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COMMENT

JOINT BANK ACCOUNTS IN WISCONSIN

The joint bank account has become a popular form of holding and transferring property. The joint account's popularity is grounded largely in the fact that it allows funds remaining on deposit at the death of a codepositor¹ to pass to the surviving codepositor without the necessity of a will and the burdens of probate. In addition to survivorship rights, the joint bank account may carry with it present ownership rights. However, the determination of lifetime rights and survivorship rights in joint accounts has been the source of considerable litigation. It is the purpose of this comment to consider the rights of codepositors in a joint account, to point out some of the problems that exist today, and to discuss possible alternatives to the present Wisconsin law.

JOINT BANK ACCOUNTS UNDER PRESENT WISCONSIN LAW

Survivorship Rights

Prior to 1935 the Wisconsin Supreme Court used the law of gifts to determine whether a joint tenancy with the right of survivorship had been created in a joint bank account. In *Marshall & Ilsley Bank v. Voigt*,² the right of survivorship was denied to the surviving codepositor of a joint savings account because, prior to the death of the donor depositor, there had never been a delivery of the passbook to the donee depositor and consequently there was no completed gift of the deposit to the donee. Then, in *Estate of Staver*,³ decided in 1935, the court departed from its previous rulings which had applied the law of gifts and adopted the contract theory.

Staver involved certificates of deposit which were payable "to the order of Joseph Staver or Frank J. Staver." Joseph Staver was the original owner of the certificates and from the facts it appeared that Frank never had possession or any physical control over the certificates prior to Joseph's death. The court, recognizing that the transaction failed to meet the requirements of a trust or gift, concluded that the question was not one of transfer but rather one of contract. The court said:

In case of joint bank accounts evidenced by certificates of deposit, the chose in action or contract claimed against the bank is at the outset created not only in the depositor but in the person whom he designates as joint payee or owner of the deposit.⁴

The contract doctrine espoused in *Staver* has become firmly established in Wisconsin. It has been applied by the court to savings bank ac-

¹ Codepositor refers to a person named in the deposit agreement and does not necessarily mean that he has made a deposit in the account.

² 214 Wis. 27, 252 N.W. 355 (1934).

³ 218 Wis. 114, 260 N.W. 655 (1935).

⁴ *Id.* at 119-20, 260 N.W. at 658.

counts,⁵ has been sustained against constitutional attack,⁶ and has been cited with approval in almost all cases involving joint bank accounts.

One problem, however, in the application of the contract theory is the variance in the forms used by banks to create joint accounts. The usual form is signed by both codepositors and declares joint ownership with rights of withdrawal and survivorship.⁷ However, in some instances the names merely appear jointly on an account or passbook. In *Estate of Skilling*,⁸ a passbook to a savings account and the bank records read "Edward or John M. Skilling" and there was a rubber stamp notation that "the money herein deposited is owned jointly by the persons named and is subject to the order of either, the balance at the death of either to belong to the survivor."⁹ Another form uses the phrase "as joint tenants" after the printed names of the parties on the deposit contract. Regardless of the variations present in the forms, however, it appears that any language which implies that the account is payable to either or the survivor is sufficient to give the donee depositor survivorship rights.

Another problem arising both from the language of some deposit contracts and from the language of the Wisconsin Supreme Court is whether the survivor takes the account because the parties were joint tenants or simply because the contract created a survivorship interest. The resolution of this issue could affect the tax liability of the parties as well as the lifetime rights of the parties to the account. In *Staver*, where the court stressed the contractual rights of the donee beneficiary, the court spoke of "joint owners"¹⁰ and said that "the legal title to the chose in action is in the depositor and the other joint payee jointly."¹¹ No definite answer is given in the cases arising after *Staver* although it does appear that the contract may create a joint tenancy and, when this occurs, survivorship rights are protected either under the principle of third party beneficiary or the rules of joint tenancy.¹²

The provisions of Wisconsin Statute Section 221.45 have been used by the court to effectuate the terms of deposit contracts, especially the survivorship term. The statute provides:

⁵ *Estate of Skilling*, 218 Wis. 574, 260 N.W. 660 (1935).

⁶ *Schwanke v. Garlt*, 219 Wis. 367, 263 N.W. 176 (1935).

⁷ Comment, 37 MARQ. L. REV. 306 (1954). The author states that many banks use the contract form approved by the American Banker's Association. 37 MARQ. L. REV. at 307.

⁸ Note 5 *supra*.

⁹ 218 Wis. at 576, 260 N.W. at 661.

¹⁰ 218 Wis. at 119, 260 N.W. at 658.

¹¹ 218 Wis. at 121, 260 N.W. at 658.

¹² See *Estate of Pfiefer*, 1 Wis. 2d 609, 85 N.W.2d 370 (1957), where the form of the account is said to raise a presumption that the creator intended the usual rights incident to jointly owned property. Compare *Staver* and its discussion of contract law.

When a deposit has been made or shall hereafter be made, in any bank, trust company bank, or mutual savings bank transacting business in this state in the names of 2 persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made.

In *Staver* the court stated that: "Our banking statute, Sec. 221.45, recognizes the right of survivorship where the certificate of deposit is in the names of two persons, payable to either or the survivor."¹³ In *Boehmer v. Boehmer*,¹⁴ the court said: "Sec. 221.45 Stat. specifically provides that a joint tenancy is created . . ."¹⁵ and held that in *Staver* the court had construed the statute as giving the right of survivorship to either payee.¹⁶ Since *Boehmer*, however, the court has stated that Wisconsin Statute Section 221.45 was enacted simply for the protection of banks and does not determine the rights of the named payees of a joint bank account as between themselves.¹⁷

Renewed importance was given to Section 221.45 in *Estate of Michaels*¹⁸ where the court said that the statute may be pertinent on the issue of whether the attempted conferral of survivorship rights on the surviving donee is an ineffective testamentary disposition. The court held that conferral of survivorship rights at the death of the depositor was valid under Section 221.45.

It is this statute which implements the deposit contract and causes legal title to vest in the survivor payee even though equity in a proper case may intervene to impress a trust against such survivor payee. The passing of legal title is irreconcilable with the concept that such an attempted transfer is an ineffective testamentary disposition because of failure to comply with the requirements of the Statute of Wills.¹⁹

The court held in *Staver* that the

legal ownership of instruments and the incidents of such ownership should generally depend upon their terms, leaving it to a court of equity to impose on the holder of the legal title such equitable obligations as the law of trusts warrants.²⁰

Two circumstances which would warrant the imposition of a trust upon the title of the survivor are: first, where it is shown that the purpose

¹³ 218 Wis. at 124, 260 N.W. at 660.

