

PROBATE CORNER

By: David M. Garten, Esq.

ARTICLE: PR's Duty Regarding Pre-Death Withdrawals From Joint Accounts

Does a Personal Representative have a duty to investigate and possibly recover jointly held assets improperly withdrawn by the surviving joint owner prior to death?

Sec. 733.309, Fla. Stat. reads: "Any person taking, converting, or intermeddling with the property of a decedent shall be liable to the PR or curator, when appointed, for the value of all the property so taken or converted and for all damages to the estate caused by the wrongful action." Additionally, §733.607, Fla. Stat., reads: "The PR shall take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution and may maintain an action to recover possession of property or to determine the title to it."

When the form of ownership of an account is joint tenancy with right of survivorship, an interest of one account holder continues in funds improperly withdrawn by the other owner, notwithstanding the right of either owner to withdraw from the account. Each person has the right, against the other, only to his individual interest in the account. Absent other provision, the shares in the joint account are presumed to be equal for purposes of alienation. Where a joint tenant withdraws more than his share, such a withdrawal is wrongful as between the parties and terminates the joint tenancy nature of the funds, in which case the withdrawing joint tenant is liable to the joint owner for that person's share of the withdrawn funds. See *Nationsbank, N.A. v. Coastal Utils., Inc.*, 814 So. 2d 122 (Fla. 4th DCA 2002).

In *Wiggins v. Parson*, 446 So. 2d 169 (Fla. 5th DCA 1984), the personal representative successfully recovered the decedent's share of the funds held in a joint account that were improperly withdrawn by a joint owner prior to the decedent's death. The Court reasoned that withdrawal of jointly-owned funds by a joint owner and placement of the funds in other persons' names, terminates the joint tenancy nature of the property and severs the right of survivorship as to the funds withdrawn. The withdrawing joint tenant is liable and accountable to the other joint owner for that person's share, but the intervening death of either does not alter the outcome.

With regard to a jointly owned pooled checking account, each tenant has the right, against the other, only to his or her individual interest in the account during the lifetime of the joint tenants. Funds in the account belong to the parties in proportion to the net contributions by each to the sums on deposit. One joint tenant may bring a conversion action against another joint tenant who wrongfully appropriates more than his share of the money from a joint tenancy account. *Joseph v. Chanin*, 940 So.2d 483 (Fla. 4th DCA 2006).

In *De Soto v. Guardianship of De Soto*, 664 So. 2d 66 (Fla. 3rd DCA 1995), the court held that one of three joint tenants in bank accounts was entitled to one-third of funds that had been transferred by the other two joint tenants' son into a trust account, absent any evidence sufficient to overcome the presumption that each party owned an equal share of the funds. In essence, when there is an account that is characterized as a joint tenancy with right of survivorship, each tenant has the right, against the other, only to his or her individual interest in the account during the lifetime of the joint tenants and the funds in the account belong to the parties in proportion to the net contributions by each to the sums on deposit.

In *Varela v. Bernachea*, 917 So. 2d 295 (Fla. 3rd DCA 2005), Varela and Bernachea developed a romantic relationship and traveled the world together. Bernachea was an attorney in Argentina for over 30 years, but has since retired and invested in American businesses and real estate. In late 2001, at Bernachea's behest, Varela stopped working and moved into his condominium where the two began living together. While they were a couple, Bernachea paid all of Varela's expenses and showered her with expensive gifts. Varela claimed that she never knew Bernachea was married. Moreover, she claimed Bernachea held her out as his wife. Bernachea disputed Varela's claims and asserted that Varela knew he had a wife, yet contented herself with being his mistress. On 1/4/02, Bernachea added Varela as a joint tenant with a right of survivorship to his Merrill Lynch CMA account. As a joint owner of the account, Varela received a Visa check card for the account, which she freely used. Merrill Lynch never received any instruction to restrict Varela's access to the account -- be it via check or check card. On 10/18/02, Bernachea suffered a heart attack. On 10/25/02, Varela wrote a \$280,000.00 check on the CMA account and deposited it in her own name in a newly opened Merrill Lynch personal account. Two weeks after his release from the hospital, Bernachea demanded that Merrill Lynch return the \$280,000.00. Merrill Lynch complied and transferred the \$280,000.00 into the CMA account. Varela contested this transfer. The appellate court found that Varela was entitled to a one-half interest in the 10/25/02 CMA account balance. The court reasoned that when a joint bank account is established with the funds of one person, a gift of the funds is presumed; this presumption may be rebutted only by clear and convincing evidence to the contrary. The court found that Bernachea failed to rebut the presumption that he intended to give Varela an equal interest in their joint bank account.