To be Argued by:
DAVID H. TENNANT
(Time Requested: 10 Minutes)

Appellate Division Docket No. CA 17-00578
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New York Supreme Court

Appellate Division—Fourth Department

ALICE ELAINE SWEETMAN,

Plaintiff-Appellant,

– against –

SONJA G. SUHR,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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QUESTIONS PRESENTED

1. Did the trial court err as a matter of law in granting judgment to the Defendant when it (a) applied a statutory presumption under Banking Law § 675 in favor of a joint tenancy (with survivorship rights) in two bank accounts and (b) required Plaintiff to come forward with clear and convincing evidence to overcome that presumption?

   Yes. The presumption in favor of joint tenancy in a bank account, and the attendant heightened evidentiary burden to overcome it, apply only when the account card, signed by the accountholder, references joint tenancy with survivorship rights, which the card in this case did not—as this Court expressly held in a prior appeal, *Sweetman v. Suhr*, 126 A.D.3d 1438 (4th Dep't 2015) ("*Sweetman I*").

2. Did Plaintiff meet the applicable common law standard for rebutting a joint account and establish by direct proof that she put her husband's name on the subject bank accounts as a matter of convenience and did not intend to convey a present beneficial interest in one-half the funds held in those accounts?

   Yes.

3. Did the trial court err as a matter of law in dismissing Plaintiff's claim for monies had and received without making a finding that Plaintiff's spouse had an actual interest in the monies held in the joint account and limiting the execution of judgment to those funds in which he had an "actual interest"?

   Yes.

4. Should this Court exercise its discretion to serve as fact-finder and direct entry of judgment in favor of Plaintiff, given the trial court's failure to apply the correct law and render findings of fact?

   Yes.

A. Statement of Nature of Matter

This case involves the execution of a judgment for child support in 2012—twelve years after the children's father made his last payment. The execution targeted funds held by Plaintiff Alice Elaine Sweetman in her checking and savings accounts. Some $58,000 was taken from her accounts and paid to Defendant Sonja Suhr on the following basis:

- Defendant's former husband, John Suhr, was married to Plaintiff at the time of the execution.
- John Suhr owed a long-lapsed support obligation to Defendant dating back to 1996.
- One month before the judgment was executed, Plaintiff added her husband's name to the bank accounts.
- Monroe County executed judgment on the bank accounts premised on the incorrect belief that John Suhr held a beneficial interest in one-half of the funds in those accounts.

Plaintiff brought a complaint against Defendant for monies had and received, alleging that the monies were transferred improperly from her accounts—and that the funds belonged to her alone, and not to her husband. Plaintiff claimed she added her husband's name to the accounts for convenience only, and did not intend to create a joint tenancy or other joint ownership that transferred a present beneficial interest in the accounts to him. Plaintiff sought a court order requiring Defendant to return the monies. (The summons and complaint are contained in the Record at 90-96 submitted in *Sweetman v. Suhr*, 126 A.D.3d 1438,1439-1440 (4th Dep't 2015) ("*Sweetman I*"); those documents are not reproduced for this appeal because they are not directly pertinent.)

As noted, this is the second appeal to reach this Court. The first, *Sweetman I*, addressed the trial court's decision to grant summary judgment to Plaintiff. This Court concluded that a trier of fact could find Plaintiff had intended to create a convenience account, as Plaintiff alleged, or might conclude she intended to create a joint account with survivorship rights or a tenancy in common. 126 A.D.3d at 1439-1440. Summary judgment therefore was not appropriate.

The instant appeal arises from a one-day bench trial held before the Hon. Matthew A. Rosenbaum, J.S.C., on remand. Justice Rosenbaum did not resolve the central question of Plaintiff's intent. Instead, the lower court denied Plaintiff's claim on the legal ground that she had failed to come forward with clear and convincing evidence to rebut the statutory presumption, found in Banking Law § 675, pursuant to which accountholders are presumed to create a joint tenancy with right of survivorship whenever they add a person to a bank account. (R. 12-13 [May 9, 2016 Decision and Order].)

The trial court did so even though this Court in *Sweetman I* concluded as a matter of law that the statutory presumption found in Banking Law § 675 does not apply in this case. 126 A.D.3d at 1439-1440.

Given the importance of the decision in *Sweetman I*, we lay out the prior proceedings and earlier summary judgment ruling along with the pertinent facts developed at trial on remand.

