

# Survivorship Rights in Joint Bank Accounts: A Misbegotten Presumption of Intent

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# **SURVIVORSHIP RIGHTS IN JOINT BANK ACCOUNTS: A MISBEGOTTEN PRESUMPTION OF INTENT**

**Gregory Eddington\***

## **INTRODUCTION**

Every day, elderly people who live alone find themselves worried about losing the mental or physical ability to pay their own bills. Those who seek legal advice would likely be told to use a durable power of attorney, where specific powers can be granted that will either continue past the principal's incapacity or will not spring into existence until incapacity. Lacking legal knowledge or advice about durable powers of attorney, the elderly person often decides to add another authorized signer to his or her bank accounts. Perhaps the person formerly had a joint account with a spouse who is now deceased, and the surviving spouse now needs an additional signer to give the assurance that someone can take care of his or her affairs. Choosing a child or another relative, one who lives nearest, to be a co-signer on a bank account seems like a logical, simple solution that allows someone to step in quickly to help if necessary. In most cases, this arrangement may be satisfactory during the remainder of the elderly person's life. The additional signer may never be needed but, if needed, the signer may carry out the duties of paying the elderly person's bills without incident.<sup>1</sup> But doing so can create untold discord later, because

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1. Of course, there are also numerous, tragic examples of the elderly being taken advantage of while alive, but those situations are not the focus of this article,

it can inadvertently change the distribution of the estate.

When an elderly person dies, the question arises: Do the funds in the account belong to the decedent's estate, to pass by will or intestacy, or do they belong to the additional signer as a co-owner of the account? In at least hundreds of reported cases,<sup>2</sup> courts have been required to determine a bank depositor's intent at the time the depositor opened a joint account or added an additional signer to an already-existing account. Many of these cases may fit the description above, but the depositor is of course deceased and thus unable to testify about his or her intentions. The heirs or beneficiaries of the decedent's estate or trust then compete with the additional signer for ownership of the funds in the account, either as part of the probate of the estate or in a separate action for conversion. The heirs or beneficiaries contend that the bank account belongs to them because the decedent only wanted someone to be available to sign in emergencies and did not intend the additional signer to receive the account at death. These parties urge the court to ignore the express or implied survivorship feature of the bank account and distribute the funds according to the decedent's will or trust, or according to state intestacy statutes. On the other hand, the additional signer claims ownership as surviving joint tenant. Because the funds automatically belong to the survivor under the rules of joint tenancy, no funds from the account exist to pass to the decedent's estate.

In response to the extensive litigation about this issue, state

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and the same financial abuse could occur with a durable power of attorney.

2. See, e.g., cases compiled at Annotation, *Deposit of Fund Belonging to Depositor in Bank Account in Name of Himself and Another*, 149 A.L.R. 879, 880-81 (1944); JESSE DUKEMINIER, ROBERT H. SITKOFF, & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 432 (8th ed. 2009) ("Because banks and brokerage houses often give their customers a joint tenancy form without regard to the customer's particular intention, courts are often left with the problem of discerning which type of account was actually intended.") The author's experience as a practicing attorney is that many more cases would be contested were it not for state court decisions that conclusively presume that the funds belong to the survivor. Further, many accounts are small compared to the value of the decedent's estate, so contesting the ownership of the funds is not cost-effective. But awarding the funds to the survivor can be contrary to the decedent's intent, regardless of the size of the account.

legislatures and courts have created various sets of rules to decide these cases or, in some jurisdictions, to eliminate litigation entirely. There are several different procedural or evidentiary approaches to resolving these disputes, most of which favor the additional signer.<sup>3</sup> Most of these frameworks provide a presumption that the depositor intended that the additional signer own the funds at the depositor's death<sup>4</sup>—in other words, that the funds pass outside the system of testacy or intestacy. In some states, this presumption is conclusive; in others, the beneficiaries or heirs may rebut the presumption. In some states, the presumption depends on the depositor's use of words like "survivor" or "survivorship," and in others, the opposite presumption may exist without these words.

This Article contends that the majority of these approaches are misguided because they treat bank accounts like other arrangements known as will substitutes. Will substitutes are arrangements, such as life insurance, that transfer property at death but operate outside the system of wills and probate. They are considered valid ways to transmit property at death even though they do not comply with the formalities required for wills. The primary policy justification for allowing their use is that the required will formalities are adequately replaced by the formalities required to set up the will substitute, so the will substitutes are sufficiently reliable.<sup>5</sup> This Article will show that although this rationale supports finding other types of will substitutes as valid ways to pass property at death, the formalities associated with creating a joint bank account are not analogous and do not prove that the depositor intended the additional signer to receive the funds in the account. These approaches ignore the fact that a bank depositor may often have other non-donative goals for creating the account or adding the signer and may not have an easy alternative method to

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3. JESSE DUKEMINIER, ROBERT H. SITKOFF, & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 434-35 (8th ed. 2009).

4. *Id.*

5. *Id.* at 397; UNIF. PROBATE CODE § 6-101 cmt. (amended 2008).

accomplish those goals. Part I of this Article will set out the policies behind treating will substitutes as valid dispositions of property at death and explain why joint bank accounts are dissimilar from all other will substitutes.

Part II of this Article will set out the differing procedural frameworks used by states and analyze why most are not consistent with the goal of determining the decedent's intent. Historically, courts decided these disputes based on common-law rules regarding presumptions and burdens of proof. The recent trend is for legislatures to set the rules through adoption of some version of the Uniform Probate Code or another statute.

Part III of this Article will evaluate the use of statutorily prescribed bank account forms. A few state statutes, primarily those from states that have adopted the most recent version of the Uniform Probate Code, provide optional forms that banks may use to assess the depositor's intent. The forms offer numerous options for a depositor to indicate intent regarding ownership rights and rights at death, and proper use of the form creates a conclusive presumption. This Article will examine the forms' complexity and propose changes that would better serve the purpose of allowing the depositor to express his or her intent.

Finally, this Article will conclude with recommendations for a new deposit account form, or alternatively, modifications to forms in existence to allow a depositor without legal training to indicate how the funds in the account should pass at death. For states that do not have a form and do not choose to adopt one, this Article proposes eliminating presumptions and evidentiary burdens that favor the additional signer over the depositor's heirs or beneficiaries.

## **I. WILL SUBSTITUTES AND THEIR POLICY JUSTIFICATION**

In the parlance of the law of wills and succession, joint or multiple-party bank accounts are part a group of arrangements

known as “will substitutes.”<sup>6</sup> They are considered substitutes for wills because they legally pass property at a person’s death without compliance with the wills statutes. The law of wills requires formalities, often including signing the document at the end and in the presence of witnesses who observe the signing.<sup>7</sup> Wills statutes may also require that the witnesses be disinterested,<sup>8</sup> and that the will-maker ask the witnesses to sign and declare to the witnesses that he is familiar with the document and that the document is intended as his will.<sup>9</sup> Jurisdictions that allow holographic wills replace the above formalities with requirements that the will be entirely handwritten, signed, and dated.<sup>10</sup> Historically, strict compliance with these formalities was required, although the modern trend is to excuse harmless errors.<sup>11</sup> The policies behind these requirements are discussed below, but the primary goal of both the formalities and excusing for harmless error is to ensure that the will-maker’s true intent is memorialized.<sup>12</sup> Then, upon the will-maker’s death, the transfer of property via the will is administered through the judicial probate system, as set out by the state statutes.<sup>13</sup>

The will substitutes are exempted from these formalities and from the probate system. Will substitutes are generally considered to include (1) revocable trusts, (2) life insurance policies, (3) retirement accounts, (4) payable-on-death or transfer on death arrangements in bank accounts or securities (or now real property), and (5) joint tenancies in real or personal property.<sup>14</sup> The Restatement (Third) of Property lists “multiple-

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6. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 (2003).

7. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt.f (1999).

8. *Id.* cmt.o.

9. *Id.* cmt.h.

10. *Id.* § 3.2.

11. *Id.* § 3.3, cmt.b.

12. *Id.* cmts.a, b.

13. *Id.* § 1.1.

14. See, e.g., RESTATEMENT (THIRD) OF PROP., *supra* note 6. The Restatement also lists annuities with death benefits as a separate category. Because death benefit

party accounts" as a separate type of will substitute but acknowledges that "not all [such] accounts are established with donative intent."<sup>15</sup> The premise of this Article is that because intent is usually unclear, multiple-party bank accounts should not be considered will substitutes, but rather should be considered a separate type of arrangement.

Although these will substitutes are exempted from the wills requirements and the probate system, the proffered reasons for the exemption have varied. The original justification for exempting will substitutes was that, unlike a will, the will substitute makes a present transfer of some property right.<sup>16</sup> The right is non-possessory, future, and subject to revocation or divestment (except for true joint tenancies), but is still a right historically recognized by property law.<sup>17</sup> Professor Langbein, in his seminal article, *The Nonprobate Revolution and the Future of the Law of Succession*, correctly pointed out the fallacy of the present-interest theory regarding all will substitutes except joint tenancies.<sup>18</sup> Will-substitute arrangements, such as life insurance designations and pay-on-death designations, are entirely revocable as long as the designator is competent. Thus, the property interest they create is no better and no more "present" than the interest created by a will, which may also be revoked or amended.<sup>19</sup>

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designations in annuities do not raise issues distinct from retirement account designations, or possibly life insurance beneficiary designations, this article does not discuss them separately. The Restatement also lists Totten trusts as a separate category. This article will discuss Totten trusts in the same category of revocable trusts. In an often-quoted article, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1111-12, 1138 n.122 (1984), the author used five categories, and discussed multiple-party bank accounts and Totten trusts in the same category as pay-on-death accounts.

15. RESTATEMENT (THIRD) OF PROP., *supra* note 6, cmt.f.

16. *Id.* cmt.a. For a discussion of the development of the gift theory as justification for recognizing multiple-party bank accounts as valid methods to transfer the funds at death. See Donald Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953); Donald Kepner, *Five More Years of the Joint Account Muddle*, 26 U. CHI. L. REV. 376, 378 (1959) "[T]here is emerging a recognition of the joint account as a unique form of gift...."

17. RESTATEMENT (THIRD) OF PROP., *supra* note 6, cmt.a.

18. Langbein, *supra* note 14, at 1128.

19. *Id.* at 1127-28.

Langbein identified another justification that he labeled “alternative formality.”<sup>20</sup> Under this justification, the will substitutes are effective to transfer property at death because they comply with formalities similar to those required for wills, and those formalities are accepted by the practice of the relevant business system—insurance, banking, or otherwise. Thus, for example, retirement plans require written beneficiary designations that are signed by the account owner and witnessed. These designations are accepted by the plan’s administrator as proof of the owner’s intent and are considered to serve the same functions as a will, so there is no need to subject the designations to the requirements for wills.

The formalities required for wills and the alternative formalities for the will substitutes are considered to be equal methods of ensuring that the transferor’s intent is implemented, which is the ultimate goal of either system. Langbein called the rule of respecting the transferor’s intent the “only. . . theory that can reconcile wills and will substitutes in a workable and honest manner.”<sup>21</sup> If the formalities required by the particular will substitute prove intent to transfer the property at death,<sup>22</sup> then the law justifiably respects the transaction and does not require compliance with the wills statutes. Langbein concluded that “[t]he alternative formalities of the standard form instruments that serve as mass will substitutes satisfy this requirement [proof of intent to transfer] so easily that the issue of intent almost never needs to be litigated.”<sup>23</sup> However, the huge exception, as

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20. *Id.* at 1130-32; see also RESTATEMENT (THIRD) OF PROP., *supra* note 6, cmt.a, reporters’ note, cmt.a.

21. Langbein, *supra* note 14, at 1132-33. Respecting the transferor’s intent is also the basis for the relaxed formalities in the modern Uniform Probate Code. See discussion *infra* accompanying notes 64-67.

22. The term “testamentary intent” is used if a person intends that the document serve as a will and thus go through the probate system. Langbein, *supra* note 14, at 1125-26 n.69. A person who uses a will substitute does not exhibit testamentary intent, because the person intends to bypass the probate system. See generally, James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1017-18 (1992) (discussing eight subcategories of testamentary intent). This article refers to the intent of a person intending to bypass the probate system as “donative intent” or “intent to pass property at death.”

