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THE JOINT AND SURVIVOR ACCOUNT IN MICHIGAN—PROGRESS THROUGH CONFUSION

*Richard V. Wellman**

LEGAL writers have been intrigued for years by the challenge of classifying and identifying the resulting incidents of the joint and survivor bank deposit when an attempt is made to use it as a mode of effectuating a donor depositor's intention to confer benefits on a donee co-depositor.[1] Much in their discussions is useful to one who is concerned with the concept that has evolved in Michigan, where a 1909 statute states that some co-depositors are presumed to be joint tenants. Michigan judges and practitioners must determine, however, whether comment about national trends is applicable here, for in many respects the starting assumptions with which they have had to work seem different from those applicable elsewhere. The use in the Michigan statute of the joint tenancy concept,[2] together with the state's traditional resistance to enforcing contracts on behalf of third-party beneficiaries,[3] has directed the dialogue

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1. See BROWN, PERSONAL PROPERTY § 65 (2d ed. 1955); Havighurst, *Gifts of Bank Deposits*, 14 N.C.L. REV. 129 (1936); Jones, *The Use of Joint Bank Accounts as a Substitute for Testamentary Disposition of Property*, 17 U. PITT. L. REV. 42 (1955); 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); Sayre, *A Review of Iowa Contract Law: 1943-1952*, 38 IOWA L. REV. 506 (1953); Comment, *Bank Accounts: Transfer of Property at Death*, 23 U. CHI. L. REV. 289 (1956); Comment, *The Joint and Survivorship Bank Account*, 1957 U. ILL. L.F. 655; Comment, 60 MICH. L. REV. 972 (1962); Note, *Disposition of Bank Accounts: The Poor Man's Will*, 53 COLUM. L. REV. 103 (1953); Note, *The Theories of Joint Bank Accounts*, 42 KY. L.J. 125 (1953).

For convenience, the terms "donor" and "donee" are used in the balance of the paper without reference to the circumstance that both, as parties to the account, are depositors. Although most of the cases discussed involve accounts that resulted entirely from funds furnished by only one of the parties, the term donor is used to identify a party who furnished funds that the other party claims or may claim otherwise than because he was the source of such funds.

2. At least eight other states have legislation making co-depositors joint tenants. These are Arkansas: ARK. STAT. ANN. § 67-521 (1947); California: CAL. FIN. CODE § 852; Colorado: COLO. REV. STAT. ANN. § 14-1-43 (1953); Missouri: MO. REV. STAT. § 362.470 (1949); Nevada: NEV. REV. STAT. § 5663.010 (1957); New York: N.Y. BANKING LAW § 134; Washington: WASH. REV. CODE § 30.20.015 (1959); West Virginia: W. VA. CODE ANN. § 3205 (1961).

3. If a bank account with two or more depositors is executed by all parties, it should not be necessary to discuss the rights of a depositor who furnished no consideration for the deposit in terms of third-party beneficiary theory. Rather, the problem becomes one of whether a promisee-party may enforce an agreement when the con-

in Michigan along lines of property rather than contract concepts.[4] However, the statute, because it speaks of a present co-tenancy, is an awkward starting point when it is used to effectuate a purpose to make a transfer at death, a purpose that many depositors seek to implement through joint and survivor accounts.[5]

Examination of the approximately forty-five Michigan Supreme Court opinions dealing with various aspects of joint and survivor accounts reveals an interesting story about legal method. By offsetting statutory deficiencies with some doctrinal double-talk, the court seems to have made the joint and survivor account an effective and reasonably reliable mode of making a transfer at death. Because the development has been of the inarticulate sort that one perhaps should expect when enabling legislation is badly drafted, the patterns are complex and likely to be misunderstood. It is

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sideration therefor moved from another. Michigan decisions permit a donee-party to enforce a promise paid for by another. See CORBIN, CONTRACTS § 779 (1951).

4. Early Michigan decisions concluded that there could be no joint tenancy in personal property. Ludwig v. Bruner, 203 Mich. 556, 169 N.W. 890 (1918); Hart v. Hart, 201 Mich. 207, 167 N.W. 337 (1918); Burns v. Burns, 132 Mich. 441, 93 N.W. 1077 (1903); Wait v. Bovee, 35 Mich. 425 (1877). Eventually, survivorship rights in personal property arising from express stipulation were recognized. See Lober v. Dorgan, 215 Mich. 62, 183 N.W. 942 (1921).

5. Statutes that appear to aid the survivor-donee without reference to whether he had a present interest or that distinguish between the kind of proof necessary to defeat the survivorship claim and a claim by the donee against the donor during the donor's lifetime are manifestly more helpful. An example of the former is the Maine legislation, which provides: "All such accounts . . . payable to either of 2 or more or the survivor . . . shall, in the absence of fraud or undue influence, upon the death of any of such person, become the sole and absolute property of the survivor or survivors, even though the intention of all or any one of the parties be in whole or in part testamentary, and though a technical joint tenancy be not in law or fact created." ME. REV. STAT. ANN. ch. 59, § 19 (Cum. Supp. 1957). The latter is represented (as to savings accounts) by the so-called conclusive presumption statute of New York, which provides, in relevant part: "When shares shall be issued in the name of two persons and in the form to be paid to either or the survivor of them, such shares and any additions thereto made by either of such persons with any accumulations thereon shall become the property of such persons, as joint tenants, and the same together with all dividends thereon shall be held for the exclusive use of such persons, and may be paid to either during the lifetime of both, or to the survivor after the death of one of them. . . . The issuance of such shares in such form shall in the absence of fraud or undue influence be conclusive evidence in any action or proceeding to which either such association or the surviving shareholder is a party, of the intention of both of such shareholders to vest title to such shares and the additions thereto in such survivor." N.Y. BANKING LAW § 394. Even statutes interpreted to protect banks and to have no impact on ownership between co-depositors seem to provide a better theoretical backdrop for effectuating a donor depositor's testamentary intent, for such statutes better enable a court to look at each survivorship case as it comes up and to reflect changing attitudes about the propriety of effectuating the decedent's intention by imaginative use of the potential of common-law gift and contract rationales. Negaunee Nat'l Bank v. LeBeau, 195 Mich. 502, 161 N.W. 974 (1917), is an example of what a court can do without a statute.

suggested that some legislative repair is needed to aid the solution of some of the more troublesome points and to facilitate the development of what could become an extraordinarily useful device for holding and disposing of funds.

I. Bank Account Gifts at Common Law

A variety of attempts to make donative transfers of bank account balances had been litigated in the Michigan Supreme Court before cases involving the 1909 statute arose. The early cases established that no gift occurred merely because a donor opened an account payable solely to another.[6] But, if additional evidence showed that the donor intended to give the other a present beneficial interest in the account, no further acts of delivery were required to complete the donation. The donee's ability to withdraw according to the terms of the account was held to satisfy the requirements of delivery under the law of gift.[7]

In *Negaunee National Bank v. LeBeau*,[8] the common-law approach was used to uphold the claim of a surviving donee to an account payable to the donor or the donee during their joint lives and to the survivor of them. It appeared the donor had requested an arrangement that would simply transfer the account to the donee at death. When he was told that no such account could be provided, the joint and survivor form was accepted. As the court saw it, the donor realized he was creating a present co-equal power of withdrawal in the donee. Hence, the provision for survivorship, rather than being testamentary, was held to be incident to an inter vivos transfer.

Two circumstances seem responsible for the rather surprising conclusion in *LeBeau* that a gift had occurred even though the donor retained a power to withdraw and thus to end the donation. The first was that, although the co-depositor statute was in effect at all times relevant to the case and would have supported the donee, the court sought a way to sustain the claim without using it since its constitutionality had been challenged. (In retrospect, the precedent thus created was quite useful to the court a few

6. Negaunee Nat'l Bank v. LeBeau, *supra* note 5; Union Trust & Sav. Bank v. Tyler, 161 Mich. 561, 126 N.W. 713 (1910); State Bank v. Johnson, 151 Mich. 538, 115 N.W. 464 (1908); Davis v. Lenawee County Sav. Bank, 53 Mich. 163 (1884). Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W.2d 140 (1963), while obviously not a pre-1909 case, illustrates the common-law approach.

7. Negaunee Nat'l Bank v. LeBeau, *supra* note 5.

8. 195 Mich. 502, 161 N.W. 974 (1917).

months later when it faced the constitutional question in another case.) The second was the donee's strong showing that the donor intended to make him a present co-owner of the account. Whatever the donor's primary motivation may have been, he acted after being warned that the transaction gave the donee a right to withdraw the entire balance immediately.

The early Michigan cases did not go so far as to hold that provision in favor of a donee had no meaning as between the donor and the banker when the transaction failed to create beneficial rights in the donee as against the donor. Indeed, the clear implication of the opinion in a leading case on this point is that a banker might rely upon, and is bound by, the terms of its contract with the depositor.[9] That case held a bank liable for failure to honor the demand of the deceased depositor's estate even though the account in question was made payable to the decedent's wife. The court said: "As between banker and depositor, there can be no doubt that the bank will be protected in paying out money in such way and on such terms as the depositor has authorized."[10] Liability was rested on the fact that the depositor originally had requested that the account be entered in his name, but was told that, since he already had one account, he was precluded from opening a second account in his own name. At the bank's suggestion, an account in the name of the wife was opened subject to the owner's draft. The court then observed, in qualifying its above statement: "[O]n the other hand, where a contract is not in writing, it is equally clear that its real character and terms may be made out by testimony, and that the contracting party can lawfully control his own funds until he has disposed of them, and that it can make no difference in what name the account is kept, if it is understood to be his account. . . ."[11] It appears then that the liability of a bank in this situation is governed by the deposit contract between it and the depositor and is not affected by the technical rules of the law of gift.

The important heritages of the pre-statute cases as they bear on the joint and survivor account, therefore, are (1) a rejection of the idea that the donee gets any rights from the deposit and the form of account without more; (2) an emphasis on the law of gift resulting in a requirement that the donor have invested the donee with a present beneficial interest in the account as a condition to

9. Davis v. Lenawee County Sav. Bank, 53 Mich. 163 (1884).
10. *Id.* at 166.
11. *Ibid.*

the donee gaining a right as survivor; (3) a recognition that the banker-depositor relationship may be governed by different considerations from those that govern the rights between co-depositors.

II. THE MICHIGAN CO-DEPOSITOR STATUTE

The 1909 statute provided:

> "When a deposit shall be made in any bank or trust company by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of one of them and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof."[12]

It is obvious from the language of the statute that the Legislature intended to change previous law by making the form of certain deposits a source of donee right. The statement about the "property of such persons" and the use of the phrase "joint tenants" in the original enactment would have been quite unnecessary if all that was intended was a statute protecting bankers.[13] Indeed, in light of the court's earlier rejection of joint tenancies in personal property, the legislative purpose in dealing with property law seems to have been two-fold: to create a form of co-ownership for holding the benefit of bank credit; and to prescribe the acts that would place co-depositors in the status created.

12. As quoted in the opinion of *In re* Rehfeld's Estate, 198 Mich. 249, 250, 164 N.W. 372 (1917). In addition to the added paragraph which is quoted later in the text, some minor changes in statutory wording have been made over the years. The current provision, MICH. COMP. LAWS § 487.703 (1948), applies expressly to deposits by more than two persons and omits the precision with which the original statute made additional deposits to the original account property in joint tenancy "upon the making thereof."

13. Kepner notes that all states with "joint tenancy" statutes have concluded that their enactments affect property rights as well as protect bankers in making payments according to the form of accounts. Kepner, *supra* note 1 (CALIF. L. REV.), at 622. This may no longer be the case in Colorado, where a 1957 amendment added the words "so far as the rights and liabilities of the bank are concerned" to the clause describing the depositors as joint tenants.

The effect of the statute as indicated by early cases applying it was to provide a presumption that the donor had intended to create a present interest in the surviving donee. In terms of the findings made in the earlier *LeBeau* case, the statute dispensed with the need for proving that the donor intended to give the donee a present beneficial right of withdrawal in order to create a valid survivorship provision.[14] Unlike the holding of the *LeBeau* case, however, the statute appeared to impose the relationship of joint tenants on the parties. Thus, while both the statute and the holding of *LeBeau* allow either party to withdraw all funds, the idea evident in *LeBeau* that such total withdrawal by either would end the beneficial right of the other appeared to be made obsolete by the statute.

In 1937, the following paragraph was added to the statute:

> "The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or *surviving depositor or depositors* is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."[15]

The reasons behind the 1937 amendment are not at all clear. Perhaps the presumption held to be raised by the earlier statute was considered conclusive in practice, although nothing in the supreme court reports so indicates. It is possible that the banking fraternity was concerned about the fact that in 1936 two justices had said that the sentence in the original enactment making co-depositors joint tenants was unconstitutional.[16] It is also possible that the purpose was to separate the question of a surviving depositor's right from the joint tenancy concept. If so, the legislation was incredibly badly drafted, for leaving the original language stating that the deposit became the property of the co-depositors as joint tenants could only serve to confuse the matter.

There seem to be three possible views concerning the meaning

14. *In re* Sadler's Estate, 201 Mich. 281, 167 N.W. 938 (1918); *In re* Rehfeld's Estate, 198 Mich. 249, 164 N.W. 372 (1917).

15. MICH. PUB. ACTS 1937, No. 286 (effective July 23, 1937). (Emphasis added.)

16. Justices Potter and Joy, concurring in Esling v. City Nat'l Bank & Trust Co., 278 Mich. 571, 270 N.W. 791 (1936), argued that the 1909 legislation dealt with banker protection and property rights between co-depositors. The title of MICH. PUB. ACTS 1909, No. 248 was "An act in relation to the payment of deposits of money in banks and trust companies by minors, trust deposits, and deposits in the names of more than one person." The justices urged that the statement making the parties joint tenants dealt with a matter not suggested by the title of the act and was invalid under the following provision of the constitution: "No law shall embrace more than one object, which shall be expressed in its title." MICH. CONST. art. 5, § 21 (1908).

of the statute as amended. One is that the amendment simply codified the earlier interpretation that the statute creates a presumption of joint tenancy.[17] So viewed, a surviving co-depositor is better off than at common law, since the statute creates a presumption that he was given a present interest—that of a joint tenant—when the account was opened. Unless the presumption is rebutted, he is entitled to the entire account as survivor, for such right is incident to the relationship presumed. Proof that only survivorship benefits were intended would rebut the presumption, because it would contradict the relationship of joint tenants.

