

IN THE SUPREME COURT OF IOWA

NO. 22-1801

WAPELLO COUNTY NO. ESPR007828

IN THE MATTER OF THE ESTATE OF JOHN EUGENE JOHNSTON

PEGGY JOHNSTON, Appellant

Appeal from Wapello County Iowa District Court, Hon. Gregory Milani,
Judge, Eighth Judicial District

APPELLANT'S FINAL BRIEF AND ARGUMENT

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TABLE OF CASES AND AUTHORITIES

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Johnson v. Dodgen, 451 N.W.2d 168 (Iowa 1990)

Kettler v. Security Nat. Bk., 805 N.W.2d 817 (Iowa Ct. App. 2011)

O'Bryan v. Henry Carlson, 828 N.W.2d 326 (Iowa Ct App 2013)

Thomann, Estate of, 649 N.W.2d 1, Iowa 2002)

STATUTES:

Section 633.33, Code of Iowa

RULES:

Iowa R. App. P. 6.903

Iowa R.Elec. P. 6.100

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it presents the application of existing legal principles. This is consistent with the criteria stated in Rule 6.1101(3)(a) of the Iowa Rules of Appellate Procedure.

STATEMENT OF THE CASE

This matter arises from a claim in probate filed by the widow of the decedent claiming a fifty percent (50%) interest in jointly held bank accounts more than 50% of which were diverted by the decedent to joint accounts with the decedent's daughter who was not the daughter of the claimant. (App. P. 20)

The claim was timely filed, denied by the executor and trial was requested by the claimant. (App. P. 20-26) Trial came on pursuant to assignment by the court administrator.

The parties appeared for trial and the claimant presented evidence. At the close of claimant's evidence, executor's counsel made an oral motion for directed verdict and the court orally sustained the motion. (App. P. 29-30, P. 81 line 11- P.82 line 4) From the adverse ruling on the Motion for Directed Verdict, Notice of Appeal was timely filed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE 1: THE TRIAL COURT COMMITTED AN ERROR AT LAW BY STATING THAT A REASON TO SUSTAIN THE MOTION FOR DIRECTED VERDICT WAS THAT THE TRANSFER OF FUNDS FROM THE JOINT ACCOUNT WAS PART OF JOHN'S ESTATE PLAN.

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ISSUE 2: THE TRIAL COURT COMMITTED AN ERROR AT LAW BY STATING THAT A REASON TO SUSTAIN THE MOTION FOR DIRECTED VERDICT WAS THAT THE TRANSFER OF FUNDS FROM THE JOINT ACCOUNT WAS PART OF JOHN'S ESTATE PLAN

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ISSUE 4: THE TRIAL COURT ERRED IN SUSTAINING THE MOTION FOR DIRECTED VERDICT

Johnson v. Dodgen, 451 N.W.2d 168 (Iowa 1990)

O'Bryan v. Henry Carlson, 828 N.W.2d 326 (Iowa Ct App 2013)

STATUTES:

Section 633.33, Code of Iowa

STATEMENT OF FACTS

John Johnston (John) and Peggy Johnston (Peggy) were husband and wife and were together for over 43 years. (App. P. 54, line 21 –P. 55 line 9) John Johnston died March 11, 2018. (App. P. 56 line 3-6) John's will was admitted to probate on March 16, 2018 (App P. 4, App P. 5-7, App. P. 8-9). John's will gave nothing to his wife and divided all of his assets among his three daughters of a different marriage. (App. P. 5-7) John and Peggy had two bank accounts for a long time, a checking account and a savings account. The accounts were held as joint tenants with right of survivorship. (App. P. 57 line11- P. 58 line 15)

Both John and Peggy wrote checks and made deposits to the

accounts. The kept a modest amount in the checking account and kept the majority of their cash in the savings account and would move money from the savings to the checking to pay bills and to make investments. (App. P. 58 line 16 – P. 59 line 11) Later in the marriage, John began to withdraw money from the savings accounts and not tell Peggy. Initially Peggy would find out about the withdrawals from the bank statements, but before his death, John began to intercept the bank statements. John told Peggy that he would do what he wanted to do with the funds and not tell Peggy. (App P. 60 line 6 –P 61 line 2)

In 2015, John began to become more secretive about financial decisions. (App. P. 61 line 8-11) In 2017, John made a new will leaving Peggy out entirely. Peggy was not involved in any discussions regarding the will. (App. P. 62 line 20 – P. 63 line 8) John bought certificates of deposit (CD) and did not tell Peggy about any purchases nor did he tell her that he was placing title in his and his daughter's name. (App. P. 62 line 20 – P. 63 Line 8, App. P. 5-8) The funds used to purchase the certificates of deposit were from the joint accounts and the certificates were placed in John's name with Rebecca Askeland, his daughter. (App. P. 64 line 15 – P. 66 line 12, App. P. 31-37, and P. 38)

