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Multiple-Party Accounts: Does Virginia's New Law Correspond with the Expectations of the Average Depositor?

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MULTIPLE-PARTY ACCOUNTS: DOES VIRGINIA'S NEW LAW CORRESPOND WITH THE EXPECTATIONS OF THE AVERAGE DEPOSITOR?

There are literally thousands of joint savings and checking accounts throughout Virginia in which the bank signature card provides that either party during their joint lives or the survivor may withdraw funds without limit from the account.[1] The Virginia Supreme Court forthrightly recognized the problems of such accounts in the landmark case of *King v. Merryman*, stating, "For more than half a century, the courts of this country have struggled to discover whether a joing deposit bank account with an extended right of survivorship . . . is a gift, a trust, a contract, or joint tenancy, or a testamentary disposition."[2] In an attempt to bring order to this area confused by judicial decisions, public misconceptions[3] and a muddle of statutory provisions, the 1979 Virginia General Assembly enacted the Multiple Party Accounts Act which became effective on July 1, 1980.[4]

The movement to rectify the uncertainty in the area of multiple-party accounts[5] in Virginia was instituted by the Virginia Bar Association. In 1975 the Bar conducted a study of the entire area of multiple-party accounts and produced a report relating Article Six of the Uniform Probate

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1. Spies, *Property, The Fifteenth Annual Survey of Virginia Law 1969-70*, 56 VA. L. REV. 1546 (1970).

2. 196 Va. 844, 849, 86 S.E.2d 141, 143 (1955).

3. General conversation as well as case law demonstrates that the public is not aware of the legal significance of joint accounts as they pertain to rights between named parties during their lifetime and to survivorship rights. Comment, *Virginia Law on Joint Bank Accounts*, 20 WASH. & LEE L. REV. 195, 198-99 (1963).

In Quesenberry v. Funk, 203 Va. 619, 621, 125 S.E.2d 869, 872 (1962), the bank official first suggested that the funds in the joint account were legally the property of the named party survivor and not the decedent's estate. However, the court, following case precedent, denied the survivor's right to the funds, holding there was insufficient evidence of donative intent.

4. 1979 Va. Acts, ch. 407, at 596. The Act amended and reenacted §§ 6.1-207 and -208.5 of the Code of Virginia concerning shares of minors in a credit union and federal credit unions respectively. The Act also added §§ 6.1-125.1 to -125.16 which deal with multiple-party accounts in financial institutions. Sections 6.1-72, -73, -77, -195.23, -195.26, -195.30 and -208.2 of the Code of Virginia were repealed, effective July 1, 1980.

5. As used in this article, multiple-party accounts refers to joint accounts, payable on death (P.O.D.) accounts and Totten trust accounts as defined in the UNIFORM PROBATE CODE § 6-101(5) [hereinafter cited as UPC].

Code (UPC) to Virginia law.[6] Its effort to eliminate statutory omissions and conflicts and bring the law closer to public expectations culminated on July 21, 1978 with the formation of a Special Drafting Committee. The charge of the committee was "to draft a comprehensive multiple-party accounts bill for introduction into the 1979 session of the General Assembly."[7] The committee's proposal, based upon Article Six of the UPC, was introduced into and approved by the 1979 General Assembly.[8]

In the 1980 session of the General Assembly, an amendment concerning the effects of divorce on ownership between the parties named to a multiple-party account was offered to section 6.1-125.4 of the Multiple-Party Accounts Act.[9]

This article will present a brief overview of the case law and statutory provisions antedating the new statute. Thereafter, the new statute and the suggested 1980 amendment will be examined and evaluated from the perspective of additions or changes to prior Virginia law and Chapter Six of the UPC as well as from the perspective of the expectations of depositors.

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6. J. Rodney Johnson, Virginia Comments to Article VI, Uniform Probate Code (Dec. 1, 1975) (unpublished report for the Virginia Bar Association) (hereinafter Virginia Comments].

7. Memorandum from the Multiple-Party Accounts Special Drafting Committee of the Virginia Bar Association to Edward S. Graves, Chairman, Wills, Trusts & Estates Committee of the Virginia Bar Association (Oct. 6, 1978).

Other than Virginia Bar Association members, representatives of the Virginia Bankers Association, the Virginia Savings and Loan League, and the Virginia Credit Union served on the drafting committee. However, in spite of its significant impact upon the public, there was no citizen representation on the committee.

8. S.B. No. 645 Va. General Assembly (1979) was offered January 10, 1979, by its patron Sen. J. Harry Michael, Jr. The bill was approved March 26, 1979. 1979 Va. Acts, ch. 407, at 597.

9. S.B. No. 388 Va. General Assembly (1980) was introduced February 15, 1980 by Sen. J. Harry Michael, Jr. The amendment proposes:

> That § 6.1-125.4 of the Code of Virginia [be] amended and reenacted as follows:
>
> § 6.1-125.4. **Effect of Divorce.** — Upon the entry of a decree of divorce, either a mensa et thoro or a vinculo matrimonii, all rights of either consort in any multiple-party account (i) then existing between them, *or* (ii) *Terminated by either of them in contemplation of divorce* including the right of survivorship, shall be extinguished; and any joint account (i) then existing between the consorts *or* (ii) *terminated by either of them in contemplation of divorce* shall thereupon be converted into [*equal shares], retroactive to (i) the date when the grounds for the divorce came into existence, (ii) the date the account was terminated in contemplation of divorce, or (iii) the date the parties began living separate and apart,* as may be ordered by the court *in order to do equity between the parties.*

The Senate Courts of Justice Committee voted to carry over S.B. No. 388 for further study.

