

## Joint Bank Accounts in Wisconsin

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## JOINT BANK ACCOUNTS IN WISCONSIN

Two recent Wisconsin cases<sup>1</sup> once again raise the problem of joint bank accounts. The scope of this comment will be limited to the rights of a depositor and co-depositor (the latter is sometimes referred to as "beneficiary," "joint owner," "joint payee" or "donee-survivor") where the account was created by the funds of the depositor. To be distinguished are situations where the joint deposit was created by the funds of both,<sup>2</sup> or where the co-depositor is excluded from any right of withdrawal during the lifetime of the depositor,<sup>3</sup> or deposits in the sole name of the donee-survivor with or without his knowledge or deposits in the depositor's own name in trust for the donee-survivor.<sup>4</sup>

Since joint bank accounts have become a more common method of deposit, courts have long sought a satisfactory solution to uphold the right of the survivor in such accounts.<sup>5</sup> Prior to 1935 Wisconsin followed the gift theory to uphold the right of survivorship.<sup>6</sup> In the *Marshall Ilsley Bank* case,<sup>7</sup> the court, in discussing the conflicting theories as laid out by the decisions of other jurisdictions, remarked that: ". . . under each of those theories the ultimate determination as to the ownership of the deposit depends upon the court's findings under the evidence as to the intention of the original owner, and whether he actually took the necessary legal steps to effectuate his intention." Under the gift theory, the necessary legal steps to effectuate intention "were the relinquishment by the depositor of the exclusive possession and control of his documentary evidence thereof and of his ownership thereof."<sup>8</sup> Relinquishment of documentary evidence or of ownership was dependent upon the type of joint tenancy created inasmuch as a joint tenancy in personal property could be created orally as well as by written instrument<sup>9</sup> providing the requisite unities of time, title, interest and possession were present. The relinquishment of control requirement was fraught with entanglement: what is the practicality of a joint bank account if "control" must be relinquished; what constitutes relinquishment; when must control be relinquished? It soon became readily apparent that this theory was cumbersome, inasmuch as it presented an insurmountable "necessary legal step" of relinquish-

<sup>1</sup> *Plaine v. Engle*, 262 Wis. 506, 56 N.W. 2d 89, 262 Wis. 518, 57 N.W. 2d 586 rehearing (1953); *Boehmer v. Boehmer*, 264 Wis. 15, 58 N.W. 2d 411 (1953).

<sup>2</sup> Compare: *New Jersey Title Guaranty & Trust Co. v. Archibald*, 91 N.J. Eq. 82, 108 A. 434 (1919) with *Tormey v. Cassidy*, 69 RI 302, 33 A2d 181 (1943).

<sup>3</sup> See Note, 155 ALR 1084.

<sup>4</sup> See Notes, 59 ALR 975; 157 ALR 925; 168 ALR 1324.

<sup>5</sup> For collected cases, See Notes, 48 ALR 189; 66 ALR 881; 103 ALR 1123; 135 ALR 993; 149 ALR 879. See, 42 Ky. L.J. 125 (1953).

<sup>6</sup> *Marshall Ilsley v. Voight*, 214 Wis. 27, 252 N.W. 355 (1934).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *In re Gabler's Estate: Petrus v. Lucas*, Wis. 60 N.W. 2nd 720 (1953).

ment of control, which, when compared with the clear intention of the depositor to retain the right to withdraw from the joint bank account, frustrated the workability of the joint bank account device. Consequently, in 1935, when two joint bank account cases arose,<sup>10</sup> the court, after carefully considering former decisions, determined that the contract theory was more consonant with logic, good principles and good public policy<sup>11</sup>—*i.e.*, logic, inasmuch as men intend the result of their acts, good principles, inasmuch as the relationship arises from a contract, and good public policy, inasmuch as acts are given legal meaning insofar as possible correlative with intention. The court, stating among other things, that “the result of the application of this theory is desirable.”<sup>12</sup>

Although the expressions of our Supreme Court upon the right of survivorship in joint bank accounts have not been numerous, and the fact situations must be carefully distinguished to ascertain the correct doctrine, yet they nevertheless afford a general guide for determining the contract doctrine. Consequently, the procedure will be to first ascertain the elements of the contract doctrine and secondly, to discuss some problems arising under joint bank accounts in their relation to this doctrine.

#### A

##### WISCONSIN CONTRACT DOCTRINE OF JOINT BANK ACCOUNTS

The procedure in creating the account varies, although apparently banks are now often using a contract form approved by the American Banker's Association. The usual procedure is a form signed by both the depositor and the co-depositor declaring joint ownership with rights of withdrawal and survivorship. In other instances, the names merely appear jointly on an account or passbook.<sup>13</sup> Consequently, the form of a bank account which gives rise to a joint interest with rights of survivorship varies. Thus, in both the *Staver* and *Skilling* cases,<sup>14</sup> a joint bank account with rights of survivorship was recognized although in neither was there a written contract of deposit or a signature card. In the *Staver* case, there were only certificates of deposit made payable to the order of “Joseph Staver or Frank J. Staver.” In the *Skilling* case, a passbook to a savings account and the bank records read “Edward or John M. Skilling” and by a rubber stamp notation

<sup>10</sup> *In re Staver's Estate*: *Wimmer v. Staver*, 218 Wis. 114, 260 N.W. 655 (1935).

*In re Skilling's Estate*: *Skilling v. Skilling*, 218 Wis. 574, 260 N.W. 660 (1935).

<sup>11</sup> In *Schwauke v. Garlt*, 219 Wis. 367, 263 N.W. 176 (1935), the court decided that Section 13, article 14 of the Wisconsin constitution does not prohibit a change by the court as to which principles should govern such a transaction.

