanied by a bank signature card expressly providing that the account was held by the decedent and appellant as joint tenants with the right of survivorship. Appellant contends that the $50,000 passed outside of the estate and was, therefore, beyond appellee's reach because the funds were deposited in a joint account with a right of survivorship. Appellant's position is that property held as joint tenants does not become part of a decedent's estate, but rather passes outside of the estate to the surviving tenant by operation of law.

In holding that the $50,000 was subject to appellee's claim, the trial court relied on T.C.A. § 45-2-703, which provides in pertinent part:

> (a) When a deposit has been made...in any bank, in the names of two (2) or more persons,...[a]ny balance so created, including any balance held by spouses, shall be subject to ...the claim of any creditor of, either depositor, as if such depositor were the sole owner of the funds....

The trial court noted that the above section allows a joint depositor a defense to the extent that he or she has a legal right to the funds. In the trial court's opinion, appellant did not prove that she deposited any of her own money into the account or that she otherwise had legal right to the funds. As a result, the court held, the $50,000 was subject to appellee's claim as a creditor of the decedent.

The trial judge and the appellee erroneously rely upon T.C.A. § 45-2-703 as

interpreted in Leffew v. Mayes, 685 S.W.2d 288 (Tenn. App. 1984), in contending that the funds are subject to appellee's claim only if appellant is unable to show that she has some legal right to the funds by placing money into the account. However, Leffew addressed a situation where there was a dispute between two depositors that arose during the lifetime of the parties, regarding a joint account. Id. at 291 (emphasis added). The court in Leffew expressly limited its holding to the facts therein. Moreover, the Leffew case specifically distinguished another line of cases holding that where one joint depositor dies, the survivor is entitled to the entire amount on deposit. Id. (citing Lowry v. Lowry, 541 S. W. 2d 128 (Tenn. 1976); Simmons v. Foster, 622 S. W. 2d 838 (Tenn. App. 1981)).

In determining whether the funds passed at the decedent's death to the appellant or to the estate, the general rule governing joint bank accounts with right of survivorship is as follows:

> Absent clear and convincing evidence of a contrary intent...a bank signature card containing an agreement that a joint account with rights of survivorship is intended, creates a joint tenancy enforceable according to its terms; and upon death of one of the joint tenants, the proceeds pass to the survivor.
>
> The right of survivorship may be created in a joint bank account...in which event the proceeds pass to the survivor by operation of law and do not become a part of the assets of the estate in the hands of the personal representative of the decedent.

Lowry, 541 S.W. 2d at 128, 132 (quoting 2 Pritchard, Law of Wills and Estates § 621 (2d. ed Phillips 1955)).

In Griffin v. Prince, 632 S. W. 2d 532, 536 (Tenn. 1982), the Tennessee Supreme Court held that even if a bank signature card does not provide that the depositors' interest in the account is held as "tenants by the entirety," but provides that the depositors' interest is held as "joint tenants," the account will nevertheless be considered a tenancy by the entirety if the depositors were married when the account was created and there is no evidence of any other type of ownership. Id. See also, Sloan v. Jones, 241 S.W.2d 506 (Tenn. 1951) (holding that a joint account in the name of "husband or wife" creates a tenancy by the entirety, even when the account is expressly designated joint tenants, and

the proceeds pass to wife immediately upon death). One of the incidents of tenancy by the entirety is that it renders marital assets virtually immune from a spouse's individual creditors. Griffin, 632 S. W. 2d at 537.

The funds in either a joint tenancy account or a tenancy by the entirety account would constitute part of the estate only if the decedent owned the funds at the time of his death. In re Estate of Nichols, 856 S.W. 2d 397, 400 (Tenn. App. 1993). A decedent cannot own the funds in such an account when there exists a right of survivorship. Id.

Our decision is not inconsistent with T.C.A. § 45-2-703, which was enacted for the protection of the depositor bank and "does not affect the rights of the joint tenants, as between themselves, during their lifetime." Leffew, 685 S. W. 2d at 291. This provision allows the other depositor to establish his or her rights in the funds as against a third party. Edwards v. Edwards, 713 S. W. 2d 642, 646 (Tenn. 1986). The statute serves merely to shift the burden of establishing the depositor's status as a joint tenant with the right of survivorship from the bank to the other depositor. Id. The Tennessee Supreme Court expressly rejected the contention that T.C.A. § 45-2-703 allows a creditor of a deceased spouse to reach funds held in a joint account in Edwards. Id. Instead, the court held, the funds passed immediately upon death to the other spouse. Id. at 647.

We hold that the $50,000 passed to appellant outside of the estate. It is indeed unfortunate that the assets of the estate appear to be insufficient to satisfy appellee's claim. The facts of this case, however, do not give rise to any basis for an action against appellant in her personal capacity, nor is there any indication that she has mismanaged the estate.

With respect to the alleged loan of the ring, we found no cases that will serve to aid appellee in establishing her *prima facie* case. In addition, the proffered testimony from appellee falls squarely within the prohibitions of the Dead Man's Statute and is, therefore, inadmissible.

The Dead Man's Statute, T.C.A. § 24-1-203 provides:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party.

The above rule of law leaves the appellee's claim that the ring was a loan to stand solely upon her testimony relating to communications and transactions with the decedent that occurred during his lifetime. Under the provisions of the Dead Man's Statute, this testimony is inadmissible.

Appellee possessed the initial burden of making out a *prima facie* case that the ring was intended to be a loan. The general rule is that the burden of proof never shifts from the party on which it rested in the first instance until the party having the burden establishes a *prima facie* case. When this occurs, the burden shifts to the opposing party to present countervailing evidence. Stone v. City of McMinnville, 896 S.W. 2d 548, 550 (Tenn. 1995). When all of the evidence is in, "the question for decision is whether the preponderance is with the plaintiff." Whipple v. McKew, 60 S.W. 2d 1006 (Tenn. 1933).

The present case is similar to the case of Watts v. Rayman, 462 S.W. 2d 520 (Tenn. App. 1970), where the plaintiff claimed against his deceased brother's estate, alleging that his brother had held certain funds and bonds in safekeeping for him. Id. at 521. The testimony offered by plaintiff in support of his position contravened the Dead Man's Statute. The court held that there was no proof upon which plaintiff's claim could be allowed unless he was permitted to testify as to a transaction with his deceased brother. Consequently, plaintiff was unable to establish the basic facts that he alleged and the court affirmed the probate court's dismissal of the action. Id. at 522.

The evidence before us completely fails to establish that there was a loan of the ring to the decedent. Unaided by a presumption, appellee has failed at the outset to make out *prima facie* case. In the absence of any other competent proof indicating that the ring was

merely loaned to the decedent, we find in favor of the appellant.

Accordingly, the judgment of the trial court is reversed in part and affirmed in part. This cause is remanded to the probate court for further and necessary proceedings consistent with this opinion. Costs on appeal are taxed to appellant.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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FARMER, J.