[Cite as *Fields v. Brackney*, 2011-Ohio-1128.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

SHIRLEY FIELDS, et al.	:	
Plaintiffs-Appellees	:	C.A. CASE NO. 23852
v.	:	T.C. NO. 08EST977
GEORGE L. BRACKNEY, EXECUTOR, et al.	:	(Civil appeal from Common Pleas Court, Probate Division)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 11th day of March, 2011.

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FROELICH, J.

{¶ 1} George L. Brackney appeals from a judgment of the Montgomery County Court of Common Pleas, Probate Division, which held that certain assets held in a joint and survivorship account with his father at his father's death would be included in the father's

probate estate. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} George W. Brackney ("George W.") and his wife, Charlotte, had five children: Jean, Robert, Shirley, George L., and Melva.

{¶ 3} In 1992, George W. and Charlotte executed wills naming each other as primary beneficiaries and, in the event that either was not survived by his or her spouse, naming each of their children as equal beneficiaries. They also executed a durable power of attorney naming their son, George L. Brackney ("George L."), as their attorney-in-fact.

{¶ 4} In 2001, George L. started to assist his parents with managing their bank accounts and investments. In 2002, George W. and Charlotte held a joint and survivorship account at Lebanon Citizen's National Bank ("LCNB"), valued at approximately $110,000; in April 2002, they added George L. to this joint and survivorship account. The power of attorney was not used to effectuate this change in the account.

{¶ 5} Over the next few years, acting pursuant to the power of attorney, George L. liquidated his parents other assets, which consisted primarily of their home, certificates of deposit, and bonds; he deposited these funds into the joint and survivorship account at LCNB. The LCNB account grew to approximately $550,000.

{¶ 6} Charlotte died in April 2005 at the age of ninety-eight. In August 2005, George L. closed the LCNB account and transferred those funds into a joint and survivorship account in his and his father's names at KeyBank.

{¶ 7} After Charlotte died, George W. changed his will. Under the new will, George W. bequested "three percent (3%), up to a maximum of Twelve Thousand Dollars

($12,000)" each to Robert, Shirley, Jean, and Melva (or their lineal descendants). We will refer to this group of beneficiaries as "the siblings." George L. was to receive the remainder of the estate and to serve as executor. Robert died in April 2006, predeceasing his father; he was survived by two children.

{¶ 8} In 2006 and 2007, George L. made two sets of gifts of his father's assets, under the power of attorney, to himself, his wife, and his two children; each set of gifts totalled $48,000. None of George W.'s other children or grandchildren received gifts during this period.

{¶ 9} George W. died in December 2007 at the age of ninety-nine. On May 1, 2008, George L. presented his father's will in the probate court and was appointed as executor. George L. took a $50,000 "advance" from the estate, from which he paid $48,000 ($12,000 per sibling) to his three surviving siblings and to Robert's children. He filed an inventory of the estate totaling $475,303.69 in intangible personal property. The siblings filed exceptions to the inventory and requested an accounting, claiming that the inventory did not include all of George W.'s assets and that George L. had improperly transferred assets using his power of attorney.

{¶ 10} On September 23, 2008, George L. filed an Amended Inventory and Appraisal, which indicated that there were no assets in the probate estate. The probate court "inadvertently" approved this inventory on October 27, 2008, but subsequently withdrew its approval.[1] On July 23, 2009, a hearing was held before the magistrate on the exceptions to

[1]The magistrate used this characterization at the hearing, indicating that he "had removed the approval" of the second inventory. The probate court's Entry Rejecting the Magistrate's Decision also used this characterization. The docket, however, does not contain a separate entry withdrawing the approval of the amended inventory.

the inventory. No exceptions were filed to the Amended Inventory but, "in the interest of judicial economy," the magistrate advised the parties at the hearing that the exceptions filed to the original inventory "would be deemed *** to have also been filed against the Amended Inventory and Appraisal."

{¶ 11} On October 6, 2009, the magistrate filed a decision holding that the siblings' exceptions were overruled and that the Amended Inventory and Appraisal was approved. Specifically, the magistrate found that George L. had liquidated assets and deposited those funds into the joint and survivorship account "at his father's direction" and that survivorship rights are presumed to have been intended when a joint and survivorship account is created. The magistrate also concluded that George W. had been "fully aware of the actions of his son regarding the funds transferred from [LCNB] to KeyBank." The magistrate did not expressly address the issue of undue influence.