Or, it could be said that the 1937 amendment impliedly repealed the original statement concerning joint tenants. That is, the explicit presumption that the surviving depositor is intended to be vested with title would be meaningless if the original provision were still read to raise a presumption of joint tenancy, for the former is included in the latter. If it is accepted that the amendment was intended to be meaningful, what is left is a statute that adds nothing to the common law concerning the relation of the parties to the account before the death of either, but that states a presumption of intent to transfer "deposits and additions" at death. Since it would be nonsense to provide a statutory presumption of intention to pass a title to another without making the intention effective, the statute also must be viewed as a source of authority for the effectuation of testamentary intention in spite of the statute of wills. Finally, if "deposits and additions" is read to mean such amounts as are in the account at the time of vesting, this theory would leave the account the exclusive property of the donor until his death, at which time the statute would immediately vest the survivor with title to any balance.

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17. There is little room for doubting that the decisions under the 1909 statute viewed the survivorship right to be incident to present co-ownership in joint tenancy, which was presumed to arise when the deposits were made. The opinion in *In re* Rehfeld's Estate, 198 Mich. 249, 253, 164 N.W. 372, 373 (1917), stated: "We are of opinion that in enacting the legislation in question it was the legislative intent not only to protect banks in the payment of deposits . . . but, in the first instance and in the absence of competent evidence to the contrary, to actually fix the ownership of the fund in the persons named as joint tenants with the attendant right of survivorship therein." The opinion, noting that legislation identical to the Michigan statute had been enacted in New York in 1909, also quoted from a New York opinion and approved its quotation from BRADY, BANK DEPOSITS 46, as follows:

> "It must be added that, under a New York statute, a deposit of this character would to-day create an estate in joint tenancy, even without the delivery of the passbook. But, under that statute, once the deposit is opened, and the estate in joint tenancy created, the depositor cannot revoke the gift or take it back. If he draws the money and uses it, he is accountable to the donee as any other joint

The third possibility is that the statute as amended raises two presumptions: the original presumption of joint tenancy that still attends the opening of an account for whatever impact it may have on the relationship between living depositors; an added presumption that aids the survivor, not necessarily because he was a joint tenant, but because the statute authorizes a new form of will.

III. Legislative Confusion Judicially Compounded

The Michigan cases provide very little comfort to one searching for a single rationale that is both compatible with the statute and adequate to explain case results. Different approaches have evolved for different kinds of controversies involving joint accounts. Even so, by combining facets of different theories to justify results, the opinions have managed to blur doctrine to the point where it becomes apparent that the results are controlled by reasoning that is not articulated.

A. *Survivorship Problems*

In contests between a surviving donee and the estate of a deceased donor over balances on deposit at the donor's death, the fighting issue regularly is whether evidence offered by the donor's estate is sufficient to rebut the statutory presumption. As noted earlier, proof that the donor did not intend to give the donee a present beneficial interest in the account would appear to rebut the co-ownership presumed by the statute. But the critical question under the decisions is whether the donor intended the donee to have the balance at death.[18] Thus, admissions by the donee that the account was understood to be the property of the donor during his lifetime have been ignored regularly.[19] The courts have disregarded proof that the donor's purpose in establishing the account was to obtain the convenience of another's ability to get at the donor's money for the donor's use, except where it also was made to appear that the donor had no additional purpose of giving the balance at death to the donee.[20]

tenant of personal property would be. [Clary v. Fitzgerald, 155 App. Div. 659, 662, 140 N.Y. Supp. 536, 539 (1913)]." *Id.* at 251.

18. Citations and digests of the cases giving significant attention to the nature of the survivor's interest are set forth in the appendix, p. 678 *infra*.

19. Turbide v. Forest, 358 Mich. 435, 100 N.W.2d 239 (1960); Jacques v. Jacques, 352 Mich. 127, 89 N.W.2d 451 (1958); Anderson v. Lewis, 342 Mich. 53, 62 N.W.2d 774 (1955); Lau v. Lau, 304 Mich. 218, 7 N.W.2d 278 (1943); Meigs v. Thayer, 289 Mich. 680, 287 N.W. 342 (1939).

20. Maahs v. Maahs, 307 Mich. 549, 12 N.W. 2d 335 (1943); Lau v. Lau, *supra* note 19.

These cases suggest either that the statute effectuates testamentary intention when expressed in the form of a joint account or that the intended joint tenancy is presumed to be revocable. In either instance, the legal device that gives the survivor a right would be consistent with a layman's idea that the donor remains owner until his death. The opinions in survivorship cases continue to speak of the joint tenancy concept, thus suggesting the revocable transfer approach.[21] But they also refer to a "poor man's will,"[22] and some of them use the language of the 1937 amendment in discussing the presumption in favor of the survivor, thus suggesting the theory of informal testamentary transfer.[23]

B. *Control Problems During the Joint Lives of the Co-depositors*

Before turning to situations testing the rights of control of co-depositors, the effect of the statutory power each party has to withdraw the deposit during joint lives must be considered. If the joint tenancy concept is used, the provision that protects the bank when it pays upon demand of either depositor could and probably should be viewed as irrelevant to the rights of the co-depositors. It is clear that the legislature was dealing with two different matters: bank protection and property rights of co-depositors. The creation of a joint tenancy by the deposit is stipulated and is not necessarily contradicted by the provision permitting the bank to pay either co-depositor, since the sums withdrawn also could be held in joint tenancy.[24] Alternatively, by analogy to the effect at common law of transformation of the subject matter of a joint tenancy by the act of one of the co-owners, withdrawal by one party could be viewed as severing the joint tenancy and ending the rights of survivorship in the sums withdrawn, leaving the parties tenants in common of such sums.[25] But the view that the statutory authority to pay either joint tenant results in a *total* divestiture of the beneficial interest of the other co-tenant in the sums withdrawn is patently inconsistent with the

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21. Jacques v. Jacques, 352 Mich. 127, 89 N.W.2d 451 (1958), repeats the portion of the opinion from *In re* Rehfeld's Estate, quoted *supra* note 17. See also Peoples State Bank v. Allstaedt, 301 Mich. 662, 4 N.W.2d 48 (1942).

22. Jacques v. Jacques, *supra* note 21.

23. *Ibid.*; Anderson v. Lewis, 342 Mich. 53, 68 N.W.2d 774 (1955).

24. See Security-First Nat'l Bank v. Stack, 32 Cal. App. 586, 90 P.2d 337 (1939), noted in 28 CALIF. L. REV. 224 (1940).

25. For the view that the withdrawal by one joint-tenant effects a severance making the parties tenants in common of the fund so obtained, see Stout v. Sutphen, 132 N.J. Eq. 583, 29 A.2d 724 (1943).

incidents of a joint tenancy. Hence, the provision concerning withdrawals by either party must be for bank protection and cannot be read as giving either party the full title to sums withdrawn.

Inter vivos controversies concerning joint accounts include cases in which the donor's right to control the deposit during his lifetime was challenged. The theory of joint accounts reflected in these situations is different from that used in litigation after the donor's death relating to the ability of a donee to keep sums withdrawn during the donor's lifetime.

Looking at the cases involving the donor's right of control during his lifetime, it becomes evident very quickly that the donor enjoys many more rights than one who is party to an irrevocable transfer to himself and another as joint tenants. First, donor withdrawals terminate any donee rights to the sums withdrawn. The process by which this position has been evolved is worth examining, since the untidiness of doctrine apparent here has served both to implement the court's evident purpose to make the joint account an effective will and to generate paradoxes that embarrass the transaction.

The earliest and most commonly cited case dealing with a donor's control over a joint account is *Rasey v. Currey's Estate.*[26] There the claimant was the personal representative of the donee, who had died during the donor's lifetime. The donor had caused the donee's name to be removed from the account before the donee's death, an act that was treated by the court as a withdrawal and re-deposit in a new, sole account. The opinion states:

> "It is clear that [the donor] . . . intended at one time to make [the donee] a gift to take effect at the time of her death, but she was shrewd enough to not place her means beyond her control, and later she expressly withdrew the prospective gift. . . . Here was no gift, by way of absolute transfer, or to take immediate effect, but, at the inception of the arrangement and in its very designation of terms, was contingent upon survivorship of [the donee] . . . . If a depositor directs a bank to pay the deposit to the depositor, or another designated, the depositor may change the designation or limit payment to himself or his order. The designation of the bank account . . . did not constitute a gift inter vivos, for it did not strip Mrs. Currey of all ownership of, and dominion over the deposit. The death of [the donee] preceded that of [the donor] and, had the designation continued until [the donee's] death, then [the donor], in any event, would take the deposit as survivor."[27]

26. 265 Mich. 597, 251 N.W. 784 (1933).
27. *Id.* at 601, 251 N.W. at 785.

The donee's estate lost; but why? Obviously, it was not because the donee failed to survive; this could not be the reason unless the joint tenancy character of the donee's interest continued in the account after the donor removed the donee's name. The opinion might mean that the donor had made an effective designation that would have resulted in a transfer at the time of her death, yet was wholly ambulatory and subject to change in the meantime. The problem with this analysis is to find authority for it in the statute. At the time of the decision, the statute gave a donee a better position than he would have at common law, but only by virtue of its declaration that he received the property interest of a joint tenant. Or, the court may have been suggesting that the donor's purpose was shown to have been only testamentary and that the statutory presumption of joint tenancy was rebutted.

Possibly the opinion meant to say that a donor's transfer to a donee via a joint account is revocable. If so, the question becomes why. The court's reference to the terms of the arrangement may have been intended to indicate that the donor's ability to withdraw amounted to provision for revocation. But, the terms also gave the donee the right to withdraw, and the court evidently was talking only of the donor's ability to change the account. Nothing in the statute nor in the joint tenancy concept supports the idea that the donor may control the account during his lifetime. Hence, the case may hold that a donor's transfer to himself and another as joint tenants of a bank deposit is subject to an implicit right to revoke that is not derived from the terms of the account.

The fact is that the opinion is quite unclear as to exactly what the court meant.

In *Esling v. City National Bank and Trust Company*,[28] decided three years later, the court faced a situation in which the donee (the donor's granddaughter), who had possession of the account passbook, told the donor of her intention to make a withdrawal. The donor telephoned the bank and directed that it not honor the donee's demand. After the donee's demand had been refused, the donor confirmed her order by a writing delivered to the bank and later changed the account to exclude the donee. The donee sued the bank for breach of contract. A part of the court's opinion suggests that it felt that the donee's prima facie showing that she was a joint tenant with a present co-equal right to withdraw had been rebutted

28. 278 Mich. 571, 270 N.W. 791 (1936).

by evidence that the donor intended only a testamentary transfer. It states:

> "It is important to note that the bank teller through whom the joint account was made testified that at the time of the deposit Mrs. Lewis (the donor) said that the money was to go to her granddaughter after Mrs. Lewis' death. This was denied by plaintiff. However, the testimony discloses facts which tend to negate an intent on the part of Mrs. Lewis that by opening an account in the joint names of herself and her granddaughter she was to release her right to, and control of, the money deposited. She was well advanced in years, enfeebled in health, and it was fair to assume that her necessities might require the use of this deposit in whole or in part. Obviously with this in mind, Mrs. Lewis reserved the right to withdraw from this account. The undisputed testimony is that the money placed in this joint account belonged to Mrs. Lewis and the bank was aware of such being the fact."[29]

The opinion then quotes at length a New York opinion that discusses the matter of rebutting the statutory presumption. As a result, it seems to suggest that the donor's telephoned notice was evidence tending to demonstrate that the donee had never been intended to be a joint tenant. Finally, the court held that the removal of the donee's name from the account revoked the transfer to the donee. Interestingly, a case from Ohio,[30] as well as *Rasey v. Currey's Estate*, was relied upon for this proposition. The court paid no attention to the circumstance that Ohio has employed a contract theory to validate donee claims to joint bank deposits. This theory, unlike the joint tenancy theory, is wholly compatible with the idea that either party may withdraw and keep all.

Esling is responsible for another idea that serves to assure that the donor retains control of the account at least until withdrawal is made by one of the parties. Although the written notice arguably was too late since it arrived after the donee had demanded withdrawal, the court stated that under the statute it served to eliminate the presumption of a present joint tenancy. This interpretation of the statute means that, when either party gives notice to the bank that it should not pay in accordance with the terms of a joint account, the common law applies and the funds belong to the donor unless other evidence of gift or agreement is shown. It is not clear that the statutory notice provision was intended to have any bear-

29. *Id.* at 576.
30. Cleveland Trust v. Scobie, 114 Ohio St. 241, 151 N.E. 373 (1926).

ing on the rights between co-depositors. Reading it as the court did, however, works entirely to the protection of the donor. It has the effect of giving him a power of revocation by written notice, although in theory his notice is not revocation but serves simply to rebut the presumption that a transfer occurred.

As was noted earlier, *Rasey* and *Esling* have been accepted as establishing that donor withdrawals end the donee's rights in sums withdrawn. Perhaps they mean that only the donor enjoys this power over the co-owner's interest; that is, that withdrawal is a means (not necessarily the only means) of exercising the donor's implied right of revocation. But they also could mean that the terms of the account permit either party to end the right of the other in sums withdrawn. This would make withdrawal the only method by which a donor could revoke. It would mean also that the account terms contradict the joint tenancy idea. Obviously, some other approach is required in order to sustain donor control against the possibility of donee withdrawal. On this point, each of these cases contains language that can be read to mean that the donor prevailed because his actions served to rebut the presumption of joint tenancy, and so each suggests an approach that will protect the donor against donee withdrawal.

Later cases involving donor control speak of revocation as well as of rebuttal of a presumed transfer. They rely on the *Rasey* and *Esling* cases.[31] Hence, the authorities have succeeded in establishing the fact of donor control while at the same time they have avoided clear approval of any particular theory.

C. *Miscellaneous Problems*

The ambiguities of theory that are apparent in the survivorship cases and in cases testing the ability of the donor to control a joint account during his lifetime are reflected by variances of approach to other kinds of problems.

Creditors Claims. For example, cases involving claims of a donor's creditors suggest either that no transfer occurs when a joint account is established or that the transfer, being revocable, is one that creditors can ignore. Of course, creditors must show that their debtor contributed the amount they claim to the account. In each

31. See *In re* Renz' Estate, 338 Mich. 347, 61 N.W.2d 148 (1953); Manufacturers Nat'l Bank v. Schirmer, 303 Mich. 598, 6 N.W.2d 908 (1942); Peoples State Bank v. Allstaedt, 301 Mich. 662, 4 N.W.2d 48 (1942).

of the cases of this sort, since the creditors failed to prove who contributed what to the joint account they sought to attach, they were limited to recovery of one-half of the balances, the co-ownership suggested by the form of the account being controlling in the absence of other proof.[32]

Donee Withdrawals. By way of contrast, one should consider two cases in which the donors died without learning that the donees had made withdrawals.[33] When the details of these cases are compared with those of survivorship cases,[34] it appears that in each the donee lost primarily because he had withdrawn, contrary to the wishes of the donor, before the donor's death. The connection is obscure between this fact and the question of whether the donee should be able to keep funds that were withdrawn while the donor was alive. However, a connection may be seen if the bank account transfer is viewed as one that did not occur until the donor's death. The donee, having had no right to keep what he withdrew when he withdrew it, cannot claim to have received such a right at the donor's death, because at that time the funds were not in an existing account and no will gave him that right. The result would be different if the bank account were viewed as a revocable transfer.