<sup>12</sup> *In re Staver's Estate*, *supra*, n. 10.

<sup>13</sup> *Cf. Doubler v. Doubler*, 412 Ill. 597, 107 N.E. 2d 789 (1952) wherein it was held that there was a statutory necessity of a signature card signed by both parties to create a joint tenancy in a bank account.

<sup>14</sup> *Supra*, n. 10.

upon the bank records and passbook "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."

Once a joint deposit contract has been entered into with a bank, a joint ownership of a *res* by a contract has been created, and it is governed by the principles of contracts. The precise meaning of the rule that joint bank accounts are governed by the principles of contracts is that the legal interest created by the contract of deposit (written, oral, or implied), either as evidenced by the instrument . . . certificate or passbook . . . initially delivered by the bank or other evidence of a contract, "vests ownership in a chose in action according to its terms."<sup>15</sup> The contract creating the joint ownership must be based on a consideration, and therein lies the crux of the difficulties under the contract theory, for the courts have not made their position too clear.<sup>16</sup> At first blush, the doctrine of donee beneficiary would seem to resolve any problem of consideration, but as the court pointed out in the *Staver* case: "a joint promisee such as is involved here (promisee under certificate of deposit) may not be treated as technically the beneficiary under a contract for the benefit of a third person" inasmuch as the doctrine of donee beneficiary is limited to contracts which "relate only to the rights of a person other than the promisee." The court further pointed out that under the doctrine of donee beneficiary it first must be established "that the purpose of the promisee in obtaining the

<sup>15</sup> *In re Staver's Estate*, *supra*, n. 10.

<sup>16</sup> Courts which professedly follow the contract theory have applied it in two basic ways:

- (a) "Gift of an interest therein created by contract," *Goldston v. Randolph*, 293 Mass. 253, 199 N.E. 896 (1936), *i.e.*, the contract takes the place of the delivery originally required.
- (b) "The agreement of the depositor determines the rights of the parties," *Hood v. Commonwealth Trust & Savings Bank*, 376 Ill. 413, 34 N.E. 2d 414 (1941). Under this approach the courts have split:
  - (1) The survivor is entitled to the deposit on the basis of a contract between the depositors themselves which was supported by consideration. *Ulmer v. Society for Savings*, 35 Ohio App. 525, 44 N.E. 2d 578 (1942).
  - (2) The survivor is entitled to the deposit on the basis of third party beneficiary under the contract between the depositor and the bank.
  - (3) The survivor is entitled to the deposit on the basis of a novation whereby the account originally in the depositor's name was changed to a joint account, *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N.E. 371 (1916); *Deal's Adm'r v. Merchants and Mechanics Savings Bank*, 120 Va. 297, 91 S.E. 135 (1917).
  - (4) The survivor is entitled to the deposit on the basis that he is the surviving joint promisee. As to the problem of consideration, the court in *Sage v. Flueck*, 132 Ohio St. 377, 7 N.E. 2d 802 (1937) said the act of depositing is an execution of the contract and consideration is dispensed with. In *Mardis v. Stein*, 293 Pa. 13, 141 A. 629 (1928), the court said that the signature card for the joint deposit signed and sealed, constituted a contract, the seal importing consideration.

promise of all or part of the performance thereof is to make a gift to the beneficiary"<sup>17</sup> . . . that is to say, there must be a donative intent in the sense that the person to whom the performance was to run was intended to be a donee beneficiary. At this point, the proponents of the donee beneficiary doctrine as the proper solution of the problem, might assert that conceding all of this, nevertheless, the court's position begs the question: for why was the survivor treated as a promisee and what consideration did he furnish to become a promisee? To this the court might reply that the promise was joint as a result of the purchase by the deceased depositor of a contract right, which from its creation was to be held jointly and it is immaterial that the survivor furnished no consideration inasmuch as a promisor may undertake a binding promise for consideration furnished by a third party.<sup>18</sup> The Wisconsin court insists that the survivor is only analogous to the donee beneficiary inasmuch as no consideration is furnished and ratification is presumed, but the position of the survivor is stronger than that of the donee beneficiary inasmuch as no question of donative intent is involved. Thus, the court concluded in the *Staver* case that "certainly his position is analogous to, and even somewhat stronger than that of the donee beneficiary, if, indeed, there is a substantial, rather than a technical, difference between them."

The joint bank account concept must be clearly distinguished from similar transactions, such as a gift of a bank account to an individual (a gift of a singly owned *res*)<sup>19</sup> which would be governed by the principles of gifts, or the joint ownership of personal property other than a bank account<sup>20</sup> which would be governed by the law of joint tenancies in personal property. Further, the principles of contracts which normally govern a joint bank account, relate only to joint bank accounts with a present interest and are not applicable to joint bank accounts for convenience:<sup>21</sup> in the latter case, equity affects the legal title of the surviving joint payee by imposing a trust in favor of the deceased depositor's heirs .

In Wisconsin, under the usual joint bank account, the depositor and the co-depositor are co-owners subject to be divested . . . *i.e.*, subject to withdrawals by either and rights of survivorship (the survivor

<sup>17</sup> *In re Staver's Estate*, *supra*, n. 10., quoting the RESTATEMENT, CONTRACTS §133.

<sup>18</sup> *O'Brien v. Biegger*, 233 Iowa 1179, 11 N.W. 2d 412 (1943); *Hill v. Havens*, 242 Iowa 920, 48 N.W. 2d 870 (1951); 38 *Harv. L. Rev.* 243.

