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Comment

BANK DEPOSITS AS WILL SUBSTITUTES IN MISSOURI

I. INTRODUCTION

This article is to present the status of the law in Missouri in respect to the testamentary aspects of bank deposits. Although there are numerous Missouri cases on this subject, confusion still abounds. To a large extent the confusion has been the result of an incomplete analysis of the nature of bank deposits and the ambiguous language used by courts in rendering their decisions.

The term "bank deposits" is used herein in a legal sense, to mean general deposits (including savings deposits, checking accounts, and certificates of deposit) in all types of financial institutions. Generally, the deposit takes, with minor variations, one of the following forms: (1) in the name of another; (2) for the depositor in trust for another; (3) for the depositor payable on death to another; and (4) for the depositor "and" another jointly, with or without words of survivorship. Variations of (4) are found in such forms as: (a) for the depositor "or" another, with or without words of survivorship; and (b) for the depositor "and/or" another, with or without words of survivorship. In an effort to carry out the intent of the depositor in such cases, courts have sustained the interest of the other party upon four principal theories—gift, trust, joint tenancy, and contract.

II. DEPOSIT OF FUNDS TO THE CREDIT OF ANOTHER¹

A. *As a Gift*

A gift of a deposit may be effected by a deposit to the credit of another, but the donative intent must be clear and the donor must complete the gift by divesting himself of dominion and control.² If a savings account passbook or certificate of deposit is delivered to the donee, it is clear that a gift is effected.³ However, a deposit of money in the name of another, without surrender of the passbook or certificate of deposit, is not alone sufficient evidence of a donative intent.⁴

In *Tygart v. McComb*⁵ a father drew out his deposit in a bank and placed it to the credit of his minor daughters, taking a passbook in their names. There-

1. In general, see BROWN, PERSONAL PROPERTY § 63 (2d ed. 1955); 4 CORBIN, CONTRACTS §§ 783, 914 (1951); 24 AM. JUR. *Gifts* § 101 (1940); Havighurst, *Gifts of Bank Deposits*, 14 N.C. L. Rev. 129-59 (1936).

2. BROWN, LAW OF PERSONAL PROPERTY § 63 (2d ed. 1955) and cases cited therein.

3. *Ibid.*

4. *Ibid.*

5. 54 Mo. App. 85 (K. C. Mo. App. 1893).

after he deposited small amounts and from time to time drew amounts by signing the daughters' names "by Alexander Wilson." On one occasion he drew \$600 and loaned this sum, taking in return a note payable to himself. When he died the passbook and note were found among his papers. The appellate court, in affirming the trial court's finding of an incomplete gift, stated:

No importance is attached to the mere fact that he kept the pass-book and never gave it over to the children, never notified them of the deposit to their credit, and that therefore no such delivery for these reasons as would answer the purpose of a valid gift. For as the transaction was clearly for the benefit of the children their assent and acceptance of the gift would be assumed. And besides a delivery of the pass-book to their father, who was their natural guardian, would be a delivery to them. . . . If then we were to decide this case, looking alone to the deposit in the bank and retention by the donor of the evidence of such deposit, we should not hesitate to award the money to these minor children.⁶

The court then considered the other evidence of the father's intent and concluded, quite correctly, that he had not intended a present gift. The court indicated that intention is the important element in determining the character of such a transaction.

The decision in *Tygart v. McComb* is in accord with the decisions in most states that have decided the question,⁷ but today the result might be different because of § 362.465 RSMo, enacted in 1959,⁸ which appears to authorize payment of funds, held on deposit in the name of a minor, to the minor. Whether this statute was intended to determine the rights of the parties in respect to the deposit, or instead was merely to protect the bank from liability for paying out the funds, is uncertain.

B. *As a Trust*

There is very little authority on the question, but it would seem that a trust in the form of a bank deposit to another's credit could be created. In *Eschen v. Steers*⁹ both a gift and a trust theory were argued and rejected. There the deceased decedent, upon his death bed, wrote his bank, directing that the funds in his account be transferred to a savings account in the name of his daughter. The passbook was to be in the daughter's name, but sent to decedent so that he might draw from the account by signing her name. He expressly retained dominion

6. *Id.* at 92.

