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otherwise have been adversely affected. Mortgagees were provided with a means of extending their liens by registration, there being no necessity for court proceedings as in the invalid Pennsylvania law. The most serious problem is the applicability of Article III, section 33 of the Florida Constitution. But, the court has indicated that this provision would not be applicable where no prior statute of limitation existed. Further, in *Mahood v. Bessemer Properties, Inc.*, the concurring justice expressed the view that that constitutional provision is satisfied if a reasonable time is provided for the enforcement of existing claims. In view of these opinions, it seems unlikely that the Florida statutes will meet a fate of being declared unconstitutional as did their Pennsylvania counterpart.

HERBERT A. WARREN

THE PRECARIOUSNESS OF THE RIGHT OF SURVIVORSHIP IN JOINT BANK ACCOUNTS

There is considerable uncertainty as to whether the survivor of a joint bank account or the personal representative of the deceased should receive the funds of a joint account. The question has been clouded, so far as the layman is concerned, by the adoption in nearly every state of "Deposit in Two-Name" statutes.¹ Laymen are of the opinion that when they sign a bank signature card, as demanded by these statutes, providing that the funds are payable to either or survivor, they have made all the arrangements for their co-depositor to receive the funds upon death. Actually, these statutes merely protect the bank in case of payment to the survivor after the death of the joint depositor.

It is proposed to show, first, the modern theories used in deciding whether or not the survivor of a joint account will receive the account; secondly, the problem as it exists under the Florida decisions; and thirdly, a suggestion as to how Florida might clarify the joint account dilemma.

When the common law was first formulating in England, personal property was of relatively little importance. Men of wealth had many acres of land, but only a few personal effects. As a result the law of the time was predominantly concerned with realty. Real property could be held in four different ways: in severalty, in joint-tenancy, in coparcenary and in common.² Each of these theories had requirements which had to be met before the estate could have legal effect.³ One of the primary reasons for determining the type of estate that existed was to establish the rights of survivor-

1. Every state except Kentucky has "Deposit in Two-Name Acts." See, e.g., FLA. STAT. § 653.16 (1949). These acts provide that the signing of a signature card, which states that the account is payable to X or Y or survivor, protects the bank in paying the survivor after the death of a joint depositor.

2. 2 BL. COMM. *343

3. *Ibid.*

ship.⁴ These estates and interests were generally not recognized in the law of personal property.⁵ This distinction has now been repudiated, and it is conceded that the same estates and interests may be created in relation to personal property, tangible or intangible, as are permissible in the law of real property.⁶

Modern day courts use gift, trust, joint-tenancy and contract theories to justify their holding in joint deposit problems.⁷ No matter which theory is used, the court's primary concern is to determine the intent of the depositor.⁸ There must have been an intention to transfer a present interest to the surviving co-depositor, in order for him to receive the funds.⁹ Otherwise, the representative of the deceased will be entitled to the deposit.¹⁰

The gift theory has been a favorite of the courts in giving effect to the intent of the deceased. It has, however, presented some difficulty, since it requires the showing of an intent to give¹¹ and a delivery.¹² The mere fact that an account has been opened in a form payable to joint depositors with right of survivorship does not of itself establish an intent to make a gift.¹³ The donee may not get a present interest in the account and, in that event, the gift would be void as a violation of the statute of wills, being an attempted testamentary disposition.¹⁴ But, if the depositor intends to make a present gift of an interest in a deposit, and delivers the bank book to the donee, a valid gift is effected.¹⁵

Some courts are prone to be rather strict as to the requirement that there be a delivery of the intended gift to the donee.¹⁶ Other courts give effect to the gift if they can find a clear intent to make a gift.¹⁷ It would

4. See *In re Conklin's Estate*, 259 App. Div. 432, 20 N.Y.S.2d 59, 62 (3d Dep't 1940) (survivorship exists where a person becomes entitled to property by reason of his having survived another person who had an interest in it).

5. BL. COMM. 342 (Gavit's ed. 1941).

6. *Ibid.*

7. E.g., *Rafferty v. Reilly*, 41 R.I. 47, 102 Atl. 711 (1918) (gift); *Coburn v. Shilling*, 138 Md. 177, 113 Atl. 761 (1922) (trust); *Compton v. Hendricks*, 154 Ga. 808, 115 S.E. 654 (1923) (joint-tenancy); *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N.E. 371 (1916) (contract).

8. *Sinift v. Sinift*, 229 Iowa 56, 293 N.W. 841 (1940).

9. *Ball v. Forbes*, 314 Mass. 200, 49 N.E.2d 898 (1943).

10. *Gibson v. Industrial Bank of Washington*, 36 A.2d 62 (Munic. Ct. D.C. 1944); *Long v. Dempsey*, 52 N.Y.S.2d 93 (Sup. Ct. 1944).

11. *The Kitty C.*, 20 F. Supp. 173 (S.D. Fla. 1937).

12. *Jones v. Ferguson*, 150 Fla. 313, 7 So.2d 464 (1942).

