IN THE COURT OF APPEALS

GENEVA GRAHL,	)	BLOUNT CIRCUIT
	)	C. A. NO. 03A01-9603-CV-00087
Plaintiff-Appellee	)	
vs.	)	HON. W. DALE YOUNG JUDGE
LILLIE DAVIS	)	REVERSED AND REMANDED WITH INSTRUCTIONS
GREGORY SCOTT JUDKINS and JEFFREY TODD JUDKINS,	)	
Defendant-Appellants	)	

NORMAN H. NEWTON and DUNCAN V. CRAWFORD, Crawford, Crawford & Newton, Maryville, for appellants.

DAVID R. DUGGAN and J. MICHAEL GARNER, Maryville, for Appellee.

OPINION

McMurray, J.

The parties are the heirs of Ms. Lillie Davis. The controversy in this action arises from the action of the trial court in approving a final accounting by the appellee, Geneva Grahl, in her capacity as conservator of the estate and person of Ms. Davis, now deceased.

There are no material facts in dispute. The appellee, Ms. Grahl was the duly appointed conservator of the person and estate of Lillie Davis prior to Ms. Davis' death. At the time of the appointment of Ms. Grahl as Conservator, Mr. Omer B. Davis, husband of Lillie Davis was still living and mentally competent. Mr. and Ms. Davis during their life time held certificates of deposit and bank accounts in their joint names. The certificates of deposit and bank accounts lie at the heart of this controversy.

The parties agree that the appellee filed the following information with the trial court: on March 8, 1990, an inventory showing total assets in financial institutions of $197,512.00; on June 19, 1990 a [first] annual accounting showing total assets of $16,659.92; and, on June 26, 1991, a [second] annual accounting was filed showing total assets of $3,871.11.[1] Ms. Davis died on October 5, 1991, and the appellee was appointed and qualified as

[1]These documents were simply filed with the clerk and no court action was taken on them.

administratrix of the estate of Ms. Davis. Sometime in November, 1991, Ms. Grahl filed a motion to approve a final accounting and transfer of the remaining assets to the administratrix.[2] On November 20, 1991, the trial court approved the final accounting by the conservator and termination of the conservatorship without notice to the appellants. On December 17, 1991, the appellants filed a motion under Rules 52 and 59, Tennessee Rules of Civil Procedure, asking the court's previous order be amended or alternatively asking for a new trial. The trial court overruled the motion and the appellants appealed that decision of the trial court.

The appeal was heard before this court. The trial court was reversed and the case remanded to the trial court for a new trial. See Geneva Grahl v. Lillie Davis, et al, C.A. No. 03A01-9207-CH-00250, Opinion filed February 2, 1993. After remand, the trial court conducted another trial, reached the same result and entered a judgment approving the accounting and transfer of assets to the estate of Lillie Davis. It is from this judgment that the appellant has sought appellate review.

[2]None of the documents referred to bear a stamp from the clerk's office showing exactly when they were filed. The parties agree, however, that the documents were filed with the clerk.

The issues of the appellants generally stated are that the appellee breached her fiduciary duty to her ward by allowing Omer Davis, the ward's husband, to extinguish the ward's survivorship interest in the certificates of deposit. They further charge the court with error in failing to find that the appellee breached her duty as attorney-in-fact for Omer Davis by participating in the redemption of the certificates of deposit.

At the trial it was established by the testimony that Ms. Grahl received thirty-one thousand, four hundred and forty-four dollars and fifty-one cents ($31,444.51) from the sale of the Davis home. This money was deposited in a conservatorship savings account and a conservatorship checking account. When money was needed, the conservator would transfer monies from the savings account to the checking account.

At the time Ms. Grahl was appointed conservator for Ms. Davis, Mr. and Ms. Davis owned three certificates of deposit and a money market certificate. The three certificates of deposit were in the name of Omer or Lillie Davis. The money market certificate was in the name of Omer Davis, Trustee for Lillie Davis.

On June 19, the conservator filed an annual accounting with reflecting itemized expenditures of $24,034.94 leaving a balance of

$16,659.92. She further reported the following: a certificate of Deposit at First Tennessee Bank in the name of Omer Davis or Geneva Davis was transferred on June 22, 1989 to a Certificate of Deposit in the name of Omer Davis or Geneva Grahl; a second Certificate of Deposit at First Tennessee Bank in the name of Omer B. Davis or Lillie Davis was transferred by Omer Davis on August 18, 1989 to a certificate of deposit in the name of Omer Davis; and a checking account in the name of Omer B. Davis, Lillie Davis, or Geneva Grahl had a balance of $1,167.71, and that after a checking account was opened for Lillie Davis, Mr. Davis used the original account as his personal account until his death on December 20, 1989.[3]

The accounting further showed that the money market Certificate of deposit at First Federal Savings and Loan in the name of Omer Davis, Trustee for Ms. Omer Davis, was transferred by Omer Davis to a Certificate of Deposit in the name of Omer Davis and that a certificate of deposit at First American Bank in the name of Omer Davis or Lillie Davis was withdrawn by Omer Davis on June 28, 1989 and deposited in a Certificate of Deposit at First Federal Savings and Loan in the name of Omer B. Davis or Geneva Davis.

