

Unilateral Withdrawals from a Joint Account: Equity Versus Certainty

In his seminal book, *The Common Law*, future Justice Oliver Wendell Holmes Jr. famously wrote: "The life of the law has not been logic: it has been experience." This aphorism has endured, influencing one legal commentator to remark as follows:

> Society creates law and law has to respond to society. Not slavishly and it can always guide society and you have to make choices and in the end someone's going to decide in our society, we hope in some sort of democratic, small "d" manner what's good. But you have to choose. You have to choose and of course the most horrible, difficult thing is to take responsibility and choose. And that's what law is all about.[1]

The holding in Fletcher *stands in contrast to the holding in* Coleman v. Olson, *another recent unanimous Tennessee Supreme Court opinion from the same five justices*

The tension (and often the choice) between logic and experience has profoundly animated the development of our law.

The recent Tennessee Supreme Court opinion in *In re Estate of Fletcher*[2] is a window into this tension between logic and experience, between certainty and the inevitable complexity of human interaction, perhaps nowhere more evident that in a marriage with issues.

In April 2012, Husband and Wife deposited joint funds into a checking account, with the account card specifically marked "JOINT – WITH SURVIVORSHIP (and not as tenants in common)," and with only one signature required for withdrawals.[3] In January 2013, Husband withdrew $100,000 without the knowledge of Wife and obtained a certificate of deposit (CD) in his name only. In September 2013, Husband died and his Will left the residue of his estate to his children by a prior marriage. Wife filed a petition in probate court to claim the CD, testifying that she was unaware of the withdrawal and purchase of the CD until after Husband's death.[4]

The probate court ruled that the CD was an asset of Husband's estate, relying on the 1992 Tennessee Court of Appeals opinion in *Mays v. Brighton Bank*,[5] which held that withdrawn funds cease to be tenancy by the entirety property upon withdrawal. The probate court found that Wife knew or should have known that the CD existed in Husband's name (or at least that the funds were held in something other than their joint bank account); that she acquiesced in creating the CD; and that there was no proof of fraud since both the joint account bank statements and Husband's CD bank statements came to their residence. Wife appealed.

The Court of Appeals reversed,[6] ruling that the CD remained impressed as entireties property, relying on the 2008 Tennessee Court of Appeals opinion in *In Re Estate of Grass,*[7] which held that a spouse's ownership interest should not cease because the other spouse withdrew from the joint account. The appellate court further held that a tenancy by the entirety can be terminated only when both spouses convey; that the joint account agreement should not be construed as proof of prior consent to termination of the right of survivorship through unilateral with-

drawal; and that there was no evidence Wife agreed to relinquish her interest. Husband's estate appealed.

This case was followed closely by estate lawyers and bankers, both of which were eager to know the rules.[8]

In a unanimous opinion, the Supreme Court reversed, holding that once one spouse withdraws funds from a joint bank account held as tenants by the entirety, the funds cease to be held by the entirety. The court noted that this was a case of first impression in Tennessee, with a split of authority not only within the Tennessee Court of Appeals, but also among those states that have considered this issue.

The Supreme Court noted that some states have adopted "the Pennsylvania approach," under which funds withdrawn from tenancy by the entirety accounts continue to be entirety property. The Pennsylvania approach assumes that spouses' joint accounts are for the benefit of both, even if one spouse can unilaterally withdraw, and that neither spouse may destroy the "true purpose" of the estate by the entirety by attempting to convert any part of it; or at least the account creates a rebuttable presumption that the joint interest follows the funds. In effect, the Pennsylvania approach recognizes and protects the other spouse's ownership interests. Spouses place trust in one another, and a unilateral withdrawal could in essence breach that trust.

The Supreme Court noted that some other states have adopted "the Arkansas approach," under which the fact that neither spouse is required to obtain the other spouse's consent to withdraw from a tenancy by the entirety account simply destroys the tenancy by the entirety on the withdrawn property.

In reversing the Court of Appeals, the Tennessee Supreme Court explicitly adopted the Arkansas approach, holding that a unilateral withdrawal terminates the entirety for two reasons. According to the court, this approach reflects the reality that spouses place trust in one another and expect and approve that each may make some unilateral withdrawals without the other's consent. The court also noted that "the Arkansas approach reflects the better approach in light of our current banking environment…. The legal status is clear, and all parties know their respective positions. The Pennsylvania approach does not provide the needed clarity and finality necessary in the banking arena."

