

2020 COA 125

**In re the Estate of Gerardo Trevino, deceased. Esteban Trevino, Appellant,
v.**

Victoria Treviño, in her capacity as Personal Representative, Appellee.

No. 19CA0199

Court of Appeals of Colorado, Seventh Division

August 20, 2020

Fremont County District Court No. 17PR30084 Honorable Stephen A. Groome, Judge
Holder & Associates, PC, Michael D. Holder, J. David Taunton, Colorado Springs, Colorado,
for Petitioner-Appellant

No Appearance for Appellee

Brown & Crona, LLC, Spencer J. Crona, Denver, Colorado, for Amicus Curiae Colorado Bar
Association Amicus Brief Committee

Fox and Lipinsky, JJ., concur.

OPINION

BERGER JUDGE

¶ 1 The principal question in this case is whether and to what extent Gerardo "Jerry" Treviño's payable on death (POD) certificate of deposit account (the account) was subject to the authority of his personal representative on Jerry's death. Usually, POD accounts automatically pass under Colorado law to the named beneficiary and do not become part of the probate estate or subject to the authority of the decedent's personal representative. § 15-15-214, C.R.S. 2019.

¶ 2 Here, however, Jerry pledged the POD account as collateral for a loan and, under the terms of the pledge agreement Jerry signed, no beneficiary or personal representative had the right to receive "any rights in the Collateral in the event of Debtor's death or incapacity until the obligations secured hereby are paid in full." Jerry and his wife, Victoria Treviño, were jointly and severally liable on the loan.

¶ 3 When Jerry died, the amount in the account exceeded the amount secured by the pledge agreement. We hold that appellee, Victoria Treviño, as personal representative of Jerry's estate, held authority over only those funds in the account necessary to pay the loan in full, but held no authority over the remaining funds. As to the amount over which she had authority as personal representative, she owed statutory duties of good faith and impartiality to the beneficiary of the account. She violated these duties when she paid the loan solely from funds in the account without first paying down the loan from other liquid assets of the estate.

¶ 4 Victoria's actions harmed the beneficiary of the account because she paid an outstanding debt from monies to which the beneficiary was legally entitled, rather than using other liquid estate assets available for that purpose.

¶ 5 We thus partially reverse the trial court's order that Victoria did not violate her fiduciary duties, and remand for further proceedings consistent with this opinion.

I. Relevant Facts and Procedural History

¶ 6 The account Jerry opened was payable on death to his son, Esteban "Tony" Treviño, the

appellant. Later, Jerry and his wife, Victoria, obtained an \$80,000 secured loan from Wells Fargo Bank. Jerry and Victoria were jointly and severally liable on the loan, for which Jerry pledged the account as collateral. Victoria never had any rights in the account. The pledge agreement provided "that no joint owner, beneficiary, surviving spouse or representative of Debtor's estate gets any rights in [the account] in the event of Debtor's death or incapacity until the obligations secured hereby are paid in full."

¶ 7 In a separate transaction, Jerry and Victoria sold residential real property in Texas on an installment loan basis to a family member. Victoria testified that the monthly loan payments from the sale of the Texas property were used to pay down the Wells Fargo loan before Jerry's death and that the payments on the real property sale were roughly equivalent to the periodic payments due to Wells Fargo.

¶ 8 Jerry's will designated Victoria as his personal representative, and she assumed that role on Jerry's death. In her capacity as personal representative, Victoria, through her attorneys, sent a letter to Wells Fargo directing it to use the account to pay the \$77,212.03 balance on the loan and to distribute the remaining \$27,246.52 in the account to Tony, as POD beneficiary. The estate (and then Victoria, as the residual beneficiary of Jerry's estate) continued to receive monthly payments from the sale of the Texas property after Jerry's death.

¶ 9 About a year after Jerry's death, Tony filed a petition asserting that Jerry's will was invalid based on Victoria's alleged undue influence. Later, Tony claimed that Victoria had misused the account and breached her fiduciary duties when her lawyer directed Wells Fargo to use the account to pay the Wells Fargo loan in full.^[1] Tony sought a surcharge judgment of \$71,711.81 plus interest.^[2]

¶ 10 In a written order, the trial court rejected Tony's challenge to the will, finding that Tony did not meet his burden of proving undue influence. Tony does not appeal this part of the court's order. The trial court also rejected Tony's claim that Victoria breached her fiduciary duties in using the account to pay Jerry's debt to Wells Fargo. The court found that Victoria acted reasonably in directing Wells Fargo to use the account because the estate did not otherwise have the ability to pay the loan. Specifically, the court found that the gross value of the estate was \$69,516.61, with only \$2415.61 in liquid assets.

