

STATE OF MICHIGAN
IN THE SUPREME COURT

DIMITRIOS ZAVRADINOS,

Plaintiff/Appellee,

Supreme Court No. 135137
Court Of Appeals No. 268570
Oakland County Circuit Court
Lower Court No: 04-062158-CK

-vs-

JTRB, INC., a Michigan corporation, **JTR II, LLC.**,
a Michigan Limited Liability Company, **RT1, INC.**,
a Michigan corporation, **LITTLE DADDY'S OF
BLOOMFIELD HILLS, MICHIGAN, LLC**, a
Michigan Limited Liability Company, **RICHARD ROGOW**,
an individual, **ATHANASIOS PERISTERIS**, an individual,

Defendants

and

ROBERT PROBERT, an individual,

Defendant/Appellant

and

LIZA DANIELLE PROBERT,

Intervening Party/Appellant

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135137

**DEFENDANT ROBERT PROBERT AND INTERVENING PARTY LIZA DANIELLE
PROBERT'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF RELIEF SOUGHT

On February 1, 2006 the Honorable Mark Goldsmith of the Oakland County Circuit Court, issued an Opinion And Order Regarding Defendant Robert Probert's Motion To Set Aside the Garnishment and Intervening Party Danielle Probert's Motion to Intervene Regarding the Garnishment. On August 23, 2007, the Court of Appeals reversed the order of the Trial Court and concluded that the Trial Court erred in determining that the presumption in favor of a tenancy by the entirety was defeated.

This Court should deny the application for Leave to Appeal since the Application (1) does not demonstrate that the issue involves a substantial question as to the validity of a legislative act, (2) the issue does not have significant public interest, and (3) the issue does not involve legal principals of major significance to the state's jurisprudence.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I.** Was the Court of Appeals correct in concluding that there is a presumption in favor of tenancy by the entirety for married persons and that the Plaintiff Zavrados did not rebut this presumption.

The Court of Appeals Answers: Yes

Defendant Robert Probert and Intervening Party
Danielle Probert Answers: Yes

Plaintiff Zavrados Answers: No

I. Statement Of Material Proceedings And Facts

Plaintiff/Appellant Dimitrios Zavrados filed the Complaint in the Oakland County Circuit Court in this matter alleging Count I – Breach of Contract, Count II – Breach of Promissory Note, Count III – Unjust Enrichment and Count IV – Piercing the Corporate Veil: JTRB, Inc. (See Docket Statement Entry 11/04/2004).

Defendant/Appellee Robert Probert was named as a Defendant. The foundation for Plaintiff's Complaint was an Agreement (attached to the Complaint) regarding payment to Plaintiff Zavrados for his interest in co-defendant JTRB, Inc. payable as \$80,000 upon execution of the Agreement, and \$170,000 payable over time pursuant to a promissory note (also attached to the Complaint, Docket Entry 11/04/2004), as part of a transaction regarding the Little Daddy's Restaurants in metropolitan Detroit. Defendant Probert did not execute either the Agreement or the Promissory Note and was a less than 10% shareholder in the companies.

Initially Defendant Robert Probert was represented by counsel but on March 17, 2005, the Trial Court entered an order allowing his counsel to withdraw (See Docket Entries). Appellant Probert then went without counsel. On August 10, 2005 the Honorable Mark. A. Goldsmith entered an Order Granting Summary Disposition against Defendant Robert Probert And a Judgment for \$170,000 plus statutory interest accruing from the date of filing the Complaint (See Docket Entries). This Order was based upon Plaintiff's Motion For Summary Disposition and the allegations contained therein which essentially were grounded in Defendant Probert's failing to respond to Requests For Admissions. Defendant Probert did not respond to the Motion for Summary nor appear at the hearing. In addition, the Court entered a default.

