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Virginia Law on Joint Bank Accounts

VIRGINIA COMMENTS

VIRGINIA LAW ON JOINT BANK ACCOUNTS

The recent Virginia case of *Quesenberry v. Funk*[1] deals with the disposition of funds remaining in a joint and survivor bank account[2] after the death of the original owner and depositor of the funds. This case follows earlier ones which, during the past decade, have established as Virginia law the position that there is a presumption[3] that such an account was created for the benefit and convenience of the depositor; therefore, the survivor attempting to claim the funds must prove that the depositor intended to make a gratuitous transfer to him and took such steps as would accomplish that result.[4]

The action was instituted by five of the children and residuary legatees of W. S. Coalson against another child and residuary legatee, Mrs. Thelma C. Quesenberry, who with the decedent was a co-depositor of the account, and against her husband, W. Eugene Quesenberry, executor of the will of the decedent. The account was the ordinary joint-and-survivor type, the usual signature card[5] having been properly filed with the bank. There was conflicting evidence as to whether the decedent intended for Mrs. Quesenberry, who attended to his business and provided some of the personal attention he required, to

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[1]203 Va. 619, 125 S.E.2d 869 (1962).

[2]The term "joint account" will be used hereinafter to mean an account with survivorship provisions unless the context clearly indicates otherwise.

[3]The word "presumption" has several meanings and it is not clear which meaning is intended by the Virginia court. From a reading of the cases involved it would seem to mean the risk of nonpersuasion and certain portions of this comment are predicated upon the assumption that this is the intended meaning. For a discussion of presumptions, see Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953).

[4]Wrenn v. Daniels, 200 Va. 419, 106 S.E.2d 126 (1958). King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955).

[5]A card furnished by the Pulaski National Bank, where the funds in question were deposited, and said to be of the type executed by Mr. Coalson and Mrs. Quesenberry reads as follows:

> "The undersigned joint depositors, hereby agree each with the other and with the above bank that all sums now on deposit heretofore or hereafter deposited by either or both of said joint depositiors with the said bank to their credit as such joint depositors with all accumulations thereon, are and shall be owned by them jointly, with right of survivorship and be subject to the check or receipt of either of them or the survivor of them and payment to or on the check of either or the survivor shall be valid and discharge said bank from liability...."

have the funds remaining in the account at the time of his death, or whether he intended the fund to become a part of his estate. The trial judge thought that the parole evidence introduced by the defendant was insufficient to prove a valid transfer,[6] and held for the petitioners on the basis of prior authority that the form of the deposit is not evidence of donative intent.[7] The Supreme Court of Appeals of Virginia refused to upset that finding.

The joint bank account is a common feature of modern banking, and realistic discussion of such accounts must be predicated upon this fact. The question is not one of legal recognition, but rather the extent to which the survivorship provisions are binding upon the parties and their heirs. Is the form of the deposit, and especially the survivorship provision, sufficient to establish that the original owner and depositor intended to transfer some interest to the co-depositor?

Various jurisdictions have attempted to uphold transfers to the co-depositor on common law concepts derived from the law relating to trusts, wills, contracts, gifts, and joint tenancies. In so doing they have ignored pertinent considerations, and legal writers have generally concluded that there is no common law doctrine which is adequate to deal with the problem.[8]

The trust theory has generally been found insufficient[9] because usually the instrument establishing the account does not manifest the essential intent to establish a trust.[10] The theory of a bequest is insufficient because the instrument does not meet the technical requirements of a will,[11] and there is a lack of the necessary testamentary

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[6]The opinion does not clearly indicate whether there was any considerable body of evidence contrary to the trial judge's finding of fact. The record of the case (Record No. 5419) clearly indicates the presence of such evidence.

[7]See note 4 supra.

[8]Kepner, The Joint and Survivorship Bank Account, A Concept Without a Name, 41 Calf. L. Rev. 596 (1953); Kepner, Five More Years of the Joint Bank Account Muddle, 26 U. Chi. L. Rev. 376 (1959). For other discussions of the development of the concept, see: Annot., 149 A.L.R. 862 (1944); Annot., 135 A.L.R. 993 (1941); Annot., 103 A.L.R. 1123 (1936); Annot., 66 A.L.R. 881 (1930); Annot., 48 A.L.R. 189 (1927); Annot., 1917C L.R.A. 550.

[9]An exception is to be found in Maryland where there is in general use a card with specific provisions for the establishment of a trust. These have been approved by the courts and help to effect a transfer of ownership. Kepner, supra note 8, 26 U. Chi L. Rev. at 390. Bierau v. Bohemian Bldg., Loan & Sav. Ass'n, 205 Md. 456, 109 A.2d 120 (1954) goes so far as to uphold a joint bank account trust on parole evidence of such an intention when the form of the deposit makes no mention of either the joint depositor or trust.

