Hastings Law Journal

Volume 5 | Issue 2 Article 13

1-1954

Evidence--Joint Bank Account--Admissibility of Parol Evidence to Show Non-Donative Intent

Wilmont Sweeney

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the Law Commons

Recommended Citation

Wilmont Sweeney, *Evidence--Joint Bank Account--Admissibility of Parol Evidence to Show Non-Donative Intent*, 5 HASTINGS L.J. 239 (1954).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol5/iss2/13

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

afford due process to the alien or withhold it as he sees fit. In the first case in which the court of appeals affirmed the dismissal of the alien's writ of habeas corpus, Judge Clark wrote a dissenting opinion in which he said:

> "I recognize that the area in which an alien can seek judicial relief and does not remain subject to the unrevocable and uncontrollable doom of a government official is steadily narrowed by Congress. . . . But I think we ought not to rush ahead of Congressional intent."[16]

It is unfortunate that the Supreme Court saw fit to deny certiorari in this case. This case might have afforded an excellent opportunity for it to have rendered a decicision interpreting this statute, and to have given its opinion on the question of whether Congress intended such drastic changes in the previous act.

William R. Manson

EVIDENCE. JOINT BANK ACCOUNT—ADMISSIBILITY OF PAROL EVIDENCE TO SHOW NON-DONATIVE INTENT.—In the case of In re *Furjanick's Estate*[1] a testator converted his individual bank accounts into joint accounts with his niece. They also signed an agreement, each with the other and with the bank, stating the account (treating the two as one) was a joint tenancy with survivorship rights. The agreement recited that it was revocable only by written notice to the bank signed by both parties. The full legal significance of the agreement was explained to the testator by the bank president before it was executed. No funds were ever contributed by the niece. Upon the testator's death, his will designated her sole executrix. Excluding the joint bank account, his bequests exceeded his personal estate. The niece withdrew the funds from the account as her personal property claiming by right of survivorship. By use of parol evidence, the other legatees sought to have the joint account declared a part of the decedent's estate. They alleged the testator did not have a donative intent when he changed his account. The evidence was admitted by the Orphans' court, but, on appeal, the Pennsylvania Supreme Court reversed. It held parol evidence inadmissible to show non-donative intent because its admission would tend to nullify the clear wording of the agreement.

First the court had to determine whether the agreement clearly and unambiguously stated the intent of the decedent. By answering this preliminary question in the affirmative, it was forced to refuse to admit the proffered parol evidence as violative of the parol evidence rule. The rule is:

> "Parol or extrinsic evidence of the intention of the parties may be received to clear up an ambiguity by reason of which such intention is not clearly expressed; but, where the writing is free from ambiguity, parol evidence is not admissible to show that the real intention of the party was other than that clearly expressed by the writing."[2]

Whether a technical joint bank account is created depends upon the actual intent of a depositor at the time of the creation of the co-tenancy in the bank account. One must bear in mind that originally all of the deposited funds belonged to only one of the parties, the decedent.[3] If title subsequently vested in the survivor, how did the

---

[16]United States *ex rel.* Dolenz v. Shaughnessy, *supra* note 1 at 292.

[1]100 A.2d 85 (Pa. 1953).

[2]32 C.J.S., Evidence § 960, p. 903.

[3]This note deals only with this aspect of the problem. For cases in which the money belonged to both, see First National Bank v. Lawrence, 212 Ala. 45, 101 So. 663 (1924), *In re* Edward's Estate, 140 Or. 431, 14 P.2d 274 (1932).

transfer occur? By bequest? No such contention was made and there was no compliance with the Statute of Wills. By contract? Whether the survivor gave consideration for it can be a close question.[4] By trust? Some courts uphold the transfer on this theory, contending that the bank or depositor is a trustee.[5] Others reject it on the ground that there is no intention to create a trust type fiduciary relationship.[6] And still other courts properly insist that the laws applicable to trusts be discarded for all purposes other than the creation of the trust.[7] But even if the trust theory is accepted, there must be found a completed gift of the equitable or beneficial title. The intent of the depositor to make a gift remains one of the essentials of the trust creation.[8]

