[Cite as *Dorsey v. Dorsey*, 2011-Ohio-6336.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

WILLIAM H. DORSEY, EXECUTOR OF THE ESTATE OF LOTTIE DORSEY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0043**
- vs -	:	
LEWIS DORSEY, et al.,	:	
Defendant-Appellant.		

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 2008 CVA 0001.

Judgment: Affirmed.

Thomas E. Schubert, 138 East Market Street, Warren, OH 44481 (For Plaintiff-Appellee).

William P. McGuire, William P. McGuire Co., L.P.A., 106 East Market Street, #705, P.O. Box 1243, Warren, OH 44482-1243 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Lewis Dorsey, appeals the judgment of the Trumbull County Court of Common Pleas, Probate Division. Lewis' brother, appellee William H. Dorsey, was the co-owner of various joint and survivorship accounts established by their mother. The court found that Lewis' removal of William as the co-owner of these accounts and Lewis' designation of others as co-owners under a power of attorney were invalid. At

issue is whether the power of attorney executed by their mother authorized him to make these alterations to her accounts. Because we hold that it did not, we affirm.

{¶2} On January 15, 2008, William, as executor of the estate of his mother, Lottie Dorsey, filed a complaint against his brother Lewis and others for declaratory judgment. William sought to invalidate various unauthorized transactions made by Lewis pursuant to a power of attorney executed by Lottie. William alleged that Lewis either closed joint and survivorship accounts in which William had an interest or removed William as a co-owner and substituted his sisters, Mary Holbrook and Virginia Allen, as co-owners on these accounts. William requested that all such transactions be set aside; that the original ownership interests in the accounts be preserved; and that Lewis be required to account for all funds wrongfully removed by him.

{¶3} Lewis filed an answer and counterclaim, alleging that William had made various transfers of funds to himself and others, which, he claimed, were assets of Lottie's estate and should be returned to the estate. The remaining defendants also filed answers to the complaint.

{¶4} Subsequently, the parties engaged in discovery proceedings. The various financial institutions produced all pertinent documents with respect to the subject accounts, and the depositions of the parties and family members were taken. Following discovery, William dismissed all parties other than Lewis.

{¶5} On September 22, 2008, the court dismissed Lewis' counterclaim without prejudice and granted him leave to file it as a separate action. Lewis has not appealed the court's ruling, and Lewis' counterclaim is therefore not part of this appeal.

{¶6} On September 23, 2008, the case came on for hearing. The parties waived trial on the complaint; agreed to submit the matter to the court on trial briefs and their respective exhibits, including the depositions; and stipulated their exhibits into evidence. The statement of facts that follows is based on the parties' depositions and exhibits.

{¶7} William testified that he was born and raised in Warren, Ohio. His parents were Alva Dorsey and Lottie Dorsey, and his siblings are Lewis Dorsey, Mary Holbrook, and Virginia Allen. In the 1960s, William began helping his parents take care of their financial affairs. They owned several rental properties, which William managed for them.

{¶8} William testified that, during their lives, his father and later his mother deeded to him their rental properties. Lottie retained a life estate in these properties and collected rents while William managed them for her.

{¶9} On February 6, 1981, Lottie executed a will in which she divided her estate among her children and grandchildren with Lewis receiving one-quarter of the residue of her estate. Lottie included the following provision in her will regarding William:

{¶10} "I hereby recognize that I have a son, William H. Dorsey, who I have not named above and it is my desire that it be known that I have not deleted William H. Dorsey from this Last Will and Testament out of any disrespect or lack of love for him, but only because I have made certain advancements to him of land during my life that were given in lieu of his share herein."

{¶11} William testified that his father died in 1982 and that, from that year until Lottie's death, William took care of Lottie's financial affairs, including the management of her rental properties. It is undisputed that after Lottie executed her will, she established the following joint and survivorship accounts solely with her own funds at various financial institutions in Warren, in the name of Lottie and William:

{¶12} Seven Seventeen Credit Union account number ****36-00;

{¶13} Seven Seventeen Credit Union account number ****62;

{¶14} Second National Bank account number ****58; and

{¶15} Second National Bank account number ****65.

