

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

FILED

August 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

SHERRY BROWN, as next friend and)
natural mother of her minor children,)
AMANDA DANETTE MCMULLIN and)
ADAM WAYNE MCMULLIN,)

Lawrence Chancery No. 8489-93

Plaintiff/Appellee)

v.)

Appeal No. 01A01-9603-CH-00113

DORRIS MCMULLIN, LARRY)
MCMULLIN, HELEN MCMULLIN and)
THE ESTATE OF EUGENE)
MCMULLIN,)

Defendants/Appellants)

APPEAL FROM THE CHANCERY COURT OF LAWRENCE COUNTY
AT LAWRENCEBURG, TENNESSEE
THE HONORABLE JAMES L. WEATHERFORD, CHANCELLOR

J. DANIEL FREEMON
Freemon, Hillhouse & Huddleston
327 W. Gaines St.
P.O. Box 787
Lawrenceburg, TN 38464
Attorney for Appellants

JANE M. JENNINGS
Hairell & Jennings
P.O. Drawer N.
200 Mahr Ave.
Lawrenceburg, TN 38464
Attorney for Appellee

AFFIRMED AND REMANDED

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, PRESIDING JUDGE

ALAN E. HIGHERS, JUDGE

OPINION

The proceeds of a policy of insurance on the life of Donnie McMullin were paid to his mother, Edith McMullin, the named beneficiary, who, jointly with her husband, Eugene McMullin, deposited these funds in a trust account, having first executed a Discretionary Revocable Joint Trustee Agreement which designated them as joint trustees of the funds for their grandchildren, Amanda and Adam McMullin (children of their son, Donnie McMullin, the insured decedent) as beneficiaries. Edith and Eugene McMullin had two other sons, Larry and Dorris McMullin.

Six years later, Edith McMullin died and Eugene McMullin continued to serve as trustee. The trust funds remained intact and productive until October 21, 1993, when they were paid out by the depository bank under unusual circumstances.

The surviving trustee, Eugene McMullin, became mortally ill. He was being transported to a hospital on October 21, 1993 [one week before his death] by Larry McMullin and Helen McMullin (wife of Dorris), when they stopped *en route* at the depository bank. Eugene was too ill to leave the car. Larry and Helen entered the bank and prevailed upon the bankers to change the beneficiaries of the trust from Adam and Amanda McMullin (both minors) to Larry and Dorris McMullin, the brothers of the minors' deceased father. Not the least lacking in cooperation, the bank issued two cashiers checks, each in the amount of \$49,945.53 to Larry and Dorris McMullins.

It is not disputed that Eugene McMullin, the trustee, did not enter the bank on October 21, 1993 and did not communicate with a banker. He signed no instruments of any kind. The record offers little explanation of the somewhat remarkable banking practice evident from the foregoing recitation.

We reproduce the trust agreement verbatim.

	DISCRETIONARY REVOCABLE TRUST ACCOUNT	
	(BOTH SIGNATURES REQUIRED FOR WITHDRAWAL)	Account No. 02-62-20328-5
	(1) MCMULLIN, EDITH	
and	(2) MCMULLIN, GENE	Joint Trustees

For MCMULLIN, ADAM

WAYNE

Beneficiary

As joint trustees with right of survivorship, the undersigned hereby apply for a savings account in the MAURY COUNTY FEDERAL SAVINGS AND LOAN ASSOCIATION and for the issuance of evidence thereof in their joint names as trustees described as aforesaid. You are directed to act pursuant to the joint-trustees' signatures, shown below, in any manner in connection with this account and to pay, without any liability for such payment, to any one of the surviving of said trustees at any time or on the signature of a duly appointed successor trustee. It is agreed by the signatory parties with each other and by parties with you that any funds placed in or added to the account by any one of the parties whether in his trustee or individual capacity is and shall be conclusively intended to be a gift at that time of such funds to the trust estate. You are authorized to accept checks and other instruments for credit to this account, whether payable to one or more of the parties, and to supply any needed endorsement. You are relieved of any liability in connection with collection of all items handled by you without negligence, and shall not be liable for acts of your agents, sub-agents, or others or for any casualty. Such funds are not withdrawable until collected. Any amount not collected, together with any kind of expense incurred relative to the account, may be charged to it.

s/Edith McMullin
s/Gene McMullin

as Joint Trustee
as Joint Trustee

Address Route 1, Box 47 Summertown, TN 38483
As Trustee for MCMULLIN, ADAM WAYNE
as specified in trust agreement on reverse side hereof.