7. The cases are collected in annotations in 1 A.L.R. 2d 538 (1948); 168 A.L.R. 1324 (1947); 157 A.L.R. 925 (1945); and 59 A.L.R. 975 (1929).

8. § 362.465, RSMo 1959 (banks) provides: "When any deposit shall be made by or in the name of any minor, the same shall be held for the exclusive right and benefit of such minor, and free from the control or lien of all other persons, except creditors, and shall be paid, together with the interest thereon to the person in whose name the deposit shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the bank." § 363.720, RSMo 1959 (trust companies) is identical. See also: § 369.155, RSMo 1959 (savings & loan associations); § 370.280, RSMo 1959 (credit unions).

9. 10 F.2d 739 (8th Cir. 1926).

and control of the fund to the extent that, if necessary, he could use the entire sum. Deceased died before the letter was received by the bank. In affirming the trial court, the appellate court found that the transaction was not sufficient to constitute either a gift or a trust, but rather showed an attempt to make a testamentary disposition not provided for by law.

C. *As a Contract*

A general deposit in a bank is ordinarily viewed as passing title to the money deposited to the bank, thus making the bank the owner of the funds, while at the same time creating in the depositor a chose in action against the bank for the amount of the deposit. The result, in other words, is to make the bank a debtor and the depositor a creditor to the extent of the deposit.¹⁰ Upon principles of contract law, there *should* be a contract for the benefit of a third party where, as here, money is deposited by the donor in the name of the donee. Where there is a contract between *A* (depositor) and *B* (bank), whereby *B*, for the consideration furnished by *A*, promises to pay to *C* (donee), *C* should be able to enforce the promise against *B* even though *A*'s purpose was solely to make a gift to *C*. *C* in this example is a third party donee-beneficiary of *B*'s promise to *A*. Notwithstanding the persuasiveness of this argument, courts generally have not been impressed by it.¹¹

III. DEPOSIT OF FUNDS IN TRUST FOR ANOTHER¹²

A. *As a Trust*

Where one deposits funds in his own name as trustee for another, with the intent to make a gift, there is a declaration of trust enforceable by the named beneficiary.¹³ Retention of the passbook is not inconsistent with a donative intent because the form of the deposit implies that legal title and control of the deposit should be in the depositor as trustee, while the equitable interest is in the donee as beneficiary.

The leading American case is *Matter of Totten*.¹⁴ The decedent, Fanny Lattan, had deposited sums of money in savings accounts as trustee for Emile Lattan. After several deposits and withdrawals, she closed the accounts. When Fanny died, Emile sought to recover from her estate the sums that she had deposited as trustee for him. The New York Court of Appeals held:

A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some un-

10. In re Central Trust Co., 68 S.W. 2d 919 (St. L. Mo. App. 1934); 18 WORDS AND PHRASES, "GENERAL DEPOSIT" 295.

11. See 4 CORBIN, CONTRACTS § 783 (1951) and cases cited therein.

12. In general, see 1 BOGERT, TRUSTS AND TRUSTEES, § 47 (1951); 1 SCOTT, TRUSTS § 58 (2d ed. 1956); RESTATEMENT (SECOND), TRUSTS § 58 (1959).

13. BROWN, PERSONAL PROPERTY, § 64 (2d ed. 1955).

14. 179 N.Y. 112, 71 N.E. 748 (1904).

equivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.¹⁵

When a depositor deposits money in a savings account in his own name in trust for another, his intention may be: (1) to create an irrevocable trust; (2) not to create a trust; or (3) to create a revocable trust.¹⁶ Where there is no evidence of the depositor's intention, other than the form of the deposit, courts are divided on what they will presume the depositor's intention to have been.¹⁷ Generally, evidence is admissible to show the depositor's actual intention.¹⁸ The *Totten* case was the first to recognize the possibility that the depositor had intended a revocable trust. This view has now been accepted by the majority of jurisdictions¹⁹ and by the *Restatement of Trusts*.²⁰

