SURVIVOR CAN DISCLAIM BENEFITS OF JOINT AND SURVIVORSHIP PROPERTIES

In Re Estate of Krakoff
87 Ohio L. Abs. 387, 179 N.E.2d 566 (P. Ct. 1961)

Krakoff died leaving his wife the surviving joint tenant of eight joint and survivorship savings accounts and stock certificates issued by five different corporations. The survivor disclaimed her interest in the properties and requested that they be administered as part of her husband's estate. The Franklin County Probate Court permitted the disclaimer and stated that the properties were thus probate assets *ab initio*.

The issue presented by this case had not previously been decided in Ohio. The court relied on comparable renunciations that have been allowed in other areas to arrive at its holding. The right of a third party beneficiary of a contract to renounce the benefits of an arrangement made in his favor was a major consideration in the court's decision.[1] Since Ohio does not recognize the common law joint estate and its incident of survivorship,[2] the joint and survivorship bank account can exist only under a contract theory.[3] The agreement, which exists between the depositor and the bank, provides that the latter will pay the account to the survivor of the depositors or a third party. The third party may be called the beneficiary of the contract between the depositor and the bank. Since the third party beneficiary of a contract can disclaim, it follows that a similar right exists in the survivor of a joint and survivorship account because her rights are also based upon a contract.

The court supported its position by citing other permissible renunciations in the property area as well as in the contract field. The donee of a gift of personalty has the right to refuse it, and the disclaimer effects a return of the gift to the donor.[4] Likewise, the grantee of realty can disclaim and thereby defeat the grant,[5] and the beneficiary of a trust can refuse to accept

[1] Rohrbacker v. Citizens Bldg. Ass'n, 138 Ohio St. 273, 34 N.E.2d 751 (1941); Trimble v. Strother, 25 Ohio St. 378 (1874).

[2] Wilson & Marsh v. Fleming, 13 Ohio 68 (1844); Sargent v. Steinberger, 2 Ohio 305 (1827); Martin, "The Incident of Survivorship in Ohio," 3 Ohio St. L.J. 48 (1936). *But see* Cleaver v. Long, 69 Ohio L. Abs. 488, 126 N.E.2d 479 (C.P. 1955).

[3] Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636 (1940); Sage v. Flueck, 132 Ohio St. 377, 7 N.E.2d 802 (1937); Cleveland Trust Co. v. Scobie, 114 Ohio St. 241, 151 N.E. 373 (1926); *In re* Estate of Copeland, 74 Ohio App. 164, 58 N.E.2d 64 (1943); Arthur v. Wittmeyer, 39 Ohio L. Abs. 505, 53 N.E.2d 915 (Ct. App. 1943); *In re* Schroeder, 75 Ohio L. Abs. 555, 144 N.E.2d 512 (P. Ct. 1957); Ohio Rev. Code § 1105.09 (1954); Atkinson, Wills ¶ 40 (2d Ed. 1953); 4 Corbin, Contracts § 783 (1951); 1 Page, Wills § 6.18 (4th Ed. 1960).

[4] Streeper v. Myers, 132 Ohio St. 322, 7 N.E.2d 554 (1937); McCoy v. Gosser, 8 Ohio App. 145 (1917).

[5] Lessee of Mitchell v. Ryan, 3 Ohio St. 377 (1855); Adams v. Adams, 107 Ohio App. 1, 150 N.E.2d 81 (1958); McDevitt v. Morrow, 57 Ohio L. Abs. 281, 94 N.E.2d 2

the proceeds designated for him.[6] Under Ohio statutory and case law, a devisee or legatee of a will may refuse a devise or legacy in his favor.[7] Ohio Revised Code section 2113.60 provides that in the absence of a residuary clause, the property disclaimed by the devisee or legatee shall pass in accordance with the statute of descent and distribution. While disclaimer is permitted as a general rule, a renunciation of property passing by operation of law cannot be made under the common law, but a recent Ohio statute permits such disclaimer.[8]

Since the surviving spouse disclaimed her interest in the joint and survivorship property, the problem of the property's devolution arose. The joint and survivorship accounts and stock certificates were nonprobate assets and therefore were not to be considered as part of the decedent's estate.[9] The rights to this property were fixed by a contract, which created an interest in the survivor when made. This interest is conditioned on her outliving the depositor and if such condition is met, her right to the property vests at his death. Hence, the assets in question would pass directly to the survivor if a disclaimer had not been made. After giving effect to the disclaimer, the court decided that the properties were probate assets *ab initio* and would pass as though the decedent had made no survivorship contract. The property passed under the statute of descent and distribution because no residuary clause appeared in the will.[10] In effect, a direct transfer of part of the joint and survivorship property was made from the decedent to his children.[11]

(Ct. App. 1950); *In re* Estate of Ketterer, 78 Ohio L. Abs. 204, 152 N.E.2d 178 (P. Ct. 1956).

[6] Erman v. Erman, 101 Ohio App. 245, 136 N.E.2d 385 (1956).

[7] Whigam v. Bannon, 21 Ohio App. 496, 153 N.E. 252 (1926); Ohio Rev. Code § 2113.60 (1954).