Neither decision articulates the idea that the joint bank account is only a transfer occurring at death. Both justify the results reached by concluding that the statutory presumption had been rebutted. The warning of the cases to anxious donees, however, is clear. The implication that the account transfer is only testamentary is less clear. But, if it is denied, one is left with nothing but guesswork as to why the presumptions of joint tenancy were held to be rebutted.

32. Sussex v. Snyder, 307 Mich. 30, 11 N.W.2d 314 (1943); Bowditch v. Michigan Trust Co., 221 Mich. 247, 190 N.W. 699 (1922); Murphy v. Michigan Trust Co., 221 Mich. 243, 190 N.W. 698 (1922). The implied approval by these cases of the idea that a creditor may reach all that his debtor contributed to a joint account seems sound. Even if the transaction is seen to effect a revocable present transfer to the other depositor rather than a transfer at death, statutes make revocable transfers void as to creditors of the transferor. MICH. COMP. LAWS § 556.14 (1948). A part of Michigan's legislation dealing with powers, the statute referred to has express reference to real property interests. However, it has been held that the legislation is applicable also to personal property. Townsend v. Gordon, 308 Mich. 438, 14 N.W.2d 57 (1944).

33. Allstaedt v. Ochs, 302 Mich. 232, 4 N.W.2d 530 (1942); Hazen v. Elmendorf, 365 Mich. 624, 113 N.W.2d 892 (1962). The facts of these cases are summarized in the appendix.

34. Cases involving a survivor's right to amounts remaining on deposit in a joint and survivor account at the death of the donor depositor are described in the appendix.

D. *Rationalized Theory To Explain the Results*

To this point, the discussion has suggested that the cases do not consistently support the view—possible if the statutory language added in 1937 is considered carefully—that a joint and survivorship bank account results only in a transfer at death. At the same time, it is clear that no case appears to start with the assumption that an irrevocable joint tenancy arises under the statute. If we start with the idea that an implied right of revocation by withdrawal accompanies the creation of a joint tenancy and add that the presumption of a joint tenancy is rebuttable, we come close to a theory that accommodates case results. But the two cases involving donee withdrawal do not fit very well. If the donor's power of revocation arises from the terms giving him a right to make withdrawals, it is not altogether obvious why the donee would not have a like power. If the donor's power of revocation is implied, it is unclear why it should be exercisable only by withdrawal unless the limitation results from rules of evidence barring self-serving declarations of a donor made after opening a joint account, a limitation which the court appears to have adopted in survivorship cases.[35]

The statute could be said to raise a rebuttable presumption of a joint tenancy and a separate presumption that the donor intended a transfer at death. If this were the case, a joint tenancy would arise upon the opening of an account, but it would disappear whenever the donor indicated that the incidents of joint tenancy were not suited to his purposes. If any balances remained in the account at the donor's death, the survivor would have the benefit of the other presumption. Thus, the joint tenancy concept explains only why creditors of a co-depositor who cannot prove how much their debtor contributed get one-half of the account and why the survivor takes when his right is not challenged. If the donor withdraws or if the donor's representatives challenge the right of the donee to take as survivor, we shift to the presumption that all that the donor intended was a transfer at death. Hence, the withdrawals are effective, but survivorship benefits exist as to balances remaining at death. If the donee withdraws during the donor's lifetime without the donor's consent or knowledge, the doubt as to what the donor would have done if he had learned of the act is resolved by assuming that he would have succeeded in rebutting the presumed joint tenancy. This leaves the donee accountable to the donor's estate for his withdrawals.

35. See discussion in text at note 63 *infra*.

The principal criticism of this view is that it proceeds from necessity to rationalize results, rather than from any rational reading of the statute. However, the statute is garbled, and who is to say that a rational reading of its words is a test of anything.

But there is another reason, not yet suggested by the cases, that might make the court slow to think in terms of two presumptions and slow to strip the joint tenancy label from the relationship between joint and survivor depositors. It lies in the fact that, unlike the statute being considered to this point which applies to deposits in banks and trust companies, Michigan statutes governing joint "shares" in savings and loan associations[36] and joint "accounts" and "shares" in credit unions[37] rely exclusively on the "joint tenancy" phrase to express survivorship rights. There are virtually no decisions interpreting these provisions. Hopefully, however, some approach will be found that will make the incidents of joint and survivor accounts in banks applicable also to these very similar arrangements with savings and loan and credit union organizations. One method, which would be in the tradition of making progress by tangling concepts, would be to indulge in the idea that all of the incidents of the joint and survivor bank deposit lump together to form a concept that exists under a statute mentioning joint tenants. Therefore, other "joint tenancies" in similar assets should have like incidents.

IV. The Products of Confusion

Enough has been said to demonstrate that the joint and survivor account concept in Michigan is a curious bundle of ideas that seem to have no very satisfactory common source except their usefulness in permitting the courts in particular settings to make Michigan's badly drafted codes work to the convenience of property owners. The many contradictions involved and the problems that may arise as the differences are perceived between the statutes applicable to accounts in various kinds of financial institutions tend to make the situation unstable. Hence, it is desirable to appraise the several features of the arrangement so that some basis may be established for predicting how lawmakers should react to correct the inadequacies. The effort is warranted also by the desirability of telling a complete story about the Michigan joint and survivor account as it exists today.

36. Mich. Comp. Laws § 489.7 (1948).
37. Mich. Comp. Laws § 490.24 (1948).

A. *Strength of the Survivorship Presumption*

Whatever else may be said about the joint and survivor account in Michigan, the pattern of results in survivorship cases indicates that the court has made it an exceptionally flexible and increasingly reliable device for effectuating testamentary intentions. The question of greatest concern at the moment relates to the security of the transaction; that is, how strong is the presumption that the donor intended the survivor to take at the donor's death?

The survivorship case abstracts in the appendix are presented with the thought that they demonstrate, better than does generalization, that trial and appellate tribunals have sought to ascertain and effectuate the decedent's probable wishes. If generalization is attempted, it needs to be prefaced by observing that appeal of a survivorship controversy, which is most commonly a non-jury matter, puts the supreme court in a position where it can reconsider the evidence.

Indications at the moment are that the court is slow to disagree with a conclusion of fact of a lower court as to whether the presumption in favor of the survivor has been rebutted. However, lower courts have been held in error when they accepted as a sufficient rebuttal to the donee's claim evidence suggesting that no *present* gift was intended.[38] One decision was later expressly overruled, apparently because it suggested that parol evidence should not be available to upset the survivor's rights except in cases of undue influence or fraud.[39] Trial courts that seem to have missed points of trust law also have been reversed.[40]

The opinions reflect the view that people who use joint and survivorship accounts usually intend the survivorship benefits they express. When such an account is intact at the donor depositor's death, the estate of the donor, if unable to show fraud, undue influence, or lack of capacity, will probably not prevail if all it can show is that a reason other than to confer benefits at death attended the opening of the account. Probably it must *also* be shown that it would have been capricious or highly unusual for the decedent to have wanted the death benefits to go to the survivor in light of the

38. Turbide v. Forest, 358 Mich. 435, 100 N.W.2d 239 (1960); Maahs v. Maahs, 307 Mich. 549, 12 N.W.2d 335 (1943).

39. Frank v. Schultz, 295 Mich. 714, 295 N.W. 374 (1940), which was overruled in Allstaedt v. Ochs, 302 Mich. 232, 4 N.W.2d 530 (1942).

40. Thompson v. Stehle, 367 Mich. 284, 116 N.W.2d 900 (1962); Turbide v. Forest, 358 Mich. 435, 100 N.W.2d 239 (1960).

decedent's circumstances, the pattern of his family relationships, and the terms of his other testamentary directions.

This trend seems desirable in the main. The bank deposit statute has been interpreted to require that express words of survivorship appear on the account form.[41] Most joint accounts are executed by both depositors, a fact that helps assure against over-casualness. Banks have been advised by their counsel not to accept joint accounts without survivorship rights, because of the likelihood of misunderstanding that is involved.[42] Bank counsel evidently believe that the usual purpose of a joint account between persons in a nonbusiness arrangement embraces the purpose of providing for the survivor. Hence, on the surface it would seem that an account provision for survivorship is a reasonably reliable indicator that survivorship was intended. There are problems relating to the form of joint accounts, however, that generate doubts about whether depositors always know what form they are getting. These will be discussed later. It will suffice here to say that, if the lawmakers eliminate the problems of form, the joint and survivor account should become an even more reliable indication of intent to give the benefits to the survivor than it is at present. As this occurs, the strength of the statutory presumption should increase.

B. *Freedom From Statute of Wills Requirements*

There seems to be every reason to approve of the immunity of the joint and survivor account from the expense and delay of probate administration. The account permits a decedent to assure quick cash to those who will be affected by his death. True, if one thinks in terms of a deadbeat or a family-hater, the device works to reduce the protection available to creditors, widows, and dependents. However, few will argue that survivorship benefits should be available only through probate administration in *all* cases just to ensure that the anti-social plans of a few eccentrics will be thwarted. In this connection, it may be desirable to enact legislation that will give a donor's estate a right to compel a donee to contribute to the payment of debts and expenses. In such event, an order of abatement would need to be established, and there is little reason for abating survivorship benefits before the probate estate is exhausted. Widows and dependents also should have the benefit of a provision making the amount of survivorship benefits

41. See discussion in text accompanying note 84 *infra*.
42. 2 PATON'S DIGEST 1686 (1942).

relevant to a determination of their share. But these matters should be dealt with directly by legislation.

In addition to evolving concepts that provide survivorship benefits without probate and without immediate loss of ownership, the court had occasion in a recent case to consider an important extension to what may validly be done through this type of account. In a written document to which the depository bank was not a party, a donee agreed with the donor that the accounts in question would remain "available to the first party for his needs and use" and that the balances would "vest in the second party upon the death of the first party." The agreement also provided that, after the donor's death, the proceeds would be divided among the donee and five other named persons, subject to reasonable expenses for services and handling. The arrangement was held testamentary by the trial court, which ordered the deposits paid to the donor's estate. The supreme court reversed, reasoning that the understanding that the donor was to remain owner until his death did not rebut the statutory presumption.[43] Presumably, the title of the survivor was subject to an enforceable trust in favor of the other named beneficiaries, but the case does not expressly so hold for the only question presented was whether the survivor was entitled to the deposit as against the decedent's estate.

An implication of the court's refusal to hold the arrangement subject to the statute of wills is that probate court supervision is avoided with respect to the affairs of some persons who are entrusted by an owner to distribute his property after his death.[44] Arguably, the attractiveness of this possibility may lead to widespread use of such trusts of survivor's rights. Accordingly, some may argue that the decision is unwise. They will say that it will lead to informal, even oral, wills and thus will undercut the policy of the statute of wills to secure a relatively high degree of certainty concerning rights to the assets of decedents. Some may say it will lead to an increase in the amount of property passing outside normal probate administration and to a consequent increase in the danger to creditors and others who are to be protected against testamentary dispositions.

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43. Turbide v. Forest, 358 Mich. 435, 100 N.W.2d 239 (1960).

44. Compare the Texas institution of the "independent executor." A general description of this device appears in "Efficient Administration of Estates," *ABA Section of Real Property, Probate and Trust Law, Proceedings, 1963, Part I, Probate and Trust Law Revisions*, p. 9. See also Woodward, *Independent Administrations Under the New Texas Probate Code*, 34 TEXAS L. REV. 687 (1956).

The answer to the second line of argument is the same as that suggested earlier. Any possible increase in the volume of assets passing outside probate that may follow when the flexibility and apparent advantages of bank deposit survivor's trust are perceived should hasten consideration of legislation that would make the trustee's title, as well as that of the beneficiaries, subordinate to the legitimate interests of persons protected from a decedent's testamentary power by special policy considerations.

The answer to the argument that informal testamentary dispositions breed uncertainty and contention contrary to the policy of the statute of wills is somewhat more obscure. Once we concede that bank deposits may belong to someone other than the named survivor and that the identity of the real owners may be found in informal agreements between the decedent and survivor that may have accompanied or followed the opening of the account, we seem to have opened the door for controversies that will be easy to generate and difficult to resolve. They will not be without parallel, however, for informal trusts of life insurance benefits certainly have left their trails in the reports of litigation, as have a variety of contracts concerning dispositions after death.[45]

Perhaps the most satisfactory approach to the problem is to assume that, in most serious attempts to create trusts of survivorship rights, the common sense of owners and their counsel will tend to ensure reasonably reliable writings evidencing the understandings. Laymen will not commonly rely on the spoken word to control matters after their death, and there will be an understandable reluctance on the part of the courts to accept stories to the contrary. In any event, to the extent believable stories of misplaced trust occur, it seems preferable to have theories that allow intentions to be carried out rather than to be limited to the alternatives of an unimpeachable right in either the surviving depositor or in the decedent's estate.

Moreover, it is unlikely that trusts of survivorship rights will be attempted very frequently. Uninformed persons are not likely to think that orally expressed agreements are effective. Persons who use written agreements of trust probably will have been exposed to competent advice. Few will persist in using the device when the questions attending it are considered. For example: does a trust of survivorship benefits in a joint account terminate if the

45. See, *e.g.*, Jackman v. Equitable Life Assur. Soc'y of the United States, 145 F.2d 945 (3d Cir. 1944); Carter v. Carter, 321 Pa. 391, 184 Atl. 78 (1936).

trustee dies before the donor? If the trust is considered to arise at the moment of deposit and agreement, the idea that a trust will not fail for want of a trustee may lead to the argument that the account should be considered impressed with a trust unless and until the donor withdraws or changes the form of the account after the trustee's death. Is the beneficial interest of the ultimate takers subject to inheritance tax? To what extent will such an arrangement be upheld against the claims of widows and other protected persons? Can a donor depositor prefer one creditor or a group of creditors by a trust of the sort described?

Overshadowing these types of questions, however, will be a fear of the novelty of the arrangement. One supreme court decision denying that such an arrangement is testamentary seems a flimsy basis for estate planning. It seems safe to say that there will be no rush of owners to use the device since much safer alternatives will usually be available.