<sup>19</sup> *Ruffalo v. Savage*, 252 Wis. 175, 31 N.W. 2d 175 (1948); *Tucker v. Limrow*, 248 Wis. 143, 21 N.W. 2d 252 (1946).

<sup>20</sup> *Farr v. Trustee Grand Lodge A.O.U.W.*, 83 Wis. 466, 53 N.W. 738 (1892); *Central Wisconsin Trust Co. v. Schumacher*, 230 Wis. 591, 284 N.W. 562 (1939).

<sup>21</sup> *In re Staver's Estate*, *supra*, n. 10; *In re Skilling's Estate*, *supra*, n. 10; *Plainse v. Engle*, *supra*, n. 1; *Estate of Krause*, 241 Wis. 41, 4 N.W. 2d 122 (1942).

taking by virtue of the contract of deposit). Consequently, either the depositor or the joint payee may withdraw the entire account without liability and this may be done without the consent of the other, providing there is no provision to the contrary in the contract of deposit.<sup>22</sup>

The legal interest of the co-depositor is fundamentally determined by the intention of the depositor as indicated by the contract with the bank. But since the deposit contract may be written, oral or implied, it follows that the usual signature card is not the only method of creating a joint tenancy in a bank account with rights of survivorship. In the circumstances where the joint account is not written but is an oral or implied contract, the court would probably look to the substance of the transaction and determine the intention in the light of all circumstances.<sup>23</sup> However, where there is an unambiguous written contract, the courts will follow it. Yet even then, parol evidence would be admissible to determine the intention of a deceased depositor insofar as it relates to a joint account created for convenience, so that it may be shown by clear and satisfactory evidence "that the purpose of the deposit was to constitute the payee other than the depositor a mere agent."<sup>24</sup> The admissibility of such evidence is not to vary the terms of the contract, but merely to ascertain the actual intention of the depositor under the theory that equity will intervene to prevent fraud.<sup>25</sup>

A further development in the Wisconsin contract doctrine of joint bank accounts occurred in the *Boehmer* case<sup>26</sup> where the court held that the guardian of an incompetent depositor does not succeed to the depositor's privilege of election in a joint bank account which has rights of withdrawal and survivorship—*i.e.*, the guardian cannot exercise the incompetent's personal right to either withdraw part or all of the account or allow it to remain intact until death. Instead, the joint bank account is considered in *custodia legis* of county court and hence any withdrawals by either the joint payee or the incompetent depositor through his guardian is subject to the approval of the court. This is done on the theory, consistent with contract law, that a personal privilege of the ward to elect between alternative or inconsistent rights or claims does not pass to the guardian.<sup>27</sup>

<sup>22</sup> Cf. 161 ALR 71; 77 ALR 799. Apparently, in some instances, a joint bank account may become irrevocable on the part of the depositor by virtue of some oral contract; *Kessler v. Olen*, 228 Wis. 662, 280 N.W. 352 (1938); . . . it may appear that decedent's placing his savings and cash bank accounts in a joint account with himself placed the funds beyond his power to reclaim them wholly to himself. *Compare*, 155 ALR. 1084.

<sup>23</sup> 48 C.J.S. 919; 9 C.J.S. 286.

<sup>24</sup> *In re Staver's Estate*, *supra*, n. 10; *Compare* *Matthew v. Moncrief*, 135 F 2d 654 (D.C. Cir. 1943); Cf. 149 ALR 862.

<sup>25</sup> *Hannon v. Kelly*, 156 Wis. 509, 146 N.W. 512 (1914).

<sup>26</sup> *Boehmer v. Boehmer*, *supra*, n. 1; *Compare* *Ulmer v. Society for Savings*, 44 N.E. 2d 578 (1942).

<sup>27</sup> *Van Steen Wyck v. Washburn*, 59 Wis. 483, 17 N.W. 289 (1883); *Kay v. Erickson*, 209 Wis. 147, 244 N.W. 625 (1932).

There are two sections<sup>28</sup> of the Wisconsin statutes referring to joint bank accounts. The Wisconsin Supreme Court has had no occasion to consider section 222.12(9). In reading this section, a problem arises as to why the Legislature saw fit to limit the application of this section, which is in derogation of the common law, to deposits in mutual savings banks. Section 249, subdivision 3 of the New York Banking Law (now Section 239, Subdivision 3) as set forth in *Massey v. Cullen*<sup>29</sup> is identical with Section 222.12(9) of the Wisconsin statutes with the one exception that Wisconsin has inserted the word "mutual" in front of "savings bank." Under this statute, the New York courts have held that two presumptions are created:<sup>30</sup>

"(a) a rebuttable presumption is created during the joint lives of the parties by a transfer creating a present interest in a deposit in a savings bank made in the names of a depositor and another person 'in form to be paid to either or the survivor of them' which becomes 'the property of such persons as joint tenants.' Hence the intention of the depositor is an issue of fact.

(b) an irrebuttable presumption (in the absence of fraud or undue influence) exists only in cases of succession by survivorship of any remaining moneys on deposit. Thus, the presumption does not apply as to any money withdrawn by either party during their joint lifetime—i.e., the presumption is not conclusive after the death of either as to any money then withdrawn."

<sup>28</sup> WIS. STATS. (1923) §221.45:

"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 two 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."

WIS. STATS. (1923) §222.12(9):

"When a deposit shall be made by any person in the names of such depositor and another person and in form to be paid to either or the survivor of them, such deposit and any additions thereto made, either of such persons after the making thereof, shall become the property of such persons as joint tenants, and the same together with all dividends thereon shall be held for the exclusive use of such persons and may be paid to either during the lifetime of both or to the survivor after the death of one of them, and such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to such mutual savings bank for all payments made on account of such deposit prior to the receipt by such mutual savings bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such mutual savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor."