1. The Parties' Prior Marriages and 20 Year-Old Child Support Judgment

This dispute concerns monies taken from Plaintiff's linked checking and savings accounts at Family First Credit Union to satisfy a twenty-year old obligation to pay child support that her husband, John Suhr, owed to his

first wife, Defendant Sonja Suhr. That prior marriage ended in divorce in 1997. Plaintiff married John Suhr three years later in 2000. (R. 22.) This was the second marriage for Plaintiff as well. (*Id.*) Plaintiff was previously married to William Nail. (*Id.*) Both of these prior marriages produced two children. (R. 22, 71.) All four children were grown adults and out of the house by the time Plaintiff and John Suhr married in 2000. (R. 22, 71.)

In the course of divorcing in 1997, Sonja Suhr obtained a judgment against John Suhr for child support in the sum of $23,553.05. (R. 70.) After small payments in 1996-97 (labeled "unemployment") and one in 2000 (labeled "employer[IEX]"), no payments were made. (R. 70.) John Suhr suffered from significant medical problems and had not been able to work since 2000. (R. 27-28, 45, 61.) (Mr. Suhr recently passed away.)

2. Plaintiff's Banking Accounts

Since 1988, Plaintiff maintained a banking account (linked checking and savings) solely in her name with Family First Federal Credit Union, located at 2520 Browncroft Blvd, Rochester, New York. (R. 24, 71.) Plaintiff established and funded these accounts in her own name, with her own money. (R. 71.) Plaintiff, at all times relevant, was employed by BOCES as an instructor for students with special needs. (R. 24, 72.) She deposited money from her earnings into her accounts. (R. 72.) She had $11,290.63 in savings and $16,753.48 in checking as of May 2007. (R. 71.)

No funds of John Suhr were ever placed into Plaintiff's Family First accounts. (R. 72.) He was not listed on her accounts at any time during their marriage from 2000 to January 10, 2012. (R. 71-72.) He did not make any deposits, or withdrawals, or write any checks. (R. 30-31, 72.) For his part, John Suhr understood the money in the two accounts was always in Plaintiff's name and belonged to her. (R. 56.)

3. The Murder of Plaintiff's Son in Texas

Plaintiff's adult son Craig Nail (Craig) lived near Plano, Texas. (R. 71.) In December 2007, Craig and his estranged wife were in the process of getting divorced, and were embroiled in a bitter custody fight over their 6 year old daughter, Kristan. (*Id.*) On December 26, 2007, Craig was shot and killed in his home. The shooter pled guilty. His estranged wife was charged with having arranged for Craig's murder. (*Id.*)

As a result of the estranged wife's arrest and alleged role in the murder of her husband, she was disqualified from receiving any proceeds from the policy of life insurance covering Craig. (R. 71.) William Nail then became the sole beneficiary of the life insurance proceeds, receiving the sums of $259,953 in April 2008 and $51,286.72 in July, 2010. (*Id.*) William Nail voluntarily paid to Plaintiff (on or shortly after his receipt of these proceeds) one half of these amounts. (*Id.*)

Plaintiff and her ex-husband, William Nail, were awarded joint custody of Kristan, Craig's daughter, who moved from Texas to Rochester to live with her grandparents. (R. 29.) She spends four days per week with Plaintiff; three days with her grandfather. (*Id.*)

4. Deposit of Life Insurance Benefits into Plaintiff's Bank Accounts

Plaintiff received a one half share of the life insurance proceeds and added these to her savings account on May 2, 2008 ($130,000) and August 16, 2010 ($25,643.36). (R. 29-30, 72.)

As of January 2012, the funds in Plaintiff's checking account were traceable to her salary from BOCES. (R. 72.) Her savings account had a total of $168,154.74, consisting of $155,643.36 in life insurance proceeds, her small lifetime savings, and small amounts of interest. (*Id.*)

5. The Addition of John Suhr to Plaintiff's Bank Accounts on January 22, 2012

Plaintiff was subpoenaed to appear at the capital murder trial by the District Attorney's Office in Collin County (R. 160), and was told to remain for the entire trial, however long it lasted—perhaps as long as a month. (R. 32-33.) She was just days away from traveling to Texas for the trial when she visited the Family First Credit Union to see about making a change to her accounts. (R. 34.) Plaintiff was distraught over the death of her son and anxious about going to Texas. (R. 33, 44.) She described herself as being under "extreme stress." (R. 44.) The person who was charged with murdering her son—her son's estranged spouse—allegedly hired a gang member to commit the killing. (R. 71, 33.) Plaintiff feared going to Texas to confront her son's killer. Her daughter-in-law despised Plaintiff for keeping her away from her daughter, and was vengeful. (R. 44.)