{¶16} It is further undisputed that on March 30, 2002, William established a joint and survivorship account number ****75 at First Place Bank in Warren in the name of Lottie and William, which was funded solely with William's own money.

{¶17} William testified that after Lottie had a stroke, in February 2005, a guardianship was opened for her. Each of the aforementioned accounts was included in Lottie's guardianship estate. After Lottie passed away in 2007, the funds in the guardianship account were transferred to her estate.

{¶18} Lewis testified that on September 30, 2002, when Lottie was 91 years old, she executed a durable power of attorney naming him as her attorney-in-fact. Lewis said the purpose of the power of attorney was to represent Lottie in the sale of her father's farm in West Virginia, which was to be sold by auction. Lewis asked his attorneys, Buckley and George, to prepare the power of attorney for him.

{¶19} Lewis testified that, although the purpose of the power of attorney was to allow him to sell Lottie's family farm, three years after the farm was sold, in 2005, he

began to use the power of attorney for other purposes. Specifically, Lewis used the power of attorney to go through Lottie's bank records and to identify accounts that were in her name. Lewis testified that, using the power of attorney, he changed the owners of Lottie's joint and survivorship bank accounts, which were originally in the name of Lottie and William, as follows:

{¶20} As to Seven Seventeen Credit Union account number ****36-00, Lewis changed the owners to Lottie and his sister Virginia Allen.

{¶21} With respect to Seven Seventeen Credit Union account number ****62, Lewis changed the owners to Lottie and Virginia.

{¶22} With respect to Second National Bank account number ****58, Lewis changed the owners to Lottie and his sister Mary Holbrook.

{¶23} As to Second National Bank account number ****65, Lewis changed the owners to Lottie and Mary.

{¶24} Lewis testified he designated Mary as a co-owner on the latter two accounts because, he claimed, in September 2004, while visiting Lottie, she allegedly became upset when Lewis showed her a deed from Lottie to William of a certain rental property. According to Lewis, Lottie did not intend to transfer that parcel to William. Lewis said that Lottie intended to give him another rental property instead. As a result, Lewis said that Lottie told him to "[t]ake [William's] name off of everything." On cross-examination, Lewis was unable to identify that alleged parcel or to produce the deed that allegedly upset Lottie.

{¶25} Lewis admitted, however, that Lottie never told him to designate Mary as an owner on these survivorship accounts, but he did it anyway. Moreover, he said he

did not know if he ever told Lottie that he put Mary on these accounts. He said he did this because he wanted one of Lottie's children to be on the accounts, and felt that Mary was as worthy a candidate as anyone else to be the co-owner on these accounts.

{¶26} Lewis testified he also used his power of attorney to close the account in Lottie's and William's names at First Place Bank that had been funded solely by William. He said he withdrew the entire balance of that account, which was $25,030, and deposited it in an account at Seven Seventeen Credit Union in the name of Lottie and Virginia. Lewis admitted that Lottie did not direct him to put Virginia's name on this account; he said he did it on his own. As of the trial date, Lewis had not accounted for any of William's funds that he withdrew from this account.

{¶27} To further justify his actions, Lewis testified that after Lottie had a stroke in February 2005 and was hospitalized, William told him to take his, i.e., William's, name off all of Lottie's joint and survivorship accounts.

{¶28} Virginia testified that, in late 2004, Lewis told her that he was going to put her name on some of the joint and survivorship accounts that had been in William's name. Lewis said he was going to do this because Lottie had told him her affairs were in disorder and she wanted him to straighten them out. Lewis did not tell her that he did this because Lottie was upset with William.

{¶29} Mary testified that, in 2005, she became aware that her name was on some of the joint and survivorship accounts that previously were in William's name. Like her sister Virginia, Mary said that Lewis made this change because Lottie's affairs were in disarray and she wanted him to put them in order.

