NO. A09-1208

State of Minnesota
In Supreme Court

Maureen Kissack,

Appellant,

vs.

Sheila M. Montognese, Bridget Beaudry, Lori France, Sandra Taverna, John Sandahl, and Steven Sandahl,

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. ONLY EVIDENCE OF INTENTION IS RELEVANT UNDER MINN. STAT. § 524.6-204(a).

Judge Johnson opined below that Respondents produced no evidence of Butler's intention with regard to the disposition of the CDs upon his death. This is the crux of Appellant's argument, grounded in the plain language of § 524.6-204(a), which requires evidence of intention to rebut the applicable presumption. The Court's task is thus to decide what sort of evidence constitutes evidence of intention, or bears on a decedent's intention in establishing a joint account, as contemplated by the statute. The authorities make clear that the evidence relied upon by Respondents is simply not evidence *of* Butler's intention.

A. Evidence Of Intention Is That Which Directly Bears Upon The Decedent's Intention.

The case law previously cited by Appellant strongly suggests that proving a decedent's intention requires evidence of specific statements and conduct of the decedent that illuminate his or her intention. The case law also suggests that to bear on a decedent's intention the evidence must arise contemporaneously with formation of the intention or sometime thereafter. Only evidence that actually bears directly on what the decedent's intention was at the time of joint account creation is relevant. Respondents attempt to attack this line of reasoning by citing

to, for instance, the appellate court's reliance on the decedent's will in *Spiess v. Schumm*, 448 N.W.2d 106 (Minn. Ct. App. 1989).

In *Spiess* the decedent made changes in his financial affairs due to an illness. *See id.* at 107. This included drafting a new will, immediately after which he set up a new bank account naming his friend as the joint account holder with a right of survivorship, and altered that portion of his new will dealing with trust accounts for his grandchildren by crossing it out and substituting, "Did at TCF 3/19/87." *See id.* Contemporaneously with these actions the decedent told his banker, after she explained to him the ramifications of the joint ownership designation, that she should "Put [his friend's] name on [the account], he will know what to do with it." Reliance on the will in *Spiess* is thus perfectly consistent with Appellant's construction of § 524.6-204(a) because it was executed and altered by hand contemporaneously with opening the joint account. The will was therefore evidence of the decedent's intention with respect to the joint account's disposition, and thus competent evidence under § 524.6-204(a).

In *Hopper v. Rech*, 375 N.W.2d 538 (Minn. Ct. App. 1985), the Court of Appeals did indeed consider a will executed some years prior to the establishment of the joint accounts. *See id.* at 542. It determined that the will reflected the decedent's intent to give the joint account holder, who had cared for the decedent, a slightly larger share than he gave his other nieces, and that allowing the joint

account holder to keep the joint accounts would result in her receiving significantly more of the estate than what the will provided. *See id.* at 540-542. However, as more fully discussed in Appellant's initial memorandum, there was ample evidence actually of the decedent's intention indicating the joint accounts were set up for convenience and not to benefit the joint holder. To the extent the Court of Appeals actually considered the will and its provisions evidence of the decedent's intention with respect to disposition of the joint accounts, the Court erred while getting its overall ruling in the case correct in light of the substantial evidence present that actually was evidence of the decedent's intention regarding the joint accounts.

Reliance on Butler's will also runs contrary to the Legislature's intent, as it has directed that disposition of joint accounts may be altered by a will only if the account is specifically referred to in the will. *See* Minn. Stat. § 524.6-204(a). The Legislature's intent is that a will not be considered probative evidence of the decedent's intention respecting a joint account unless it contains such an express and specific reference. Holding that the will proves or helps prove a different intention is an end run around § 524.6-204(a). In accord with this analysis is a case cited by Respondents, *Estate of Miller*, 960 A.2d 1140 (Me. 2008).

Respondents cite *Estate of Miller* for the proposition that a joint savings account was returned to the decedent's estate on the basis of the decedent's will, etc. *See* Respondent's Memorandum at 21. In fact, the savings account at issue in

Estate of Miller was not returned to the decedent's estate at all; it was left with the named joint owner. *See id.* at 1145. Another statutory provision proscribed reliance on the will in establishing "the clear and convincing evidence of a different intention" required by the probate code. *Id.* at 1145. (construing 18-A M.R.S. 6-104(e) and relying on *Estate of Cormier*, 580 A.2d 157 (Me. 1990)). The same result is mandated, albeit by logical inference rather than explicit statutory language, by the "specifically referring to" language contained in § 524.6-204(a), such that unless this provision is satisfied by inclusion of the specific reference to the joint account the will is not probative of the decedent's intention.