I. A Review of Virginia's Statutory and Case Law Prior to July 1, 1980

A. *A Discussion of Case Law*

Beginning in 1917 with *Deal's Administrator v. Merchant's and Mechanic's Savings Bank,*[10] the common thread running through the thirteen Virginia cases dealing with multiple-party accounts[11] is that the intention of the depositor is the controlling factor.[12] These cases deal with the right of survivorship in joint accounts. There is no case law in Virginia concerning the rights to such accounts while both parties are alive.[13]

The Virginia Supreme Court established that, although the form of the joint account provides for survivorship, it is *presumed* that such deposits by a person in the name of himself and another, not his spouse,[14] are made merely for the convenience of the depositor.[15] Thus, no incident of survivorship necessarily attaches. The court's decisions indicated, however, that the survivor could rebut this presumption of convenience where in the language of the signature card itself there was a definite and unambiguous expression of an intention that the incidents of survivorship

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10. 120 Va. 297, 91 S.E. 135 (1917). Although the court in *Deal's* explicitly relied on the contract theory, the opinion also stated that the deposit was made by the decedent with the manifest intention that the balance would go to the survivor. *Id.* at 298, 91 S.E. at 135.

11. Thurston v. Maggard, _ Va. _, 263 S.E.2d 64 (1980); Virginia Nat'l Bank v. Harris, 220 Va. 336, 257 S.E.2d 867 (1979); Robbins v. Grimes, 211 Va. 97, 175 S.E.2d 246 (1970); Campbell v. Campbell, 211 Va. 31, 175 S.E.2d 243 (1970); Colley v. Cox, 209 Va. 811, 167 S.E.2d 317 (1969); Haynes v. Hurt, 209 Va. 447, 164 S.E.2d 671 (1968); Wilkinson v. Witherspoon, 206 Va. 297, 142 S.E.2d 478 (1965); Stevens v. Sparks, 205 Va. 128, 135 S.E.2d 140 (1964); Quesenberry v. Funk, 203 Va. 619, 125 S.E.2d 869 (1962); Johnson v. McCarty, 202 Va. 49, 115 S.E.2d 915 (1960); Wrenn v. Daniels, 200 Va. 419, 106 S.E.2d 126 (1958); King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955); Deal's Adm'r v. Merchant's and Mechanic's Sav. Bank, 120 Va. 297, 91 S.E. 135 (1917).

All the cases involve joint accounts in a financial institution with the exception of *Virginia Nat'l Bank v. Harris* which concerns a P.O.D. account.

12. 3A Michies' Jurisprudence, *Banks and Banking* § 66 (Repl. Vol. 1976).

13. Virginia Comments, *supra* note 6, at 10.

14. Va. Code Ann. § 6.1-73 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601) provides that "[w]hen a deposit has been made . . . under the names of a husband and wife, payable to either, or payable to the survivor, such deposit . . . upon the death of either . . . shall vest in the survivor."

15. 38 C.J.S. *Gifts* § 50, at 836 (1943) as cited in King v. Merryman, 196 Va. 844 at 856, 86 S.E.2d 141 at 147 (1955).

By presumption of convenience, the court means that the one furnishing the funds for the deposit merely wished his cotenant to act as an agent in obtaining funds from the joint account for the depositor. J. Rodney Johnson, *Joint, Totten Trust, and P.O.D. Bank Accounts: Virginia Law Compared to the Uniform Probate Code,* 8 U. Rich. L. Rev. 41, 43 (1973).

should attach,[16] or where, in the absence of the signature card fully disclosing such an intention, extrinsic evidence demonstrated such an intention.[17] These cases have been aptly described as long-form and short-form cases, respectively.[18] The result in the long-form cases is said by the court to be based on contract theory[19] while the outcome of the short-form case turns on the intention of the depositor within a common-law gift theory.[20]

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16. *See, e.g.*, Thurston v. Maggard, _ Va. _, 263 S.E.2d 64 (1980); Robbins v. Grimes, 211 Va. 97, 175 S.E.2d 246 (1970); Campbell v. Campbell, 211 Va. 31, 175 S.E.2d 243 (1970); Wilkinson v. Witherspoon, 206 Va. 297, 142 S.E.2d 478 (1965).

The unambiguous language on the signature card so far as is pertinent read:

> [Depositor's name]. . . . and [co-tenant's name] . . . as joint tenants with right of survivorship . . . It is agreed by the signatory parties with each other and by the parties with you that any funds placed in or added to the account by any one of the parties *is and shall be conclusively intended to be a gift and delivery* at that time of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account. . . .

Wilkinson v. Witherspoon, 206 Va. at 300, 142 S.E.2d at 480. In *Thurston* different but equally unambiguous language provided in part: " 'That all moneys, checks and other instruments for the payment of money . . . deposited in this account . . . will be our joint property during our joint lives and upon the death of either of us the entire right, title and interest therein shall vest absolutely in the survivor. . . .' " Thurston v. Maggard, _ Va. at _, 263 S.E.2d at 65.

See also VA. CODE ANN. § 55-21 (Repl. Vol. 1974).

