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Once More Unto the Breach

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Body

Joint and survivor bank accounts, among the most common forms of ownership of property, have generated a raft of contested proceedings in our courts with problematic results. The latest proposed solution to the litigation, an amendment to Banking Law Â§675 suggested by the OCA Advisory Committee on Surrogate's Practice, is the topic of this column and will be discussed below.

Currently, such accounts are governed by the above Banking Law, which in paragraph (a) protects a banking institution that pays out to either customer during the lifetime of both or to the survivor. In paragraph (b) the statute provides that opening such an account "in the absence of fraud or undue influence" is prima facie evidence of the depositor's intent to create a joint and survivor account and the burden of proving otherwise is on the party challenging the right of the surviving depositor to the funds in the account.

Except it is not that simple.

First, the opening of such an account creates, in the words of the statute, a "joint tenancy" and the account holders are "joint tenants." That means that the interests of the account holders when they are alive are analogous to those of joint tenants in real property-they hold undivided moieties, so if account holder A deposits all of the funds in the account, account holder B immediately has the right to withdraw one-half of the funds. Such result, in turn, gives rise to an obvious question: Has A made a transfer to B subject to gift tax (at least to the extent one-half the value of the deposited funds exceed the presently interest exclusion under IRC Â§2503(b), currently $16,000)? The short answer is no.

Second, signing an account agreement, often referred to as the "signature card," stating the account is a joint and survivor account is not the only way to create such an account. There is also a common law joint and survivor account. It is clear under New York law that in the absence of the necessary signed agreement (usually a signature card) between the account holders and the bank, a surviving holder has the burden of proving the that deceased account holder intended to create a joint and survivor account.

Third, even if the signature card creating the account states that the account is a joint and survivor account, it is still possible for the estate of the deceased account holder to prove that the decedent's intent was to create a convenience account, that is, the joint and survivor arrangement was used only as to allow that person to sign checks to pay the decedent's expenses. Unfortunately, it was probably the only option offered to the customer.

The scenarios are remarkably uniform: A person, often of more or less advanced age, realizes that help is needed to make sure bills and expenses are paid. The solution is someone with the authority to sign checks drawn on the person's account. Our hypothetical person (the depositor) identifies a friend willing to take on the task. The depositor and the friend visit the bank, explain what is wanted, and the solution offered is a joint and survivor account. At the depositor's death, the friend, as the surviving joint holder, claims the funds and the depositor also claims the funds as well, insisting that the decedent intended only to create a convenience account.

The first issue has been resolved by inaction. In the 1970s the Treasury considered whether local law should determine whether or not the creation of a joint and survivor account results in a completed gift at the time of the deposit of funds into the account. In the end the decision was to issue no ruling of any sort and to continue to have

all joint accounts governed by Treas. Reg. Â§25.2511-1(h), example 4, which states that a completed gift occurs only when the non-depositor makes a withdrawal from the account without any obligation to account to the depositor.

The other two issues are the subject of frequent litigation. Now all three issues are addressed by a bill, sponsored by the OCA Advisory Committee on Surrogate's Practice which will be introduced in the new legislative session.

Such bill would repeal Banking Law Â§675, and replace it with Â§675-a which would apply to accounts established on or after the effective date, namely 30 days after it becomes law.

Paragraph (a) of the Bill deals with deposits into accounts in the name of the depositor and another person "in form to be paid or delivered to either or to the survivor of them." Payments from the account may be made to either "during the lifetime of both" unless either the depositor or the other person gives the bank written notice not to pay in accord with the terms of the account and, in that case, the bank may require the approval of both the depositor and the other person for any further payments.

Paragraph (b) provides that despite the source of the funds, title to a deposit in an account described in paragraph (a) is solely in the depositor. This provision, coupled with the omission from the bill of any reference to the account holders as "joint tenants", puts an end to the moiety doctrine and the possibility of a gift on the creation of the account from the depositor to the other person.

Paragraph (c) protects the banking institution by providing that on the death of the "other person" during the depositor's lifetime, payment to the depositor of the funds remaining in the account is a valid release to the banking institution.

Paragraph (d) contains a major change, namely, the default rule which requires that on the death of the depositor the funds in the account are to be paid to the depositor's estate. The funds are to be paid to the other person only if the depositor has indicated in the contract creating the account that it is a survivorship account. The bill even suggests the language to be used to create such an account.

Unlike the current statute, the bill says nothing about presumptions and burdens of proof.

It also appears that under the bill it is not possible to create a common law joint and survivor account. Without the written statement of survivorship rights in the non-depositor, the account is a convenience account-period.

These provisions all deal with what happens on the death of the depositor. But what are the rights of the account holders against each other while they are both alive?

The bank, of course, is indifferent. Under existing law and under proposed Â§675-a, the bank simply pays a check with the valid signature of one of the account holders and is free of liability in the absence of contrary instructions from one of the depositors.

Under the moiety doctrine, an account holder who never deposited any funds into the account can withdraw one half of the funds on deposit and the other account holder has nothing to say about it. The right of survivorship in the person making the withdrawal is destroyed (*Kleinberg v. Heller, 38 N.Y.2d 836 (1976)*).

Under proposed Â§675-a, the only provision that addresses this issue is paragraph (b), which, as discussed above, places title to all the property in the account in the depositor, no matter who deposited it originally.

This provision may raise a gift tax issue that in a sense is the mirror image of the problem created by the moiety rule. Consider A and B who share a household and wish to equitably apportion financial responsibility for the household expenses. Both are employed outside the home and A's salary is exactly twice B's. A opens a joint account as the depositor with B as the "other person." A properly states in writing that if A is the first to die, the funds in the account belong to B. A opens the account with a nominal deposit and thereafter each month A deposits $X and B deposits Â½ $X.

B's deposit belongs to A. Under gift tax regulation cited above, does a gift occur when A withdraws an amount greater than what A has actually deposited, or is that result impossible because all the funds in the account are considered to have come from A? If the latter, does the account become a way to evade the gift tax? If the couple decides to separate, do all the funds in the account belong to A because A is "considered" to have deposited them into the account?

In short, under current law, the depositor loses control over one-half of the funds deposited. Under the bill, the person who is not the depositor who opens the account but who adds funds to the account may lose all control over those funds.

These problems are less significant if the couple is married, first because of the unlimited gift tax deduction for outright gifts to a spouse held in joint and survivor form with the donor spouse (IRC Â§2323[d]), and second,

because on dissolution of the marriage the law of equitable distribution will deal with the bank account if the couple cannot agree what to do.

If the bill is enacted, the question will remain of how banking institutions will implement its provisions. Banking Law Â§678, in effect since 1991, authorizes the creation of an account in the name of the depositor and another person "for the convenience" of the depositor. The funds in the account belong only to the depositor and the other person has no right of survivorship in the account.

Twenty years ago, an article in this newspaper observed that it was "curious" that the enactment of Banking Law Â§678 has not resulted in an abatement of joint account litigation (Charles F. Gibbs and Coleen Carew, Joint Bank Accounts-Litigation Reigns, N.Y.L.J., June 13, 2002, p.6.).

Nothing has changed because the statutory convenience account simply does not seem to be one of the options offered to bank customers.

We offer another solution which will be less difficult for the banks. The signature card referred to above, that the banks give depositors, should simply allow the depositor to decide the type of account wanted.

The card should give the depositor the opportunity to check one of the two choices as follows:

_____ convenience account

_____ Joint and Survivor account

Whether the proposed statute solves many of the problems discussed above, depends upon the banking institutions. If bank employees are trained to offer these accounts, litigation will be reduced. Simply put, the bottom line is, will the banks cooperate?

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