COURT OF APPEALS
DECISION
DATED AND RELEASED

February 19, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0449

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

In the Matter of the Estate of
WILMA M. RADIGAN, Deceased:

PATRICIA RADIGAN BROPHY,

Appellant,

v.

MICHAEL E. RADIGAN,
Personal Representative for the
Estate of WILMA M. RADIGAN,

Respondent.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Patricia Radigan Brophy appeals from a judgment disallowing her claim against the estate of her late mother, Wilma M. Radigan. Because we conclude that the trial court properly ruled that Radigan did not gift an investment account to Brophy, we affirm the trial court's dismissal of

Brophy's claim that her mother converted her property when she withdrew funds from the account.

In 1974, Radigan opened an investment account in her and Brophy's names as joint tenants with the right of survivorship. Although the signatures of Radigan and Brophy were required to withdraw funds from the account, Radigan did not adhere to this requirement when she withdrew funds from the account. She solely controlled the account from the time it was opened until the time of her death. Brophy deposited no funds to the account; over the years, Radigan disbursed funds from the account to Brophy, her creditors and children. Brophy was unaware of the account's existence until the late 1980s and did not learn that Radigan had been withdrawing funds from the account until 1993.

Radigan died in January 1994, and her will was admitted to probate in April 1994. Brophy filed a claim against the estate alleging that her mother converted funds from the investment account during the years 1989 through 1993 in the amount of $84,800. The trial court concluded that there was no evidence that Radigan intended to gift the account to Brophy, notwithstanding its establishment as a joint account with a right of survivorship. In the absence of a gift, Brophy could not sustain her claim for conversion.[1] Brophy appeals.

The elements of a gift are: (1) donor's intention to give; (2) actual or constructive delivery to the donee; (3) termination of the donor's dominion over the subject of the gift; and (4) dominion in the donee. *See* ***Giese v. Reist,*** 91 Wis.2d 209, 218, 281 N.W.2d 86, 90 (1979). The trial court found that none of the elements was established in this case.

On appeal, Brophy contends that Radigan's intent to gift the account is apparent from her creation of a joint tenancy account. While

[1] "Conversion is the wrongful or unauthorized exercise of dominion or control over a chattel." ***Farm Credit Bank of St. Paul v. F&A Dairy,*** 165 Wis.2d 360, 371, 477 N.W.2d 357, 361 (Ct. App. 1991). The party alleging conversion must prove that it was in possession of or entitled to immediate possession of the property converted. *See* ***id.***

donative intent is presumed if the form of ownership is a joint tenancy with the right of survivorship, this presumption can be rebutted by clear and convincing evidence that the donor intended to retain sole control over the property. *See* ***Johnson v. Mielke,*** 49 Wis.2d 60, 76-77, 181 N.W.2d 503, 511-12 (1970); *see also* ***First Wis. Trust Co. v. United States,*** 553 F. Supp. 26, 30 (E.D. Wis. 1982). The putative donor's conduct subsequent to the establishment of the account may be relevant and probative of the putative donor's intent at the time the account was created. *See* ***Johnson,*** 49 Wis.2d at 77, 181 N.W.2d at 512.

Brophy argues that the estate presented insufficient evidence to rebut the presumption that Radigan intended the joint account to be a gift to Brophy. The trial court disagreed. We will uphold its findings of fact on the question of Radigan's intent if those findings are not clearly erroneous. *See* § 805.17(2), STATS.

The trial court found that Radigan handled the account in the same manner from its opening until she died. There was no evidence that Radigan altered her behavior in any matter or relinquished sole control over the account. She freely managed the fund and spent it as she saw fit. She did not make Brophy aware of the existence of the account. The court found that Radigan's actions were totally inconsistent with any dominion over the account by Brophy, even if the account was a joint tenancy. The court found that all of Radigan's actions with regard to the account indicated her intention to retain control of it prior to her death.

The trial court's findings of fact are not clearly erroneous. In concluding that Radigan did not gift the account to Brophy, the trial court properly considered all incidents of the account, not just the fact that it was jointly titled with a right of survivorship.

We do not agree with Brophy that because the fund was established arguably for her benefit, Radigan's donative intent was established. Although income generated by the account was paid by Radigan to Brophy and to others for her benefit over the years, such conduct does not establish a gift in the absence of the putative donor's intention to give, termination of the donor's dominion over the account and dominion in the donee. *See* ***Giese***, 91 Wis.2d at 218, 281 N.W.2d at 90.

As Brophy's brief acknowledges, the fact that funds were distributed from the account to Brophy or for her benefit is subject to various inferences. One inference is that Radigan intended to gift the account to Brophy. Another inference is that Radigan did not intend to gift the account to Brophy but wanted to use its funds for her benefit and provide for a disposition of the account at Radigan's death. The trial court drew the latter inference. That it did so is not clearly erroneous based upon this record.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.