17. *See, e.g.*, Stevens v. Sparks, 205 Va. 128, 135 S.E.2d 140 (1964); Quesenberry v. Funk, 203 Va. 619, 125 S.E.2d 869 (1962); Wrenn v. Daniels, 200 Va. 419, 106 S.E.2d 126 (1958); King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955). Only in *Stevens* did the court find the presumption of convenience rebutted. The signature card in these cases was

> in the form of "A or B, and subject to the check of either of us or the sirvivor", "A or B or survivor", "A and B as joint tenants with right of survivorship, and not as tenants in common", or . . . "jointly, with right of survivorship and . . . subject to the check or receipt of either of them or the survivor . . . ."

Johnson, *supra* note 15, at 42.

18. *Id.*

19. The contract theory of the long-form cases has been criticized since the crucial language the court refers to in these cases, "shall be conclusively intended to be a gift," recognizes the existence of a gift. Spies, *supra* note 1, at 1548-49 (1970). Furthermore, the precedential value of these decisions is in doubt. *See* Unauthorized Practice of Law Poin. No. 403 (formerly UPL Opin. No. 45) summarized in 27 VA. BAR NEWS 22 (Aug. 1978) which concludes that "furnishing a joint account signature card contract containing language establishing an inter vivos gift from one party of the account to the other constitute[s] the unauthorized practice of law."

20. *See* Stevens v. Sparks, 205 Va. 128, 135 S.E.2d 140 (1964), a short-form case which used the language A or B as joint tenants with right of survivorship, and not as tenants in common. Relying on extrinsic evidence instead of basing its decision upon the language on the signature card, the court upheld the survivorship rights of the nursemaid cotenant of the decedent depositor. *Cf.* Quesenberry v. Funk, 203 Va. 619, 125 S.E.2d 869 (1962); Wrenn v. Daniels, 200 Va. 419, 106 S.E.2d 126 (1958); King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955), where the court refused to uphold survivorship rights in joint accounts because

Two further distinctions appearing in Virginia case law demand attention as a background to Virginia's new Multiple-Party Accounts Statute. Where there is a short-form account consisting of funds belonging to both of the tenants, the Virginia Supreme Court has held no presumption of convenience is applicable. The burden of proving the lack of intention of survivorship falls on those claiming through the decedent.[21] And, in *Johnson v. McCarty*,[22] the only case dealing with joint accounts between husband and wife, the court held that the joint bank account became the property of the surviving tenant by operation of law stating: "[t]he method and procedure of setting up the Virginia bank account created a joint estate with the express right of survivorship. Virginia Code, § 51-21."[23] Although the *Johnson* joint account was of the short form variety,[24] the court did not discuss the presumption of convenience. It is unclear whether this lack of discussion was due to the language found in other cases that the presumption of convenience did not apply to husband and wife accounts[25] or whether it was due to a statute then in force providing for vesting the balance of the funds in the surviving spouse.[26] Nevertheless, clearly the courts did not apply the presumption of convenience to husband and wife accounts.

Thus, the Virginia decisions were well settled that a bank account may be so fixed between two persons *during their lives* that the survivor takes

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extrinsic evidence strengthened the presumption of convenience.

In Colley v. Cox, 209 Va. 811, 167 S.E.2d 317 (1969), a short-form case, despite extrinsic evidence of the depositor's intent that her son, the surviving cotenant, be entitled to the balance of the fund, the court held that the preseumption did not come into play since no survivorship account was created by oral "instructions to the bank . . . or contractual language on the signature card." Thurston v. Maggard, _ Va. at _, 263 S.E.2d at 66.

The pertinent part of the *Colley* account reads: " 'Savings Joint Account [names] . . . . Either one or both or the survivor to sign. The signature of either one to be sufficient for withdrawal of all, or any part of the funds. . . .' " Colley v. Cox, 209 Va. at 813, 167 S.E.2d at 318-19. For a discussion of this seemingly anamalous decision, *see* Johnson, *supra* note 15, at 45.

21. Haynes v. Hurt, 209 Va. 447, 164 S.E.2d 671 (1968). *See* Johnson, *supra* note 15, at 45.

22. 202 Va. 49, 115 S.E.2d 915 (1960).

23. *Id.* at 56, 115 S.E.2d at 920.

24. The account in question read "to 'J. Roland Johnson or Sarah N. Johnson, joint owners, payable to either or the survivor.' " *Id.* at 53, 115 S.E.2d at 918.

25. *See* note 15 *supra* and accompanying text.

26. VA. CODE ANN. § 6.1-73 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601). The *Johnson* court made no reference to this statute. For further discussion of the *Johnson* case, see Comment, *Virginia Law on Bank Accounts*, 20 WASH. & LEE L. REV. 195, 197-98 n.21 (1963).

on the death of the other.[27] However, whether or not the incident of survivorship attached to a joint account could "depend upon the terms of the deposit, that is the contract made with the bank, . . . upon the intentions of the depositors as disclosed by their declarations, oral or written,"[28] upon funds belonging to both named parties, or upon the relationship of such parties. Subjective intent was a dominant theme in the resolution of these joint account cases. Consequently, the results were not predictable and the survivorship expectations of the depositors were clearly frustrated.[29]

B. *The Statutory Picture in Virginia*

Although survivorship between joint tenants has been abolished by section 55-20 of the Code of Virginia, another statute creates an exception to this rule "when it manifestly appears from the tenor of the instrument that it was intended the part [of the estate] of the one dying should then belong to the others."[30] These statutes have been held applicable to joint deposit accounts.[31]

In addition, the Virginia General Assembly in the past dealt with multiple-party accounts in the Banking Act,[32] the Virginia Savings and Loan Act[33] and the Industrial Loan Associations Act.[34]

Upon the death of the trustees, sections 6.1-207, 6.1-195.23, and 6.1-73.1 of the Virginia Code governing Totten trusts[35] had three different effects based not on the substance of the account, but upon which type of financial institution the depositor happened to choose. Respectively,

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27. King v. Merryman, 196 Va. 844, 858, 86 S.E.2d 141, 148 (1955).