23. Langbein, *supra* note 14, at 1132.



evidenced by the number of reported cases contesting the transferor's intent, has been multiple-party bank accounts where the formalities have been inadequate. The reason for this inadequacy is that the functions served by the wills formalities are simply not met by the formalities required for joint bank accounts.

The formalities required for wills are considered to serve four functions:<sup>24</sup>

(1) The "evidentiary function" is to ensure that the probate court has "reliable evidence of testamentary intent and of the terms of the will."<sup>25</sup> For example, the requirement of a writing proves the terms of the testamentary dispositions; the requirement of a signature at the end prevents insertions; the requirement of witnesses assures genuineness of signatures and testimony regarding testamentary intent.<sup>26</sup> In states that allow holographic wills, the requirement that the testator write everything by hand is considered an adequate substitute for the formalities.<sup>27</sup>

(2) The "channeling function" means that the standardization of format makes it easier to ensure that the document was intended as a will and to identify its dispositive terms.<sup>28</sup> Thus, both the probate courts and the testator can confidently rely on the document as testamentary because it is typical of other documents that are accepted as testamentary.<sup>29</sup> In other words, the testator's compliance with formalities makes it highly unlikely that he or she intended anything other than a testamentary act. As Langbein noted, "the formalities for witnessed wills call for a virtually unmistakable testamentary

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24. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941); John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 492-97 (1975).

25. Langbein, *supra* note 24, at 492 (1975).

26. *Id.* at 493.

27. *Id.* (quoting Gulliver, *supra* note 24, at 13).

28. Langbein, *supra* note 24, at 493-94.

29. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt.a (1999).

act.”<sup>30</sup>

(3) The “cautionary” or “ritual function” of formalities means that the testator is put on notice that he is performing an important act that will be treated as determinative of his intent.<sup>31</sup> The standard will-execution ceremony, where the testator signs the written document in the presence of witnesses who must also sign (and in some states requiring the testator’s statement to the witnesses that the document is his will), puts the testator on notice that the document will be treated as his certain expression of how he wants his property distributed at death.<sup>32</sup>

(4) The “protective function” of will formalities refers to ensuring that the testator is not pressured or deceived, and that the document is actually the one he intended to serve as his will.<sup>33</sup> The formalities related to this function are the requirement of disinterested witnesses to protect against coercion or fraud, and the requirement that the witnesses sign in the presence of the testator to protect against substitution of another document. This function has been subject to criticism on the grounds that the formalities are ineffective at protecting the testator and sometimes result in wills being voided for technicalities.<sup>34</sup> Because of these concerns, the most recent version of the Uniform Probate Code has eliminated the requirements that witnesses be disinterested, that they sign in the presence of the testator, and that the testator announce that the document is his will.<sup>35</sup> This function is also wholly absent in holographic wills and in all of the will substitutes.<sup>36</sup>

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30. Langbein, *supra* note 24, at 494. Holographic wills obviously serve this function less well because of lack of standardization, *id.*, which explains their less-universal acceptance and associated disputes about intent, *see* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 cmts. a & c (1999).

31. Langbein, *supra* note 24, at 495.

32. Again, holographic wills are problematic, especially when testamentary intent is less than clear from the document. *Id.* at 494-96.

33. *Id.* at 496; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt.a (1999).

34. Gulliver, *supra* note 24, at 9-13; Langbein, *supra* note 24, at 496.

35. *See* UNIF. PROBATE CODE §§ 2-502 cmt.a, 2-505 (amended 2010); *see also* Langbein, *supra* note 24, at 496.

36. *Id.* at 497; RESTATEMENT (THIRD) OF PROP., *supra* note 6, cmt.a.

Omitting the discredited protective function, the question then becomes whether the remaining three functions are served by the formalities required by a particular will substitute. If the three functions are adequately served, then by analogy, the will substitute should be respected as a valid way to transmit property at death. To understand why joint bank accounts are not analogous, we must first examine why the formalities of other will substitutes serve the functions of the will formalities.

### **REVOCABLE TRUSTS**

A trust is a fiduciary arrangement where one person holds the legal title to property and has an equitable duty to use the property for the benefit of another.<sup>37</sup> In the typical revocable trust used as a will substitute, the owner (the “settlor”) transfers title to property to a trustee (which often is the same person as the owner) for the benefit of the settlor during life, retaining the power to revoke. The settlor names a successor trustee to take over the duties at the settlor’s death or incapacity and hold the property for the benefit of other beneficiaries or distribute the property to them outright at the settlor’s death.<sup>38</sup> Thus, the trust escapes the probate system because the legal title is in the name of a trustee and successor trustees, and the legal title is not affected by the original owner’s death.<sup>39</sup> Although a revocable trust for personal property may be oral in most states,<sup>40</sup> intentional use of an oral trust would be foolhardy and invite litigation. Furthermore, some states require formalities similar to those for wills.<sup>41</sup> A writing is always required for a trust of real property.<sup>42</sup> Regardless of minimum requirements, all well-

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37. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

38. MYRON KOVE, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 264.5, at 25 (3d ed. rev. 2012).

39. *Id.* at 26.

40. *See, e.g.*, UNIF. TRUST CODE § 407 (2000), requiring clear and convincing evidence to prove its creation and terms.

41. FLA. STAT. ANN. § 737.111 (West 2012); N.Y. ESTATE POWERS & TRUSTS LAW § 7-1.18 (2007).

42. RESTATEMENT (THIRD) OF TRUSTS § 22 cmt.a (2003).

drafted trusts are written, signed, and include notarial acknowledgements.

These formalities meet the evidentiary function by providing a written document setting out dispositions of property upon the settlor's death and an authenticated signature. Furthermore, it would be the rare settlor who creates a revocable trust without using somewhat standardized documents, either with the assistance of a lawyer or using documents from another source. Thus, the channeling function is also met, and intent to transmit property at death is clear because avoiding probate historically has been the primary reason for creating the revocable trust.<sup>43</sup> Even though the trust also has provisions for the settlor's and trustees' incapacities, the provisions for dealing with the property at the settlor's death are identical to those of a will,<sup>44</sup> so the settlor demonstrates donative intent in the same manner as a testator. Finally, the cautionary function is met by the complexity of creating the trust instrument, if nothing else. There are no known cases of a person lightly entering into a revocable trust with questionable donative intent. In fact, some commentators consider revocable trusts superior to wills for the purpose of eliminating contests.<sup>45</sup> The fact that the settlor used the trust during life and operated under its terms shows that it was not entered into lightly.

A "Totten trust" or "tentative trust" is a less formal type of revocable trust. A Totten trust is created when a depositor opens an account with a financial institution in the name of the depositor "as trustee" or "in trust" for another.<sup>46</sup> Both the Restatement (Third) of Trusts<sup>47</sup> and the Uniform Probate Code<sup>48</sup>

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43. See, e.g., Langbein, *supra* note 14, at 1115-16; KOVE et al., *supra* note 38, at 23.

44. KOVE et al., *supra* note 38, at 25.

45. E.g., WAYNE M. GAZUR AND ROBERT M. PHILLIPS, ESTATE PLANNING PRINCIPLES AND PROBLEMS, 400-01 (3rd ed. 2012); DUKEMINIER, *supra* note 3, at 442.

46. RESTATEMENT (THIRD) OF TRUSTS § 26 (2003). The Totten trust is revocable because the depositor may withdraw the funds at any time. Whatever funds remain at the depositor's death belong to the beneficiary named in the agreement.

47. *Id.*

48. UNIF. PROBATE CODE § 6-201 (8), cmt. (treating Totten trusts as POD designations and thus payable to the beneficiary at the depositor's death under

treat the beneficiary as the owner of the funds at the depositor's death.<sup>49</sup> Although the comment to the Restatement includes discussion of cases where the depositor's intent in creating a Totten trust has been litigated, for the most part donative intent is apparent. Use of the word "trust" or "trustee" is evidence that the depositor intends to benefit another. The signature is authenticated by a bank employee, and the standardization of language can be seen to channel the depositor's intent. The cautionary function is somewhat weaker because only the use of the term "trust" indicates the seriousness of the transaction. However, this at least gives the depositor indication that he is creating something other than the usual individual bank account.<sup>50</sup>

### *LIFE INSURANCE POLICIES*

The beneficiary designations for life insurance policies typically require only notarization or witnesses, or both.<sup>51</sup> But in fact, the evidentiary function is easily met by such limited formalities. The evidentiary function is met by evidence of intent and of the terms of the disposition. In a life insurance beneficiary designation, the signature is proven, and no reason exists for the designation except to provide for disposition of the proceeds at death. Thus, no other evidence is needed. The other two functions are just as easily met. The standardized form ensures that the policyholder's wishes are stated, and the nature of the document leaves no doubt that the policyholder intended the beneficiary to take the proceeds at death, thus channeling his

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section 6-212 (b)).

49. The comment to the Restatement notes that "[e]vidence may also be admitted to show that the depositor did not intend to create a trust at all." RESTATEMENT (THIRD) OF TRUSTS § 26 cmt.a.

50. One obvious and problematic alternative to donative intent would be intent to avoid Federal Deposit Insurance Corporation limits on the amount insured. As discussed at notes 65 *infra* and the accompanying text, the FDIC allows and encourages use of joint accounts and Totten trusts as ways to increase the amount insured.

51. RESTATEMENT (THIRD) OF PROP., *supra* note 6; UNIF. PROBATE CODE § 6-101 (2004).

wishes. The cautionary function is also met, again by the very nature of a life insurance beneficiary designation.

### **RETIREMENT ACCOUNTS**

The beneficiary designations in retirement accounts are treated as will substitutes. Although this treatment has been subject to recent criticism,<sup>52</sup> including the argument that the account holders may not treat the designation with care because they are not concerned about transferring property at death when they are filling out retirement forms (perhaps when starting a new job),<sup>53</sup> the beneficiary designations themselves are undoubtedly made for the sole purpose of transmitting the assets at death. So if the formalities associated with the beneficiary designations serve the same functions as the will formalities, then treating the designations as will substitutes is supported by policy. The evidentiary function and channeling function are met in much the same way as life insurance beneficiary designations discussed above. In fact, the forms are generally somewhat similar. The cautionary function is slightly more problematic, as noted above. But, even if the account holder may not be focused on death at the time of completing the form, there is no doubt that the purpose of the designation is to “effectuate a transfer” at death. Thus, regardless of the account holder’s lack of focus or concern about death at the time of completing the designation, he or she cannot fault the formalities for failing to inform of the consequences of the act.

### **PAY ON DEATH AND TRANSFER ON DEATH ACCOUNTS**

These accounts, along with life insurance policies, are the easiest to justify as will substitutes. They are created by a signed writing, and the signature is either notarized or verified by a representative of the institution. The standardization of the

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52. Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 2 (forthcoming 2014).

53. *Id.* at 2-3, 35.

forms is statutory,<sup>54</sup> and the words themselves reference death, so they leave no doubt that the account holder is indicating who is to receive the property at death. Thus the evidentiary and channeling functions are met. The cautionary function may be met by the title of the document alone; there could be no doubt that the account holder is seriously contemplating distribution of the property at his or her death.

*JOINT TENANCIES WITH SURVIVORSHIP IN REAL PROPERTY OR  
PERSONAL PROPERTY*

Joint tenancies in tangible property can be justified either by the policy of analogy to wills formalities or by the old “present interest” theory. First, the formalities associated with creating these joint tenancies are comparable to those of wills and the other will substitutes. Notarization evidences the signature, and the co-tenants are listed in writing. Further, the law itself provides evidence of the terms—equal ownership on creation and sole ownership on the death of the co-tenant.<sup>55</sup> The standardization of forms clearly channels the donor’s intent. Real estate deeds are statutory, and all parties can be confident in their acceptance for transmitting the property to the survivor. Similarly, auto titles (or similar titles for other personal property) are standardized, and provided and administered by state agencies guaranteeing their acceptance and ensuring that the channeling function is met. Regarding the cautionary function, although there are instances of donors attempting to revoke joint tenancies by contending that they created them out of motives other than intent to transmit property,<sup>56</sup> the rarity of these instances indicates that donors understand the seriousness of creating joint tenancies. There are also numerous cases where a person has created a joint tenancy, intending to use it as a will substitute, but then changed his mind and attempted to unwind

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54. *See, e.g.*, UNIF. TOD SECURITY REGISTRATION ACT (1989).