On September 21, 2005, the Court issued a Request and Writ for Non-Periodic Garnishment as to Solomon Smith Barney regarding Plaintiff's Judgment Against Defendant Robert Probert only for \$170,000 (See Docket Entries). On September 29, 2005 Smith Barney filed a disclosure with the Court indicating that Defendant Robert Probert and his wife Liza Danielle Probert had an interest in 2 current stock accounts held through Smith Barney:

<u>Account No.</u>	<u>Account Name</u>	<u>Type of Acct.</u>	<u>Acct. Value</u>
213-03022	Robert Allen Probert & Liza Danielle Probert	JTWROS	\$54,528.88
213-05892	Robert Allen Probert & Liza Danielle Probert	JTWROS	\$103,608.24

The disclosure identified both of the above accounts as held by Defendant Robert Probert and his wife, Liza Danielle Probert. On September 30, 2005, Defendant Robert Probert filed a Motion To Set Aside Garnishment And Objections To Garnishment of Smith Barney account, as well as a Motion To Set Aside Order and Judgment Dated August 10, 2005. On October 12, 2005, the Trial Court denied the Motion To Set Aside The Order and Judgment dated August 10, 2005 and in a separate order, scheduled the Motion To Set Aside Garnishment and Objections To Garnishment for an evidentiary hearing on December 7, 2005. Appellant Liza Danielle Probert was allowed to intervene in this action by Court Order dated November 18, 2005 to protect her rights to the funds held in the two accounts.

On December 7, 2005, an evidentiary hearing was held before the Hon. Mark A. Goldsmith. The first witness called by Defendant Robert Probert and Intervening Party Danielle Probert was the Proberts' financial consultant with Smith Barney, Janet Kemp

(See p. 5-6 of Dec. 7, 2005 Transcript; all references to transcript are the 12/7/05 hearing). Exhibit "A" was admitted through Ms. Kemp at the Evidentiary Hearing (p. 9 of Transcript) and contained documents related to the two garnished account numbers ending 05892 and 03022 (p. 8 of Trans.). Janet Kemp testified that account number 05892 opened in March or April of 2001 and the other account 21303022 opened in the beginning of 2000 (p. 9 of Trans.). She testified that both accounts are classified as "stock accounts" and that the stock in the various corporations are registered in their street names and that if the Proberts wanted evidence of ownership, the brokerage would send them a certificate (pp. 10-11 of Trans.).

Ms. Kemp testified that one of the Proberts could "call and ask for a certain dollar amount or whatever to be withdrawn, but the money, the check would be issued in joint account" and in "joint name" and that "both their names would be on it". (See pp. 11-12 of Tr.). Intervening Party Lisa Probert testified that she and Robert Probert had been married since 1993 (p. 27 of Tr.).

At the close of the evidentiary hearing, counsel for the Probert's argued that the two Smith Barney accounts were exempt from garnishment as they were held as husband and wife and are tenancy by the entireties. The Court took the matter under advisement and in an Opinion dated February 1, 2006 held that the accounts were not exempt from garnishment. Defendant Robert Probert and Intervening Party Liza Probert filed an appeal to the Court of Appeals on February 15, 2006.

The Court of Appeals issued its Opinion in this matter on August 23, 2007 which reversed the decision of the trial court and in so doing ruled that the trial court should have held that the Proberts' two investment accounts were held as tenants by the entirety.

On September 7th, 2007, Plaintiff/Appellant filed a Motion For Reconsideration pursuant to MCR 7.215(I) and this Request was denied on September 28, 2007. Plaintiff's request for publication was also denied on October 18, 2007.

II. Argument

A. The Solomon Smith Barney Accounts Are Exempt From Garnishment As They Are Held As Husband And Wife And Are Tenancy By The Entireties

The recently enacted **MCLA 600.6023(a), Exemption of Property held Jointly by Husband and Wife from Execution upon Judgment Against Only One Spouse**, states as follows:

“Property described in Sec. 1 of 1927 P.A. 212 MCL 557.151, or real property, held jointly by husband and wife as a tenancy by the entirety is exempt from execution under a Judgment entered against only one spouse.”¹

MCL 557.151, states that:

“All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidence of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restriction, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of death of either.