¹⁴ 264 Wis. 15, 58 N.W.2d 411 (1953).

¹⁵ *Id.* at 19, 58 N.W.2d at 413.

¹⁶ *Id.* at 20, 58 N.W.2d at 413.

¹⁷ *Estate of Schley*, 271 Wis. 74, 72 N.W.2d 767 (1955); *Estate of Kemmerer*, 16 Wis. 2d 480, 114 N.W.2d 803 (1962).

¹⁸ 26 Wis. 2d 382, 132 N.W.2d 557 (1965).

¹⁹ *Id.* at 397-8, 132 N.W.2d at 565.

²⁰ *Estate of Staver*, 218 Wis. 114, 124; 260 N.W. 655, 659 (1935).

of the deposit was to constitute the payee, other than the depositor, a mere agent;²¹ and, second, where the donee payee by an express agreement with the depositor promised to distribute the funds as the depositor desired.²² The court made it clear, however, that even in these circumstances, the legal title is in the survivor and it would be necessary to show by clear and satisfactory evidence a duty upon the survivor to hold the title in trust for another.²³ In *Estate of Michaels*,²⁴ the court stated that a logical and natural development of the theory espoused in *Staver* would be to hold that a rebuttable presumption exists that the donor depositor intended the right of survivorship, which presumption could be rebutted only by clear and satisfactory evidence.²⁵ The rebuttable presumption discussed in dicta in *Michaels* was fully recognized in *Estate of Pfeifer*,²⁶ where the court said:

Although the form of the account is not conclusive, as we said in the cases *supra*, an account opened in joint names raises a rebuttable presumption that the creator of such an account intended the usual rights incident to jointly owned property, such as rights of survivorship, to attach to it. Evidence showing a different intent, for instance that the joint names were adopted for convenience without the intent of conferring ownership, may serve to prove agency or trusteeship in the third party in respect to the account but in the absence of such evidence, which must be clear and satisfactory, the presumption that the depositor intended the usual incidents of jointly held property when he opened a joint account is sufficient to support a finding to that effect.²⁷

Lifetime Rights

The general rule that "an account opened in joint names raises a rebuttable presumption that the creator of such an account intended the usual rights incident to jointly owned property"²⁸ was applied to determine the lifetime rights of co-depositors in *Estate of Gray*.²⁹ In the more recent case of *Estate of Kohn*,³⁰ the court stated that "in a true joint tenancy, each tenant has an interest to a proportionate part but the power to deal with the whole."³¹ However, there are joint ac-

²¹ *Id.* at 121, 260 N.W. at 658.

²² *Id.* at 122, 260 N.W. at 658.

²³ *Ibid.*

²⁴ 26 Wis. 2d 382, 132 N.W.2d 561 (1965).

²⁵ *Id.* at 390, 132 N.W.2d at 561.

²⁶ 1 Wis. 2d 609, 85 N.W.2d 370 (1957).

²⁷ *Id.* at 612-3, 85 N.W.2d at 372. Also cited in *Estate of Kemmerer*, 16 Wis. 2d 480, 488-9, 114 N.W.2d 803, 807 (1962); *Estate of Roth*, 25 Wis. 2d 528, 533, 131 N.W.2d 286, 288 (1964); *Estate of Michaels*, 26 Wis. 2d 382, 390-1, 132 N.W.2d 557, 561 (1965).

²⁸ *Estate of Pfeifer*, 1 Wis. 2d 609, 612-3, 85 N.W.2d 370, 372 (1957).

²⁹ 27 Wis. 2d 204, 133 N.W.2d 816 (1965).

³⁰ 43 Wis. 2d 520, 168 N.W.2d 812 (1969).

³¹ *Id.* at 525, 168 N.W.2d at 815. Either named party acting alone could withdraw the entire amount pursuant to terms of the deposit agreement. The party who withdraws more than his proportionate share is under a duty to restore the interest of the other party.

counts which are not intended to create a joint tenancy. The account of convenience where one party is merely an agent of the other has already been mentioned as an alternative to the true joint tenancy.³² In *Kohn* the court recognized as another alternative those "arrangements which only intend a right of survivorship and no present right."³³ When either of these alternatives is found to exist, the court will have determined that the donor depositor did not intend to give half of the amount deposited to the other party named on the deposit contract.

The fundamental question is one of intent. In *Kohn* the court said:

[I]n *Kelberger v. First Federal Savings & Loan Asso.* (1955), 270 Wis. 434, 71 N.W.2d 257, we definitely established that the nature of a joint deposit depended primarily upon the intention of the depositor and this was a question of fact. Consequently, the intention of the depositor to create or not to create a joint tenancy in a bank account or the intention of the parties, generally husband and wife if they both participate in the creation of the account, is a controlling factor and the form of the bank account is not determinative of its nature.³⁴

However, the court went on to say:

[T]he form of the savings account is prima facie evidence of what it purports to be and the evidence to overcome it must be clear and convincing.³⁵

These two statements frame the problem involved in determining inter vivos rights in a joint account. In the first quote, the court made it clear that the intention of the depositor controls the nature of the joint deposit. However, as indicated by the second statement, the court starts its inquiry with a rebuttable presumption that the depositor's intention conforms to the language of the deposit contract.

In Wisconsin there have been six cases in which lifetime rights of the parties to a joint account were in issue.³⁶ One of the cases, *Zander v. Holly*,³⁷ stands out because, in deciding it, the court did not mention the existence of the presumption regarding the incidents of joint tenancy. In *Zander* the court stated, "We have been unable to find any cases decided by this court in which the rights of two named depositors during the lifetime of each were determined."³⁸ After considering many

³² *Estate of Staver*, 218 Wis. 114, 260 N.W. 655 (1935); *Plainse v. Engle*, 262 Wis. 506, 56 N.W.2d 89 (1952).

³³ 43 Wis. 2d at 525, 168 N.W.2d at 815. This type of account was found to exist and given effect in *Michaels*, note 24 *supra*.

³⁴ 43 Wis. 2d at 524, 168 N.W.2d at 815.