{¶30} On November 17, 2005, a guardianship was opened for Lottie. The guardian's inventory indicated that the total value of her personal and real estate was $414,339 and that the value of her bank accounts was approximately $144,945. The inventory did not include the $25,030 that Lewis had withdrawn from William's First Place Bank account. Lottie subsequently died on January 13, 2007. William was appointed executor of her estate pursuant to her will.

{¶31} On March 5, 2009, the trial court entered its judgment, finding that during Lottie's lifetime, she developed a testamentary and non-testamentary plan for the distribution of her assets upon her death. The court found that when Lottie established the subject joint and survivorship accounts, she intended that William would receive the balance remaining in the accounts on her death. The court found that Lottie did not consent to Lewis changing the survivor on the accounts, and that he did not have authority under the power of attorney to alter the non-testamentary disposition of her property by changing the designated beneficiaries on her joint and survivorship accounts.

{¶32} The court found that the appointment of a guardian for Lottie did not change the joint and survivorship nature of the accounts. Further, the court found that the guardian's withdrawal from the joint and survivorship accounts to obtain funds for Lottie's care did not alter the rights of the survivors that Lottie had designated on the accounts, and that they are entitled to share proportionately in the balance of all funds remaining at the time of Lottie's death.

{¶33} Further, the court found that Lewis had no authority under the power of attorney to withdraw funds from the joint and survivorship account established by

William at First Place Bank since William was the sole depositor and owner of the funds in that account.

{¶34} The court found that Lewis' alteration of Lottie's non-testamentary disposition of her accounts was invalid, and that William was the survivor on the following accounts, which were originally held in the name of Lottie and William:

{¶35} Seven Seventeen Credit Union account number ****36-00;

{¶36} Seven Seventeen Credit Union account number ****62;

{¶37} Second National Bank account number ****58; and

{¶38} Second National Bank account number ****65.

{¶39} The court found that as the owner of the joint and survivorship accounts at the time of Lottie's death, William was entitled to the sums that would be remaining in those accounts, less the proportionate amount used by the guardian for Lottie's care.

{¶40} The court found that Lottie's guardian spent $50,646 for her care from all of her assets, of which $36,153 was withdrawn from her joint and survivorship accounts. The court found that the $36,153 would be apportioned among the beneficiaries reflecting the percentage share of their inheritance. The court ordered the matter to be set for hearing to calculate the amount that would be remaining in the accounts because the parties had not submitted sufficient information to the court to make such determination.

{¶41} The court also ordered Lewis to pay $25,030 to William subject to his accounting of any amounts he spent for Lottie's benefit.

{¶42} On March 12, 2009, the court scheduled a hearing for April 20, 2009, to calculate the amounts that would be remaining in the various bank accounts. However,

prior to said hearing, Lewis appealed the court's March 5, 2009 judgment. On August 7, 2009, in *Dorsey v. Dorsey*, 11th Dist. No. 2009-T-0027, 2009-Ohio-3934, this court dismissed the appeal for lack of a final, appealable order. Id. at ¶6.

{¶43} Subsequently, on January 6, 2010, Lewis filed an accounting of the funds he withdrew from William's First Place Bank account number ****75. In the trial court's January 15, 2010 judgment entry, the court found, pursuant to the parties' stipulation, that on December 23, 2004, Lewis withdrew $25,030 from William's account, which was the entire balance in that account. On March 2, 2005, Lewis cashed the disbursement check. He deposited $2,000 into Seven Seventeen Credit Union account number ****50, which was in Lottie's sole name, and $23,258 into Seven Seventeen Credit Union account number ****36-00, the account then owned by Lottie and Virginia. Lewis kept $132 for himself. Lewis also withdrew $8,100 for his personal use from Seven Seventeen Credit Union account number ****26-00, which was owned by Lottie. The court ordered Lewis to pay the sum of these latter two amounts, i.e., $8,232, to Lottie's estate. The court further appointed a special court investigator to calculate any income lost due to Lewis' misconduct and to apportion the $36,153 spent by the guardian for Lottie's care among the beneficiaries to reflect their percentage share of the inheritance.