Plaintiff went to her credit union in a severely distracted state of mind to explore making a change to the names on the bank accounts. (R. 33-35.) She went to the bank solely in response to the criminal trial subpoena and her concerns about traveling to Texas for that trial. (R. 34, 42.) She knew that if she were stuck in Texas for the duration of the trial, bills would come due. She determined that her husband would have to write the checks for those near-term bills. (R. 38-39.) She understood that having his signature on the account card gave him permission to write these household checks while she was away—"[w]hile in my absence" (R. 45) —"to keep the household going." (R. 39.) Plaintiff explained that her husband "never handled household matters" and that only she used the debit card and wrote checks. (R. 38.) Her husband corroborated this: "she had always taken care of the money." (R. 56.) He never wrote any checks and never received a debit card. (R. 57.)

Plaintiff also thought about the harm that might befall her in Texas. She wanted to protect her granddaughter and husband in the event she was harmed (injured or killed) in Texas. (R. 34.)

Plaintiff remembers little of the discussion with a clerk at the bank. (R. 35-36.) She brought home an account card that both she and her husband signed on January 22, 2012, adding her husband to the account for the first time. (R. 36.) She believed this change would allow her husband to pay bills in her absence and to access the savings account funds if something happened to her in Texas. (R. 45.) Plaintiff did not intend to make any gift to her husband when she added him temporarily to the accounts on the eve of traveling to Texas. (R. 31, 34, 55.) She did not intend to give him an immediate beneficial interest in one half of the monies in either account. She was not re-arranging her affairs. "No. No. This was to—for convenience because I would be attending this trial." (R. 34.)

The account card does not reference survivorship rights (R. 161) as this Court previously found. 126 A.D.3d at 1439-1440.

6. Texas Travel Late January 2012

Plaintiff traveled with her daughter to Texas in late January for the scheduled criminal trial. (R. 36-37, 72.) Because some pre-trial matters remained, the case was called but then adjourned until April 9, 2012. (R. 37.) Plaintiff received a new subpoena for the new April 2012 trial date. (*Id.*)

Plaintiff returned to Rochester before her husband needed to write any checks. (R. 57, 40.) He did not pay any household expenses during the short time she was away. (*Id.*) She resumed managing the household finances including writing checks to pay bills. (R. 40.) The funds in the bank accounts remained 100 percent Plaintiff's money. (*Id.*)

7. Attachment of Plaintiff's Bank Accounts February 24, 2012

The Monroe County Office of Child Support Enforcement caused an attachment on the Family First accounts which then named Plaintiff and John Suhr. (R. 72, 40-41.) This action was taken on February 24, 2012, to enforce the judgment entered against John Suhr in 1996. (R. 72.)

Plaintiff initially learned that her accounts were frozen when her debit card was refused when she was shopping for groceries. (R. 40-41, 72.) When she called her bank, she was told the bank could not provide any information to her. (R. 41, 72.)

Family First remitted the sum of $58,839.64 to the MCSCU. (R. 73.) Then MCSCU paid to Defendant the sum of $58,814.64 by check. (*Id.*)

Defendant had done nothing to enforce the 1996 judgment. (R. 73.) After receiving these funds from Plaintiff's bank accounts, Defendant declined to return the funds to Plaintiff even after being advised that the money represented insurance proceeds from the death of Plaintiff's son, who had been murdered, and been designated to care for Plaintiff's granddaughter. (R. 58-59, 73.)

Plaintiff closed the joint accounts and transferred all remaining funds back into her individual name. (R. 73, 41-42.) He husband did not object. (R. 59, 42.) He understood the money was being put back in Plaintiff's name alone, as it had been for twelve years before Plaintiff was served with a subpoena to testify in a capital murder trial in Texas. (R. 59, 42.)