MCLA 557.151 was enacted in 1927 to give the above six classes of personal property the same protections of joint ownership as those enjoyed by husband and wife in real property. The statute recognized and codified entireties ownership in the identified items of personal property, the same as entireties ownership in real property held by a husband and wife. There are only two Smith Barney stock accounts at issue in this matter: 21305892 and 21303022. There is no dispute in the instant case that the two accounts at issue are part of the categories listed in the statute. The Trial Court stated, “the parties do not dispute that the Probert’s brokerage accounts would fall within one of the listed forms

¹ § 6023 A was added by P.A.2004, 575, Imd. Eff. Jan.3, 2005.

of property in MCL 557.151 and would be subject to the statutory presumption” (See p. 2 of February 1, 2006 Order).

The Court of Appeals, in its Opinion dated August 23, 2007, stated that there is no dispute that property held as tenants by the entirety is not subject to garnishment because of MCL 600.6023a and that accounts held by married persons are held in an estate by the entireties “unless an intent to do otherwise is affirmatively expressed” as indicated in *DeYoung v Mesler*, 373 Mich 499, 504; 130 NW2d 38 (1964). The Appellate Court found further that MCL 557.151 explicitly and unambiguously provides that stock and bonds owned by a husband and wife are owned as tenants by the entirety “unless otherwise therein expressly provided” (See page 2 of the Opinion).

In Michigan, the common-law rule that a conveyance to husband and wife creates a tenancy by the entirety has persisted except in respect to conveyances *explicitly* indicating that some other kind of tenancy is intended. “Even the qualifying phrase ‘as joint tenants’, while sufficient to create a joint tenancy in a conveyance to grantees generally, does not avoid the creation of an estate by the entirety when the grantees stand in marital relation to each other” *DeYoung v Mesler*, 373 Mich 499 (1964) (citing *Hoyt v Winstanley* 221 Mich 515). The *DeYoung* case held that:

“The language of the cited case appears to require that in order not to create a tenancy by the entirety in realty conveyed to husband and wife, even the use of the words ‘as joint tenants’ is insufficient. The only alternative seems to be to use the words ‘not as tenants by the entirety’ when such is the intent of the conveyance”. *Id.* p. 503-504.

“To create an estate in joint tenancy in a conveyance to a husband and wife, the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended. Estates in joint tenancy are not favored.” *Id.* at p. 503.

The Court of Appeals found that there is no affirmative indication that the Probert's accounts were to not be held as tenants by the entirety and the presumption cannot be overcome. Thus, the property held in the Smith Barney accounts by Defendant Robert Probert and his wife Liza Danielle is held as tenancy by the entirety and is fully exempt from garnishment.

The *DeYoung* Court found, as indicated by the Court of Appeals, that even listing a married couple as "joint tenants" is insufficient to extinguish a tenancy by the entirety, and in order to do so, an express statement of "not as tenants by the entirety" must be indicated. *DeYoung*, p. 503-504.

Michigan courts hold that "property owned by the entirety may not be garnished by a single spouse's creditors" See *SNB Bank and Trust v Kensey*, 145 Mich App 765, 775-776 (1985). In the instant case, there is no judgment against Intervening Party Lisa Danielle Probert. Payment from the Solomon Smith Barney account can only be made to both parties, and one party cannot withdraw funds without the other's consent. In addition, as it is a stock account, it holds certificates of stock issued jointly to Robert Probert and Liza Probert as husband and wife. Thus, the Solomon Smith Barney accounts are exempt from garnishment.

The error of the Trial Court was that it believed that if the accounts are held as joint tenants and the accounts did not state as tenants by the entirety, that the accounts are not exempt from garnishment even if the account holders are married. The case law indicates differently in that in order to destroy tenants by the entirety ownership between husband and wife, the accounts must clearly state "not as tenants by the entirety".