John withdrew \$40,000 from the joint account and purchased CD#

55970, (App. P. 39) unbeknownst to Peggy, and when it came due in June, 2015, he opened a sole checking account and then he purchased a new CD and made Rebecca Askeland the new joint owner. John withdrew \$70,769. (App. P. 66 line 7 – 12) (App. P.66 line 13 – P. 67 line 3, App. P. 39 and 40) In June, 2017, John purchased a certificate of deposit for \$70,000. (App. P. 69 line 6-18)

John removed more than \$110,000 from the joint account and at his death the balance of the accounts was \$636.76. (App. P. 71 line 15 – line 20, App. 11-19)

Peggy filed a claim in the estate of John which the executors denied. (App P. 20-24, App P. 25-26) The claim proceeded to trial and Peggy submitted a trial brief which alerted the Court to the basis for the claim (App. P. 27-28). At the close of Peggy’s evidence, a Motion for Directed Verdict was made by defendant’s counsel. (App P. 78 line 4 –P. 79 line 12) Peggy’s counsel resisted the Motion. (App P. 79 line 15 – P. 81 line 10). The Trial Court sustained the Motion for Directed Verdict. (App P. 81line 11–P. 82 line 4).

ARGUMENT

ISSUE 1: THE TRIAL COURT COMMITTED AN ERROR AT LAW BY FAILING TO RULE THAT WHEN A CO-TENANT REMOVES MORE THAN THE COTENANT’S SHARE OF THE ACCOUNT THE OTHER COTENANT IS NOT ENTITLED TO

RECOVER A PROPORTIONATE SHARE OF THE ACCOUNT.

PRESERVATION OF ERROR: The Trial Court sustained a Motion for Directed Verdict at the close of the Plaintiff's evidence and a Notice of Appeal was timely filed with the Wapello County Clerk to preserve the Trial Court's error.

STANDARD OF REVIEW: Section 633.33, Code of Iowa states, in part, "Actions.... for the establishment of claims shall be triable in probate as law actions. "Generally, the respective rights of the parties to a joint bank account are determined by the rules of contract law, ...", Anderson v. Iowa Dept. of Human Serv., 368 N.W.2d 104, 109 (Iowa, 1985) As a result, this matter is reviewed for errors of law.

INTRODUCTION: The Trial Court applied the incorrect law to the facts presented and ignored the reference to the prevailing authority contained in Peggy's Trial Brief and referred to in the resistance to the Motion. (App. P. 79 Line 14- P. 81 line10)

ARGUMENT

The Trial Court analyzed Peggy's claim as a conversion case in tort and not a contract case as indicated in a line of cases from Fredrick v. Shorman, 59 Iowa 541, 147 N.W.2d 478 (1966), Anderson v. Iowa Dept. of Human

Serv., 368 N.W.2d 104 (Iowa 1985), to Kettler v. Security Nat. Bk., 805 N.W.2d 817 (IA App, 2011) This Court has determined that a joint bank account has two features, the accretive interest and the proportional interest. In re Estate of Thomann, 649 N.W. 2d 1, 6 (Iowa 2002) and Kettler, at 822. The Court has established a cause of action based in contract when one cotenant to a joint bank account takes more than the cotenant's share of the account to the detriment of the other cotenant. Anderson v. Iowa Dept. of Human Serv., 368 N.W.2d 104 (Iowa 1985)

Peggy is making a claim based upon a loss of a proportional interest of the bank accounts. "Each joint tenant is presumed to own an equal share in the joint bank account; however, this presumption is rebuttable." Anderson at 109. In this case there is no evidence that ownership was other than equal. The Trial Court in its short ruling stated "that there has to be ownership by the plaintiff or other possessory right in the plaintiff greater than that of the defendant." (App. P. 81 Line 14-16) This ruling may be appropriate if the case was tried as a tort of conversion, but this case was tried as a claim for diversion of a greater portion of the joint bank accounts by John. The Trial Court ignored Peggy's Trial Brief that was filed in the case and referred to the cause of action identified in Kettler. The Trial Court failed to consider Kettler as authority for the claim and defined the evidentiary requirements to

prove the claim. The Trial Court persisted to treat the case as a tort of conversion after reference was made to the authority in the Trial Brief and in the oral resistance to the Motion for Directed Verdict. (App. P. 79 Line 14–App. P.81 line 10)

Peggy submitted evidence showing that there were two joint accounts that John and Peggy had and had been in effect for over 38 years. Peggy proved that John removed at least \$110,000.00 from the accounts and placed them in his joint ownership with his daughter. Peggy removed funds to pay joint living expenses. At John’s death, Peggy received \$636.76.