{¶44} On February 19, 2010, the court entered two judgments. In the first, the court ordered Seven Seventeen Credit Union to return to William account numbers ****36-00 and ****62. In the second, the court ordered Lewis to pay the special court investigator $302 for his services in preparing his report for the court.

{¶45} Lewis appeals the trial court's judgments, asserting four assignments of error. For his first assigned error, Lewis alleges:

{¶46} "The trial court erred prejudicially to the appellant, when it determined, as a matter of law, and abused its discretion that the power of attorney holder could not as a matter of statute change the beneficiary designation on a survivorship account."

{¶47} Lewis argues that a power of attorney inherently includes the power to remove a co-owner on a joint and survivorship account and to substitute another person as the co-owner of the account. We do not agree.

{¶48} "*** [A] power of attorney is a written instrument authorizing an agent to perform *specific acts on behalf of the principal*. See, e.g., *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164. The agent has a fiduciary relationship with the principal. *In re Scott* (1996), 111 Ohio App.3d 273, 276. This fiduciary relationship imposes a duty of loyalty to the principal. Id. Thus, *an agent 'may not make gratuitous transfers of the principal's assets unless the power of attorney from which the authority is derived expressly and unambiguously grants the authority to do so*.' *MacEwen v. Jordan*, 1st Dist. No. C-020431, 2003-Ohio-1547, at ¶12." (Emphasis added.) *In re Meloni*, 11th Dist. No. 2003-T-0096, 2004-Ohio-7224, at ¶34.

{¶49} We review the interpretation of written instruments de novo. *OSI Sealants, Inc. v. Wausau Underwriters Ins. Co*., 11th Dist. No. 2003-L-181, 2005-Ohio-2528, at ¶19.

{¶50} The trial court found that the power of attorney at issue did not give Lewis the power to make gifts or to alter Lottie's non-testamentary disposition of her property by changing the designated beneficiaries of her joint and survivorship accounts. Based on our review of the power of attorney, there is no provision in that instrument giving Lewis authority to remove co-owners from Lottie's joint and survivorship accounts or to

designate others as co-owners on those accounts. We therefore hold the trial court did not err in finding that the power of attorney did not authorize Lewis to remove William as co-owner of Lottie's accounts or to designate others in his place.

{¶51} We further hold that the trial court did not err in finding that Lottie did not consent to or have knowledge that Lewis used her power of attorney to change the designated survivor on her joint and survivorship accounts. In fact, Lewis admitted that Lottie never instructed him to designate Mary and Virginia as beneficiaries of her accounts and that he did not tell Lottie afterwards that he had done so.

{¶52} Lewis suggests that he was authorized to make these gifts to his sisters because, in designating them as co-owners of the subject accounts, he did not confer any benefit on himself. However, this argument misses the point. In *MacEwan*, supra, followed by this court in *Meloni*, supra, the First District, at ¶12, held: "[A] general durable power of attorney does not authorize attorneys-in-fact to transfer the principal's property *to themselves or to others*, unless the power of attorney explicitly confers this power." (Emphasis added.)

{¶53} Thus, even if the gifts were made to persons other than Lewis, because the power of attorney did not expressly and unambiguously confer the power on Lewis to make gifts of a survivorship interest in Lottie's joint and survivorship accounts to others, his attempts to do so were invalid.

{¶54} Next, Lewis argues the trial court should have given greater weight to his testimony that Lottie changed her mind while still alive and no longer wanted William to be a co-owner on her accounts.

{¶55} Before addressing this issue, we note that in *In re Estate of Thompson* (1981), 66 Ohio St.2d 433, the Supreme Court of Ohio held that "[a] joint and survivorship account belongs, *during the lifetime of all parties*, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." Id. at paragraph one of the syllabus. (Emphasis added.)