13. *Thomas v. Houston*, 181 N.C. 91, 106 S.E. 466 (1921); *Sawyer v. Mabus*, 107 S.C. 369, 92 S.E. 1029 (1917).

14. *In re King's Will*, 51 Misc. 375, 101 N.Y. Supp. 279 (Surr. Ct. 1906); *Sullivan v. Sullivan*, 39 App. Div. 99, 56 N.Y. Supp. 693 (3d Dep't 1899) *aff'd.* 161 N.Y. 554, 56 N.E. 116 (1900); *Jonte v. English*, 171 Okla. 291, 40 P.2d 646 (1935); *Onofrey v. Wolliver*, 351 Pa. 18, 40 A.2d 35 (1944).

15. *Rafferty v. Reilly*, 41 R.I. 47, 102 Atl. 711 (1918).

16. *Hudson v. Bradley*, 176 Ark. 853, 4 S.W.2d 534 (1928); *First & Tri-State National Bank and Trust Co. v. Caywood*, 95 Ind. App. 591, 176 N.E. 871 (1931); *Thomas v. Houston*, 181 N.C. 91, 106 S.E. 466 (1921).

17. *In re Johnson's Estate*, 218 N.W. 739 (Neb. 1928).

scem, however, that the donee must at least know of the gift during the lifetime of the donor.¹⁸

Under the contract theory, which has been applied mainly by Massachusetts courts,¹⁹ when co-depositors sign a bank signature card, a contract is made between the parties, as well as with the bank. This theory has been used closely in connection with the joint-tenancy theory. The contract with the bank is held to create a joint-tenancy where there is technically no joint-tenancy.²⁰ The reasoning appears fallacious in that the contract is actually between the bank and the co-depositors, and there is no contract between the co-depositors themselves. It would seem that the contract theory should be used only where there is a written contract between the joint depositors, separate and distinct from the contract with the bank.

Some courts follow the joint-tenancy theory to vest title in survivors of joint depositors. However, this theory causes difficulty because it requires unities of time, title, interest and possession.²¹ Numerous courts have denied recovery when these requisites have not been met.²² But where the parties have definitely shown in their contract that they intended a joint-tenancy with right of survivorship, it has been given effect and the survivor held entitled to the fund.²³

The trust theory is disliked by some courts because it seems that it is used only to effectuate an imperfect gift.²⁴ The right of the survivor will be sustained only when there is a declaration of trust, so that the equitable title vests in the cestui que trust and passes beyond the control of the settlor.²⁵ It is admitted in some cases that the opening of an account in the joint names of donor and another is evidence of an intention to establish a trust, but such intention may be rebutted.²⁶ Since co-depositors in a joint bank account can draw upon the account at will, it is impossible to prove a true trust unless the power of revocation, through ability to withdraw all the funds of the account, is not exercised during the lifetime of the creator of the trust.²⁷

The law as to the right of a survivor to the money on deposit in a joint bank account has been and still is quite unsettled in Florida. Very few

18. *Perry v. Leveroni*, 252 Mass. 390, 147 N.E. 826 (1925).

19. *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N.E. 371 (1916).

20. *Goldston v. Randolph*, 293 Mass. 253, 199 N.E. 896 (1936) (a transfer and signature card gave the survivor a right to the account even though the transfer appeared testamentary in character).

21. *Neal v. Neal*, 106 S.W.2d 595 (Ark. 1937); *Heard v. Gundy*, 127 Me. 480, 144 Atl. 399 (1929); *Portland National Bank v. Brooks*, 126 Me. 251, 137 Atl. 641 (1927).

22. *Denigan v. San Francisco Savings Union*, 127 Cal. 142, 59 Pac. 390 (1899), *Staples v. Berry*, 110 Me. 32, 85 Atl. 303 (1912); *Burns v. Nolette*, 83 N.H. 489, 144 Atl. 848 (1929).

23. *Compton v. Hendricks*, 154 Ga. 808, 115 S.E. 654 (1923); *Erwin v. Felter*, 283 Ill. 36, 119 N.E. 926 (1918).

24. *Howard v. Dingley*, 122 Me. 5, 118 Atl. 529 (1922).

25. *Murphy v. Haynes*, 197 Ky. 444, 247 S.W. 362 (1923).

26. *Coburn v. Shilling*, 138 Md. 177, 113 Atl. 761 (1922).

27. *Ladner v. Ladner*, 128 Miss. 75, 90 So. 593 (1921).

cases have been decided directly on point. The intent of the deceased seems to be the controlling factor, and this intent may be supported by any one of the four previously discussed theories.

In one case²⁸ the Florida court held that even though the joint depositors were husband and wife, with a resultant estate by the entirety, the money should go to the son as executor rather than to the wife. The court based its opinion on the theory that in order for the wife to receive the money, a gift to her by the husband had to be established. Since the intent of the husband in opening the account was merely to allow the wife to meet current obligations, the requisites of a gift, an intent to give and a delivery, were not present.