{¶ 12} The siblings filed objections to the magistrate's decision, claiming that it ignored the "realities of ownership" regarding the estate's assets and incorrectly applied the law.

{¶ 13} The probate court filed an Entry Rejecting the Magistrate's Decision. Although the probate court agreed with the magistrate that the use of a joint and survivorship account is typically presumptive evidence of the depositor's intention to transfer the funds in the account to the survivor at death, it limited the application of that principle to funds the decedent knew to be in the account. In other words, the probate court concluded that, where additional funds had been transferred to the joint and survivorship account by the beneficiary using a power of attorney, "there is a suspicion that the transactions were a result of undue

influence," and the beneficiary of the account must show "that his conduct has been free of undue influence." The probate court concluded that George L. had failed to make such a showing. Accordingly, the court concluded that "all of the funds in this case are part of the estate, including certificate of deposits, the two sets of gifts of $48,000, the $50,000 advancement of inheritance, and the $19,000 bond." It excluded from the estate, however, the original balance in the joint and survivorship account at LCNB at the time George L. was added to the account, before George L. transferred additional assets into the account using his power of attorney. The probate court did not attach a specific sum to the original balance of the LCNB account.

{¶ 14} On February 3, 2010, George L. filed a "Fiduciary/Estate's Notice of Appeal," which was signed by his attorney as "Attorney for Defendants, George L. Brackney As Executor and George L. Brackney, Individually." However, on August 5, 2010, George L. moved to voluntarily dismiss his appeal as executor of the estate and to proceed only in his individual capacity. We sustained this motion on August 16, 2010. Thereafter, George L. filed two briefs. In a brief styled "Brief of the Appellant George L. Brackney," he raises four assignments of error in his individual capacity as a beneficiary of the estate; in a brief styled "Brief of the Appellee, George Brackney, As Executor of the Estate," he purports to respond to the assignments raised in his other brief by asserting that the probate court's ruling had "no bearing on the executor's ability to act in accordance with the law of Ohio," that the "size of the estate ha[d] no bearing on the duty of the executor," and that he "will perform his duties based on the rulings of this Court and as required by law." The siblings'/ appellees' brief primarily addresses the arguments that George L. raises in his individual capacity, although it

does challenge his dual role in this case. We will discuss all of these issues below.

II

{¶ 15} The first two assignments of error raised in George L.'s brief relate to the appropriate burden of proof, and we will address them together.

{¶ 16} "THE PROBATE COURT ERRED WHEN IT APPLIED AN INCORRECT STANDARD TO THE CHALLENGE TO THE INVENTORY OF THE ESTATE OF GEORGE W. BRACKNEY."

{¶ 17} "THE PROBATE COURT ERRED IN FINDING THAT THE FUNDS IN A JOINT AND SURVIVORSHIP ACCOUNT SHOULD BE CONSIDERED PROBATE ESTATE ASSETS."

{¶ 18} George L. claims that the siblings should have had the burden to prove undue influence by clear and convincing evidence when they challenged his inventory of the estate in the probate court. George L. also argues that, even if he had the burden to prove the absence of undue influence in his handling of his father's assets, he did establish that he had acted at the direction and with the knowledge of George W. in transferring George W.'s assets into the joint account. The siblings contend that the probate court properly placed the burden of proof on George L. to show that he had not exerted undue influence, because of his fiduciary relationship with George W., and that he failed to show that the transfers in question were not the product of undue influence.

{¶ 19} The Supreme Court has held that "the opening of a joint and survivorship account in the absence of fraud, duress, undue influence or lack of capacity on the part of the decedent is conclusive evidence of his or her intention to transfer to the surviving party or

parties a survivorship interest in the balance remaining in the account at his or her death." *Wright v. Bloom*, 69 Ohio St.3d 596, 1994-Ohio-153, paragraph two of the syllabus. The Supreme Court has characterized this rule as a "rebuttable presumption" in favor of the surviving owner. See *Estate of Cowling v. Estate of Cowling*,109 Ohio St.3d 276, 2006-Ohio-2418, ¶12; see, also, *Wright*, 69 Ohio St.3d at 605; *In re Estate of Case* (Apr. 3, 1998), Montgomery App. No. 16747.

{¶ 20} The dispute in this case centers around the use of the power of attorney executed by George W. and Charlotte Brackney in favor of their son, George L. "The holder of a power of attorney has a fiduciary relationship with his or her principal." *In re Scott* (1996), 111 Ohio App.3d 273, 276. "A 'fiduciary relationship' is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78, quoting *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115. A fiduciary owes the utmost loyalty and honesty to his principal. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 165. The law is zealous in guarding against abuse of such a relationship. *In re Termination of Employment*, 40 Ohio St.2d at 115.

