ALAN WILSON
ATTORNEY GENERAL

June 30, 2022

Mikhail M. Mironenko
Detective
Spartanburg County Sheriff's Office
Post Office Box 771
Spartanburg, South Carolina 29304

Dear Detective Mironenko:

We received your letter requesting an opinion of this Office concerning joint/multi-party bank accounts. Specifically, you ask "can a party on a joint/multi-party bank account be convicted for theft (Larceny, Breach of Trust, Obtaining Property Under False Pretenses or Financial Exploitation of a Vulnerable Adult)?"

Law/Analysis

All of the criminal violations mentioned in your letter involve the taking of property owned by others. "Larceny involves the felonious taking and carrying away of the goods of another . . . which must be accomplished against the will or without the consent of the other." State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979) (citations omitted); S.C. Code Ann. 16-13-30 (2015) (codifying larceny as a statutory offense). "To convict of larceny, the State must show the defendant took the property and carried it away with intent to steal it." State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct. App. 2003), overruled on other grounds by State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015).

The criminal offense for breach of trust is codified under section 16-13-230 of the South Carolina Code (2015). While similar to larceny, breach of trust involves obtaining property in trust with the owner's consent, but later breaching such trust. State v. Parris, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005). See also, State v. McCann, 167 S.C. 393, 166 S.E. 411, 413 (1932) ("The main distinction between the two crimes is this: In common-law larceny, possession of the property stolen is obtained unlawfully, while in breach of trust, the possession is obtained lawfully."). To successfully convict a person for breach of trust, the prosecution must prove the existence of a trust relationship in which the transferor of the property intended for the trustee to act for the transferor's benefit instead of on his own. Id. at 482, 611 S.E.2d at 503.

Section 16-13-240 of the South Carolina Code (2015) makes "[a] person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another

cheat and defraud a person of that property" guilty of a felony or misdemeanor depending on the value of the property obtained. In order to be convicted of obtaining property under false pretenses, our Supreme Court determined "a fraudulent representation of a past or existing fact by one who knows of its falsity, in order to induce the person to whom it is made to part with something valuable" is required. State v. Dickinson, 339 S.C. 194, 198, 528 S.E.2d 675, 677 (Ct. App. 2000).

Chapter 35 of title 43 of the South Carolina Code (2015 & Supp. 2021) governs the protection of vulnerable adults. Section 43-35-85(D) of the South Carolina Code (2015) provides: "A person who knowingly and wilfully exploits a vulnerable adult is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both, and may be required by the court to make restitution." Section 43-35-10 of the South Carolina Code (2015) defines "exploitation" as

> (a) causing or requiring a vulnerable adult to engage in activity or labor which is improper, unlawful, or against the reasonable and rational wishes of the vulnerable adult. Exploitation does not include requiring a vulnerable adult to participate in an activity or labor which is a part of a written plan of care or which is prescribed or authorized by a licensed physician attending the patient;
>
> (b) an improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person; or
>
> (c) causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through: (i) undue influence, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property.

All of these statutes hinge upon the taking of money or property, with or without consent, which belong to someone else. Therefore, we must first consider whether placing someone's name on a joint account creates some sort of ownership interest that would make charging someone under these circumstances impossible. Accordingly, we look to the law governing joint accounts. Section 34-11-10 of the South Carolina Code (2020), under the Banking, Financial Institution and Money provisions, governs payments made from joint/multi-party banks accounts. According to this provision, subject to sections 62-6-101, et seq. contained in the South Carolina Probate Code,

> (a) when a deposit has been made in a bank, banking institution, or depository transacting business in this State in the names of two or more persons, payable to any of the depositors or payable to any of the depositors or the survivor or survivors, the deposit or any part thereof may be paid to any of the persons, whether the other or others are living or not and the receipt or acquittance of

> the person or persons paid is a valid and sufficient release and discharge for any or all payments made.
>
> (b) The pledge or hypothecation to any bank, banking institution, or other depository transacting business in this State of all or part of a deposit account in the names of two or more persons, payable to any of the depositors or payable to any of the depositors or the survivor or survivors, by any depositor or depositors, whether minor or adult, upon whose signature or signatures withdrawals may be made from the account is, unless the terms of the deposit account provide specifically to the contrary, a valid pledge and transfer to the institution of that portion of the account pledged or hypothecated.

S.C. Code Ann. § 34-11-10. This provision clearly allows a bank or similar institution to pay "any of the persons" named on the account making such payment "valid and sufficient release and discharge for any or all payments made." However, it does not address the relationship between the persons whose names are on the account. Thus, we look to the provisions in the Probate Code referred to in section 34-11-10. Section 62-6-201 of the South Carolina Code (2022) explains the ownership of a multi-party account during the lifetime of the parties whose names are on the account:

> (A) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
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> (B) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.
>
> (C) An agent in an account with an agency designation has no beneficial right to sums on deposit.