[10]1 Bogert, Trusts and Trustees § 45 (1951).

[11]The facts of the Quesenberry case are such as to make the possibility of upholding the transfer on the bequest theory not as remote as in most cases. Mr.

intent.[12] The contract theory fails because the contract is between parties as joint depositors on the one hand and the bank on the other, and so it is not determinative of the rights of the parties between themselves.[13] The gift theory has been used most often, though not without difficulty, since it is necessary to rely on parole evidence to establish donative intent. Most courts have found it convenient to overlook the requirements of delivery and the necessity of determining the exact interest transferred and when such interest vests.[14] The theory that a joint tenancy[15] is established by the signature card is insufficient because technical requirements, such as the four unities, make it impossible to establish a body of law which can be uniformly applied.[16]

The first Virginia case involving the joint bank account was the 1917 case of *Deal's Adm'r v. Merchant's and Mechanic's Sav. Bank*[17] which used the contract theory to give the deposit to the survivor. Although the court explicitly relies on the contract theory, it is significant, in light of later cases, that the court also found the decedent had manifested an intention to give the funds to the survivor.[18]

In 1928 a statute [19] was passed providing that a bank might pay a joint deposit to either party or survivor and be released from all liability. In *King v. Merryman*[20] this statute was interpreted as being only for the protection of the bank and of no effect in determining the rights of the survivor. This is in accord with the usual interpretation placed on such statutes.[21]

Quesenberry had made his mark which was witnessed by Mr. Utt; on the same card was Mrs. Quesenberry's signature. Thus if the signature of Mrs. Quesenberry had been accepted as that of a witness, the statutory requirement for two witnesses would have been met.

[12]1 Page, Wills § 1.2 (1960).

[13]Cerny v. Cerny, 152 Fla. 333, 11 So. 2d 777 (1943).

[14]Kepner, supra note 8, 41 Calif. L. Rev. at 598-99.

[15]Some cases have seemingly confused the issue by not distinguishing between joint tenancy as a distinct theory of transfer and the interest of a joint tenant as the subject of an intervivos gift.

[16]Kepner, supra note 8, 41 Calif. L. Rev. at 600-03.

[17]120 Va. 297, 91 S.E. 135 (1917).

[18]Id. at 298, 91 S.E. at 135.

[19]Va. Code Ann. § 6-55 (1950).

[20]196 Va. 844, 86 S.E.2d 141 (1955).

[21]In 1956, following the decision in King v. Merryman and probably as a result of that decision, the Virginia legislature provided that where a husband and wife have a joint and survivorship account, title vests in the survivor. Va. Code Ann. § 6-55.1 (Supp. 1962). In Johnson v. McCarthy, 202 Va. 49, 57, 115 S.E.2d 915, 921 (1960), the Supreme Court of Appeals upheld the rights of the surviving spouse on the basis of this statute, but at the same time hinted that the statute

In *King v. Merryman* the court found that it had not been established that the depositor intended to transfer property rights to the survivor, thus distinguishing the situation from that presented earlier in *Deal's Adm'r.*[22] Seemingly, this factual determination was reached with the aid of the presumption[23] that such a deposit was made for the convenience of the original depositor,[24] and the holding that a survivor claiming to the contrary would have to prove that a transfer had been effected by a recognized common law method.[25]

In 1958 in *Wrenn v. Daniels,*[26] and again in the principal case, the court re-affirmed the rule of *King v. Merryman.* Although the court stated that with proper evidence the rights of the survivor would be sustained, the fact that there are no appellate cases in which the remaining funds have been awarded to the survivor[27] indicates that it is difficult for the survivor to sustain the burden cast upon him.

The opening of a joint bank account is a seemingly simple act. The cards that are signed employ simple language with no indication that the words do not mean what they appear to say, and with varying degrees of absoluteness they appear to say that the signing and filing of the card is sufficient to vest a property right in the co-depositor.[28] It therefore seems reasonable to think that the public does not take the same view of the joint account which Virginia courts have taken. The evidence in the principal case,[29] as well as opinions expressed by in-

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does not preclude judicial probing into the intention of the parties by saying, "He must have known of the effect of having the bank deposit made in the name of himself and [his]wife, 'payable to either or the survivor....' Had he intended [otherwise]... it would have been a simple matter for him to have so provided."

[22]King v. Merryman, note 20 supra, at 851-52, 857, 86 S.E.2d at 144-46, 148.

[23]With regard to the nature of this presumption, see note 3 supra.

[24]King v. Merryman, see note 20 supra. The court quotes with approval from 38 C.J.S. Gifts § 50, 1943.

[25]Id. at 851, 86 S.E.2d at 145.