55. RESTATEMENT (THIRD) OF PROP., *supra* note 6, cmt.a

56. *E.g.*, Heible v. Heible, 316 A.2d 777, 779 (Conn. 1972).

the transaction.<sup>57</sup> However, this is not an argument against respecting the transaction as a will substitute but is only an argument in favor of allowing revocation. Furthermore, the fact that the deed is filed at the courthouse (or the title is filed with a state agency) puts donors on notice that they are executing a formal, serious document.

Additionally, joint tenancies are the one will substitute where the “present interest” theory can be applied. This rationale is that the transaction does not have to meet the wills formalities, because it creates an immediate interest, not just an interest at death. Under black-letter law, a joint tenancy creates a present estate in which both tenants are considered to own the whole.<sup>58</sup> Therefore, nothing passes at death, because the survivor’s interest is a continuation of the interest already owned when the joint tenancy was created.

#### ***APPLICATION OF ALTERNATIVE FORMALITY POLICY TO JOINT BANK ACCOUNTS***

The overriding difficulty with applying the alternative formality policy to joint bank accounts is that the general purpose of all three functions—evidentiary, channeling, and cautionary—is to ascertain and effectuate the decedent’s intent regarding who is to receive the property at death. As noted above in the discussion of each type of will substitute, even though the creator of the substitute may change his mind later or may not be sufficiently focused on his time of death when filling out a designation, the existence of intent to transfer property at death is clear in each type of transaction. The formalities required for each will substitute ensure that the transferor’s intent is memorialized. In contrast, a person creating a joint bank account may be doing so for at least two non-donative reasons. First, and most commonly litigated, the account holder

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57. *E.g.*, *Blanchette v. Blanchette*, 287 N.E.2d 459, 461 (Mass. 1972), *noted in* Langbein, *supra* note 14, at 1114.

58. *See, e.g.*, JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 106 (3d ed. 1989).



may be creating a joint account or adding an additional signer to an existing account as a substitute for a durable power of attorney. A durable power of attorney is one where the powers of the agent or attorney-in-fact survive the principal's incapacity or do not spring into existence until the principal is incapacitated.<sup>59</sup> This is a common estate planning document that is often routinely executed at the same time as a will or revocable trust. Despite the prevalence of durable powers and the existence of uniform forms,<sup>60</sup> a person without legal advice could easily be unaware of the ability to execute this document, or be reluctant to do so, because of lack of understanding or fear of the document's apparent complexity. So, an elderly person wanting to give a relative the ability to write checks in order to pay bills in the event of incapacity may turn to a joint bank account instead. Accounts of this type are commonly referred to as convenience accounts.<sup>61</sup>

Another non-donative reason to open a joint bank account may be to avoid the Federal Deposit Insurance Corporation (FDIC) limits on account size. The FDIC insures deposits only up to \$250,000 in a single account.<sup>62</sup> However, a person may open a joint account with a co-owner and receive another \$250,000 of coverage.<sup>63</sup> The FDIC even advises about how to structure accounts for maximum coverage without any corresponding advice about potential ramifications.<sup>64</sup>

Keeping these possible intentions in mind, when attempting to apply the wills formalities functions to joint bank accounts, the analogy is far from apt. The evidentiary function is to provide evidence of testamentary intent (or intent to transmit

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59. *E.g.*, UNIF. DURABLE POWER OF ATTORNEY ACT § 1 (amended 1984).

60. *E.g.*, UNIF. POWER OF ATTORNEY ACT § 301 (2006).

61. The Uniform Probate Code uses the term "agency" instead. *See* UNIF. PROBATE CODE § 6-204(a) (2004).

62. 12 U.S.C. § 1821(a)(1)(E) (2012).

63. 12 C.F.R. § 330.9 (2013).

64. *See Your Insured Deposit*, FDIC (AUG. 23, 2011),

<https://www.fdic.gov/deposit/deposits/insured/ownership3.html>. Totten trust accounts may also be used to increase FDIC coverage, creating a similar argument about the depositor/trustee's intent.

property at death, in the case of a will substitute) and of the dispositive terms. As stated, the document creating a joint account could be supported by various intentions. Unless the document creating the account allows for those alternative intentions to be expressed, so that it clearly shows that the decedent chose a joint account to benefit the additional signer rather than for mere convenience, the document could hardly be said to be reliable evidence of intent to transmit property at death. The fact that the signature on the deposit agreement is verified by a bank employee is reliable evidence of the signature's authenticity only, not of the signer's intent.

Furthermore, the process of opening a multi-party bank account fails to satisfy the channeling function. Deposit agreements may or may not be standardized from state to state or from bank to bank. Whether certain options are available in the deposit agreement is also not consistent.<sup>65</sup> For example, the only joint deposit form offered to a depositor may provide for "survivorship," so that a depositor wanting to create a joint account has no easy means to create a convenience or agency account. Further, even if a deposit agreement is standardized within a particular bank or a particular jurisdiction, the depositor may not understand the document, so his intent can hardly be said to be channeled.<sup>66</sup> Recall that the channeling function is met by wills because the formalities "call for a virtually unmistakable testamentary act."<sup>67</sup> As discussed in Part III, most account forms are not user-friendly, so the depositor's intent is anything but unmistakable.

Finally, depositors creating joint accounts are not adequately cautioned about the donative-transfer aspect of what they are doing. Again, the cautionary function of will formalities is to impress upon the testator that this is a serious transaction that will determine who receives the property at the testator's death. Any analogous caution is almost totally lacking

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65. See discussion *infra* Part III.

66. See *id.*

67. Langbein, *supra* note 24, at 494.

when the typical joint bank account is created. Even the Uniform Probate Code form, which includes numerous options designed to offer the depositor a way to express his intent, does not contain any warnings or cautions;<sup>68</sup> it merely offers various alternatives. Some type of conspicuous notice similar to those in uniform durable power of attorney forms<sup>69</sup> would be more appropriate, given that the depositor may not have donative intent in mind yet may be held to have done something he or she did not intend at all. Even less cautionary are forms that merely use the word "survivorship" amongst other terms of legalese that are mostly designed to protect the bank. Explanation of these terms, if any, is left to bank employees rather than legal counsel. Furthermore, and somewhat incredibly, even the words "survivorship" or "survivor" are not required in most jurisdictions. Merely adding an authorized signer presumptively indicates intent to transfer the property to that person at the depositor's death. This rule indicates almost total disregard for the cautionary function of formalities.<sup>70</sup> The existence of alternate possibilities for the depositor's intent makes cautionary formalities critical.

So, the three functions of wills formalities are not adequately met by the formalities required for opening a multiple-party bank account. Can it be argued that treating such accounts as will substitutes, despite this weakness, is consistent with the trend towards relaxing the formalities required for wills? The answer is clearly "no" when one considers the reason for this trend. The most recent versions of the Uniform Probate Code and the Restatement provide a harmless error rule that allow a document to be treated as a will if clear and convincing

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68. See UNIF. PROBATE CODE § 6-204 (2004).

69. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1 (1988) (where the principal is warned in all capital letters that "THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING...IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE"); UNIF. POWER OF ATTORNEY ACT § 301 (2006), warning in bold letters: "If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form."

70. See discussion *infra* parts II.A, II.C.

evidence shows the decedent's intent that it be a will, despite failure to comply with execution requirements.<sup>71</sup> This rule has developed in response to cases where courts held that a technical defect, such as signing on an attached self-proving affidavit instead of on the will itself, voided the will.<sup>72</sup> This harmless-error rule is consistent with the purpose of formalities, which ensures that the decedent's intent is ascertained and respected.<sup>73</sup> If the decedent's testamentary intent was clear, insisting on exact compliance with the formalities contradicts the purpose of the formalities.<sup>74</sup> But the same cannot be said for joint bank accounts. The decedent's intent usually was not clear, so any analogy to the lessening of wills formalities is inapposite.

The existence of possible alternate intentions also undermines the present transfer theory as support for treating joint bank accounts as will substitutes.<sup>75</sup> Creation of joint interests in tangible property, or even intangible titled property such as stock, creates present rights to the property and cannot be simply undone. But a person who creates a joint bank account only for convenience does not create any property rights at all. An agency is a fiduciary relationship, not an interest in property.<sup>76</sup> Thus, treatment of joint bank accounts as will substitutes is dubious under either policy rationale.

## II. FIVE APPROACHES TO RESOLVING CLAIMS TO A DECEDENT'S BANK ACCOUNT

As one court noted in 1994, "[s]lowly and unevenly, . . . courts have moved toward the inevitable realization that the joint and

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71. UNIF. PROBATE CODE § 2-503 (2004). RESTATEMENT (THIRD) OF PROP., *supra* note 6.

72. *E.g.*, *Boren v. Boren*, 402 S.W.2d 728, 729-30 (Tex. 1966).

73. *See generally*, James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1032 (1992) (arguing for reduced formalities to better "effectuate testators' intents").

74. *In re Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) (citing Langbein, *supra* note 24, at 489).

75. Although the present-transfer theory has fallen into disfavor, some courts still rely on it to justify awarding funds to the surviving party instead of the decedent's estate. *In re Estate of Metz*, 256 P.3d 45, 49 (Okla. 2011).

76. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

survivorship bank account has its own identity unconflicting to any hitherto recognized common-law methods of transferring property."<sup>77</sup> When the ownership of the account is disputed after the depositor's death, the process of resolving the dispute varies from state to state. These varying approaches are themselves evidence that generalizations about transferors' intentions are difficult at best.

Yet perhaps because of the "public dissatisfaction with probate" that Professor Langbein noted almost thirty years ago,<sup>78</sup> the legislative and judicial trend, albeit uneven, has developed toward treating joint accounts like other will substitutes, finding that the funds pass to the additional signer, outside the decedent's will or intestate succession statutes. In most states, either a statute conclusively determines ownership based on the language used in the account agreement, or the statute sets out a presumption of ownership or a burden of proof, or both.<sup>79</sup> Most states favor the surviving co-tenant to some degree. The majority of states have adopted some version of the Uniform Probate Code or one of the uniform acts that are incorporated therein. Others have common-law presumptions with varying burdens of proof. The various approaches can be grouped into five general categories, which are presented below in the order of their frequency of use. For each category, an analysis of the policy basis or lack thereof is presented. As will be seen, most approaches fail to satisfy the primary policy goal of respecting the transferor's intent.

**A. PRESUMPTION OF SURVIVORSHIP CAN BE OVERCOME ONLY BY CLEAR AND CONVINCING EVIDENCE.**

The most common rule is that funds remaining in a "joint account" belong to the survivor, absent clear and convincing evidence of the deceased depositor's contrary intent. The term

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77. *Wright v. Bloom*, 635 N.E.2d 31, 37 (Ohio 1994).

78. Langbein, *supra* note 14, at 1116.

79. *Infra* n.83.

“joint account” includes “an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned.”<sup>80</sup> Several states have adopted this standard via common law or statute.<sup>81</sup> This rule has the advantage of some flexibility, avoiding the harshness of a conclusive presumption. But the rule is still more favorable to the co-tenant than any other approach because the presumption exists regardless of whether the term “survivor” or “survivorship” appears in the account agreement.<sup>82</sup>

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80. UNIF. PROBATE CODE § 6-101 (2004).