<sup>29</sup> *Massey v. Cullen*, 145 Misc. 655, 260 N.Y.S. 20 (1932).

<sup>30</sup> *Moskowitz v. Marrow*, 251 N.Y. 380, 167 N.E. 506 (1929); *Re Poriando*, 256 N.Y. 423, 176 N.E. 826 (1931); *Re Cokey*, 140 Misc. 779, 252 N.Y.S. 434 (1931); *Re Hills*, 145 Misc. 631, 260 N.Y.S. 635 (1932); *Re Timko*, 150 Misc. 701, 270 N.Y.S. 323 (1934); *Re Juedel*, 280 N.Y. 37, 19 N.E. 2d 671 (1939).

In addition, the New York courts have held that the statutory form is an absolute protection to the bank unless written notice has been given by one of the depositors as authorized by statute: "and such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release . . . prior to the receipt . . . of notice in writing not to pay such deposit in accordance with the terms thereof." However, this notice is not effectual as a revocation or cancellation of the joint bank account, but merely withdraws the immunity given by statute.<sup>31</sup>

On the other hand, Section 221.45 of the Wisconsin Statutes has occasioned three comments by the court. Thus in *Marshall & Ilsley Bank v. Voight*<sup>32</sup> the court said:

"the purpose and effect of that statute are to render legally effective receipts or acquittance given to a bank upon its payment of a deposit to either of the persons to whom an account was made payable, regardless of the actual legal rights of such persons, as between themselves, to such deposits."

*Re Staver's Estate*<sup>33</sup> modified the ruling in the *Marshall & Ilsley* case (although not necessarily the comment on Section 221.45) and in commenting on Section 221.45, the court stated:

"Our banking statute, Section 221.45, recognizes the right of survivorship where the certificate of deposit is in the names of two persons, payable to either, or payable to either or the survivor."

In *Boehmer v. Boehmer*<sup>34</sup> the guardian of an incompetent depositor argued "that in the absence of evidence other than the form of the deposit itself, no presumption of a joint tenancy arises, and that such deposit is only conclusive on the question of both parties having a

<sup>31</sup> California has given a similar construction to such a statute: California Civil Code, §1828; Bank Act, Deering's General Laws, 1931, Act 652, §15 a; *Wallace v. Riley*, 23 Cal. App. 2d 669, 74 P. 2d 800 (1937); *Pfingst v. Goetting*, 96 Cal. App. 2d 293, 215 P. 2d 93 (1950); *Paterson v. Comastri*, 244 P. 2d 902 (Cal. 1952). However it should be noted that both California and New York approached the construction of this statute under the gift theory. On the other hand, Michigan, one of the jurisdictions which follows the joint deposit rule in the *Staver* case (the court in *Ruffalo v. Savage*, 22 Wis. 175, 31 N.W. 2d 175 (1948) stated that: "the joint deposit rule in the *Staver* case followed the rule in Massachusetts, Ohio, Michigan . . .") has a statute which combines the major elements of the two Wisconsin statutes; *Cf.* Act No. 286, Public Acts 1937 (Stat. Ann. 1942 Supp. §23.303) amending 3 Comp. Law 1929, S. 12063; *Frank v. Schultz*, 295 Mich. 714, 295 N.W. 374 (1940); *Manufacturer's Nat. Bank v. Schirmer*, 303 Mich. 598, 6 N.W. 2d 908 (1942); *Pence v. Wessels*, 320 Mich. 195, 30 N.W. 2d 834 (1948). However, the Michigan statute expressly applies to any bank and the deposit form is only prima facie evidence of the intention of the depositor.

<sup>32</sup> *Marshall & Ilsley Bank v. Voight*, *supra*, n. 6.

<sup>33</sup> *In re Staver's Estate*, *supra*, n. 10.

<sup>34</sup> *Boehmer v. Boehmer*, *supra*, n. 1.

right to withdraw the funds as long as both live and remain competent." The court in rejecting this argument stated:

"Section 221.45, statutes, especially provides that a joint tenancy is created upon such facts as are presented in this case. . . . In the Staver case . . . the court construed that statute as giving the right of survivorship to either payee; and found, at least inferentially, that such a situation creates a joint tenancy."

Contrary to the Wisconsin position, it has been generally held that statutes such as Section 221.45 do not effect the title to the deposit as between the parties other than the bank and the purpose of such a statute is merely to protect banks in making payments.<sup>35</sup>

## B

### TAXATION OF JOINT BANK ACCOUNT

Upon the creation of a joint bank account, where both parties can withdraw but only one has contributed, no gift tax results under the Federal or Wisconsin law. The federal gift tax consequences of a joint bank account are covered by Regulation 108, 86.2 (4) which provides that a gift tax is due on any withdrawals to the extent of the withdrawals when made by a joint payee who has not contributed or if he has contributed, when in excess of the contribution. In such a case, section 1008 (a) of the Internal Revenue Code provides that the donor is primarily liable. However, such taxability is subject to the annual exclusion of \$3,000<sup>36</sup> and if the joint owners are husband and wife, a gift tax marital deduction may be taken.<sup>37</sup> In addition the lifetime exemption of \$30,000 would be available.<sup>38</sup> Hence, even assuming the Commissioner presumes the party withdrawing did not contribute to the account (and such contributions cannot be traced), the exclusions and exemptions available will often make such problems relatively unimportant. The Wisconsin gift tax consequences of a joint bank account are partially controlled by the *Berry* case<sup>39</sup> wherein the court decided that where a joint bank account is derived solely from the funds of the husband, the surviving wife is not subject to a gift tax under section 72.75 upon the one half in said account not subjected to inheritance tax under section 72.01 (6). It may be implied from the case that a gift results upon withdrawals to the extent of the withdrawals since the rationale for the result in that case is a revocable transfer. If such be the gift liability before death, then section 72.81 (4) makes the donee of the gift personally liable for the

<sup>35</sup> 9 C.J.S. 595; See, 48 C.J.S. 924.