³⁵ *Ibid.*

³⁶ *Estate of Schley*, 271 Wis. 74, 72 N.W.2d 767 (1955); *Boehmer v. Boehmer*, 264 Wis. 15, 58 N.W.2d 411 (1953); *Zander v. Holly*, 1 Wis. 2d 300, 84 N.W.2d 87 (1957); *Estate of Roth*, 25 Wis. 2d 528, 131 N.W.2d 286 (1964); *Estate of Gray*, 27 Wis. 2d 204, 133 N.W.2d 816 (1965); *Estate of Kohn*, 43 Wis. 2d 520, 168 N.W.2d 812 (1969).

³⁷ 1 Wis. 2d 300, 84 N.W.2d 87 (1957).

³⁸ *Id.* at 308, 84 N.W.2d at 92. Two previous cases, *Boehmer v. Boehmer*, 264

cases from other jurisdictions, the rule followed by New York and Michigan was adopted. The rule in those states is based upon the opinion written by Judge Cardozo in *Maskowitz v. Morrow*,³⁹ where he stated that the "realities of ownership" test is to be applied to determine lifetime rights and that the form of the account does not create a conclusive presumption of proportionate ownership.⁴⁰ Having adopted the "realities of ownership" test, the Wisconsin court held that:

In determining the validity of any gift of an interest in a bank account, the first element to be determined is an intention on the part of the donor to give.⁴¹

It would seem that if *Zander* were the only case in which the Wisconsin court had dealt with lifetime rights accompanying a joint bank account, an argument could be made that the intention of the parties should be decided without the application of the presumption. Despite the failure to apply the presumption in *Zander*, however, the Wisconsin position seems fairly well settled that an intention to confer both survivorship rights and present ownership rights will be presumed when parties use a joint bank account.⁴²

Rebutting the Presumption of Joint Tenancy

The presumption of a true joint tenancy is rebuttable by clear and convincing evidence. The strength of the presumption in Wisconsin can best be understood by considering evidence which the court has held to be clear and convincing. Generally it can be said that the court views all the evidence and that a combination of many facts may have a cumulative effect that rebuts the presumption. Nonetheless, there do appear to be several key factors that the court looks for and, absent these, the presumption will prevail.

Before considering the specific cases where an attempt was made to rebut the presumption of joint tenancy arising from the deposit agreement, it should be remembered that the decision in *Estate of Michaels* recognizes joint accounts where the donee depositor has only survivorship rights. Consequently, in a lifetime dispute between the original depositor and the co-named party, the original depositor would have the opportunity to show that he intended only survivorship rights without relinquishing control during his lifetime over the funds deposited. Also, where an account of convenience exists, *i.e.*, where the creator of the account intended the other party to be a mere agent, the agent-codepositor has neither absolute survivorship rights nor present ownership rights. Thus, the creator of a joint account can argue the existence

Wis. 15, 58 N.W.2d 411 (1953) and *Estate of Schley*, 271 Wis. 74, 72 N.W.2d 767 (1955) apparently were not brought to the Court's attention.

³⁹ 251 N.Y. 380, 167 N.E. 506, (1929).

⁴⁰ *Id.* at 399, 167 N.E. at 511.

⁴¹ 1 Wis. 2d at 311, 84 N.W.2d at 93.

⁴² See note 28 *supra*.

of an account of convenience when lifetime rights are involved. In a survivorship case, the account of convenience argument is the only one available to defeat the rights of the surviving codepositor.

In *Plainse v. Engle*,⁴³ an action was brought by the guardian of the donor depositor of a joint savings account against the donor's daughter, who was named as joint payee. The daughter had withdrawn funds from the joint bank account immediately prior to an adjudication of her father's incompetency. The evidence which was held sufficient to establish an agency was testimony by the daughter that "he just had my name put on there in case he got ill or anything."⁴⁴ Testimony by the donee depositor that the donor depositor's intention was to create an agency seems to be the strongest evidence available and is certainly clear and convincing. A case involving testimony by both parties to the agreement that an agency was intended was *Zander v. Holly*⁴⁵ where the defendant donee had testified at an adverse examination that she did not claim to have the right to make withdrawals without the donor depositor's instructions. In *Zander* there was also evidence that the donor depositor, an aunt of the donee who was seeking to reclaim full ownership of the account, was advanced in years and of feeble health.

In *Estate of Pfeifer*,⁴⁶ a case involving survivorship rights rather than lifetime rights, the court stressed the importance of evidence of the parties' intent at the time of creation of the account. The court held not to be clear and convincing evidence the fact that the existence of the account had been concealed from the co-owner and that, once the existence of the account was revealed, its use was limited to payment of the donor's bills. Special mention was made of the lack of testimony of word or condition contemporaneous with the creation of the account. Statements to the bank officials at the time the account is opened may be quite significant.

Concealment of the existence of the account by the original depositor has been held to be a neutral circumstance and to fall short of rebutting the presumption of survivorship.⁴⁷ However, in *Estate of Gray*,⁴⁸ it appears that such evidence would have been sufficient to rebut the presumption of present ownership rights of the unknowing codepositor. In *Gray* the trial court found that the donor did not intend to create a true joint tenancy but only the right of survivorship. The supreme court reversed and relied on the fact that there was "no evidence from which it could be concluded that Otto Gray was barred from making withdrawals or from fully enjoying the account as a joint tenant." Stated affirmatively, the court will find the intent to create present ownership

⁴³ 262 Wis. 506, 56 N.W.2d 89 (1952).

⁴⁴ *Id.* at 516, 56 N.W.2d at 94.

⁴⁵ 1 Wis. 2d 300, 84 N.W.2d 87 (1957).

⁴⁶ 1 Wis. 2d 609, 85 N.W.2d 370 (1957).

⁴⁷ *Estate of Michaels*, 26 Wis. 2d 382, 132 N.W.2d 557 (1964).

⁴⁸ 27 Wis. 2d 204, 133 N.W.2d 816 (1965).

in the donee whenever the donee is able to make withdrawals. The donee can be prevented from making withdrawals only by concealment of the existence of a checking account or by retention of the passbook to a savings account.⁴⁹

EVALUATION OF PRESENT LAW

The joint bank account is a unique form of ownership and it is inappropriate to characterize it as a joint tenancy. The Wisconsin Supreme Court in *Estate of Michaels*⁵⁰ recognized the difficulties in classifying a joint bank account under traditional property concepts. The court ended its opinion with this statement:

The joint bank account is a comparatively new device in the long development of the law. While the joint payees of such account are termed joint tenants for lack of better terminology, the account has different attributes than a true joint tenancy. Such an account provides a useful technique for transferring property, and need not fit any of the historical and traditional property concepts associated with the law of inter vivos gifts and joint tenancy. It would be a mistake to ignore the deposit contract and the intent of the parties in order to apply such concepts.⁵¹

Professor Richard W. Effland has suggested the need for a re-evaluation of the law governing joint bank accounts.