28. *Id.*

29. In a 1978 Virginia survey using a short-form signature card, 83.8% of approximately 700 respondents believed that survivorship would result if used by a husband and wife and 61.2% believed survivorship would attach if used by persons other than spouses. Report of the Multiple-Party Deposit Accounts Committee of the Virginia Bar Association, Meeting of September 18, 1978, at 2 (Sept. 19, 1978).

30. VA. CODE ANN. § 55-21 (Repl. Vol. 1974).

31. *See, e.g.*, Johnson v. McCarty, 202 Va. 49, 115 S.E.2d 915 (1960); King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955).

32. VA. CODE ANN. §§ 6.1-3 to -125 (Repl. Vol. 1979).

33. VA. CODE ANN. §§ 6.1-195.1 to -195.76 (Repl. Vol. 1979).

34. VA. CODE ANN. §§ 6.1-196 to -226 (Repl. Vol. 1979).

35. [Such a trust is] created by the deposit by one person of his own money in his own name as a trustee for another and it is a tentative trust revocable at will until the depositor dies . . . and if the depositor dies before the beneficiary without revocation . . . the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

Johnson, *supra* note 15, at 46 n.37.

these statutes resulted in: 1) a minor beneficiary being able immediately to withdraw funds if the account was in a credit union, 2) a minor beneficiary unable to withdraw funds without a guardian if the account was in a savings and loan, and 3) uncertainty as to what withdrawal rights, if any, a minor beneficiary had in bank deposits exceeding five thousand dollars. These statutes dealt only with the rights of the beneficiaries of such accounts. Protection of the Totten trust financial institution was not addressed anywhere in the Code.

In payable on death (P.O.D.) accounts, as with the minor beneficiaries of the Totten trust accounts, different treatment occurred purely because of the type of financial institution involved. In those accounts opened in a bank, assuming the death of the depositors, while a bank had the power to turn over the funds to a surviving minor immediately without liability attaching, it did not have to do so without a judicial determination.[36] By way of contrast, this same statute provided that, upon the death of a depositor, a P.O.D. fund vested in a surviving spouse. The minor's right to P.O.D. funds deposited in a savings and loan association was the same with the additional stipulation that no payment could occur until sixty days after the death of such member.[37] "[N]o statute in the Code [dealt] with P.O.D. accounts in credit unions."[38] Thus, the only recourse for determining the right to these accounts seemed to have been the courts.

Various statutes provided a general discharge from liability for all types of financial institutions in their payments to survivors of joint accounts.[39] Sections 6.1-195.26 and 6.1-208.2 of the Code of Virginia, dealing with joint accounts in savings and loan associations and credit unions, respectively, provided that, upon the receipt of a written stop payment order by a party to a joint account, the financial institution *may* have refused to honor another party's withdrawal request pending determination of the

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36. VA. CODE ANN. § 6.1-77 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601). A thorough discussion of this statute appears in Virginia Nat'l Bank v. Harris, 220 Va. 336, 257 S.E.2d 867 (1979).

37. VA. CODE ANN. § 6.1-195.30 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601). The sixty-day restriction does not apply to a surviving spouse who, according to statute, is to be paid immediately.

38. Johnson, *supra* note 15, at 48.

39. VA. CODE ANN. § 6.1-72 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601) provided payment is release for banks and trust companies.

VA. CODE ANN. § 6.1-208.2 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601) provided the same type of discharge from liability for credit unions.

VA. CODE ANN. § 6.1-195.26 (Repl. Vol. 1979) (repealed effective July 1, 1980 1979 Va. Acts, ch. 407, at 601) granted the same protection to savings and loan associations. For a discussion of the discrepancies in the statutory law of Virginia surrounding multiple-party accounts, *see* Johnson, *supra* note 15, at 45-48.

parties' rights. "[T]he financial institution [was] protected whether it [chose] to honor the stop payment request or not. . . . There [was] no comparable section in the Virginia Code that deal[t] with this problem if the account [was] in a bank or trust company. . . ."[40]

The statutory law also provided for the right of set off against such survivorship accounts in financial institutions.[41]

Two additional statutes dealt with the rights of parties to joint accounts during their lifetimes.[42] Section 6.1-73 provided that, in the absence of any specific order of the court involved, the interest of the parties was transformed to a tenancy in common upon the delivery of a certified copy of a divorce decree to a bank.[43] Section 6.1-195.26 provided that, when two or more persons opened an account in a savings and loan association that provided for withdrawals to be made by either or the survivor, the savings account vested in those persons as joint tenants. No such language appeared in statutes concerning banks or credit unions. Absent case law interpretation and the legislative history of this section, the meaning of the statute is unclear. However, it is believed no true joint tenancy was intended on account of the resultant gift tax exposure.[44]

This discussion of Virginia's statutory provisions concerning multiple-party accounts prior to July 1, 1980 demonstrates clearly that confusing and conflicting results emanated from these provisions and their omissions. The injustice of a network of statutes which treated persons holding the same joint account device differently based on "the character of the financial institution in which the deposit is made, rather than the

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40. Johnson, *supra* note 40, at 55 n.81. *See also* Virginia Comments, *supra* note 6, at 10-20.