<sup>36</sup> INT. REV. CODE, §1003.

<sup>37</sup> INT. REV. CODE, §1004 (a) (3) (A) and (D).

<sup>38</sup> INT. REV. CODE, §1004 (a) (1).

<sup>39</sup> Wisconsin Department of Taxation v. Barry, 258 Wisconsin 544, 46 NW 2d 757 (1951).

gift tax; if unpaid when due, then the donor and the donee are jointly and severally liable for its payment.

During the lifetime of the depositors, income tax problems may arise. Federal income tax liability arises in joint bank accounts bearing interest since interest payments are taxable under section 22 (a) of the Internal Revenue Code.<sup>40</sup> Further, a bank may deduct interest paid on its deposits, since a creditor-debtor relationship exists between a bank and its depositors.<sup>41</sup> In addition, the depositors may take a bad debt deduction when a bank is closed.<sup>42</sup> The question of who is taxable on the income is important only where a joint return is not used (either because the joint owners are not spouses or, if spouses, elect to file separately) because the income splitting computation on a joint return has the effect of taxing the combined income as if one half belonged to each.<sup>43</sup> When joint returns are not used, the divisibility for federal tax purposes of income from jointly owned property is determined under state law.<sup>44</sup> Generally, under state law, it may be presumed that joint bank accounts belong equally to each spouse regardless of how much each one may have put into the account.<sup>45</sup> This presumption may be predicated on the analogous principal that each joint tenant is entitled to his share of the profits and hence may each separately report one half of the income; strictly speaking, however, a joint bank account under Wisconsin law is not a technical joint tenancy.<sup>46</sup>

<sup>40</sup> Cf. U.S. TREAS. REG. 118, 39.22 (a) (1). The constructive receipt doctrine would apply as to the time the income is to be reported (U.S. TREAS. REG. 118, 39.423); thus, interest credited on a joint bank account would be income to the depositors when credited, notwithstanding bank rules requiring so many days notice before withdrawals are permitted. Such interest would be reportable as income and not as capital gain: see 29 Taxes 741. Certain exceptions, as to reportability, are authorized: for example, 119 (a) (1) (A) excepts interest on deposits paid to non-resident aliens and foreign corporations.

<sup>41</sup> INT. REV. CODE, §23 (b); U.S. TREAS. REG. 118, 39.23 (b)-1.

<sup>42</sup> Cf. 1954 P.H. FEDERAL TAX SERVICE 13, 875-A.

<sup>43</sup> INT. REV. CODE, §51 (b).

<sup>44</sup> Alfred Hafner 31 B T A 338; James Nicholson, 32 B T A 977 (aff. without discussion of this point, 90 F2d 978.) As an example, and by way of analogy, in a joint tenancy in land, income may be equally split if the state law governing the ownership of the property meets the following Treasury requirements: 1. the state law must permit the wife to own property herself; 2. the state law must permit a joint tenancy between husband and wife with respect to the type of property involved; 3. the state law must permit a valid gift of property between husband and wife, where the joint tenancy is created by gift from husband to wife. (I.T. 3825, CUM. BULL. 1946-2, 51; I.T. 3754 CUM. BULL. 1944, 143.) So far, the Treasury department has published rulings on only three states: Wisconsin (I.T. 3754, CUM. BULL. 1945, 143), Colorado (I.T. 3825, CUM. BULL. 1946-2, 51) and Indiana (I.T. 3898, CUM. BULL. 1948-1, 55). These rulings held that the laws of these states permitted the splitting of income and capital gain or losses from property held in joint tenancy.

<sup>45</sup> Walter E. Dunham, 27 B T A 1068; H. W. Evans 5 T C 336.

<sup>46</sup> It has been suggested in 4 TAX LAW REVIEW 3, 26, that perhaps the rule of U.S. Savings Bonds (I.T. 3301, CUM. BULL. 1939-2, 75) might apply "to interest on a joint bank account where the contributing spouse under local law

Section 71.03 (1) (c) of the Wisconsin statutes also requires the inclusion of interest payments in gross income. Such income is split equally<sup>47</sup> and Rule 109, issued by the Department of Taxation in pursuance of its authority under 71.11 (24) (a), requires separate income tax returns for a husband and wife if each has a gross income of \$600 or more or if either has any net income when their combined net income is \$1,400 or more.<sup>48</sup>

On the death of one of the parties to a joint bank account, in the absence of a joint return, the survivor takes free of any federal income tax deficiency on the interest from the joint bank account owned by the decedent;<sup>49</sup> but if decedent's gross estate (which can include more than the probate estate) exceeds \$60,000 a problem of federal estate tax liability arises. The federal estate tax provision on joint bank accounts<sup>50</sup> provides that the entire value of the account<sup>51</sup> is to be included in the decedent's gross estate subject to the following exceptions:

- a. No part of the account is included in the gross estate of the decedent if the survivor originally owned it.
- b. No part of the account contributed by the survivor is included in the gross estate of the decedent.
- c. No part of the account attributable to the survivor's proportionate share created by a third person is included in the gross estate of the decedent.