Joint tenancy ownership is “an undivided interest in the entire estate to which is attached the right of survivorship”. Anderson at 109. In joint tenancy cases, the Court looks to the intent of the parties regarding the ownership of the account, its creation, severance and termination. See Estate of Johnson, 739 N.W.2d 493 (Iowa 2007) No evidence was offered concerning John’s intent to sever or terminate the accounts. When Peggy asked John about his dealings with the accounts, John told Peggy that he would do with the accounts what he wanted to do. (App. P. 60 line 6 –P. 61 line 2) John could not ignore and disregard Peggy’s proportionate interest in the bank accounts. John could not divert a disproportionate share of the funds from Peggy without incurring liability. The executors did not believe

that the accounts were terminated nor severed as the executors of the estate the accounts listed on the probate inventory as being jointly held between John and Peggy. (App. P. 11-19)

John took more than half of the money from the joint bank account and he is liable to Peggy for the excess taken. John took at least \$110,000 and left Peggy with \$636.76. “[A] cotenant may not withdraw from the account in excess of his interest; if he has done so, he is liable to the other joint tenant for the excess so withdrawn.” (citations and internal quotations omitted). Rather, the remedy is a suit between the joint tenants to recover the funds taken in excess of the withdrawing joint tenant's proportional share.” Kettler v. Sec. Nat'l Bank of Sioux City, 805 N.W.2d 817 (Iowa App. 2011) This diversion was not disputed by the defendants nor did the defendants present evidence that John and Peggy were other than equal owners of the accounts.

Treating the case before the Court as a tortious conversion claim when the claim was based on the diversion of a greater portion of the proportionate interest of a joint bank account by John was error. The Trial Court applied the wrong law to the Claim. This Court should reverse the Trial Court and remand the case to the District Court for entry of a judgment in Peggy’s favor in the amount of \$54,363.24. ($\$110,000/2 - \$636.76 = \$54,363.24$)

plus interest and costs as by law provided.

CONCLUSION: Due to the error by the Trial Court in applying the incorrect law to the facts of the case, the decision of the Trial Court to sustain the Motion for Directed Verdict should be reversed and the case should be remanded for entry of an award to Peggy of \$54,363.24 ($\$110,000/2 - \$636.76 = \$54,363.24$) plus interest and costs.

ISSUE 2: THE TRIAL COURT COMMITTED AN ERROR AT LAW BY STATING THAT A REASON TO SUSTAIN THE MOTION FOR DIRECTED VERDICT WAS THAT THE TRANSFER OF FUNDS FROM THE JOINT ACCOUNT WAS PART OF JOHN'S ESTATE PLAN.

PRESERVATION OF ERROR: The Trial Court sustained a Motion for Directed Verdict at the close of the Plaintiff's evidence and a Notice of Appeal was timely filed with the Wapello County Clerk to preserve the Trial Court's error

STANDARD OF REVIEW: Section 633.33, Code of Iowa states, in part, "Actions... for the establishment of claims shall be triable in probate as law actions. "Generally, the respective rights of the parties to a joint bank account are determined by the rules of contract law, ...", Anderson v. Iowa Dept. of Human Serv., 368 N.W.2d 104, 109 (Iowa, 1985) As a result, this matter is reviewed for errors of law.

INTRODUCTION: The Trial Court erroneously, based on the evidence, ruled that the transfer of the disproportionate share of the joint bank account was part of an estate plan.

ARGUMENT

In the short ruling dictated into the record at the close of Plaintiff's evidence, the Trial Court ruled "There's no evidence to prove this was anything other than estate planning done by the decedent." (App. P. 81 line 20-22) The ruling by the Trial Court is unsubstantiated by any factual findings. It was speculation about John's intent. No evidence was submitted except John's will that left everything to his three girls to the exclusion of his wife of 38 years. The defendant did not plead a defense that the claim should be denied due to the estate plan of John. The oral Motion for Directed Verdict was based upon the claim that the funds went through the account but that there was no accounting of who contributed to the account. As was indicated in Brief Point 1, a Court should look at the account contract and unless there is an intent to the contrary, the account is owned equally between the owners. The Court has stated that in a joint tenancy account there is a rebuttable presumption of equal shares. Fredrick v. Shorman, 59 Iowa 1050, 147 N.W.2d 478 (1966)