8. Summary Judgment Affidavits Regarding the Purpose and Intent of Adding Husband to Bank Accounts

Plaintiff submitted an affidavit (*Sweetman I* Record on Appeal) as did her husband (*id.* at 67-72) and daughter (*id.* at 44-46). Plaintiff's affidavit explained, among other things, the stress of the upcoming criminal trial in

Texas, mourning for her son, and fear about what might happen to her while away for an extended period—prompting her to make the name change on the account. By adding her husband's name to the account she believed she would protect her granddaughter *if* something happened to Plaintiff. She did not intend to transfer to her husband any present beneficial interest in the accounts. She did not intend to make a gift.

9. September 22, 2013 Motion Court Decision Granting Summary Judgment to Plaintiff

The motion court (Hon. Matthew A. Rosenbaum, S.J.C.) in its original decision, dated September 22, 2013, concluded that Banking Law § 675 applied to Plaintiff's claim, and as such, imposed a presumption that Plaintiff intended to create a joint account with right of survivorship when she added her husband to her checking and savings accounts. (R. 169-70.) The motion court then held that Plaintiff's affidavits were sufficient to rebut the statutory presumption as a matter of law, and granted summary judgment to Plaintiff for monies had and received. (R. 170.)

10. Fourth Department's Decision Reversing Summary Judgment

This Court reversed the grant of summary judgment to Plaintiff, finding fault in the motion court's analysis in two respects. *Sweetman I,* 126 A.D.3d at 1439-1440. First, this Court determined that the motion court committed legal error in applying the presumption in favor of a joint tenancy with right of survivorship that arises under Banking Law § 675. *Id.* at 1439 ("Although the bank account is designated as 'joint,' the account documents do not contain the necessary survivorship language, and thus the statutory presumption of a right of survivorship does not apply") (quoting *Matter of Degnan*, 55 A.D.3d 1238, 1239 (4th Dep't 2008)). That presumption arises

only where the account document signed by the accountholder includes the JTWROS designation—which is not the case here. (R. 161.)

Second, the motion court erred as a matter of law in granting summary judgment to Plaintiff based on the affidavits and exhibits submitted. This Court noted that Plaintiff's statements "seemingly establish that plaintiff 'did not have a present intention to transfer an interest in the [money] to [John], despite having placed his name on the [account]'" (quoting *Hom v. Hom*, 101 A.D.3d 816, 817 (2d Dep't 2012)) and further noted that "John made no deposits or withdrawals to the account, which also supports plaintiff's position that the account was opened as a matter of convenience only." 126 A.D.3d at 1440 (citations omitted). Yet this Court concluded that a triable issue of fact existed as to what Plaintiff intended when she added her husband's name to the savings and checking accounts, thus precluding summary judgment. *Id.* at 1440 ("we conclude that plaintiff's statements raise a triable issue of fact whether she intended John to have a right of survivorship in the joint tenancy account.") This Court thus concluded that a trier of fact, after listening to the testimony of Plaintiff and her husband, and making credibility determinations, and upon evaluating the banking records and drawing inferences from those records, might be persuaded to find she intended to create a convenience account (as she alleged), but such a finding was not *compelled* by the paper record assembled for the summary judgment motion. Rather, a fact-finder (judge or jury) might be persuaded that Plaintiff intended to create a joint account (JTWROS) or a tenancy in common. *Id.* at 1439-1440. The case had to be tried to resolve the basic fact of Plaintiff's intent which was not resolvable on the papers. Without that basic fact resolved in Plaintiff's favor, "plaintiff failed to establish as a matter of law that the account was a convenience account." *Id.* at 1440.

11. Testimony Regarding Plaintiff's Decision to Add John Suhr's Name to the Family First Accounts

The lone "triable issue" to be resolved on remand was Plaintiff's intent when she added her husband to the linked accounts on the eve of travelling to Texas. The peculiar—indeed tragic—circumstances under which Plaintiff added her husband's name to the accounts, provided a chilling backdrop to an otherwise perfunctory change to a bank form. The only reason to add John Suhr's name to the accounts was to address the Texas trial subpoena and upset in Plaintiff's life at that moment: she had to comply with the District Attorney's subpoena to attend a capital murder trial concerning her dead child that might take a month to try to verdict. (R. 32-33.)

That development was the only reason Plaintiff added her husband's name to the accounts. (R. 34, 42.) She sought to accomplish two things by doing it.