A review of *Estate of Cormier*, cited in *Estate of Miller*, supports Appellant's argument that a will may constitute "evidence of a different intention" only if it specifically references the joint account at issue, as the *Cormier* court refers to the moment at which the account was created as the critical point: "[T]he record contains no evidence of any contrary intention existing at the critical point, namely, when the account was created. The court erred in relying on the will as clear and convincing evidence of a contrary intention." *Id.* at 158. Butler's will was executed some years prior to his purchase of the CDs, does not reference the CDs, and thus does not constitute evidence of his intention regarding the CDs.

The case law is consistent with logic as well because there simply can be no evidence of a person's intention in any respect until the intention is being formed.

Not until the intention begins to be formed can there exist evidence of what that intention is or was.

1. Case law applying gift theory helps define "evidence of intention."

In addition to those cases already cited by Appellant, cases involving gift theory, or more specifically those in which the intention of the donor is examined, are instructive as to what evidence actually bears on a decedent's intention pursuant to § 524.6-204(a). These cases are consistent with Appellant's argument.[1]

B. Respondents Misconstrue *Rutchick v. Salute.*

Respondents seem to argue that in *Rutchick v. Salute*, 179 N.W.2d 607 (Minn. 1970) the Court applied a presumption in favor of the joint owner of the savings certificate involved therein. *See* Respondents' Memorandum at 8-9. It therefore follows, according to Respondents, that because the evidence presented

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[1] *See, e.g., Zigan v. LeBlanc*, 254 N.W. 810 (Minn. 1934), where the "evidence of intention" included the fact the decedent was informed by bank personnel of the legal effect of naming someone a joint owner at the time he purchased the CDs, had voiced concerns over his daughter's financial condition and stated that he would see to it that she was taken care of, and had stated to his banker the purpose of naming his daughter the joint owner. *See id.* at 811-12. This is in line with *Rutchick*, which holds that evidence of intention is "fact evidence of words and conduct of the donor," and specifically, "conversations had by [the decedent] with any other persons as to his intent...," which evidenced the gift. 179 N.W.2d at 611. *See also Johnson v. Holst*, 86 Minn. 496, 90 N.W. 1115 (1902), which held that evidence of the decedent's intention included statements he had made prior to dying that he wanted some promissory notes returned to his wife's relatives, and that he had handed the notes to the relatives, one of whom marked two of the notes "Paid" in the decedent's presence.

in *Rutchick* was held to have rebutted the presumption, the same result here should be reached because the evidence is similar.

The fatal flaw in Respondents' argument is that while the *Rutchick* Court seems to hold that Minn. Stat. § 48.30 provided a presumption in favor of the joint owner, or more accurately, the donee, it directly contradicted the idea that it actually applied the presumption by holding that "the claimant's case [cannot] rest entirely upon the presumption where the essentials of the gift of the [certificate] [have] not been established." *Id.* at 611. The Court went on to hold, based on its prior cases, that:

> [A]n alleged donee in an action to determine ownership of a joint savings certificate or account possessed by the decedent donor must establish by competent evidence that the donor intended to create a present interest in the donee. In the face of countervailing evidence, the presumption is not dispositive of the issue. In those cases where the donee has prevailed, there was additional fact evidence of words and conduct of the donor which evidenced the gift.

Id.

These quotations make clear that, even though the Court spoke of a presumption in favor of the joint owner/donee, from a practical standpoint the Court ignored the presumption and placed the burden on the donee to produce some evidence in the form of "words and conduct of the donor which evidenced the gift." With the enactment of the MPAA, however, and its strong presumption in favor of the joint account owner, the decedent's mere selection of joint

ownership with survivorship rights is all the joint owner need prove. Here, because Respondents did not produce *any* evidence of Butler's intention, the presumption is unrebutted.

