[Cite as *Estate of Strang v. Strang*, 2004-Ohio-3677.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
ESTATE OF JOHN A. STRANG, deceased	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
-vs-	:	
	:	
IVAN A. STRANG	:	Case No. 03-COA-071
	:	
Defendant-Appellant	:	
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING: Criminal appeal from the Ashland County Court of Common Pleas, Case No. 2002-1035

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: JULY 12, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Boggins, J.

{¶1} This is an appeal from a decision of the Probate Court of Ashland County which determined that a certificate of deposit of the deceased which formerly contained a payable on death designation to Appellant was an asset of the Estate rather than that of Appellant.

{¶2} The facts available indicate that the deceased, John A. Strang had funds on deposit at Bank One. On May 5, 1997, such funds were utilized to open a certificate of deposit at the Huntington Bank in the amount of $21,383.81 payable on death to Appellant.

{¶3} At the time this action was taken, Appellant held a power of attorney from his now deceased father.

{¶4} The briefs differ in the facts as to whether John A. Strang opened the certificate of deposit individually or whether Appellant utilized his power of attorney to create the certificate in the form stated.

{¶5} On June 25, 1999, Janet Helbert, daughter of John A. Strang, was appointed guardian of the person and estate of John A. Strang after a determination of his incompetency.

{¶6} The certificate's payable-on-death clause was deleted after the appointment of such guardian and on expiration of the original term it was renewed as a new certificate, but also without the payable on death designation.

{¶7} Such funds were not needed by John A. Strang during his lifetime and existed at his death on February 18, 2002.

{¶8} Under the Will of John A. Strang, Appellant was to receive a 155-acre farm and $10,000.00 with Janet Helbert and two other sisters being residual beneficiaries.

{¶9} Appellant was originally appointed as Executor of the Estate of his father, but was removed after an evidentiary hearing due to allegations of financial misconduct. In his final account, the certificate of deposit in question was listed as an estate asset. He then filed a motion to delete such item from his account. An evidentiary hearing was held after which the court, while treating the motion as one in declaratory judgment, without objection, found such certificate to remain as an estate asset.

{¶10} Two Assignments of Error are raised:

ASSIGNMENTS OF ERROR

{¶11} "I. THE TRIAL COURT ERRED IN DECIDING THAT UPON THE DEATH OF THE DECEDENT, JOHN A. STRANG, THE OWNERSHIP OF THE CERTIFICATE OF DEPOSIT MADE BY THE DECEDENT ORIGINALLY IN THE AMOUNT OF $21,383.81 PAYABLE UPON THE DEATH OF JOHN A. STRANG TO THE NAMED DEATH BENEFICIARY IVAN J. STRANG, WAS IN THE ESTATE OF JOHN A. STRANG, DECEASED, NOT IN THAT OF THE APPELLANT.

{¶12} "II. THE TRIAL COURT ERRED IN DECIDING THAT JANET HELBERT, GUARDIAN OF THE ESTATE OF JOHN A. STRANG, AN INCOMPETENT PERSON, HAD THE RIGHT TO CANCEL THE PAY ON DEATH DESIGNATION OF SAID BANK DEPOSIT WITHOUT OBTAINING AUTHORITY THEREFOR FROM THE ASHLAND COUNTY PROBATE COURT."

I, II.

{¶13} We shall address both Assignments of Error jointly as they are interrelated.

{¶14} Appellant argues that Janet Helbert, as guardian, lacked authority, without court approval, to delete the payable-on-death designation as the funds were not needed for the care and support of John A. Strang. Also, he states that her action further violated her position as guardian in that, as a residual beneficiary, she benefited by the deletion of

the payable-on-death clause.

{¶15} As stated heretofore, a difference of opinion exists in the briefs as to whether the certificate was opened at the Huntington Bank by John A. Strang or by Appellant under the power of attorney he possessed. While the court found that the latter event occurred according to the testimony of Ms. Vines, a Huntington representative, her testimony is to the effect that she was not present when it was opened, but that the bank employee involved was Janet Kammer. Ms. Kammer was not called as a witness.

{¶16} However, this misconstruction is not significant as the controlling legal issue is one of the authority by the guardian.

{¶17} We dismiss the argument as to violation of the duties as a guardian due to partial benefit resulting as we reiterate the question is one of authority. Of course, if the record indicated that the certificate was opened under the power of attorney by Appellant, the same argument as to self dealing could be made, but this is not before us.