First, on a practical level, she needed her husband to pay household bills that would come due while she was away. Plaintiff alone managed the household expenses including paying all bills. Even though her husband had never paid the bills before, she determined he was going to have to step up and pay the bills (including his own medical bills) that would come due in her absence. (R. 38-39, 45.) By adding him to the account, he would be allowed to write checks on the checking account for that specific and limited purpose—just for the time she was away. (*Id.*)

Second, on an emotional level, she sought to address a deep-seated fear that something terrible might happen to her in Texas. She feared being injured or killed. (R. 44.) Plaintiff wanted to know the money in her savings account, set aside for her granddaughter, would be accessible to her husband,

so he could care for her granddaughter, should something horrible befall her in Texas. (R. 34.) It never did.

Plaintiff's testimony thus ruled out any intent on her part to make a present transfer to her husband of any interest in the funds in her accounts, much less an undivided 1/2 share of both accounts, as a gift or otherwise. (R. 31, 34.) Her testimony established without contradiction that she limited her husband's access to the accounts to her time in Texas. (R. 37-39.) Likewise her husband's testimony ruled out any claim on his part to any beneficial interest in the funds in those accounts. He understood the monies always belonged to Plaintiff and that her decision to add him to the account was done as a convenience while she was away. (R. 57-60.)

12. Trial Court Decision Dismissing Claim On Legal Grounds

Despite this Court's directive to hold a trial to conclusively determine—as a factual matter—Plaintiff's intent when she added her husband's name to the bank accounts, Justice Rosenbaum held a one-day bench trial, heard live testimony from Plaintiff and her husband, and then issued a short written decision denying Plaintiff's claims, without making any findings of fact regarding Plaintiff's intent. (R. 12-13.) The trial court never evaluated the credibility of the witnesses and never drew any inferences from the evidence, including what weight, if any, to give to the fact that certain bank documents—but not the signature card—reference "a joint tenancy account with survivorship rights." *See Sweetman*, 126 A.D.3d at 1440 ("while the signature card's reference to a document stating that rights of survivorship are created when obtaining a joint bank account is insufficient to invoke the statutory presumption of Banking Law § 675, it is a factor that may be considered when determining whether the bank account is a joint tenancy

account with survivorship rights.") (citations omitted). The Court's perfunctory decision did not even credit the agreed upon facts.

In rejecting Plaintiff's claims as a matter of law on a threshold legal issue the trial court committed the very same legal mistake contained in its September 22, 2013 summary judgment decision. The lower court again subjected Plaintiff's claims to a presumption under Banking Law § 675 that she intended to create a joint account (JTWROS)—which this Court expressly held was inapplicable (*id.* at 1439)—and the trial court then exacerbated that error by requiring Plaintiff to come forward with "clear and convincing" evidence to overcome the presumption. (R. 13.)

After citing the incorrect legal standards, the trial court concluded Plaintiff had not come forward with sufficient evidence as matter of law and entered judgment in favor of Defendant. (R. 13.) In doing so, the trial court believed it was following the directions of this Court in *Sweetman I.* Justice Rosenbaum said he was "constrained to treat the account as joint," noting that "[t]he Appellate Division required additional evidence to corroborate Plaintiff's contentions." (*Id.*)

The trial court's decision to "treat the account as joint" left the following question begging: Even if Plaintiff's evidence were insufficient to rebut a joint account, the trial court still had to determine the actual interest of the judgment debtor (John Suhr) in that joint account because a levy against one depositor to a joint account is effective only as to the actual interest of that depositor. Here, the trial court's abdication of fact-finding included never determining whether John Suhr had an actual ownership interest in Plaintiff's checking and savings accounts, and if so, to what extent.

ARGUMENT

I. The Trial Court Erred as a Matter of Law by Imposing The Presumption of a Joint Account Under Banking Law § 675, and Requiring Plaintiff to Overcome it With Clear and Convincing Evidence, When the Presumption Was Declared Inapplicable by this Court in *Sweetman I*.

The trial court committed legal error holding that Banking Law § 675 applied to this case and then (a) imposing the statutory presumption under § 675 in favor of a joint tenancy and (b) requiring Plaintiff to overcome it with "clear and convincing evidence." (R. 13 (citing a single trial court decision from Nassau County and nothing from any Appellate Division).) That conclusion of law is incorrect for three reasons.