Other consequences worth noting follow from the fact that survivorship rights are not governed by the statute of wills.[46] For example, the statute of wills complicates the solution of a problem that occurs when a testator exacts a promise from a legatee to the effect that the legatee will pay or apply some or all of what he inherits to the benefit of a third person. Most authority provides a remedy for the intended beneficiary by treating the legatee's failure to perform his promise as fraud warranting constructive trust relief.[47] As has been seen, an understanding between a decedent and a person who succeeds to the decedent's bank balances as surviving co-depositor that calls for division of the proceeds with

46. One such advantage is that a joint account apparently provides a device by which a minor may make a disposition at death. The hedging is due to the language of MICH. COMP. LAWS § 487.701 (1948) dealing with minors' deposits, which provides: "When any deposit of money shall be made in any bank or trust company by or in the name of any minor, the same *shall be held for the exclusive right and benefit of such minor,* and shall be paid . . . to the person in whose name the deposit shall have been made . . . ." (Emphasis added.) It might be argued that a minor may deposit only in a form that is for his "exclusive right and benefit" and so cannot make an effective joint and survivor account by his deposit. The argument is countered somewhat by the language directing payment to the person "in whose name the deposit shall have been made," which becomes superfluous if the account may be held only for the minor. It seems probable that the purpose of the "exclusive right and benefit" provision was to emphasize the character of the minor's rights to accounts in his name and to protect banks in paying accordingly rather than to prevent minors from making dispositions via deposits.

47. See cases cited in 1 SCOTT, TRUSTS § 55 (2d ed. 1956). The question is in some doubt in Michigan in view of Haack v. Burmeister, 289 Mich. 418, 286 N.W. 666 (1939). See also Townsend v. Gordon, 308 Mich. 438, 14 N.W.2d 57 (1944) (dictum).

others does not demonstrate that the transaction is testamentary.[48] Since the creation of the right in the survivor is not governed by the statute of wills, conversations or agreements between the parties may well be sufficient to contradict the form of the transaction or to create a trust. Hence, it should be unnecessary to approach the problem as one involving fraud.

Similarly, a will containing an outright bequest in favor of a legatee would be unaffected by an unattested expression of the testator that the bequest was to be held for another. No constructive trust would be imposed on the bequest unless the decedent's intention were communicated to the legatee and not rejected. The same kind of proof relating to a survivor's benefit in a joint account, although arguably objectionable as hearsay,[49] should be admissible and effective to create a trust whether or not the survivor knew of the donor's purpose; but the donee should, of course, have an opportunity to refuse to serve as trustee.[50]

Suppose, after a testator's death, an unattested note is found indicating that an outright bequest in his will is to be divided in accordance with instructions that cannot be found. The legatee would keep his bequest. A surviving co-depositor might be deprived of benefit, however, if a court were persuaded that no benefit was intended for him, even though no intended trust can be proved.

A related problem is suggested by another recent Michigan decision.[51] If a testator makes an outright bequest to a legatee solely because of an understanding that the benefits involved will be paid to another, what happens when the intention to benefit the third person is withdrawn or satisfied but the will remains unchanged at death? Regardless of whether the jurisdiction enforces the so-called secret trust, it would seem that the legatee would take. The doctrine of satisfaction surely would not be extended so as to make direct payment to the intended beneficiary adeem the outright gift to another who is described in the will.[52] Plainly, the will has not been revoked or amended. While it may be constructive fraud for the legatee to keep the legacy when he knew that the decedent's wish was for him to turn it over to another, it is not

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48. Turbide v. Forest, 358 Mich. 435, 100 N.W.2d 239 (1960).

49. See discussion in text following note 59 *infra*.

50. 1 SCOTT, TRUSTS § 102 (2d ed. 1956).

51. Thompson v. Stehle, 367 Mich. 284, 116 N.W.2d 900 (1962).

52. If there is a close relationship between the named legatee and the donee, however, ademption by satisfaction may occur. 57 AM. JUR. *Wills* § 1099 (1948); Annot., 26 A.L.R.2d 1 (1952).

fraudulent for him to take, as the will says he should, when it is quite unclear what the testator wanted to happen to the legacy.

If the facts are changed so that the understanding relates to a co-depositor's right to collect a bank deposit in the event he survives the donor, the result may change. Now an inter vivos transfer to a trustee for purposes that have failed is involved. The standard solution of returning the property to the donor by means of a resulting trust seems preferable to indulging in guesswork concerning what the donor meant when he left the transaction intact after its purpose had been abandoned.[53]

In all the cases supposed, it has been assumed that the donor's intention that the donee be an intermediary to a transfer to others existed when the account was opened. Preventing unintended benefit in these situations may be less troublesome than it is in cases where, at the time the account was opened, the donor intended to benefit the donee at the former's death but later changed his intention without changing the form of the account or giving written notice to the bank before his death. This situation is discussed later in connection with other matters that appear to be approached from the assumption that the donee gains valuable rights during the donor's lifetime.

Inapplicability of the statute of wills to survivorship benefits permits escape from intention frustration that is sometimes caused by the rules of ademption. When a testator who has executed a will making specific gifts becomes incompetent, disposition by the guardian of the items bequeathed may result in a failure of the

53. Five of the eight supreme court justices agreed with this view in dealing with a closely related problem litigated in Thompson v. Stehle, 367 Mich. 284, 116 N.W.2d 900 (1962). The joint and survivor account in question was between decedent and a former tenant of his farm who admitted that, when the account was established with a deposit of nineteen hundred dollars in 1958, she and decedent had agreed that the balance remaining after the payment of decedent's debts should go to St. James Roman Catholic Church of Bay City. Eight months later, decedent sold his farm and deposited nineteen thousand dollars in the account. Thereafter, decedent executed a will leaving the residue of his estate to the same church. At the same time, he withdrew ten thousand dollars from the joint account and opened an account in his name alone in another bank. At his death, about ten thousand dollars remained in the joint account. The court held that the decedent's estate was entitled to the balance. Three justices dissented, arguing that the majority's reversal of the lower court, which had ruled in favor of the surviving depositor, gave too little weight to the inference concerning decedent's intention that they were willing to draw from his maintenance of the joint or survivor account until the time of his death.

Certainly, any guess as to what decedent wanted under the circumstances is extremely hazardous. It is obvious that either he did not understand the relationship between joint accounts and wills at all or that he understood it very well but guessed wrong about the enforceability of his oral understanding with the survivor. The solution selected by the majority tends to minimize the necessity for guesswork.

testator's testamentary scheme.[54] What happens when a guardian for an incompetent donor depositor withdraws and re-deposits in a guardian's account? Is the testamentary intent implicit in the form of account frustrated? The Michigan Supreme Court has developed an approach that seems well designed to accommodate the situation. Viewing the establishment of the joint account as a transfer that leaves the owner with a power of revocation, the court tied its holding to authority that denies that guardians succeed automatically to discretionary titles of their wards. Thus, it was able to view the change of form of the bank deposit asset by the guardian as unauthorized when not justified by court order or by clear necessity. It followed that the donee, who ultimately survived the donor, was entitled to traceable proceeds of the withdrawal that had not been properly expended.[55]

The same result might have been reached by viewing the joint bank account as a will sufficient in formality because of the bank deposit statute. The rule of ademption that has caused some courts to disregard the involuntary character of dispositions of the sort discussed seems attributable to a judicial assumption that concern for intention in involuntary disposition cases leads to concern for intention in all cases of inter vivos dispositions. This, in turn, runs afoul of the wills statute formulae for revocation and the effort to limit proof of intention to means approved by statute.[56] But if the statute is not applied, as is the case when a joint account is involved, much of the reason for a blind spot here disappears.

C. *Inter Vivos Incidents*

The incidents of Michigan's survivorship account that have been discussed so far are attributable to judicial willingness to enforce testamentary intention unaided by, and consequently unencumbered by, the statute of wills. Apart from *calling* the transaction nontestamentary, which may be just another way of saying that the ordinary statute of wills is inapplicable, should other inter vivos incidents be retained?

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54. *In re* Ireland's Estate, 257 N.Y. 155, 177 N.E. 405 (1931). This view is said to be the minority position. *In re* Bierstedt's Estate, 254 Iowa 772, 119 N.W.2d 234 (1963), contains an extensive review of the authorities. See also Annot., 51 A.L.R.2d 770 (1957). Michigan statutes provide limited protection for a devisee against a sale of devised lands by a guardian of the testator. MICH. COMP. LAWS § 709.36 (1948). However, no Michigan case dealing with the personal property problem has been found.

55. First Fed. Sav. & Loan Ass'n v. Savallisch, 364 Mich. 168, 110 N.W.2d 724 (1961).

56. See Mechem, *Specific Legacies of Unspecific Things—Ashburner v. MacGuire Reconsidered*, 87 U. PA. L. REV. 546 (1939).

1. *The Banker-Depositor Relationship*

As far as the banker-depositor relationship is concerned, the account contract is and must continue to be the statement of present rights and duties. The survivorship account doctrine has developed around the assumption that the ability of the bank to pay in accordance with the terms of the contract can be separated from the question of whether such payments give the withdrawing party a right against his co-depositor that he did not have previously. The bank deposit statute makes this distinction explicit in cases that are within its orbit. If banks were required to assume the risk of determining the exact terms of the relationships between co-depositors, few such arrangements would be permitted.

2. *The Co-depositor Relationship*

Obviously, the position of each co-depositor is affected by the fact that the bank will be protected if it pays according to the terms of the contract. Each is vulnerable to the possibility that his claim will be transformed, without his approval, from one against the bank to a possible right of action against the party making withdrawals. Apart from this, however, the cases involving controversies between living depositors suggest that, as far as determination of the ultimate rights of the parties is concerned, the appearance of co-ownership generated by the account has no more meaning than the possession of a chattel by a non-owner.

This proposition is demonstrated most satisfactorily by the disregard for concept in controversies between depositors. The cases have made it appear that, no matter what the statute may suggest, ways and means will be found to protect a donor in the beneficial ownership of his deposits during his lifetime.[57]

It is demonstrated also by the results in another kind of litigation that may arise if a depository permits a co-depositor without a passbook to make withdrawals even though the terms of the account require that the passbook be presented for withdrawals. In *La Valley v. Pere Marquette Employee's Credit Union*,[58] the donor, who discovered that his deposit credits had been reduced by unauthorized withdrawals of the donee made while the donor retained the passbook, prevailed in an action for breach of contract against the depository. In view of the fact that the action was against

57. See text at notes 23-34 *supra*.
58. 342 Mich. 639, 70 N.W.2d 798 (1955).

the bank, the court might have started with the assumption that each co-depositor had beneficial rights in his power to withdraw. Thus, each would appear to be entitled to withdraw, with the effect of either shifting the joint tenancy to the proceeds or severing the relationship and imposing on the party making the withdrawal an obligation to account for one-half or to disprove joint tenancy. The added provision that the passbook must be presented in order to make any withdrawal, as in the case of a single depositor, would appear to be designed to protect the bank by aiding it in identifying the depositors. It would follow that the bank might waive the condition and that its doing so would not be an occasion for complaint by either depositor. Significantly, the court assumed that the provision requiring presentation of the passbook was for the benefit of the co-depositors rather than the bank. Consequently, waiver by one was ineffective as to the other. Thus, the opinion implements the layman's assumption that the retention of the passbook protects a depositor against unwanted withdrawals by his co-depositor. It also illustrates, in a context free of the confusing distinction between an ambulatory transaction and a revocable transfer, that the Michigan survivorship account is presumed not to involve any alteration of the donor's beneficial rights, in spite of the label that indicates a joint tenancy has been formed.

3. *The Rights of Creditors*

Surely the results in cases involving creditors' claims should be consistent with the substance of the transaction rather than with its form. The present rule allows creditors to reach what they can show their debtor to have contributed to the account or one-half in the absence of such proof. It tends to work against creditors, for normally only the co-depositors will be able to offer satisfactory proof of the amount of each party's contribution. When the debtor is a donor who furnished substantially all of the present balance, the co-depositors cannot be expected to help the creditor increase his take. If the donee's creditors attach the account, present indications are that the donor will be allowed to prove the source of the deposit and defeat the attachment provided he learns about the matter before judgment.[59] The court might well offset this inequity

59. In Czajkowski v. Lount, 333 Mich. 156, 52 N.W.2d 642 (1952), a donee's creditor obtained judgment for one-half of the amount on deposit at the time of service of process on the garnishee defendant. No notice of suit had been given to the donor. The court held that the creditor could proceed in reliance on the form of ownership

by establishing a presumption that the debtor depositor furnished the entire balance. This would put the burden of proving contributions on the other depositor, who is much more able to bring forward such evidence.

4. *Taxes*

Except for sums deposited less than two years before death, the transfer of benefits via a joint and survivor account has been held to be outside the taxable transfers identified by Michigan's inheritance tax provisions.[60] The court has accepted the argument that, when the account is established, the donee receives a beneficial right to control equal to that of the donor. The donee's right to the entire benefit at the donor's death is viewed as an incident of a pre-existing joint tenancy and of the old idea that each joint tenant owns all as well as a moiety.

The realities of the situation are certainly at odds with these premises. The donee clearly does not enjoy the benefits of a present right to withdraw. Surely neither he nor the donor are treated as joint tenants for any purpose other than survivorship. A careful reading of the court's language indicates that it was influenced by the desirability of sustaining well-established practice. The result upheld a 1920 attorney general's opinion that had relied on precedents from New York, whose similar joint tenancy and inheritance tax statutes had been copied in Michigan.[61] Hence, it can be seen as meaning that settled inheritance tax procedures should remain unchanged despite increasing indications that the basic transaction is somewhat different from that which may have been the original model. There is little reason to criticize this view. The state does not depend importantly on the inheritance tax for its revenue. If the situation is to be changed, the Legislature should either eliminate the joint tenancy language from the bank deposit legislation or change the inheritance tax statute.

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expressed by the account and that no notice of the suit needed to be given to the co-depositor of the debtor. The case does not hold that the donor would be precluded from offering proof that he was the sole contributor to the account or from withdrawing or ending the donee's interest by written notice, provided he acted before judgment was entered. It is likely that banks as well as debtor-depositors give notice to non-debtor depositors when joint accounts are attached. If he gets such informal notice before judgment a donor co-depositor has little reason to worry about the claims of the donee's creditors.

60. *In re* Renz' Estate, 338 Mich. 347, 61 N.W.2d 148 (1955).

61. REPORT OF ATTORNEY GENERAL, 1921-22, at 72.

5. *Revocation and Rebuttal*

Can a donor revoke a joint account transfer other than by withdrawing all funds or causing the donee's name to be removed from the account? Some doubt has been generated in cases involving donor withdrawals by suggestions to the effect that these actions are effective revocations because they are permitted by the terms of the account.[62] This may imply that other modes of revocation not sanctioned by the statute are ineffective. As noted earlier, viewing the terms of the account as the source of the donor's ability to control the account is unsatisfactory, for the terms give the donee a like power. Moreover, such a reading makes the statute self-contradicting.