[8] A recent Ohio statute allows any competent adult to renounce his interest in an intestate succession by filing a written statement of renunciation with the probate court within sixty days after notice of the hearing on inventory of the intestate's property has been given. "Any property renounced pursuant to this section shall be distributed as provided by law as if such competent adult had predeceased such decedent." Ohio Rev. Code § 2105.061 (1961). See also Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir. 1952); Wallace v. McMicken, 13 Ohio Dec. Reprint 345 (Super. Ct. Cincinnati 1859); Annot., 170 A.L.R. 435, 436 (1947): "According to the common law, title to the property of one who dies intestate passes by force of the rules of law and no voluntary act on the part of the decedent former owner or of the subsequent owner who takes by intestate succession is of any legal significance. In conformity with this legal theory, it has been held . . . that the person who takes by intestate succession has no power to prevent the passage of title to himself by renunciation."

[9] Berberick v. Courtade, *supra* note 3; Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935); Tax Comm'n of Ohio v. Hutchison, 120 Ohio St. 361, 166 N.E. 352 (1929); Cleveland Trust Co. v. Scobie, *supra* note 3; Lambert v. Lambert, 95 Ohio App. 187, 118 N.E.2d 545 (1953); *In re* Estate of Copeland, *supra* note 3; *In re* Estate of Shangle, 32 Ohio L. Rep. 185 (Ct. App. 1930); *In re* Schroeder, *supra* note 3; Boehm, "Death and Taxes I," 22 Ohio St. L.J. 327 (1961).

[10] Whigam v. Bannon, *supra* note 7; Ohio Rev. Code §§ 2105.06, 2113.60 (1954).

[11] Ohio Rev. Code § 2105.06: "(b) If there is a spouse and one child or its lineal

The allowance of disclaimer by the court can be readily accepted, but one might inquire into the reason behind the survivor's desire to disclaim the property. The answer lies in the tax advantages to be gained. The wife's motive appears to be to effect a transfer of property to her children while avoiding both Federal Estate and Gift Tax consequences and reducing her taxable estate at death. If she had not disclaimed, her husband's estate would include the joint and survivorship properties for Federal Estate Tax purposes and would be liable for the amount of tax levied on this property.[12] Mrs. Krakoff would be liable for the Ohio Inheritance Tax on the property, based upon one-half the total value of this property.[13] Also, at Mrs. Krakoff's death, her estate would include these properties for Federal Estate Tax purposes and her heirs would be liable for the Ohio Inheritance Tax based upon the full value of the property.[14] The joint and survivorship property, in effect, would have to pass through two estates.

The avoidance of tax liabilities brought about by the use of disclaimer are substantial in this situation. Since the wife has renounced, the properties in part will pass from the decedent's estate directly to his children. The resulting tax consequences include only a Federal Estate Tax charge on the decedent's estate[15] and the Ohio Inheritance Tax levied upon the full value of the property, which is taxable to the children.[16] By her refusal to accept the properties, the spouse has thus avoided payment of a Federal Estate Tax on most of the property at *her* death and has lessened the burden of the Ohio Inheritance Tax at present.[17] She has thus cut the amount of tax liability approximately in half.

If the survivor had accepted the property and attempted to make an *inter vivos* gift of the property to her children, the Federal Gift Tax might well be applicable.[18] However, it does not appear that the transfer accomplished in the case could be treated as a gift from the survivor to her children for Federal Gift Tax purposes. The Gift Tax assumes that the property is the donor's to give, but this is not the case here. There was no actual acceptance by the survivor; she had only an option to accept which she declined to exercise. Since she never acquired an interest in the property, she could not have the power to make a gift.[19]

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descendants surviving, one half to the spouse and one half to such child or its lineal descendants, per stirpes; (c) If there is a spouse and more than one child or their lineal descendants surviving, one third to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes."

[12] See Int. Rev. Code of 1954, §§ 2001, 2002, 2011, 2051, 2052.

[13] Tax Comm'n of Ohio v. Hutchison, *supra* note 9; Tax Comm'n v. Reeves, 11 Ohio L. Abs. 154 (Ct. App. 1931); *In re* Estate of Sawyer, 36 Ohio Op. 234, 75 N.E.2d 695 (P. Ct. 1947); *In re* Estate of Kirkham, 21 Ohio Op. 342, 6 Ohio Supp. 293 (P. Ct. 1941); Ohio Rev. Code § 5731.02(e) (1954).

[14] Ohio Rev. Code § 5731.02(a) (1954).

[15] See Int. Rev. Code of 1954, §§ 2001, 2002, 2011, 2051, 2052.

[16] Ohio Rev. Code § 5731.02(a) (1954).

[17] Ohio Rev. Code § 5731.02(e) (1954).

[18] See Int. Rev. Code of 1954, §§ 2501, 2502, 2521, 2522.

[19] Gallagher v. Smith, 223 F.2d 218 (3d Cir. 1955); Brown v. Routzahn, 63 F.2d 914

The legal aspects of this disclaimer are interesting but certainly not startling. Similar devices have been used in many situations where benefits would otherwise pass either under property or contract theories. It follows that a renunciation in this case is proper since it applies essentially to a right created by contract. The real value of the case is its illustration of a possible use of disclaimer for tax avoidance purposes. The desire of the spouse was obviously to effect the transfer of these assets to her children. By disclaiming, she accomplished this purpose and reduced the tax consequences in the process.

(6th Cir. 1933); Tax Comm'n v. Glass, 119 Ohio St. 389, 164 N.E. 425 (1925); People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928); Kay, "Renunciations, Disclaimers and Releases," 35 Taxes 767 (1957); Rice, Family Tax Planning 878 (1960); Note, "Disclaimers in Federal Taxation," 63 Harv. L. Rev. 1047 (1950); Ohio Rev. Code § 2105.061 (1961).