In the Missouri case of *Frank v. Heimann*²¹ a father deposited money in his own name as trustee for his daughter. Deposits were made periodically to the account and from time to time checks were written by the father against it to pay bills. After the daughter's marriage, relations between the father and daughter became strained, whereupon she sued her father claiming that an irrevocable trust had been created in her favor. The Missouri Supreme Court, in reversing the lower court, held that the treating of the funds by the father as his own property rebutted the theory that the funds deposited were intended to become the daughter's. The court indicated that the nature of the transaction was the creation of a tentative trust, revocable by the depositor until death.

Frank v. Heimann differs from the *Totten* case in two aspects. In the *Frank* case the depositor was living and was party to the suit. Furthermore, the account was a checking account, whereas in the *Totten* case it was a savings account. Whether a Missouri court would follow the *Totten* case under an identical factual situation is a matter of conjecture, since no other Missouri case has been found wherein the facts are identical. However, in at least two other Missouri decisions the courts appear to have adopted the tentative or *Totten* trust doctrine although the factual situations were not identical with either the *Totten* or the *Frank* case.²² Considering the language used by the court in *Frank v. Heimann*, plus the fact that Missouri courts have sustained tentative trusts in at least two other situations, it is very probable that Missouri courts would follow the *Totten* case unless, as indicated below, the problem has been handled by statute.

15. *Id.* at 125-26, 71 N.E. at 752.

16. See 1 SCOTT, TRUSTS § 58 (2d ed. 1956).

17. *Ibid.* and cases cited therein.

18. *Ibid.*

19. The cases are collected in 168 A.L.R. 1324 (1947); 157 A.L.R. 925 (1945); and 59 A.L.R. 975 (1929).

20. See RESTATEMENT (SECOND) TRUSTS § 58 (1959).

21. 302 Mo. 334, 258 S.W. 1000 (en banc 1924).

22. See *Butler State Bank v. Duncan*, 319 S.W.2d 913 (K.C. Mo. App. 1959); *In re Geel's Estate*, 143 S.W.2d 327 (St. L. Mo. App. 1940).

Missouri now has statutes²³ purporting to deal with the *Totten* situation. Whether these statutes are intended merely to protect the bank against liability for paying funds to the wrong party, or whether they also fix ownership of the funds on deposit, is not clear. So far as this writer can find, no Missouri case has construed the statutes as they apply to beneficiaries of a bank account trust.

IV. DEPOSIT OF FUNDS IN DEPOSITOR'S NAME PAYABLE ON DEATH TO ANOTHER

A. *As a Gift*

A gift by assignment of a deposit, if not intended to be effective until the death of the depositor, is generally considered a testamentary disposition and fails if the requirements of the Statute of Wills are not complied with.²⁴ Thus, where *A* deposits funds in his own name payable upon his death to *B*, the transaction will not be sustained as a gift because there is no intention to make a gift of a present interest, and the depositor has not surrendered dominion and control over the funds. The transaction cannot be sustained as a testamentary disposition because of the failure to satisfy the Statute of Wills.

B. *As a Trust*

In some Missouri cases *B*'s interest, in the above type of situation, has been sustained upon the theory that an executed parol trust has been established by the depositor for the benefit of *B*. The decisions falling within this general area are difficult, if not impossible, to reconcile. It is clear from the cases that the trust does not arise from the mere form of the deposit. The basis for a finding of trust appears to be the intent of the depositor as implied from his words, acts, and purpose in carrying the deposit in that specific form. Apparently the Missouri courts are not concerned with the form of the deposit, but are primarily interested in the above mentioned factors.