If the donor's ability to revoke arises by implication, there is still room for doubt with respect to whether any act but withdrawal will be effective to exercise the power. In contests between a donor's estate and a surviving donee, the court has excluded evidence of declarations of a donor made after the account has been opened and out of the presence of the donee.[63] The reason that has been assigned is that such declarations are hearsay and self-serving.

To date, the efficacy of such statements as possible exercises of an implied power of revocation has not been discussed. Nonetheless, the same reasoning has been employed to exclude the terms of a donor's later-executed will. Hence, facts that could have been seen as involving a change of mind or revocation have been dealt with in the same manner as facts offered to rebut the statutory presumption. Surely similar considerations of fairness and policy are involved when a survivor's right to balances in an account at the donor's death is attacked on the basis of statements or acts of the donor made or done after the account was opened and out of the donee's presence. For this reason, revocation and rebuttal by acts other than withdrawal or notice to the bank will be discussed together.

It might be argued that post-account declarations tending to show the donor's purpose in opening a joint account should be irrelevant. This argument would be tenable if the initial transaction establishing the joint account were considered to be a clear ex-

62. See Rasey v. Currey's Estate, 265 Mich. 597, 251 N.W. 784 (1933), described in text at note 26 *supra*.

63. Pence v. Wessels, 320 Mich. 195, 30 N.W.2d 834 (1948); Mitts v. Williams, 319 Mich. 417, 29 N.W.2d 841 (1947); Hazen v. Elmendorf, 365 Mich. 624, 113 N.W.2d 892 (1962) (dictum).

pression of the donor's purpose. But many cases permitting rebuttal of the statutory presumption demonstrate that it is not. Moreover, if the joint account transaction is impliedly revocable, evidence suggesting a change of mind is definitely relevant.

By qualifying the exclusion so that it relates only to declarations made out of the donee's presence, the court perhaps has suggested an assumption that the donee has some expectations that deserve protection. On the other hand, the assumption may be that declarations by the donor out of the donee's presence to the effect that he did not intend or no longer intends the benefits to pass to the donee at his death are never sufficiently reliable to be given legal effect. Neither assumption appears to be fully warranted.

As to the first, the cases demonstrate that substantively the donee has no more protection in a joint bank account during the lifetime of the donor than he would have if the transaction were classified as a special, informal specific bequest of account balances remaining at death. He cannot prevent the donor's withdrawal.[64] He seems to be penalized if he withdraws before the donor's death and without his knowledge.[65] He is better off than a legatee of specific property if the donor becomes incompetent, but his position in this situation also would seem to follow if we considered him a legatee under an effective informal will.[66] His creditors have a technical advantage in seeking to reach his "interest" before the donor's death that creditors of a legatee of a living testator would not have; but the advantage seems so illusory that it may be disregarded.[67] The inheritance tax advantage he enjoys is attributable to historic accident rather than to a reflection of substantive ownership.[68]

The donee usually will have learned of the account before the donor's death. Ordinarily, he will have signed a signature card, although it does not appear that notice or signature is a prerequisite to his ability to claim under the Michigan statute. If one argues from the basis of the typical case, it may be urged that the donee does gain expectations that deserve consideration. But that argument proves too much. A legatee's position is technically the same whether or not he knows of the testator's will. If it is argued that joint and survivor bank accounts are distinguishable because there is mutual assent between donor and donee to the effect that

64. See text accompanying note 23 *supra*.
65. See text accompanying note 33 *supra*.
66. See text accompanying note 55 *supra*.
67. See note 59 *supra*.
68. See text accompanying notes 60-61 *supra*.

the donee will be entitled to balances at death unless the donor withdraws or gives notice to the bank, it must also be accepted that this assent is the reason or consideration for the arrangement. It is appropriate to protect the donee's interest only if he establishes this. But it seems doubtful that this is usually the case.

As to the reliability of a donor's post-account statements that suggest that he never intended the donee to receive any benefit from the account, no safe general rule can be formulated. Ordinarily, the donor might be expected to advise the donee of his purpose in establishing the account when he obtains the donee's usual signature. The form of account suggests that benefit for the donee is intended, and the donor perhaps should be taken as intending as much if he says nothing at the time. Still, there are silly people and secretive people, and they, together with others in odd circumstances, may leave trails that persuade a court that, although they did not say as much to the other party to the transaction, they did not intend the apparent death benefit for him. Since most cases involving these matters will be non-jury affairs, it seems preferable to leave the question of the relevance of such declarations to the discretion of the court.

The reliability of informal declarations of revocatory intent is more troublesome, and a variety of considerations need to be taken into account. First, Michigan law makes it clear that the usual ways of ending the relationship created by a joint account, such as by withdrawal or by giving notice to the bank not to pay the donee as indicated by the account, are effective. Thus, instances of irregular revocation will be uncommon. Second, the joint account is an arrangement with implications of immediate importance to the bank and to the donor. Monthly statements or regular reports of interest earnings provide occasions when the form of the arrangement usually will be brought to the attention of the donor. The arrangement is unlike a will, which alters no rights when executed and may well be put away and forgotten in many instances.

It should be perceived that a revocation, like acts sufficient to make a gift or a will, should be required to be demonstrated by definite acts. The lines between unaccomplished donative purpose and donative intent would become quite indistinct if the rules were otherwise. Hence, requiring a donor to change the account or to give written notice to the bank makes some sense. Moreover, the ritual helps offset what appears to be a tendency of people to use declarations of what they mean to do with their property as in-

ducements for attention from children and acquaintances. The cases contain examples of donor statements that probably should be ignored, just as "puffing" of sellers is ignored.[69]

These considerations tend to rule out any but written statements of revocatory intent, for it will seldom occur that a donor will believe that his spoken word can affect the written arrangement with the bank and co-depositor. However, a donor may attempt a gift of an account by turning over possession of a passbook to a person other than the donee. The importance of the passbook to enjoyment of accounts that require that the book be presented for withdrawals is great enough to make delivery of a passbook strong evidence of donative intent. So long as the bank is protected there seems to be no controlling reason for denying effect to such a transfer.[70]

Written revocations unaccompanied by delivery of a passbook will be directed to the bank in the usual case and will be effective, not technically as revocations, but as a way of eliminating the effect of the statute.[71] Undelivered statements of revocation probably are not conceived to be final and should be disregarded. No reason is apparent for disregarding provisions of a duly executed last will of a deceased donor that are inconsistent with the terms of the account, however, so long as the bank will be protected in making payments according to the terms of the account.

Thus, there is some reason to criticize the idea that all donor post-account declarations contradicting the stated survivorship provision are inadmissible hearsay unless made in the presence of the donee. But the court's position may not be as uncompromising as the cases to date have made it appear. Only one case has refused to consider the terms of a donor's will that was executed after the account was established. The will in that case, although described in the opinion as "specifically inconsistent" with the survivor's rights stated in the account, was capable of being read as compatible with survivorship.[72] Other cases in which the rule has been applied have

69. Examples may be found in Mitts v. Williams, 319 Mich. 417, 29 N.W.2d 841 (1947), and Pence v. Wessels, 320 Mich. 195, 30 N.W.2d 834 (1948). For a case of an elderly gentleman who seemed to use his bank account designations to induce others to give him free housing, see Jakobowski v. Bacalia, 314 Mich. 678, 23 N.W.2d 125 (1946).

70. Delivery of possession of a savings passbook was held to override the terms of the account in Union Trust & Sav. Bank v. Tyler, 161 Mich. 561, 126 N.W. 713 (1910), and Ruch v. First Nat'l Bank, 326 Mich. 52, 39 N.W.2d 240 (1949).

71. See text accompanying note 29 *supra*.

72. Betker v. Ide, 335 Mich. 291, 55 N.W.2d 835 (1952). This case involved an

involved a variety of essentially unreliable declarations none of which met the requirements for clearly relevant evidence of the donor's intent at the inception or for a definite statement clearly marking intent to revoke.[73] Finally, comments in the most recent case discussing the rule indicate that a later will of a donor may evidence his assumption that he had property that he could control by will. So viewed, the evidence was admitted to aid a donor's estate in recovering sums withdrawn by the donee before the will was executed.[74]

"*A* or *B*" account that was held not to be in proper form for survivorship rights. Hence, at *A*'s death, the amount he contributed was held to be a part of his estate. *A*'s will, executed after the account was opened, made reference to the account by the name of the bank but left little but a puzzle regarding whether it was an attempt at an inconsistent disposition. It provided "while at the present time, I have an account at the Almont Savings Bank (the account in suit) and one at the Commonwealth Bank . . . together with insurance policies and a balance due me on the sale of the business . . . and a recent loan . . . I realize that there may be no monies left, but if there is then it is my will the $500 be given to the American Lutheran Church. Also $200 to Minnie Betker, and $200 to Beatrice Betker (the claimant of the bank deposit) and $200 to Vincent Cosentino." Record on Appeal, p. 24, Supreme Court Records and Briefs, 335 Mich. 287-324, Case No. 45615. The point is worth noting for, although the holding that the will should be excluded was explicit and attributed to Pence v. Wessels, 320 Mich. 195, 30 N.W.2d 834 (1948), the result may be seen to give effect to decedent's testamentary expression, depending on what the excluded will is read to mean.

Other cases have involved wills that appear to mention joint and survivor accounts in order to guard against the possibility that the account will be held ineffective to create survivorship rights. See Kuykendall v. Kuykendall, 370 Mich. 220, 121 N.W.2d 455 (1963); Turbide v. Forest, 358 Mich. 435, 100 N.W.2d 239 (1960). Admission of a will that "supports" a joint and survivor account as an intended disposition in favor of the survivor is permitted because it is not self-serving.

In Allstaedt v. Ochs, 302 Mich. 232, 4 N.W.2d 530 (1942), the court relied on the provisions of decedent's 1937 will together with other circumstances attending the opening of the account in 1934 to support the conclusion that the statutory presumption was rebutted. It is to be noted that the rule excluding post-account declarations was not clearly articulated by the court until 1947.

73. Pence v. Wessels, 320 Mich. 195, 30 N.W.2d 834 (1948); Mitts v. Williams, 319 Mich. 417, 29 N.W.2d 841 (1947).

74. In Hazen v. Elmendorf, 365 Mich. 624, 113 N.W.2d 892 (1962), a post-deposit will was admitted by the lower court. The supreme court opinion, which affirmed the judgment below, develops at least three theories that tend to counter the rule precluding admission of post-deposit declarations. They are (1) If, as in the case before the court, the donee withdrew before the donor's death, the donor's will, showing an assumption that the donor had an estate to dispose of, may be admitted to show that the donor trusted the donee with possession of funds still considered by the donor to belong to her. The court indicates approval of declarations tending to show the depositor's state of mind at the time of deposit and at the time of the donee's withdrawal. (2) A will is not objectionable as hearsay. While the testimony of the attorney who prepared the will may be objectionable as hearsay, the will itself is not, and it may be admitted if it tends to show an assumption that the account belonged to the decedent. (Query!) (3) In an equity proceeding, the decree of the lower court, if not shown to have been the result of improperly received evidence, may be affirmed if other evidence sustains it.

Should revocation ever be implied from a marked change of circumstances such as divorce between the parties to a joint account?[75] Even though revocation otherwise than by withdrawal should be approved, there is little to recommend recognition of revocation by implication. There is reason to conclude that the form of joint accounts is less likely to be forgotten than the provisions of a will. Nor does it seem reasonable to assume that the typical donor who is involved in a marital split-up after opening an account in joint form with his or her spouse will not have been forced to think about the form of the account in connection with the divorce. Moreover, donors should and probably do realize that the bank is a party to the account and that notice to the bank is appropriate when there is some change of assumption concerning survivorship rights.

V. A Trust Rationale for Judicial Reform

If the court will be a bit more forthright in its concessions that the joint and survivor account typically is not intended to be for the benefit of the donee until the donor's death, we may see the development of an analysis that will accommodate the desirable features of the joint and survivor account and still leave it with some reasonable claim to the joint tenancy label. If so, a means of handling variances among the several statutes dealing with different savings arrangements may be perceived.

Could we not say that the typical donor (a joint tenant according to the statute) intends to make the donee (also a joint tenant) a trustee of his power to withdraw from the account? The trust would be for the benefit of the donor during his lifetime and, subject to the possibility of revocation or consumption by the donor, for the benefit of the donee upon the donor's death.

Under this theory, the donor would not be trustee of his interest as joint tenant, for commonly he does not intend to be a trustee.[76]

75. Michigan authority recognizes that a will may be revoked by divorce and property settlement occurring after execution. The question as it relates to a joint and survivor account has not yet been before the Michigan Supreme Court. A case considering the problem is Thorp v. Besozzi, 144 N.E.2d 430 (Ind. Ct. App. 1957).

76. The analysis proposed is to be contrasted with the so-called Totten Trust, where the donor opens an account in his name as trustee for a named beneficiary. See Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904); Restatement (Second), Trusts § 58 (1959). Michigan statutes protect a bank that honors the demand of the beneficiary of such a trust for payment of balances on deposit at the death of the trustee, but there is little case law concerned with the arrangement. For example, it does not appear to have been decided whether the statute has any bearing on the question

His withdrawal of the entire account, amounting to a retaking of sole possession of the wealth represented by the account, would revoke the trust and relieve the trustee of any further responsibility.[77] The donee, even if he exercised his right of withdrawal during the donor's lifetime, could not affect the donor's right in equity to compel the application of the proceeds of the trustee's title to the donor's benefit. If the donor died prior to revocation of the trust, his interest would cease and the donee's equitable right to the balance in the account would become present beneficial ownership.[78]

The Michigan cases contain glimmers of recognition of this idea. In one case involving a separate written agreement requiring the donor to recognize that the bank account balances were to be available to the donor depositor for his needs and use if he desired at any time prior to his death, the court relied on California and New York cases that used trust terminology as support for its conclusion that the agreement did not make the arrangement testamentary.[79]

Another case used the trust concept to explain how the donee could have present power to withdraw from a joint account but still not be entitled beneficially to the proceeds of the account.[80] This case is most useful because it applied the trust rationale even though there was no proof of a special understanding between donor and donee. The conclusion rested largely on a finding that the donor did not intend to confer benefits on the donee by the establishment of the account. If it were found or assumed that the donor intended no present benefit, but only intended the donee to have the benefits of his title at the donor's death, the case would suggest that he would be a trustee of his position until such event and beneficial owner thereafter.

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of whether an inter vivos trust arises in such a case or whether the beneficiary has rights as against the trustee's estate by virtue of the statute if the trustee's intention was to make a transfer at death. See MICH. COMP. LAWS § 487.702 (1948).

