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GIFTS--BANKING--GIFT OF JOINT SAVINGS BANK DEPOSITS

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GIFTS—BANKING—GIFT OF JOINT SAVINGS BANK DEPOSITS—*A*, the mother of *B*, transferred three savings bank deposits from her sole account to the account of "*A* or *B*—either or survivor." Two of the depositors' signature cards contained this language: "We hereby certify that this account and all moneys to be credited to it belong to us as joint tenants, and will be the absolute property of the survivor of us." There was evidence that one of the reasons for *A*'s transferring her deposits to the joint account was to enable *B* to draw money therefrom for *A* while *A* was in the hospital. *A* retained sole possession of the bank books and, upon her death intestate, *B* claimed as owner the balance in the three joint accounts. *Held*, that the transfers of the accounts to *A* and *B*, jointly, did not constitute gifts to *B*, for there was no donative intent and there was no surrender of control over the bank accounts to *B*. *Rush v. Rush*, (N.J. Eq. 1946) 49 A. (2d) 238.

Where money belonging to *A* is deposited in a savings bank account to "*A* or *B*" or to "*A* or *B*, or survivor," what are the rights of claimant *B* to the balance of the account upon the death of *A*? Various jurisdictions have sustained or defeated *B*'s right to the account upon four theories: joint tenancy,[1] contract,[2] trust,[3] and gift. Statutes in many states, providing generally that if a bank account is made payable to either of several joint depositors or the survivor,

[1] A joint tenancy is found in the creation of the joint bank account, and *B* takes as survivor. The difficulty of establishing a technical joint tenancy where the account is in the name of "*A* or *B*" has not been discussed by most courts. Chippendale v. North Adams Sav. Bank, 222 Mass. 499, 111 N.E. 371 (1916); Berkowitz's Estate, 344 Pa. 481, 26 A. (2d) 296 (1942).

[2] The contractual relationship, as evidenced by the deposit form, or signature card, is sometimes construed as making *B* a third party beneficiary of the contract between *A* and the bank that the surviving co-depositor will be paid the deposit balance. In re Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935). Sometimes *B*'s right to the balance is based upon his standing as a promisee under the contract. New Jersey Title Guaranty & Trust Co. v. Archibald, 91 N.J. Eq. 82, 108 A. 434 (1919).

[3] In these cases *B* is usually considered as the beneficiary of a self-declaration of trust by settlor, *A*. Murphy v. Haynes, 197 Ky. 444, 247 S.W. 362 (1923); In re Kellogg, 41 Cal. App. (2d) 833, 107 P. (2d) 964 (1940).

payment to one will discharge the bank of all liability, have affected the interest of *B* according to the particular statutory terms and their construction by the courts.[4] When the contest over the account proceeds upon a gift theory, the courts almost uniformly measure the efficacy of the gift by the yardsticks of donative intent and actual or symbolic delivery.[5] If the donor intends the gift to take effect only upon his death, the courts have generally stricken down the transaction as an ineffective attempt to dispose of property in violation of the statutes of wills,[6] unless there is present the requisites of a valid gift causa mortis.[7] When a gift in praesenti is intended, the donor may desire to transfer a complete interest in the bank account to the donee, or he may intend a present gift of a partial interest in the account with the enjoyment of the balance postponed until the donor's death.[8] The donative intent may be found in the statements and acts of the parties and other attendant circumstances.[9] It is usually held that when only the fact of the deposit in the joint account appears, there is no valid gift, for the transaction may have been effected for the convenience of *A*,[10] or through *A*'s ignorance of the meaning of a joint account,[11] or to make a testamentary gift to *B* upon *A*'s death.[12] Some courts find a rebuttable presumption of a gift in the creation of a joint bank account when the co-depositors are husband and wife.[13] A donative intent is found by some courts, in the absence of contrary evidence, in the language of the certificate of deposit or signature

[4] The statute in the principal case provides in part: "When a deposit has been made . . . in any bank . . . in the names of two persons, payable to either or payable to either or to the survivor, the balance . . . may be paid to either of said persons during the life of both and in case of the death of either . . . the balance of the credit of said account shall be paid to the survivor, and the legal representatives of the one dying shall not have any claim or right thereto. . . ." N.J. Rev. Stat. (1937) § 17:9-5. The court interpreted this statute as affording protection to the bank in payment of moneys deposited, rather than determining the survivor's right to the balance in the account.

The Michigan statute is discussed in Manufacturers Nat. Bank v. Schirmer, 303 Mich. 598, 6 N.W. (2d) 908 (1942), where it is said that the statute creates a rebuttable presumption of ownership to the balance in the survivor. See generally 103 A.L.R. 1123 (1936) and 149 A.L.R. 879 at 893 (1944).

