Property - Joint Tenancy: Special Aspects as to Joint Banks Accounts

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Most jurisdictions which have a code provision of the type relied upon in the principal case to support the right of intervention do not regard it as authorizing intervention at all. Rather, they consider it as providing for the common law practice of bringing in indispensable or necessary parties, plaintiff or defendant, who have not been joined by plaintiff’s motion, on the court’s own initiation, nor upon application of the necessary or indispensable party himself. Indeed, Wisconsin, in an earlier decision, has taken a like position, which the word *shall* in the statute itself clearly supports. Furthermore, this state has held that where joinder is optional with the plaintiff, new parties cannot be brought in under this section.

As the Court says in the *White House Milk Co.* case, many states have liberal intervention statutes. These provide substantially that:

“Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third party is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant.”

So also, Rule 24 of the Rules of Procedure for the District Courts provides for liberal intervention. It is intervention of this type which was unknown at common law but which was derived from civil law, coming particularly from the Louisiana Code.

It would seem that substantial benefit to the Wisconsin procedure would result if the provision relied upon in the *White House Milk Co.* case were confined to the bringing in of necessary and indispensable parties, and either the code intervention provision above-quoted or the provisions of the federal rule were adopted.

MARY ALICE HOHMANN

Property — Joint Tenancy: Special Aspects as to Joint Bank Accounts — The co-owners of joint bank accounts are ordinarily said to hold their interest as joint tenants. Two recent Wisconsin cases

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17 Clark, Code Pleading §64 (1928).
18 Hustig Co. v. Coca-Cola Co., 192 Wis. 311, 216 N.W. 833 (1927).
21 Clark, *op. cit. supra* note 17, at §65.
suggest special problems in this area when the relation of the owners is analyzed under the general law of joint tenancy.\(^1\)

In an action to divest defendant of title to stock certificates held in joint tenancy, the defendant counterclaimed to compel the plaintiff to restore her name as joint depositor on certain bank accounts. The plaintiff's niece, feeling that she was not adequately provided for in her aunt's will, persuaded the latter to name the defendant niece as a co-depositor on the bank accounts in question, and to purchase stock in the joint names of the parties. The aunt kept control of the pass book, and the niece signed over to her all dividends periodically received on the stock. The niece testified that the intent of the parties was to confer no present interest, but that the niece was to take as survivor on the death of the aunt. *Held:* No joint tenancy was created, though, by inference obiter, the niece's survivorship right would have been recognized in a contest with the heirs of the aunt. Therefore, the aunt was entitled to return the account to her sole name during her lifetime, effectively destroying the survivorship. However, the court did declare a joint tenancy in the stock. *Zander v. Holly,* 1 Wis. 2d 300, 84 N.W. 2d 87 (1957).

In the second principal case, the deceased father of the parties to the action created a joint savings account in his name and the name of his son. There was no evidence of any declaration by the depositor or other special circumstance attendant upon the creation of the account. For three and a half years the father notified no one of his act; but from time to time he made additional deposits and two withdrawals, retaining sole possession of the pass book. In his last illness, he notified his son of the existence of the account, and said the son might draw on it if necessary to pay the expenses of the illness. *Held:* the son, upon death of the father, took sole title to the account as surviving joint tenant. An account opened in joint names raises a rebuttable presumption that the creator intended a joint tenancy. The co-owner will be deemed an agent or trustee of his interest for the benefit of the creator only if such an intent can be shown by clear and satisfactory evidence. But, in the absence of such evidence, the form of the account is sufficient to sustain a judgment for the survivor as joint tenant. Here, nothing contemporaneous with the opening of the account showed such contrary intent; and acts of the father subsequent thereto were consistent with joint tenancy. A deposit of excess funds was built up which could be used for the father if

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\(^1\) A recent article has thoroughly analyzed the entire area of joint tenancy, with special attention paid to joint bank accounts: Cotter, *Observation on the Law of Joint Tenancy in Wisconsin,* 39 MARQ. L. REV. 110 (1956) and 40 MARQ. L. REV. 92 (1956). It is the purpose of this article to explore only that part of the field of joint bank accounts that has developed since the publication of the above article.
needed, but which otherwise would go to the son on his death. In re Estate Pfiefer, 1 Wis. 2d 609, 85 N.W. 2d 370 (1957).