The reporter's comments to this provision further explain:

> This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership. The section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them.
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> The assumption that no present change of beneficial ownership is intended may be disproved by showing that a gift was intended. For example, under subsection (b) it is presumed that the beneficiary of a POD designation has no

> present ownership interest during lifetime. However, it is possible that in the case of a POD designation in trust form an irrevocable gift was intended.
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> It is important to note that the section is limited to ownership of an account while parties are alive. Section 62-6-202 prescribes what happens to beneficial ownership on the death of a party.
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> The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party. Sections 62-6-301 and 62-6-306 protect a financial institution in that circumstance without reference to whether a withdrawing party may be entitled to less than that party withdraws as against another party. Rights between parties in this situation are governed by general law other than this part.
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> The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals, and not equal and undivided ownership that would be an incident of joint tenancy.

Id. (emphasis added).

In Trotter v. First Federal Savings and Loan Association, 298 S.C. 85, 378 S.E.2d 267 (Ct. App. 1989), the Court of Appeals clarified the distinction between the relationship of the parties whose names are on account and those parties' relationship with the bank.

> An account card was discussed in Austin v. Summers, 237 S.C. 613, 118 S.E.2d 684 (1961). The case states the contract of deposit permitted one party to an account to withdraw the money without liability by the bank to the other party. Id. at 623, 118 S.E.2d at 688. Other cases also demonstrate the distinction between the rights between the parties and the contractual agreement with the bank. See Hawkins v. Thackston, 224 S.C. 445, 79 S.E.2d 714 (1954); Johnson v. Herrin, 272 S.C. 224, 250 S.E.2d 334 (1978); Clinkscales v. Clinkscales, 275 S.C. 308, 270 S.E.2d 715 (1980). Since Willis Trotter had contractual authority over the First Federal account he had authority to pledge it to C & S.

Id. at 91, 378 S.E.2d at 270.

In Austin, referenced by the Court of Appeals in Trotter, the Supreme Court considered whether the withdrawing by one joint tenant of the entire account, placing it beyond the reach of other joint tenant, and refusing to pay the other joint tenant one half of the account after demand, amounted to a conversion. In that case, Joseph T. Fry, Janie Austin Fry, and Irene Summers entered into a joint account agreement with a bank. Discussing the relationship between the account holders, the Court stated:

It is clear that both Janie Austin Fry and Irene Summers had substantial and equal interests in this account following the death of Joseph T. Fry. Neither had contributed the money making up this account which, under several decisions, gives the contributing party greater rights of withdrawal without liability. See 161 A.L.R. 75. When it has been established that both parties have substantial interests in a joint account, it follows that neither can appropriate the whole without liability to the other. 7 Am.Jur. (Banks) 1959 Supplement, page 39. Also 161 A.L.R. at pages 74-75.

The contract of deposit, referred to above, undoubtedly authorized Irene Summers to withdraw the entire amount of the account without liability on the part of the Savings and Loan Association to the other party and this is also sanctioned by statute, as set forth in Section 8–602 of the 1952 Code of Laws of South Carolina. But the power to withdraw is one thing and the power or right to destroy a co-interest is another. The removal of this account in full by Irene Summers and redeposit of same in her own name in North Carolina, clearly placed the money, or any part of it, outside of the control and possession of Janie Austin Fry and beyond her reach. As a joint tenant having a substantial interest in this account, Janie Austin Fry could have terminated the account by a withdrawal of one-half thereof, or by a voluntary partition or agreement with her co-owner. See 14 Am.Jur. (Cotenancy) page 86. She was entitled to withdraw one-half of the account without becoming liable in any way to Irene Summers and Irene Summers could have withdrawn her half share in like manner. Had Janie Austin Fry taken no action to sever this account, or to claim any part thereof during her lifetime, it cannot be questioned but that Irene Summers, as the survivor, would have taken the entire account on the death of Janie Austin Fry. However, the record shows that Janie Austin Fry did make an effort to secure her part of this account during her life, having made written demand on Irene Summers for an accounting of the money removed from the joint Savings and Loan Association account and for $5,000 of this account. Had Janie Austin Fry lived, she could have enforced this demand by a partition action or, if the money had not been removed from the joint account, by merely withdrawing her share. Clearly, she wanted her share and was rightfully entitled to same, but was prevented from obtaining same by the action of Irene Summers in removing the money to an individual account in another State.

I therefore conclude and so find, that the action of Irene Summers in withdrawing the entire account from the First Federal Savings and Loan account and placing same beyond the reach of Janie Austin Fry and her further failure to pay to Janie Austin Fry one-half of this account, after demand was made upon her, amounts to a conversion of the share of Janie Austin Fry in this account. In effect, her action amounted to an appropriation of the entire

> account. Janie Austin Fry was entitled to one-half of the account of $10,497.95, or the sum of $5,248.97, with interest thereon from August 11, 1956.

Id. at 623-24, 118 S.E.2d at 688-89.