[5] 7 AM. JUR., Banks, § 427 (1937); 135 A.L.R. 993 (1941).

[6] In re Gokey's Estate, 140 Misc. 779, 252 N.Y.S. 434 (1931); Hudson v. Bradley, 176 Ark. 853, 4 S.W. (2d) 534 (1928).

[7] A valid gift causa mortis must have been made in contemplation of death from a present illness or some imminent peril. Thomas v. Houston, 181 N.C. 91, 106 S.E. 466 (1921).

[8] 25 MICH. L. REV. 791 (1927); 7 AM. JUR., Banks, § 430 (1937).

[9] That the intention to make a gift must concur with the transfer of the account to the co-depositors, see Hudson City Sav. Bank v. Havemeyer, 137 N.J. Eq. 145, 43 A. (2d) 834 (1945).

But see Kittridge v. Manning, 317 Mass. 689, 59 N.E. (2d) 261 (1945), where a gift was sustained although the donative intent was manifested two years after the joint account was established.

[10] Principal case; Jones v. Ferguson, 150 Fla. 313, 7 S. (2d) 464 (1942).

[11] Williams' Estate v. Tuch, 313 Ill. App. 230, 39 N.E. (2d) 695 (1942); Lochinger v. Hanlon, 348 Pa. 29, 33 A. (2d) 1 (1943).

[12] Phoenix Title & Trust Co. v. King, 58 Ariz. 477, 121 P. (2d) 429 (1942); First Nat. Bank & Trust Co. v. Huntley, 251 Mich. 483, 232 N.W. 192 (1930).

[13] In re Kane's Estate, 246 N.Y. 498, 159 N.E. 410 (1927).

card; [14] in other jurisdictions even strong donative language in the form or the account counts for nothing.[15] Generally the retention of a power of revocation by the donor will not defeat an otherwise valid gift.[16] There is much confusion in the cases regarding the nature of the delivery requisite to sustain the gift. Many courts state that the donor must strip himself completely of all ownership over the account and surrender the pass book to the donee, but it is doubtful if, in the presence of a clear donative intent, the rule is rigorously applied.[17] If the "complete surrender of control" test be applied, it is difficult to see how the usual attempted gift of a partial interest in the account can be sustained. Yet the majority of cases hold that the donor may vest a present right to a share in the deposit in the donee through a gift.[18] The rationale of these decisions seems to be that since the thing given is a share in the account, the legal situation does not admit of literal compliance with the rule of complete divesting of control, and the requirement is substantially fulfilled by the donor's placing the deposits within the *joint* control of both depositors.[19] When a gift of the entire account is intended, clearly there is less reason for a departure from the general rule of complete delivery. Many of the contradictions found in the decisions, even within the same jurisdictions, may be due to a failure to distinguish between an intended gift of (1) an entire and complete interest, and (2) a partial interest, in the donor's bank deposits. It would seem that the inherent distinction between the two types of gifts should be recognized, so that delivery of the bank book to the donee would be deemed essential in the former, and merely as evidence bearing upon the intention of the parties in the latter.

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[14] Kennedy v. McMurray, 169 Cal. 287, 146 P. 647 (1915), where deposit certificate stated that all money deposited belonged to *A* and *B* jointly. In Commercial Trust Co. v. White, 99 N.J. Eq. 119, 132 A. 761 (1926), a donative intent was found in a deposit certificate declaring that the account belonged to *A* and *B* as joint tenants, to be the absolute property of the survivor, but no donative intent was discovered in a deposit certificate stating merely that *A* and *B* owned the account as joint tenants.

[15] 7 AM. JUR., Banks, § 428 (1937); L.R.A. 1917 C 556.

[16] McLeod v. Hennepin County Sav. Bank, 145 Minn. 299, 176 N.W. 987 (1920); Cleveland Trust Co. v. Scobie, 114 Ohio St. 241, 151 N.E. 373 (1926).

[17] In Old Nat. Bank & Union Trust Co. v. Kendall, 14 Wash. (2d) 19, 126 P. (2d) 603 (1942), the court, after stating the rule that to sustain a gift there must be delivery such as will divest the donor of dominion over the property absolutely, sustained a gift where the donor used the pass book he had given the donee, to make withdrawals for his own purposes. To the same effect, see Earnest v. Earnest, 26 Ala. App. 260, 157 S. 885 (1934).

[18] 103 A.L.R. 1123 (1936); 149 A.L.R. 879 (1944).

[19] Beach v. Holland, 172 Ore. 396, 142 P. (2d) 990 (1943); First Nat. Bank of Aurora v. Mulich, 83 Colo. 518, 266 P. 1110 (1928). It is sometimes said that delivery of the pass book to the donor is a delivery to the donee.