77. Of course, if there were evidence that the donor did not mean to terminate the rights of the donee in the sums withdrawn by the donor, effect could be given to such intention. Commonly, however, the donor will assume that sums he withdraws from the account are withdrawn from any arrangement involving the donee. Hence, his withdrawal evidences revocation and should be effective as such, even though the donee's withdrawal is quite a different matter. It should be recalled that Michigan cases speak of the donor's withdrawal as a revocation and hence may be said to have reflected the trust concept without speaking of it.

78. There is no doubt but that a person may be trustee for the benefit of himself and another. *In re* Peck Estate, 320 Mich. 692, 32 N.W.2d 14 (1948); 1 SCOTT, TRUSTS § 993 (2d ed. 1956).

79. Turbide v. Forest, 358 Mich. 435, 100 N.W.2d 239 (1960).

80. Hazen v. Elmendorf, 365 Mich. 624, 113 N.W.2d 892 (1962).

More to the point, the assumption that the donor did not intend immediate benefits for the donee seems to be implicit in the results of the several kinds of cases involving joint accounts. Only the case dealing with inheritance tax is out of line, and here the present rule seems attributable to history.

That the donee has "title" to the bank's promise to pay either party can hardly be denied, for the promise is made to him in his name. The assumption of donor's intention to retain benefits seems wholly justified, since the form of account that states the contrary is not due to the choice of parties in a free-bargain setting. Rather, it is due partly to the early assumption that survivorship interests under a bank deposit contract could not stand alone but had to be coupled with a present interest[81] and partly to inept legislative reaction. If a gift is intended, why does the donor remain as co-depositor? The idea that a gift of a co-equal power of withdrawal is intended may have been an ingenious way of effectuating a testamentary transfer without the aid of a will, but it is ridiculous to imagine that parties want a peculiar arrangement that makes the first to withdraw the owner of all.[82] Title without intended benefit spells out trust or agency, and the cases implicitly accept the trust classification because a designation appended to an agency arrangement that a transfer is to occur at the principal's death is ineffective.[83]

In short, the cases support the idea that a joint and survivor bank deposit, whether regulated by the statute governing deposits in bank and trust companies or by statutes talking only in terms of joint tenancies, establishes, as a matter of "legal title," a joint tenancy in the historic sense. The cases indicate, however, that beneficial ownership of the funds in the account is a quite different matter controlled, not by the form of the account, but by what experience indicates to be the intention commonly associated with the use of the device.

Under the trust analysis, we would continue to presume that survivorship benefits were intended; also, the presumed intention would continue to be subject to rebuttal. Informal or irregular revocations might be found to be effective alterations of the provision for the benefit of the survivor at the trustor's death. Creditors

81. See Union Trust & Sav. Bank v. Tyler, 161 Mich. 561, 126 N.W. 713 (1910).

82. This is a reference to Negaunee Nat'l Bank v. Le Beau, 195 Mich. 502, 161 N.W. 974 (1917).

83. An agent's authority ends with the principal's death, and an agency to transfer at the principal's death is ineffective. Fischer v. Gorman, 65 S.D. 453, 274 N.W. 866 (1937); 2 C.J.S. *Agency* § 86 (1936) and cases therein cited.

of the donor should be able to reach the entire deposit during his lifetime, and creditors of the donee should be able to get no more than a lien on his interest as a survivor and on any sums he has contributed. The inheritance tax consequences should remain as they are now until a statutory change occurs.

If the trustee violates the trust by withdrawing money for his use during the donor's lifetime but the donor dies without learning of the matter, the trust rationale may lead to results different from those that follow if the joint and survivor account is seen as an informal will. As a will, the account is effective only as to sums on deposit when the donor dies, and sums previously taken from the account by the donee remain the donor's property, passing with his general estate for want of any effective legal device for transferring title to them to the donee.

If the donee's present interest in the account is seen to be held in an inter vivos trust for the benefit of the donor for life and then for the benefit of the donee, the donor's estate would be entitled only to interest until the donor's death on the sums taken. This result would be consistent with the donor's last indicated intent. If the donor learned of the breach of trust but did nothing about it before his death, it would be proper to inquire as to what he meant. Perhaps he approved. If he disapproved, but did not have time to attend to the matter, it could be handled as a revocation and full recovery by the estate allowed.

VI. Legislative Reform

A. *The Need*

There are problems associated with the joint and survivor account which probably lie beyond the resources of the courts to remedy. Legislation is necessary to correct these, and legislation would be most desirable as a means of providing a statutory backdrop which more adequately reflects what the courts are doing with the problems of bank account transfers.

Express Survivorship Provisions. A variety of problems have been generated by the Michigan Supreme Court's insistence that the provision for survivorship be express in cases involving accounts in commercial banks and trust companies.[84] Literally, the statutory

84. The position was established in Wayne County Sav. Bank v. Smith, 194 Mich. 151, 160 N.W. 472 (1916). It has been reaffirmed many times. Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W.2d 140 (1963); Betker v. Ide, 335 Mich. 291, 55

phrase "payable to either or the survivor" suggests alternatives. If so read, however, the statute would apply to an account payable to one person until his death and then to another as survivor. This would be at odds with the joint tenancy idea which the statute also expresses. In any event, the Michigan conclusion that the account must be expressly payable to either *and* payable to the survivor has support in the case law of other states having similar legislation.[85]

Michigan decisions have applied this requirement of an express survivorship provision with a vengeance, influenced perhaps by the absence of any common-law device for implying survivorship between two co-owners of personal property as well as by a probable desire for certainty. For example, one case[86] involved a donor who had a joint *and survivor* account in proper form with one *X*. From his deathbed, the donor wrote the bank directing that *X*'s name be removed from the account and *Y*'s name substituted. The bank received the directions but did nothing more about the matter prior to the donor's death. *X* was denied any benefit in the account because the donor's letter was seen to be an effective notice in writing that ended *X*'s ability to rely on the statute.[87] *Y* also lost, even though a previous decision had held that a depositor's directions concerning changes in his account should not be allowed to fail merely because of failure of the bank to carry them out.[88] The assigned reason was that the donor's letter did not make specific mention of survivorship benefits. Another case refused to give effect to survivorship rights even though the country banker involved testified that for fifteen years his bank had made checking accounts payable simply to "*A* or *B*" when survivorship benefits were desired.[89]

Although a Michigan statute enacted after the joint bank deposit statute directs that "evidences of indebtedness" payable simply to

N.W.2d 835 (1952); Peoples State Bank v. Allstaedt, 301 Mich. 662, 4 N.W.2d 48 (1942); McMahon v. Holland, 260 Mich. 246, 244 N.W. 462 (1932).

It is to be noticed that this view applies only to the statute dealing with "deposits" in any "bank or trust company." Cases involving savings and loan accounts are governed by a different statute and thus are not in point. See, *e.g.*, Roach v. Plank, 300 Mich. 43, 1 N.W.2d 446 (1942).

85. Kepner notes that courts in states having statutes like Michigan's have consistently held that the provision for survivorship must be express. Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596, 623, citing cases from Missouri, New York, and Washington.

86. Peoples State Bank v. Allstaedt, 301 Mich. 662, 4 N.W.2d 48 (1942).

87. See text accompanying note 30 *supra*.

88. Equitable & Cent. Trust Co. v. Zdziebko, 260 Mich. 366, 244 N.W. 505 (1932).

89. Leib v. Genesee Merchants Bank & Trust Co., 371 Mich. 89, 123 N.W.2d 140 (1963).

two persons who are husband and wife shall be held in joint tenancy,[90] another case held that a bank deposit payable to a husband or wife is not held in joint tenancy.[91] The joint bank account statute was held not to apply because there was no mention of survivorship in the form of account. The "evidence of indebtedness" statute was also held inapplicable because it did not specifically mention bank deposits. The result is that Michigan husbands and wives who share the typical household checking account are more or less at the mercy of their banks insofar as survivorship benefits are concerned. Without a passbook being drawn to their attention whenever they make deposits or withdrawals, they are likely not to know whether the magic words "payable to either or the survivor" are stamped or printed on the record of the account. If the words are not there, the survivor will be entitled only to what he can show to have resulted from his contribution or to have been deposited by the other with the intent to make a present gift.[92] This is nonsense, and it should be changed.

Convenience Accounts—Poor Man's Trust. But for the implications of a very recent case, the supreme court's rigid insistence upon express words of survivorship as a prerequisite to the applicability of the statute could have a salutary effect for persons who would use co-depositor arrangements for a variety of purposes. This introduces a somewhat complicated story, which can best be told by first providing some perspective.

It is apparent to one reading many joint deposit cases that owners need a form of account that enables another to gain access to their funds in the event of the owner's illness or incapacity but does not deprive the owner's estate of the right to funds unused at death. The survivorship cases described in the appendix holding that a "convenience" account was intended illustrate the pressure. Other cases holding for the survivor leave room for doubt concerning whether the decedent really wanted to create survivorship bene-

90. MICH. COMP. LAWS § 557.151 (1948), originally enacted in 1927.

91. Betker v. Ide, 335 Mich. 291, 55 N.W.2d 835 (1952).

92. McMahon v. Holland, 260 Mich. 246, 244 N.W. 462 (1932). The court permitted the wife's estate to keep the entire amount that had been withdrawn by the decedent from her joint account with her husband. The record failed to establish who had been responsible for deposits that created the account. The decision rested on the contract provision permitting either to withdraw all. As the court saw it, the account would be equally divided if the question were raised before either made disputed withdrawals. The opinion suggests that a different result would have followed if the account had created a joint tenancy under the statute. Query.

fits or whether the provision creating them was inserted rather incidentally into an account created primarily for convenience.[93]

General need for a simple device for giving a non-owner power to withdraw an owner's funds can be seen also in the shortcomings and complexities of alternative devices. A power of attorney to withdraw funds that stand in the sole name of an owner may not be readily available to persons unwilling to incur a lawyer's fee, nor is such an instrument technically effective in the event of known incapacity.[94] A revocable inter vivos trust with funds presently standing in the name of a trustee goes too far, because what is needed is an arrangement that leaves the owner in control until some occasion for enlisting the help of another arises, at which time control may be passed to the other without a new transaction.

Few will argue that persons should be compelled to suffer the indignity, expense, and over-elaborateness of a general guardianship when no property must be sold and a trusted friend or relative is willing to administer an owner's bank deposit without a charge. Moreover, experienced counselors will attest to the unsatisfactory character of the guardianship mechanism as a means of handling the affairs of the senile. The difficulty lies not in obtaining the appointment of a guardian, but in finding someone who will make the necessary petition, for the odds that lucidity will return are excellent in many cases and few relatives want to incur the wrath of a prospective decedent who may have his own views about the motives of the "scoundrel" who had him declared incompetent.

In theory, a savings or a checking account payable to "*A* or *B*," which does not imply beneficial rights for the survivor, should provide an ideal solution. *A*, the originating depositor, would notify *B* of the arrangement when the account is opened. If it is a savings account, it would be understood that *B* is to get the passbook if *A* becomes incapacitated so that *B* might withdraw money and use it for *A*. *A*, having possession of the passbook and being secured by the common-law rejection of the form of the account as evidence of any beneficial right in *B* against *A*, would be amply protected in his ownership and control of the account for the time being.[95] If

93. Jacques v. Jacques, 352 Mich. 127, 89 N.W.2d 451 (1958), and Maahs v. Maahs, 307 Mich. 549, 12 N.W.2d 335 (1943) are examples. They are discussed in the appendix.

94. 2 C.J.S. *Agency* § 88 (1936).

95. The risk would be somewhat greater if a checking account were used, for *A* would probably not learn of improper checks written by *B* until after the bank had paid the checks. On the other hand, the convenience of a joint checking account is much greater for it obviates any problem that may be encountered in getting possession of the passbook. With a joint savings account, possession of the passbook must be

A becomes incompetent, *B* could make withdrawals in his own name under the deposit contract. *B*'s exercise of the power to withdraw would not make him beneficial owner of the sums obtained from the bank, however, because *A* lacked donative intent and the co-depositor statute is inapplicable to this form of deposit. *B* would be a trustee of his rights under the deposit contract for *A*, and this seems to be exactly what *A* wanted. *A* and his estate would be protected in equity against any attempts by *B* to keep withdrawals for himself. The exact terms of the trust during *A*'s incompetency might not be desirably definite, but the implied content would usually serve the desired purposes, since *B* would at least have the ability to make withdrawals and expenditures of amounts necessary for *A*'s care and comfort.

The bank would be as much protected in paying *B* in accordance with the terms of the deposit contract as it would be in paying sums it owed to any trustee.[96] And, whether or not it has notice of *A*'s incompetency or death, it should be protected in paying *B* unless and until it has reasonable cause to believe that *B* means to use funds withdrawn for purposes other than the payment of expenses incurred in caring for *A*.[97]

Just as the joint and survivor form of account provides a form of "poor man's will," the joint account without provision for survivorship might offer a more sorely needed "poor man's trust."

The problem, however, lies in the fact that in *Leib v. Genesee Merchants Bank*,[98] decided about a year ago, the Michigan Supreme Court held a bank that made payment from an "*A* or *B*" account

obtained in view of the decision in La Valley v. Pere Marquette Employees' Credit Union, 342 Mich. 639, 70 N.W.2d 798 (1955), for, unless indemnity is provided, few banks will pay without presentation of a passbook called for by the contract.

96. Although Michigan has not adopted the UNIFORM FIDUCIARIES ACT, it is likely that the tests stated in § 7 of the act would be deemed to reflect the common law. The provision exonerates a bank from liability to a beneficiary when the bank pays on the order of a fiduciary in whose name the account is carried, "unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith." 9B U.L.A. 22. See Columbia Land Co. v. Empson, 305 Mich. 220, 9 N.W.2d 452 (1943).

97. Opinions of the General Counsel of the American Bankers Association reveal ambivalence at this point. They recognize the difference between questions concerning banker liability for payment according to the terms of the deposit contract and questions concerning beneficial rights between co-depositors. 2 PATON'S DIGEST 1689 (1942). Elsewhere, they imply that payments made after the death of one co-depositor in an account not covered by a bank protection statute are protected only if the bank was ignorant of the fact of death. 2 PATON'S DIGEST 1692.93 (1942). The ambivalence appears to be due to an effort to point out areas in which litigation may be likely as well as to set forth rules of law.