{¶56} Further, in *Wright v. Bloom* (1994), 69 Ohio St.3d 596, the Supreme Court of Ohio held:

{¶57} "The survivorship rights under a joint and survivorship account of the co-party *** to the sums remaining on deposit at the death of the depositor may not be defeated by extrinsic evidence that the decedent did not intend to create in such surviving party *** a present interest in the account during the decedent's lifetime.

{¶58} "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 *** intention to transfer to the surviving party *** a survivorship interest in the balance remaining in the account at his *** death." Id. at paragraphs one and two of the syllabus.

{¶59} The Court in *Wright* explained, however, that extrinsic evidence may be used in determining creator intent in cases involving "controversies *inter vivos*" "during the joint lives of the depositors." (Emphasis sic.) Id. At 600, 607. In such cases, the court held that the form of the deposit should not be conclusive of the subject of joint ownership. Id.

{¶60} This court in *In re Estate of Anderson* (Dec. 15, 2000), 11th Dist. No. 99-T-0160, 2000 Ohio App. LEXIS 5928, explained the court's holding in *Wright*, as follows:

{¶61} "*** [T]he Supreme Court of Ohio in *Wright*[, supra] overruled paragraph two of the *Thompson* syllabus which held that courts could look to evidence of the decedent's intent to transfer a present interest in the joint and survivorship assets to the surviving party during the decedent's lifetime to determine whether the assets belonged to the surviving party upon the decedent's death. Instead, the court in *Wright* 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 *** intention to transfer to the surviving party *** a survivorship interest in the balance remaining in the account at his or her death.' Id. at paragraph two of the syllabus. Thus, *Ohio courts no longer consider evidence concerning the present donative intent of the decedent because the opening of the joint and survivorship account is conclusive evidence of the decedent's intent to transfer a survivorship interest in the balance of the account's assets at his *** death*." (Emphasis added.) *Anderson*, supra, at *14, fn. 1.

{¶62} While the trial court did not exclude Lewis' testimony that Lottie changed her mind about William being co-owner on her accounts, we note that, pursuant to *Wright*, supra, such extrinsic evidence would have been irrelevant since this is not a controversy inter vivos. Id. at 603. ("We *** find the depositor's intent to transfer a present interest in a joint and survivorship account to be irrelevant in a controversy involving the rights of a surviving party to the sums remaining in such account at the death of the depositor.")

{¶63} In any event, even if evidence of Lottie's intent was admissible, the trial court was not obligated to find it credible. The decision of the trial court will not be reversed as being against the manifest weight of the evidence when the court's judgment is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. The weight to be given to the evidence and the credibility of the witnesses are within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶64} Lewis argues the trial court should have found that Lottie changed her mind due to her discovery that William had allegedly transferred to himself an absolute interest in a parcel without reserving a life interest to her. However, this would have been an issue of credibility for the court to resolve. In any event, we note that there is no evidence in the record to support this argument. To the contrary, Lewis testified that Lottie was upset with William because he allegedly prepared a deed transferring a certain rental property to him when she intended to transfer another property to him. Further, on cross-examination, Lewis was unable to produce the alleged deed or even to describe the parcel at issue. Moreover, both Virginia and Mary testified that Lottie decided to remove William as a co-owner on her accounts, not because she was upset with him, but rather because her affairs were allegedly in disarray and she wanted Lewis to straighten them out. The trial court would have been entitled to consider these weaknesses in Lewis' testimony in determining whether it was credible.

{¶65} Next, Lewis argues that William waived his interest in the joint and survivorship accounts because, Lewis claims, William actually instructed him to remove his name from Lottie's accounts. However, it would have been for the trial court to

determine the credibility of this testimony. In making this determination, the trial court could properly consider: (1) Lewis' bias; (2) the self-serving nature of his testimony; (3) the fact that Lewis did not offer any written proof in support of his testimony; and (4) the fact that Lewis offered no plausible explanation as to why William would make such a statement against his pecuniary interest.

{¶66} Finally, Lewis has failed to cite any pertinent authority in support of his argument that the power to sign and file gift tax returns and to use any gift-splitting provisions or other tax elections included in the power of attorney embraced the power to make gifts of Lottie's assets. It is therefore not well taken. See App.R. 16(A)(7).