Consequently, it follows that on the death of a joint owner, there is a prima facie presumption that the entire value of the jointly held bank account is part of his gross estate, but this may be rebutted by showing the value traceable to the survivor which would then be excluded from decedent's estate. This burden of proof as to the survivor's contribution is on the personal representative of the deceased co-owner. The personal representative of the deceased co-owner meets this burden by positive proof that either all or part of the money originally belonged to the survivor or all or part of the money was acquired from the decedent for full and adequate consideration.<sup>52</sup> The

has the power to regain individual possession of the funds contributed by him to the account."

<sup>47</sup> See, *Estate of J. S. Mahoney*, 233 Wis. 138, 288 NW 763 (1939); *Estate of Hounsell*, 252 Wis 138, 31 NW 2d 203 (1948), *cert. U.S. Supreme Court*, October 18, 1948; *George H. Moeller v. Wis. Department of Taxation* 3 W B T A 279 (1947).

<sup>48</sup> See, *Amerpohl v. Tax Commission*, 225 Wis. 62, 272 NW 472 (1937).

<sup>49</sup> *Irvine v. Helvering*, 99 F2d 265.

<sup>50</sup> INT. REV. CODE, §811 (e). Cf. annotations in 75 L. Ed. 157 and 84 L. Ed. 620.

<sup>51</sup> Valuation would be the date of death unless fluctuation in the value of assets make it desirable to use the optional valuation date provided in 811 (j).

<sup>52</sup> *Estate of Ralph Owen Howard* 9 T.C. 1192 (1942). One possible solution in the tracing problem would be the application of "best estimate" of the separate contribution under the rule of *Cohan v. Commissioner*, 39 F2d 540 (1930). In this connection see *Estate of Mary Louise Seleckman*, P-H 1950 TC Mun. Dec. #50, 267 (1950).

problem of tracing ownership of deposits and withdrawals is exceptionally difficult and even copies of all the deposit slips used in the years under review would be of little aid. Perhaps the best solution would be to keep detailed records during the maintenance of the joint account, if it were substantial. Further, even if it were assumed that the personal representative was able to trace the various deposits and withdrawals, the joint account might be caught under other sections of the code.<sup>53</sup> However, this possibility was limited to 811 (c) (1) (A)—(transfers in contemplation of death)—by the Tax Court in the case of *Estate of Nathalie Koussevitsky*<sup>54</sup> wherein it was held that 811 (e) is the exclusive method for the taxability of joint interests except where the joint interest was created in contemplation of death. This exception is based on the rationale that 811 (c) is more specific than 811 (e). The problem would only arise where the survivor had originally given all the funds to the deceased and later the deceased establishes a joint account with the survivor. The Commissioner would be unable to include any part of the account under 811 (e), if it is assumed that there is positive proof of tracing, but the Commissioner then could use 811 (c) to include the entire value.

Ordinarily, the interest of a decedent in a joint bank account which passes to the surviving spouse qualifies for the marital deduction<sup>55</sup> and may qualify for the gift tax credit against an estate tax.<sup>56</sup> If a non-spouse survivor dies within five years, a deduction for a previously taxed account is allowed, subject to the limitations of 812 (c).

It can be seen from the above that unless the advantages derived from joint ownership of a bank account outweigh federal estate tax considerations it is inadvisable to hold as joint owners. Some non-tax factors to be considered in this decision are the survivor's immediate ownership without the cost and delay of probate proceedings<sup>57</sup> and the fact that, ordinarily, accrued interest is free from the claims of the deceased's creditors.<sup>58</sup>

The inheritance tax consequences of a joint bank account in Wisconsin depend on 72.01 (6) which provides that where there is a joint bank account, it is deemed that it was held as a tenancy in common and the decedent's share had been bequeathed to the survivor: thus either one half of the joint bank account, if there are only two depositors, or the decedent's proportionate share, if there are more than two depositors, is deemed to be a taxable transfer on the death of

<sup>53</sup> *Estate of Henry Wilson*, 2 T.C. 1059 (1943).

<sup>54</sup> 5 T.C. 650.

<sup>55</sup> INT. REV. CODE §812(e).

<sup>56</sup> INT. REV. CODE §813 (a); 936 (b).

<sup>57</sup> Although a delay in obtaining a release is likely under Wisconsin law. See p.141, *infra*.

<sup>58</sup> See p. 143, *infra*.

one of the depositors as if bequeathed by the decedent. Consequently, the relative contributions during their lifetime or the fact that the entire sum was contributed by one of the co-owners is immaterial; as the court stated in *In re Hounsell's Estate*.<sup>59</sup> "—all that is needed to set the statute in motion is to have property in the joint names of the parties." It can be seen that it is possible in certain situations that a husband may have to pay an inheritance tax on a joint bank account created with his own funds.<sup>60</sup> Thus if it is assumed that H (husband) created a joint account of \$20,000 with W (wife) and W predeceased him, H would have to pay an inheritance tax on \$10,000, subject to exemptions allowed in Wisconsin.<sup>61</sup> The only possible way H could escape the tax would be to show, by clear and satisfactory evidence, "a transaction clearly indicating a trust relation or the existence of an agency only."<sup>62</sup> At the hearing for the determination of inheritance tax, H would be incompetent, under section 325.16, Statutes (the dead man's rule), to testify to any transactions with W,<sup>63</sup> consequently, it will be difficult to meet the burden of proof. Instead of trying to establish a trust or agency at the inheritance tax hearing, H could proceed against the estate of W seeking to reform the evidences of title, but this still would not obviate the effect of section 325.16, Statutes. On the other hand, if H predeceased W a new factor might enter into the picture: section 72.17 (2) requires the presumptive inclusion of the entire value if the joint ownership were created in contemplation of death which could be rebutted by W showing such was not the case by competent evidence.<sup>64</sup> The practical difference is that all of the account would be taxable instead of one-half.

