View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by University of North Carolina School of Law

North Carolina Law Review

Volume 46 | Number 3 Article 14

4-1-1968

# Survivorship -- Joint Bank Accounts with the Right of Survivorship in North Carolina

William H. Lewis Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

William H. Lewis Jr., *Survivorship -- Joint Bank Accounts with the Right of Survivorship in North Carolina*, 46 N.C. L. Rev. 669 (1968).
Available at: http://scholarship.law.unc.edu/nclr/vol46/iss3/14

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

If industry is to be given so unbridled a hand in locating, the fears expressed by the dissenters may well be realized. The ultimate implications which the decision may have on the power of eminent domain and the existing theories of land ownership cannot be adequately assessed until the court provides clarification in future cases. Such a clarification of the court's position is in order not only for the benefit of the Bar and the Highway Commission, but more importantly for the North Carolina landowner.

LAURENCE V. SENN, JR.

## Survivorship—Joint Bank Accounts with the Right of Survivorship in North Carolina

In 1784, North Carolina abolished the right of survivorship as an incident of joint tenancy,[1] but the state supreme court held that oral and written contracts making the rights of the parties dependent on survivorship remained valid.[2] Thereafter, it was generally accepted that joint bank accounts with the right of survivorship could

one fact but on the seeming unfairness of the decision. The Record reveals numerous efforts by individual members of the Burlington-Alamance County Chamber of Commerce to persuade Mr. Thorton to donate or sell his land so that Associated Transport would not move from the area. Mild hints of possible litigation were resorted to when Mr. Thorton indicated that he was not "community-minded" enough to allow large, noisy tractor-trailer trucks to cross his land "24 hours a day." Highway Comm'n v. Thorton, 271 N.C. 227, 233, 156 S.E.2d 248, 253 (1967). At no time did Associated or the Highway Commission approach Mr. Thorton. Here then a small landowner of limited means runs afoul of the desire of a body of non-elective business leaders to keep business within the area. While their purpose is commendable, the methods employed are not.

[1] N.C. GEN. STAT. § 41-2 (1966).

[2] Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895).

The contract theory has been used by a growing number of courts in other states to uphold the joint bank account with the right of survivorship. Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951); Malone v. Sullivan, 136 Kan. 193, 14 P.2d 647 (1932); Bishop v. Bishop's Ex'rs, 293 Ky. 652, 170 S.W.2d 1 (1943); Chippendale v. North Adams Sav. Bank, 222 Mass. 499, 111 N.E. 371 (1915); Holt v. Bayles, 85 Utah 364, 39 P.2d 715 (1934); Deal's Adm'r v. Merchants and Mechanics Bank, 120 Va. 297, 91 S.E. 135 (1917).

For a discussion of the contract theory and other legal theories by which the courts have tried to test the validity of the joint bank account with the right of survivorship, see Kepner, *The Joint and Survivorship Bank Account—a Concept Without a Name*, 41 CALIF. L. REV. 596 (1953); Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959); and Note, 31 N.C.L. REV. 95 (1952).

be created, and the principal issue litigated was whether the parties had effectively established such an account. The accounts were basically of two types—joint accounts where a written agreement provided for the right of survivorship and ones where there was not such an agreement. In the former the court upheld the claim of survivorship,[3] but in the latter its decision hinged on whether there were circumstances indicating the parties' intent to create the right of survivorship. With sufficient evidence of such intent the court reasoned there was a right of survivorship;[4] without such evidence the court held that the party not depositing the funds was merely an agent for the depositor.[5]

In 1959 the legislature, in an attempt to clarify the law, passed a statute[6] that required the parties to sign a written agreement[7] expressly providing for the right of survivorship.[8] While this statute applied only to husband and wife deposit accounts,[9] an amendment passed in 1963[10] eliminated this restriction and brought accounts opened by any two or more persons with a banking institution[11]

---

[3] *E.g.*, Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

[4] *See, e.g.*, Jones v. Waldroup, 217 N.C. 178, 7 S.E.2d 366 (1940), where the husband assigned building and loan association stock in his name alone to himself or his wife "either or the survivor." Then he had the stock transferred and reissued stating that he wanted the survivor to be able to cash in the stock "without the usual red tape." These facts combined with the wife's possession of the stock resulted in a finding that a common ownership with the right of survivorship had been created, although there was no formal contract. The North Carolina Supreme Court, however, allowed a partial new trial because of erroneous instructions to the jury.