{¶ 21} Any transfer of property from a principal to his attorney-in-fact is viewed with some suspicion. *Studniewski v. Krzyzanowski* (1989), 65 Ohio App.3d 628, 632. Self-dealing transactions by a fiduciary are presumptively invalid. *In re Estate of Cunningham* (Oct. 25, 1989), Knox App. No. 89-CA-10. In such a case, the attorney-in-fact is obligated to demonstrate the fairness of his conduct. *In re Scott*, 111 Ohio App.3d at 276. See, also *Hoopes v. Hoopes* (April 9, 2007), Stark App. No. 2006 CA 220, ¶38-39.

{¶ 22} In *Case*, we addressed a similar factual situation to that presented here. Case's niece had a power of attorney during his lifetime, but a survivorship account had been created in Case's and the neice's name without the use of the power of attorney. The account was funded with approximately $27,000. Using her power of attorney, the niece placed additional funds into the survivorship accounts from other bank accounts of Case and from Case's retirement income. In an inventory filed by the administrator of the estate after Case's death, which included the survivorship accounts, approximately eighty-eight percent of the decedent's assets ($66,230 out of net assets of $75,540) was in the survivorship accounts. The niece sought to exclude these assets from the estate.

{¶ 23} *Case* required us to weigh the rebuttable presumption of survivorship rights in a joint and survivorship account against the suspicion with which we must view transfers of money under a power of attorney for the attorney-in-fact's benefit. We acknowledged the *Wright* presumption in favor of survivorship rights, but we further stated:

{¶ 24} "[W]here additional funds were transferred into the [survivorship] accounts under a power of attorney, we hold that the *Wright* presumption applies only to those funds that Case [the decedent] knew to be in the survivorship accounts. The presumption does not apply to additional funds that [the niece], as an attorney-in-fact who was also the beneficiary of the survivorship accounts, transferred into the survivorship accounts, unless the propriety of such transfers can withstand exacting scrutiny.

{¶ 25} "***

{¶ 26} "In a fiduciary relationship, the person who holds the power bears the burden of proof on the fairness of a transaction between the agent and the principal. *** In

particular, in cases where a fiduciary relationship exists between the creator of a joint and survivorship account and a survivor beneficiary, there is suspicion that the transaction resulted from undue influence, and a presumption of undue influence arises. *** Once this presumption arises, the burden of going forward with evidence shifts to the beneficiary to show that his conduct has been free of undue influence or fraud. *** The beneficiary 'has little leave to complain if the finder of fact chooses not to believe some or all of his proofs.' *** The beneficiary must rebut the presumption by a preponderance of the evidence." Id. (Internal citations omitted). In this case, the probate court recognized that the *Wright* presumption applied to the funds that were in the joint and survivorship account when it was opened by George W. and Charlotte. This amount was not specifically determined by the probate court, but the siblings assert that there was approximately $110,000 in the account when George L. was added to the account, and George L. does not dispute this figure. As to the additional funds transferred into the account, however, the probate court held that there was "a suspicion that the transactions were a result of undue influence" because of the fiduciary relationship between George L., who held the power of attorney, and his parents, who created the joint and survivorship account, and because of George L.'s use of the power of attorney to transfer additional funds into the survivorship account. The burden of proof applied by the probate court was consistent with our holding in *Case*.

{¶ 27} At the hearing before the magistrate, George L. admitted that he had not had an ownership interest in his parents' home, the certificates of deposits, or the bonds that he had liquidated and transferred into the joint and survivorship accounts at LCNB and, subsequently, at KeyBank. He claimed that he made these transfers under his father's

direction in an attempt to maximize the interest earned on the assets. He also claimed that he did not recognize that he would receive survivorship benefits from these accounts until after his father's death; he had believed that the funds deposited in those accounts "were [his] father's property" and did not begin to "formulate the idea that maybe those are [his own] funds" until after his father's death. Although George L. acknowledged that he did not have any documents to directly support his claims that his father had been involved in all of these decisions, he pointed to his father's signature on the deposit slip related to the bonds and to his father's signature on a bank card removing Charlotte's name from the account after her death as evidence that George W. knew of and approved these transactions. George L. did not offer any evidence that the rate of return on the funds held in the joint and survivorship account was better than it had been when the assets were held in other forms.