41. VA. CODE ANN. § 6.1-206 (Repl. Vol. 1979) (pertaining to credit unions); VA. CODE ANN. § 6.1-195.26 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601 (pertaining to savings and loan associations). While no statute creates such a right for banks, case law has so provided. *See* Reserve Bank v. State Bank, 150 Va. 423, 143 S.E. 697 (1928).

42. Virginia Comments, *supra* note 6, at 10.

43. A companion statute, VA. CODE ANN. § 20-111 (Repl. Vol. 1975) provides:

> Upon the entry of a decree of divorce . . . all contingent rights of either consort in the real and personal property of the other . . . *including the right of survivorship in real or personal property* title to which is vested in the parties as joint tenants . . . shall be extinguished, and such estate by the entirety shall thereupon be converted into a tenancy in common. (emphasis added)

44. For a discussion of joint tenancy and gift tax, *see* notes 97-98 *infra* and accompanying text.

character of the deposit itself"[45] is glaring.

II. An Examination of the Multiple-Party Accounts Act

With an awareness of the quagmire of judicial decisions and statutory provisions concerning multiple-party accounts and their failure to match depositor expectations or to provide certainty and unanimity of result, the General Assembly recently enacted a new statute to govern this area.[46]

Generally, the structure of Virginia's Multiple-Party Accounts Statute follows article six of the Uniform Probate Code.[47] The first section[48] contains definitions which apply throughout. Financial institutions are defined so as to include "banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions."[49] This definition should eliminate the injustice of identical account devices being treated by the courts in as many as three ways upon the death of the depositor dependent upon the nature of the financial institution involved.[50] These statutory definitions are new to Virginia law but in no way conflict with prior law.[51]

Section 6.1-125.2 identifies and states the purpose of the sections to follow. It provides that sections 6.1-125.3 through 6.1-125.5 are relevant only as to disputes between parties to the accounts and their creditors and successors. On the other hand, the provisions of sections 6.1-125.9 through 6.1-125.14 "govern the liability of financial institutions who make payments pursuant"[52] to signature card contracts. There is no cross application between these two groups. "Hence a financial institution may be protected in making payments . . . but the parties to the account may

45. Johnson, *supra* note 15, at 47.

46. Va. Code Ann. §§ 6.1-125.1 to -.6 (Repl. Vol. 1979).

47. 8 Uniform Laws Annotated 99 (Supp. 1980) shows that fourteen states have adopted the UPC in whole or part. Eleven have adopted chapter VI of the UPC on multiple-party accounts. Alaska, Alaska Stat. §§ 13.06.005 to .36.100 (1972 & Supp. 1978); Arizona, Ariz. Rev. Stat. Ann. §§ 14-1101 to -7307 (Supp. 1979-80); Colorado, Colo. Rev. Stat. §§ 15-10-101 to -17-101 (1973 & Supp. 1979); Hawaii, Hawaii Rev. Stat. §§ 560:1-101 to :8-101 (Repl. Vol. 1976); Idaho, Idaho Code §§ 15-1-101 to -7-401 (1979 & Supp. 1980); Maine, Me. Rev. Stat. Ann. tit. 18A, §§ 1-101 to 8-401 (1979); Minnesota, Minn. Stat. Ann. §§ 524.1-101 to .8-103 (West 1975); Nebraska, Neb. Rev. Stat. §§ 30-2201 to -2902 (1979); New Mexico. N.M. Stat. Ann. §§ 45-1-101 to -7-401 (1978); North Dakota, N.D. Cent. Code §§ 30.1-01-01 to -35-01 (1976); Utah, Utah Code Ann. §§ 75-1-101 to -8-101 (1978).

48. Va. Code Ann. § 6.1-125.1 (Repl. Vol. 1979).

49. Va. Code Ann. § 6.1-125.1(3) (Repl. Vol. 1979).

50. Virginia Comments, *supra* note 6, at 3.

51. *Id.* at 7-8.

52. Va. Code Ann. § 6.1-125.2 (Repl. Vol. 1979).

still litigate between themselves the ownership of the funds paid out."[53] Previously, no provision comparable to section 6.1-125.2 existed in Virginia law. However, "[i]t is believed that sections 6.1-72 and 6.1-208.2 related [solely] to the [protection of] the financial institution; that sections 6.1-73, 6.1-73.1, [and] 6.1-195.23 . . . [dealt] with the relationship between parties to multiple-party accounts; and that sections 6.1-77, 6.1-195.26, 6.1-195.30, and 6.1-207 [dealt] with both relationships."[54]

Under the Multiple-Party Accounts Act, the form of the account conclusively determines the liability of the financial institutions for payment on accounts.[55] Thus, certainty of result in a volume business is created and maintained. Although similar protection statutes already existed in Virginia,[56] there was no uniformity in the protection afforded.[57]

It should be noted that under the Uniform Probate Code, the financial institution is not protected if payments are made after written stop payment notice is given by any party able to request present withdrawals.[58] Identical language is found in section 6.1-125.13. The Virginia provision then goes on to add that "should any party . . . notify the financial institution in writing not to permit withdrawals by any party, the financial institution *may refuse,* without liability, to allow *any* withdrawal pending the determination of the rights of the parties."[59] Such language appeared in earlier statutes dealing with credit unions[60] and savings and loan associations.[61] It will now also apply to banks. This provision gives the bank the discretionary power to refuse payment to *all* parties to the account. While the parties to a joint account dispute their rights, this statutory language has the beneficial effect of insulating the account from raids by any party.