The Proberts provided the legal basis for dissolving the garnishments for these two accounts on the grounds that since the Proberts were married at the time the accounts were formed in 2000 and 2001, and are still married, then the accounts are held as tenancy by the entireties, and under MCLA 600.6023(a) and MCLA 557.151, both accounts are fully exempt from garnishment. The Proberts provided supporting case law, *DeYoung v Mesler*, 373 Mich 499 (1964) which states that the parties must use affirmative language such as “not as tenancy by the entireties” in order to remove it from the realm of tenancy by the entireties. The two accounts at issue qualify under MCL 557.151 and are exempt from garnishment under MCLA 600.6023(a).

In reaching its conclusion, the Trial Court focused on the case of *In Re Vanconett Estate*, 262 Mich App 660; 687 NW2d 167 (2004) *appeal granted* 474 Mich 999 (2006). This case held that a deed or devise of real property to a husband and wife presumptively creates a tenancy by the entireties, but this presumption may be overcome by explicit language in the deed, citing to the *DeYoung* case. *Id.* at 667. In *Vanconett*, the devise stated “as joint tenants with full rights of survivorship and *not as tenants in common*” [emphasis added]. *Id.* at 667. In the instant case there is no language declaring the property not held as tenants by the entireties.

1. *VanConett*

The Court of Appeals examined the case of *In re VanConett Estate*, 262 Mich App 660; 687 NW2d 167 (2004). *VanConett* involved real property owned by a husband and wife *and* a third person where all three took title to the property under a deed containing explicit language “as joint tenants with full rights of survivorship and not as tenants in common”. *VanConett, supra*, p. 667. Since there was a third person involved

in the ownership, all three parties could not own the property as tenancy by the entireties since only a husband and wife can own property in this manner. The *VanConett* Court cited to the case of *DeYoung v Mesler*, 373 Mich 449 for the rule that a “deed or devise of real property to a husband and wife presumptively creates a tenancy by the entireties, MCL 554.44; MCL 554.45, but this presumption may be overcome by explicit language in the deed”. The *VanConett* Court then ruled that because explicit language was used, a tenancy by the entireties was not created between the husband and wife, and all three held the property as joint tenants with full rights of survivorship. *Id.* at 667. The Court of Appeals correctly found that *VanConett* applied *DeYoung*. Further, the Appellate Court found that *VanConett* is distinguishable because it involved three people and not only a husband and wife. *VanConnet* found that a tenancy by the entireties could only be created when husband and wife *took title* to the property as co-owners under MCLA 554.44 and 554.45. Therefore, because a tenancy by the entireties can only be created when a husband and wife take title to property, when the third party died, the joint tenancy with full rights of survivorship was not converted to a tenancy by the entireties. *Van Connet*, supra, p. 667. This is unlike the facts of the instant case where Robert and Danielle Probert took title to the stock accounts as husband and wife.

2. *Burkacki*

The Plaintiff/Appellant cites to the unpublished case of *Burkacki v Barr* (2006). The facts of *Burkacki* were that a husband and wife opened a brokerage account with Morgan Stanley Dean Witter pursuant to a “Joint Account Agreement with Right of Survivorship” and this Agreement stated:

“It is the express intention of the undersigned to create an estate or account as joint tenants with rights of survivorship and not as tenants in

common. In the event of death of either or any of the undersigned, the entire interest in the joint account shall be vested in the survivor or vested in the survivors on the same terms and conditions as theretofore held ...”
Burkacki, p. 2.