Also, as in *Rutchick*, Butler "[s]igning the signature card [is] the *only* act performed by him [] *bearing on his intention*," and there are "no conversations had by him with any other persons as to his intent to make a gift...." *Rutchick*, 179 N.W.2d at 611. (Italics added). Respondents' claim that the same factors present in *Rutchick* are also present here is therefore correct—Butler's decision to hold the CDs jointly with Appellant and have a right of survivorship is the "*only* act performed by him... *bearing on his intention*," and there is no evidence of "conversations had by him with any other persons as to his intent to make a gift," let alone his intent to not make a gift. Respondents' failure to produce any evidence bearing on Butler's intention means they failed to rebut the presumption in favor of Appellant who, unlike the nephew in *Rutchick*, can rest on the presumption alone without producing any further evidence of Butler's intention.

C. The Opinion Below Will Engender Significant Additional Litigation And Unsettled Expectations.

Respondents argue that the MPAA has been in force "for over thirty years without a flood of litigation," and therefore Appellant is wrong in predicting increased, unnecessary litigation. Respondents' Memorandum at 19. However, Appellant does not argue, as Respondents claim, that the language in the MPAA

itself will lead to a flood of litigation. Appellant's point is that now, after the opinion below has muddied the waters by essentially holding that "evidence of a different intention" includes all manner of things that, in fact, have no bearing on a decedent's intention, enterprising attorneys and litigants will be able to manufacture colorable claims that heretofore would have found no legal support.

This is also the view of Judge Johnson below, who expressed the concern that "the opinion of the court injects too much uncertainty into this area of the law and is likely to disrupt settled expectations." Of course, areas of the law where there is uncertainty are areas where attorneys certainly do not fear to tread; such areas invite litigation until the open questions are settled by the courts.

For instance, any time a decedent's will includes the same text as that of his or her deceased spouse, was executed at the same time, and distributes estate assets equally among siblings, the siblings will be armed with "evidence of a different intention" and be able to mount a good faith attack on a separate, non-probate disposition of the decedent's assets, such as a joint CD or other joint account.

Another example of how the opinion below encourages litigation to override a decedent's settled expectations is where the decedent treated all of his or children equally, but made a disposition of a non-probate asset to one or more via joint account to the exclusion of others. The argument will be that since the decedent

treated all his or her children equally and played no favorites, he or she could simply not have intended for the joint account to go only to the named joint owner.

One can also easily imagine a challenge being brought where the decedent used the funds held in a joint account to secure a loan used to purchase an asset later disposed of by his or her will. Citing to the opinion below, the argument will be that use of the jointly held asset as collateral on an estate asset is simply inconsistent with the decedent having the intention that the jointly held funds go solely to the named joint owner. This contention is nonsensical by itself, but is especially so when Butler's actual reasoning for using the CD—to get a lower interest rate and avoid a costly appraisal—is taken into account

These arguments would not have held water prior to the decision below, but armed with it, many more beneficiaries will have the factual and legal support to challenge the disposition of assets held in a joint account with right of survivorship. Rather than allowing this can of worms to remain open, this Court should use this case as a vehicle to make clear what the Legislature means by "evidence of a different intention."

D. The Court Should Define What Constitutes "Evidence Of A Different Intention."

The bright line rule suggested by Appellant may be more accurately described as some general guidance on what constitutes evidence of intention under § 524.6-204(a). Examples are set forth in the cases discussed in the previous

memorandum, e.g., contemporaneous or subsequent statements of the decedent, lack of knowledge in the decedent of the ramifications of choosing a joint account at the time it is opened or thereafter, evidence that the account was opened for the purpose of convenience due to the decedent's frailty of mind or body, or that the account was opened by the named joint owner at the decedent's insistence.

Whether one refers to evidence of intention as "evidence of actual intention," as Judge Johnson does, or "actual evidence of intention," or uses some other phrase, the result is the same. The evidence must illuminate what the decedent had in his or her mind at the time the joint account was opened. This is where Respondents' evidence fails.

Respondents' suggestion that evidence coming into existence long after the joint account is created may bear on what the decedent's intention was in opting for the joint ownership with right of survivorship is correct. To the extent Appellant's first memorandum can be read to suggest otherwise Appellant stands corrected.