The same question of determining the depositor's intent presents itself if the transfer of title to the survivor is based upon the "inter vivos gift" theory [9] The mere creation of a co-tenancy in the account with the right of either party to make withdrawals is not conclusive evidence of donative intent or of the creation of a joint account with survivorship rights.[10] However, some statutes have provided to the contrary.[11] In one case, passbooks, signature cards and joint account contracts were held not conclusive evidence of the depositor's intent.[12] As a general rule it can only be said that the depositor must clearly and unambiguously manifest his donative intent. Then the determination of the degree of his clarity becomes a question of law for the court before it can rule upon the admissibility of parol evidence which would tend to vary the terms of the written agreement.[13]

---

[4]It has been held that the signature card imported consideration for creation of joint tenancy. *In re* Winkler's Estate, 232 Iowa 930, 5 N.W.2d 153 (1942) Where donee had cared for depositor for several years before accounts were changed, the daughter, by application of "contract theory," was deemed entitled to entire balance remaining in the joint accounts at testator's death. Armstrong's Ex'r. v. Morris Plan Industrial Bank, 282 Ky. 192, 138 S.W.2d 359 (1940) To avoid the question of consideration, courts have sometimes resorted to the third party beneficiary analogy. They treat the arrangement as a contract between the donor and the bank, which the donee, as a beneficiary, may enforce, although he has not given any consideration. Sullivan v. Hudgins, 303 Mass. 442, 22 N.E.2d 43 (1939) and cases noted in 103 A.L.R. 1140 (1936) 135 A.L.R. 1021 (1941) lists cases holding that there is an executed contract requiring no consideration.

[5]Booth v. Oakland Sav. Bank, 122 Cal. 19, 54 Pac. 370 (1898), Drinkhouse v. German Savings and Loan Society, 17 Cal.App. 162, 118 Pac. 953 (1911), Stone v. Nat'l City Bank, 126 Md. 144, 94 Atl. 657 (1915), Harris Banking Company v. Miller, 190 Mo. 640, 89 S.W 629 (1905), 48 A.L.R. 202 (1927), 66 A.L.R. 890 (1930), 103 A.L.R. 1132 (1936), 135 A.L.R. 1005 (1941), 149 A.L.R. 889 (1944)

[6]McGillvray v. First Nat'l Bank, 56 N.D. 152, 217 N.W 155 (1927), *In re* Staver's Estate, 218 Wis. 114, 260 N.W 655 (1935), 103 A.L.R. 1132 (1936)

[7]Webster v. St. Petersburg Fed. Sav. & Loan Ass'n, 155 Fla. 412, 20 So.2d 400 (1945), Howard v. Dingley, 122 Me. 5, 118 Atl. 592 (1922), Contra cases collected 48 A.L.R. 202 n. 67 (1927). See 1A BOGERT, TRUSTS AND TRUSTEES § 205 n. 80, 81 (1935).

[8]1 BOGERT, *op. cit. supra* note 7, § 46 n. 85; See cases collected in 65 C.J., Trusts § 66, p. 291, n. 6.

[9]A lack of donative intent in the settlor would nullify the agreement as an executed gift and the burden of proof is on the recipient. Michaelson v. Wolf, 261 S.W.2d 918 (Mo. 1953), *In re* Yasilonis' Estate, 125 N.Y.S.2d 363 (1953), *in re* Sussman's Estate, 125 N.Y.S.2d 584.

[10]Sinift v. Sinift, 229 Iowa 56, 293 N.W 841 (1940) *In re* Jarmakowski's Estate, 169 Misc. 463, 8 N.Y.S.2d (1938), *In re* Wilkins Will, 131 Misc. 188, 226 N.Y.Supp. 415 (1928), Holbrook v. Hendrick's Estate, 175 Or. 159, 152 P.2d 573 (1944) "That a passbook is made out in the joint names of two persons is evidence simply of the depositor's intent that the deposit may be drawn out by either of the persons named." 7 C.J., Banks and Banking § 908, p.865.