81. States currently using the original Uniform Probate Code for multiple-party bank accounts or a statutes based on the same language are California, CAL. PROB. CODE § 5302 (West 2009); Maine, ME. REV. STAT. ANN.; South Dakota, S.D. CODIFIED LAWS § 29A-6-104; South Carolina, S.C. CODE ANN. § 62-6-104 (2009); HAW. REV. STAT. ANN. § 560:6-104 (LexisNexis 2010); Minnesota, MINN. STAT. ANN. § 524.6-204 (West 2012); New Jersey, N.J. STAT. ANN. § 17:16I-5 (West 2001); Utah, UTAH CODE ANN. § 75-6-104 (LexisNexis 1993); Virginia, VA. CODE ANN. § 6.2-608 (2010). States that have not adopted the Uniform Probate Code but use the same rules are the following: Illinois, 765 ILL. COMP. STAT. 1005/2 (West 2009) (abolishing survivorship rights but excepting multiple-party bank accounts. Prior case law provided a rebuttable presumption for the survivor, *Murgic v. Granite City Trust & Sav. Bank*, 202 N.E.2d 470, 472 (Ill. 1964)); Florida, FLA. STAT. ANN. § 655.79 (West 2013); Connecticut, CONN. GEN. STAT. ANN. § 36A-290 (West 2011); Georgia, GA. CODE ANN. § 7-1-813 (2004); Indiana, IND. CODE § 32-17-11-18 (2002); Kentucky, KY. REV. STAT. ANN. § 391.315 (2010); Oregon, OR. REV. STAT. § 708A.470 (2011) (rebuttable presumption but no requirement that evidence be clear and convincing); Pennsylvania, 20 PA. CONS. STAT. ANN. § 6304 (West 2005); Washington, WASH. REV. CODE ANN. § 30.22.100 (West 2005); Wisconsin, WIS. STAT. ANN. § 705.04 (West 2013); Iowa, IOWA CODE ANN. § 524.806 (West 2012); *see also* Peterson v. Corstenson, 249 N.W.2d 622, 625 (1977) (presumption may be rebutted by “substantial evidence”); *In re Estate of Samek*, 213 N.W.2d 690, 692 (1973) (summarizing law including that if parties were in confidential relationship, burden shifts to the survivor). New York has a unique rule that is most closely analogous to this category of states. In New York, use of survivorship language creates a rebuttable presumption. N.Y. BANKING LAW § 675 (McKinney 1982). Without survivorship language, the survivor can still prove ownership. *In re Estate of Corcoran*, 63 A.D.3d 93, 97-98 (N.Y. App. Div. 2009); *In re Yaros*, 90 A.D.3d 1063, 1064 (N.Y. App. Div. 2011).

82. This presumption in favor of survivorship is also inconsistent with modern rules regarding joint tenancies in real property. Historically, the common law presumed joint tenancy with survivorship when the document did not clearly specify survivorship rights. This was based on “the feudal desire to keep the land in a single ownership, if possible.” JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 107 (3d ed. 1989). “[T]he common-law presumption has been universally reversed” regarding real property, presumably because it may be inconsistent with the parties’ intent, and now tenancy in common is presumed unless rebutted by some type of survivorship language. *Id.* Despite this reversal, and despite the fact that the historical feudal desires that support the

According to the Comment to Uniform Probate Code Section 6-104, the rule is based on “[t]he underlying assumption [ ] that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death.”<sup>83</sup> However, the comment goes on to acknowledge that “[t]his assumption may be questioned in states...where existing statutes and decisions do not provide any safe and wholly practical method of establishing a joint account which is not survivorship.”<sup>84</sup> The comment notes that “use of a form negating survivorship”<sup>85</sup> would make the decedent’s estate the legal owner, yet still protect banks who paid the survivor. Therefore, the comment concludes that this rule allows “a safe nonsurvivorship account form” and predicts that the presumption will “become increasingly defensible.”<sup>86</sup>

In fact, the presumption has not become increasingly defensible. Most states that have this Uniform Probate Code section or a similar section have no statutorily mandated or suggested form.<sup>87</sup> So a depositor who wants to use a bank account as a convenience account – a durable power of attorney substitute – may have no obvious alternative to a joint account that after his death will be held to have created a survivorship right. Unless the depositor has independent knowledge of his ability to designate that the account is without survivorship rights, he is totally reliant on a bank employee to advise about of any such option. Presuming that the depositor intends survivorship rights ignores the plausible alternative reasons for opening the account. This presumption of survivorship rights is

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presumption regarding land are inapplicable to bank accounts, the original Uniform Probate Code and those states using the same approach have adopted the analogous presumption that depositors have created survivorship rights instead of agencies.

83. UNIF. PROBATE CODE § 6-104 cmt. (2004).

84. *Id.*

85. *Id.*

86. *Id.*

87. Only Florida has a statutory example of the form of a contract of deposit, and it does not include choices for convenience or agency accounts. FLA. STAT. ANN. § 655.82 (West 2013).

inconsistent with the analogy to wills formalities because the bank account formalities are not convincing indications of intent to transmit property at death. A depositor is presumed to have intended to benefit the survivor with only slight evidence of that intent and without any evidence that the cautionary function was addressed.

As in other types of cases requiring clear and convincing evidence, the presumption is difficult to overcome. For example, contrary provisions in a will are usually not clear and convincing evidence to overcome the presumption. In states that have adopted the Uniform Probate Code or equivalent rules, survivorship rights that arise in a joint account by use of the word “survivorship” or by merely adding an additional signer cannot be changed by will.<sup>88</sup> One court held that a will executed prior to the time the joint account was created could not even be considered as evidence of the decedent’s intent.<sup>89</sup> Similarly, evidence showing the decedent’s “continuing intent, over substantial periods of time, to dispose of her estate in the manner described in her will” was not sufficient to overcome a presumption of survivorship in a bank account, even though the account contained “substantially [her] entire estate.”<sup>90</sup>

Some states have made overcoming the presumption even

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88. UNIF. PROBATE CODE §§ 6-104(e), 6-213(b) (2004). *Contra* MINN. STAT. ANN. § 524.6-204(d) (West 2012). Interestingly, the RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 7.2 cmt.e (2003) recognizes the issue of attempted revocation of will substitutes by a later will, notes that the courts are divided, and recommends that the financial institution pay the proceeds as directed under the will, or at least interplead if in doubt. This is flatly contradictory to both versions of the Uniform Probate Code, which prohibit alteration by will. The Restatement comment concludes that “[t]he party alleging revocation bears the burden of proving that an asserted revocation actually referred to the will substitute in question...” and that “a mere residuary clause in a later will” would not suffice. John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 AM. C. OF TRUST & EST. COUNS. J., 18-19 (2013) (noting that “courts have mostly held that the provision in the later will is ineffective...[but] that the better solution is to honor the later instrument, in order not to defeat the transferor’s intent.”).

89. *In re Estate of Cormier*, 580 A.2d 157, 158 (Me. 1990) (“the record contains no evidence of any contrary intention existing at the critical point, namely, when the account was created.”).

90. *Thompson v. Barngrover*, 680 P.2d 356, 358-59 (N.M. Ct. App. 1984).



more difficult by requiring that the evidence be in writing<sup>91</sup> or specifically refer to the account in question.<sup>92</sup> These requirements make the presumption even less defensible.<sup>93</sup> A South Carolina case, where the statute requires that clear and convincing evidence be found in the will itself, is a particularly egregious illustration. In *Estate of Chappell v. Gillespie*, the decedent, Chappell, executed a will leaving to the plaintiffs certain real estate, about \$15,000 in specific devises, and three-quarters of the residue, and leaving to the defendant-personal representative, Gillespie, one-quarter of the residue.<sup>94</sup> Three days later, Chappell went with Gillespie to the bank and added Gillespie's name to the checking account. A bank employee gave Chappell a signature card that created a joint account with survivorship rights, and also gave him a 32-page deposit agreement that explained that the survivor would receive the account at his death. The bank employee told Chappell that Gillespie would be able to write checks but failed to mention that Gillespie would also receive all the funds at Chappell's death. Chappell signed the card, which also acknowledged his receipt of the 32-page agreement. When Chappell died a few weeks later, the account contained about \$81,000—nearly half his estate.<sup>95</sup> The appellate court affirmed a judgment notwithstanding the verdict for Gillespie.<sup>96</sup> Noting that the statute required that all evidence of the decedent's intent be contained in the will, the court held that the inconsistent provisions in the will and the fact that, without the funds from the bank account, the assets of the estate were insufficient to pay

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91. S.C. CODE ANN. § 62-6-104.

92. *In re Estate of Butler*, 803 N.W.2d 393 (Minn. 2011) (interpreting MINN. STAT. ANN. § 524.6-204(a) (West 2012)).

93. The author's experience in private practice and in supervising a law school "wills clinic" is that most clients are surprised that their wills do not supersede their designations in will substitutes. This makes adequate legal advice critical and should create significant concern when the later will is holographic and the testator likely had no legal advice.

94. *Estate of Chappell v. Gillespie*, 491 S.E.2d 267 (S.C. Ct. App. 1997).

95. *Id.* at 268.

96. *Id.* at 272.

the specific bequests, did not amount to clear and convincing evidence.<sup>97</sup>

One court opined that it is “difficult for an estate to overcome the statutory presumption through the use of circumstantial evidence. In the absence of a clear statement of a contrary intent by the deceased, or evidence of a contrary intent based upon testimony from the attorney who prepared the probated will, a bank employee or a person with special knowledge regarding the decedent’s estate plan, it will be difficult for the estate to prevail in this type of case.”<sup>98</sup> So only in extremely strong cases have contestants been successful. For example, one court considered a prior inconsistent will clear and convincing evidence when there was also evidence that the bank offered no joint account option without survivorship rights, and the defendant *admitted* that the account was for the decedent’s convenience.<sup>99</sup> In another case, evidence that a decedent had medical problems, paid one bill twice, asked two of his children for assistance with his bank account and added one son as a signer on the account, had a family meeting where he showed all children a list of assets including the bank accounts in question, and had always told his children about gifts to his son was clear and convincing to show that the son was on the account only for convenience.<sup>100</sup>

Thus, the presumption can lead to harsh results. The presumption is especially unwarranted without evidence that the bank offered the depositor an account form allowing a choice of whether to provide survivorship rights or not. Perhaps because of this unfairness, the 1989 version of the Uniform

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97. *Id.* at 271-72.

98. *In re Estate of Combee*, 583 So. 2d 708, 712-13 (Fla. Dist. Ct. App. 1991).

99. *Williamson v. Echols*, 422 S.E.2d 329, 330-31 (Ga. Ct. App. 1992). *See also In re Estate of Savage*, 631 N.E.2d 797, 799-800 (Ill. App. Ct. 1994) (affirming the trial court’s finding that a prior will that left an estate to three children equally, evidence that all of decedent’s assets were placed in joint account when decedent knew the assets were needed for his care, and the confidential relationship with the child who was co-tenant were clear and convincing to overcome the presumption of survivorship).

100. *King v. Estate of King*, 554 So. 2d 600, 601 (Fla. Dist. Ct. App. 1989).

Probate Code addressed this problem.

