UNITED STATES OF AMERICA

BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

**XXXX** Docket No. BD 4-12

Creditor Claim
Borinquen Federal Credit Union

## Decision and Order on Appeal

## Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to §709.8 of NCUA Regulations (12 C.F.R. §709.8), as an appeal from the denial by the Liquidating Agent for Borinquen Federal Credit Union (Borinquen) of a creditor claim filed by XXXX (Claimant).

### Background and Initial Determination

The Board placed Borinquen, a $7 million credit union located in Philadelphia, into liquidation on July 8, 2011 due to its insolvency and appointed itself Liquidating Agent; NCUA's Asset Management and Assistance Center (AMAC) was appointed Agent for the Liquidating Agent. The claim involves a share account maintained at Borinquen by XXXX. As of January 2011, the share account had a balance of approximately $18,000. Through counsel, Claimant asserted to AMAC that Borinquen wrongfully permitted XXXX to be added to the account and to make withdrawals from the account equal to $15,400[1], which amount Claimant seeks to recover from Borinquen's liquidation estate.

According to Claimant, Borinquen added XXXX based on insufficient authorization from XXXX and should, therefore, account to Claimant for the monies withdrawn by XXXX. AMAC's initial response to the claim was that the account signature card properly reflected XXXX's name and interest as a joint owner and that the withdrawals she made from Borinquen were, therefore, legitimate. AMAC rejected the claim on that basis and Claimant appealed to the Board.

### Analysis.

[1] Borinquen's withdrawal records show that XXXX actually withdrew only $15,031 from the account.

The Board views this case as dependent on two separate, although related, considerations: first, whether Claimant's relationship to the account affords a basis on which Claimant may maintain her challenge; and, second, assuming it does, whether Claimant has succeed in establishing that Borinquen was negligent in adding XXXX to the account and permitting her to make withdrawals from the account in January 2011. Each of these is addressed below.

*Standing.*

To prevail on her claim, Claimant must, at a minimum, establish that she was a true joint owner of the account as she contends. If she were merely a payable-on-death (POD) beneficiary, she would lack standing to assert any claim. *See McAuley v. Southington Savings Bank*, 796 A.2d 1250 (Conn. App. Ct. 2002). A POD beneficiary has no enforceable right concerning the use of the funds in an account and has no control over what happens to those funds during the lifetime of the account owner. *See In re Estate of Stevenson*, 648 A.2d 559 (Pa. Super. Ct. 1994); *see also* 10 Am.Jur.2d *Banks and Financial Institutions*, §692. Accordingly, if Claimant were merely a POD beneficiary, she would have no standing to assert a claim concerning the disposition of the funds in the account prior to the death of the account owner.

The starting point for analysis to determine Claimant's status with respect to the account is the account signature card. Case law in Pennsylvania provides that the account signature card is *prima facie* evidence of the relationship among parties to an account. *See In re Dzierski's Estate*, 296 A.2d 716 (Pa. 1972). If the signature card and account records reveal the intent of the depositor clearly and without ambiguity, a party seeking to challenge the account configuration will not be allowed to offer evidence showing that the account owner had a contrary intent. *See In re Cilvik's Estate*, 267 A.2d 836, 841 (Pa. 1970). If sufficient ambiguity were present to permit a challenge, the party challenging the configuration and relationship among the parties to an account, as reflected in the account card itself, must present evidence of a clear, strong or compelling nature. *In re Lux's Estate*, 389 A.2d 1053 (Pa. 1978).

In this case, Claimant's name appears on the account signature card in the section where POD beneficiaries are noted, under the heading "Account Designation," rather than in the section where joint owners are identified. Her name is written on the line titled "Beneficiary." This is an indication that XXXX, the original account owner, intended for her daughter to be a POD beneficiary. Even allowing for the possibility that certain irregularities with respect to the account signature card are sufficient to permit an inference that XXXX's intent for her daughter is unclear, Claimant must come forward with some evidence to support her position that she was intended to be a joint owner. *See In re Lux's Estate*, *supra* (upholding principle that "clear, precise and convincing evidence" is required to overcome presumption that account signature card reflects the intention of the parties).

Through her attorney, Claimant asserts that XXXX intended for Claimant to be a joint owner. She relies on the fact that Claimant signed the front section of the signature card in 2006 when she was added to the account. As specified on the card, however, this signature simply signifies her receipt and agreement to the terms and conditions set out in the Membership Booklet, which contains the account agreement and related disclosures.

The Board is not convinced that merely signing the signature card denotes joint ownership status, particularly when the same card, on the reverse side, identifies Claimant as a POD beneficiary. No withdrawals from the account were ever made by Claimant since she was added to the account. The Board also notes that Borinquen did not assess a membership fee against the account in November 2006 when Claimant was added to the account, although it did assess a membership fee of $8.00 when XXXX was added in 2011.

Claimant was provided an opportunity to provide affirmative support for her view that she was a joint owner of the account. Claimant provided nothing that would support her position on this issue.

In view of the foregoing, the Board concludes that Claimant has failed to meet her burden of establishing her status as a joint owner. The Board determines, therefore, that Claimant lacks standing to maintain the appeal and the Board denies the appeal on that basis.[2] Assuming, arguendo, that Claimant had standing to maintain the appeal, the Board has also considered the question of whether Claimant has established that Borinquen acted unreasonably in permitting XXXX to be added to the account as a joint owner.