[11]See NEB. REV. STAT. § 8-167 (1943) cited in McConnell v. McCook Nat'l Bank of McCook, 142 Neb. 451, 6 N.W.2d 599 (1942)

[12]Rauhut v. Reinhart, 22 Del.Ch. 431, 180 Atl. 913 (1935)

[13]Schmidt v. Macco Const. Co., 260 P.2d 230 (Cal.App. 1953); Ross & Sensibaugh v. McLelland, 262 S.W.2d 205 (Tex.Civ.App. 1953) "Whether there is ambiguity in written instrument authorizing introduction of parol testimony is question of law for determination of court and not by jury." Butler v. Southwest Dairy Products Co., 146 S.W.2d 1036 (Tex.Civ.App. 1941)

Another requirement of an inter vivos gift is that there be a delivery of the subject matter of the gift by the donor to the donee with the *intention* to part with dominion and control over it.[14] Where can one find a delivery of the subject matter of a joint bank account at the time of its creation? The title to the subject matter which passes to the donee must be so full and complete that if the donor resumed control over it, without the consent of the donee, he would be answerable in damages as a trespasser.[15] It has been held that the gift must fail where the donor intends to retain a joint interest in the deposit by virtue of which he has the right and power to divert the entire fund to his own use.[16] That the donee has a similar power is immaterial.

From the foregoing, then, it is easily discernible that proper ascertainment of the depositor's intent at the time of the creation of the co-tenancy in his bank account provides the key to the co-tenant's survivorship rights. This is true, whether one treats the co-tenancy creation as a trust or as an inter vivos gift. Perhaps one of the better general observations on the problem was made by a California court. That court, speaking through Mr. Justice Johnson, said:

> "There has been considerable puzzlement on the part of the courts respecting the development of a legalistic formula for upholding the interest of a survivor in a voluntary joint tenancy account maintained without the concomitant of a delivery. Some courts, in fact, the majority, adopt, in the absence of statute, the theory of a gift where such intent is shown. Others sustain the interest of the survivor on the theory of the creation of a trust. Whichever theory is accepted, the general tendency is to take a liberal view of the transaction and to devise a way of effectuating the intent without scrupulous insistence on technical correctitude."[17]

The *Furjanick* decision states that the mere creation of the account in the joint names of both parties with right of survivorship inscribed on the signature card only constitutes prima facie evidence of a gift inter vivos; that such acts alone are considered so incomplete or equivocal as to permit the admissibility of parol evidence. The only additional element in this decision is the separate agreement. The agreement provides for: (1) Mutuality of agreement, (2) Joint ownership with right of survivorship, (3) a spelling out of what "survivorship" means, and (4) explicit provision in the agreement for its own revocation. It may be inferred that whereas strict adherence to the technical requirements of a gift or trust effectuation in other respects may not be too closely scrutinized, the court will require the utmost exactitude in the manifestation of donative intent if the use of parol evidence is to be averted.

Of course a court is obligated to decide questions of law according to the rules of law of the jurisdiction. The parol evidence rule is one of many. In the principal case the court properly held the agreement creating the joint account unambiguous and certain. Its application of the parol evidence rule perpetuates the legal theory that the integrity of clearly written, unambiguous agreements should not be aborted by the introduction of parol, extrinsic evidence.

Wilmont Sweeney.

---

[14]Jean v. Jean, 207 Cal. 115, 277 Pac. 313 (1929); Vincent v. Putnam, 248 N.Y. 76, 161 N.E. 425 (1928); Fitzpatrick v. Fitzpatrick, 346 Pa. 202, 29 A.2d 790 (1943)

[15]Rice v. Bennington County Sav. Bank, 93 Vt. 493, 108 Atl. 708 (1920).

[16]Rose v. Osborne, 133 Me. 497, 180 Atl. 315 (1935); Pearre v. Gross Nickle, 139 Md. 274, 115 Atl. 49 (1921); Rasey v. Currey, 265 Mich. 597, 251 N.W 784 (1933).

[17]By statute in Wallace v. Riley, 23 Cal.App.2d 654, 659, 74 P.2d 807, 810 (1937).