Defendant's motion referred to the plaintiff's failure to show which

person contributed to the accounts and how much each contributed. Peggy testified that she and John both deposited money into the accounts and both wrote checks from the accounts to pay living expenses. She also testified that the proceeds of a jointly owned house were deposited into the accounts and the sale of a trailer park upon which both worked to operate and improve were deposited into the accounts. John's estate plan which was embodied in his will provided that all of his assets, regardless of how the title was held was to be divided into three equal shares and delivered to two daughters outright and to the two daughters as trustee for the third daughter. (App. P. 5-8)

Diverting funds from a joint bank account to another joint account with only one daughter is inconsistent with the will which embodied his estate plan. The defendants did not offer evidence that showed that the diversion from the joint bank accounts to a different account was done for any tax-saving reason, nor for the convenience of John in the event he became disabled. If he was disabled, he and Peggy were living together in the family residence that was purchased from funds in the joint bank accounts and Peggy was handling payment of the living expenses..

To claim that the diversion of funds to John's sole control was part of an estate plan which excused his transfer of greater amounts than 50% was

unsupported by evidence and pleadings. The Trial Court speculated that the diversion from the joint bank account was for estate planning purposes. To do so was reversible error.

CONCLUSION: Due to the complete absence of evidence that an estate planning intention justified the excess diversion of funds from the joint bank accounts constitutes reversible error by the Trial Court. This court should reverse the ruling of the Trial Court and remand the case for entry of a judgment in Peggy's favor in the amount of \$54,363.24 plus interest and costs as by law provided.

ISSUE 3: THE TRIAL COURT COMMITTED ERROR AT LAW BY DETERMINING THAT PEGGY WAS REQUIRED TO HAVE A GREATER INTEREST IN THE PROPERTY IN ORDER TO SUSTAIN HER CLAIM.

PRESERVATION OF ERROR: The Trial Court sustained a Motion for Directed Verdict at the close of the Plaintiff's evidence and a Notice of Appeal was timely filed with the Wapello County Clerk to preserve the Trial Court's error

STANDARD OF REVIEW: Section 633.33, Code of Iowa states, in part, "Actions.... for the establishment of claims shall be triable in probate as law actions. "Generally, the respective rights of the parties to a joint bank account are determined by the rules of contract law, ...," Anderson v. Iowa Dept. of Human Serv. 368 N.W.2d 104, 109 (Iowa, 1985). This matter is

reviewed for errors of law.

INTRODUCTION: As argued in Issue 1, the Trial Court erroneously applied a tort-based claim of conversion to the facts and found that to recover Peggy had to have a greater interest in the property than John.

ARGUMENT

Peggy filed a claim in John's estate to recover funds when John diverted greater than 50% of the joint bank accounts to his own control and ownership to the exclusion of Peggy. The Trial Court treated this claim as a tortious conversion when the claim was presented as a contract claim for funds diverted from an equally-owned joint bank account.

The Trial Court ruled that in order to recover, Peggy had to show "that for conversion there has to be ownership by the plaintiff or other possessory right in the plaintiff greater than that of the defendant." (App. P. 81 line 13-16) The Trial Court said that "there was no evidence of that in this case." (App. P. 81 line 16) The Trial Court went on to say that the Plaintiff "has to show dominion or control over titles by the defendant inconsistent with or derogation of the plaintiff's possessory rights." (App. P. 81 line 17 - line 19). This is an accurate recitation of the standards necessary for a tortious conversion. In Matter of the Estate of Bearbower, 426 N.W.2d 392 (Iowa

1988) this Court stated, "The essential elements of conversion are: 1) ownership by the plaintiff or other possessory right in the plaintiff greater than that of the defendant; 2) exercise of dominion or control over chattels by defendant inconsistent with, and in derogation of, plaintiff's possessory rights thereto; and 3) damage to plaintiff." Bearbower at footnote 1. The problem with the Trial Court's reliance on ruling that the claim should be dismissed because there was a lack of evidence to prove a tort of conversion is that conversion is the wrong theory urged by Peggy. Peggy identified her theory for recovery as a diversion of funds from a joint bank account to the Trial Court in its Trial Brief (Court file Trial Brief). In the Trial Brief, Peggy identified that the claim was based upon diversion of funds from a joint bank account and cited the Iowa Court of Appeals case of Kettler v. Security Nat. Bk., 805 N.W.2d817 (Iowa Ct. App 2011) The brief stated that this case was remarkably similar to the facts in Kettler. The brief stated that "A cotenant may not withdraw from the account in excess of his interest; if he has done so, he is liable to the other joint tenant for the excess so withdrawn". Anderson v. Iowa Dept. of Human Serv., 368 N.W.2d 104,110 (Iowa 1985) The Court in Anderson cited a New York case , Coughlin v. Commissioner of Social Services, 75 A.D. 2d 895, 428 N.Y.S.2d 291 (2d Dept., 1980) when it said "The right to withdraw funds

from the joint account depends upon the agreement or the understanding of the party.” Anderson at 110.

