

2015 WL 4041602 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

Donna PETIT, Plaintiff-Appellant,
v.
Mary Jane PETIT, Defendant-Appellee.

No. 2015-P-0349.
June 18, 2015.

On Appeal from a Judgment of the Bristol County Probate Court Docket No. BR11E0049QC

Brief of the Defendant-Appellee Mary Jane Petit

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***1 STATEMENT OF ISSUES PRESENTED**

1. Is there sufficient evidence to sustain the Trial Court's finding that Roger Petit ("Roger") made Defendant/Appellee Mary Jane Petit ("Mary) a co-owner of his bank accounts?
2. Is the Trial Court's finding that Roger made Mary a co-owner of his bank accounts plainly wrong?
3. Was the Trial Court plainly wrong in finding that Mary did not become a bailee of Roger's coin collection, did not violate any *2 fiduciary duty, and was not liable for any loss of the coin collection?

STATEMENT OF CASE

Roger Petit and Mary Jane Petit were married from 1980 until his death in 2011. During this entire time they resided in a home owned by Mary. Roger was a knowledgeable investor. He made his eldest daughter, Donna Petit, co-owner on some investments; and following his marriage to Mary, he made Mary the beneficiary of his annuity.

Roger and Mary maintained separate bank accounts. However, they shared their marital expenses such that Mary paid household expenses, and Roger paid for their entertainment and vacations.

After Roger's stroke in 2007, Roger made Mary co-owner of his bank accounts. Mary became his care-giver and paid a certified nurse's assistant (CNA) to assist with Roger's care. She also paid their on-going expenses from the joint accounts as well as her accounts.

Donna was appointed special administrator of her father's estate. She filed a three count complaint, and after a five-day trial and post-trial motions, the Trial Court issued an Order and Amended Judgment but *3 denied Donna's Motions for a new trial and for attorney's fees.

The Trial Court ruled for Donna in Court and found Mary liable to Donna in the total amount of \$65,248.64. The Trial Court found for Mary on Counts 2 and 3, holding that Mary was not liable to the estate for funds disbursed from Roger's bank accounts or for any items missing from Roger's coin collection.

Donna appealed from the judgment on Counts 2 and 3 and from the denial of her motion for attorney's fees. Those appeals are consolidated.

STATEMENT OF THE FACTS

1. Roger and Mary married in 1980 and lived together in Mary's home at 53 Buckley Street, Fall River, MA, until shortly before Roger's death in 2011. It was the second marriage for each. (See Bristol County Probate Court Order and Amended Judgment; Amended Findings of Fact and Rationale dated April 23, 2014, nunc pro tunc, February 11, 2014 (hereinafter "Findings" #5,A-68))
2. Roger was knowledgeable in investments and financial affairs. (Finding #55, A-73)
- *4 3. He added the name of his oldest daughter, Donna Petit, to some of his investments and made Mary the beneficiary of his substantial annuity. (Finding #8,A-68)
4. He also made Donna the beneficiary of his IRA's. (Finding #55,A-73)
5. Roger and Mary entered the marriage with separate bank accounts and maintained separate accounts until 2007.
6. During the course of the marriage, Roger and Mary managed their finances to their mutual satisfaction. Mary paid the expenses of the household, and Roger paid for their extensive entertainment expenses and vacations. (Finding 7,A-68)
7. Roger had no estate plan. (Finding #9, A-68; Finding #57, A-73)
8. Mary executed a will and pour-over trust for her grandchildren. The will excluded Mary's daughter. The will also excluded Roger, because "that's how he wanted it." (Finding #8,A-68). (See Trial Testimony of Mary Petit, A-361-362)