{¶18} The court and Appellee relied on the Ohio Supreme Court's decision in *Miller v. Peoples Federal Savings & Loan Association* (1981), 68 Ohio St.2d 175, which stated:

{¶19} "Depositor of a payable-on-death account retains her rights to ownership and full control of such account during her lifetime; therefore, following a finding of incompetency, depositor's ownership rights passed to the legally appointed guardian of her estate, including the right to designate a change in the registration of that account. R.C. §§ 2111.14(B), 2131.10, 2131.11."

{¶20} Appellant finds the *Miller* case, supra, to be inapplicable as the inception of such case differs and that the amendment on April 1, 2002, by the Supreme Court to the effect that the text of a case, not merely the syllabus, is the stated law.

{¶21} He also cites several cases including *Friedrich v. BancOhio National Bank*

(1984), 14 Ohio App.3d 247, and *Dorfmeier, Gdn. v. Dorfmeier, Admr.,* 69 Abs. 15 (Probate Court 1954 Montgomery County) and *Zuber v. Zuber* (1952), 93 Ohio App. 195.

{¶22} First, the fact that the Supreme Court now considers the text of a case to be a statement of the law has no bearing as both the syllabus along with the text are controlling.

{¶23} Also, the facts of the *Miller* case, supra, while originating as an action against the savings institution by the deleted beneficiaries under payable-on-death accounts altered by the guardian of the incompetent depositor are quite similar to the case sub judice and we find that it is controlling.

{¶24} While the court did comment that the guardian had the authority "in the best interests of the ward", we fail to find any evidence presented as to the action not being in the best interest of Mr. Strang at the time of change other than his estate was substantially solvent at death. Also, the court determined, "At that time Mrs. Helbert did in fact remove the payable on death designation so that these funds would be available at the death of John A. Strang to pay necessary expenses and bills. There were in fact substantial bills after Mr. Strang's death considering the estate taxes which were owed." How the deletion of an after death designation affected the interests of Mr. Strang is not developed.

{¶25} The *Friedrich v. Bancohio*, supra, case, involved a guardian attempting to terminate her ward's inter vivos trust purportedly on the basis of medical needs. However, the trust had liquid assets in excess of $40,000.00 and the trustee, in accordance with the trust provisions, on request, would have provided funds for medical care. The court drew a distinction between the facts presented and the holding of *Miller v. Peoples Federal Savings*:

{¶26} "As was stated in *Miller, supra,* the depositor retains an ownership right to change the beneficiary or withdraw the funds. In other words, legal title to the funds in the account remains with the depositor. Such is not the situation with an *inter vivos* trust,

wherein a settlor out of necessity must convey the legal title to the trust *res* to the trustee so that the trustee may hold the property for the benefit of the *cestui que trust. First Natl. Bank of Cincinnati v. Tenney* (1956), 165 Ohio St. 513, 138 N.E.2d 15; *First Natl. Bank of Middletown v. Gregory* (1983), 13 Ohio App.3d 161, 468 N.E.2d 739.

{¶27} "By reserving a power of revocation, a settlor retains the right to reinvest himself with legal title at some point in the future. However, the power of revocation does not give the settlor the same ownership interest in the trust *res* as that which a depositor retains upon creating a P.O.D. account. In a P.O.D. account, the depositor-owner retains both the legal and equitable interests in the account. Also, the interest of a "beneficiary" in a P.O.D. account does not vest until the death of the owner. *Eger v. Eger* (1974), 39 Ohio App.2d 14, 314 N.E.2d 394. Thus, a P.O.D. account does not encompass one of the fundamental essentials of a trust, namely, the separation of the legal estate from the equitable estate. See *Hill v. Irons* (1953), 160 Ohio St. 21, 113 N.E.2d 243."

{¶28} *Dorfmeier, Gdn. v. Dorfmeier, Admr.,* supra, permitted the guardian of an incompetent spouse to exercise such ward's election to purchase the mansion house from her husband's estate. The ward would not only receive an income by such purchase, but she was liable on the mortgage on such residence. While the court, on Application for Authority, did state that the guardian was not the alter ego of the ward, statutory authority existed to grant the application. This case does not support Appellant's position.

{¶29} *Zuber v. Zuber* , supra, was an attempt by a guardian to alter the payment method and beneficiaries on certain insurance policies obtained by her incompetent spouse solely for her own benefit. Again, this case is not pertinent to the issue in the case sub judice.

{¶30} We therefore affirm the decision of Judge Vercillo at Appellant's costs and reject the Assignments of Error.

By Boggins, J.

Wise, J., concurs separately.