Where survivorship rights are dependent upon contract rather than property notions of joint tenancy, traditional notions of joint tenancy should be inapplicable, and rights during lifetime as well as survivorship at death should be determined by the intent of the parties as expressed in terms of the contract interpreted in the light of all relevant circumstances.⁵²

The law governing the relationship of codepositors should reflect the intent of the person or persons who created the joint bank account. Wisconsin cases continually have held that the nature of a joint deposit depends primarily upon the intention of the depositor.⁵³ At the same time, however, it is held that the form of the account raises a presumption that a joint tenancy was intended. The crucial question is whether this presumption is grounded in reality.

The survivorship feature of a joint bank account was given effect in the *Michaels* case despite the lack of any interest in the surviv-

⁴⁹ Clear and convincing evidence was found to exist in *Estate of Roth*, 25 Wis. 2d 528, 131 N.W.2d 826 (1964), but the circumstances were very unusual. Mr. Roth was in the hospital having two discs removed from his spine. Just prior to the operation he signed a signature card for a new savings account which added his stepson's name to the account. According to Mr. Roth, he did not read the card because he was in pain and he testified that there were no other signatures on the card when he signed it.

⁵⁰ 26 Wis. 2d 382, 132 N.W.2d 557 (1965).

⁵¹ *Id.* at 398, 132 N.W.2d at 565.

⁵² Effland, *Estate Planning: Co-Ownership*, 1958 WIS. L. REV. 507, 514.

⁵³ *Estate of Kohn*, 43 Wis. 2d 520, 168 N.W.2d 812 (1969).

ing codepositor during the lifetime of the deceased creator of the account. The desire of the courts to protect survivorship rights is probably one of the chief reasons joint tenancy concepts were applied to joint bank accounts. It would seem, however, that contract principles would be sufficient to establish survivorship rights. Now that survivorship rights can exist independent of a present interest, there is less reason to categorize a joint account as a true joint tenancy since the necessity to presume all the incidents of a joint tenancy no longer exists. The presumption of survivorship should remain if it is clear that parties by using a joint account intend that the survivor have absolute title to the remaining balance at the death of either party. The joint bank account has been termed a "poor man's will"⁵⁴ and there is little doubt that survivorship is the predominant feature of this popular way of holding property.

The other incident of joint tenancy, proportionate lifetime rights, should be treated separately from survivorship and the correctness of the presumption as to it should be tested independently. Since the intention of the parties is the controlling factor, it is proper to ask whether, when one party to a joint account makes a deposit, he usually intends to make a gift of one-half the amount. It is submitted that most people do not intend to make an irrevocable gift and that the presumption of a gift works against the intent of the parties.⁵⁵

If the presumption of proportionate ownership is not grounded in reality, what steps should be taken to improve the law in this area? One solution would be to reverse the present presumption so that it follows and supports the intention of the parties. A depositor then would be presumed not to intend to relinquish control over one-half or other fraction of his deposit. The Uniform Probate Code has come to grips with the problem of lifetime rights of codepositors and its solution is found in Article Six.

ARTICLE SIX OF THE UNIFORM PROBATE CODE

Part One of Article Six of the Uniform Probate Code deals with multi-party accounts, *i.e.*, accounts in financial institutions involving two or more named parties. A multiple party account includes the following types of accounts: (1) joint accounts, (2) payable-on-death or P.O.D. accounts, and (3) trust accounts.⁵⁶ The stated purpose of Part One is to strengthen popular arrangements involving various deposit accounts by which funds may be transmitted from one person to

⁵⁴ Estate of Michaels, 26 Wis. 2d 382, 394, 132 N.W.2d 557, 563 (1965).

⁵⁵ Wellman, *Joint and Survivor Accounts*, 63 MICH. L. REV. 629 (1965). After suggesting that an account that combines the aspects of a "trust and will" should be adopted in Michigan, the author states at p. 675: "There seems to be no reason for presuming that a joint account created by the deposit of one person is intended to be a present to another. If a gift is intended, there is no reason for the joint account form."

⁵⁶ UNIFORM PROBATE CODE SEC. 6-10(e).

another upon death. Article Six, by establishing uniform rules regarding the form of survivorship accounts, and by avoiding theories of joint tenancy or tenancy in common in regard to rights of living codepositors, would seem to accomplish its purpose.

Financial institutions are fully protected when payment is made in accordance with the deposit contract. The provisions of Sections 6-108 to 6-113 govern the liability of financial institutions and their set-off rights. Those provisions are independent of Sections 6-103 to 6-105 which bear on the rights of depositors as among themselves.⁵⁷ Section 6-102 is important because it organizes the sections into those dealing with the relationship between the parties to multiple party accounts on the one hand, and those relating to the financial institution-depositor relationship on the other. By keeping these relationships separate, Article Six seeks to achieve the degree of definiteness desired by financial institutions, while preserving the opportunity for individuals involved in the accounts to show various intentions that may have attended the original deposit or any unusual transactions affecting the account thereafter.

The joint account is defined as an account payable to one or more of two or more parties whether or not mention is made of any right of survivorship.⁵⁸ "Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account.⁵⁹ The discussion of the provisions of Article Six concerned with the relationship of the parties will be limited to the joint account and will not apply to other multiple party accounts such as the P.O.D. and the trust account. Under the provisions of Article Six, the joint account is not treated as a joint tenancy. There is no presumption that the parties enjoy proportionate ownership. Section 6-103(a) provides:

A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

In the official comment to Section 6-103, it is stated that the rule reflects the assumption that a person who deposits funds in a multiple party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership. Section 6-103 requires clear and convincing evidence to show a different intent on the part of the depositor and in effect a presumption is created. The presumed fact under Section 6-103 is the exact opposite of that presumed presently in Wisconsin case law.

⁵⁷ Sec. 6-102.

⁵⁸ Sec. 6-101(d).

⁵⁹ Sec. 6-101(g).