It is not difficult to imagine such evidence existing. For example, if for several years after Butler purchased the CDs he had told no one about them or why he opted for joint ownership, but then one day told someone that he had put them in his and Appellant's name so they could be divided between the siblings immediately upon his death, such statement would qualify as "evidence of

intention" with respect to disposition of the CDs. The proper inquiry is whether it illuminates what Butler's intention was when he bought the CDs, i.e., it is evidence of intention. This does not help Respondents, however, because they have no such evidence to rely on.

II. RESPONDENTS' ARGUMENTS AS A WHOLE ARE FLAWED AND UNCONVINCING.

In their Memorandum Respondents make numerous arguments that miscast Appellant's arguments and/or misstate the law.

A. The Trial Court's Initial Ruling Does Not Buttress Respondents' Case.

Respondents take the position that the trial court's initial ruling on the disposition of the CDs in favor of the estate bolsters its case. To the contrary, given the trial court's misapplication of the law its ruling is of no relevance. Further, when the first hearing on Respondents' petition was held there was no request then before the trial court to recharacterize the CDs as estate assets, such that Appellant was not prepared to try that issue and any findings stemming from this hearing are therefore inherently unreliable. The trial court found as much when it granted a jury trial on this issue.

B. Appellant's Reference To The CDs As "Dad's accounts" Is Of No Probative Value.

Respondents also argue that Appellant's referral to the CDs as "Dad's accounts," and failure to retain them for herself until informed of her right to do so

by an attorney is somehow proof of Butler's intention. This claim lacks any merit. First, Appellant is not versed in the vagaries of probate law and thus her assumption that the CDs belonged to her father, even after his death, is one that every lay person would probably make. Second, Appellant had not been aware of the CDs' existence prior to Butler's death and so referring to them as "Dad's accounts" does not constitute evidence that she somehow knew they were not intended to become her property alone, as was apparent in other cases where the joint account owner's referred to the joint account as the property of the decedent, and wanted to or did deliver the proceeds to the estate because they had prior knowledge of the account and the decedent's intention as to its disposition.[2]

Here, Appellant could not possibly have any knowledge of Butler's intention because she, like her siblings, was completely ignorant of the CDs' existence. Therefore, calling the CDs "Dad's accounts," and not seeking their sole ownership until being advised by an attorney of her right to do so, cannot be indicative of any preexisting knowledge of Butler's intention. Respondent's apparent assertion to the contrary is therefore erroneous.

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[2] *See, e.g., Spiess*, 448 N.W.2d 106 (holding that, in light of other consistent evidence, joint owner's expressed desire to distribute the funds to the decedent's beneficiaries was evidence that he knew the decedent had intended to have him do just that).

C. Appellant Has Not Waived Her Argument Regarding Admission Of Relevant Evidence.

Respondents assert that Appellant waived her argument that the only relevant evidence of Butler's intention would be that evidence arising at the time of the account's creation. Appellant has done nothing of the sort, and in any event does not make the claim that evidence coming into existence after the CDs were purchased cannot be probative of Butler's intention.

D. Butler's Use Of A CD To Secure A Home Loan Is Not Evidence Of His Intention.

Respondents claim that Butler's use of one of the CDs to secure a loan on his home is evidence of his intention. *See id.* This argument lacks merit. First, Butler's reasoning for using the CD as collateral was explained by his banker, who testified that Butler was offered several options for collateralization of a loan he was taking out and chose to use the CD because this gave him the best interest rate and no expense for an appraisal. Moreover, at the time Butler collateralized the CD it was 100% his to do with as he saw fit. Appellant had not contributed to it, and because these funds belonged to the account owners in proportion to their contributions it belonged totally to Butler. His use of the CD to secure a loan on any asset, let alone an estate asset, is of absolutely zero probative value in determining Butler's intention regarding ultimate disposition of the CDs, let alone providing clear and convincing evidence of same.

CONCLUSION

The evidence relied on by Respondents simply does not constitute evidence of Butler's intention regarding the CDs. Respondents' failure to muster such evidence required a directed verdict as there was no evidentiary basis for the jury to conclude Butler had a different intention. The jury's finding that there was such evidence, and that it met the clear and convincing standard, is completely without support in the record. Accordingly, the opinion of the Court of Appeals should be reversed and judgment as a matter of law should be entered in favor of Appellant.

Dated: Oct. 21, 2010

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