First, Banking Law § 675 does not apply in this case—as a matter of law of the case. *See Sweetman I*, 126 A.D.3d at 1439 (citing *In re Estate of Camarda*, 63 A.D.2d 837, 838 (4th Dep't 1978) and other cases). As a result, the trial court was required to apply the flexible evidentiary standard articulated by this Court in *Harrington v. Brunson*, 129 A.D.3d 1581 (4th Dep't 2015) for overcoming the common law presumption of a joint account: the party seeking to rebut that presumption must offer "direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account[s] had been opened as a convenience only." *Id.* at 1582 (citing *Wacikowski v. Wacikowski*, 93 A.D.2d 885 (2d Dep't 1983). "Clear and convincing" is nowhere found in that standard. Moreover, it does not appear that this Court applies the clear and convincing standard even to challenges covered by Banking Law § 675. *See Harrington*,129 A.D.3d at 1582 (applying "direct proof" standard and not clear and convincing standard); *cf. Richter v. Richter*, 77 A.D.2d 1470, 1471 (4th Dep't 2010) (applying clear and convincing

standard in context of challenge to equitable distribution of marital property acquired with comingled funds in a joint account—citing case law specific to marital distribution—while noting statutory presumption).

Second, this Court, while finding that Banking Law § 675 was inapplicable, remanded for trial concluding "that the complaint states a cause of action for money had and received . . ." 126 A.D.3d at 1440. The trial court failed to assess the evidence in light of the elements of that cause of action: (a) that Plaintiff was the owner of the money in question; (b) that Defendant is holding Plaintiff's money; and (c) under principles of equity or law, the money should be returned to Plaintiff, as Defendant has no legal right to retain Plaintiff's money. All these elements are established by the record evidence.

Third, the trial court mis-read *Sweetman I* to impose on Plaintiff the obligation to present additional evidence beyond that submitted on summary judgment. To be sure, this Court found the paper record presented for summary judgment was insufficient to award judgment to Plaintiff as a matter of law, owing to the unresolved issue of fact regarding her intent. But all that meant was that, on remand, the trial court needed to discharge its duties as fact-finder to determine precisely what Plaintiff intended when she added her husband's name to the accounts.

A party's intent presents a question of fact that frequently is not susceptible to resolution on summary judgment. *See, e.g., Matter of Yaros*, 90 A.D.3d 1063, 1064-1065 (2d Dep't 2011) (affirming denial of summary judgment where triable issue of fact existed as to the decedent's intent when opening a joint account with daughter); cf. *Harrington*, 129 A.D.3d at 1582-1583 (reversing summary judgment where plaintiff came forward with evidence to create triable issue of fact concerning intent to create joint

account with survivorship rights). This Court's decision in *Sweetman I* to reverse summary judgment (126 A.D.3d at 1440) is typical in this regard. A trier of fact is entitled to hear live testimony, observe the witnesses as they testify, and make credibility determinations based on the witnesses' demeanor and the testimony's consistency or inconsistency with other evidence. That is what the trial court should have done in this bench trial, and determined, under the applicable common law standard, Plaintiff's intent when she added her husband's name to the accounts.

The trial court did not do that. Instead, the lower court applied the incorrect and already rejected statutory presumption under Banking Law § 675 (and strict "clear and convincing" evidentiary standard) while abdicating its role as trier of fact. The trial court failed to acknowledge the testimony of the Plaintiff as to her state of mind and lack of intention to convey a current interest in her accounts to her husband and corroborating testimony of her husband. Having failed to apply the correct legal standard, the trial court also failed to acknowledge that Plaintiff properly proved the elements of her cause of action for money had and received. That was error.

II. Plaintiff Proved—Under Any Standard—That She Established a Convenience Account and Did Not Intend to Transfer to Her Husband a Present Beneficial Interest in the Bank Accounts.

Plaintiff's task at trial was straight-forward under the flexible common law standard that applies in the absence of that statutory presumption. *See Harrington*, 129 A.D.3d at1582. She was obligated to (and did) present direct testimony establishing her intent in adding her husband's name to the linked accounts, along with the testimony of her husband who corroborated her testimony, including providing important proof that he never deposited or withdrew money from the accounts, because he considered the accounts to

belong exclusively to his wife. Johns Suhr's conduct as the co-named accountholder is a "major factor in determining whether a bank account is opened as a matter of convenience or as a joint account" (*Matter of Camarda*, 63 A.D.2d at 839) and provides competent proof that his wife intended to create only a time-limited convenience account. In the prior twelve years of marriage—before suddenly being added to the Family First accounts on the eve of Plaintiff's departure to Texas—John Suhr had never received bank statements, used the debit card, or written checks. (R. 31, 55.) He never claimed ownership of any part of the accounts. (R. 59.)