The most important and difficult concept in Section 6-103 is that of "net contributions." Ownership during the lifetime of the parties is in proportion to their "net contributions." What are "net contributions" and how are they determined? They are defined as

the sum of all deposits made by or for him [the depositor], less withdrawals made by or for him which have not been paid or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance.⁶⁰

Many practical problems can be foreseen when it becomes necessary to determine the exact net contribution of each party. When a checking account is involved, deposits and withdrawals are so frequent that it may be a formidable task to go back in time and to allocate them between the parties. Of course, the cancelled checks and returned deposit slips may be available to start the allocation. If a savings account is involved usually the only record of deposits and withdrawals retained is the passbook which does not indicate which party conducted the transaction. Assuming the parties could identify their deposits and withdrawals, it must still be determined if any were made for another party or applied to the use of any other party. If a husband and wife were the parties, questions would arise concerning the husband's duty of support. The wife apparently would not reduce her net contribution by the withdrawal of funds for household and necessary personal expenses, but if she purchased a personal luxury or a present for her mother, the withdrawal would affect her equity in the account.

There is no provision dealing with division of an account when the parties fail to prove net contributions. Considering the difficulties of establishing net contributions, it is likely that the failure of proof will be frequent. In the Third and Fourth Working Drafts of the Uniform Probate Code the failure-of-proof problem was handled by presuming the parties own the account in equal undivided interests⁶¹ and, thus, the parties occupied the position of tenants in common. One reason given for deleting the provision was that the statement dealing with failure to prove net contribution undesirably narrowed the possibility of proof of partial contributions. It would seem that the situations where net contributions are wholly incapable of being shown will exist and the problem must be faced. Proof of partial contributions could be retained and even expressly provided for, but when there is no proof as to the whole account or even part of it, the consequences should be stated clearly.

Michigan has adopted the position of Section 6-103 to regulate credit union demand accounts.⁶² However, Michigan has also provided

⁶⁰ Sec. 6-101(f).

⁶¹ UNIFORM PROBATE CODE Sec. 6-104 (Third Working Draft).

⁶² Mich. Stat. Sec. 490.53. Presumptions; demand accounts ownership in propor-

that there should be a presumption of ownership in equal undivided interests when there is an absence of satisfactory proof of the net contributions.⁶³

The concept of net contributions would seem to permit the parties to a joint account to be as definite, or as indefinite, as they wish with respect to the matter of how beneficial ownership should be apportioned between them. This latitude may give full effect to the intention of the parties but, in cases of dispute between the parties over ownership, previously desirable indefiniteness may result in failure of proof by both parties as to their net contributions. Some guidelines are surely needed when indefiniteness exists or the concept of net contributions may prove unsatisfactory.

Section 6-103 does not undertake to describe the situation between parties if one withdraws more than he is then entitled to as against the other party. In the Comment to Section 6-103 it is stated that presumably overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as a debtor or trustee. However, evidence of intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective. Clear and convincing evidence of a gift may be required for it would seem consistent to continue the presumption against a gift during the existence of the account.

It is important to note that Section 6-103 is limited to ownership rights of an account while the original parties are alive. Section 6-104 prescribes what happens to beneficial ownership on the death of a party and provides:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.

The presumption of survivorship rights is retained and is based upon the presumption that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death.

ARTICLE SIX COMPARED TO THE WISCONSIN POSITION

Article Six does not treat a joint account as a present joint tenancy but rather recognizes that a joint account is a unique way of holding

tion to net contributions.

(3) During the lifetime of all parties, a multiple party account which provides that sums on deposit or in shares may be paid on the demand of either of 2 or more parties is presumed to belong to the parties in proportion to the net contributions by each of the sums on deposit.

⁶³ Mich. Stat. Sec. 490.54. Presumptions; ownership in equal undivided interests.

(4) In the absence of satisfactory proof of the net contributions, those who are parties from time to time shall be presumed to own a multiple account in equal undivided interests.

and transferring property. During the lives of the parties, each retains ownership rights over his net contributions and at the death of a party the account operates as a valid disposition. In Wisconsin, the joint bank account is treated as a true joint tenancy and upon deposit a party is considered as having given up ownership rights in part of the amount deposited. The validity of the Wisconsin position on lifetime rights turns upon the validity of the assumption that most people who deposit funds in a joint account intend to make a gift of all or part of the fund. If this assumption is not grounded in reality, the present rule is contrary to the intention of the parties and Article Six appears to provide the framework for fashioning a satisfactory alternative.

Survivorship rights are treated the same under Article Six as they are under the present Wisconsin law. Both presume that survivorship was intended by the depositor and under both views only clear and convincing evidence will rebut the presumption. It is not improbable that the same evidence which has been held sufficient to show a contrary intention in Wisconsin would also be sufficient under Article Six.

TAX CONSEQUENCES OF JOINT BANK ACCOUNTS

The tax consequences of a joint bank account cannot be definitely established at the time the account is created. Under present law the donor depositor may have to pay an inheritance tax on half of the deposit if the donee predeceases him. On the other hand, there is presently a tax loophole available when incorporating a joint bank account into an estate plan.⁶⁴ In general, the adoption of Article Six of the Uniform Probate Code would clarify the rights of the various parties to a joint bank account and may point up a need for some corresponding changes in the various tax laws.

In *Department of Taxation v. Berry*,⁶⁵ the Wisconsin Supreme Court held that, since a deposit into a joint account is revocable at the will of the donor depositor, no gift tax arises upon deposit. The court relied on Wisconsin Statute Section 72.76 which provides:

A gift shall be complete for tax purposes when the donor has divested himself of all beneficial interest in the property transferred and has no power to revest any such interest in himself or his estate.

The Supreme Court has recognized that the rule in *Berry* is inconsistent with the court's position on rights of living codepositors.⁶⁶ *Berry*

⁶⁴ Note, *Taxation-Inheritance and Gift Taxes on Joint Bank Accounts*, 1961 Wis. L. REV. 150, 151. An example of the tax loophole is the spousal donor-donee situation. When the donor deposits a sum in the account there is no gift tax imposed and under the inheritance tax statute only half of the sum shall be deemed a transfer.

⁶⁵ 258 Wis. 544, 46 N.W.2d 757 (1951).

⁶⁶ Estate of Simonson, 11 Wis. 2d 84, 90, 104 N.W.2d 134, 137 (1960).

is also inconsistent with *Estate of Schley*⁶⁷ which held that interests in joint bank accounts are presumed equal regardless of the fact that the deposit agreement allows either party to withdraw the entire fund. A gift tax liability would appear to arise each time a party to a joint account withdraws a sum which exceeds his contributions because at that time, under the rule in *Berry* and Wisconsin Statutes Section 72.76, a gift has been perfected to the extent of the excess of the amount withdrawn over the withdrawing party's contributions.