In the Zander case, the Court seems to have created a new type of property interest, right of survivorship without present interest. Such an interest depends upon the intent of the donor, and only presumptively upon the form of the instrument creating it. This result seems to violate both the parole evidence rule and the Statute of Wills. The written evidence of the contract with the bank named both parties as holders of the account; but the plaintiff was allowed to prove, by parole, that in fact no interest was given to the other. But, more basically, the Court sanctioned a form of testamentary disposition that did not comply with the formalities of the Statute of Wills. The Court held that the owner of a bank account could retain in herself all present interest in it; but, by an agreement with the bank, could name the person to take on her death. This seems to be in direct conflict with the former holding in Tucker v. Simrow. In that case a writing directing the bank to pay the account to certain named persons on the depositor's death, but not naming them as co-owners, was held to be invalid as an attempted testamentary disposition.

A true joint tenancy has two indispensible characteristics: present joint interest, and right of survivorship. As to bank accounts, the Court in the Zander case sanctioned the latter without the former. In earlier cases, the Court had sanctioned the concept of a present joint interest in a bank account, incumbered with a trust, and presumably not subject to survivorship. In a contest between the parties, the co-owner was said to hold his legal title as a trustee for the other, who was said to have sole equitable title. Thus, in effect, one joint tenant had the complete interest, and the other a mere power, which he was under duty to utilize for the benefit of the one with equitable title.

In Plainse v. Engle, the father created the savings account in the name of himself and his daughter, with the sole purpose of enabling his daughter to care for him in the event of his illness. There was no intent to give the daughter any beneficial interest in the account. She drew all the money out of the bank, but was forced to return it to the father's guardian after he was declared incompetent. Estate of Staver, in which Wisconsin adopted the contract theory of joint bank accounts, laid down a similar proposition in dicta. It was approved in Estate of Hounsel, but held not applicable to the fact situation there.

There have been cases where a true joint tenancy was declared to exist in a bank account. In Estate of Schley, the plaintiff was the

2 248 Wis. 143, 21 N.W. 2d 252 (1946).
3 Estate of Gabler, 265 Wis. 126, 60 N.W. 2d 720 (1953).
4 262 Wis. 506, 60 N.W. 2d 89, 57 N.W. 2d 586 (1952).
5 218 Wis. 114, 260 N.W. 655 (1935).
6 252 Wis. 138, 31 N.W. 2d 203 (1948).
7 271 Wis. 74, 72 N.W. 2d 767 (1955).
husband of the deceased; the parties had held various savings accounts and certificates as joint tenants. During her life, the wife withdrew the money held jointly and deposited some of it in her name or in the names of herself and others. It was held that the wife, although she had power to withdraw the funds, did not have the power or right to appropriate them and thereby destroy her husband's interest therein. Severing the joint tenancy did not destroy her husband's interest therein, and the husband was entitled to one-half of the funds which he could trace to the subsequent deposits. It is significant that, originally, the particular funds in question were derived from the wife's separate property. In *Boehmer v. Boehmer*, there was a joint tenancy between husband and wife. When the husband was declared incompetent, the savings account was placed in custodia legis, to guard against either the wife or guardian invading the account to the prejudice of the other.

When the contest is between the survivor and the estate, the principal issue is whether the deposit was made for convenience, or for the purpose of giving rise to the right of survivorship. If the Court finds a donative intent, it declares the account to have been held in joint tenancy, and ordinarily does not inquire whether in fact a bare "right of survivorship," rather than a true joint tenancy, existed.

However, under the law of joint tenancy, more than an effective intent to create the joint tenancy is required for the survivor to take on the death of the other: the joint tenancy must not have been destroyed during the life of the deceased. A joint tenancy can be terminated by the destruction of any one of its unities, since they are all necessary to its existence. Thus, if either of the parties to a joint bank account, during the lives of both, was to draw out some of the funds for his exclusive benefit, a severance would be effected and the incident of survivorship destroyed. Consequently, in a contest between the survivor and the deceased's estate, whenever a true joint tenancy in a bank account is found to have been created, it should also be determined that it continued to exist until the death of one of the parties, to enable the survivor to take the whole of the account.