Moreover, the banking records and stipulated facts corroborate the testimony of both Plaintiff and her husband. (R. 71-73.) A key stipulated fact is that Plaintiff established both accounts long before her marriage to John Suhr and had solely funded the accounts for years. (R. 71.) She had always kept her accounts separate, and deposited her savings into a saving account and added to that account the life insurance benefits she received from the death of her son from her prior marriage. (R. 24-25, 55-56, 71.) The funds in the savings account were held for the benefit of her granddaughter Kristan, who lived with Plaintiff part of the time. (R. 23.)

Plaintiff always took care of paying household expenses using the funds in her checking account. (R. 30-31, 37, 59.) She has not touched a dime of the insurance money. (R. 30.) She paid for Kristan's care from her earnings. (*Id.*)

John Suhr did not access the bank accounts when Plaintiff traveled to Texas. (R. 40.) The trial did not go forward and she returned before any bills had to be paid. (*Id.*) When Plaintiff returned from Texas, she resumed her sole management of the bank accounts. (*Id.*) The money was all hers. (*Id.*)

The evidence is easily sufficient to prove an account of convenience under the proper common law standard—or even under the inapplicable clear and convincing standard.

Plaintiff's testimony does not demonstrate an intention to transfer a beneficial interest in the bank accounts to her husband, as this Court previously recognized, 126 A.D.3d at 1439, much less transfer a permanent half interest in both. At most, she intended a convenience account that would permit access by John Suhr to the checking account to pay household bills during her trip to Texas, and which Plaintiff believed would permit her husband to access the savings account upon a specific event occurring (her death or disablement in Texas) which did not occur.

The bank documents here conferred on John Suhr no present right or beneficial interest in the accounts. Indeed, courts regularly find no present transfer of an interest in funds when an accountholder adds the name of a relative to the account for the specific purpose of accessing the account upon the accountholder's death. *See Hom*, 101 A.D.3d at 817 (the accountholder / father did not intend irrevocable present transfer of interest in bank and brokerage accounts by adding son's name to the accounts where the father "testified that he added the [son's] name to the accounts at the suggestion of bank officials, so that the [son] could retrieve the funds upon his death.'"); *In re Estate of Friedman*, 104 A.D.2d 366, 367 (2d Dep't 1984) (depositor intended convenience account where "the money was placed in the joint account merely for convenience in the event of illness or death" and thus "did not intend to confer a present interest of one half on the [co-accountholder]").

The facts and controlling case law demonstrate that Plaintiff did not intend to transfer any present beneficial interest in either bank account. She added her husband's name to the linked bank accounts merely as a

convenience to address the practical problems and risks associated with attending the murder trial in Texas. She made the decision quickly on the eve of trial, involving a brief transaction at the bank. Plaintiff gave no consideration beyond the immediate need for bills to be paid in her absence, and to protect her granddaughter if Plaintiff was killed or left disabled in Texas. Her emotional reaction to the Texas criminal trial subpoena, and decision to change to the bank account form in response, was not intended to confer a sizable *inter vivos* gift on her husband. (R. 31, 34.) Plaintiff intended a simple way to authorize her husband to pay household bills from the checking account and allow him access to the savings account *if* something happened to her in Texas. Nothing happened.

This record conclusively rebuts any presumption of a joint account.

III. The Trial Court Failed to Make Necessary Findings With Respect to John Suhr's Purported Actual Interest in Plaintiff's Bank Accounts.