While both Trotter and Austin indicate the parties to a joint account can claim retribution from one another for moneys improperly withdrawn from the account, they do not address whether a joint account holder can be held criminally liable for withdrawing funds from a joint account. Furthermore, we did not find any South Carolina case law addressing this issue. However, as you mentioned in your request letter, other jurisdictions considering this issue have found a joint account holder can be held criminally liable. In particular, you cite to Wagner v. State, 445 Md. 404, 409, 128 A.3d 1, 4 (2015), in which the Maryland Court of Appeals determined a person named on a joint account with her father could be charged with theft because under the Maryland law governing joint accounts, simply adding a person's name to a joint account does not create an ownership interest.

> Because FI § 1-204(f) does not mention or implicate the ownership rights among living parties to a joint or multiple-party account, and instead provides that a party to a joint or multiple-party account may access and withdraw funds in the account, we reject Wagner's contention that she had an ownership interest in the funds in the Account and that, as a matter of law, she cannot be guilty of theft. Plainly put, under the circumstances of this case, nothing in FI § 1-204(f) prevents a conviction for theft. The evidence demonstrated that Wagner willfully or knowingly obtained or exerted unauthorized control over the funds in the IRA and the Account-which belonged to Father, the owner of the funds-without Father's knowledge or consent, and with the intent to deprive Father of those funds. In other words, the evidence was sufficient to demonstrate that Wagner committed theft.

Id. at 436, 128 A.3d at 20. The Maryland Court of Appeals also cited to numerous other jurisdictions reaching the same conclusion. Id. at 436-37, 128 A.3d at 20 (citing Hicks v. State, 419 S.W.3d 555, 559 (Tex.Ct.App.2013) (finding sufficient evidence to convict a named party on a joint account of appropriation of property); State v. Gagne, 165 N.H. 363, 79 A.3d 448, 456 (2013) (finding the funds in a joint account were the property of another and therefore supported convicting a named party on the account of theft)). Additionally, the Maryland Court of Appeals found allowing someone access to the account creates a fiduciary relationship and therefore, a joint account holder can also be charged with embezzlement. Id. at 441, 128 A.3d at 23.

In addition to Maryland, Texas, and New Hampshire, the Nevada Court of Appeals also found under certain circumstances a person named on a joint account can still be convicted of theft for withdrawing and/or misusing funds from the joint account despite a Nevada law establishing a presumption that a person's status as a joint account holder provides that person with ownership

of, and authority to use, the funds in the joint account. Natko v. State, 134 Nev. 841, 435 P.3d 680 (Nev. App. 2018). The Nevada Court of Appeals explained:

> nothing in NRS 100.085 that precludes a joint account holder from being convicted of theft for the withdrawal and/or misuse of funds in the joint account. However, based on the reasoning in Walch, in order to convict a joint account holder of theft based on the withdrawal and/or misuse of funds from a joint account, the State must allege and establish that the criminal intent arose prior to the funds being deposited into the joint account.

Id. at 844, 435 P.3d at 683 (citing Walch v. State, 112 Nev. 25, 909 P.2d 1184 (1996) (holding a person's status as a joint account holder does not by itself provide lawful authority to use or transfer another's assets for their own benefit.)).

We believe South Carolina courts would view this issue much like other jurisdictions. Like the laws in Maryland, Texas, and New Hampshire, section 34-11-10 does not prohibit a conviction for theft or any of the other offenses you mentioned in your letter. Moreover, under South Carolina law, an ownership interest is not created merely be adding a person's name to an account. Section 62-6-201 specifies, "[d]uring the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent." Therefore, if the person named on the joint account cannot establish an ownership interest, then it may be possible to convict such a person of theft or a similar crime for obtaining or using funds for their own benefit which do not belong to them. However, just as the Nevada Court of Appeals advised, we believe our courts would also require the evidence show the non-contributing account holder willfully or knowingly obtained or exerted control over the funds in which he or she had no legal right of ownership of in addition to any other requirements of a particular charge.

Conclusion

Section 34-11-10 allows payment to any person whose name appears on a joint account. However, the authority to withdrawal funds does not equate to ownership of the funds. Moreover, section 62-6-201 of the South Carolina Code specifies the presumption that joint accountholders ownership is "in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent." South Carolina case law indicates when someone withdrawals in excess of this amount, he or she can be held liable to the other party or parties on the account. Trotter, 298 S.C. at 91, 378 S.E.2d at 270. However, in our research, we did not find any South Carolina case law addressing the ability of a law enforcement agency to criminally charge a joint account holder for theft or a similar charge for removing funds from a joint bank account. Other jurisdictions recognized that if a joint account holder does not have an ownership in funds he or she withdrawals, he or she may be charged criminally for improperly removing funds from the account. Wagner, 445 Md. 404, 128 A.3d 1; Hicks, 419 S.W.3d 555; Gagne, 165 N.H. 363, 79 A3d 448; Natko, 134 Nev. 841, 435 P3d 680. Similar to other states,

South Carolina does not prohibit criminal charges against a joint accountholder for the improper removal of funds from a joint account. Therefore, if a joint accountholder did not have ownership over the funds and willingly and knowingly obtained control over the funds, we believe they could be convicted of theft or a similar charge.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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