Of course, if the survivor held only a right of survivorship with no present interest, this would not be necessary. Since the four unities are never present, the possibility of their destruction is nonexistent. As the instant case of *Zander v. Holly* shows, the donor in such a case can withdraw all or part of the funds for his separate use, since

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9 Estate of Gabler, 265 Wis. 126, 60 N.W. 2d 720 (1953); 2 *Tiffany, Real Property* §425 (3rd ed. 1939); 2 *American Law of Property* §6.2 (Casher ed. 1952).
10 Estate of Schley, 271 Wis. 74, 72 N.W. 2d 767 (1955).
he holds the complete present interest. In a contest between the survivor and the deceased donor's estate, most often the facts disclose a "right of survivorship" with no present beneficial interest, but at times a true joint tenancy could be found. In the instant case of *Estate of Pfiester*, the father made withdrawals during his life. If such withdrawals were for his separate benefit, it would seem that under the law of true joint tenancy, as applied in *Estate of Schley*, a severance would have been effected. The result, in *Estate of Pfiester*, would therefore have been recovery of one half of the corpus of the account by the son.

On this basis, the rule of presumption, stated in *Estate of Pfiester*, that:

"... [A]n 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... to attach to it."

would be better stated:

"An account opened in joint names raises a rebuttable presumption that the creator of such an account intended a right of survivorship to attach to it, with or without a present beneficial interest, simply as opposed to an account for mere convenience."

If this be the proper interpretation of the *Pfiester* rule, then the father in that case, during his lifetime, was at complete liberty to destroy the survivorship, in whole or part, by withdrawals.

In the area of joint bank accounts, the Court has departed from well established property law concepts, and has established special rules which, so far at least, have been limited in application to bank accounts. Joint tenancy is defined as a common law estate which is held by two or more jointly, with an equal right in all to share in the enjoyment during their lives. Thus the common law requirement of unity of interest would prohibit one joint tenant from holding a legal estate and one an equitable estate. The desirability of applying the common law unities is questionable; but there can be no doubt that Wisconsin does not apply them to personal property other than bank accounts, and to real property. In personal property other than

11 *Estate of Skilling*, 218 Wis. 574, 260 N.W. 660 (1935); *Kelberger v. First Federal Savings & Loan*, 270 Wis. 434, 72 N.W. 2d 257 (1955); *Schunke v. Garlt*, 219 Wis. 367, 263 N.W. 176 (1935).
12 *Estate of Stayer*, 218 Wis. 114, 260 N.W. 655 (1935). Also, the instant case of *Estate of Pfiester*.
13 1 Wis. 2d at 612, 85 N.W. 2d at 372.
14 48 C.J.S., Joint Tenancy §1 (1947).
15 Wisconsin has never squarely decided the problem, although dicta in *Kurowski v. Retail Hardware Mutual Insurance Co.*, 203 Wis. 644, 234 N.W. 900 (1931), indicated that a contract by a joint tenant to sell his interest is a severance in equity.
16 *Estate of Gabler*, 265 Wis. 126, 60 N.W. 2d 720, 61 N.W. 2d 823 (1953).
bank accounts, the Court does not allow one joint tenant to hold as trustee for the other upon a finding of intent to create the interest for convenience only. In the Zander case, the intent as to the bank accounts, and that as to the stock, was the same; but contrary holdings resulted. Even though the aunt intended to give no joint beneficial interest in the stock to which she named herself and her niece joint owners, she could not compel the niece to sign the stock or even the dividends over to her. A similar position would be reached in regard to real property, since the rules are the same.

Under existing law, as applied to property other than joint bank accounts, there can be no right of survivorship independent of joint tenancy. Sec. 230.43 of the Wisconsin Statutes (1955) divides estates in respect to number and connection of their owners into estates in severalty, in joint tenancy, and in common. The court has logically construed this to mean that an estate with an incident of survivorship can be only a joint tenancy, since in Wisconsin there is no estate by the entireties. There was certainly no other type of common law estate by which survivorship could be established.