{¶ 28} George L. also testified about two "gift letters," dated June 2006 and June 2007 respectively and signed by his father, that instructed George L. to transfer $12,000 each to himself, his wife, and his two daughters. George L. effectuated these gifts; none of siblings or George W.'s other grandchildren received such gifts. George L.'s sister, Jean, testified that her father had been very "tight" with his money and that neither his children nor his grandchildren had ever received birthday gifts of more than a dollar or two. Jean testified that her father would never have given such substantial gifts. She also testified that, in her opinion, George W. would not have singled out some members of the family for such gifts; he would have treated all equally.

{¶ 29} George L. suggests that the probate court erred in ignoring the magistrate's findings about the credibility of the evidence because the magistrate personally observed

George L.'s testimony and because the siblings did not present evidence contradicting George L.'s claims.

{¶ 30} Although magistrates "truly do the 'heavy lifting,'" *Quick v. Kwiatkowski*, Montgomery App. No. 18620, 2001-Ohio-1498, "magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court. Therefore, magistrates do not constitute a judicial tribunal independent of the court that appoints them. Instead, they are adjuncts of their appointing courts, which remain responsible to critically review and verify the work of the magistrates they appoint. *** Civ.R. 53(E)(4)(b) contemplates a de novo review of any issue of fact or law that a magistrate has determined when an appropriate objection is timely filed. The trial court may not properly defer to the magistrate in the exercise of the trial court's de novo review. The magistrate is a subordinate officer of the trial court, not an independent officer performing a separate function." *Francis v. McDermott*, Darke App. No 1744, 2008-Ohio- 6723, ¶12, citing *Quick*, supra (internal citations omitted). Thus, as long as it has the complete record before it, a trial court, such as the probate court, may not defer to a magistrate's findings of fact; it must conduct its own review of the evidence, after which it is permitted to adopt or reject the magistrate's decision in whole or in part. Civ.R. 53(D)(4)(b).

{¶ 31} The probate court concluded that George L. "did not present sufficient evidence to rebut the presumptions of undue influence in transferring funds into the [LCNB] account, or in opening and funding the KeyBank account," noting that "the only evidence presented by George L. that specifically addressed the issues was his own self-serving

testimony." George L. presented bank documents purportedly bearing George W.'s signature as evidence that he knew of the transfers, but the documents purportedly signed by George W. after the transfers were made do not contain account balances. He also offered a note from a KeyBank employee stating that HH bonds were to be redeemed and direct deposited into George W.'s account, but George W.'s signature is only on the direct deposit form; this packet of documents does not clearly establish, in itself and without reference to George L.'s testimony, that George W. knew the purpose of the direct deposit form. Moreover, only George L. testified that the signatures on the bank documents and on the gift letters belonged to his father. The court was not required to make the inferences advanced by George L., namely that these signatures established George W.'s knowledge and approval of all of the transfers into the joint accounts. And the trial court was not required to credit George L.'s testimony that all of the transfers were directed by his father and reflected his father's wishes. The probate court reasonably concluded that George L. had not rebutted the presumption of undue influence by a preponderance of the evidence.

{¶ 32} The first and second assignments of error are overruled.

III

{¶ 33} George L.'s third assignment of error states:

{¶ 34} "THE PROBATE COURT ERRED IN FAILING TO FIND THAT THE ACCEPTORS WAIVED AND RELINQUISHED THEIR RIGHTS TO OBJECT TO THE INVENTORY BY ACCEPTING SETTLEMENT FUNDS."

{¶ 35} George L. contends that he paid each of his siblings $12,000 from the joint and survivorship account pursuant to his father's wishes, as expressed in his Will, even

though there were no estate assets. Because each of his siblings was entitled to a maximum of $12,000 under the Will, he concludes that his siblings would not benefit from having the probate court return any additional funds from the joint and survivorship account to the estate. He also contends that the siblings waived any claim against the estate by accepting the $12,000 payment. The probate court did not address this argument.

{¶ 36} The checks that George L. wrote to his siblings, niece, and nephew included the notation "Will payment settlement," but the checks were written before the estate was opened and before George L. was appointed to serve as executor. Although a memo line on a check may serve as evidence of an enforceable agreement, see, e.g., *Mantia v. House*, 178 Ohio App.3d 763, 2008-Ohio-5374, a court is not required to conclude that such a memo establishes an enforceable agreement between the parties. Moreover, the probate court's judgment from which George L. appeals did not address the validity of the Will and, according to the siblings, proceedings on this issue are pending in the probate court. For all of these reasons, the trial court could have reasonably rejected George L.'s argument that the siblings waived any claim against the estate or any challenge to his actions as attorney-in-fact by accepting these checks.