9. Roger suffered a stroke on August 31, 2007. While in the hospital, he signed a durable power of attorney nominating Mary as his attorney-in-fact. *5 At Roger's request a representative of his bank also came to the hospital, and Roger added Mary as a co-owner of his bank accounts. (Finding #10,A-68)
10. After Roger's stroke Mary cared for him in their home until he entered a nursing facility, Catholic Memorial Home, on April 15, 2011. During this entire period, Mary was assisted by Connie Machado, a certified nurse's assistant (CAN). (Finding #13,A-69 and Finding #15,A-69)
11. In 2008 Donna filed a complaint with Bristol **Elder** Services alleging that Mary was **neglecting** Roger. A caseworker, Patrick Cullen, came to the home and interviewed Roger alone. Roger told Cullen that he was very happy with Mary's care. (Finding #13,A-69 and Finding #14, A-69)
12. In 2009, Donna created a photo album for Roger's birthday party. One caption stated, "Thanks Mary for all you do for dad." The caption for the final photo of Roger and Mary stated, "God Bless the both of you." (See Trial Exhibit #26, photo album, and Trial Testimony of Donna Petit, Volume 4, Page 33 of the Transcript)
3. Donna also alleged that Mary secluded Roger from his children and did not permit the children to visit him at home after the stroke. (See Verified *6 Complaint in Equity, Paragraph 4, A (Vol. 1) Page 8). Trial Testimony of Donna Petit, Volume 3, Page 73 of the Transcript)
14. However, Donna in fact visited Roger 20 times per year and even had a key to the home. (Finding #17,A-70, and Trial Testimony of Mary Petit, Volume 4, Page 140 of the Transcript)
15. After Roger's stroke Mary managed Roger's and her own bank accounts. Mary would tell Roger when she was making a payment from his account, and he would approve her actions. (Finding #12, A-69)
16. Mary withdrew funds from Roger's account for her personal expenses. However, she also withdrew funds from her account for Roger's expenses, including approximately \$18,000.00 for Connie Machado per year. (Finding #15, A-69, and #16,A-70)
17. Roger and Mary co-mingled their funds. As Mary stated, "It became our money, yes." Mary also considered it her duty to pay his bills. In her words, "I don't know that you'd call it convenience. (Mary Petit's Trial Testimony, Volume 5, Pages 55-57 of Transcript). (Rationale, A-74).
18. Roger had a safe deposit box with Donna at the Bank of Fall River. (Finding #18, A-70)
19. After his stroke Roger added Mary as an authorized *7 user on December 24, 2007. (Finding #21,A-70)
20. The records show that Roger and Mary accessed the Safe deposit box on March 28, 2008. The records do not show a signature of Mary Petit on any other day. (See Trial Exhibit #17(Q-2))
21. On March 28, 2008, Roger also made Mary the attorney-in-fact of his Merrill Lynch accounts; and he changed the beneficiary of both of his IRA's from Donna to Mary. (Finding #58, A-58) (See Trial Testimony of Deborah Smith, Volume 2, Page 49 of Transcript)
22. Connie Machado, the CNA hired by Mary, stated that Roger was competent until shortly before his death in 2011. (Trial Testimony of Connie Machado, Volume 3, Pages 109-113 of Transcript)

23. Connie also stated that Roger always spoke glowingly of Mary. He referred to her as “a good girl, and “Queen Mary.” “She did everything for him.” Roger was very grateful for all that Mary did for him. (Trial Testimony of Connie Machado, Volume 3, Page 110-112 of Transcript)

24. Roger periodically purchased gold and silver coins, which were kept in cabinet drawers in the basement of their home but were also strewn all over the house. (Finding #42)

*8 25. In March, 2010 Roger asked Mary to buy two safes to move the coins upstairs into the living quarters upstairs which they shared until he went to the nursing home on April 15, 2011. (Trial Testimony of Mary Petit, A-344-346)

26. During most of this period up to April 15, 2011. Roger remained mentally competent. (Trial Testimony of Connie Machado, Volume 3, Pages 100-112 of Transcript)(Trial Testimony of Mary Petit, Volume 4, Pages 121-123 of Transcript)

27. After Roger entered the nursing home, Mary and her grandson Adam discussed selling coins to pay for Roger's care. This conversation was on speaker phone in Donna's presence. (Finding #45, A-72)

28. Donna prevailed on Count I of her complaint. She testified that she did not sign the documents to transfer the investments which she held jointly with her father. There was no contrary testimony from any witness, and the Trial Court adopted her testimony. Still, there is un rebutted evidence that Roger signed the check for \$6,776.00 (from Rite-Aide stock) on April 2, 2008 and was therefore knowledgeable of the transaction. (Trial Exhibit 4(B-1) and Trial Testimony of Mary Petit, Volume 5, Pages 14 and 15 of Transcript.