The Trial Court was given the theory of recovery in the Trial Brief and was told the theory of recovery in argument as opposition to the Motion for Directed Verdict. (App. P. 79 line 14 – P. 81 line 10). The Trial Court erroneously ruled against Peggy based upon a theory that was neither pled nor proved. The Trial Court committed reversible error when it ruled on the Motion for Directed Verdict applying the wrong law.

CONCLUSION: The Trial Court, after having been told the theory of recovery in a trial brief and again told the theory of recovery in the resistance to the Motion for Directed Verdict applied the wrong law as a basis for sustaining the Motion for Directed Verdict. To have done so was and is reversible error. The Court should reverse the decision of the Trial Court and remand the case for entry of a judgement in Peggy’s favor in the amount of \$54,363.24 plus interest and cost as by law provided.

ISSUE 4: THE TRIAL COURT ERRED IN SUSTAINING THE MOTION FOR DIRECTED VERDICT

PRESERVATION OF ERROR: The Trial Court sustained a Motion for Directed Verdict at the close of the Plaintiff’s evidence and a Notice of

Appeal was timely filed with the Wapello County Clerk to preserve the Trial Court's error

STANDARD OF REVIEW: Review of the action could be for an abuse of discretion but if the case is tried as a law action per Section 633.33 Code of Iowa, then the review is for errors at law.

INTRODUCTION: At the close of Peggy's evidence, a Motion for Directed Verdict was sustained by the Trial Court applying the wrong law and was not only an improper abuse of discretion but also was based upon the application of the wrong law of the case.

ARGUMENT

The Trial Court sustained an oral Motion for Directed Verdict at the close of Peggy's evidence. (App. P. 81 line 11 – P. 82 Line 4). In O'Bryan v. Henry Carlson, 828 N.W.2d 326 (Iowa Ct App, 2013) this Court stated that "It is improper in all but 'the most obvious cases' to grant a directed verdict at the close of the plaintiff's case."

If the Trial Court had applied the correct law to the facts, it would have found substantial evidence was presented. "Evidence is substantial when a reasonable person would accept it as adequate to reach a conclusion." Johnson v. Dodgeon, 171 Iowa 168, 171, 451 N.W.2d 168

(1990) Peggy presented evidence that she and John had joint tenancy bank accounts and they were equal owners. Both deposited money from labor, sales of jointly held real estate and other investments. This occurred for nearly 40 years. Over a period of about three years, John removed over \$110,000 from the accounts and converted them to his own control. When John died, there was only \$636.76 left in the accounts. Peggy made no withdrawals from the accounts that were not used for the benefit of both John and her.

There was substantial evidence presented to establish that John had removed more than his share of the accounts and sustaining the Motion for Directed Verdict when applied to the correct law as stated in Issues 1, 2 and 3, the Trial Court committed reversible error by ruling that the Motion for Directed Verdict should be sustained.

CONCLUSION: The Trial Court committed reversible error by applying the incorrect law to the facts presented in Peggy's case and to have done so was an abuse of discretion after considering all of the evidence that Peggy presented based upon the law if it had been correctly applied. The Court should reverse the Trial Court's ruling and remand this case for entry of a judgment in Peggy's favor in the amount of \$54,363.24 plus interest and costs as by law provided.

REQUESTED RELIEF: Claimant requests that the decision of the Trial Court be reversed and that this case be remanded for entry of judgment to Claimant in the amount of \$54,363.24, plus interest and costs as by law provided.

REQUEST FOR ORAL SUBMISSION

Appellant requests this matter be scheduled for oral submission.

CERTIFICATE OF COSTS

Because this matter is filed electronically in compliance with Iowa R.Elec. P. 6.100, Claimant-Appellant's Proof Brief is filed electronically through EDMS and no costs are charged.

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P.

6.903(1)(g)(1) or (2) because this brief contains 3,975 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in font size 14 of Times New Roman.

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CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

The undersigned hereby certifies that a true copy of the Appendix was served March 15, 2023, upon the following parties:

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by electronic notification from the Iowa Supreme Court for the CM/ECF
system.

The undersigned further certifies that on March 15, 2023, I will
electronically file this document with the Clerk of the Iowa Supreme Court.

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