*Negligence.*

According to XXXX, with whom representatives of NCUA's Office of General Counsel spoke (with the assistance of a translator), XXXX called Borinquen and explained her intention to permit XXXX access to her account so that she could pay her funeral expenses, as she knew her death was imminent. XXXX said that Borinquen advised that XXXX should come in to Borinquen, with the account pass book and appropriate identification, so that she could be added to the account. XXXX did so, bringing with her the passbook and a handwritten statement signed by XXXX, explaining (in Spanish) her intention to have XXXX "take all the steps" necessary to pay for her funeral. This statement, dated January 12, 2011, is not addressed to Borinquen and makes no specific reference to her account at Borinquen. Nevertheless, on the strength of this statement and the presentation of the account passbook and formal identification by

[2] As described herein, state law principles are sufficient to resolve this claim. The application of Federal law principles would yield a similar result. As the Supreme Court noted in *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), the liquidator of a failed depository institution is entitled to rely on the books and records of the institution, and parties are barred from reliance on an unwritten agreement that contradicts the written terms. *See also OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306, 308 (11th Cir.1993) (noting that the *D'Oench* doctrine now applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records).

XXXX, Borinquen added XXXX to the account as a joint owner and permitted her to withdraw $9,000 in cash from the account on January 12, 2011.

XXXX was also in possession of another note, dated January 14, 2011, apparently signed by XXXX. This second note was notarized and contained more extensive instructions about XXXX's preferences (but still not specifically addressed to Borinquen or referring to her account there).[3] Contrary to the first note, the second note described XXXX's intention to allow XXXX to have ownership of all of her funds remaining after payment of certain designated items. It specifically stated that XXXX did not intend for any of her money to go to Claimant, to whom she had already given $5,000. The note clearly indicates that "that is all" she intended to give to Claimant. Following the date of the second note, Borinquen permitted XXXX to withdraw $427 on January 18th, $2,604 on January 21st, and $3,000 on January 24th (three days after XXXX's death). XXXX withdrew a total of $15,031 from the account.

XXXX produced documentation supporting that approximately $11,000 of the money she withdrew was applied directly to items specifically requested by XXXX (initial funeral expenses and personal bequests). She used $8,250, from the initial withdrawal of $9,000, to pay the funeral arrangements for XXXX at the Rodriguez Funeral Home in Philadelphia.[4] She also produced statements for home health care and hospice arrangements, although these are not in the form of itemized receipts and it is unclear whether, or to what extent, the additional funds withdrawn by XXXX were used for these items.

In considering the entire record in this case, including that which was apparently relied on by Borinquen and what NCUA personnel developed in connection with their review and investigation of the case, the Board believes a basis is present on which to conclude that Borinquen acted reasonably. Based on the handwritten notes and XXXX's possession and presentation of the passbook, the Board considers it reasonable that Borinquen interpreted XXXX to be requesting that XXXX be added to the account to provide her with access to those funds to cover certain expenses and bequests as identified by XXXX. Furthermore, the evidence in the case suggests that this is essentially what XXXX did with the money. On balance, the Board is of the view that evidence produced by XXXX is sufficient to support a presumption that her addition to the account and her access to the funds in it were both in accordance with the expressed desires of XXXX.

In contrast, Claimant has simply made conclusory statements alleging that Borinquen was wrong and allowed XXXX to take advantage of XXXX. Claimant appears to take the position that the mere fact that Borinquen allowed XXXX access to the account (Claimant asserts, in fact, that Borinquen permitted XXXX to add herself to the account)

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[3] The Office of General Counsel obtained independent, third party translations of both notes, including the handwritten and the typed versions of the second note.

[4] The Board understands that, following XXXX's death, XXXX and Claimant came to the funeral home and jointly determined to arrange for the cremation of the body. This resulted in a reduction of the charges, and the funeral home refunded $2,595 to XXXX. XXXX apparently kept this money.

speaks for itself and evidences negligence on the part of Borinquen. Claimant points out that the handwritten statements from XXXX are "addressed to no one in particular" and make no reference either to Borinquen or to her account there. Claimant also asserts that XXXX's signature on the January 14, 2011 notarized statement is a forgery.

The Board is not convinced that these allegations rise to the level of "clear, precise and convincing evidence" of the type described in the relevant cases. Something more than what has been produced is necessary to support Claimant's position.

Under the Federal Credit Union Act and NCUA Regulations, the burden of proof in establishing a claim is on the Claimant. 12 U.S.C. §1787(b)(5)(D); 12 C.F.R. §709.6(a)(1). As explained herein, Claimant has failed to meet this burden.

## Order

For the reasons set forth above, it is ORDERED as follows:

The decision of AMAC denying XXXX's claim in the amount of $15,400 is affirmed and the appeal of XXXX is denied.

The Board's decision constitutes a final agency determination. Pursuant to 12 C.F.R. 709.8(c)(1)(iv)(B), this final determination is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the credit union's principal place of business was located. Such action must be filed within 60 days of the date of this final determination.

So **Ordered** this 23d day of July, 2012, by the National Credit Union Administration Board.

/S/
Jon Canerday
Acting Secretary of the Board