

1989

In the Matter of the Estate of Walter F. Wolfinger v. : Brief of Appellee

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

CKET NO. 89-0323

In the Matter of the Estate of)	
)	Case No. 890323-CA
WALTER F. WOLFINGER,)	
)	Priority No. 14b
Deceased.)	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY
STATE OF UTAH

THE HONORABLE JUDGE J. PHILIP EVES

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Claimant/Appellant

DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

FILED

SEP 27 1989

COURT OF APPEALS

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BRIEF OF RESPONDENT

JURISDICTION OF THE COURT OF APPEALS

This Court has appellant jurisdiction pursuant to Utah Code Ann. Section 78-2a-3(2)(h). The appeal was originally filed with the Utah Supreme Court, but was transferred to this Court on May 19, 1989.

NATURE OF THE PROCEEDINGS

This is an appeal of the trial court's Judgment. The trial proceeded on stipulated facts and the parties submitted memorandums in support of their respective positions.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ON APPEAL

The issues presented for review on appeal are as follows:

1. Did the lower Court error in determining that the proceeds from the \$30,000.00 Promissory Note should not be delivered to the appellant.

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES AND RULES

The Respondent relies to some extent on the following statutes

which are set forth in the Addendum:

Utah Code Ann.	Section 75-6-101
Utah Code Ann.	Section 75-6-102
Utah Code Ann.	Section 75-6-103
Utah Code Ann.	Section 75-6-104
Utah Code Ann.	Section 75-6-105
Utah Code Ann.	Section 75-6-106
Utah Code Ann.	Section 75-6-107
Utah Code Ann.	Section 75-6-108
Utah Code Ann.	Section 75-6-109
Utah Code Ann.	Section 75-6-110

Appellant does not rely on any constitutional provisions, ordinances or rules.

STATEMENT OF THE CASE

Susan Wolfinger (hereafter Susan) is the daughter of the decedent, Walter F. Wolfinger (hereafter Mr. Wolfinger). Mr. Wolfinger maintained several accounts with a company known as NEFCO Finance Company (hereafter NEFCO). These accounts were evidenced by certain promissory notes from NEFCO to Mr. Wolfinger.

At the time Mr. Wolfinger died on December 6, 1984, he had several accounts which were in his name alone and one account which was in his name and the name of his daughter Susan. That account was for \$10,000.00 and Judge J. Philip Eves entered an Order granting that amount to Susan. The Judge thereafter ruled that she was not entitled to the proceeds of a certain \$30,000.00 note which her name was not on.

The stipulated evidence concluded that Susans name was not on the \$30,000.00 promissory note at the time of Mr. Wolfingers death and certain renewal notes were never located and the parties did not know whether Susan's name appeared on any of the missing notes

during Mr. Wolfingers lifetime.

SUMMARY OF ARGUMENT

The trial court correctly ruled that, at the time of his death, Mr. Wolfinger did not have a joint account with Susan for \$30,000.00.

ARGUMENT

POINT I

AT THE TIME OF THE DEATH OF MR. WOLFINGER HE DID NOT HAVE A JOINT ACCOUNT WITH SUSAN WOLFINGER A/K/A/ SUSAN BOYLES FOR \$30,000.00 AND THEREFORE SHE WAS NOT ENTITLED TO THE PROCEEDS OF THAT ACCOUNT AT HIS DEATH.

The trial Court determined, from the stipulated facts, that Mr. Wolfinger instructed NEFCO to place Susans name on the note as a joint payee and then instructed NEFCO to take her name off the note as a joint payee. There was no evidence that her name was actually placed on the note and taken off the promissory note. The notes issued on December 14, 1983, June 14, 1984 and December 14, 1984 were not found and the note which was in effect at the time of Mr. Wolfingers death was in his name alone and was issued to him on June 14, 1985.

The Appellant contends that the stipulated facts determined that a joint account was created and that Susans name could not be taken off that account without written notice to the financial institution. This position does not seem viable when viewed in light of all of the statutes set forth under the heading Multi-party Accounts, Sections 75-6-101 through 75-6-115, Utah Code Ann. 1953 (as amended).

Section 75-6-103 provides that a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. The evidence before this Court is that the account belonged to Mr. Wolfinger during his lifetime, whether it was a joint account or otherwise. That Section (75-6-103) also provides that a P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees. In this case, Mr. Wolfinger was the original payee and the \$30,000.00 amount belonged to him and he could renew the promissory notes as he choose.

Section 75-6-104 provides that sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created. In this case the account was changed prior to the death of Mr. Wolfinger so there is no right of survivorship under Section 75-6-104.