*9 29. Mary prevailed on Counts II and III of the complaint in which Donna sought damages of approximately \$140,000.00, and in pursuit of which Donna engaged in exhaustive discovery and presented volumes of trial exhibits.

ARGUMENT

The marriage of Roger Petit and Mary Petit marked a new beginning for each of them. Roger was divorced with several children from his first marriage. Mary had a daughter and two grandsons from her prior marriage. From the start each respected the family and the independence of the other. Mary ran her own business. Roger was an experienced pilot and normally flew on a daily basis. Each of them had his/her own income, assets and bank accounts. So, when they married again at 50 years of age, it was natural that they would maintain separate finances.

Mary had established accounts for her grandsons and her son-in-law. Roger made his eldest daughter a co-owner of a series of investments and his two IRA accounts. He also gave his daughter access to his safe deposit box.

*10 Since Mary already owned the Buckley Street property, she continued to pay the expenses of the property and bought most of the food. For his part Roger paid for dining in restaurants three times per week, going dancing twice a week, and enjoying cruises and other vacations every three or four months. All in all, the division of expenses was reasonable.

Roger purchased an annuity in 1993 and made Mary the beneficiary, no doubt signifying the strength of the marriage.

When Roger suffered a stroke in 2007, their relationship change. Roger remained mentally alert, but he lost his physical independence. He understood immediately that Mary would be his care giver and would have many new responsibilities. Mary also understood that her life would have to change in order to monitor Roger's progress and maintain him in the home. In essence, from that moment, she dedicated her life to his well-being.

1. CREDIBILITY

The Trial Court conducted a five-day trial. Donna and Mary testified at great length. The Court was able to observe them throughout the course of the trial and to assess their credibility. In [Adoption of *11 Arnold, 50 Mass. App. CT. 743,750 \(2000\)](#) the Court noted: “It was the trial judge who had the opportunity to see and hear the witness, and it is for him and not for us to assess their credibility and to weigh the evidence presented. Only if there is clear error will we disturb those findings.” In [City of Revere vs. Rowe Contracting Company and another, 362 Mass. 884, 885 \(1972\)](#), the Supreme Judicial Court stated... “Our duty is to examine the evidence and decide the case according to our own judgment, accepting the findings of the trial judge, whether based wholly or in part upon oral testimony, as true, unless they are shown to be plainly wrong.” This standard applies here, as well. The Trial Court largely credited Mary’s testimony, except on the issue of the transfer documents of investments Roger held with Donna. Otherwise, where the testimony was conflicting, the Trial Court rejected Donna’s testimony on matters in controversy.

2. ROGER'S BANK ACCOUNTS

Six days after his stroke, Roger had a representative of his bank come to the hospital in order to add Mary’s name to his two accounts (checking and savings). That same day he executed a durable power of attorney making Mary his attorney-in-fact. *12 Roger was an experienced, savvy investor. He knew that the power of attorney was sufficient to permit Mary to sign his checks, make deposits and withdrawals and generally manage his accounts. Yet, he went a step further and made her a named owner of the account. After all, she was his wife of 27 years; she was his care giver. She was the centerpiece of his life.

Mary thought only about paying his bills. She considered it to be her duty. The key inquiry, however, is to deduce Roger’s intent when he made her a named owner of the accounts. Here, we must project from the totality of the evidence.

First, Roger gave Mary a general power of attorney. Then he added her name to his bank accounts. A few months later he authorized her access to the safe deposit box. Finally, he signed a Merrill Lynch power of attorney for Mary and made Mary the beneficiary of his IRAs and annuity. The evidence is therefore overwhelming that Roger intended to benefit Mary, even in substitution of Donna.

Looking at all of these changes, one could justifiably conclude that Roger did have an estate plan, with Mary as his beneficiary. All of his assets which required a title of ownership were transferred to Mary. Still, the Trial Court’s finding that Roger had *13 no estate plan is reasonable. Donna’s claim of an informal estate plan to benefit the children, through her, is implausible on its face. The Trial Court rejected significant portions of Donna’s testimony and made findings which are fully supported by the record.

