

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

IN RE: ESTATE OF ROBERT D. PAYNE,
Deceased,

KAL HELOU, Administrator CTA,

Plaintiff-Appellant,

Vs.

WILLIAM D'SHIELL FISHER,
KENNETH FISHER and SUSAN
FISHER,

Defendants-Appellees,

And

OLD HICKORY CREDIT UNION,

FILED

August 28, 1996

Cecil W. Crowson
Appellate Court Clerk

Davidson Probate No. 93P-1239

C.A. No. 01A01-9603-PB-00092

FROM THE PROBATE COURT OF DAVIDSON COUNTY
THE HONORABLE JAMES R. EVERETT, JR., JUDGE

Kal Helou of Nashville
For Plaintiff-Appellant

David B. Foutch; Rochelle, McCulloch & Aulds
of Lebanon, For Defendants-Appellees

VACATED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

HOLLY KIRBY LILLARD, JUDGE

WILLIAM C. KOCH, JR., JUDGE

This appeal involves a dispute between a decedent's estate and three payees named jointly with the deceased on three separate certificates of deposit. Kal Helou, Administrator of the Estate of Robert D. Payne, appeals from the order of the probate court which found that the certificates of deposit were

held jointly with right of survivorship and that the defendants are the outright owners of the respective certificates. The only issue on appeal is whether the trial court erred in holding that the respective certificates are the property of the respective defendants.

At the outset, we note that the lower court proceedings are somewhat unusual. The parties concede that there was no evidentiary hearing, yet the record contains pretrial briefs and a pretrial statement required by local court rules concerning the witnesses to be called at trial. Moreover, the record is devoid of any motion by either party for a summary judgment, judgment on the pleadings, or any other motion for disposition without an evidentiary hearing. The trial court's order of September 29, 1995, from which the appeal is taken, recites:

After the hearing on January 18, 1995 the court took the matter under advisement to review the briefs, affidavits, and the entire record in this cause.

The order continued by finding that the certificates of deposit in question were owned by the respective defendants. Although the trial court's order refers to a hearing, the record is devoid of anything which would indicate that any hearing actually took place. The record¹ reflects that the parties contemplated an evidentiary hearing by complying with various local rules concerning trial, but for some reason the matter was decided by the court without the benefit of such a hearing.

Without any record citations, both parties assert in their briefs various facts in support of their respective positions. The alleged facts, as taken from the briefs in this case, are as follows:

On December 17, 1992, decedent, Robert Payne, purchased three \$20,000.00 Certificates of Deposit (CDs) from Old Hickory Credit Union. At the

¹The record consists of what was formerly known as the technical record and includes an affidavit of a bank employee whose signature apparently appears on the certificates of deposit.

time Mr. Payne purchased the CDs, he was assisted by Judy Parnell, a member service representative for Old Hickory Credit Union. Ms. Parnell completed the terms of the CDs, and her signature appears in the "Authorized Signature" line on each of the certificates. The "Purchaser's Signature" line, however, was left blank on all three certificates. The face of each CD contains the name of one of the defendants followed by a virgule ("/") and the name of the deceased. The face of each certificate also lists the address of Mr. Payne and the social security number of the respective defendant. The three CDs are completed as follows:

Automatic Renewable Certificate of Deposit
 Old Hickory Credit Union - 1000 Industrial Road
 Old Hickory, TN 37138

To: William D'Shiell Fisher/ D. Payne Certificate Number: FI-1
 Term: 18 Month Address: 800
Elliston Street At Maturity: \$20,000.00 Old Hickory,
TN 37138 Issue Date: 12-17-92 Social Securiry Number:
[Redacted] Maturity Date: 6-16-94
 * * * *

Automatic Renewable Certificate of Deposit
 Old Hickory Credit Union - 1000 Industrial Road
 Old Hickory, TN 37138

To: Kenneth Fisher/ D. Payne Certificate Number: FI-1
 Term: 18 Month Address: 800
Elliston Street At Maturity: \$20,000.00 Old Hickory,
TN 37138 Issue Date: 12-17-92 Social Securiry Number:
[Redacted] Maturity Date: 6-16-94
 * * * *

Automatic Renewable Certificate of Deposit
 Old Hickory Credit Union - 1000 Industrial Road
 Old Hickory, TN 37138

To: Susan Fisher/ D. Payne Certificate Number: FI-1
 Term: 18 Month Address: 800
Elliston Street At Maturity: \$20,000.00 Old Hickory,
TN 37138 Issue Date: 12-17-92 Social Securiry Number:
[Redacted] Maturity Date: 6-16-94

_____The face of each CD also contained the following provision: "THIS CERTIFICATE IS SUBJECT TO THE PROVISIONS OF THE REVERSE SIDE." The reverse

side of each CD provides:

Additional Provisions

1. If this Certificate (which term refers both to this instrument and to the deposit it represents) is payable in the alternative (that is, in the form "Member A or Member B"); unless otherwise expressly stated on its face: The payees shall be deemed joint tenants with right of survivorship (or, if husband and wife, tenants by the entirety); this Certificate may be paid to any payee, and may be assigned by any payee as collateral security to the issuer without prior notice to, or consent from, any other payee.