98. 371 Mich. 89, 123 N.W.2d 140 (1963).

liable to *A*'s estate for sums paid to *B* after *A*'s death. The case is extraordinarily badly reasoned. Judging from what appears in the opinion, the court saw no possibility of separating the issue of banker liability for payment in accordance with the terms of the account from the question of beneficial rights between the decedent's estate and the survivor. The lower court, which had protected the bank, was reversed with the observation that its holding "in legal effect [meant] that every joint account carries with it the right of survivorship."[99] The cases relied upon as authority are the cases previously alluded to which establish that express provision for survivorship is necessary in order to bring the deposit contract within the terms of the co-depositor statute.[100]

It may be conceded that the co-depositor statute applies only when there is an express mention of survivorship rights. But it does not follow that the bank should be liable for payment according to the terms of the deposit contract when it has no special cause to believe that the recipient of the funds intends to violate a trust that attends his right to withdraw.[101] No previous Michigan case has so held,[102] and authority outside Michigan in support of the result in *Leib* is almost nonexistent.[103] Affirmative authority sup-

99. *Id.* at 92, 123 N.W.2d at 142.

100. The opinion cites Betker v. Ide, 335 Mich. 291, 55 N.W.2d 835 (1952), and Peoples State Bank v. Allstaedt, 301 Mich. 662, 4 N.W.2d 48 (1942).

101. Liability in *Leib* might have been rested on the fact that the bank paid to one whom it should have known was a trustee with knowledge of facts that gave it reasonable cause to believe that the money was going to be applied to the trustee's own use. This argument might have been used in view of the fact that *B*, after *A*'s death, went to the bank and asked if he might close out the account. The bank knew of *A*'s death, but nonetheless permitted the withdrawal.

The weak point in this argument would be the question of whether the bank knew, or should have known, that *B*'s interest was that of a trustee. That the form of account did not raise a presumption of gift to *B* does not mean that the bank must assume no gift has occurred. In addition, in the *Leib* case *B* and *A* had drawn checks on the account prior to *A*'s death, and the bank might well have assumed that *B* had received an interest in the account by gift as evidenced by his use of the account during *A*'s lifetime. See text accompanying note 12 *supra*.

102. The closest case seems to be Davis v. Lenawee County Sav. Bank, 53 Mich. 163 (1884), described in the text accompanying notes 8-9 *supra*. Banks were parties in some earlier "*A* or *B*" cases, but only as stakeholders. See case cited in note 92 *supra*.

103. Only two cases have been found that would support *Leib*. In Second Nat'l Bank v. Wrightson, 63 Md. 81 (1884), the bank was held liable for paying a donee after notice of the death of the donor. The point being discussed did not receive much attention, however, for the bank conceded prima facie liability by seeking reformation of the deposit contract to a form that would have enabled the survivor to keep the funds. The decision relied on an earlier Maryland case that had not involved banker liability. Smith v. Planter's Sav. Bank, 124 S.C. 100, 117 S.E. 312 (1922) is a better reasoned holding on the point. The report includes an excellent dissent. In Hawkins v. Thackston, 224 S.C. 445, 79 S.E.2d 714 (1954), the South Carolina court was urged

porting the trial court's view is also hard to find,[104] but this is understandable since bankers apparently have been careful in the main to limit their offerings to accounts in which their protection is made clear by statute.[105] Surely the court can claim little support from the fact that the Michigan bank protection statute did not cover the case. Banker-endorsed legislation is usually enacted to clarify and approve special banking practices. It certainly is not often intended to change existing law with respect to practices outside the scope of the enactment. Therefore, *Leib* should be rejected simply because it ignores the principle of contract law that a party who performs in accordance with the terms of the agreement violates no duty to other parties.

Apart from its assault on sound legal analysis, the vice of *Leib* is what it portends for the "*A* or *B*" account. Some may say that the case is of concern only to a bank that pays under such a deposit contract after it learns of the death of one of the parties and that it leaves untouched the essential utility of an "*A* or *B*" account as a poor man's living trust. After all, they may argue, the court in *Leib* was concerned that previous holdings requiring express language of survivorship would be compromised by any other result than the one reached. Hence, they may say, if the right of a survivor is not in the picture, the case is inapplicable.

But this argument presents a dilemma in legal theory. When the transaction is not known by the bank to involve a breach of trust by *B*, the only reason it could be liable for paying *B* after *A*'s death is that *B* is considered not a trustee, but an agent, whose authority ends with *A*'s death.[106] The agency arises, one would be

to follow the *Smith* case but declined to do so. It observed that *Smith* had been decided without reference to "the tripartite nature of the contract."

104. Sawyer v. National Shawmut Bank, 306 Mass. 313, 28 N.E.2d 455 (1940) and Landretto v. First Trust & Sav. Bank, 333 Ill. 442, 164 N.E. 836 (1928), are close, even though neither involves payment after the death of an owner depositor. Both conclude that the banker is protected by the terms of the contract irrespective of the rights between the parties, and neither relies on bank protection statutes. Cases like Estate of Williams, 313 Ill. App. 230, 39 N.W.2d 695 (1942), which contain statements separating the issue of banker liability from that of the rights between depositors are also useful, although arguably they are only reflective of the impact of a statute which, while protecting banks, only creates a prima facie entitlement for co-depositors. See also, Note, 9 CORNELL L.Q. 48 (1923).

105. "Recommendation: Banks should carefully examine the Deposits in Two Names Statute of their own state, and should make certain that the forms which they use are such as to make the statute applicable." Opinions of General Counsel, American Bankers Association, 2 PATON'S DIGEST 1691 (1942).

106. There appears to be no sound reason for assuming that agency rather than trust principles govern. The line between trust and agency is readily perceived when

led to believe, from the absence of any gift to *B*. Now the dilemma is apparent. If there is no gift in the opening of an "*A* or *B*" account, the beneficial ownership of the credit must remain where it was before the deposit. The other co-depositor has no interest in the funds other than that of an agent. Consequently, a bank that paid sums from the account to such agent after having reason to know of his principal's incompetence would be as liable to the principal and his estate as in the case of payment to the agent after the principal's death. Thus, *Leib* cannot easily be limited to survivorship problems. Banks are not safe in allowing such accounts unless the donee is viewed as a trustee of his power over the account.

If Michigan banks cease to offer "*A* or *B*" accounts as a result of the *Leib* decision, a worrisome impact on the stability of the joint and survivor transaction may result. The suspicion that a particular donor wanted a trust entirely for his benefit, but used the form that suggests intention to benefit the survivor because it was the only form available, will become well-founded in an increasing number of cases. *Leib* must be rejected as much to protect the "poor man's will" as to permit a "poor man's trust."

The rejection should come from the Legislature, since bankers cannot afford to continue to offer the "*A* or *B*" account on the gamble that the supreme court will reconsider the matter if the

no title to property is vested in the fiduciary, but the matter becomes more troublesome when the so-called agent-trustee is involved. See RESTATEMENT (SECOND), TRUSTS § 8, comment *h* (1959); RESTATEMENT (SECOND), AGENCY §§ 14(b), 423 (1958). According to these authorities, an agent with title is an agent-trustee governed, in the main, by the principles of agency. However, it is far from clear when one who has title will be classified as an agent-trustee rather than an independent trustee. At one time, Professor Scott suggested that the matter should turn on the degree of control retained by the principal over the fiduciary. His later writings and the position of the RESTATEMENT (SECOND), TRUSTS (1959), suggest a shift from the control test to one that depends on several considerations. These include the degree of formality attending the passage of title to the fiduciary, whether the transaction is called a trust or an agency, and whether any public policy is threatened by shifting a given transaction from the agency to the trust category. See 1 SCOTT, TRUSTS § 57.2 (2d ed. 1956), RESTATEMENT (SECOND), TRUSTS § 57 (1959).

In the setting of the problem being discussed, it is to be noted that the fiduciary's title is created by a three-party written contract which, though executed on bank forms, certainly involves formalities that are more obvious than those involved in other transfers such as where bearer paper is handed to one who is to have no benefit in the asset. The transaction is not labelled trust or agency. The direct consequence of classifying the non-donee as agent, rather than trustee, is to subject the banker to a surprising liability that makes him assume the risk of determining whether a gift has occurred between the co-depositors and denies him the protection of the terms of the agreement to which he was a party.

Calling the co-depositor who is not a donee a trustee, rather than an agent, does not circumvent the statute of wills because, in the absence of other designation, the benefit of the co-depositor's title is still lodged in the originating depositor and his estate.

Hence, the policy arguments seem to be entirely in favor of the trust classification.

opportunity is presented. All that is needed is a statute that makes it clear that a banker is protected in paying according to the terms of an "*A* or *B*" deposit contract and that stipulates that it does not affect the question of title as between the parties. Traditional law will do the rest of the job.

Unification of the Law Governing Other Savings Institutions. A remaining problem that the Legislature must remedy lies in the fact previously noticed that different statutes apparently prescribing different forms for survivorship accounts apply to (1) deposits in "any bank or trust company,"[107] (2) building and loan or savings and loan association "shares,"[108] and (3) credit union "shares" and "deposits."[109] Deposits or investments in other forms of organization presumably are governed by Michigan's odd common law respecting survivorship estates in personal property[110] unless the statute dealing with certain categories of intangibles owned by husband and wife is applicable.[111]

Unlike the statute relating to bank deposits, which has been the primary focus of discussion, the statute relating to building and loan and savings and loan "shares" provides:

> "Except as hereinafter provided, shares issued . . . to a husband and wife, or to any two or more persons, shall become the property of such persons as joint tenants, and . . . shall be held for the exclusive use of the persons so named and may be paid to either or the survivor or survivors after the death of any of them. . . . When so requested, shares may be issued by any association to a husband and wife, or to any two or more persons as tenants in common."[112]

This statute appears to prescribe a rule of property law rather than a presumption. Moreover, it seems to say that a share account payable to "*A and B*," as well as one payable to "*A or B*," is a joint tenancy unless a tenancy in common has been requested and identified.[113] Only one case has been found that involved an account

107. See MICH. COMP. LAWS § 487.703 (1948).
108. See MICH. COMP. LAWS § 489.7 (1948).
109. See MICH. COMP. LAWS § 490.24 (1948).
110. See note 4 *supra*.
111. See text accompanying notes 90-92 *supra*.
112. MICH. COMP. LAWS § 489.7 (1948).
113. An account in the name of "*A* and *B*" surely seems to be within the language "issued . . . to any two . . . persons." However, the statute then goes on to say that the accounts that it makes joint tenancies may be "paid to either." The latter provision seems to be concerned with bank protection. But, by analogy to the common law of co-tenancies in land, if the "*A* and *B*" account is a joint tenancy, either co-tenant might have a right to collect the entire account, for this could be said to be equivalent to his common-law right to possess the entire subject of the co-tenancy provided he

within this section. It suggested, but did not rest upon, the idea that a right of survivorship exists between co-depositors in a savings and loan association, irrespective of the use of words of survivorship.[114] The statute relating to credit union accounts is even less helpful, for it says only that "shares may be issued and deposits received in joint tenancy with right of survivorship."[115] While this does not appear to stipulate a form of account, it might be so read, in which case the words "joint tenancy" and "with right of survivorship" would need to appear. Alternatively, analogies could be taken to the bank deposit statute, to the savings and loan statute, or to the common law,[116] each of which has different import as far as language requirements for survivorship are concerned.

Confusion is a major result of these various approaches defining the creation of a right of survivorship among co-depositors. It is probable that each kind of organization will use forms that are reasonably safe, as far as they are concerned, to accomplish what is intended. But how are depositors to be kept from applying the advice received at one establishment to the technically dissimilar, but to the layman indistinguishable, arrangement at another? Until the statutes are altered to express common patterns, there will be room to doubt whether a depositor in one or the other forms of organization knew what rights and relationships he was creating by establishing his account.

B. *Recommendations for Legislation*

The foregoing discussion demonstrates the need for a thorough revision of the various statutes dealing with two-party deposits and

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does not "oust" his co-tenant. Hence, there is no necessary inconsistency between the account payable to "*A* and *B*" and the statutory suggestion that it is a joint tenancy and may be paid to either. However, bank practice and common sense indicate that an account payable to "*A* and *B*" requires two signatures. 2 PATON'S DIGEST 1693 (1942). Reading the statute in the light of this practice, one could conclude that the accounts that become joint tenancies are those payable to two persons in a form permitting payment to either. This leads to the next question, however, which is whether it must also be stated to be payable to the survivor in order to describe a joint tenancy, or whether it is sufficient if the parties are called "joint tenants." See note 4 *supra*.

114. Roach v. Plank, 300 Mich. 43, 1 N.W.2d 446 (1942). The account had been closed by the donee's withdrawal prior to the donor's death.

115. MICH. COMP. LAWS § 490.24 (1948).

116. Reference to the common law might prove particularly difficult, for it is not at all clear that the joint estate with survivorship, which Michigan cases permit in personal property, is a true joint tenancy. A joint tenancy is severable, and Michigan real property precedents suggest that an estate created with express provision for survivorship prevents either party from affecting the other's contingent interest as survivor. Ballard v. Wilson, 364 Mich. 479, 110 N.W.2d 751 (1961); Ames v. Cheyne, 290 Mich. 215, 287 N.W. 439 (1939). See cases cited in note 4 *supra*.

similar arrangements in financial institutions. Without attempting to draft appropriate provisions, I would urge that the following points be covered:

1. *Legislation should approve "pay on death" accounts.* The farce of insisting that a "present interest" must pass in order to support valid survivor's rights should be eliminated. Michigan cases provide ample proof that people want, should have, and are getting simple devices for effectuating quick transfers of funds from a decedent to a survivor. Some may contend that legislative sanction of accounts "payable to *A* and upon his death to *B*" would be undesirable, either because persons would use such forms inadvisedly or because permitting direct payment to named survivors would undercut the interest of widows, other dependents, and creditors, all of whom derive protection from the probate process. The first contention is answered by the fact that the effect of the decisions under the present joint and survivor account statute is to permit Michigan depositors to make testamentary transfers by bank account forms. It will not be possible to make a very persuasive case that the transaction is likely to be used carelessly or without proper understanding if some of the vexatious complexities of the present system are eliminated. Indeed, changing the form of the account so that it more nearly suggests its substance should serve to prevent ill-advised use. As for persons who deserve special protection from testamentary transfers, the answer should be that well-drafted legislation concerning bank deposit wills would provide that persons protected against an owner's testamentary power are similarly protected against an owner's power to pass bank balances at death to persons named in deposit contracts. This could be implemented by requiring banks paying death benefits under such agreements to provide information to executors or administrators about such payments, by increasing the estate by the amount of such deposits for purposes of spouses' election and protection of dependents, and by giving decedents' fiduciaries a right to compel contribution as needed in order to provide sums required for widows, dependents, and creditors.[117]

117. The more troublesome question in this area is what other sorts of transfers effective at death should be treated as part of the probate estate for purposes of protecting widows, other dependents, and creditors. Should life insurance benefits be treated similarly? How about survivor's benefits under pension or profit sharing agreements? How about revocable living trusts? However, reformation of the statutes dealing with demand deposits in financial institutions should not await the threshing out of larger questions involving better settled institutions.