[3]According to the testimony of Ms. Grahl, the balance in the checking account at the time of Mr. Davis's death was transferred to Ms. Davis's conservatorship estate.

The second accounting filed by Ms. Grahl listed itemized expenditures for Ms. Davis in the total amount of $25,475,39, leaving a balance of $3,871.11. The final accounting again contained an itemized list of expenditures and a final balance of $1,937.17 at the time of Ms. Davis' death.[4]

All the above transactions relating to the certificates of deposit took place after Ms. Grahl's appointment as conservator and before her father's death. The undisputed testimony reflected that the transactions were carried out by Mr. Davis.

Mr. Davis died testate on December, 20, 1989. His will provided as follows:

* * * *

> I hereby give, devise and bequeath to my daughter, GENEVA GRAHL, all my property, of whatever nature, or wherever located or situated, in Trust, for the use and benefit of my dear wife, Lillie Davis. The entire property is to be used for the best interest of my wife, and as far as possible in the same way and manner that I would do were I living.
>
> The trust shall continue for, and during the natural life of my dear wife, Lillie Davis, or as long as there are any assets left in the Trust. The Trust shall terminate upon the happening of the first of the events mentioned above.

[4]Apparently, the expenditures are not questioned by the appellants.

> In the event that there is [sic] any assets left in the Trust after it is terminated as provided above, I give, bequeath the same to my daughter, GENEVA GRAHL, in its entirety, absolutely and in fee simple, without condition or limitation, it being her sole discretion to retain all of the assets or funds as hers, or to make any gifts of them which she may choose.
>
> I make this provision having great confidence that she will care for my dear wife in the same way and manner I would do were I living.

* * * *

It seems eminently clear that if Mr. Davis had the lawful authority to transfer the certificates of deposit from the joint names of himself and his wife thereby extinguishing her interest, the accounting should be approved as presented. The assets would become the property of Ms. Grahl through Mr. Davis' will. On the other hand, if he had no authority to do so, some liability may attach to the conservator for failure to protect the interests of her ward since she admitted to being aware of each of the transactions. Thus it becomes incumbent upon us to examine the law relative to joint accounts.

It is well-settled that funds held in a joint account by a husband and wife using words either in the disjunctive "or" or the conjunctive "and" are presumed to create a tenancy by the entirety in the account. See Sloan v. Jones, 241 S.W.2d 506 (Tenn. 1951) and Griffin v. Prince, 632 S.W.2d 532 (Tenn. 1982).

In Sloan, the Supreme Court of Tennessee followed the reasoning of the Pennsylvania Supreme Court in Madden v. Gosztonyi Sav. & Trust Co., 31 Pa. 476, 200 A. 624.

> The Supreme Court of Pennsylvania in Madden v. Gosztonyi Sav. & Trust Co., 331 Pa. 476, 200 A. 624, 630, 117 A.L.R. 904, has held that bank deposits payable to the husband and wife, or to the husband or wife, are held by them as tenants by the entireties, with all incidents thereof. Unity of control in the case of deposits payable to either being found in the implication of authority in one to act for both. That Court, among other things said: "When, on the other hand, an account is made payable in its creation to either 'husband or wife', there is an immediate expression of authority, of agency to act for both. As an incident of these estates by entireties is the power that each gives the other, at the time of the estate's creation, to act for the other." That court then goes on and cites a number of other cases and quotes therefrom to support this statement and concludes as follows: "Where a deposit is made payable to either spouse, agency or authority exists by implication, and the husband or the wife may withdraw the entire account, but the money thus withdrawn is impressed with the entirety provision that it is the property of both, and any one dealing with such specific property as severalty, knowing that it belongs to both, must submit to the consequences." (Emphasis added).
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> * * * *
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> We have considered these cases pro and con and agree with the reasoning of the Pennsylvania case above quoted . . . .

Sloan, at pages 508-509.