The husband had created a revocable trust and allegedly transferred the account assets to the trust, and the Trustee argued that after the husband’s death, the account assets were part of the trust. *Burkacki*, p. 3. The Court of Appeals, however, determined that the decedent had not properly effectuated a transfer of the assets prior to death, and that the account assets automatically passed to the wife as the survivor. The Plaintiff/Appellee somehow believes that this case supports its position arguing that the “*Burkacki* Court did not impose a tenancy by the entireties”. This, however, was not an issue for the Court in *Burkacki* because (1) no one “took the requisite steps to complete a legal transfer” before the husband’s death, (2) the Account Agreement explicitly stated it “is the express intention of the undersigned to create an estate or account as joint tenants with rights of survivorship and not as tenants in common”, and (3) the Court was not being asked to determine whether the account was a joint tenancy with rights of survivorship or tenancy by the entireties.

For its ruling, it did not matter to the Court because under either ownership, the account assets go to the wife and/or her estate. In a joint tenancy with rights of survivorship, “either cotenant may transfer her interest in the joint life estate and such a transfer has no effect on the contingent remainders. Upon the death of either of the original cotenants, the *other* cotenant, or any person to whom she has transferred her contingent remainder, takes the whole estate” [emphasis added]. See *Albro v Allen*, 434 Mich 271, 287 454 NW2d 85 (1990). Likewise, in a tenancy by the entireties, a husband and wife hold joint title to property with right of survivorship. *Lilly v Schmock*, 297 Mich

513, 517, 298 NW 116 (1941). Thus, for the Court in *Burkacki*, under either a joint tenancy with rights of survivorship or a tenancy by the entireties, the property transfers to the surviving wife upon the death of the husband.

3. *DeYoung*

The Supreme Court, in *DeYoung*, was requested to rule upon the statutory language of MCL 557.151. MCL 557.151 which states that stock and the other items listed made payable to persons who are husband and wife, is held by them as joint tenants “unless otherwise therein expressly provided” the same as real estate held jointly by husband and wife, with full rights of survivorship. The issue for the Court in *DeYoung* was does MCL 557.151 “which specifically provides that debentures made payable to husband and wife shall be held by them in joint tenancy in the same manner as real estate held jointly by them, with full rights of survivorship create, instead, a tenancy by the entireties in such property” *DeYoung*, supra, p. 501. The Court held that estates by entirety are a modified form of joint tenancy and that “in order not to create a tenancy by the entirety”, the words “ ‘not as tenants by the entirety’ “ must be used. *DeYoung*, supra, p. 503-504.

4. *Hoyt*

The *DeYoung* Court relied upon *Hoyt v Winstanley*, 221 Mich 515, 191 Mich 515 (1922), wherein property was transferred to husband and wife “as joint tenants”. *Id.*, at 516. The claim was that this conveyance “did not create an estate in entirety, but one in joint tenancy only” and that the husband was the owner of a half interest in the property and subject to execution by a creditor. *Hoyt*, supra, p. 516. The Court in *Hoyt* disagreed with this proposition and held that

“the explanatory words, ‘as joint tenants’, would of themselves be sufficient to indicate that an estate in joint tenancy was intended to be conveyed were it not for the fact that an estate by the entirety is a species of joint tenancy and is commonly included in that class. We have held that a grant to a husband and wife jointly conveyed an estate in entirety. The same word ‘jointly’ used in a conveyance to grantees, not husband and wife, conveys an estate in joint tenancy. So too the words ‘joint tenants’, when coupled with ‘husband and wife’, do not bear the ordinary meaning; for an estate by the entirety is a joint tenancy.” *Hoyt, supra*, p. 214.

The Court held that:

“[I]n view of the fact that estates by entirety are a modified form of joint tenancy, that the terms are sometimes used interchangeably, and that our statute treats them as species of joint tenancy, it is my judgment that the words ‘as joint tenants’, coupled with husband and wife, are not sufficient to indicate that an estate in joint tenancy was intended to be conveyed. To create an estate in joint tenancy in a conveyance to a husband and wife, the words used must be sufficiently clear to negative the common law presumption that an estate by entirety was intended. Estates in joint tenancy are not favored. Since the enactment of our statutes, all presumptions are against them.” *Hoyt, supra*, 519-520.