{¶ 37} The third assignment of error is overruled.

IV

{¶ 38} George L.'s fourth assignment of error states:

{¶ 39} "THE PROBATE COURT LACKED JURISDICTION TO DECIDE ISSUES CONCERNING A JOINT AND SURVIVORSHIP ACCOUNT."

{¶ 40} George L. argues that the probate court "lacked jurisdiction" over the joint and

survivorship accounts because such accounts are typically non-probate assets.

{¶ 41} In our view, there is no question that the probate court has jurisdiction to hear and determine an action that involves a power of attorney and to determine whether an attorney-in-fact properly placed a decedent's assets in a joint account. R.C. 2101.24(B)(1)(b) provides that the probate court "has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas *** to hear and determine *** [a]ny action that involves *** a power of attorney, including, but not limited to, a durable power of attorney***." See, also, *In re Estate of Leach*, Montgomery App. No. 21242, 2006-Ohio-3755, ¶12, 17. Even the case relied on by George L., *In re Estate of Jaric*, Mahoning App. No. 00CA243, 2002-Ohio-5016, acknowledges that, in some circumstances, such as "when a fiduciary relationship, i.e. power of attorney, exists between a creator of a joint and survivorship account and the surviving beneficiary," a joint and survivorship account may be a probate asset and within the probate court's jurisdiction. The trial court had jurisdiction to hear the issues raised by the siblings in this case.

{¶ 42} The fourth assignment of error is overruled.

V

{¶ 43} The siblings raise one additional issue in their brief. They contend[2] that George L. "cannot appeal in his capacity as an individual beneficiary because he is also the Executor of the Estate." The siblings assert that George L. cannot sue the estate in his individual capacity because he is "effectively su[ing] himself;" they claim that, as the

[2]The siblings filed a Motion to Dismiss the appeal on February 19, 2010. In a subsequent Decision and Entry, we found that dismissal was not appropriate because the central issues were "'standing' issues," which could "properly be raised as assignments of error on appeal."

executor, George L. was required to "defend an appeal that seeks to remove assets from the estate." The siblings rely on *Fried v. Fried* (1989), 65 Ohio App.3d 61, a case from the Eighth Appellate District. The Eighth District held that "[a] person in his representative capacity cannot sue himself in the same action in his individual capacity, or vise versa. *Fielder v. Edison Co.* (1952), 158 Ohio St. 375, *** paragraph three of the syllabus.***" *Fried*, 65 Ohio App.3d at 64.

{¶ 44} Although we agree with the Eighth District that an executor should not be permitted to sue the estate in his capacity as a beneficiary because of the inherent conflict of interest, we are also cognizant of the fact that the legislature has set forth a procedure for the removal of executors in the probate court. R.C. 2109.04 provides that "[t]he court may remove any fiduciary, *** for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the property, testamentary trust, or estate that the fiduciary is responsible for administering demands it, or for any other cause authorized by law." Generally, "[a] disqualifying conflict is one between the fiduciary and the best interests of the estate[,] not one between the fiduciary and a claimant against the estate." *In re Estate of Christy* (Oct. 27, 1987), Franklin App. No. 87AP-472. However, when the claimant and the fiduciary are the same person, as in this case, the conflict of interest seems clear.

{¶ 45} The siblings did not ask the probate court to remove George L. as the executor, but they now seek to have his appeal dismissed because George L., "*the individual*, is without standing to bring this appeal." (Emphasis in original.) Although there are procedural anomalies in this case – such as George L.'s failure to pursue his interest

individually, as a beneficiary, in the probate court, in addition to any interest he had as the executor, and his filing of two briefs – he is clearly affected, in his individual capacity, by the probate court's decision to include in the estate those assets that passed through his parents' joint and survivorship account after it was created. The issue of lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court, and is waived if not timely asserted. *Countrywide Home Loans, Inc. v. Swayne,* Greene App. No. 2009 CA 65, 2010-Ohio-3903, ¶29, citing *Mid-State Trust IX v. Davis*, Champaign App. No. 07-CA-31, 2008-Ohio-1985, ¶56. We are reluctant to dismiss George L.'s appeal for lack of standing because he did, individually, have a real interest in the subject matter of action, even though he has asserted it belatedly.

VI

{¶ 46} The assignments of error are overruled.

{¶ 47} The judgment of the probate court will be affirmed.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

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