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Joint Accounts—Establishment of Deceased Donor Depositor's Intent.—Idaho First National Bank v. First National Bank of Caldwell.

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traditional view. There is no present indication of a trend away from it, but on the contrary the rule appears to be static.[5] The rationale behind this view is that general words alone do not necessarily import an intent to hold an indemnitor liable to an indemnitee for damages resulting from the negligence of the latter; for an obligation so extraordinary and so harsh should be expressed in clear and unequivocal terms.[6] The court in the case at bar does not accept the majority rule, but on the contrary, holds that one need not expressly refer to negligence in the contract, where the terms of the indemnification contract were so broad as to be all-inclusive.

It is believed that the able dissent of Justice McGhee which interprets the law in this question to be that where the parties fail to refer expressly to negligence in their contract, such failure evidences the parties' intention not to provide for indemnification against the indemnitee's negligent acts is both the better interpretational effort and the sounder view. Public policy requires such contracts to be restricted rather than extended, for the liability of the indemnitor for the indemnitee's negligence is regarded as so hazardous, and the character of the indemnity so unusual, that there can be no presumption that the indemnitor intended to assume it in the absence of express stipulations. This conclusion is based upon the traditional view holding for strict construction of indemnity contracts. To hold otherwise would be to put a premium on negligence rather than to discourage it.

RAYMOND J. DOWD

Joint Accounts—Establishment of Deceased Donor Depositor's Intent.— ***Idaho First National Bank v. First National Bank of Caldwell.***[1]—Action brought by administrator to recover certain funds deposited in a joint bank account of the decedent, his nephew and the nephew's wife, co-defendants with depositee of the funds, and also to determine ownership of certain land sales contracts executed by decedent and to also determine title to a promissory note on which the decedent was payee, proceeds from both of which

& Son Co., 236 Mass. 98, 127 N.E. 532 (1920); George Dingledy Lumber Co. v. Erie R. Co., 102 Ohio 236, 131 N.E. 723 (1921); Southern P. Co. v. Layman, 173 Or. 275, 145 P.2d 295 (1944).

[5] Annot., 175 A.L.R. 1 (1948).

[6] Perry v. Payne, 217 Pa. 252, 66 Atl. 553 (1907); but it appears that the rule of strict construction of indemnity contract is relaxed where the indemnitor is a professional such as an insurance company. Most courts do not in such instances require an express reference to negligence, but hold the indemnitor liable for the principal's negligence if such an intent can be inferred from the contract of indemnifity. Maryland Cas. Co. v. Tighe, 115 F.2d 297 (9th Cir. 1940); Roche v. United States Fidelity & Guaranty Co., 273 N.Y. 473, 6 N.E.2d 410 (1936); National Bank of Tacoma v. Aetna Casualty & Surety Co., 161 Wash. 239, 296 Pac. 831 (1931); Fitzgerald v. Milwaukee Automobile Ins. Co. et al., 226 Wis. 520, 277 N.W. 183 (1938).

[1] 340 P.2d 1094 (Idaho 1959).

were to be deposited in the joint account. The sales contract and the promissory note were held by the bank as escrow and collecting agent. Deceased had executed in writing the joint account agreement with nephew and nephew's wife, declaring that ". . . all funds deposited heretofore and hereafter by said joint depositors or either of them, with said bank, to be owned by them jointly with right of survivorship . . . ." The lower court found defendants did not sustain the burden of proving decedent's intention to make an inter vivos gift either of the funds in the account or of the land sales contracts or the promissory note, the account being deemed to have been established solely for the business necessity and convenience of the deceased. On appeal, the Supreme Court of Idaho affirmed. Held: When money in a joint account is deposited by one party and a question arises as to whether the depositor intended to make a gift of any of the funds deposited, the party asserting ownership of the funds through a gift must prove the elements of the gift by clear and convincing evidence.

The Court dismissed summarily the appellants' claim to title of the land sales contracts and to the promissory note because of their total failure to sustain the burden of proving a gift inter vivos of such; the arrangement as to the deposit of funds received from such sources into the joint bank account does not substantiate a claim of a property right therein. In its determination of the rights to the funds in the joint account, the Court by its ruling reduced even further the effectiveness of the written agreement establishing a joint interest in the funds of the account.

Various legal principles have been adopted to judicially reconcile the interests of the parties to joint account agreements, the result of which has been to compound the discord among the various jurisdictions; theories of trust, contract, gift and joint tenancy have been utilized at various times to determine the ownership of joint account funds.[2] The overwhelming majority of jurisdictions has adopted the gift theory[3] as did Idaho in the leading case of *Gray v. Gray*.[4] It was there held that a valid gift of a joint interest was made at the time of the signing of the joint account agreement by the parties and the donee survivor had title to all funds of the account upon the death intestate of the donor depositor. The court there stated that a joint account agreement, similar in both substance and form to that in the instant case not only subjected the funds of the account to the exculpatory

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[2] For an excellent discussion of the various theories and their merit see Kepner, The Joint and Survivorship Bank Account—A Concept Without a Name, 41 Calif. L. Rev. 596 (1953-54).

[3] In Re Schnieder's Estate, 6 Ill. 2d 180, 127 N.E.2d 445 (1955); Ball v. Forbes, 314 Mass. 200, 49 N.E.2d 898 (1943); Millman v. Streeter, 66 R.I. 341, 19 A.2d 254 (1941), rehearing denied, 67 R.I. 218, 21 A.2d 559 (1941); Old National Bank and Union Trust Company v. Kendall, 14 Wash. 2d 19, 126 P.2d 603 (1942); Annot., 48 A.L.R. 189 (1927); 66 A.L.R. 881 (1930); 135 A.L.R. 993 (1941); 149 A.L.R. 879 (1944).