¶ 11 The court also noted that there was "a question whether Tony's 'claim' against the [personal representative] was timely filed" because Tony made the claim several months after the statutory expiration for creditor claims against the estate under section 15-12-803, C.R.S. 2019. The court did not decide that question because it ruled against Tony on the merits.

¶ 12 Tony appeals.^[3]

II. Analysis

¶ 13 We review the trial court's legal conclusions de novo but defer to the court's findings of fact when they are supported by the record. *In re Estate of Owens*, 2017 COA 53, ¶ 19. Whether an asset is part of a decedent's estate is a question of law that we review de novo. *Sandstead-Corona v. Sandstead*, 2018 CO 26, ¶ 69.

¶ 14 Loan pledge agreements are contracts, see *Amos v. Aspen Alps 123, LLC*, 298 P.3d 940, 959 (Colo.App. 2010), *aff'd in part and rev'd in part*, 2012 CO 46, and we review de novo

questions of contract interpretation. *Ad Two, Inc. v. City & Cty. of Denver*, 9 P.3d 373, 376 (Colo. 2001). "[A] court must give effect to the plain and ordinary meaning of [a contract's] terms." *Emenyonu v. State Farm Fire & Cas. Co.*, 885 P.2d 320, 323 (Colo.App. 1994).

A. Payable on Death Accounts

¶ 15 POD designations are authorized by statute. § 15-15-203(1), C.R.S. 2019. Section 15-15-201(8), C.R.S. 2019, defines "POD designation," in pertinent part, as "the designation . . . in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries"

¶ 16 A POD account is not ordinarily an asset of the estate or subject to probate because, by operation of law, at the instant of the account owner's death, the named beneficiary becomes the owner of the account. §§ 15-15-212, -214, C.R.S. 2019; *In re Estate of Owens*, ¶ 11. Thus, ordinarily a personal representative would not have authority over a POD account because it never becomes an asset of the probate estate.^[4] Indeed, section 15-15-214 expressly provides that POD accounts are nontestamentary and not subject to estate administration. *See also* § 15-15-101(1), C.R.S. 2019 (defining nonprobate transfers on death).

¶ 17 Tony argues that the account, though encumbered by and subject to the terms of the pledge agreement, became his property when Jerry died. Thus, he argues that Victoria never had authority over the account because it was never part of the estate.

¶ 18 Under the plain language of the pledge agreement, however, no beneficiary or personal representative "gets any rights in the Collateral . . . until the obligations secured hereby are paid in full."^[5] (Emphasis added.) This leaves the question of who gained authority over the account when Jerry died.

¶ 19 Neither Colorado case law nor statutes address a personal representative's authority over a POD account that is subject to a pledge agreement. Outside Colorado, authority on this topic is sparse. In Oklahoma, by statute, a POD beneficiary is entitled to the funds in a POD account only "after payment of account proceeds to any secured party with a valid security interest in the account." *Tinker Fed. Credit Union v. Grant*, 391 P.3d 766, 770 (Okla.Civ.App. 2016) (quoting Okla. Stat. Ann. tit. 6, § 901(B)(2) (West 2020)). But the Oklahoma court did not specifically address authority over a POD account before satisfaction of the pledge.

¶ 20 Ohio takes a different approach: a beneficiary of a POD account "receive[s] only an encumbered interest" in the account upon the decedent's death. *Jamison v. Soc'y Nat'l Bank*, 611 N.E.2d 307, 310 (Ohio 1993). The creditor, however, "has an immediate right to satisfy the debt from the proceeds of the P.O.D. C.D. without first seeking payment from the decedent's estate, and the beneficiary of the P.O.D. C.D. is entitled only to the surplus." *Id.* at 309; *see also In re Estate of Gullett*, 521 N.E.2d 14, 15-16 (Ohio Ct. C.P. 1987).

¶ 21 We do not follow the Ohio approach because it could create a situation in which a creditor uses a POD account to satisfy obligations that should have been paid from the decedent's estate. At the same time, we see no justification for submitting an entire POD account to the authority of a personal representative when only a portion of the account is required to cover the amount owed under the pledge agreement. And while the pledge agreement in this case provided that neither the account's beneficiary nor the representative of the decedent's estate would have

any interest in the account until the pledge agreement was satisfied, someone must have the authority to decide the extent to which the account should be used to cover the pledge agreement.