***B. REVISED UNIFORM PROBATE CODE (1989)***<sup>101</sup>

The 1989 version of the Uniform Probate Code overhauled the rules on joint bank accounts<sup>102</sup> and included a standardized bank account form that gives the depositor the ability to designate his intent by initialing lines. The form offers a complete array of choices, including pay-on-death designations, rights of survivorship, and power-of-attorney designations. A serious problem with the form is that it may not be easily understood by account holders.<sup>103</sup> But if the form is used, its

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101. The Uniform Multiple-Person Accounts Act was incorporated into the Uniform Probate Code as sections 6-201 through 6-227. Nine states and the District of Columbia use this regime: Alabama, ALA. CODE §§ 5-24-1 to 5-24-34 (LexisNexis 1996); Alaska, ALASKA STAT. §§ 13.33.201 to 13.33.227 (1962); Arizona, ARIZ. REV. STAT. ANN. §§ 14-6201 to 14-6227 (2012); Colorado, COLO. REV. STAT. §§ 15-15-201 to 15-15-227 (2013); District of Columbia, D.C. CODE §§ 19-602.01 to 19-602.27 (2012); Montana, MONT. CODE ANN. §§ 72-6-201 to 72-6-227 (West 2013); Nebraska, NEB. REV. STAT. §§ 30-2716 to 30-2733 (2008); New Mexico, N.M. STAT. ANN. §§ 45-6-201 to 45-6-227 (2013); North Dakota, N.D. CENT. CODE §§ 30.1-31-01 to 30.1-31-20 (2008); and Rhode Island, R.I. GEN. LAWS § 19-9-14.1 (2013). Colorado altered the Act regarding the rights of survivors in multiple-party accounts by adding subsection 5 to section 6-212 of the Uniform Act. See COLO. REV. STAT. § 15-15-212(5) (2013). Subsection 5 provides that the estate may prove ownership of the funds by clear and convincing evidence. So despite enacting the model account form and the other provisions of the Act, Colorado retains the evidentiary burdens of the original Uniform Probate Code. Michigan has not adopted the Uniform Probate Code, but its joint account statutes contain similar rules. Michigan statutes provide a form that is conclusive if used properly. MICH. COMP. LAWS §§ 487.715 to 487.16 (West 2005). If the form is not used or not completed entirely, the courts look to prior law to determine the decedent's intent. The term "survivor" is prima facie evidence of intent to pass the property to the survivor at death, but the heirs or beneficiaries may rebut. MICH. COMP. LAWS § 487.703 (West 2005); *Betker v. Ide*, 55 N.W.2d 835, 837-38 (Mich. 1952). In 2011, Nevada adopted almost identical statutes. NEV. REV. STAT. §§ 111.783-.815 (2011).

102. The 1989 version incorporates the Uniform Multiple-Person Accounts Act and uses the term "multiple owners," but the definition is almost identical to the previous definition of a "joint account." See UNIF. PROBATE CODE § 6-201(5) (amended 2008).

103. As discussed *infra* at Part III, these choices may be quite clear to a lawyer, but conclusively presuming that the hypothetical elderly person discussed above has expressed his intent on the form seems to be a stretch. The depositor is unlikely to have a lawyer present when opening the account, likely has not had legal advice before opening the account, and may not be receiving adequate advice from the bank employee who is assisting in the transaction.

indications of intent are binding,<sup>104</sup> and the financial institution is protected as well.<sup>105</sup> The form operates along with section 6-212, which provides that the funds in a joint account pass to the survivor, “unless a nonsurvivorship arrangement is specified in the terms of the account.”<sup>106</sup> So the deposit agreement must explicitly indicate lack of survivorship; if it does not, survivorship is conclusively presumed. However, if the form is used correctly, no presumption is ever needed, because the form instructs the depositor to select and initial a line indicating whether or not survivorship rights are granted.

However, the bank is not required to use the statutory form.<sup>107</sup> A recent case, *Krzycki v. Krzycki*,<sup>108</sup> clarified the treatment of depositors who do not use the form in a jurisdiction that has adopted it by statute. If the form is not used, the presumption disappears, and the court must determine the depositor’s intent.<sup>109</sup> In *Krzycki*, an account holder engaged in a series of transactions where she opened accounts and transferred funds. Most of the funds came from annual payments from a personal injury lawsuit settlement involving the decedent and her ex-husband. They later divorced, and the divorce settlement provided that the decedent would receive the payments as settlor, trustee, and beneficiary of a trust she created. At her death, the trust proceeds were to be paid to her four children equally. The decedent never opened a bank account for the trust, but the court traced the lawsuit settlement proceeds into the account in question.<sup>110</sup> Instead of the statutory form, the Wells Fargo Bank deposit agreement listed the

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104. See UNIF. PROBATE CODE § 6-204(a) (amended 2008) (“A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of this part applicable to an account of that type[.]”).

105. UNIF. PROBATE CODE §§ 6-221, 6-222, 6-226 (amended 2008).

106. UNIF. PROBATE CODE § 6-212 cmt. (amended 2008).

107. See UNIF. PROBATE CODE § 6-204(b) (amended 2008) (providing alternative treatment for account agreements not based on the form).

108. *Krzycki v. Krzycki*, 824 N.W.2d 659 (Neb. 2012).

109. *Id.* at 666.

110. *Id.* at 661-64.

decedent as “Primary Joint Owner” and one of decedent’s four children, a daughter, as “Secondary Joint Owner.” Both the decedent and her daughter signed the agreement.<sup>111</sup> At the decedent’s death, the “Secondary Joint Owner” transferred the funds into her own name, and the son who was trustee of the trust sued for conversion.<sup>112</sup>

The daughter contended that she was entitled to the funds because as “Secondary Joint Owner,” she had survivorship rights.<sup>113</sup> Thus, the court had to determine what rights were available to a survivor when the decedent did not use the statutory form. Section 6-204 (b) of the Uniform Probate Code<sup>114</sup> provides that a deposit agreement that is not substantially in the statutory form “is governed by the provisions of [this part] applicable to the type of account that most nearly conforms to the depositor’s intent.”<sup>115</sup> The comment to section 204 directs the court to section 203 to determine the appropriate type of account.<sup>116</sup> Section 203 provides that an account “is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation.”<sup>117</sup> So the court had to decide which lines the decedent would have checked, had the decedent correctly used the form to express her intent.

Since the daughter had the funds, the court required the trustee to prove conversion. First, the court correctly reasoned that the trustee needed proof only by a preponderance of the evidence, because the 1989 version of the Code requires clear and convincing evidence only for disputes about proportional ownership during the parties’ lifetimes.<sup>118</sup> The court relied on

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111. *Id.* at 663.

112. *Id.* at 664.

113. *Id.*

114. *See* NEB. REV. STAT. § 30-2719(a) (2008) (coresponding Nebraska statute).

115. *Krzycki*, 824 N.W.2d at 667.

116. UNIF. PROBATE CODE § 6-204 cmt. (amended 2008).

117. UNIF. PROBATE CODE § 6-203(b) (amended 2008).

118. *Krzycki*, 824 N.W.2d at 667. During the parties’ joint lifetimes, funds in the account belong to the parties “in proportion to the net contribution of each...unless there is clear and convincing evidence of a different intent.” UNIF. PROBATE CODE §

the divorce decree and the trust document executed pursuant to it as evidence that the decedent intended the account funds to pass to her trust, not to her daughter.<sup>119</sup> The court also relied on statements in the decedent's will, stating her intent "to have. . .at death, a bank account through which the settlement proceeds. . .shall pass" and that "one or more. . .children [would be] listed on said account so as to enable them to obtain the funds for distribution according to this [will]."<sup>120</sup> Based on the documents and the tracing of the funds to the settlement payments, the court found that the type of account most nearly conforming to the depositor's intent was a single-party account with an agency designation.<sup>121</sup> And section 205 provides that an agent has no rights after death of the sole party.<sup>122</sup>

So the 1989 Uniform Probate Code changed the original act in two respects regarding survivorship rights, and both changes improved the original. First, the 1989 version relies on the depositor's use of a form to express intent, and that expression is binding.<sup>123</sup> Putting aside, for the moment, concerns about the depositor's understanding of the form, the revised UPC rules that apply when the form is used are well supported by the analogy to wills formalities. The evidentiary function is

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6-211(b) (amended 2008).

119. *Krzycki*, 824 N.W.2d at 740.

120. *Id.* at 667.

121. *Id.* at 668.

122. UNIF. PROBATE CODE § 6-205(c) (amended 2008). Although the court's opinion appears clearly correct as it determined the decedent's intent, an alternative, formalistic result would have been possible. Section 6-201(5) defines a "multiple-party account" as one "payable on request to one or more of two or more parties," regardless of whether survivorship is mentioned. UNIF. PROBATE CODE § 6-201(5) (amended 2008). Nothing in the deposit agreement indicated any restrictions on either joint owner, so the account would have been payable to either on request and thus would have met the definition of a multiple-party account. Section 6-212 provides that at death of a party to a multiple-party account, the funds belong to the survivor unless survivorship rights are specifically excluded by the account agreement. *Id.* The account did not mention survivorship rights, so under this reasoning, the joint owner would be entitled to the account. This result would be inequitable because the section 212 preference for survivorship rights is based on the depositor's ability to designate otherwise on the form. If the form is not used, the depositor may well have been unable to make any such designation. Thus, the court's analysis was both technically correct and fair.

123. *See* UNIF. PROBATE CODE § 6 (1989).

arguably met because the depositor has indicated in a witnessed writing whether he or she intended to create survivorship rights. Similarly, the channeling function is met by the standardized words of survivorship or their absence. The cautionary function is still somewhat suspect because there is no cautionary language on the form. However, the form does have a heading, "rights at death," which arguably cautions the depositor as much as a retirement beneficiary designation.

Second, for account-holders who do not use the form, the revised UPC has eliminated the presumption in favor of survivorship and eliminated the "clear and convincing" requirement for the heirs' or beneficiaries' evidence. This rule reflects the lack of analogy to the wills formalities in that situation. Without a form offering different options, assumptions about the depositor's intent are not supported by any formalities. So allowing the decedent's heirs or beneficiaries to challenge ownership based on a preponderance standard is consistent with the ambiguous indications of intent that can be inferred by merely opening a joint account or adding an authorized signer.

### C. "SURVIVORSHIP" IS CONCLUSIVE.

In jurisdictions that follow this approach, use of survivorship language conclusively establishes ownership in the survivor.<sup>124</sup> Thus, the existence of survivorship language

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124. These jurisdictions have slight variations, but all can be generally categorized as following this approach: Arkansas, ARK. CODE ANN. § 23-32-207 (2012); *Williams v. Davis*, 373 S.W.3d 381 (Ark. Ct. App. 2009); Maryland, MD. CODE ANN., FIN. INST. § 1-204 (LexisNexis 2011) (providing that express terms are conclusive, but absent express terms, funds pass to survivor); *see also Stanley v. Stanley*, 927 A.2d 40 (Md. Ct. Spec. App. 2007) (confirming this interpretation where parties were listed as "primary owner" and "secondary owner"); Mississippi, *Estate of Huddleston*, 755 So. 2d 435, 439-40 (Miss. Ct. App. 1999) (interpreting bank protection statute, MISS. CODE ANN. § 81-5-63 (2001), as creating conclusive presumption if survivorship language is unambiguous); Missouri, *Maudlin v. Lang*, 867 S.W.2d 514 (Mo. 1993) (interpreting MO. ANN. STAT. §§ 362.470, 369.174 as providing that titling account in one of three ways – joint tenants, with survivorship, or payable to any of the depositors – conclusively determines that the funds pass to the survivor); Oklahoma, *In re Estate of Metz*, 256

benefits co-tenants in these states more than in original Uniform Probate Code jurisdictions where co-tenants get only a presumption of survivorship. In that respect, these jurisdictions are even more favorable to claims of co-tenants than the old UPC rules. But the rules in these states vary regarding ownership when survivorship language is absent. In some states, the co-tenant must prove that survivorship was intended. In others, particularly Maryland, Mississippi, and Missouri, the presumption of survivorship is conclusive even if the account agreement uses only the term “joint” or says that the funds are payable to “any” of the authorized signers.<sup>125</sup>

Focusing on survivorship language is consistent with the modern development of the law regarding joint tenancies in real property. Numerous statutes provide that express declarations of joint tenancy or survivorship are sufficient to create survivorship rights in real property.<sup>126</sup> However, the real property statutes also provide that an express declaration is a necessary condition for survivorship, whereas the bank account rules of jurisdictions in this section are more liberal and allow co-tenants to prove survivorship rights even without any express declaration.

A recent case illustrates the unfairness of a conclusive presumption. In *In re Estate of Metz*,<sup>127</sup> the decedent added his nephew to an account, using a bank signature card providing ownership as “joint tenants with right of survivorship, and not as tenants in common, and payable to either during the lifetime

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P.3d 45 (Okla. 2011); Tennessee, TENN. CODE ANN. § 45-2-703(e) (2007); Vermont, VT. STAT. ANN. tit. 8, § 14204 (2013) (providing for conclusive presumption; neither the statute nor cases identify the rule for cases where survivorship language is not used).