On appeal, Donna relies on the word “convenience” to assert that Roger’s bank account remained his sole property and further asserts that Mary so stated. However, in the last day of trial, on cross-examination, Mary testified, “It became our money, yes;” and “I don’t know that you’d call it convenience.” The Trial Court’s finding that Mary was co-owner of Roger’s bank accounts was not plainly wrong. It was fully supported by the evidence and was made with reliance on the facts as presented and on the witnesses’ credibility.

“The finding as to the intent of the alleged donor when a joint bank account was created is a pure question of fact.” [Desrosiers vs. Germain, 12 Mass. App. Ct. 852, 856 \(1981\)](#), citing [Blanchette Vs. Blanchette, 362 Mass. 518, 524 \(1972\)](#). In [Desrosiers](#), the co-owner never had possession of the bank book. She even agreed to share the proceeds of the account if her two siblings agreed to her appointment as *14 administratrix. The Trial Court found that no gift was intended. In [Astravas vs. Petronis, 361 Mass. 366 \(1972\)](#), the facts informed a different result, and the Trial Court found that a donative intent existed. In each case, the Trial Court was upheld on appeal.

3. ROGER'S COIN COLLECTION

Donna argues that Mary became a bailee of the coins and is therefore liable to the estate for the value of the coins which are listed in the inventory from Eastern Numismatics but were not delivered to her after Roger's death. Donna asserts that Roger asked Mary to protect the coins; but in fact he asked only that Mary buy two safes and bring the coins upstairs. At that point, neither Roger nor Mary was venturing into the basement, and Roger's request to have the coins in their shared living space was quite sensible. Mary complied with Roger's request. From then on the coins from the basement were kept upstairs. If anything, Mary "delivered" the coins to Roger. Roger was competent and lived upstairs with Mary the entire time. He never questioned whether coins were missing, and Mary never took interest in the coins, apart from the 19 that he gave her over the years.

***15** The usual bailment is one for hire and consists of the bailor delivering the property to the bailee. A bailment can be made between private parties and even between family members. Here again, however, there is a requirement of delivery of the property to the bailee. For example, a son could leave property with his parents if they have adequate storage space, and he resides in a small apartment or in temporary quarters.

Donna cites two cases also cited by the Trial Court, *Brooks vs. Davis*, 294 Mass. 236 (1936), and *King vs. Trustees of Boston University*, 420 Mass. 52 (1995), both of which declared the need for delivery in order to create a bailment. However, where the Trial Court found no delivery or bailment in Petit, Donna urges a different result.

Prior to his stroke it is undisputed that Roger had full control of all of his assets. Neither Donna nor Mary even viewed the coins more than once or twice. No one may question his right to gift, sell or exchange any of those coins. In consequence, Donna must now prove that the coins in question disappeared from the home in the three and one half years between Roger's return from the hospital and his entry into the nursing home. There is no such evidence. No one knows when or if the coins "went missing."

***16** Donna acknowledged that the coin dealer kept calling Roger after his stroke, and Roger "could not say no." Finally, Mary's lawyer instructed the dealer not to call. In doing so, Mary was saving Roger from himself. Had she harbored any larcenous intent, she would most certainly have encouraged more coin purchases. Instead, she showed appropriate care and concern for her husband's well-being. At the time of the stroke Mary was 80 years old. She dedicated the following years to Roger's care. She was deferential to his needs and his requests and was in every way a good wife.

Arthur Conan Doyle's Sherlock Holmes famously said, "When you have eliminated all which is impossible, then whatever remains, however improbable, must be the truth." When, as here, nothing is impossible, the truth shall remain an unknowable mystery.

4. ATTORNEY'S FEES

Donna prevailed on Count I, of the Complaint, which dealt only with a few of Roger's assets co-owned with Donna but which Donna did not sign to permit their transfer to Roger and Mary. Since no appeal was filed, Donna requested attorney's fees and costs of ***17** \$104,653.70. The request itself was wildly disproportionate and must have included vast amounts of fees and costs required in Donna's attempt to prove Counts II and III, on which Mary prevailed. The Trial Court denied Donna's motion. Mary can do no better than to reference the rationale of the Trial Courts order denying the motion.

CONCLUSION

Mary Petit requests that the Court affirm the Trial Court's judgment, as amended, and its denial of Plaintiff / Appellant's motion for attorney's fees.

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