In contrast to the financial institution protection provisions where form controls, the sections dealing with the relationship between persons

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53. R. EFFLAND, UNIFORM PROBATE CODE PRACTICE MANUAL 253 (1972).

54. Virginia Comments, *supra* note 6, at 9.

55. *See* VA. CODE ANN. §§ 6.1-125.9 to -125.14. *See also* R. EFFLAND, UNIFORM PROBATE PRACTICE MANUAL 257-59 (1972).

56. *See* notes 39-40 & 52 *supra* and accompanying text.

57. For instance, the statutory sections pertaining to Totten trust accounts are not cast in "protection" terminology. *See* note 35 *supra* and accompanying text. *See also* Virginia Comments, *supra* note 6, at 25-26, which lists and discusses various financial protection statutes prior to July 1, 1980.

58. UPC § 6-112.

59. VA. CODE ANN. § 6.1-125.13 (Repl. Vol. 1979) (emphasis added).

60. VA. CODE ANN. § 6.1-208.2 (Repl. Vol. 1979). *See* Virginia Comments, *supra* note 6, at 26.

61. VA. CODE ANN. § 6.1-195.26 (Repl. Vol. 1979).

named in the accounts create presumptions but permit inquiry into the intent apart from form.[62] Sections 6.1-125.3 to 6.1-125.5 have the most significant impact in terms of clarifying prior Virginia law.

Sections 6.1-125.3 and 6.1-125.4 apply to ownership rights during the lifetime of the persons named. The former is a general statement of such rights in joint accounts. The latter section affects rights upon divorce.

> Section 6.1-125.3 reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit . . . . The theory of [this] section is that the basic relationship of the parties [during their lifetimes] is that of individual ownership of values attributable to their respective deposits and withdrawals. . . .[63]

Thus, in the case of a joint account or Totten trust, ownership during lifetime, is, in effect, based upon the net contributions of the parties to the account unless there is clear and convincing evidence of a different intent.[64]

Purposefully, no provision is made for the situation where net contributions cannot be determined in order to avoid any possible gift tax implications. However, it is believed the division would be in equal shares.[65]

This section on lifetime ownership rights parallels the UPC[66] and, even though prior law in this area has been less than precise, it seemingly codifies preceding law in Virginia. The case law concerning lifetime interests was nonexistent. Virginia cases pertaining to multiple-party accounts had dealt exclusively with survivorship rights, not lifetime rights, in the funds of such accounts.[67] On the statutory side, section 6.1-195.26 "provide[d] that when two or more persons open an account in a savings and loan association that provides for withdrawals to be made by either or the survivor, '. . . such savings account shall be vested in such persons as *joint tenants*. . . .' "[68] No case law interpreted this statute before its repeal. Other jurisdictions have recognized that the creation of a joint bank account results in a legal joint tenancy.[69] Such a joint tenancy is statutory

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62. *See* R. EFFLAND, UNIFORM PROBATE CODE PRACTICE MANUAL 252 (1972).

63. Official Comment to UPC § 6-103.

64. VA. CODE ANN. § 6.1-126.3(A) (Repl. Vol. 1979) (joint accounts); VA. CODE ANN. § 6.1-125.3(C) (Repl. Vol. 1979) (Totten trusts). *Cf.* VA. CODE ANN. § 6.1-125.3(B) (Repl. Vol. 1979) (P.O.D. accounts belong conclusively to the original payee (depositor)).

65. Official Comment to UPC § 6-103.

66. UPC § 6-103.

67. *See* notes 16-17 *supra.*

68. Virginia Comments, *supra* note 6, at 10 (emphasis added).

69. *See, e.g.,* Ison v. Ison, 410 S.W.2d 65 (Mo. 1967); 5A N.Y. JUR. REV. *Banks & Trust*

in nature; therefore, the lack of the four common law unities of interest, title, time and possession is not determinative.[70] However, as evidenced at hearings before the House Committee on Banking and in studies by the Division of Legislative Services, it was determined that in Virginia no true joint tenancy was created by this section.[71] The determination rested primarily upon the federal gift tax implications of a true joint tenancy.[72] The legal consequence of such a tenancy would have been "a present transfer of a one-half interest in the account to each joint tenant"[73] and gift tax exposure for the depositor.[74] For this reason, the present section clarifies, as well as reflects, prior statutory law.[75]

It is noted, nonetheless, that, as between spouses, the net contribution concept of section 6.1-125.3 may not meet depositor expectations. Additionally, while there is no track record in the realm of lifetime rights, prior statutory and case law on survivorship rights differentiated between accounts where the parties were spouses vis a vis accounts where the parties were not husband and wife.[76] These considerations suggest the need for further legislative study of lifetime rights in such accounts and, more generally, for legislative study in the area of spousal rights to all forms of property.