125. MD. CODE ANN., FIN. INST. § 1-204 (West 2011); MISS. CODE. ANN. § 81-5-63 (2001); MO. REV. STAT. § 362.470 (1997).

126. E.g., N.Y. EST. POWERS & TRUSTS § 6-2.2(b); OKLA. STAT. ANN. tit. 60, § 74 (West 2010). In one respect, some of these real property statutes are even more liberal at finding joint tenancies than the counterpart bank account rules because the statutes require only a declaration of “joint tenancy,” while the rules for bank accounts in many of these jurisdictions require a specific reference to “survivorship” to invoke the conclusive presumption.

127. *Metz*, 256 P.3d 45.



of both or to the survivor(s) after the death of one of them.”<sup>128</sup> The court held that this language conclusively established ownership in the nephew as surviving joint tenant.<sup>129</sup> The court declined to consider evidence outside the written document and instead applied rules of contract construction to hold that the parties’ intent was unambiguously expressed within the four corners of the contract.<sup>130</sup> The evidence outside the written signature card—evidence that the majority refused to consider—was that the parties verbally agreed that the nephew would not use the account during the decedent’s life, unless the decedent consented. The nephew never contributed or withdrew funds. The decedent’s will did not specifically mention the account and left percentages of the estate to various relatives, including the nephew.<sup>131</sup> Furthermore, the trial court had found that other evidence established the decedent’s intent that the account “be used for his medical expenses and other needs during his life,” and that the account “be the property of his estate after his death.”<sup>132</sup> The dissent reasoned that the evidence was clear and convincing and thus warranted a resulting trust in favor of the will’s beneficiaries.<sup>133</sup>

The majority opinion illustrates the problem with this conclusive presumption approach. Nothing in the opinion indicates that the decedent was offered other signature cards

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128. *Id.* at 46-47.

129. *Id.* at 49-51.

130. *Id.* at 51.

131. *Id.* at 47.

132. *Id.* at 51 (Winchester, J., dissenting).

133. *Id.* at 52. “A resulting trust arises when a person (the “transferor”) makes or causes to be made a disposition of property under circumstances (i) in which some or all of the transferor’s beneficial interest is not effectively transferred to others (and yet not expressly retained by the transferor) and (ii) which raise an un rebutted presumption that the transferor does not intend the one who receives the property (the “transferee”) to have the remaining beneficial interest.” RESTATEMENT (THIRD) OF TRUSTS § 7 cmt.a (2003). Here, the resulting trust would be an equitable method to require the joint tenant to deliver the property to the estate. Rather than holding that no survivorship rights existed, the dissent would respect the survivorship rights as delivering legal title to the joint tenant but hold that he impliedly received it in trust for the estate because of the decedent’s intent.

that did not contain survivorship language or that he understood or even read the language on the card. A scenario at least equally likely is that he informed a bank employee that he wanted to open an account with his nephew, the bank employee handed him a signature card, and both parties signed it. Conclusively presuming intent to create survivorship rights, especially in view of evidence that the decedent intended the account to be used for his medical expenses, elevates form over substance. This approach also lacks policy justification. The evidentiary and channeling functions of formalities were not met because there was no evidence that the decedent was directed to think about rights at death, other than the mere presence of the word “survivorship,” which is not convincing absent a choice of other language. No language appeared on the signature card to put the depositor on notice that the card would override his will or state law, so the cautionary function was not met. At a minimum, the will’s beneficiaries should have had the opportunity to argue for a resulting trust based on a clear and convincing evidence standard. Even more fair, because of the uncertainty regarding intent, would be the preponderance standard used in modern Uniform Probate Code jurisdictions. Thus, this approach is much more rigid and weighted in favor of survivorship rights than either version of the Uniform Probate Code.

***D. SURVIVORSHIP OR ITS ABSENCE IS CONCLUSIVE.***

Five states, either by statute or by common-law rule, require an explicit declaration of “survivorship” rights before the surviving co-tenant may take the account.<sup>134</sup> This declaration

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134. The five states are: Texas, *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990); TEX. ESTATES CODE § 113.151 (2014) (formerly cited as TEX. PROB. CODE ANN. § 439(a)(West 2003)). *But see* *Holmes v. Beatty*, 290 S.W.3d 852, 858-60 (Tex. 2009) (incorporating common law to provide different rule for spouses’ community property); Ohio, *Wright v. Bloom*, 635 N.E.2d 31 (Ohio 1994); North Carolina, *In re Estate of Frances*, 394 S.E.2d 150 (N.C. 1990); Kansas, *Johnson v. Capitol Fed. Sav. & Loan Ass’n*, 524 P.2d 1127 (Kan. 1974); and New Hampshire, N.H. REV. STAT. ANN. § 384:28 (2006); *see also* *Blais v. Colebrook Guaranty Sav. Bank*, 220 A.2d 763 (N.H. 1966).

conclusively establishes ownership in the surviving co-tenant, and, in absence of this declaration, conclusively establishes ownership in the decedent's estate. Obviously, this bright-line rule has the advantages of certainty and eliminating litigation. In fact, one court adopting this rule stated its goal to avoid a requirement that "lawyers, trial judges, juries, and appellate judges perform post mortem cerebral autopsies. . .to determine and second-guess what the subjective intent of the deceased joint owner of the account was at the time the account was created."<sup>135</sup> This approach puts all the emphasis on the account agreement. Essentially, the agreement is considered an integrated contract, and no outside evidence is allowed.

If a depositor clearly has the option to either elect survivorship rights or none, this approach appears more fair than that of the states that conclusively presume survivorship from use of the word but allow co-tenants the opportunity to argue for survivorship even absent such language. This rule clearly sets forth the alternative formalities that are required for the account to be treated as a will substitute: explicit reference to survivorship. Assuming that the person understands the requirement and elects survivorship, the signature card would provide good evidence of his intent. The standardization of the required term and use of the signature card would also meet the channeling function of formalities, giving the depositor confidence that his intent would be respected, and the document could fairly be considered a will substitute. If the depositor chooses no survivorship rights, then conclusively presuming that there are none also is warranted.

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135. *Robinson v. Delfino*, 710 A.2d 154, 160 (R.I. 1998). The court also noted its impatience with joint bank account litigation by stating, "It has been facetiously noted that there are two ways to start a civil action in this state. The first is pursuant to Super. R.Civ.P. 3, and the second is by opening a joint bank account with right of survivorship." *Id.* at 156-57 n.8. In 2008, the legislature adopted in substantial part the Uniform Multiple-Person Accounts Act, R.I. GEN. LAWS §19-9-14.1, so Rhode Island is not listed in this section. The conclusive presumptions are the same, as long as the form is used. But if a bank fails to use the statutory form, an "autopsy" will now be required to determine the depositor's intent. *See* notes 108-122 *supra* and accompanying text. Strangely, the statutory form omits the option of an agency account, although the statute itself provides for it.

In two of these states, Texas and North Carolina, the state legislatures have taken steps to ensure that the evidentiary and channeling functions are met, as well as the cautionary function. Texas has adopted a statutory form, discussed in Part III, that presents the option of a convenience account or a survivorship account, among other alternatives.<sup>136</sup> North Carolina statute requires a depositor to elect survivorship by signing a statement “containing language set forth in a conspicuous manner and substantially similar to the following: Upon the death of one joint owner, the money remaining in the account will belong to the surviving joint owners and will not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner’s will.”<sup>137</sup> Thus, in both these states, the depositor has ample opportunity to elect survivorship rights, so relying exclusively on that election, or lack thereof, is warranted.

However, three of these five jurisdictions, New Hampshire, Kansas, and Ohio, have declined to prescribe forms for signature cards. In those states, assumptions about the depositor’s intent are unwarranted. Without inquiry into the options, if any, that the bank provided the depositor, there is no basis to conclude that the evidentiary function or the channeling functions were met by the mere presence or absence of the word “survivorship.” Nor does the informality of the signature card process satisfy the cautionary function of formalities. So effectively, the only difference between these two jurisdictions and those discussed in Part II (C) above is that the unsupported conclusion about intent equally affects the rights of the account survivor and the beneficiaries or heirs of the deceased depositor’s estate. All are bound by the presence or absence of one term, “survivorship.”

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136. TEX. ESTATES CODE § 113.052 (2014) (formerly cited as TEX. PROB. CODE ANN. § 439(a)(West 2003)); see analysis *infra* Part III accompanying note 156.

137. N.C. GEN. STAT. ANN. § 53C-6-6 (West).

*E. "SURVIVORSHIP" MAY BE OVERCOME OR STILL REQUIRES SURVIVOR TO PROVE OWNERSHIP.*

This category includes all jurisdictions that to some degree disfavor those claiming survivorship rights. In Delaware,<sup>138</sup> Massachusetts,<sup>139</sup> Wyoming,<sup>140</sup> and West Virginia,<sup>141</sup> use of "survivorship" language is required to create survivorship rights, but its presence is not conclusive. Even with that language present, those claiming through the estate, will, or trust may prove that the decedent intended to benefit them instead of the co-tenant. Louisiana requires proof of "an authentic act of donation"—presumably meaning proof of a completed gift—or the property remains in the estate of the decedent.<sup>142</sup> Finally, Idaho, the state most favorable to the beneficiaries of the decedent's estate or will, always requires the survivor to prove by clear and convincing evidence that the decedent intended the account to pass to the survivor.<sup>143</sup>

Obviously, these states treat the claims of surviving co-tenants with some skepticism. As discussed earlier, in light of the possible alternative reasons for creating a joint bank account and the lack of a valid analogy between the wills formalities and the formalities associated with opening joint bank accounts, this skepticism seems valid. Furthermore, placing the burden of proof on the co-tenant or allowing the will beneficiaries or heirs to attempt to overcome the use of survivorship language is

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138. *Bothe v. Dennie*, 324 A.2d 784, 788 (Del. Super. Ct. 1974).

139. See MASS. GEN. LAWS ch. 167D, §5; *Egan v. Deely*, 282 N.E.2d 686, 686 (Mass. 1972) (requiring rebuttal by preponderance of evidence).

140. *Nat'l Bank of Newcastle v. Wartell*, 580 P.2d 1142 (Wyo. 1978).

141. W. VA. CODE § 31A-4-33 (2009); *Lutz v. Orinick*, 401 S.E.2d 464, 468 (W. Va. 1990).

142. *In re Succession of Bella*, 75 So. 3d 972, 975 (La. Ct. App. 2011).

143. Idaho adopted the original Uniform Probate Code but reversed the burden regarding survivorship. "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent if an intent to give the account can be shown by the surviving party or parties." IDAHO CODE ANN. § 15-6-104 (2009). The court in *In re Estate of Lewis*, 543 P.2d 852, 856 (Idaho 1975) held that the surviving party must meet the burden by clear and convincing evidence, consistent with prior law in the state.

consistent with recognition that the decedent may have had no practical way to open the account as a durable-power-of-attorney substitute.

### III. STATUTORILY MANDATED UNIFORM ACCOUNT FORMS

As shown above, through various evidentiary burdens, the majority of states strongly favor the surviving co-tenant over the estate of the deceased depositor. These evidentiary burdens exist without any proof that the depositor actually made a conscious choice of survivorship rights, or in original Uniform Probate Code states, without any evidence that the depositor chose survivorship rights at all. One obvious way to better ascertain a depositor's intent is use of a deposit agreement form that allows the depositor to indicate whether he or she intends survivorship rights in the account. Yet only a few states offer a standardized form at all, leaving it to the banks to provide agreements without any guidance from the state.

The most commonly used standardized form is the 1989 Uniform Probate Code uniform bank account form, designed to allow a depositor to express his or her intent about ownership during life, rights at death, and power of attorney designations. If a depositor uses the form correctly, the choices are binding, and claimants' rights are determined by statute.<sup>144</sup> Based on a non-scientific sampling of non-lawyers, the problem with the form is that it is difficult to understand.

The form appears in section 6-204 (a) and is reproduced below.<sup>145</sup> The first choice that the depositor must make is

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144. UNIF. PROBATE CODE § 6-204(a) (amended 2008).

145. UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM  
PARTIES [Name One or More Parties]:

OWNERSHIP [Select One And Initial]:

\_\_\_\_\_ SINGLE-PARTY ACCOUNT

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

whether the account is a "single-party account" or "multiple-party account." The form does not define these two types of accounts, so the depositor must choose based on his or her own understanding of these terms. The only guidance is the additional language about ownership "in proportion to net

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RIGHTS AT DEATH [Select One And Initial]:

\_\_\_\_\_ SINGLE-PARTY ACCOUNT

At death of party, ownership passes as part of party's estate.

\_\_\_\_\_ SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH)  
DESIGNATION

[Name One Or More Beneficiaries]:

At death of party, ownership passes to POD beneficiaries and is not part of party's estate.

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

At death of party, ownership passes to surviving parties.

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND  
POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

\_\_\_\_\_ MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

[To Add Agency Designation To Account, Name One Or More Agents]:

[Select One And Initial]:

\_\_\_\_\_ AGENCY DESIGNATION SURVIVES DISABILITY OR  
INCAPACITY OF PARTIES

\_\_\_\_\_ AGENCY DESIGNATION TERMINATES ON DISABILITY OR  
INCAPACITY OF PARTIES

contributions” that appears after the multiple-party heading.<sup>146</sup> No similar guidance appears after the single-party heading. The hypothetical elderly person mentioned at the beginning of this article, who wants to use the account to allow a relative to write checks in case of incapacity, may well think that wanting an additional signer requires a multiple-party account.<sup>147</sup> In fact, this account should be a single-party account because the elderly person does not intend that the additional signer have any ownership rights or any right to contribute funds to the account.

Only by examining the statutory definitions in section 6-201 does this distinction become somewhat clear. A “multiple-party account” is one that is “payable on request to one or more of two or more parties,”<sup>148</sup> and a “party” is “a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent.”<sup>149</sup> What our elderly person wants is an agent.<sup>150</sup> Therefore, he or she should choose a single-party account. Then at the next decision point, “rights at death,” he or she should choose the first of the two single-party options, which provides that “ownership passes as part of the party’s estate.”<sup>151</sup> Finally, he or she needs to proceed to the optional agency designation, and initial the choice that the agency will survive parties’ “disability or incapacity.”<sup>152</sup> The additional language on the form offered to explain agency mirrors the statutory definitions and informs the depositor that the agent “may make account transactions” but will “have no ownership or rights at death.”<sup>153</sup> If our depositor

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146. UNIF. PROBATE CODE § 6-204(a) (amended 2008).

147. Even a legal expert has recently written that this is the correct choice. Charles P. Sabatino, *Damage Prevention and Control for Financial Incapacity*, 305 J. AM. MED. ASS’N 707, 707-08 (2011). This would be true only in states such as Rhode Island that use the form but omit the choice of an agency designation.

148. UNIF. PROBATE CODE § 6-201(5) (amended 2008).

149. UNIF. PROBATE CODE § 6-201(6) (amended 2008) (emphasis added).

150. UNIF. PROBATE CODE §§ 6-201(2), 6-211(d) (amended 2008) (“An agent in an account with an agency designation has no beneficial right to sums on deposit.”).

151. See UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM, *supra* note 145.

152. *Id.*

153. *Id.*



correctly chooses and initials these three lines, then his or her intent will be clear and respected.

Suppose, instead, that the depositor opts for the multiple-party account at the initial decision point above, thinking that the additional signer is a "party." This is likely, given that the form does not define either "party" or "single-party account." To effectuate the desire that the account pass by will or by the law of intestacy, the person would next initial the line for "multiple-party account without right of survivorship."<sup>154</sup> By initialing these two lines, has the person created different rights than when he or she made the single-party agency choices above? The answer is yes: only slightly, but possibly significantly. Under this scenario, the additional signer may withdraw funds during the life of the other party,<sup>155</sup> but the additional signer does not have an agency relationship with the elderly person. So several disputes could arise and make it more difficult for the elderly person's desired beneficiaries.

First, the two parties now own the account in proportion to their net contributions.<sup>156</sup> One can envision a scenario where the additional signer makes contributions to the account, payments are then made from the account, and a dispute arises about which party's funds should be charged with the payments. Second, because the additional signer has none of the legal duties of an agent,<sup>157</sup> what is the treatment of withdrawals made by the additional signer? The parties own the account in proportion to their net contributions, and courts have held that the same rule applies to funds that have been expended from the account.<sup>158</sup> But the official comment notes that "parties to

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154. *Id.*

155. Compare UNIF. PROBATE CODE § 6-211(d) (During the lifetime of any party, "An agent in an account with an agency designation has no beneficial right to sums on deposit.") with section 6-201(6) "'Party' means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent."

156. UNIF. PROBATE CODE § 6-211(a)-(b) (amended 2008).

157. See RESTATEMENT (THIRD) OF AGENCY §§ 8.01 to 8.12 (2006).

158. *In re Estate of Jones*, 826 N.W.2d 540, 544-46 (Minn. Ct. App. 2012); *Kemp v. Rawlings*, 594 S.E.2d 845, 850 (S.C. 2004).

accounts [may] be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them.”<sup>159</sup> The additional signer could argue plausibly that had the initial depositor intended that the funds be spent only on the depositor’s behalf, the depositor would have chosen an agency account. Because he or she instead chose a multiple-party account, the depositor must have intended that the additional signer have rights to withdraw during their joint lives.<sup>160</sup> This would complicate the intended beneficiaries’ claim for conversion against the additional signer because the additional signer can argue the issue of intent. The statute and the form provide that the funds are owned in proportion to net contributions, “unless there is clear and convincing evidence of a different intent.”<sup>161</sup> This allows the additional signer an avenue to claim ownership of the funds in the account both during their joint lives and at the depositor’s death, albeit at a heightened standard of proof. Unlike the agency account, which terminates at death of the principal,<sup>162</sup> death of the depositor would not conclusively end any claim of the additional signer.<sup>163</sup>

In view of the potential problems created by a multiple-party account without survivorship, one has to wonder who would want to create this type of account instead of an agency account. Why would a person want an additional signer who has lifetime rights to withdraw but no agency obligations

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159. UNIF. PROBATE CODE § 6-211 cmt. (amended 2008).

160. The bank is protected when paying either a party in a multiple-party account or an agent in an agency account, so the distinction is relevant only to the additional signer. UNIF. PROBATE CODE §§ 6-222, 6-224 (amended 2008).

161. UNIF. PROBATE CODE § 6-211(b) (amended 2008).

162. UNIF. PROBATE CODE § 6-205(c) (amended 2008).

163. This is because without a right of survivorship, “the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 is transferred as part of the decedent’s estate.” UNIF. PROBATE CODE § 6-212(c) (2008). The decedent’s share under 6-211 is subject to the “clear and convincing evidence” standard that could allow the survivor to argue that the parties had an ownership agreement different from net contributions. Both cases cited above in note 151, *In re Estate of Jones*, 826 N.W.2d 540, 546 (Minn. Ct. App. 2012); *Kemp v. Rawlings*, 594 S.E.2d 845, 850 (S.C. 2004), allowed evidence of intent to benefit the survivor who had withdrawn the funds.

attached to the withdrawals? Hypothesizing two parties, the two parties would have to want an account that contained funds of both, or funds of one that were available to the other. During their joint lifetimes, they would not limit each other's ability to access those funds, because the bank is allowed to pay either party.<sup>164</sup> At death, however, the account would be segregated into the remaining net contributions of each party, and the deceased party's share would pass to his heirs or beneficiaries. Perhaps this would apply to a married couple or life partners who wish to have a shared account during their joint lives yet retain individual ownership of their portion of the funds at death. The drafters of this section believed this to be the most common situation and that depositors in multiple-party accounts "usually intend[] no present change of beneficial ownership."<sup>165</sup> This may well be true in the sense that the parties do not intend an irrevocable gift; they retain the ability to withdraw the funds to the extent they remain in the account.<sup>166</sup> But the potential problems with this type of arrangement, as detailed above, counsel in favor of funding such an account only with an amount that the parties do not mind commingling and risking that the funds would not pass to their other heirs or beneficiaries at death.<sup>167</sup> Providing this option along with single-party accounts and agency accounts on the same form interjects confusion. Especially given the limited explanatory notes on the

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164. UNIF. PROBATE CODE §§ 6-221, 6-222 (amended 2008).

165. UNIF. PROBATE CODE § 6-211 cmt. (amended 2008).

166. See Carolyn Satenberg, *Joint Bank Accounts in New York: Confusion, Discrimination, and the Need for Change*, 9 *Cardozo Pub. L. Pol'y & Ethics J.* 607, 634-35 (2011) (quoting legislative history of New York joint deposit law for proposition that 90% of people surveyed did not know that New York law provided equal ownership of joint deposits and arguing that "net contribution" rule of Uniform Probate Code should be adopted). This is also consistent with the gift tax treatment of deposits into multiple-party accounts. Deposits are not considered gifts until the co-tenant withdraws funds. 26 C.F.R. § 25.2511-1(h)(4) (2013).

167. "The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party. Sections 6-221 and 6-226 protect a financial institution in that circumstance without reference to whether a withdrawing party may be entitled to less than that party withdraws . . . . Rights between parties in this situation are governed by general law . . . ." UNIF. PROBATE CODE § 6-211 cmt. (amended 2008).

form, a depositor could easily make the wrong choice.

These concerns about complexity and understandability are supported by the results of a small survey conducted by the author. The survey asked twenty adults to assume that they were elderly, unmarried, and concerned about ability to pay bills in case of illness. They were to further assume that they had three children and wanted the one who lived closest to be able to sign checks if necessary. At death, the funds were to pass as part of the estate, which would give them to all three children equally, rather than to the child who was the authorized signer. Each person was asked to fill out the Uniform Probate Code form, initialing the appropriate lines. Only three correctly chose a single-party account and designated an agent (one of those three had previously worked at a bank).

Many struggled with whether the account was single-party or multiple-party. Seven chose multiple-party account without survivorship, plus an agency designation. Although the form does not explicitly prohibit this, the statute provides that an agent must be a person other than a party.<sup>168</sup> Therefore, if the bank did not require the depositor to correct this error, presumably, the agency designation would not be valid, and the account would remain a multiple-party account without survivorship. As discussed above, this is not ideal.

Others created multiple-party accounts with the authorized signer, either with or without survivorship rights, and made pay-on-death designations to all three children. Both these are problematic. First, “[a pay-on-death] designation in a multiple-party account without right of survivorship is ineffective.”<sup>169</sup> Second, a pay-on-death designation to all three children would be ineffective for practical purposes in an account that is multiple-party *with* survivorship. The pay-on-death designation

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168. UNIF. PROBATE CODE § 6-205(a) (amended 2008).

169. UNIF. PROBATE CODE § 6-212(c) (amended 2008). Presumably, this is because the bank would not know which funds belonged to the survivor and which to the decedent.

only operates on the death of the last party to die.<sup>170</sup> At the first death, presumably that of the elderly depositor, the funds would belong to the survivor<sup>171</sup> —the child who should have been designated as an agent. Only if that child were to leave the funds in the account until his or her own death would the pay-on-death designation ever operate: an unlikely event.

This survey illustrates the weakness of the Uniform Probate Code form. Assuming that even the majority of depositors can navigate the form correctly is unwarranted. The form uses numerous legal terms, most without even a hint of explanation. A depositor is expected to distinguish between single-party accounts and multiple-party accounts, and understand the meaning of net contributions and clear and convincing evidence. He or she must discern the difference between right of survivorship and pay-on-death designations. The depositor must know that he or she needs an agency account or power of attorney, and decide whether the power “survives. . .incapacity of parties.”<sup>172</sup> The form seems more designed to be a law school exam question than something an average depositor could complete.

Presumably, the drafters of the form intended that bank employees would provide advice and assistance. This assumption may well be unwarranted. One author has noted that “[e]ven with the [Uniform Probate Code], financial institutions have little incentive to recommend alternatives to the traditional joint account because it takes more time and money to train employees to explain the different kinds of accounts and forms to the customer.”<sup>173</sup> Further, advice from bank employees may be inconsistent or incorrect.<sup>174</sup> So a more

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170. UNIF. PROBATE CODE § 6-212(b)(2) (amended 2008).