Beneficiary
Dated Feb. 9, 1987

* * * * *

DISCRETIONARY REVOCABLE JOINT TRUST AGREEMENT

The funds in the account indicated on the reverse side of this instrument, together with earnings thereon and any future additions thereto, are conveyed to the trustees jointly as indicated for the benefit of the beneficiary as indicated. The conditions of said trust are: (1) The trustees are authorized to hold, manage, invest and reinvest said funds in their sole discretion; (2) The undersigned grantors reserve the right to revoke said trust in part or in full at any time, and any partial or complete withdrawal by the original trustees, if they be both of the grantors, shall be a revocation to the extent of such withdrawal, but no other revocation shall be valid unless written notice by both of such trustees is given to the institution named on the reverse side of this card; (3) In the event of the death, resignation, removal or incompetence of both of said trustees, DORRIS MCMULLIN is appointed successor trustee, and in the event of his death, resignation, removal, or incompetence, [BLANK] is appointed successor trustee, or in the event no successor trustee is named herein or the successor or successors die, resign, are removed, become incompetent, or fail to act, the institution named on the reverse side hereof is authorized to appoint a successor trustee, and such successor trustee shall have the powers of the original trustees; (4) This trust, subject to the right of revocation, shall continue for the life of the grantors and thereafter until the beneficiary is TWENTY-FIVE years of age and then the proceeds shall be delivered to the beneficiary, and if the age of the beneficiary is not specified this trust is for twenty-one years; (5) The institution in which such funds are invested is authorized to pay the same or to act in any respect affecting said account, before or after the termination of this trust, upon the signature of the trustees, or successor trustees, duly appointed, and has no responsibility to follow the application of the funds. In this instrument, except as otherwise indicated, the singular includes the plural and the masculine includes the feminine and the neuter.

This NINTH day of FEBRUARY, 1987
s/Edith McMullin

Grantor s/Gene McMullin

Grantor

It will be seen that the funds were deposited in a Revocable Trust Account by Edith and Gene McMullin, as joint trustees with a right of survivorship; that the trustees (grantors) retained the right to revoke the trust, that in the event of the death, resignation, removal or incompetence of both trustees, Dorris McMullin was designated successor trustee, who “shall have the powers of the original trustees.”

Both parties moved for summary judgment, relying upon their depositions and the depositions of bank employees. The trial court granted the motion of the plaintiff and denied the motion of the defendants, who appeal and argue, contrary to their position in the trial court, that there are contested issues of material fact. The defendants raised no issue of the purported inappropriateness of TENN. R. CIV. PROC., Rule 56, until the trial court decided the case adversely to them. We observe, minimally, that this procedure is unacceptable and not in the best interests of the legal profession.

We take the case no further than the pleadings warrant; the natural guardian of the beneficiaries alleged essentially that Larry and Helen McMullin had no authority to revoke the trust by withdrawing the funds. That they did so is not disputed; that Eugene McMullin, the surviving trustee did not authorize the strangers to the trust to revoke the trust is not seriously questioned. To this extent, we think the trial court was authorized to consider summary judgment, keeping in mind that the soon-to-be successor trustee was not present.

We agree that on October 21, 1993, Larry McMullin and Helen McMullin had no authority whatever to revoke the trust and withdraw the corpus. They were, simply stated, strangers to the trust. In connection with this facet of the case, we observe that the parties did not brief the issue of the competency of Eugene McMullin and for this reason we take no further notice of it.

The trust was admittedly a revocable one, tentative in nature. By its terms, the grantor(s) retained unrestrained control of the corpus, thereby empowering them to terminate the trust in their discretion. See *Leader Fed. Sav. and Loan Ass'n v. Hamilton*, 330 S.W.2d 33 (Tenn. App. 1959). The appellee argues that since the trust agreement provides that “both signatures required for withdrawal,” the surviving

trustee could not, in proper person or by agents, unilaterally revoke the trust. It is true that printed near the top of the depository card are the words “both signatures required for withdrawal”; but even a casual reading of the document can lead only to the inescapable conclusion that the survivor of the original trustees, or the successor trustee, was authorized to revoke the trust. It was the position of the appellee at argument that upon the death of Edith McMullin the trust became irrevocable. We obviously do not agree and do not notice the point further, except to observe that the case relied on by the appellee, *Bumbaugh v. Burns*, 635 S.W.2d 518 (Tenn. App. 1982), is inapposite to the factual posture of this case.

In summary, we affirm the grant of summary judgment on the narrow ground that Larry and Helen McMullin were strangers to the trust and therefore had no authority to revoke it or to receive the corpus of the trust.

Costs are assessed to the parties evenly, and the case is remanded for all necessary purposes.

William H. Inman, Senior Judge

CONCUR:

W. Frank Crawford, Presiding Judge

Alan E. Highers, Judge