¶ 22 The personal representative, owing fiduciary duties to the named beneficiary (as discussed below) and governed by probate law, sits in the best position to do so. Accordingly, we conclude that, when a POD account is subject to a pledge agreement, and the account holder dies, the account holder's personal representative has authority over the account *only* as to the amount secured by the pledge agreement.

¶ 23 Applying these principles here, Victoria had authority over \$77, 212.03 in the account - the remaining balance of the Wells Fargo loan. She had no authority over the remaining \$27, 246.52 in the account. This does not mean that Tony's rights as POD beneficiary were eliminated as to the \$77, 212.03 under Victoria's authority. Applying the plain language of the pledge agreement, when the Wells Fargo loan was paid in full, Tony's rights as POD beneficiary attached and entitled him to the remainder of the account.

B. Duties of the Personal Representative

¶ 24 A personal representative is a fiduciary. § 15-1-802(3)(a)(I), C.R.S. 2019. She has "a duty to act reasonably and equitably with due regard for [her] obligations and responsibilities toward the interests of beneficiaries and creditors, the estate or trust involved, and the purposes thereof" § 15-1-804(1), C.R.S. 2019.

¶ 25 A personal representative must also use her authority "for the best interests of successors to the estate" and must observe the standards of care applicable to a trustee. § 15-12-703(1), C.R.S. 2019. The standards of care include the duty of good faith in the administration of the estate; the duty of loyalty in favor of the interests of the beneficiaries; the duty of impartiality between beneficiaries; and the duty of prudence in consideration of the purposes, terms, distribution requirements, and other circumstances of the estate. §§ 15-5-801 to -804, C.R.S. 2019. These duties protect not only beneficiaries and creditors, but also other "interested persons." § 15-10-504(2), C.R.S. 2019. "If a court, after a hearing, determines that a breach of fiduciary duty has occurred . . . the court may surcharge the fiduciary for any damage or loss to the estate, beneficiaries, or *interested persons*." *Id.* (emphasis added).

¶ 26 Additionally, "[a] personal representative has a duty to settle and distribute the estate . . . as expeditiously and efficiently as is consistent with the best interests of the estate," § 15-12-703(1), and "a duty to exercise diligent care in *timely* disposing of claims presented to him or her." *In re Estate of Hall*, 936 P.2d 592, 595 (Colo.App. 1996) (emphasis added), *aff'd*, 948 P.2d 539 (Colo. 1997); *see also In re Estate of Ongaro*, 973 P.2d 660, 662 (Colo.App. 1998) ("The purpose of the Colorado Probate Code is to promote a speedy and efficient system for settling the estate of the decedent and making distributions to his or her successors."), *aff'd*, 998 P.2d 1097 (Colo. 2000).

¶ 27 With record support, the trial court found that "the estate did not have the ability to pay off the Wells Fargo loan using estate funds." While it is true that the estate did not have sufficient liquid assets to pay the entire loan, the estate was capable of paying part of the loan from funds other than those in the POD account because the court found (again, with record support) that the estate had \$2415.61 in unpledged liquid assets.^[6]

¶ 28 As the personal representative of Jerry's estate, Victoria had a duty to exercise her powers in a neutral fashion and in the best interests of all intended beneficiaries and interested persons. This duty included the recognition of Tony's unvested interest in the portion of the account that was not needed to pay off the Wells Fargo loan. § 15-10-504. Victoria's actions violated this duty. By paying the loan from an account in which Tony had an interest, Victoria benefited herself - both as the only beneficiary of the rest of the estate and as a co-obligor on the loan - to Tony's detriment. To the extent there were liquid funds in the estate to pay the loan, this use violated Victoria's fiduciary duties to Tony.

¶ 29 But apart from Victoria's failure to use the liquid assets, we cannot conclude that Victoria breached her fiduciary duties.

¶ 30 Tony's argument to the contrary is that the monthly payments from the sale of the Texas property should have been used to pay the loan. It is undisputed that the estate received monthly payments from the sale of that property, and that those payments were used to make loan payments while Jerry was alive. Tony argues that Victoria should have continued to use this money to pay down the loan, thereby preserving his interest in the account.