Section 75-6-105 provides that the rights of survivorship are determined by the form of the account at the death of a party. The form of the account in this case is attached to the stipulated facts as "Exhibit A" and appears to be a promissory note signed by NEFCO in favor of Walt Wolfinger for the sum of \$30,000.00 which is due on demand ninety (90) days or six (6) months. The section provides that the terms of this account must be changed by written order or the survivorship will stay as it is on the death of the

original payee. This can only mean that Mr. Wolfinger, in order to change the terms of a document, must have submitted a writing to NEFCO telling them what changes he wanted on this document. To find otherwise would mean that the original payee is not really the owner of a joint account during his life time as provided in Section 75-6-103. To find otherwise would mean that the financial institution could not pay the P.O.D. account as provided in Sections 75-6-108, 75-6-109 and 75-6-110.

It is apparent that Mr. Wolfinger intended to take the name of Susan Boyles from the account, if it was ever placed on the account, and that she did not have a right of survivorship under Section 75-6-104, which provides that sums remaining on deposit at the death of a party to a joint account belong to the surviving party unless there is clear and convincing evidence of a different intention at the time the account is created. It is apparent that Mr. Wolfinger did not intend to make Susan a co-owner of any of the accounts during his lifetime because he treated the promissory notes as his own and they were paid to him or renewed every six (6) months as presumed.

Common law in the State of Utah supports the right of survivorship doctrine set forth in Section 75-6-104. In OBradovich v. Walker Brothers Bankers, 16 P.2d 212 (Utah 1932), the Court stated that the mere fact that a person deposits funds in the name of himself and another, without more, does not show either a gift or an intention to make another a joint owner of the fund. In this case there was no evidence that Mr. Wolfinger wanted to make Susan

a joint owner of the fund at the time of his death because she was not listed as a joint owner at that time. In First Security v. Burgi, 251 P.2d 279 (Utah 1952), cards were signed by father and son authorizing the bank to treat them as joint depositors. The Court held that the son would have to show more than his name on the account to be entitled to it on the death of his father. It was probably after this case that the legislature, with assistance from financial institutions, determined that the financial institution may make payments in a joint account, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded, (Section 75-6-108). This section does not require a written demand by a payee on a joint account. The legislature chose to leave a question of fact for the heirs and the estate if a different intention existed at the time the account was created, other than a joint account.

The provision upon which Appellants rely, Section 75-6-105 was intended by the legislature to protect the financial institution so that the institution could pay anyone who was on the joint account unless there was a writing that altered the form of the instrument created. In the instant case there are no joint payees and therefore, Section 75-6-105 does not apply.

It appears to be well settled law in Utah that complete unconditional delivery and acceptance is essential to the validity of a gift. In Helper State Bank v. Cruz, 81 P.2d 359 (Utah 1938), the Court recognized that in order to consummate a gift, the donor

must surrender to the donee all control over the property. In this case Mr. Wolfinger probably did not tell Susan that her name was or was not on any of the promissory notes. The stipulated facts do not include any evidence of delivery of any of the promissory notes to Susan. This should be clear and convincing evidence that Mr. Wolfinger did not intend to create a joint account at the time this or any of the promissory notes were negotiated with NEFCO.

In Christensen v. Ogden State Bank, 286 P. 638 (Utah 1930) the Court reasoned that a mere intention to make a gift to take affect during the life of the donor is not sufficient to pass away title either legal or equitable. In this case legal title did not pass to Susan and therefore, there was no reason for Mr. Wolfinger to present any of the promissory notes to Susan for her approval or disapproval during his lifetime.

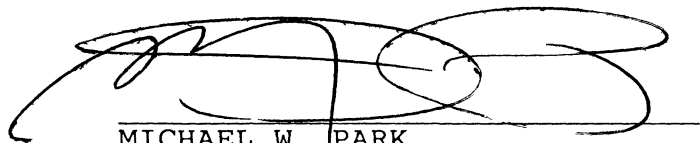
CONCLUSION

Section 75-6-101 provides that a joint account means an account payable, upon request, to two parties whether or not mention is made of any right of survivorship. Section 75-6-108 provides that financial institutions may enter into multi-party accounts to the same extent that they enter into single party accounts and any multi-party account may be paid on request to any one or more of the parties. Section 75-6-109 provides that any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded. Section 75-6-110 states that a financial institution may make payment, on request,

to any original party to the account. These sections do not require Mr. Wolfinger to gain the approval of Susan for payment if she is a joint payee, nor do they require Mr. Wolfinger to provide a writing to the financial institution when he renewed the notes and was paid the interest. What the financial institution is required to do or what they chose to do is take back the promissory note and when the promissory note is delivered they either make payment or renew it. They do not require a writing unless that promissory note is not being paid or renewed but is being altered.

RESPECTFULLY SUBMITTED this 25th day of September, 1989.