2. If this Certificate is not payable in the alternative (that is, if it is payable in the form, "Member A and Member B:[']") and unless otherwise expressly stated on its face payee [sic] shall be deemed tenants in common without right of survivorship, except that if the payees are husband and wife they shall be deemed tenants by the entirety.

The appellant alleges that the decedent kept possession of the CDs at all times, and that he kept all interest earned by the CDs. The decedent died on September 4, 1993. On June 15, 1994, the estate brought this action seeking a declaration that the estate is the owner of the three certificates of deposit. The estate maintains that although the appellees were joint tenants with the decedent, they had no survivorship interest in the CDs. The estate contends that the information on the front of the CDs is insufficient to create a right of survivorship as a matter of law, and that the decedent had no intention of creating a right of survivorship. The appellees, on the other hand, contend the information on the front of the CDs created a joint tenancy with right of survivorship.

In its September 29, 1995 order, the trial court ruled that the virgule is to be read as "or," meaning that the certificates of deposit were payable in the alternative and, therefore, the CDs are the property of the respective defendants.

Due to the irregularity of the proceedings in this case and the incomplete record, this Court is compelled to vacate the judgment entered and remand this case for further proceedings. If, in fact, the certificates of deposit were prepared by and under the direction of the bank employee, the use of the virgule in place of the words "and" or "or," as the case may be, should be explained in order to correctly interpret the instruments in question. For instance, proof could be introduced as to whether the use of the virgule by the bank constitutes "substantially similar language" to a designation of joint tenants with the right of survivorship. See T.C.A. § 45-2-703 (e)(1).²

²T.C.A. § 45-2-703 provides in pertinent part:

45-2-703. Deposits in two or more names - Multiple-party deposit accounts. - (a) When a deposit has been made or shall hereafter be made, in any bank, in the names of two (2) or more persons, payable to either, or survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of such persons, whether the others be living or not; and the receipt or acquittance of such person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made. Any balance so created, including, without limitation, any balance held by spouses, shall be subject to assignment by, or the claim of any creditor of, either depositor, as if such depositor were the sole owner of the funds; provided, that if such creditor realizes its claim by any means other than enforcement of an assignment, pledge, or the grant of a security interest made by any one (1) of such depositors, any other depositor not indebted to the creditor may, by commencing a separate action against the creditor, establish such rights as that depositor may have in the funds.

* * *

(d)(1) When opening a multiple-party deposit account, or amending an existing deposit account so as to create a multiple-party deposit account, each bank shall utilize account documents which enable the depositor to designate ownership interest therein in terms substantially similar to the following:

- (A) Joint tenants with right of survivorship;
- (B) Additional authorized signatory; and
- (C) Such other deposit designation as may be acceptable to the bank.

In view of the inadequacy of the record before us, the judgment of the trial court is vacated, and this case is remanded to the trial court for trial on the

(2) Account documents which enable the depositor to indicate the depositor's intent of the ownership interest in any multiple-party deposit account may include any of the following:

- (A) The signature card;
- (B) The deposit agreement;
- (C) A certificate of deposit;
- (D) A document confirming purchase of a certificate of deposit; or
- (E) Such other document provided by the bank or deposit institution which indicates the intent of the depositor.

(e) Accounts described in subsection (c) shall establish the following interests:

(1) A designation of "joint tenants with right of survivorship," or **substantially similar language**, shall be conclusive evidence in any action or proceeding of the intentions of all named that title vests in the survivorship;

(2) The designation of a person as "additional authorized signatory," or substantially similar language, shall be conclusive evidence in any action or proceeding that the person so designated has power of attorney with respect to such account and is not an owner of such account;

(3) Other designations acceptable to the bank shall establish interests in accordance with their respective provisions; and

(4) In the absence of any specific designation in accordance with subsection (d), property held under the title, tenancy by the entireties, carries a right of survivorship; property held under the title, joint tenancy, carries no right of survivorship unless a contrary intention is expressly stated. Any other person to whose order the accounts or certificate of deposit is subject shall be presumed to have power of attorney with respect thereto and not to be an owner thereof. Such presumptions may be rebutted by clear and convincing evidence presented in the course of legal or equitable proceedings. Final judicial determinations contrary to such presumptions shall not affect a bank's earlier payment in accordance therewith, or the limitations on liability conferred by the provisions of subsections (a) and (b) or § 45-2-707.

Id. (emphasis supplied).

merits. Costs of appeal are assessed one-half to appellant and one-half to appellees.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

HOLLY KIRBY LILLARD, JUDGE

WILLIAM C. KOCH, JR., JUDGE