¶ 31 We reject this argument because using the monthly payments would have indefinitely delayed the final settlement of Jerry's estate -including the distribution to Tony of any portion of the account-and violated Victoria's duty to timely resolve the estate's debts. *In re Estate of Hall*, 936 P.2d at 595. Under these circumstances, like the trial court, we cannot conclude that Victoria would have acted unreasonably or violated her fiduciary duties had she used the account to discharge the Wells Fargo debt *after* having applied the estate's liquid assets to the debt.

C. Further Proceedings

¶ 32 If a personal representative breaches a fiduciary duty, she is subject to the surcharge provisions in section 15-10-504 and "is liable to interested persons for damage or loss resulting from" the breach. § 15-12-712, C.R.S. 2019. The surcharge statute states that, if a court determines there was a breach of fiduciary duty, "the court *may* surcharge the fiduciary for any damages or loss to the estate, beneficiaries, or interested persons. Such damages may include compensatory damages, interest, and attorney fees and costs." § 15-10-504(2)(a) (emphasis added).

¶ 33 Because we conclude that Victoria breached her fiduciary duties to Tony by not applying the estate's liquid assets to reduce the amount due to Wells Fargo before paying the remaining balance of the loan from the funds in the account, we remand to the trial court to consider a surcharge judgment in the amount of the liquid assets, and, if the court determines that it is appropriate, interest, attorney fees, and costs.

¶ 34 But before doing so, the trial court must resolve the question of whether Tony's claim against Victoria was timely. The court noted in its order that Tony's claim "was filed several months after the expiration in the notice to creditors," but the court did not resolve the issue. The court should consider whether the creditor deadline applies at all, given the fact that Tony is not a creditor of the estate, but rather, seeks a surcharge judgment against the estate's personal representative. The court should also consider whether the claim was tried by implied consent under C.R.C.P. 15(b) because nothing in the record indicates that Victoria objected on timeliness

grounds, and she fully litigated the claim at the hearing. And the court should consider whether Victoria waived any statute of limitations affirmative defense by not timely raising it below.

¶ 35 Finally, we express no opinion on whether Tony has a right to contribution under section 13-50-103, C.R.S. 2019, or a common law claim of unjust enrichment against Victoria in her personal capacity.

III. Conclusion

¶ 36 The order is affirmed in part and reversed in part. The trial court's judgment that Victoria did not breach her fiduciary duty to Tony is reversed to the extent of her nonuse of the liquid assets in the estate - \$2415.61 - and the case is remanded for the trial court, subject to its determination regarding the timeliness of Tony's claim, to consider a surcharge judgment against Victoria and in favor of Tony for that amount, plus statutory interest. Also on remand, if the court enters a surcharge judgment, the court must determine whether to award attorney fees and costs under section 15-10-504(2)(a). In all other respects, the order is affirmed, without prejudice to a claim by Tony in an appropriate action for contribution under section 13-50-103 or a common law claim of unjust enrichment.

JUDGE FOX and JUDGE LIPINSKY concur.

Notes:

[1] Victoria testified at the trial that she never directed Wells Fargo to do anything and that the decision to use the account to pay the loan was made entirely by Wells Fargo. This contention is conclusively disproved by the letter Victoria's lawyer sent to Wells Fargo, which said, "[o]n Ms. Treviño's behalf, we request that Wells Fargo release the funds in the CD account to pay off the personal loan in full, and then distribute any remaining funds to [Tony]." While Victoria consistently alleged that Wells Fargo acted of its own accord in using the account, she never contested the authenticity of the letter.

[2] The trial court stated in its order that "[Tony] contends that [Victoria] breached her duty by authorizing Wells Fargo to use \$71, 711.81 of the proceeds of [the account] to pay off the personal loan rather than using assets of the estate to do so." But later, the court found that the balance due on the loan was \$77, 212.03. This discrepancy does not affect our analysis.

[3] Victoria has not entered an appearance in this court. At our invitation, the Colorado Bar Association filed an amicus brief in this case. We express our appreciation to the Bar Association and to the authors of the amicus brief in helping us decide this case.

[4] In defined circumstances, a nonprobate asset may be used to satisfy an estate debt under section 15-15-103(8), C.R.S. 2019, but the necessary conditions are not present in this case, and no party has claimed that this section applies.

[5] "It is a presumption of law that the parties to a contract bind not only themselves but their personal representatives." *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 170 (Colo. 1993) (quoting *United States ex rel. Wilhelm v. Chain*, 300 U.S. 31, 34 (1937)).

[6] Victoria presented no evidence that these funds were needed to pay any other estate obligations.