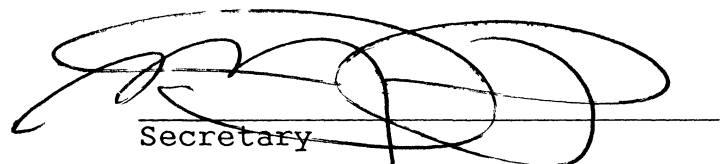
THE PARK FIRM,



MICHAEL W. PARK
Attorneys for Respondents

CERTIFICATE OF HAND-DELIVERY

I do hereby certify that on the 25th day of September, 1989, I hand delivered four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT, to Colin R. Winchester, CHAMBERLAIN & HIGBEE, 250 South Main Street, Cedar City, Utah 84720.



Secretary

ADDENDUM

As used in this part

(1) "Account" means a contract of deposit of funds between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement

(2) "Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee

(3) "Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, industrial loan corporations with thrift certificate authorization, savings banks, building and loan associations, savings and loan companies or associations, and credit unions

(4) "Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship

(5) "Multiple-party account" means any of the following types of account (a) a joint account, (b) a P O D account, or (c) a trust account It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or a regular fiduciary or trust account where the relationship is established other than by deposit agreement

(6) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits to it made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a prorata share of any interest or dividends included in the current balance The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question

(7) "Party" means a person, including a minor, who, by the terms of the account, has a present

right, subject to request, to payment from a multiple party account A P O D payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee and includes a guardian, conservator, personal representative, or assignee, including an attaching creditor, of a party It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal

(8) "Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any setoff, reduction, or other disposition of all or part of an account pursuant to a pledge

(9) "Proof of death" includes a death certificate or record or report which is prima facie proof of death under Section 75-1-107

(10) "P O D account" means an account payable on request to one person during lifetime and on his death to one or more P O D payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P O D payees

(11) "P O D payee" means a person designated on a P O D account as one to whom the account is payable on request after the death of one or more persons

(12) "Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution, but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal

(13) "Sums on deposit" means the balance payable on a multiple-party account, including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party

(14) "Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account, and it is not essential that payment to the beneficiary be mentioned in the deposit agreement A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client

(15) "Withdrawal" includes payment to a third person pursuant to check or other directive of a party

75-6-102. Ownership as between parties, and others — Protection of financial institutions.

The provisions of Sections 75-6-103 through 75-6-105 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant

only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of Sections 75-6-108 through 75-6-113 govern the liability of financial institutions who make payments pursuant thereto, and their setoff rights. 1975

75-6-103. Ownership during lifetime.

(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(2) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by Subsection (1) of this section.

(3) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by Subsection (1) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

(1) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 75-6-103 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

(2) If the account is a P.O.D. account:

(a) On death of one of two or more original payees the rights to any sums remaining on deposit are governed by Subsection (1);

(b) On death of the sole original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee; if two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(3) If the account is a trust account:

(a) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by Subsection (1);

(b) On death of the sole trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear evidence of a contrary intent; and if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the ac-

count or deposit agreement expressly provide for survivorship between them.

(4) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

(5) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D.

75-6-105. Effect of written notice to financial institution.

The provisions of Section 75-6-104 as to rights of survivorship are determined by the form of the account at the death of a party. This form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime.

1975

75-6-106. Accounts and transfers nontestamentary.

Any transfers resulting from the application of Section 75-6-104 are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to Chapters 1 through 4 of this code, except as provided in Sections 75-2-201 through 75-2-207, and except as a consequence of, and to the extent directed by, Sections 75-6-107 and 75-3-916.

1977

75-6-107. Rights of creditors.

No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to his personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor, or one acting for a minor or dependent child of the decedent; and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof or make it liable to the estate of a deceased party unless before payment the institution has been served with process in a proceeding by the personal representative.

1975

**75-6-108. Financial institution protection —
Payment on signature of one party.**

Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for

deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

1975

75-6-109. Financial institution protection —
Payment after death or disability —
Joint account.

Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under Section 75-6-104. 1975

**75-6-110. Financial institution protection —
Payment of P.O.D. account.**

Any P.O.D. account may be paid, on request, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

1975

\$30,000.00

10969

Cedar City, Utah June 14, 1985, 19

.....after date, for value received, I, we, or either
promise to pay to the order of ***Walt Wolfinger***

.....
the sum of **Thirty thousand and no/100***** DOLL
negotiable and payable at 920 No. Main Cedar City, Ut

.....for 6 mos.
in legal tender of the United States of America, with interest at the rate of *9.60%/.....per cent per ann
from date until maturity, and at a rate of 10 per cent per annum after maturity until paid, and if this
be placed in the hands of an attorney for collection, I, we, or either of us promise to pay a reasonable at
ney's fee. The makers, sureties, guarantors and endorsers hereof severally waive presentment for paym
protest, notice of protest and on non payment of this note. If the interest on this note is not paid prom
at the time it becomes due, the holder of this note may, at his option, declare the principle immediately
and payable.

P. O. Address

NEFCO: *B. H. Banta*

Due on demand 90 days

WITNESS: *Billy Banta*