The adoption of Uniform Probate Code Section 6-103 would conform the law governing rights of living codepositors with the theory in the *Berry* case. Under Section 6-103, the joint account, during the lifetime of the depositors, belongs to each party to the extent of his net contribution to the sum on deposit.⁶⁸ Since the depositor retains full ownership rights over a sum equal to the amount of money he has deposited less the amount of money he has withdrawn, there is no present gift upon deposit. The rule in *Schley* would be superseded and the present inconsistency between *Schley* and *Berry* would disappear.

The final draft of Article Six of the proposed code does not contain a provision dealing with the division of an account when the parties fail to prove net contributions. One of the reasons given for not attempting to cope with the problem was a concern that gift tax consequences applicable to the creation of a tenancy in common might attach. With regard to the Wisconsin gift tax, such a possibility seems minimal as long as the rule in *Berry* remains the law. A provision declaring that depositors will share equally when there is a lack of proof as to net contributions would be only an alternative or secondary presumption. Presently, proportionate ownership is the primary presumption and there is no gift tax upon creation.

Wisconsin allows a yearly exemption from gift tax for any transfer of property of the clear value of \$1,000 by any donor to any donee.⁶⁹ The Secretary of Revenue's Subcommittee on Taxation of Joint Tenancy Property has proposed that the exemption be increased to \$3,000 per year.⁷⁰ The subcommittee considered the increase desirable for several reasons, one of which was the fact that, under the proposed amendment, a gift tax return would be required to prove that contributions to a joint account were intended as gifts to the codepositor. The

⁶⁷ 271 Wis. 74, 72 N.W.2d 767 (1955).

"Although under the statute she hereafter had the power to withdraw said funds, she did not have the power or the right to appropriate and thereby destroy her husband's interest therein. When she made such withdrawals without the consent of her husband her acts severed the joint tenancy but did not destroy her husband's joint and equal interest therein." For a more recent case coming to the same conclusion, see *Estate of Gray*, 27 Wis. 2d 204, 133 N.W.2d 816 (1965).

⁶⁸ UNIFORM PROBATE CODE Sec. 6-103(a).

⁶⁹ Wis. Stat. Sec 72.08(1).

⁷⁰ Letter from Neil M. Conway to James R. Morgan, Secretary of Revenue, January 20, 1970.

most significant proposal by the subcommittee is to impose an inheritance tax on certain types of property held in joint names (including joint checking and savings accounts) to the full value of the property less provable contributions. If gifts were made between codepositors, such gifts would constitute provable contributions only if gift tax returns were made, whether required or not by the standard exclusion. The filing of a gift tax return would be a substitute for attempts to prove donative intent at time of deposit. Under the proposed plan, the gift tax return could become a more important tool in formulating an estate plan.

FEDERAL GIFT TAX ON CREATION

Under both federal law⁷¹ and Wisconsin law,⁷² the gratuitous transfer of property by an owner to himself and another as joint tenants is considered a gift of one-half the value of the property given. Although deposits into joint bank accounts would seem to be within the scope of this general rule, the deposits receive special treatment under both federal and state law.

Under federal tax law, deposits into joint bank accounts do not give rise to a gift tax, apparently because of the ability of the depositor to withdraw the amount deposited at will (assuming his co-depositor has not done so).⁷³ The reasoning behind the federal tax treatment of joint accounts is the same as that expressed by the Wisconsin Supreme Court in the *Berry* case. However, it must be remembered that, under Wisconsin property law, the joint bank account is treated the same as other property held in joint tenancy. Upon deposit, the donor depositor has effectively given up ownership of one-half the deposit, and consequently may not appropriate more than one-half the account.⁷⁴

A distinction may be made, however, between the mere ability to withdraw from a bank account and the right to appropriate, which is withdrawal by one party for his private use with no intent to reimburse the account. For tax purposes, the courts are considering the ability to withdraw when they conclude that a donor has not relinquished control over deposited funds. The ability to withdraw from a joint account arises from the deposit contract with the bank. For purposes of determining federal gift tax liability the federal law appears to rely on the common law of gifts and where the depositor has the right to withdraw the entire fund there will be no tax.

⁷¹ Treas. Reg. 25.2511-1(h) (5) (1958).

⁷² Wis. Stat. Sec. 72.75.

⁷³ The example given is: "If A creates a joint bank account for himself and B (or a similar type of ownership by which A can regain the entire fund without B's consent) there is a gift to B when B draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A."

⁷⁴ Estate of Kohn, 43 Wis. 2d 520, 168 N.W.2d 812 (1969).

The adoption of the rule in Section 6-103 leaving complete control in the donor during his lifetime over his net contributions would seem to do away with the necessity of recognizing a distinction between withdrawal and appropriation. A depositor under Section 6-103 has the right to appropriate his net contributions; this right gives him greater control over his deposit than he now enjoys under Wisconsin case law. The example given in Treasury Regulation 25.2511-1(h)(4) speaks in terms of a form of ownership by which a depositor can regain the entire fund without the codepositor's consent, which seems more like the complete control which is retained under Section 6-103 than the mere ability to withdraw presently permitted in Wisconsin.

Inclusion of the presumption of equal ownership in cases where there is absence of proof as to net contributions would not seem to result in adverse federal gift tax consequences. Adoption of such a secondary presumption should not by itself alter the present policy of not attempting to tax the creation of a joint bank account.

WISCONSIN INHERITANCE TAX

When a joint tenant dies, Wisconsin assesses an inheritance tax against his interest in the property so owned as if he had owned the property as a tenant in common with his co-owner or co-owners and had devised or bequeathed his interests to the survivors.⁷⁵ Wisconsin Statutes Section 72.01(6) specifically provides that joint bank accounts are taxed at a fraction of their value as joint tenancies upon the death of a depositor,⁷⁶ but questions arose when it could be shown that one depositor in fact contributed all or more than his share of the deposit. A claim by the survivor that he supplied all the funds on deposit in joint names has been held immaterial; a taxable transfer of one-half or other proper fraction is deemed to have occurred at the death of the one dying first, even though he had never deposited any of his own funds in the account.⁷⁷ In *Estate of Simonson*⁷⁸ the Court stated:

⁷⁵ Wis Stat. Sec. 72.01(6) (1959).