[26]200 Va. 419, 106 S.E.2d 126 (1958).

[27]The exception to this statement is Johnson v. McCarty, note 21 supra, where the relationship of the parties made a special statute applicable.

[28]A card obtained from another Virginia bank reads, "We [the depositors] agree and declare that all funds, now, or hereafter, deposited in this account are, and shall be, our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by or upon the order of, either of us or the survivor. It is especially agreed that withdrawls of funds by the survivor shall be binding upon us and upon our heirs, next of kin, legatees, assigns and personal representatives." See also note 5 supra.

[29]It is stated that a bank official was the first to suggest that the funds in question were legally the property of Mrs. Quesenberry. 203 Va. at 621, 125 S.E.2d at 872.

dividuals in general conversation, indicate the general understanding to be different from the judicial understanding. Having this erroneous idea, it is not surprising that joint depositors seldom take additional steps to demonstrate an intention to effect a transfer. This is especially true in cases where the intention to transfer funds is secondary and the primary purpose is to provide for the depositor's convenience. If this misinterpretation of the law by the public does exist, there is a need to remove the resulting conflict between the present law and the ideas of the majority of depositors. The question is whether the law is to be changed or the public is to be adequately informed of the law.

The public could be informed more fully through the simple expedient of requiring banks to print, in a conspicuous position on the signature cards, words clearly indicating that the form of the deposit does not control the property interest and the making of such a deposit is not sufficient to effect a transfer. This action can cure the most flagrant evil of the present situation, but it must have the approval of the banking interests to be effective.

Such a solution also fails to consider the need for modification of the present law so as to make the opening of a joint account sufficient in itself to effect a property transfer. The preferable remedy would be for the legislature to state the legal effect of the joint account in accord with the general understanding.

The legislature should first abolish all requirements that the transfer conform to common law theories and then proceed to establish the new law. This might take the form of a unequivocal rule of law that the funds shall belong to the surviving depositor. Several states have such statutes[30] and although these have been attacked as being unconstitutional for resulting in a deprivation of property without due process,[31] the passage of such statutes has generally been held to be within the legislative power to alter the common law.[32] Since these statutes eliminate judicial inquiry as to actual intent, they seem to give the survivor more protection than is desirable. Judicial distaste for them is evidenced by the holdings that such statutes do

[30]Ala. Code, tit. 5, § 128 (2a) 1960; Cal. Fin. Code § 852; Conn. Gen. Stat. Rev., § 36-36 (1952); Me. Rev. Stat. Ann. ch. 59, § 19-G-V-B (Supp. 1961); N. J. Rev. Stat. § 17: 9A-218B (Supp. 1961); N.Y. Banking Law § 134(3).

[31]New Jersey uses the phrase "conclusively presumed" to indicate the establishment of a rule of law. See note 3 Supra.

[32]Hill v. Badeljy, 107 Cal. App. 598, 290 Pac. 637 (1930); Ward v. Marine Nat'l Bank, 38 N.J. 132, 183 A.2d 60 (1962); Heiner v. Greenwich Sav. Bank, 18 Misc. 326, 193 N.Y.S. 291 (Sup. Ct. 1922).

not create binding rules in the absence of the strongest possible language.[33]

One writer[34] has suggested that this type of statute should be enlarged so as to recognize an alternative form of joint account which provides survivorship. In the absence of fraud or mistake, upon the death of the original depositor the remaining funds would go to the decedent's estate.

A preferable statute would provide that funds of a joint deposit shall belong to the survivor unless an adverse claimant can show by "clear and convincing evidence" that the decedent did not intend such a result. This would place upon the adverse claimant, with regard to intent, the single controlling factor, the burden of going forward with the evidence and the risk of nonpersuasion, both of which are now on the survivor. This seems a reasonable burden in light of the words to which the original depositor has affixed his signature.

This statute can also be extended to recognize the alternative form of joint account with no mention of survivorship. Upon the death of the original depositor the remaining funds would go to the decedent's estate unless the survivor can present "clear and convincing evidence" that the depositor intended otherwise. This type of account, providing the convenience of the joint account without the incident of survivorship, would be governed by the same law as presently applies to the joint-and-survivorship account.

Quesenberry v. Funk may not be the "hard case" that has prompted other states to revise their laws regulating joint bank accounts. Yet it does point out the wide disparity between the common law view which the Virginia court takes, supported almost solely by tradition, and the view which the public seems to take, supported by common sense and logical language interpretation. Members of the legal and banking professions should eliminate this difference either through the education of the public or the modification of Virginia law. The latter would seem to be the more fruitful approach.

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[33]In Re Perrone, 5 N.J. 514, 76 A.2d 518 (1950).
[34]Kepner, supra note 8, 41 Calif. L. Rev. at 636-37.