It is contended, moreover, that the option of a gift or true joint tenancy upon "clear and convincing evidence of intent" would become more of a reality via an amendment to section 6.1-125.15 of the Virginia Code. Such an amendment could require financial institutions to offer a third "form"

Companies § 281 (1975) (which establishes a rebuttable statutory joint tenancy during life).

70. Note, *Property Owned with Spouse: Joint Tenancy, Tenancy by the Entireties and Community Property,* 11 REAL PROP., PROB. & TR. J. 405, 406 (1976).

71. DIVISION OF LEGISLATIVE SERVICES STUDY reported in letter from C. William Cramme to Delegate Mary Sue Terry (May 14, 1979).

72. *Id.* at 4-5. *See also* Virginia Comments, *supra* note 6, at 10.

73. Panel Discussion, *Joint Property: Its Virtues and Vices,* 111 TR. & EST. 446, 449 (1972) (remarks by the Hon. Nathan R. Sobel).

74. Presently, where the depositing party to a joint account has the right to withdraw the whole fund without the consent of the other party, there is no gift tax. The transfer is deemed incomplete. Treas. Reg. § 25.2511-1(h)(4) (1979). With a true joint tenancy there would be no right to withdraw the whole without accounting since each party owns an undivided one-half and there would be an immediate gift by the depositor of one-half. Panel Discussion, *supra* note 73, at 453 (remarks by Jerome A. Manning).

75. *See generally* Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy,* 54 MINN. L. REV. 509 (1970) commenting that in some instances legislatures have treated the joint account as a distinct species of property ownership without intending a true joint tenancy to result.

76. Johnson v. McCarty, 202 Va. 49, 115 S.E.2d 915 (1960); King v. Merryman, 196 Va. 844, 86 S.E.2d 741 (1955); VA. CODE ANN. § 6.1-73 (Repl. Vol. 1979) (repealed effective July 1, 1980 by Va. Acts, ch. 407, at 601).

alternative: JOINT ACCOUNT - PRESENT GIFT OF A ONE-HALF INTEREST - SURVIVORSHIP. It is asserted that this new language would suffice as clear and convincing evidence of an intent for ownerhip in life in proportions other than net contributions of the parties as required by section 6.1-125.3.[77]

Section 6.1-125.4, a companion section, provides lifetime ownership rights upon entry of a decree of divorce. As presently enacted, it too provides for ownership based on net contribution. At first glance, this section appears to accurately reflect prior Virginia law which stated that, upon entry of a decree of divorce, parties interested in joint accounts in a bank or trust account were to be treated as tenants in common.[78] Although a tenancy in common presumptively creates equal undivided interests in the transferees, the presumption can be rebutted by showing unequal contributions.[79] Therefore, the net contribution concept would follow. Nonetheless, it is also possible that section 6.1-73 when considered in light of section 20-111[80] in the divorce law was designed to provide equal shares upon divorce.[81]

An amendment was proposed to the 1980 General Assembly advocating the "equal share" approach as well as granting flexibility to the court in setting the date of extinguishment and conversion into equal shares.[82] Such an amendment would give recognition to the contribution of the

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77. Such an amendment might operate similarly to the gift election option with real property of I.R.C. § 2515(c).

78. VA. CODE ANN. § 6.1-73 (Repl. Vol. 1979) (repealed effective July 1, 1980 by 1979 Va. Acts, ch. 407, at 601).

79. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 224 n.3 (1962).

80. VA. CODE ANN. § 20-111 (Repl. Vol. 1975) provides:

> Upon the entry of a decree of divorce . . . all contingent rights of either consort in the real and personal property of the other then existing . . ., including the right of survivorship in real or personal property title to which is vested in the parties as joint tenants or as tenants by the entirety, with survivorship as at common law, shall be extinguished, and . . . converted into a tenancy in common.

81. In Smith v. Smith, 200 Va. 77, 104 S.E.2d 17 (1958), the court held that despite the wife's greater contribution to the jointly-owned property, only equal shares could be allotted under § 20-111. This case speaks in terms of gift and the statute refers to title vesting as joint tenants. Of course, if the joint account is not deemed a true joint tenancy and no gift occurs, § 20-111 would not apply to joint accounts. Such a conclusion does not bar the possibility that the legislature in § 6.1-73 intended joint accounts, notwithstanding the property title question, to be divided equally upon divorce.

82. S.B. No. 388 Va. General Assembly (1980). For the provisions of this amendment and its present status, see note 9 *supra* and accompanying text. It is suggested that wherever the word "terminated" is utilized, the phrase "or partially depleted" should be added to prevent parties contemplating divorce from drawing such accounts down to minimal sums without terminating the accounts.

non-breadwinning spouse in a marriage. In addition, no gift tax exposure would result since section 2516 of the Internal Revenue Code has been interpreted to mean "that transfers of property or interests in property made under the terms of a written agreement between spouses in settlement of their . . . property rights [pursuant to a divorce and where a final decree is procured within two years after entering into the agreement] are deemed to be for an adequate and full consideration in money or money's worth and, therefore, exempt from the gift tax. . . ."[83] Furthermore, the flexibility afforded the court in setting the date of extinguishment and conversion into equal shares will discourage the race to the bank by parties in the divorce situation.