[5] *E.g.*, Nannie v. Pollard, 205 N.C. 362, 171 S.E. 341 (1933).

[6] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

[7] The written agreement could be either on a signature card or by separate instrument. However, the requirement that the agreement be written was the only element of the statutory account contrary to the common law accounts.

[8] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

[9] *Id.*

(e) As used in this section:

(2) "Deposit account" includes both time and demand deposits in commercial banks and industrial banks, installment shares, optional shares and fully paid share certificates in building and loan associations and savings and loan associations, and deposits and shares in credit unions.

[10] N.C. GEN. STAT. § 41-2.1 (1966).

[11] *Id.*

(e) As used in this section:

(1) "Banking institution" includes commercial banks, industrial banks, building and loan associations, savings and loan associations, and credit unions.

within its purview.[12] This amendment did not alter the basic prerequisite of an express written agreement.

Assuming a joint bank account has been established, however, certain questions still remain. What are the legal incidents which follow from its creation? This question can best be answered by considering the accounts at two points in time—while the parties are living and when one party dies.

The common law and statutory law attached certain incidents to joint accounts while the parties were still living. At common law,[13] in the absence of evidence to the contrary, the parties were deemed to own the account equally.[14] Furthermore, creditors of each could attach the account to the extent of the interest of the particular debtor.[15] It should be noted here that the common law was supplemented in 1919 by N.C. GEN. STAT § 53-146 (1965), which provided that when an account was opened in the names of two persons payable to either, withdrawal by one party discharged the banking institution from liability to the other party.[16]

Under subsequent statutes the law remained much the same. With respect to the incidents which attach during the lifetime of the parties to a husband and wife account, the 1959 statute[17] with a few minor exceptions was essentially a comprehensive codification

[12] *Id.*: (a) "A dposit account may be established with a banking institution in the names of two or more persons. . . ."

[13] For the purposes of this comment the common law of joint bank accounts is defined in the following manner: with respect to husband and wife accounts the North Carolina case law prior to 1959 is referred to; and with respect to accounts established by parties not husband and wife, the case law prior to 1963 is referred to.

[14] Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961). A joint bank account with the right of survivorship was involved but the account also provided that the deposit "shall be for the use and benefit of both of us." *Id.* at 153, 120 S.E.2d at 577.

[15] Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

[16] This statute did not affect the interests of the parties in the funds but only afforded protection for the banking institutions. The bank could pay out the balance to the survivor if the account was established in two names, payable to either or the survivor, but the surviving party could not prevail in an action by the decedent's estate for the decedent's portion of the funds unless the account had been created by a contract providing for the right of survivorship. Also, a question arose as to whether the bank was protected when the account was in the names of more than two persons.

Similar statutes have been passed in many states, *e.g.*, GA. CODE ANN. § 13-2039 (1967), which was enacted in 1919 and is almost an exact replica of N.C. GEN. STAT. § 53-146 (1965).

[17] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

of the common law and the 1917 statute.[18] It specifically stated that either party could withdraw,[19] and such a withdrawal was a complete discharge of the banking institution.[20] Although the statute included no provision relating to the inter vivos ownership of the funds,[21] it provided that during the lifetime of the parties the account was subject to their respective debts to the extent that each had contributed. If their respective contributions could not be determined, it stated that the funds would be deemed to be owned equally for this purpose.[22] With respect to the legal incidents while the parties are living, the 1963 amendment makes no changes.

When one party to an account died, the common law,[23] the 1959 statute[24] and 1963 amended version of that statute[25] all pro-

[18] N.C. GEN. STAT. § 53-146 (1965).

[19] Such a provision was one of the more important terms of the common law account and, although this is an incident of the creation of the statutory account, the sample agreement set out in the 1959 statute and the 1963 amended version of the statute included such as a provision.