Before dismissing Plaintiff's claims, the trial court was required to determine not only that John Suhr was a joint accountholder whose share of the joint checking and savings accounts could be executed upon to satisfy the child support judgment, but also determine precisely what interest John Suhr held in those accounts. Even where a joint account can be levied upon by the creditor of one joint tenant, the levy is effective only as to "the actual interest" of the judgment debtor in the account. *See Viggiano v. Viggiano*, 136 A.D.2d 630 (2d Dep't 1988) (citing *Olshan v. East N.Y. Sav. Bank*, 28 F. Supp. 727 (E.D.N.Y. 1939) and Annotation Attachment–*Joint Bank Account*, 11 A.L.R.3d 1465, 1473); Annotation, M. Churchill, *Joint Bank Account As Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor*, 86 A.L.R.5th 527, 554 (2004). As explained in the recent ALR

Annotation: "[t]he account holders all own the account, but they do not necessarily own the money in it ... courts are interested in determining which depositors hold equitable title to the money that is in the account, so that the creditor of one depositor does not wrongfully take property belonging to another depositor." 86 A.L.R.5th 527 at 4.

These authorities make clear that while a judgment creditor is free to levy upon funds as to which the judgment debtor holds equitable title (including funds deposited by the judgment debtor), the judgment creditor is not free to attach monies contributed by another depositor. 86 A.L.R.5th at 4, 12-13. These principles apply equally in the child support enforcement context. *See* New York State Office of Temporary and Disability Assistance [Division of Child Support Enforcement], Administrative Directive OTDA 09-ADM-07 [Rev 5/2009] at p. 6, available at otda.ny.gov/policy/directives/2009/ADM/09-ADM-07.pdf.

Because John Suhr never deposited a dime into either account, with all funds traceable to and owned by Plaintiff, his judgment creditor (Monroe County) had nothing upon which to levy. John Suhr did not possess equitable title to any of the funds in the accounts. No funds therefore were available to satisfy the child support judgment even if Plaintiff had failed to prove she added her husband's name to the accounts for convenience.

IV. The Appellate Division Should Review the Trial Record and Direct Entry of Judgment in Favor of Plaintiff.

On appeal from the bench Judgment at issue, this Court has the discretion to assume the role of fact-finder and come to the determination that should have been reached by the trial court. *See generally, Northern Westchester Prof'l Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983). In so doing, the Court may "search the record and render the judgment which

is warranted on the facts as [it] determine[s] them to be." *Kirisits v. State*, 107 A.D.2d 156, 160 (4th Dep't 1985). *See also Matter of Bankoski v. Green*, 109 A.D.3d 690, 692 (4th Dep't 2013) (in exercising its authority, the appellate court sitting on an appeal of a non-jury decision "may render the judgment [it finds] warranted by the facts.") (citation omitted).

The Fourth Department has explained as follows with respect to the scope of its authority under the circumstances at hand:

> [T]his court's inquiry is not limited to whether the findings were supported by some credible evidence. If it appears on all the credible evidence that a different finding or a finding different from that of the court is not unreasonable, then this court must weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from such testimony. It is within the power of this court to grant the judgment which upon the evidence should have been granted by the trial court.

Koester v. State of New York, 90 A.D.2d 357, 363-64 (4th Dep't 1982) (citations omitted).

This Court's level of inquiry "is as broad as that of the trial court." *Graf v. State of New York*, 117 A.D.2d 910, 911 (3d Dep't 1986). *See also Baba-Ali v. State of New York*, 19 N.Y.3d 627, 640 (2012) ("[W]here, as here, the Appellate Division reviews a judgment after a nonjury trial it has virtually plenary power to render the judgment it finds warranted by the facts."). In exercising its authority, the Court may "mak[e] an appropriate award of damages." *Karagiannis v. New York State Thruway Auth.*, 187 A.D.2d 1009, 1010 (4th Dep't 1992).

Because the trial court abdicated its role as fact-finder and made no evaluation of the evidence "after seeing the witnesses and hearing the testimony," no deference is owed here. This Court should evaluate the record

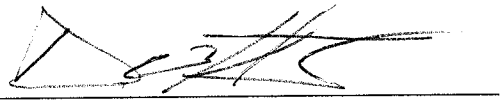
evidence under the correct legal standards (i.e., free of Banking Law § 675's presumption in favor of joint tenancy and the evidentiary requirement of clear and convincing evidence), and direct entry of judgment in favor of Plaintiff.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Elaine Alice Sweetman respectfully requests this Court to enter judgment in her favor, or, in the alternative, remand the matter to the trial court with instructions as to the correct legal standards to apply in considering the evidence, to enable the lower court to render the required findings of fact and conclusions of law.

Dated: May 30, 2017

NIXON PEABODY LLP



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