The requirement of unity of interest would forbid an independent right of survivorship in a joint tenant without a present interest. The interest of each must be of the same duration; one could not be a fee, and the other a remainder.

It is apparent that the Court has placed bank accounts in a separate category, not explicitly differentiating them from other types of property, but nevertheless applying concepts to them never applied to other types of property. In view of the common law and the statutes, it may be impossible to extend these concepts. There appears no reason why they should have been applied to bank accounts in the first instance, since bank accounts are, in fact and in legal theory, merely personal property. The special aspects of the deposit contract will present some problems not elsewhere present, but the property concept itself is the same.

In addition to creating new types of estates, the Court has also established new methods of their creation. To establish or change the legal incidents of property ownership, the law has always required

18 Here there would be an additional reason, the Statute of Uses, Wis. Stats. §231.03 (1955): "Right of Possession and Profits a Legal Estate. Every person who by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the actual possession of lands and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein of the same quality and duration and subject to the same conditions as his beneficial interest."
212 TIFFANY, REAL PROPERTY §418 (3rd ed. 1939).
22 Estate of Hounsel, 252 Wis. 138, 31 N.W. 2d 203 (1948).
23 Ibid.
that certain formalities be observed; transfer of title, like binding oneself in contract, is primarily a matter of intent; but, for accuracy and stability of the law, the method of manifesting that intent is prescribed. Proper procedure reduces the danger of fraud and instills confidence in the law. It is for these reasons that we have the parole evidence rule and the Statute of Frauds. Joint tenancy can not be created in real or personal property by intent alone without the proper procedure. To transfer title to real property by gift, delivery of the property is essential. Bank accounts seem to be the only area in which no transfer is necessary for a gift. Naming a person as a co-owner of the account, in the deposit contract with the bank, seems to be the only formality required; and, as such, takes the place of delivery.

There appears no reason why the rules relating to the formalities of delivery could not be applied to the formality of contracting. A deed can not be delivered to the grantee with parole conditions attached. If the grantor intends to give up control over it, it passes title according to its terms, any intention of the grantor notwithstanding. If the grantor wants title to pass on some condition, he must so state in the deed or deliver it into escrow. The reason is obvious. If it were possible to prove parole conditions attached to the formal delivery of a deed, there would be no safety in accepting the deed, and the formality of delivery would be useless. It would then be possible to vary the terms of the deed, and hence title would always be in doubt.

By contrast, in the principal case of Estate of Pfiefer, there was only a presumption that a joint tenancy was created by the contract with the bank. If a contrary intent would have been satisfactorily proven, the presumption would have been rebutted, and the terms of the contract, which normally determine the property interest, would have been varied. The terms of a deed will be reformed by a court of equity only where there was a definite agreement between the parties, and some term was omitted by mutual mistake or by the wrongful act of one party. An intent by the grantor, contrary to the terms of the instrument, would not be ground for reformation.

In summary, it is submitted that the Wisconsin Supreme Court has established some novel property concepts in relation to joint bank accounts. The Court has held that an account joint in form can create

25 Mo. v. Krupke, 255 Wis. 33, 37 N.W. 2d 865 (1949).
26 Estate of Gabler, 265 Wis. 126, 60 N.W. 2d 720, 61 N.W. 2d 823 (1953).
27 Estate of Staver, 218 Wis. 114, 260 N.W. 655 (1935).
29 Lowber v. Connit, 36 Wis. 176 (1874).
30 Chaudoir v. Witt, 170 Wis. 556, 170 N.W. 932 (1919).
31 Auer v. Matthews, 129 Wis. 143, 108 N.W. 45 (1906).
any of three different interests, upon retrospective examination: (1) a true joint tenancy, (2) a present power, highly perishable, and without right of survivorship, or (3) a right of survivorship, also highly perishable, without present interest. Just how great an extension of these concepts will follow is a matter for speculation. Presently, however, a transfer of any other sort of property in comparable form creates either the traditional joint tenancy or no interest at all.

John P. Miller