[20] The 1917 statute was not superseded by the 1963 amended version of the joint bank account statute with respect to the bank's liability when the owners of accounts in two names are still living. However, the scope of the protection was changed. In one sense the 1917 statute afforded more limited protection; in another it gave a broader protection. Literally, at least, it only applied to accounts in two names, whereas the more recent statute applies to accounts in the names of two or more persons. But for the bank to be protected no particular agreement between the parties was necessary, whereas the recent legislation requires a written agreement signed by the parties expressly providing for survivorship.

As to bank protection when one of the parties dies, the 1917 statute allowed the bank to pay out funds to the other party. However, it appears to have been superseded to the extent that, if an account comes within the terms of N.C. GEN. STAT. § 41-2.1 (1966), the bank must pay the decedent's equal share to the legal representative of the estate. But it would appear that if an account in two names was not within the scope of the latter statute, the bank could still pay out the funds to the survivor.

[21] In Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961), the court stated that unless it could be shown otherwise the parties would be deemed to own the account equally. The agreement stated the deposit was "for the use and benefit of . . . both." *Id.* at 153, 120 S.E.2d at 577. However, many of the agreements establishing survivorship accounts now state that the parties are co-owners of the funds regardless of whose are deposited. Such a provision is included in the sample agreement in both the 1959 statute and the 1963 amended version of the statute. This might lead the court conclusively to presume equal ownership while the parties are living.

For a discussion of inter vivos rights in joint bank accounts in general and a survey of case law on the topic, see Comment, *The Donee's Inter Vivos Interests*, 60 MICH. L. REV. 972 (1962).

[22] Also accounts opened under the statute were subject to the provisions of law applicable to transfers in fraud of creditors.

[23] Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

[24] Ch. 404 [1959] N.C. Sess L. (amended 1963).

[25] N.C. GEN. STAT. § 41-2.1 (1966).

vided that the survivor became the sole owner of the unwithdrawn deposit, but the more important question was, what were the rights of creditors? At common law the survivor was entitled to the funds free from the claims of creditors.[26] However, the 1959 statute,[27] which was only applicable to husband and wife accounts, modified the common law and provided that the entire account was subject to the claims of creditors. Accounts owned by parties not husband and wife remained exempt from the debts of the deceased. This inconsistency led to the amendment of the statute in 1963,[28] which brings all deposit accounts within its purview[29] and makes such accounts subject to the claims of creditors only to the extent of the decedent's equal share.[30] To make certain that the funds will be available for payment of creditors, the 1963 amendment provides for the banking institution to pay the decedent's equal share to the legal representative of the deceased and the remainder to the surviving joint tenant.[31] The legal representative is not to pay the claims of creditors from the decedent's share until all other personal assets of the estate are exhausted.[32]

Although the 1963 amended version of the statute is generally clear, with respect to the rights of creditors and whom may open accounts, two important questions remain unanswered. First, does the statute apply retrospectively? Second, if the statute is to apply prospectively, does the date of the contract determine the law applicable, or does the deposit of the particular funds control?

The author of the bill assumed it was to operate retroactively,[33] but the North Carolina Attorney General ruled that the 1963

[26] Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

[27] Ch. 404 [1959] N.C. Sess. L. (amended 1963).

[28] One authority recommended that the 1959 statute be amended to conform with the original drafting; i.e., exempt accounts from the claims of creditors, or be entirely repealed. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 126 n.72 (3d ed. 1963).

The 1963 amendment improved the status of the husband and wife account, in that no more than one-half is subject to the debts of the deceased. However, the statute was detrimental to the interests of parties not husband and wife since it superseded the common law as set out in Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960), and made the decedent's proportionate share subject to the claims of creditors.

[29] N.C. GEN. STAT. § 41-2.1(a) (1966).

[30] N.C. GEN. STAT. § 41-2.1(b)(3) (1966).

[31] N.C. GEN. STAT. § 41-2.1(b)(4) (1966).