Gwin, P. J., dissents.

Wise, J., concurring.

{¶31} I concur in the majority's result but write separately to express my concern for the potential of defeating a valid estate plan or testamentary intent of the ward that was created while the ward was competent. An analysis of what is in the best interest of the ward must include the ward's estate plan. If the guardianship was created after the ward attained the age of twenty-one and was legally competent to contract with a bank, to create an account, the court must then consider whether the account was part of an estate plan.

{¶32} The use of survivorship accounts and P.O.D. accounts are as important and as integral a part of an estate plan as a will. A guardian cannot revoke a will and defeat the expressed intent of the ward, as to the transfer of his assets at death, without the intervention of the probate court. Should a guardian be permitted to accomplish the same result by terminating or manipulating the ward's bank account that expresses a testamentary intent? Currently, no statute requires a guardian to seek the court's permission and therefore, the guardian is not required to do so.

{¶33} However, I find the court must analyze what is in the ward's best interest by considering the effect, if any, on the ward's valid testamentary intent. A testator's intent may be defeated by the practical aspects of life. Debts may limit what assets remain to be transferred at death. If all other assets are depleted and only the P.O.D. account remains, this could also defeat the ward's testamentary intent expressed by his will. However, this problem should not be compounded by arbitrary, malicious or self-serving acts of a guardian. Compounding the problem, in this case, is the fact that the guardian is a

beneficiary under the will and stands to personally benefit financially from the removal of the P.O.D. designation. Self-dealing, of course, would be a breach of a fiduciary's duty.

{¶34} Despite these concerns, I conclude the trial court, in this case, acted within its discretion in not setting aside the transfer of the funds and finding no misconduct on the part of the guardian. I base this conclusion upon the fact that the guardian did not cancel the P.O.D. account but failed to renew a P.O.D. account that had expired. I further agree with the court's concern over the validity of the creation of the account and finding that the funds were necessary for the administration of the estate.

{¶35} Therefore, I concur in the majority's conclusion and affirm the judgment of the court.

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JUDGE JOHN W. WISE

Gwin, J. dissenting.

{¶36} I must dissent from the result reached by the majority. I believe the appellee had no authority to change the POD designation.

{¶37} I find the *Miller* case relied upon by the appellee and the majority is not applicable here. This case deals with the potential liability of a bank in honoring the guardian's instructions to change the beneficiary of the account. *Miller* stands for the proposition the former beneficiaries cannot recover from the bank for wrongfully paying over the funds pursuant to the guardian's changes.

{¶38} Likewise, I see no practical difference between a guardian changing the beneficiary in the middle of a term or on a renewal. The establishing of a POD account expresses the ward's wishes and the guardian cannot disregard those wishes except under her authority as given by the court.

{¶39} A guardian must provide for the suitable and necessary maintenance of the ward out of the ward's estate, R.C. 2111.13. The guardian is not the "alter ego" of the ward, see *Zuber*, supra. She may only act in furtherance of her duties to provide for the ward's needs, and the probate court is without power to permit her to enter into contracts not connected with the management of the ward's estate and person, Id.

{¶40} The case of *Witt v. Ward* (1989), 60 Ohio App. 3d 21, 573 N.E.2d 201 provides an interesting twist on this issue. In *Witt*, the ward changed the beneficiary on her POD accounts without the knowledge of her guardian, and when the guardian learned of the change, he changed them back. The Court of Appeals for Preble County found the guardian acted improperly. The court held a guardian has no authority to prohibit or interfere with a ward's testamentary disposition, especially when there is no showing the change is in the best interest of the ward. Additionally, the mere establishment of a guardianship does not destroy the POD account created prior to the guardianship, *Witt*, at 206, citations deleted. The Twelfth District found nothing in the *Miller* case contradicted this holding, and noted the guardian must always be guided by the best interest of the ward.

{¶41} I would find the appellee here only had authority to withdraw funds from the POD account in an amount needed to support the ward. It is clear these funds were not needed by the ward during his lifetime, and the appellee's stated reason for taking the funds was to pay the estate taxes after the ward died. I believe this is far outside her authority as guardian, and in no way related to the best interest of the ward. Further, it is highly suspect given that she is a remainderman of the will.

{¶42} I would sustain the assignments of error.

JUDGE W. SCOTT GWIN

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ESTATE OF JOHN A. STRANG, deceased	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
IVAN A. STRANG	:	
Defendant-Appellant	:	CASE NO. 03COA-071

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed. Costs to Appellant.

JUDGES