Aside from establishing rights during life, the Multiple-Party Accounts Act settles the issue of survivorship rights by declaring that the sums remaining on deposit at the death of a party to a joint account presumptively belong to the surviving party as against the claims of the estate of the decedent unless there is clear and convincing evidence of a different intent.[84] As discussed previously, prior case law in Virginia provided a variety of results as to survivorship rights.[85] There was a presumption of convenience which, in fact, more often than not, denied survivorship.[86] The clarity that this new section on survivorship brings to joint accounts and its recognition of depositors' expectations that the incident of survivorship presumptively attaches[87] produces a positive and valuable base upon which Virginia's Multiple-Party Account law may rest.

The last two sections of Virginia's Multiple-Party Accounts Act merit attention. Neither appears in section VI of the UPC.

Section 6.1-125.15 states that forms for the creation of joint accounts are to be clearly labeled as "JOINT ACCOUNT WITH SURVIVORSHIP" and "JOINT ACCOUNT - NO SURVIVORSHIP."[88] This provision has the positive effect of giving the depositors a clear election as to the right of survivorship and alerts the depositor to the consequences of opening such an account.[89] The clause declaring that this section is not applicable to joint accounts created before July 1, 1980 seems unnecessary. Notices to all old account holders and the issuance of new signature cards would help to

83. Treas. Reg. § 25.2516.1 (1979).

84. VA. CODE ANN. § 6.1-125.5 (Repl. Vol. 1979).

85. *See* notes 16, 17, 21 & 22 *supra* and accompanying text.

86. *See* note 20 *supra.*

87. *See* note 28 *supra* for the results of a Virginia survey on depositor expectations.

88. VA. CODE ANN. § 6.1-125.15 (Repl. Vol. 1979).

89. *See* notes 86-87 *supra* and accompanying text which suggest a third alternative, a gift election.

assure that the form of the joint account matched the depositor's intention without unreasonably burdening the financial institution. Since the law is currently in effect, an amendment would be required to affect this result.

Section 6.1-125.16 fixes the effective date for the new act. It provides that the new act is applicable to all facets of existing multiple-party accounts *except for the inter-parties aspect* of joint accounts *between persons not married to each other* in accounts created prior to July 1, 1980. This section creates a grandfather clause which has already caused confusion as to its applicability.[90] Again an amendment could remedy this situation providing a delayed effective date so that the financial institutions could get notice to their customers on the need to review accounts because of new legislation.

III. Conclusion

The new Virginia law on multiple-party accounts establishes an excellent system of uniform rules for joint, pay-on-death and trust accounts in various financial institutions. It for the most part has adopted the recommendations of the Uniform Probate Code, section VI on Multiple-Party Accounts.

The section on survivorship rights took a muddle of prior case law and statutes and created a single rule of a rebuttable presumption of survivorship which clearly mirrors the expectations of most depositors. Likewise, the statute affords the financial institutions protection for payments made according to the form provided in every case.

The section on lifetime rights between parties to joint accounts provides certainty in its concept of "net contributions" as determinative of ownership in life. In addition, a reasonable interpretation of depositors' expectations includes the theory that the basic relationship of the parties to multiple-party accounts is that of individual ownership equivalent to net deposits, a right of withdrawal for the depositor to the extent of his ownership without accounting, a right of withdrawal for the non-depositor as agent for contributor and the right of survivorship at death of the owner. This viewpoint recognizes and holds to the testamentary character of joint and survivor accounts.

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90. Thurston v. Maggard, _ Va. _, 263 S.E.2d 64, 66 n.* (1980). This note expresses the view that the presumption of convenience has been abolished by Va. Code Ann. § 6.1-125.5 (Repl. Vol. 1979). But, in fact, as to accounts prior to July 1, 1980, it has not been abolished as to *interparty disputes* (versus disputes with the financial institution) between persons not married to each other. *See also* Official Comment to UPC § 6-104.

However, this view provides no recognition of the special husband-wife relationship or of the non-economic contributions inherent in the husband-wife relationship. It is also doubtful whether, as between husband and wife, the "net contribution" concept reflects depositors' expectations. These factors illustrate forcefully the need for legislative study and action in the sphere of spousal property rights.

In addition, passage of Senate Bill No. 388 as an amendment to section 6.1-125.4 addressing the effect of divorce on joint accounts is recommended.[91] Such a bill, if enacted, would provide for joint accounts to be converted into equal shares upon divorce. It would also grant the court flexibility in setting the date upon which the account would be converted into equal shares. It is asserted that such a bill would have the favorable effects of recognizing the contribution to the family or partnership of the non-wage earning spouse without gift tax consequences and would discourage the race to the bank by parties contemplating divorce.

The code section providing for clear labeling of accounts "survivorship"-"no survivorship"[92] is a good addition to Virginia law for it helps to educate the depositor on the meaning of the creation of joint accounts and gives him the opportunity to make an election. However, this section, should be amended to create a third form providing for a joint-tenancy-gift account. Such a form would provide the clear and convincing intent required by the statute for lifetime ownership rights in a joint account which are not intended to be in proportion to net contribution.

Although not without areas in need of modification and study, the new Multiple-Party Accounts Act in Virginia shows a welcome progression from judicial attempts to identify the joint account by traditional common law concepts of gift and contract "to recognition of the account as a new and useful technique for transferring property which need not fit any historical molds."[93]

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91. S.B. No. 388 General Assembly (1980) addresses this problem.

92. VA. CODE ANN. § 6.1-125.15 (Repl. Vol. 1979).

93. Kepner, *Five More Years of the Joint Bank Account Muddle,* 26 CHI. L. REV. 376, 401 (1959).