Plaintiff/Appellant has not demonstrated a palpable error in application of the *DeYoung* decision and by extension, the decision in *Hoyt*, to the facts of this case.

Plaintiff attempts to confuse the Appellate panel’s determination about whether the form for an account not at issue in this case was signed by the Probert’s or whether it was merely filled out by the financial advisor. Plaintiff states that if the Proberts did not authorize it, they could have testified. Plaintiff, however, could have asked Liza Probert about this document, but chose not to. There is a presumption of tenancy by the entireties between married persons, and Plaintiff/Appellant has not presented any new evidence to defeat this presumption. What the Michigan Courts have stated is that since tenancy by the entireties is a species of joint tenancy, that when property is transferred to a husband and wife, “as joint tenants with rights of survivorship” there is a presumption that this is a

tenancy by the entireties unless words negating this intent are used. For these reasons, the Application for Leave To Appeal should be denied.

At the hearing, Plaintiff provided Exhibit 3 (which is attached to its Exhibit Book Book as Number 5) which contained an Account Application with handwritten financial information for account number 213-3857710401, a different account number. Plaintiff Zavrados attempts to argue that this application shows that the accounts were not intended to be held as tenants by the entireties. The information and application of proposed Exhibit 3, however, was *only* for an account number 3857710401 (now closed) which is not one of the accounts at issue which are account numbers 213-03022 and 213-05892. Even Plaintiff's counsel readily admits to this (p.20 of Tr). Thus, any information contained on the Account Application that is part of proposed Exhibit 3 is completely immaterial to whether or not the two accounts at issue as part of the garnishment are held as tenancy by the entireties. There are no such applications for account numbers 05892 and 03022.

The Plaintiff argues that an Application for another account, an account not at issue in these proceedings, could have been marked tenants by the entirety, and that this is evidence of the Proberts' intent². The Court of Appeals, however, correctly stated that "for plaintiff to prevail, we would have to conclude that a form that may or may not have been signed by the account holders that selects a joint tenancy rather than a tenancy by the entirety for a different account at the same financial institution meets the statutory standard of expressly providing for a form of ownership other than as tenants by the

² In fact, the documents from the other account number were never actually received by the trial court as exhibits. According to page 2 of the Table of Contents from the Evidentiary Hearing Transcript dated December 7, 2005, only Defendants Exhibits were received by the Court, and not those of Plaintiff.

entirety. We cannot make that leap of logic” (See page 2 of Opinion)³. What the Court of Appeals appeared to say is that even if it were correct that a different account was to be held as tenancy by the entireties, this does not hold true for the two accounts at issue.

Thus, the accounts are held as tenancy by the entireties and exempt from judgment against only one account holder.

B. At A Minimum, The Intervening Party Has An Interest In The Accounts As A Joint Holder

Assuming arguendo, that the above does not apply, then under MCLA 487.718 and *Danielson v Lazoski*, 209 Mich App 623, Intervening Party Liza Danielle Probert is considered an owner in the assets since she is married to Robert Probert and is deemed to have contributed half of the balance in the accounts, then only half of the accounts may be garnished. The Appellate Court did not address this argument based on the conclusion that the accounts was held as tenancy by the entireties.

³ Further, Janet Kemp testified that the Proberts did not sign the application for the different account not at issue and that Ms. Kemp probably took down the information (See lines 4-11 of December 7, 2005 Evidentiary Hearing Transcript, page 25).

III. Conclusion

Defendant Robert Probert and Intervening party Liza Danielle Probert respectfully requests that this Honorable Court deny the Application for Leave to Appeal.

Respectfully submitted,

CAMPBELL, O'BRIEN & MISTELE, P.C.



ROBERT J. FIGA (P47159)

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Dated: November 16, 2007

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings this 16th day of November, 2007.

By: U.S. Mail Hand Delivered
 Certified Mail Facsimile



Client/Probert/Supreme Court Application Brief