This was followed by an interpretation of the Florida law in a federal court. The case²⁹ involved the construction of a Florida statute³⁰ modifying the common law of joint-tenancy with right of survivorship. Two women were the joint depositors and they had signed a written agreement at the time of the deposit, to the effect that they agreed with each other and with the bank that all sums theretofore or thereafter deposited in the joint account by either party should be owned by both jointly, with right of survivorship. The Fifth Circuit Court of Appeals held the survivor had a right to take title to the money as against the administratrix. The mere signing of a bank signature card would not have been sufficient,³¹ since that would simply have complied with the statute to protect the bank in case of payment to the survivor after the death of one of the depositors.³² In a concurring opinion, Judge Russell noted that, in the absence of statute,³³ a gift might not have been effectuated, since entire dominion over the account would not have been relinquished. He also questioned the creation of a joint-tenancy under the statute since he felt that joint-tenancy does not exist when one party can withdraw all the funds at any time. He stated that he would strike down the agreement as being a testamentary

28. *Jones v. Ferguson*, 150 Fla. 313, 7 So.2d 464 (1942). *Contra*: *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925) (a savings bank deposit which the parties held as an estate by the entirety was given to the surviving husband, notwithstanding a contrary provision in the will of the deceased wife).

29. *Lynch v. Murray*, 139 F.2d 649 (5th Cir. 1943).

30. FLA. STAT. § 689.15 (1949) ("The doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state; that is to say, except in cases of estates by entirety, a devise, transfer or conveyance heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship; and in cases of estates by entirety, the tenants, upon divorce, shall become tenants in common.").

31. *Cerny v. Cerny*, 152 Fla. 333, 11 So.2d 777 (1943); *Crossman v. Naphtali*, 160 Fla. 148, 33 So.2d 726 (1948).

32. FLA. STAT. § 653.16 ("When a deposit has been made, or shall hereafter be made, in any . . . banking institution transacting business in this state, in the names of two or more persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons whether the other or others be living or not; and the receipt or acquittance of the person so paid shall be valid and sufficient release and discharge to said institutions for any payment so made.").

33. See note 30 *supra*.

disposition, without the formality of a will, except for the fact that a Florida case has allowed the survivor to take under such a written "contract".³⁴ This concurring opinion clearly shows the precariousness in Florida of trying to establish a right of survivorship in a joint account without a written contract other than the statutory bank signature card.

A 1945 case³⁵ leaves no doubt but that the joint-tenancy, gift, trust and contract theories will be considered by the Florida courts. The deceased had opened several accounts in which he had included another name along with his own, and in which he had designated who was to take in case of his death. His manner of opening the accounts left no doubt as to the fact that he intended his survivors to take. No written contracts had been entered into between the deceased and the survivors, nor were any bank signature cards signed by the survivors. The court held that, since none of the various theories could be established, they had no power under equitable principles to decree the deposits to be the property of the survivor, merely because such was the intent of the deceased.

Although Florida has refused to hold that the signing of a bank signature card creates a joint-tenancy with right of survivorship,³⁶ the court has partially reversed that position in a case involving joint depositors who were mother and daughter. It is to be doubted whether this latest case³⁷ would be authority for holding that the signing of a bank signature card would create a joint-tenancy with right of survivorship *unless* the parties were close blood relatives.

It is submitted that the following statements would probably be valid in connection with the right of survivorship in joint bank accounts in Florida:

1. When opening a joint bank account the joint depositors, in addition to signing the bank signature card, should also execute a contract between themselves, stating that it is the intention of the parties to create a joint tenancy with right of survivorship, and not a tenancy in common.

2. When the survivor of a joint account is a close relative of the deceased co-depositor, and a signature card has been signed, the Florida courts will probably hold that the survivor should take, under the contract theory. Any available favorable evidence as to the intent of the deceased should, however, be presented.

3. When the survivor of a joint account is not a close relative of the deceased co-depositor it is necessary to establish that a gift, trust, joint-tenancy, or contract was created. The intent of the deceased in such a case is an extremely important factor and the supporting evidence must be almost conclusive. Of course, a written contract, as suggested above, will be

34. Cerny v. Cerny, 152 Fla. 333, 11 So.2d 777 (1943).

35. Webster v. St. Petersburg Federal Savings & Loan Ass'n, 155 Fla. 412, 20 So.2d 400 (1945).

36. Crossman v. Naphtali, 160 Fla. 148, 33 So.2d 726 (1948).

37. Crabtree v. Garcia, 43 So.2d 466 (Fla. 1949).

given effect by the courts but, in the absence of such a contract, it would seem best to proceed under the gift theory.

The only true solution would appear to be legislative action. Such legislation should require that a contract between the parties be included by the banks on their signature cards. It could be in substantially the following form: "I (do) (do not) wish this account to be a joint-tenancy with right of survivorship." This statement would be followed by a space for the signature of both parties. Such legislation would in no way increase the banks' liability but it would save the courts from handling much needless litigation.

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