⁷⁶ *Id.* "Joint Interests. Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer of one-half or other proper fraction thereof taxable under the provisions of this chapter in the same manner as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor, by will."

⁷⁷ *Estate of Hounsell*, 252 Wis. 138, 31 N.W.2d 203 (1948); *Estate of Atkinson*, 261 Wis. 481, 53 N.W.2d 185 (1952). Both cases involved a husband and wife joint bank account.

⁷⁸ 11 Wis. 2d 84, 104 N.W.2d 134 (1960).

Nothing in [Section 72.01(6)] suggests that its operation on bank deposits in joint names is to be affected in any way by the original ownership of the deposited funds. Sub. (6) quite clearly provides for a tax upon the event of survivorship, and specifies that survivorship shall be deemed a taxable transfer of one-half, or other proper fraction of the amount on the deposit.⁷⁹

A claim by the state that the survivor supplied none of the funds is also immaterial, and under Section 72.01(6) a taxable transfer of one-half is deemed to have occurred.⁸⁰

The application of Section 72.01(6) to joint bank accounts has the distinct advantage of simplicity of administration. A literal application of the statute can be criticized because it results in double taxation of one-half of the deposit if a surviving donor supplied all of the funds and the donee predeceases the donor. When the donor dies first, Section 72.01(6) fails to reach one-half of the sum deposited which also has avoided a gift tax under the *Berry* case.

The Inheritance Tax Department, however, applies Section 72.01(6) literally only when dealing with a husband and wife account. In all other cases the department taxes the full amount of the account less those contributions the survivor can prove he made.⁸¹

The Secretary of Revenue's Subcommittee on Taxation of Joint Tenancy Property has suggested a revision of Section 72.01(6) which property distinguishes between the true joint tenancy property and "quasi" joint property such as joint bank accounts.⁸² The revision of

⁷⁹ *Id.* at 88, 104 N.W.2d at 136.

⁸⁰ *Id.*

⁸¹ Letter from Patrick Lyons to James R. Morgan, Secretary of Revenue, August 13, 1969.

"It is most difficult to ascertain the true interests of spouses as joint tenants because of the common possession control and enjoyment of the property. Where the facts relating to these points are clear and where they establish the exclusion of one or the other spouse the property is taxed according to the equities of the tenants. For practical purposes, however, we have made no effort to try to establish the exclusion of either joint tenant as between spouses.

Where property is held jointly with other than a spouse these factors are more easily established and we propose to tax the equities."

⁸² Proposed Wis. Stat. Sec. 72.01(6).

(a) Whenever any property, real or personal, is held in the joint names of two or more persons, upon the death of one of such persons the right of the surviving joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be a transfer of one-half or other proper fraction thereof taxable under the provisions of this chapter in the same manner as though the property to which such transfer relates belonged to said joint tenant or tenants, person or persons as tenants in common and had been bequeathed or devised to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or person by will, except as set forth in subparagraphs (b) and (c) of this subsection.

(b) Whenever any personal property is deposited in banks or other institutions in checking accounts, savings accounts, certificates of deposit or other similar forms of holding monies in the joint names of two or

Section 72.01(6) allows the tax department to tax the equities in the "quasi" joint property and extends the treatment presently given property held jointly by spouses to all real property held in joint tenancy. Under the revised Section 72.01(6)(a) true joint tenancy property, that which requires signatures of all joint tenants to transfer, shall be taxable at one-half or other proper fraction based on the number of joint tenants owning an interest in the property at the date of death of the decedent. In the proposed subsections (b) and (c), "quasi" joint tenancy property requiring signature of only one joint tenant to transfer shall be taxable at full value except for offsets granted for provable contributions or for gifts evidenced by the filing of gift tax returns, whether or not such returns had been required.

The adoption of Section 6-103 of the Uniform Probate Code would lend additional support for revising Section 72.01(6). Once the pre-

more persons and payable to either or the survivor upon the death of one or such persons, the right of the surviving person or persons to the immediate ownership or possession and enjoyment of such property shall be a transfer fully taxable under the provisions of this chapter, except such part thereof as may be shown to have originally belonged to the survivor or survivors and never to have been received or acquired by them from the decedent for less than an adequate and full consideration in money or money's worth, in which case there shall be excepted only such part as is proportionate to the consideration furnished by the survivor or survivors. Provided where said deposits have been acquired at any time by gift, bequest, devise or inheritance by the decedent and any other person or persons as joint tenants, the taxable portion shall be the value of a fractional part of said property to be determined by dividing the value of the property by the number of joint tenants. Provided further that where a gift of a portion or all of said deposit has been made by the decedent to the other person or persons who have said deposits in their joint names with the decedent and a gift tax return filed, the value of the gift shall be treated as adequate and full consideration by the donee in determining the proportionate share to be expected from the decedent's estate.

(c) Whenever any personal property, including but not limited to government obligations and brokerage street accounts, is held in joint names of two or more persons and such property may be transferred during the lifetime by any one of said persons to himself or to such other person as he in his sole discretion desires upon his signature alone, upon the death of one of such persons the right of the surviving person or persons to the immediate ownership or possession and enjoyment of such property shall be a transfer fully taxable under the provisions of this chapter, except such part thereof as may be shown to have originally belonged to the survivor or survivors and never to have been received or acquired by them from the decedent for less than an adequate and full consideration in money or money's worth, in which case there shall be excepted only such part as is proportionate to the consideration furnished by the survivor or survivors. Provided where said property has been acquired at any time by gift, bequest, devise, or inheritance by the decedent and any other person or persons as joint tenants, the taxable portion shall be the value of the fractional part of said property to be determined by dividing the value of the property by the number of joint tenants. Provided further that where a gift of said property has been made by the decedent to the other person or persons who have said property in their joint names with the decedent and a gift tax return filed, the value of the gift shall be treated as adequate and full consideration by the donee in determining the proportionate share to be expected from the decedent's estate.

sumption of a true joint tenancy is removed (a result Section 6-103 would accomplish), there is no reason for grouping joint bank accounts with property held in true joint tenancy. Article 6 and the proposed Section 72.01(6)(b) complement each other in their recognition of the concept of net contributions.⁸³

The proposed Section 72.01(6)(b) specifically affords recognition of net contributions so long as they are provable. Of course, the burden of proof is on the survivor to show his net contributions. In an inter vivos dispute under Section 6-103, rights are also determined by net contributions. Records kept by the parties are of prime importance and parties might be persuaded to keep these records since they are so essential for both tax and non-tax reasons.