171. UNIF. PROBATE CODE § 6-212(a) (amended 2008).

172. UNIF. PROBATE CODE § 6-204(a) (amended 2008).

173. Sabatino, *supra* note 147.

174. *See, e.g.*, Sheri Brown, The Statutory Convenience Account: A Viable Solution to Unnecessary Joint Account Litigation, 21 DCBA BRIEF 24, 31 n.89 (2008) (describing errors in advice about account types from bank employees). The author's experience as an estate planner in a non-Uniform Probate Code state has also been that bank employees often may not accurately convey the options

user-friendly form, with explanations of terms and consequences, would be in order.<sup>175</sup>

Three problems seem to be the primary causes of confusion about the form. First, the term “party” has a technical meaning, and the form does not define it. The word “owner” would be more understandable to a non-lawyer and serve the same purpose.<sup>176</sup> The statute defines a “party” as a person who has a present right to payment, who is not a beneficiary or agent. To most people, that person would surely be considered an “owner” of the account. Second, again as evidenced by the survey, many people do not understand the distinction between pay-on-death and survivorship. What is the difference? Both provide a payment at death. Survivorship rights require payment to a “party” whereas “pay-on-death” means payment to a beneficiary—one who is not a party.<sup>177</sup> Would not a simpler solution be to establish a heading, “rights at death,” and leave space for the names of those who are entitled to the funds at the death of either or both owners, or to specifically ask whether funds are to pass to the survivor? Finally, and not surprisingly, judging from the dearth of survey participants who selected an

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available to a depositor.

175. Reliance on bank employees for legal advice is subject to other criticisms that may not be cured by a more understandable account form. For example, no one without legal training could be expected to provide advice about issues such as whether creditors of the co-tenant may reach the entire account balance, how the lapse or anti-lapse rules operate for survivorship accounts and pay-on-death designations, or how the rules of particular states determine whether designations in subsequent wills revoke or override the designations in the account contract. For example, as to the latter, the Uniform Probate Code requires a signed writing delivered to the bank. UNIF. PROBATE CODE § 6-213(a) (amended 2008). But the RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (2003) recognizes differences in states’ laws on the subject, as noted in the comment following UNIF. PROBATE CODE § 6-213 (amended 2008). *See, e.g.*, S.C. CODE ANN. § 62-6-104 (2013) and *Abernathy v. Latham*, 545 S.E.2d 848 (Ga. 2001) (interpreting statute to require writing delivered to bank or specific reference to bank account in subsequent will). All of these considerations could change a depositor’s choice of account type. Furthermore, bank employees are likely unaware of the depositor’s complete estate plan and family situation. Kent D. Schenkel, *Testamentary Fragmentation and The Diminishing Role Of The Will: An Argument For Revival*, 41 Creighton L. Rev. 155, 162 (2008).

176. *Cf.* MICH. COMP. LAWS § 487.715 (2005) (using the word “person” and then asking “who owns the funds[?]”).

177. UNIF. PROBATE CODE § 6-201(3), (6) (amended 2008).

agency designation, many people do not understand the legal definition of “agency.” Presumably, most rule out that choice because they assume that it has the meaning given in one of the first three definitions from a popular online dictionary: “an organization, company, or bureau that provides some service for another: *a welfare agency*. 2. a company having a franchise to represent another. 3. a governmental bureau, or an office that represents it.”<sup>178</sup> All of these definitions obviously seem irrelevant to the task at hand—adding an additional authorized signer to help with bill payment—so the depositor makes other choices.

Other states also have statutory forms. The form used in Texas<sup>179</sup> addresses many of these concerns. First, the top of the

178. *Agency*, DICTIONARY.COM (2014), <http://dictionary.reference.com/browse/agency?s=t> (emphasis omitted).

179. UNIFORM SINGLE-PARTY OR MULTIPLE-PARTY ACCOUNT SELECTION FORM NOTICE: The type of account you select may determine how property passes on your death. Your will may not control the disposition of funds held in some of the following accounts. You may choose to designate one or more convenience signers on an account, even if the account is not a convenience account. A designated convenience signer may make transactions on your behalf during your lifetime, but does not own the account during your lifetime. The designated convenience signer owns the account on your death only if the convenience signer is also designated as a P.O.D. payee or trust account beneficiary.

Select one of the following accounts by placing your initials next to the account selected:

\_\_\_ (1) SINGLE-PARTY ACCOUNT WITHOUT "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the name of the party:

\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_

\_\_\_ (2) SINGLE-PARTY ACCOUNT WITH "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate.

Enter the name of the party:

\_\_\_\_\_  
Enter the name or names of the P.O.D. beneficiaries:

\_\_\_\_\_  
\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_ (3) MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the names of the parties:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_ (4) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes to the surviving parties.

Enter the names of the parties:

\_\_\_\_\_  
\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_ (5) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND P.O.D. (PAYABLE ON DEATH) DESIGNATION. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of the last surviving party, the ownership of the account passes to the P.O.D. beneficiaries.

Enter the names of the parties:

\_\_\_\_\_  
\_\_\_\_\_

Enter the name or names of the P.O.D. beneficiaries:

\_\_\_\_\_  
\_\_\_\_\_



form contains a notice advising the depositor that the selections on the form may determine ownership of the funds at death. This addition satisfies the cautionary function, to some extent,<sup>180</sup> and provides much more reliable evidence that the depositor

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Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_

\_\_\_ (6) CONVENIENCE ACCOUNT. The parties to the account own the account. One or more convenience signers to the account may make account transactions for a party. A convenience signer does not own the account. On the death of the last surviving party, ownership of the account passes as a part of the last surviving party's estate under the last surviving party's will or by intestacy. The financial institution may pay funds in the account to a convenience signer before the financial institution receives notice of the death of the last surviving party. The payment to a convenience signer does not affect the parties' ownership of the account.

Enter the names of the parties:

\_\_\_\_\_

Enter the name(s) of the convenience signer(s):

\_\_\_\_\_

\_\_\_ (7) TRUST ACCOUNT. The parties named as trustees to the account own the account in proportion to the parties' net contributions to the account. A trustee may withdraw funds from the account. A beneficiary may not withdraw funds from the account before all trustees are deceased. On the death of the last surviving trustee, the ownership of the account passes to the beneficiary. The trust account is not a part of a trustee's estate and does not pass under the trustee's will or by intestacy, unless the trustee survives all of the beneficiaries and all other trustees.

Enter the name or names of the trustees:

\_\_\_\_\_

Enter the name or names of the beneficiaries:

\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_

180. A more conspicuous notice would ensure that a depositor is on notice that he may be about to determine how the funds will pass at death. *See, e.g.*, U.C.C. § 1-201(10) (2011) (suggesting all capital letters, larger type, or contrasting color to meet a requirement that a term or clause is conspicuous).

intended the form as a will substitute, if the depositor in fact chooses survivorship or pay-on-death options. Next, the form defines each type of account. For each account where more than one party may withdraw funds, the form describes the ownership rights of the parties or cosigner and the rights of the financial institution. And finally, the form gives the option of a “convenience account.” Both the name of the account and the corresponding explanation make it clear to our hypothetical depositor that this is the correct choice. Furthermore, the form also allows for combinations of pay-on-death, agency, and multiple parties. The survey participants were much more successful at completing the Texas form. Thirteen correctly chose convenience account provisions.

Other states have either forms or statutory requirements for bank deposit agreements. For example, as mentioned earlier, North Carolina statutes require a depositor to indicate in conspicuous language an intent that the account belong to the survivor.<sup>181</sup> Michigan statute suggests a form where for each “person” listed, lines are checked indicating that person’s right to withdraw and the disposition of the funds in the account if that person dies before the other person.<sup>182</sup> A Virginia statute requires that a bank use either two separate forms for joint accounts with or without survivorship rights, or one form clearly indicating the two choices and requiring that the depositor sign one or the other.<sup>183</sup> The Virginia statute also requires disclosures explaining that the funds will pass to the survivor or to the estate, depending on the type of account.<sup>184</sup>

The goal of any form should be to allow the depositor to express his intent and thereby provide evidence of that intent at the depositor’s death. To meet those goals, the form should have as few choices as possible and explain those choices in

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181. N.C. GEN. STAT. § 53C-6-6 to 53C-6-7 (2012) (for survivorship rights and POD designations); N.C. GEN. STAT. § 54C-167 (for agency designations).

182. MICH. COMP. LAWS § 487.715 (2005).

183. VA. CODE ANN. § 6.2-618(A) (1950).

184. VA. CODE ANN. § 6.2-618 (1950).



A. At death of an owner, do the owner's funds pass to other living owners? YES \_\_\_ NO \_\_\_

If there is more than one owner, and you check "NO", each owner's share of funds will pass to the owner's estate according to the owner's will or state law if the owner has no will. Be aware that the bank is not responsible for determining percentages of ownership and may pay funds to the surviving owner.

B. If you answered YES in 1A above, choose one of the following options:

\_\_\_ At death of last owner, funds pass to that owner's estate according to that owner's will or state law.

\_\_\_ At death of last owner, funds pass to the following persons:

\_\_\_\_\_

2. If there is only one owner of the account, choose one of the following options:

\_\_\_ At death of owner, funds pass to owner's estate according to will or the state laws for persons without wills.

\_\_\_ At death of owner, funds pass to the following persons:

\_\_\_\_\_

\_\_\_\_\_

## CONCLUSION

Return to the hypothetical widow or widower who, because of concerns about health, added one of three children as an additional signer. Perhaps he or she was offered only a joint account form, or perhaps didn't understand all the choices on the form the bank provided, so he or she added one child as a party and created survivorship rights (either by using the word survivor or just by having an additional person on the account in those states that consider any multi-party account to belong to the survivor). Perhaps the elderly person was even concerned enough about making things go smoothly for the three children that he or she executed a will, leaving everything to the three of

them equally, which is how the person intended all of the estate, including the bank account, to be divided. Does the will override the designation on the bank account? Certainly not in the modern Uniform Probate Code jurisdictions if the bank used the statutory form. The form is conclusive, and if he or she didn't understand the need for an "agency" account (as most of the survey participants didn't), the account goes to the child whose name is on the account.<sup>185</sup> Certainly not in a conclusive-presumption state where the word "survivor" or "survivorship" means that the court closes its eyes to any contrary evidence. Only in states where the children are allowed to present evidence to overcome the presumption is there any chance that his wishes will be carried out, and even then, the children will likely have to prove intent by clear and convincing evidence, which will be difficult.

The majority of courts and legislatures have created rules that favor co-tenants of bank accounts over the heirs or beneficiaries of the decedent. The policy of encouraging the avoidance of probate has outweighed the lack of policy justification for treating joint accounts as wills substitutes. Furthermore, the recognition that joint bank accounts are unique has given way to a desire for certainty of result. Instead, joint bank accounts have been swept along with the rest of the "Nonprobate Revolution."

A state wishing to both end disputes over joint bank accounts and ensure that the depositor's intent is respected should do one of two things. First, and ideally, the state legislature should mandate a bank account form that allows a depositor to clearly indicate ownership at the depositor's death. The form most commonly adopted by legislatures thus far is confusing and, without reliable assistance from a bank employee, seems unlikely to result in a clear expression of intent. Legislatures should provide an easy way for depositors to confidently express their intent. Second, courts deciding

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185. UNIF. PROBATE CODE § 6-213(b) (amended 2008).

disputes where the legislature has not required a specific account form—or where the form was not used— should recognize the distinct possibility that the decedent intended a convenience account instead of a survivorship account. Courts should require proof that the bank actually offered an understandable account agreement that would have allowed a convenience account. Absent such evidence, courts should not treat joint bank accounts as will substitutes. Nor should they engage in presumptions, whether conclusive or rebuttable, that the word “survivorship” or its absence indicates the decedent’s intent, or worse, presumptions that merely listing an additional authorized signer indicates intent for survivorship rights. Courts should remember that as in wills, the ultimate goal is to respect the transferor’s intent.