While there is understandably a strong policy preference for certainty in banking transactions, the divorce statistics demonstrate that spouses do not always act in ways that reflect the assumed mutual trust. Indeed, the *Fletcher* opinion states: "One could certainly be swayed by equity to side with the Pennsylvania approach when the withdrawn sum is rather large as in this case." When a breach of marital trust does occur, as in *Fletcher*, should there be no remedy?

The answer may be found in footnote 3 of the opinion, which states: "There is no allegation or evidence that Mr. Fletcher acted fraudulently by withdrawing $100,000 from the joint account or by placing the certificate of deposit in his individual name. Therefore, we need not address the status of funds withdrawn from a joint account by one spouse under circumstances suggesting an intent to defraud, to avoid creditors, or to defeat the interests of a spouse in anticipation of divorce."

Footnote 3 gives petitioners a roadmap to overcoming the apparent presumption that a unilateral withdrawal terminates the entirety. Query whether Wife might have approached the case differently had she known that proof of fraud was necessary to overcome the presumption against her. Withdrawal from a joint account without your spouse's knowledge in order to leave joint assets to your own children by a prior marriage suggests a prima facie case of intent to defraud. The trial court's finding that there was no fraud based solely on the account statements being mailed to the residence seems thin. Perhaps the case could have been remanded to the probate court for a hearing on fraud and the equities of the parties, in light of the Supreme Court opinion.

The holding in *Fletcher* stands in contrast to the holding in *Coleman v. Olson*,[9] another recent unanimous Tennessee Supreme Court opinion from the same five justices. In *Coleman*, Wife filed for divorce, which triggered the statutory mandatory injunction[10] prohibiting either spouse from changing the beneficiary on any life insurance policy naming the other as beneficiary. Within two weeks after filing, Wife became ill, changed the beneficiary from her husband to her mother in violation of the injunction, and then died. The trial court had imposed a constructive trust on the mother for the benefit of the only child of the marriage. The Court of Appeals reversed and awarded the death benefit to the husband.[11]

The Tennessee Supreme Court reversed, first noting that this was a case of first impression in Tennessee. The Court also noted that although the change in beneficiary was a violation of the injunction when done, Wife's death abated the divorce action, so the injunction was no longer effective. The court more or less had two choices: it could either adopt a *per se* rule holding that changing the beneficiary in violation of the injunction necessarily voids such change, which would create certainty of result, or it could fashion an equitable remedy, which would require judicial determination. The Supreme Court chose the latter, remanding the case to the trial court for a hearing on the equities of the parties, however providing no specific guidance. No doubt many spouses experiencing a divorce may feel more encouraged to change their life insurance beneficiaries despite the

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injunction, on the basis that there may be little to lose and potentially much to gain, notwithstanding that the ultimate outcome will depend on a trial court's equitable balancing.

In other words, in two recent Supreme Court cases, in *Fletcher* certainty trumped equity, but in *Coleman* equity trumped certainty.

Contrary to Holmes' classic quote, perhaps both logic and experience, predictability and equity, are the life of the law. Both matter.

As Professor LaPiana remarked, "You have to choose." But there is wisdom in this, too, according to Emerson: "A foolish consistency is the hobgoblin of little minds."[12]

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Notes

1. Professor William P. LaPiana, http://www.lifeofthelaw.org/2012/09/logic-and-experience.

2. *In re Estate of Calvert Hugh Fletcher,* 538 S.W.3d 444 (2017).

3. In Tennessee, a joint bank account held by husband and wife is presumed to be tenancy by the entirety absent proof to the contrary.

4. If this had been a divorce case after the withdrawal of funds rather than a probate matter, removal of funds from a joint account (which is marital property) would not negate the "marital" (and thus "mutually owned") nature of the funds removed. Such funds can typically be easily recaptured for purposes of division of marital property, or else taken into consideration by the court in equitably dividing the marital property.

5. *Mays v. Brighton Bank*, 832 S.W.2d 347 (Tenn. Ct. App. 1992).

6. *In re Estate of Fletcher,* No. M2015-01297-COA-R3-CV, 2016 WL 3090920 (Tenn. Ct. App. May 23, 2016).

7. *In re Estate of Grass,* No. M2005-00641-COA-R3-CV, 2008 WL 2343068, (Tenn. Ct. App. June 4, 2008).

8. Notably, the Tennessee Bankers Association filed an amicus brief.

9. *Coleman v. Olson*, 551 S.W.3d 686 (2018).

10. *Tenn. Code Ann.* §36-4-106(d).

11. *Coleman v. Olson,* No. M2015-00823-COA-R3-CV, 2016 WL 6135395 (Tenn. Ct. App. Oct. 20, 2016).

12. Ralph Waldo Emerson, *Self-Reliance.*