In *Estate of Simonson*,⁸⁴ the state tried to close the loophole that occurs when a donor depositor who has contributed more than half of the amount in a joint account predeceases the donee depositor. As noted earlier, no gift tax is assessed at the time of deposit because of the donor's ability to withdraw. Under Section 72.01(6), only half of the deposit is subject to inheritance tax. The state in *Simonson* contended that the full amount of a joint deposit was subject to inheritance tax under the provisions of Section 72.01(3)(b) which taxes all transfers intended to take effect in possession or enjoyment at or after the death of the grantor.⁸⁵

Mr. Simonson's estate included bank deposits and government bonds valued at approximately a quarter of a million dollars which were held in joint tenancy with his wife. Almost \$100,000 of that amount had been placed in joint tenancy within two years preceding his death. The Supreme Court concluded that the legislature intended subsection (6) to preclude subsection (3)(b) from applying to joint accounts.⁸⁶ On the other hand, however, the court ruled that subsec-

⁸³ UNIFORM PROBATE CODE Sec. 6-101(f): "net contribution of a party to a joint account as of any given time is the sum of all the deposits made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance."

⁸⁴ Note 66 *supra*.

⁸⁵ Wis. Stat. Sec. 72.01(3)(b) (1959):

When a transfer is of property, made without an adequate and full consideration in money or money's worth by a resident or by a nonresident when such nonresident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale, or gift, intended to take effect in possession or enjoyment at or after the death of the grantor, vendor, or donor, including any transfer where the transferor has retained for his life or for any period not ending before his death: 1) the possession or enjoyment of, or the right to the income, or to economic benefit from, the property, or 2) the right, either alone or in conjunction with any person, to alter, amend, revoke, or terminate such transfer, or to designate the beneficiary who shall possess or enjoy the property, or the income, or the income, or economic benefit therefrom.

⁸⁶ 11 Wis. 2d at 88, 104 N.W.2d at 136.

tion (3)(a)⁸⁷ applied to those deposits made within two years of Simonson's death.⁸⁸

The Court in coming to the decision that subsection (3)(b) does not apply to joint bank accounts limited its ruling to a joint bank account established "with the intention that each should have the right to withdraw at will before or after the death of the other."⁸⁹ After recognizing the possibility of an account of convenience or an agency account and that in cases not involving tax issues intention of the depositor is important, the Court held:

Whether sub. (3)(b), rather than sub. (6) would apply to a bank deposit by a decedent in the names of himself and another where the other was unaware of his apparent right to withdraw or where the other bound himself not to withdraw during the life of the decedent need not be decided in this case.⁹⁰

The Court evidently was speaking of an account like that in the *Michaels* case⁹¹ where the donee had no knowledge of the joint account. The survivorship feature of the account was given effect in that case. Article 6 could be said to create an account somewhat similar to a *Michaels'* account. Present ownership is presumed to remain in the donor but survivorship is presumed to be intended and is given effect. Possibly the Department of Revenue would have support for applying subsection (3)(b) to an Article 6 multiple party account in the language quoted above from *Simonson*.

The proposed revision of Section 72.01(6) allows inclusion of the full amount of the account into the decedent's estate subject to proof of contributions by the survivor or filing of gift tax returns. Since the same result would be reached under the proposed Section 72.01(6) (b) as that allowed under application of subsection (3)(b), the inheritance tax department would have little reason to use subsection (3)(b).

FEDERAL ESTATE TAX

The federal estate tax applies only to estates of more than \$60,000⁹² and joint interests expressly qualify for marital deduction⁹³ so that a

⁸⁷ Wis. Stat. Sec. 72.01(3) (a) (1959):

When the transfer is of property, made by a resident or by a non-resident when such nonresident's property is within the state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor. Every transfer by deed, grant, bargain, sale or gift, made within 2 years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate and full consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

⁸⁸ 11 Wis. 2d at 92, 104 N.W.2d at 138.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Estate of Michaels, 23 Wis. 2d 382, 132 N.W.2d 557 (1965).

⁹² INT. REV. CODE OF 1954, § 2052.

⁹³ INT. REV. CODE OF 1954, § 2052.

joint bank account between husband and wife will pose federal estate tax problems only where the estate exceeds \$120,000.

The Internal Revenue Code requires inclusion as part of the decedent's estate of "... the value of all property held as joint tenant by the decedent and any any other person . . . or deposited . . . in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent" as a gift.⁹⁴ Consequently, the joint bank account may be included in the decedent's estate at any amount ranging from the total deposit to nothing. However, Section 2040 of the Internal Revenue Code places on the taxpayer the burden of showing the extent to which the survivor contributed all or part of the joint account.⁹⁵ The circumstances of each fact situation determine the kinds of evidence which would show the survivor's contribution. The position of Section 6-103 of the Uniform Probate Code compliments Section 2040 of the Internal Revenue Code. If Section 6-103 were the law, each party would have a greater incentive to keep adequate records and to retain evidence of ownership rights in a joint account. The same kinds of evidence showing the net contributions of each party could be used to resolve disputes between living codepositors, to determine amounts transferred for inheritance tax purposes, and to determine federal estate tax pursuant to Internal Revenue Code Section 2040.

SUMMARY

The application of traditional property concepts to joint bank accounts is susceptible to criticism. There is little question that the joint account is not a true joint tenancy. Survivorship rights and lifetime rights should be treated separately if separate treatment is needed to give full effect to the intention of the parties. The rules found in Article Six of the Uniform Probate Code seem to be an improvement over the present law in Wisconsin. Section 6-103 creates a presumption that is closer to and protects the actual intention of the parties. The concept of net contributions poses some practical problems of administration but with additional rules providing for situations where there is complete or partial failure of proof as to net contribution, this problem could be alleviated. In the area of taxation, Article Six's position on inter vivos rights does not cause any serious problems

⁹⁴ INT. REV. CODE OF 1954, § 2040.

⁹⁵ Treas. Reg. 3040-1(a)(2) (1958) provides:

The entire value of jointly held property is included in a decedent's gross estate unless the executor submits facts sufficient to show that property was not acquired entirely with consideration furnished by the decedent, or was acquired by the decedent and the other joint owner or owners by gift, bequest, devise, or inheritance.

and the changes that would result from the Article's adoption seem to be desirable. In the final analysis, it would appear that uniform rules modeled upon those of the Article Six would be an improvement over the present Wisconsin position.

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