The first case in Missouri to sustain such a trust was *Harris Banking Co. v. Miller*.²⁵ That case involved an interpleader action by a bank to determine owner-

23. § 362.475, RSMo 1959 (banks) provides: "When any deposit shall be made by any person describing himself in making such deposit as trustee for another, and no other or further notice of the existence and terms of a legal and valid trust than such description shall have been given in writing to the bank, in the event of the death of the person so described as trustee, such deposit or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the deposit was thus stated to have been made." § 362.480, RSMo 1959 (banks) provides, "Whenever any deposit shall be made in any *bank, banking institution* or *trust company* by any person as trustee, or by any person in trust for another, and no other or further notice of the existence and terms of such trust shall have been given in writing to the *bank, banking institution* or *trust company*, the same may be paid upon the check or order of said trustee, bearing his signature and containing the same words in which said deposit was made." (Emphasis added) § 363.730, RSMo 1959 (trust companies) is identical to § 362.475, RSMo 1959 (banks). See also: § 369.160, RSMo 1959 (savings & loan associations); § 370.280, RSMo 1959 (credit unions).

24. 1 SCOTT, TRUSTS § 58.6 (2d ed. 1956).

25. 190 Mo. 640, 89 S.W. 629 (1905).

ship of a certificate of deposit as between the assignee and the decedent's executors. The decedent deposited money in a bank in his own name and assigned the certificate of deposit to his housekeeper, stating that he wanted her to have the money. He showed her the certificate and told her that it was hers, but that he wanted to use it while he lived for the purpose of drawing the interest for his own use. He asked the housekeeper to take possession of the certificate and upon her refusal he retained it. The certificate was found in his possession at his death. The trial court held that there was a valid executed gift to the housekeeper. The Supreme Court held the evidence insufficient to establish a gift, but affirmed the result on the ground that the facts did establish an executed parol trust. This case is probably not the true "payable on death" situation, as a discussion of the next two cases will show, but, if the depositor did not intend for the assignment to become effective until the time of his death (the court found otherwise), the transaction would clearly have been testamentary and very close to the payable on death situation. The result in this case is made acceptable by the existence of facts tending to show that the decedent had made a self-declaration of trust of the funds on deposit.

*Bank of Perryville v. Kutz*²⁶ involved an interpleader action by a bank against claimants of a checking account to determine rights in respect to the balance of the account. The decedent had a checking account under an agreement whereby the bank agreed to pay all or any part of the funds so deposited to the decedent, or to any person or persons designated by him on regular checks. At the direction of the decedent, the bank's cashier inserted upon its records of the decedent's deposits, "Payable on death to Tony Kohlfeld." Thereafter Kohlfeld was advised of the designation. Without having changed the designation on the bank's records, decedent died 14 days after making the designation. The bank did not consider the designation as authority for Kohlfeld to draw checks because decedent retained the right to draw checks on the account. A lower court finding for the decedent's administrator, as against the widow of Kohlfeld was affirmed. The appellate court held that the stipulated facts were insufficient to establish either a gift to Kohlfeld or the creation of a trust in his favor.

The next case was *Butler State Bank v. Duncan*.²⁷ The deceased had opened a savings account with the deposit slip and signature card being made out to the deceased, payable on death to her daughter. The deceased's son testified that deceased disclosed to him at the time of the deposit that her intention was that she could withdraw any or all of the fund as she might need, that her daughter also had an absolute right to use any or all of it, and that the balance in the account on her death should be the property of her daughter. The trial court found for the daughter on the theory that the deceased had established a trust fund with power reserved to her own use for life, but the remainder, if any, was to go to the daughter at the deceased's death. The appellate court affirmed, finding a tentative trust account had been created for the daughter. The court, attempting to distinguish the *Kutz* case, stated:

26. 276 S.W.2d 593 (St. L. Mo. App. 1955).

27. 319 S.W.2d 913 (K.C. Mo. App. 1959).

That case, on the facts, is to be distinguished from the case at bar. Here, we have before us not only the bank deposit slip, but we have the sworn testimony of the son of deceased who recounted, in detail, what deceased said regarding her intention with reference to the bank deposit, in the office of Mr. Page, where she received the checks from which the deposit came. In addition to her statements, made at that time, she delivered the passbook into the custody of her son and, thereafter, instructed him to deliver it to respondent, saying at the time that respondent might need to make withdrawals for hospitalization expenses.