{¶67} Lewis' first assignment of error is overruled.

{¶68} For his second assigned error, Lewis maintains:

{¶69} "The trial court erred as a matter of law and abused its discretion prejudicially to the appellant when it did not give evidence of changed intent nor the realities of ownership its proper weight."

{¶70} Once again, Lewis argues the court should have given more weight to his testimony that Lottie instructed him to remove William's name from "everything" as evidence that she changed her intent to designate him as a co-owner on her accounts. While the trial court did not exclude this evidence, as noted above, pursuant to *Wright*, supra, such extrinsic evidence would have been irrelevant because Lottie opened the accounts as survivorship accounts and she has since deceased. Id. at 603. In any event, even if such extrinsic evidence was admissible, as the trier of fact, the trial court was entitled to determine the credibility of the witnesses. *DeHass*, supra. It was, therefore, entitled to find Lewis' testimony not credible in this regard, as it obviously did.

{¶71} Next, Lewis suggests that because William made "excessive withdrawals" from Lottie's accounts, the trial court should have imposed a constructive trust on those amounts. The argument is flawed, however, because there is no counterclaim seeking a constructive trust before us. The trial court dismissed Lewis' counterclaim and, in any event, that pleading did not include a request for a constructive trust. Moreover, the undisputed evidence is that the withdrawals at issue were for utilities, taxes, insurance, and maintenance on the rental properties in which Lottie retained a life estate and received rental income and for which she agreed to be responsible. We note that Lewis failed to present any evidence to dispute William's testimony that these payments were either directly made by Lottie or authorized by her.

{¶72} Next, Lewis argues that because William did not challenge Lewis' removal of his name as co-owner of Lottie's survivorship accounts before her death, he waived his right to challenge Lewis' conduct. However, Lewis' reliance on *In re Stowers* (Nov. 9, 1995), 11th Dist. No. 95-A-0009, 1995 Ohio App. LEXIS 5038 is misplaced. In *Stowers*, this court held:

{¶73} "*** [A]ny challenge to an *unauthorized withdrawal by the beneficiary* from a joint and survivorship account must be made prior to the depositor's death. Once the death of the depositor occurs, *all moneys allegedly misused by the beneficiary would go to the survivor anyway*, resulting in any challenge being moot. Obviously, there could be a challenge, per *Wright*, to the formation of the accounts due to '*** fraud, duress, undue influence or lack of mental capacity ***.' *Wright*, at 607. But once it is determined that the *creation of the account was valid*, there seems to be little room for a

challenge to the inter vivos actions of the beneficiary except by the living depositor." *Stowers*, supra, at *9-*10.

{¶74} *Stowers* thus contemplates a challenge by the depositor to one or more wrongful withdrawals by the co-owner. It also contemplates that the co-owner will remain on the account and ultimately receive the balance of the account on the death of the depositor. Consequently, if the depositor does not challenge a specific withdrawal by the co-owner before the depositor's death, the challenge is moot.

{¶75} Here, William was not the depositor and had no objections to any specific withdrawals. Instead, Lewis removed William as a beneficiary entirely, so that he would not receive the balance of the funds upon Lottie's death. *Stowers* is therefore inapposite. As a result, William was not required to challenge Lewis' misconduct prior to Lottie's death.

{¶76} Finally, Lewis argues that Lottie's alleged statement instructing him to remove William's name from everything was not excluded by the hearsay rule under Evid.R. 804(B)(5). However, the trial court did not find that such statement was inadmissible. It merely determined that William's testimony was more worthy of belief than the statement attributed to Lottie by Lewis, which was within the trial court's province as the trier of fact.

{¶77} Lewis' second assignment of error is overruled.

{¶78} For his third assigned error, Lewis alleges:

{¶79} "The trial court erred as a matter of law and abused its discretion prejudicially to the appellant when it determined that the intervening authority of the

guardian in closing the joint and survivorship account did not terminate the survivorship nature of the account."