In Sloan, the controversy was between the heirs of a deceased wife and the administrator of her deceased husband over a fund which was deposited in the name of "Joe Tatum or wife." In its

final analysis the Sloan Court held that the property passed to the survivor on the death of the first by reason of the tenancy by the entirety and that the laws of descent and distribution did not apply. This ruling taken in conjunction with the rule emphasized in Madden as set out above leads us to only one conclusion, i.e., when the funds in the instant case were withdrawn by Mr. Davis thereby extinguishing the joint accounts, both the conservator and Mr. Davis were chargeable with knowledge that the funds invested in the new certificates still belonged to Mr. and Ms. Davis as tenants by the entirety. Further, in Griffin v. Prince, 632 S.W.2d 532 (Tenn. 1982), the court citing Sloan and other authorities stated:

> There is abundant authority in this state that the use of the word "or" between the names of spouses on a bank account or negotiable instrument does not preclude their ownership of the asset by the entirety and that joint property of spouses will be deemed to be so held in the absence of proof to the contrary.

Griffin, at p. 536.

In this case, the record is totally devoid of any evidence that the joint property of Mr. and Ms. Davis was intended to be anything other than a tenancy by the entirety.

The appellees rely upon the case of Mays v. Brighton Bank, 832 S.W.2d 347 (Tenn. App. 1992) as authority to the contrary. We are of the opinion that appellee's reliance upon Mays is misplaced.

Firstly, we note that Sloan has never been overruled or modified by our Supreme Court nor has it been statutorily altered. Secondly, the Court of Appeals as an intermediate appellate court is bound by the doctrine of stare decisis and is bound to follow the dictates of the Supreme Court. In any event, Mays is distinguishable on its facts.

In Mays, neither of the parties was deceased. The husband borrowed money from the bank to purchase a trailer. The bank deposited the proceeds of the loan into the Mays' joint bank account. Ms. Mays withdrew the funds, purchased a trailer and received a "certificate of origin" assigning ownership of the trailer to her. No liens were recorded on the certificate. The issue before the court was whether the bank had a valid security interest in the trailer. The court determined that the bank did have a security interest in the trailer, however, the issue turned on a question of agency. The court found that Ms. Mays was acting as agent for Mr. Mays in purchasing the trailer and he, therefore, acquired an interest in the trailer sufficient to support the bank's purchase money security interest in the property.

Admittedly, the Mays court agreed that the position which has been adopted by the Arkansas Courts as the better view:

> An estate by the entireties in a bank account differs in one significant aspect from such an estate in real property in that the estate exists in the account only until one of the tenants withdraws such funds or dies leaving a balance in the account. Funds withdrawn or otherwise diverted from the account by one of the tenants is reduced to that tenant's separate possession ceases to be a part of the estate by the entireties. (Citations omitted in the original). This does not mean that in a proper case under timely allegations of fraud or other such remedy, that one of the cotenants could not sustain an action to recover all or a part of the funds diverted or withdrawn by the other. McIntyre v. Estate of McIntyre, 267 Ark. 169, 590 S.W.2d 241 (1979). (Emphasis added).

Even if we were to accept Mays as controlling authority in this case, it would appear to have been incumbent upon the conservator in her fiduciary capacity to challenge the actions of the cotenant since she stood in the shoes of Ms. Davis and was under a duty to protect Ms. Davis' assets. This she did not do.

We are of the opinion that the certificates of deposit purchased by Mr. Davis with funds from the joint accounts of Mr. and Ms. Davis remained property owned by them as tenants by the entirety, notwithstanding that her name did not appear on the instruments. Further, the money market certificate that was held by Mr. Davis as trustee for Ms. Davis was clearly not the property of Mr. Davis but that of Ms. Davis absent evidence to the contrary. There is none in the record. As trustee, he was under a duty to account for the funds to Ms. Grahl as conservator of the person and

estate of Ms. Davis. She was aware that he had transferred the funds to his own name, yet took no action to protect Ms. Davis' interest.

We are of the opinion that there is merit in the first issue presented by the appellants. The second issue, however, was not raised in the trial court and will not be considered on appeal. It is a well-established law than an appellate court will not consider an issue which is raised for the first time in the appellate court. Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983). In any event the second issue is now moot.

The appellee has filed a multiplicity of issues relating to estoppel and waiver. Again, we find that these issues were not raised in the trial court and will not be considered here. In any event, it appears that all of the issues raised have been answered either in the earlier appeal or in our disposition of the appellants' first issue.

We are of the opinion that the judgment of the trial court approving the final accounting of the conservator must be reversed. Accordingly, we reverse the judgment of the trial court and remand the case to the trial court for a new final accounting and for such other and further action, including the taking of additional proof,

as may be necessary to establish a correct final accounting and protect the rights of the parties. Such further action shall be consistent with this opinion. Costs are taxed to the appellee.

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Don T. McMurray, J.

CONCUR:

_____
Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., J.

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Defendant-Appellants	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Blount County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

Accordingly, we reverse the judgment of the trial court and remand the case to the trial court for a new final accounting and for such other and further action, including the taking of additional proof, as may be necessary to establish a correct final accounting and protect the rights of the parties. Such further

action shall be consistent with this opinion. Costs are taxed to the appellee.

PER CURIAM