[32] *Id.*

[33] Interview with B. T. Jones, in Forest City, North Carolina, September 7, 1967.

amended version of the statute applies only prospectively.[34] As a result of this ruling, the question of whether the contract or deposit date is controlling takes on greater significance when one party dies. If the contract date is controlling, husband and wife accounts established prior to 1959 and accounts established by parties not husband and wife prior to 1963 are subject to the common law and therefore exempt from the claims of creditors of a deceased party. Husband and wife accounts established between 1959 and 1963 do not enjoy this favored position since they remain subject to the claims of creditors in their entirety. It would be advisable for the owners of these latter accounts to withdraw their funds and establish new accounts so that only one-half the account will be subject to the claims of creditors, since the present statute would govern their accounts. Of course, all joint accounts established after 1963, whether or not they are husband and wife accounts are subject to the claims of creditors to the extent of the decedent's proportionate share.

If the date of each deposit is considered determinative of applicable law, the results upon the death of one party will be interesting. A husband and wife account established prior to 1959 will be treated as follows: funds deposited prior to 1959 will be exempt from the claims of creditors; funds deposited between 1959 and 1963 will be subject in their entirety to such claims; and one-half the funds deposited after 1963 will be subject to the debts of the deceased. As to accounts opened by parties not husband and wife anytime prior to 1963, the funds deposited before 1963 will be exempt from the claims of creditors, but those funds deposited after that

[34] Opinion of Attorney General of North Carolina to Hon. E .W. Tanner, Clerk of Rutherford Superior Court, dated 18 February 1964. This interpretation was based on two subsections of N.C. GEN. STAT. § 41-2.1 (1966). Subsection (a) provides that "a deposit account may be established," and subsection (d) states that the statute is not to be deemed exclusive with deposit accounts not conforming to the statute being governed by other applicable provisions of the law.

A retroactive application of the statute would raise the constitutional problems of impairment of the obligation of contract and of taking of property without due process of law. The court would probably hold the statute to be prospective, relying on the canon of construction to avoid the constitutional issue. *See, e.g.,* United States v. Rumely, 345 U.S. 41 (1953).

If the statute were construed to be prospective only in application, another question raised is whether a joint account with the right of survivorship could still be established under the common law, i.e., providing for the account to be exempt from the claims of creditors. Through use of the two provisions of the statute mentioned above, it appears a plausible argument exists in favor of this interpretation.

time will be subject to the decedent's debts to the extent of his proportionate share. Determining the total amount subject to the claims of creditors would not be difficult if the depositors made no withdrawals prior to death. But if withdrawals were made, the character of the remaining funds would have to be determined. Such funds may be exempt, partially subject or fully subject to the claims of creditors.[35]

In conclusion, the 1963 amended version of the statute is basically a comprehensive codification of the common law of joint bank accounts with the right of survivorship in North Carolina. Subjecting accounts to the claims of creditors to the extent of the decedent's proportionate share is the only provision affecting the rights of the parties which is inconsistent with the case law. To assist in the administration of this fund and to protect the creditor's rights upon the death of one of the parties, the statute includes a method of disbursement. Although generally explicit in its terms, the statute should be clarified as to whether it is to be applicable retroactively or prospectively, and also as to whether the contract date of the account or the deposit date of the particular funds determines the rights of creditors upon the death of one of the parties.

WILLIAM H. LEWIS, JR.

## Taxation—Deduction of Meals as a Business Travel Expense

The United States Supreme Court recently held in *United States v. Correll*[1] that a wholesale grocery salesman could not deduct the costs of breakfasts and lunches he ate while traveling in his territory because he was not required to stop for sleep or rest. Mr. Correll lived outside his territory but was required by his employer to be in the district at the start of the working day and to eat breakfast and lunch at the restaurants of his customers.[2] The Corrells filed a joint income tax return[3] and claimed the expense of these meals as a business deduction under section 162(a)(2) of the Internal

[35] The court would have to adopt a formula to determine this: *e.g.*, the first funds in were the first funds out or the last funds in were the first funds out.

[1] 36 U.S.L.W. 4055 (U.S. Dec. 11, 1967).
[2] Correll v. United States, 369 F.2d 87 (6th Cir. 1966).
[3] INT. REV. CODE OF 1954, § 6013.