Practical difficulties may be encountered in Wisconsin when the survivor is in need of liquid assets (essentially this problem would relate solely to the co-depositor's widow who is the survivor). The inheritance tax consequences of a joint bank account may tend to tie up the account because of the effects of two statutes: section 230.48 expressly covers joint bank accounts and apparently requires a certificate of termination of joint tenancy in personality; section 72.11 (3) requires that banks which have accounts, in the names of a resident and others, shall not transfer them unless a notice of time and place be served on the Tax Department and Public Administrator ten days prior to the transfer. In addition, the bank must retain a sufficient portion to pay the tax unless the Tax Department consents to the transfer

<sup>59</sup> 252 Wis. 138, 31 NW 2d 203 (1948).

<sup>60</sup> *Ibid*; Compare *In re Atkinson's Estate: Atkinson v. Wisconsin Department of Taxation*, 261 Wis 481, 54 NW 2d 185 (1952).

<sup>61</sup> Wis. STATS. §72.04.

<sup>62</sup> *Hounsell, supra*, n. 59.

<sup>63</sup> *Ibid*.

<sup>64</sup> Wisconsin Tax Com. Ruling 541, October 1, 1926.

in writing, although the Tax Department may issue a certificate authorizing the delivery whenever no tax is due. The Wisconsin Department of Taxation has prepared a form similar to a questionnaire entitled "Application for consent to transfer securities and property jointly owned or controlled pursuant to 72.11 (3) of the statutes" which is used in obtaining the transfer certificates.<sup>65</sup> The form is executed under oath and one copy is sent to the Department of Taxation and one copy to each Public Administrator of the county in which the decedent was a resident. A transfer certificate is issued, if, from the face of the application, no inheritance tax is due. If from the face of the application, it is apparent that an inheritance tax is due, then the transfer consent certificate is sent to the Public Administrator where it is held until procedure is taken under 230.48 or until a tender of an amount sufficient to cover any tax on the transfer is made. The inheritance tax is due on the termination of the joint tenancy and a lien arises on the decedent's proportionate share deemed bequeathed.<sup>66</sup> The burden of the tax rests on the survivor, but the administrator or executor as well as the survivor are personally liable for the payment of the tax.<sup>67</sup> However, it seems possible that by a carefully worded provision in a will, the tax which would otherwise be payable by the survivor, is payable out of the decedent's estate.<sup>68</sup>

No deductions in computing the inheritance tax on the joint bank account are authorized unless the entire estate consists of joint property, in which case the only deductions allowed are filing fees, appraisal fees, attorney fees, and recording fees.<sup>69</sup> But section 72.04 authorizes the same personal exemptions from the inheritance tax as are available in other types of transfers.

## C

### MISCELLANEOUS PROBLEMS

The problem of the rights of creditors in relation to a joint bank account has produced conflicting solutions.<sup>70</sup> In Wisconsin, a joint bank account is not subject to garnishment, although it is not clear whether the remedies of attachment, execution or supplementary proceedings are available.<sup>71</sup> In those jurisdictions which have considered

<sup>65</sup> See Bullinger, *Wisconsin Inheritance, Gift, Estate and Emergency Tax Law Manual* (1949).

<sup>66</sup> WIS. STATS. §72.05 (1); See *Estate of Frederick*, 247 Wis. 268, 19 NW 2d 249 (1944).

<sup>67</sup> WIS. STATS. §72.07; §72.05 (1). Cf. 142 A.L.R. 1135, 1 A.L.R. 2d 978.

<sup>68</sup> *Estate of Levalley: First Wisconsin Trust Company et al v. Wisconsin Tax Commission*, 191 Wis. 356, 210 NW 941 (1926); *Will of Cudahy*, 251 Wis. 116, 28 NW 2d 340 (1947); Cf. 1 A.L.R. 2d 1101 (1111).

<sup>69</sup> Bullinger, *supra*, n. 65, at 75.

<sup>70</sup> Cf. Note 116 A.L.R. 1340.

<sup>71</sup> *Badger Lumber Company v. Stern*, 123 Wis. 618, 101 NW 1093. (1905); *Rymer v. Mart*, 168 Wis. 493, 170 NW 714 (1919); *Gerber v. Ogle Coal Company*, 195 Wis. 578, 218 NW 361 (1928). One possibility, as to the other

the problem, various results have been reached: in Minnesota, all or any part of a "joint and several" bank account may be levied upon for the individual debt of one of the depositors.<sup>72</sup> In Michigan, a rebuttable presumption that each are equal contributors and owners of the funds in a joint account was applied and as joint tenants, the debtor's ownership is severable for the purpose of meeting the demands of the creditors.<sup>73</sup> In Pennsylvania, a creditor cannot attach a joint bank account if it is an estate by the entireties<sup>74</sup> but an execution severs a bank account held in joint tenancy thereby making the interest of the tenant in common liable.<sup>75</sup> In Massachusetts, a creditor may garnishee a joint bank account for the individual debt of one of the joint depositors by virtue of a statute which provides, that where any deposit is made in a bank in the name of two persons, payable to either or the survivor, then it must be so paid, "if not then attached at law or in equity in a suit against either of said persons."<sup>76</sup>

Generally under bankruptcy law, a bank account passes to the trustee.<sup>77</sup> A joint bank account generally passes to the trustee subject to the right of the non-bankrupt co-depositor to show true ownership.<sup>78</sup>

A conflict of law question can arise in determining whether a joint tenancy was created or in determining the rights of the survivor. Generally, it is held that title and rights in a joint bank account are governed by the law of the place where the deposit had been made and the account kept.<sup>79</sup> Thus, in a Wisconsin case,<sup>80</sup> the court held that a joint bank account in trust was governed by the law of Michigan where it was executed and kept, even though the settlor was a resident of Wisconsin and retained full control over the account during his life.