[4] 78 Idaho 439, 304 P.2d 650 (1956).

provisions of the Idaho joint account statute,[5] the purpose of which was to protect the banking interests from liability in the event of a payment of an account's funds to either party or the survivor, but also overcame the statutory provisions that multiparty interests are to be deemed held in common unless declared in their creation to be joint.[6] The instant case relies strongly on the fact that the purpose of the exculpatory statute was to protect the banks rather than to establish property rights and, consequently, the survivors' rights cannot be determined thereby.

The Court states that the rule in *Gray* that funds held in a joint account agreement are held jointly has been limited by allowing, during the life of the donor, testimony as to the intent of the donor to create other than a joint tenancy in the funds of the account.[7] The instant case, however, extends the elaborated doctrine of *Gray* by announcing that the joint account agreement is not only not conclusive evidence of the intention of the donor depositor to establish a joint tenancy in the account, but also may be rebutted even after his death and the surviving co-tenant has the burden of proof of the existence of the joint tenancy once evidence of a contrary intent of the decedent has been introduced.

It would seem from the foregoing that the Court in the instant case could have reached the contrary conclusion that after his death the written agreement of the parties was conclusive evidence of the donative intent of the decedent as is statutorily declared in other jurisdictions,[8] and that only a substantiation of allegations of fraud, undue influence or incompetency shall prevent the distribution of the funds of the account accordingly.

It is believed that the holding of this case in that the presumption of a joint tenancy of the funds of the account is rebuttable for reasons other than fraud, undue influence, or incompetency after the death of the donor depositor, facilitates the frustration of the expressed intention of the donor. Even more subject to criticism is the imposition upon the donee survivor of the additional burden of proof establishing what the agreement specifically states after the introduction of evidence contrary to the terms of the joint

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[5] § 26-1014 of the Idaho Code provides: "Deposit in two or more names—When a deposit has been made, or shall hereafter be made, in any bank, in the name of two or more persons, payable to any of such persons or payable to the survivor, or survivors, such deposit, or any part thereof, or interest or dividend thereon, if not then attached at law or in equity in a suit against any of said persons, may be made to any of said persons whether the other be living or not, and such payment shall discharge the bank making the same from its obligations, if any to either or any of such other persons or their legal representatives for or on account of such deposit. This section shall apply to husband and wife to all intents and purposes the same as to other persons."

[6] I.C.A. § 55-104.

[7] 340 P.2d at 1099, where the Court cites Shurrum v. Watts, 80 Idaho 44, 329 P.2d 380 (1958).

[8] Wash. Rev. Code § 30.20.010 (1952); Nev. Rev. Stat. 663.010; see also N.Y. Banking Law, § 239 (as applied to savings banks).

account agreement. However, other jurisdictions are in accord with the conclusion of the instant case.[9]

CHARLES D. FERRIS

Labor Arbitration— Coverage of a Unilateral Noncontributory Pension Plan.—***Saks and Company, Inc. v. Saks Fifth Avenue Women's Shoe Salespeople Committee.***[1]—An employer entered into a collective bargaining agreement with a Union which provided for general arbitration,[2] severance pay, and also, the extension of an existing pension plan to these employees covered by the contract.[3] Later, on the advice of the pension committee the employer refused to extend the plan to a retiring employee who requested severance pay, the refusal being on the theory that the employee must elect either severance pay or retirement benefits.[4] The union requested arbitration. The employer contended that the issue was not arbitrable as the pension plan was not made so by the collective bargaining agreement. In a proceeding to compel arbitration before the Supreme Court, New York County, the employer's motion to stay arbitration was granted. On appeal, the Appellate Division, (1st Dep't) in denying the employee's motion, and thereby reversing the lower court, held in a three-to-two decision that although the administration and interpretation of the pension plan was not a proper subject matter for arbitration, there was an arbitrable question as to whether the pension plan with the interpretation of the pension committee, satisfied the obligations assumed by the employer under the collective bargaining contract.

In reaching this result the court relied heavily on a case involving an employer's right to subcontract.[5] There the court held that although a dispute over such a right constituted no arbitrable issue under a broad arbitration clause, there was an arbitrable question as to whether the subcontract was bona fide or a mere subterfuge to avoid the obligations of the collective bargaining agreement.

Much dissatisfaction with the rulings of the State courts in the labor arbitration field[6] can be traced to their adherence to the *Cutler Hammer*

[9] Mitts v. Williams, 319 Mich. 417, 29 N.W.2d 841 (1947); In Re Hickmotts Estate, 256 App. Div. 1047, 10 N.Y.S.2d 918 (4th Dep't 1939).

[1] 192 N.Y.S.2d 1002 (App. Div. 1st Dep't 1959).

[2] "Any claim, dispute, grievance or difference arising out of, or relating to this agreement . . . shall be submitted to arbitration."

[3] "Any pension plan, additional vacation or holiday granted to the salespeople in the New York Store generally shall also be extended automatically to employees covered by this contract. When available, the details of the Pension Plan now in effect and subject to ratification by the stockholders shall be communicated to the shoe salespeople of Departments 23 and 723."

[4] The pension committee construed a clause in the plan which, for eligibility, an employee, ". . . shall not be a participant or be eligible for participation in any plan providing retirement or similar benefits . . . ."

[5] Matter of Otis Elevator Co. (Carney) 6 N.Y.2d 360, 189 N.Y.S.2d 874 (1959).

[6] See Kharas and Koretz, Judicial Determination of the Arbitrable Issue in Labor Arbitration, 7 Syracuse L. Rev. 193 (1956), Summers, Judicial Review of Labor Arbitration or Alice Through a Looking Glass, 2 Buffalo L. Rev. 1 (1952).