{¶80} Lewis argues that the guardian closed the joint and survivorship account, and therefore terminated the survivorship nature of the accounts. He therefore argues those funds should have been turned over to Lottie's estate after she died, rather than distributed to William as the surviving co-owner of her accounts, thus allowing Lewis to share in those funds as a beneficiary of Lottie's residual estate. However, Lewis' argument ignores the well-settled law of this state. In *Miller v. Yocum* (1970), 21 Ohio St.2d 162, the Supreme Court of Ohio held:

{¶81} "Where a person, now deceased, created during her lifetime a joint and survivorship bank account for the benefit of the survivor, *** the fact that the decedent, after she had created the account, was declared to be an incompetent and a guardian was properly appointed for her, does not, as a matter of law, terminate the joint and survivorship nature of the account." Id. at syllabus.

{¶82} Further, in *In re Estate of Lilley*, 12th Dist. Nos. CA2005-08-091, CA2005-08-092, CA2005-08-095, & CA2005-08-096, 2006-Ohio-5510, the Twelfth District held:

{¶83} "*** If the funds in the joint and survivorship account are required to provide necessary support and maintenance for the ward, the guardian may apply to the probate court for an order permitting the guardian to use the funds ***. *The transfer of funds by a guardian from the ward's joint and survivorship account to other accounts does not alter the right of surviving co-owners to the balance of all remaining funds at the ward's death.*" (Emphasis added and internal citations omitted.) Id. at ¶20, citing with approval *Guerra v. Guerra* (1970), 25 Ohio Misc. 1, 7-8.

{¶84} This court in *Gibbons v. Bokan* (Mar. 30, 1990), 11th Dist. No. 89-T-4193, 1990 Ohio App. LEXIS 1221, *20, also cited with approval *Guerra*, supra, decided by the Lake County Probate Court.

{¶85} Lewis' reliance on *Miller v. People's Fed. S. & L. Assn*. (1981), 68 Ohio St.2d 175 and *Estate of Strang v. Strang*, 5th Dist. No. 03-COA-071, 2004-Ohio-3677 is misplaced because in those cases, the courts held that, pursuant to R.C. 2111.14(B), the guardian had the right to designate a change in the registration of the payable on death accounts if the change was in the best interest of the ward. *Miller*, supra, at 178; *Strang*, supra, at ¶19. Contrary to Lewis' argument, in the case sub judice, there is no evidence that the guardian closed the joint and survivorship accounts, terminated the survivorship nature of the accounts, changed the designated beneficiaries, or that it was in Lottie's best interests to do so.

{¶86} We therefore hold that the trial court did not err in finding that the guardian, in transferring Lottie's survivorship accounts to the guardianship estate to be used for her care, did not destroy the survivorship nature of these accounts or William's right as the surviving co-owner to the balance of these accounts. We note that this result is salutary in that it accomplishes the non-testamentary disposition of assets Lottie intended when she designated William as the co-owner on her joint and survivorship accounts.

{¶87} Lewis' third assignment of error is overruled.

{¶88} For his fourth and final assigned error, Lewis alleges:

{¶89} "The trial court erred as a matter of law and abused its discretion in charging the appellant with the cost of the special investigator as the acts of the [power

of attorney] were supported by the facts and circumstances and were permitted by the various banks as those services were for the benefit of the estate."

{¶90} Appellant argues the trial court abused its discretion in ordering Lewis to pay the cost of the court's investigator. We note that Lewis has failed to cite any authority or to reference the record in support of his argument. It is therefore without merit pursuant to App.R. 16(A)(7). In any event, we note that the assessment of costs is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Taylor v. McCullough-Hyde Mem. Hosp*. (1996), 116 Ohio App.3d 595, 600. Here, the trial court had before it reliable evidence of Lewis' wrongdoing, and we cannot say that in ordering Lewis to pay the investigator's fee, the court abused its discretion.

{¶91} Lewis' fourth assignment of error is overruled.

{¶92} For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.