2. *There should be a common set of forms for all savings.* The only apparent reason for the variant provisions presently applicable to accounts in banks, savings and loan associations, and credit unions is that the legislation was drafted at different times and by different people. It is difficult to imagine a more persuasive example to point up the need for a well-staffed legislative drafting and revision service.

3. *A "poor man's living trust" account should be sanctioned.* A joint account without presumed entitlement for the survivor should be provided with a provision protecting financial institutions in paying according to the form of account except where notice has been given to the contrary or in cases of bad faith.

4. *A combination of "trust and will" should be provided.* A joint and survivor account form should be sanctioned that features apparent present ownership by two or more depositors plus survivorship benefits. The statute should state a presumption that such an account, when established by the sole contributions of one depositor, represents a trust in the non-contributor of his right to withdraw for the life benefit of the donor, who is also entitled to withdraw and revoke. The statute also should state a presumption that the survivor is entitled to balances remaining on deposit at death subject to abatement and contribution. The purpose of the statute would be to sanction accounts that combine the purposes of the "*A* or *B*" accounts and the "pay on death" accounts, for frequently an owner will want one person to be both trustee during the owner's life and beneficiary of balances at death.

There seems to be no reason for presuming that a joint account created by the deposit of one person is intended to be a present gift to another. If a gift is intended, there is no reason for the joint account form. If a revocable gift or a gift subject to retained control is desired, an improved version of the existing deposit-by-trustee statute should be utilized.

5. *A trust deposit form that allows revocable gifts should be provided.* Michigan has a statute dealing with trust deposits that appears to sanction the so-called Totten Trust; but it leaves many questions unanswered.[118] A statute that makes a deposit in the name of *A* as trustee for *B* prima facie evidence of *B*'s beneficial

118. The Michigan statute dealing with trust deposits is MICH. COMP. LAWS § 487.702 (1948). The trust deposit statute appears to deal with bank protection only. If it is read to create a presumption of beneficial entitlement, it is not clear whether the trust presumed is revocable or irrevocable.

entitlement to balances at *A*'s death in the event *B* survives *A* should be enacted. The statute should indicate that the deposit remains the property of the depositor until his death; it should also provide that the death benefit for the beneficiary is to be treated like other bank deposit transfers at death.

6. *Outright gifts via bank deposits should be sanctioned.* With the variety of suggested arrangements available, there would seem to be little reason for perpetuating the old idea that an account opened in the sole name of another does not thereby become the property of the person named. It is suggested that a presumption of ownership by persons to whom an account is made payable be stated. In any event, a statute should be enacted protecting bankers in paying according to the form of accounts, unless there is notice to the contrary or bad faith.

No recommendation in terms of "conclusive" presumptions is made. Experience teaches that the courts will permit evidence of fraud, undue influence, trust, and probably mistake no matter what the statute says. It seems preferable to work for stability by making certain that the available transactions meet the predictable needs of owners, thereby reducing the likelihood that one transaction will be used to accomplish the purpose of another.

If the legislative reforms suggested seem too revolutionary, a more modest minimum list of spot corrections for existing anomalies should be enacted. This list, in order of priority, should include the following:

> 1. An amendment to section 557.151,[119] dealing with intangibles owned by husband and wife, that would make bank and credit union deposits that are payable to husband and wife subject to the section. This would establish survivorship rights between spouses on such accounts, irrespective of whether survivorship benefits are mentioned.
>
> 2. An amendment to the several financial institution codes that would protect the institutions in making payment accord-

119. MICH. COMP. LAWS § 557.151 (1948). This suggestion was conceived before the decision in DeYoung v. Mesler, 373 Mich. 499, 130 N.W.2d 38, decided Sept. 2, 1964, which held that relationships within the purview of this section are tenancies by the entirety, unless the controlling language specifically negates this concept. Extending the tenancy by the entireties concept to joint accounts between husbands and wives would result in total immunity of joint deposits from the claims of the creditors of either of the spouses. In view of the difficulties attending creditors' efforts to reach debtors' interest in joint accounts under existing assumptions, total protection for the accounts of married persons against the claims of the creditors of either is not an alarming prospect.

ing to the terms of a joint account that is not in the form required to raise a presumption of entitlement for the survivor. The provision should state that it is for bank protection only and has nothing to do with beneficial interests as between codepositors or their representatives.

3. An amendment to the several financial institution codes that would establish a common form for joint and survivor deposits. The form that seems preferable is one that includes express reference to survivorship. The amendment should establish a statutory presumption in favor of survivorship benefits when the approved form is used.

VII. Conclusions

Without bothering to answer the many theoretical difficulties involved, the decisions of the Michigan Supreme Court have made the joint and survivor bank deposit a reasonably reliable vehicle for effectuating a purpose of transferring bank balances at an owner's death to another person without complying with the wills statute and without the expense and delay of probate. Imaginative use of the trust concept could provide a tool for judicial housecleaning in this area that would tend to eliminate anomalies and litigant confusion.

However, the lack of cohesive theoretical background may continue to cast doubts on the transaction. This will impair its usefulness. Moreover, incongruous variances in the forms of contract that are deemed sufficient to create survivorship rights in various forms of intangible personal property exist; they may serve both to confuse persons who seek to order their affairs and to weaken the inferences available from the form of accounts in other cases. Finally, a much needed arrangement that will enable an owner to make another a trustee of the owner's bank credits for the benefit of the owner should emerge if the unfortunate holding in *Leib v. Genesee Merchants Bank* is reversed.

These several considerations support the conclusion that legislative reform is sorely needed if this corner of the law, so important to little people and their affairs, is to be improved.

APPENDIX

The ten case abstracts presented here do not by any means represent all survivorship cases; but they do cover the more important decisions on the sufficiency of various evidential facts to rebut the statutory presumption. Survivorship cases not represented here fall into three categories: older decisions that contain little helpful discussion of anything except whether the statute had any effect on ownership problems; cases involving trusts of survivorship rights; and cases principally concerned with fraud or undue influence.

I. Contest over Balances on Deposit at Donor Depositor's Death

Meigs v. Thayer.[120] The decedent, a single lady whose estate ultimately was in the fifty thousand dollar range, in 1933 opened an account in statutory form. She died in 1937. The co-depositor, *P*, then released the balance of the account to the executor because she did not consider that she was entitled to the balance since she had made no contribution to it. The supreme court reversed the circuit court decree dismissing *P*'s bill to recover the money paid to the executor on the theory that it had been paid under mistake and entered a decree for *P*. The post-death action of *P*, though arguably reflective of an understanding of the depositors that no part of the balance was to become *P*'s, was disregarded. The court simply chose not to consider it as indicative of the relevant intention of the decedent.

Van't Hof v. Jemison.[121] Four months before her death, decedent, then eighty-nine, opened joint and survivor accounts by depositing 2,800 dollars of her total assets of about 9,300 dollars with defendant, a non-relative ex-neighbor who had assisted the decedent with her banking affairs on previous occasions and with whom decedent made her home for a few months prior to her death. Decedent was survived by a brother, a sister, and various nieces and nephews. Her will made pecuniary gifts of 3,250 dollars to various relatives and divided the rest of her estate between her brother and her sister. Decedent paid defendant for all assistance received, the boarding arrangement being at the agreed rate of one dollar per day. The defendant conceded that the account was to be used to pay decedent's funeral expenses. A lower court decree in favor of the decedent's estate was affirmed on the dual grounds that the evidence tended to show that decedent never intended defendant to keep the proceeds of the account and that the defendant, as a person in confidential relationship with decedent, had failed to meet a burden of proving absence of undue influence. *Meigs v. Thayer*[122] was distinguished as a case in which there was no showing that decedent did not want the survivor to have the balance at death.

Lau v. Lau.[123] The decedent, survived in 1938 by three sons and a daughter, had opened several joint accounts with a daughter-in-law, *D*, in whose home he had lived for twelve years and with whom he continued to live until his death seven years later. Though his will named *D* executrix and directed that the residue of the estate be divided equally among the children, the decedent thereafter conveyed his real estate to his children, reserving a life estate. There was evidence of admissions by *D* that the bank accounts had been considered the decedent's money during his lifetime. There was also evidence of possibly conflicting delarations by the decedent: (a) that the bank account money was to go to *D*; and (b) that his "property was to go to all of his children equally." The court refused to disturb a decree below dismissing the administrator's suit to recover from *D:* "Reasonably clear and persuasive proof, stronger than appears in this record, is required to overcome the statutory provision that deposits of the character here involved 'become the property of' the survivor of the joint depositors. Otherwise there would be no security or certainty as to the rights of such surviving depositors."[124]

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120. 289 Mich. 680, 287 N.W. 342 (1939).
121. 291 Mich. 385, 289 N.W. 186 (1939).
122. 289 Mich. 680, 287 N.W. 342 (1939).
123. 304 Mich. 218, 7 N.W.2d 278 (1943).
124. *Id.* at 224, 7 N.W.2d at 280.

Maahs v. Maahs.[125] The decedent, following a dispute with one of her two sons, had closed a joint and survivor account that named him as co-depositor and moved from his home to the home of her other son. She died several months thereafter. Two weeks before her death and while confined to her bed, she executed a signature card that established a joint and survivor account with the second son. A decree in favor of the decedent's executor against the survivor-donee was reversed by a divided court. The prevailing opinion concluded that there was no evidence "incident to the creation" of the challenged account "which in any way tends to overcome the statutory presumption." The court ignored testimony regarding a conversation between an attorney for the first son and the decedent that occurred sometime before the disputed joint account had been opened to the effect that the decedent and the claimant desired the account in joint form so that the son with whom the decedent then lived could handle his mother's money for her as his brother had done for years.

Mitts v. Williams.[126] The supreme court ruled that a joint and survivor account in favor of a daughter was ineffective to create survivorship rights. The trial court was reversed because the supreme court decided it had ignored competent testimony by a friend with whom decedent previously had shared a joint account. The friend testified that her joint account with the decedent had been a convenience arrangement and had been converted into the account in question because the friend was becoming old, had no car, and was less able to handle the banking than was the defendant. The decedent's will, executed while the account stood in the name of the decedent and the friend, mentioned the account as assets of the decedent. Testimony said to have been properly excluded suggested that decedent stated just prior to death that the bank account was to pass according to her will.

Pence v. Wessels.[127] A childless widower whose next of kin lived in Canada, having without success asked two Detroit acquaintances to help him handle his money during a contemplated trip to Florida, opened a joint account with a third acquaintance a few months before being killed in a traffic accident. His will, executed three years earlier, divided his estate among his relatives. The trial court concluded that the statutory presumption had been rebutted despite evidence of a declaration of the decedent made after the account was opened to the effect that he wanted the balance to go to the defendant co-depositor should anything happen to him. The supreme court ruled that the post-account declaration should have been excluded. The judgment below was affirmed because, on the basis of admissible evidence, the court was unwilling to term the trial court's judgment clearly wrong.

Mineau v. Boisclair.[128] This case was tried before a jury. The decedent, some weeks before her death, sold a small property and turned the check for about eleven hundred dollars over to a daughter, the defendant, with whom she lived. The daughter deposited eight hundred dollars in a joint and survivor account and gave the cash balance to her mother. Another daughter, as administrator, brought the action and testified that she had advised the decedent to establish the joint account for convenience since decedent had been physically unable to get to the bank. Defendant was allowed to testify that she was supposed to keep the balance. The court held that the jury verdict in favor of plaintiff should not be disturbed in view of the conflict in evidence.

Jacques v. Jacques.[129] The facts of this case bear a marked resemblance to those in *Lau v. Lau.*[130] The contest was between a daughter-in-law, survivor on a joint account opened by the decedent nine years before his death, and her brother-in-law who sought to compel an accounting. The lower court had held that the survivor was not liable to account on the theory that the evidence tending to show that the arrangement was intended as a convenience deposit of the decedent's money during his lifetime did not contradict the inference that the decedent intended the survivor to have

125. 307 Mich. 549, 12 N.W.2d 335 (1943).
126. 319 Mich. 417, 29 N.W.2d 841 (1947).
127. 320 Mich. 195, 30 N.W.2d 834 (1948).
128. 323 Mich. 64, 34 N.W.2d 556 (1948).
129. 352 Mich. 127, 89 N.W.2d 451 (1958).
130. 304 Mich. 218, 7 N.W.2d 278 (1943).

the balance. This reasoning was expressly approved by the supreme court, which concluded that the decree for the survivor should be affirmed.

II. DONEE WITHDRAWALS DURING DONOR'S LIFETIME CHALLENGED AFTER DONOR'S DEATH

Allstaedt v. Ochs.[131] The decedent's will, executed in 1937, divided his estate, described generally, equally among his three children. The decedent had established joint and survivor accounts in 1934 with the defendant, a daughter, who admitted agreeing with her father that she would make no withdrawals from the account without his consent. Nonetheless, six days after the donor underwent serious surgery and two months before his death, the defendant withdrew 21,500 dollars. Evidence in the record suggests that the decedent had learned of the withdrawals but at a time when his competency was questionable. There was also testimony by a bank teller to the effect that the decedent had established the account so that someone could handle his money if an emergency arose. The court, purporting to treat the case as if the account had been undisturbed at the donor's death, affirmed a decree in favor of the decedent's estate which, without the account in question, inventoried at about 23,000 dollars. It held that the decree was based on sufficient evidence to rebut the statutory presumption. The court acknowledged that the defendant was a favorite child who had done much for the decedent, but it was impressed also by the fact that the decedent treated his children equally in his recently executed will. The evidence suggesting that the account was for convenience was pointed to as sustaining the result.

Hazen v. Elmendorf.[132] Decedent moved into the home of defendant in the latter part of 1952, at which time she had two thousand dollars in a bank account in her own name and corporate stock worth about ten thousand dollars. In April 1953, a joint account between decedent and defendant was opened with eleven hundred dollars, which was the balance then remaining of decedent's sole bank account. In 1955, decedent sold her corporate stock, and the proceeds were deposited in the joint account from which 9,600 dollars was withdrawn by defendant within five months thereafter. In 1956, decedent made a will leaving one-half of her estate to defendant. The trial court's conclusion that the accounts had been established for the use of the decedent and that the defendant, having failed to account for sums withdrawn, was liable to repay all sums taken was affirmed. As the court saw it, decedent's will showed that in 1956 she thought she had an estate to bequeath and so tended to indicate that she continued to consider money deposited in the joint account as her own. The court was also impressed with the speed with which defendant emptied the joint account by withdrawals following deposits by decedent. The opinion does not reveal who the decedent's heirs were, nor whether the defendant was a relative. It makes no mention of any understanding between decedent and defendant concerning how the costs of decedent's care were to be borne.

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131. 302 Mich. 232, 4 N.W.2d 530 (1942).
132. 365 Mich. 624, 113 N.W.2d 892 (1962).