The role of a joint bank account in a judgment for divorce involving alimony or a division of the estate is variable since any judgment is made under the statute<sup>81</sup> and the amount of the alimony

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remedies, would be to seek equitable relief (after the issuance and levy of execution) to set aside the claim of the co-depositor on the basis of fraud, *Hyman v. Landry*, 135 Wis. 598, 116 NW 236 (1908).

<sup>72</sup> *Park Enterprises, Inc. v. Track*, 233 Minn. 467, 47 NW 2d 194 (1951). The court used very sound reasons for allowing this result: by contract the parties have virtually declared they are indifferent to the exact percentage of ownership between themselves and therefore should abide the results which flow from their own declared purpose.

<sup>73</sup> *Sussex v. Synder*, 307 Mich. 30, 11 NW 2d 642 (1952). *Czajkowski v. Lount*, 333 Mich. 156, 52 NW 2d 642 (1952).

<sup>74</sup> *Goretzka v. Whissen*, 87 P. L. T. 57 (1939).

<sup>75</sup> *American Oil Company v. Falconer*, 136 Pa. Super. 598, 8 A 2d 418 (1939).

<sup>76</sup> GL, c.246 §33 (Compare Wis. STATS. §221.45); *R. H. White Co. v. Lees*, 267 Mass. 112, 166 NE 705 (1929).

<sup>77</sup> *In re Burofsky*, 64 F. Supp. 128 (1946).

<sup>78</sup> *Olshan v. East New York Savings Bank*, 28 F. Supp. 727 (1939).

<sup>79</sup> *Cf.* 25 A.L.R. 2d 1240.

<sup>80</sup> *Boyle v. Kempkin*, 243 Wis. 86, 9 NW 2d 589 (1943).

<sup>81</sup> Wis. STATS. §247.26.

or property division is discretionary with the court.<sup>82</sup> However, joint accounts are always entirely included in the estate and the fact of joint ownership is considered immaterial.<sup>83</sup>

Checks drawn upon a joint bank account, in the absence of a contract provision to the contrary, generally required the signature of all the depositors.<sup>84</sup> However most signature cards creating a joint account now provide in one form or another that the sums deposited are subject to the check or receipt of either depositor. Consequently, a bank, by the contract of deposit and hence without liability, may recognize a check signed by either withdrawing party on the entire account.<sup>85</sup>

The question of murder of one of the parties in a joint bank account by the other interested party as it affects the rights of survivorship has not been precisely determined in Wisconsin.<sup>86</sup> Little harmony in the results has been reached in those jurisdictions which have considered the precise question involved. Three jurisdictions have concluded that the survivor-murderer is entitled to the money in the joint bank account because he has a vested interest by virtue of the contract of deposit.<sup>87</sup> One jurisdiction held that the murderer was entitled to the money in the joint bank account because the statutes relating to joint tenancy were binding on the court and they made no exception to the right of survivorship.<sup>88</sup> On the other hand, one jurisdiction has held that the murderer is divested of all legal title and has no right to any of the money on deposit in a joint bank account.<sup>89</sup> The quasi-constructive trustee doctrine used in Wisconsin<sup>90</sup> was applied by one jurisdiction when the court, on demurrer, applied a constructive trust for the benefit of the estate of the decedent upon the entire balance of a joint and several bank account of a husband and wife, where the wife feloniously caused the death of the husband (the wife, with knowledge of decedent's serious heart ailment, of which he was unaware, coerced decedent to walk with her through deep snow on a cold and windy day, thereby causing his death after he had walked two blocks.)<sup>91</sup>

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<sup>82</sup> *Tupitza v. Tupitza*, 251 Wis. 257, 29 NW 2d 54 (1947); *Bruhn v. Bruhn*, 197 Wis. 358, 222 NW 242 (1928).

<sup>83</sup> *Skrzypczak v. Skrzypczak*, 252 Wis. 538, 32 NW 2d 243 (1948); *Wacker v. Wacker*, 199 Wis. 197, 225 NW 749 (1929). Compare *Loth v. Loth*, 227 Minn. 387, 35 NW 2d 542 (1949).

<sup>84</sup> 61 A.L.R. 967.

<sup>85</sup> See *Sawyer v. National Shawmut Bank*, 306 Mass. 313, 28 NE 2d 455 (1940).

<sup>86</sup> In this connection see 32 A.L.R. 2d 1099; 98 A.L.R. 773.

<sup>87</sup> *Welsh v. James*, 408 Ill. 18, 95 NE 2d 872 (1950); *Oleff v. Hodapp*, 129 Ohio St. 432, 195 NE 838 (1935); *Di Lallo v. Corea*, 19 Pa. Dist., 282, 81 P.L.J. 119.

<sup>88</sup> *Smith v. Greenburg*, 121 Colo. 417, 218 P2d 514 (1950).

<sup>89</sup> *Matter of Santourian's Estate*, 125 Misc. 668, 212 NYS 116 (1925); *Bierbrauer v. Moran*, 244 App. Div. 87, 279 NYS 176 (1935).

<sup>90</sup> *In re King's Estate*, 261 Wis. 266, 52 NW 2d 885 (1952).

<sup>91</sup> *Vesey v. Vesey*, 54 NW 2d 385, (Minn. 1952).