In the Kutz case the Court said there is nothing to show intent or purpose; here, the intent and purpose of deceased is shown beyond question . . .²⁸

Whether the court in deciding the *Duncan* case adequately distinguished it from the *Kutz* case is arguable. It may be the two cases are in conflict. The court in the former case apparently based its decision on the depositor's intent and purpose in carrying the account in that manner. Generally, the intent of the depositor is only one of two factors in deciding whether the depositor's intention can be carried out, the other factor being whether or not there is any obstacle to the effectuation of the intention.²⁹ Unless a contract theory is relied upon, it would seem that the Statute of Wills would be an obstacle to effectuation of the depositor's intention in the *Duncan* case, because the creation of a trust is an invalid testamentary disposition if no interest passes to the beneficiary before the death of the settlor. It is hard to see how the *Duncan* case can survive this general rule.

Courts have generally held,³⁰ with few exceptions,³¹ that a deposit in the name of the depositor payable on death to another is testamentary and void. Only New Jersey has viewed this as a desirable way to dispose of property and has expressly adopted it by legislation.³²

C. *As a Contract*

A promise to dispose of property, or to make a payment of money, on or after the promisee's death is not testamentary if given for consideration.³³ It was

28. *Id.* at 916.

29. *Supra* note 24.

30. *Webster v. St. Petersburg Federal Savings & L. Assoc.* 155 Fla. 412, 20 So. 2d 400 (1945); *Guest v. Stone*, 206 Ga. 239, 56 S.E.2d 247 (1949) noted in 11 U. Pitt. L. Rev. 711 (1950); *Hillie v. Slovenian Savings & Loan Assoc.* 67 D. & C. 190 (Pa. 1948); *Vercher v. Roy*, 171 La. 523, 131 So. 658 (1930); *Brown's Estate*, 343 Pa. 230, 22 A.2d 821 (1941).

31. *Murphy v. Hayner*, 197 Ky. 444, 247 S.W. 362 (1923); *Union Trust & Savings Bank v. Tyler*, 161 Mich. 561, 126 N.W. 713 (1910); *Pickering v. Higgins*, 69 R.I. 22, 30 A.2d 846 (1943); *Helper State Bank v. Gruz*, 95 Utah 320, 81 P.2d 359 (1938).

32. N.J.S.A. § 17.9A-217 (1950).

33. 1 SCOTT, TRUSTS § 56.5A (2d ed. 1956); RESTATEMENT (SECOND) TRUSTS § 56, Comment f (1959); *Kansas City Life Ins. Co. v. Rainey*, 353 Mo. 477, 182 S.W. 2d 624, (1944) discussed in 25 Mo. L. Rev. 417, at 418 (1960); see Annots., 131 A.L.R. 967 (1941), 155 A.L.R. 174 (1945), 161 A.L.R. 304 (1946), and 171 A.L.R. 522 (1947). See also 168 A.L.R. 245 (1947).

pointed out earlier in this discussion that a general bank deposit is generally viewed as creating a debtor-creditor relationship between the depositor and the bank. If the debtor-creditor relationship is viewed as creating a contractual obligation at the time it is made, it should not be viewed as testamentary merely because the bank's obligation is not payable until after the depositor's death. This was the essence of the bank's promise, given in exchange for the deposit. Thus, if *A* deposits funds in a bank in his own name payable on death to *B*, has the bank not promised to pay the funds on deposit to *B* after *A*'s death, if *A* predeceases *B*. It would seem that *B* is a third-party donee beneficiary of the bank's promise. Although no Missouri court has to date upheld a deposit payable on death to another as a contractual right, there is some authority upon which such an argument could be made. In *Kansas City Life Ins. Co. v. Rainey*³⁴ the decedent paid \$50,000 to an insurance company for a policy whereby the company agreed to pay him a certain sum as a quarterly annuity as long as he lived, and upon his death, to pay \$50,000 to a designated beneficiary. In this policy the decedent reserved the right to change the beneficiary and exercised this right. The decedent's executor argued that the designation of a beneficiary was testamentary. The Supreme Court of Missouri held the beneficiary was entitled to the proceeds, writing:

The policy we are considering is a contract between Hall and the insurance company for the benefit of Miss Rainey. This is true regardless of the element of risk. *It still would be a contract for the benefit of a third person if made with a bank, a corporation of any other sort, or an individual.* In the policy Miss Rainey is a third-party donee-beneficiary. Restatement of Contracts, § 133. She is entitled to enforce the contract even though she is a stranger to both the contract and to the consideration. 12 Am. Jur. Contracts, § 277.

The policy is not testamentary because it became effective before Hall's death. It was a contract made and in force during Hall's lifetime. Hence there would be no reason to surround it with formalities which safeguard a will. . . . (emphasis added)³⁵

The question raised by the *Rainey* case is this: If the court really meant what it said (in the underlined passages), isn't the bank's promise identical with the promise made by a life insurance company to its policyholder; by the U.S. Government to owners of savings bonds when the bonds are made payable on death to named beneficiaries; or by the maker of a note or bond to the holder of such security when the bond or note is payable on death to a named third party? In each of these examples, the contractual obligation is entered into prior to death upon a sufficient consideration. What then, is the difference, if any, between these contractual obligations? From the *Rainey* case one would get the impression that there is no real difference. Nevertheless, the courts have only been willing to extend the theory of a contractual right to the joint bank account cases, where there was right of survivorship provided.³⁶ It may be that the theory of a contract

34. 353 Mo. 477, 182 S.W.2d 624 (1944).

35. *Id.* at 483, 182 S.W.2d at 626.

36. *Infra* note 84.

right has not been argued in other situations, but on the other hand, it may be that life insurance and government bonds are exceptions to the general rule, notwithstanding the broad language of the *Rainey* case. Bank deposits, notes, bonds, and other choses in action are generally viewed as something more than a mere contractual right in that courts also recognize a property right, whereas government bonds are generally viewed as based upon federally created rights governed by federal law.³⁷ At any rate, this much can be said for the *Rainey* case: it raises interesting questions and may lead to serious ramifications.

V. DEPOSIT IN DONOR'S NAME AS A GIFT BY DELIVERY OF PASSBOOK OR CERTIFICATE OF DEPOSIT

A. *As a Gift*

A valid gift may be made of a savings deposit by delivery of the passbook to another, without an assignment in writing.³⁸ A distinction, however, has been made between a deposit in a savings account and one in a checking account. The weight of authority is that a general deposit in a bank, withdrawal by check, does not pass title by delivery of the passbook showing the deposit.³⁹ Actual delivery to the donee is not required in savings account. Both delivery of the key to a deposit box containing the bank book⁴⁰ and delivery to a third person for the donee⁴¹ has been held sufficient.

Causa Mortis

In *Genteman v. Sutter*,⁴² the decedent was an elderly lady in poor health and about to enter a hospital. She handed her bank books to the plaintiff, her friend and companion, stating: "These are my bank books and if I do not come back they are yours." Plaintiff took the bank books and put them in decedent's purse, assuring the latter that she would be all right. The bank books remained with the decedent in the hospital until her death. The trial court found for the decedent's administrator. The Supreme Court of Missouri affirmed, holding there was not a sufficient delivery to sustain a gift *causa mortis*.

Inter Vivos

Harris Banking Co. v. Miller,⁴³ was an interpleader action by a bank to determine ownership of a certificate of deposit as between the assignee and the decedent's executors. The decedent had deposited money in a bank in his own name

37. See 171 A.L.R. 522 (1947).

38. *Ormbaum v. First National Bank*, 215 Col. 72, 8 P.2d 470 (1932); *Snidow v. Brotherton*, 140 Va. 187, 124 S.E. 182 (1924).

39. *Snidow v. Brotherton*, 140 Va. 187, 124 S.E. 182 (1924). The cases are collected in annotations in 40 A.L.R. 1246 (1926), 84 A.L.R. 558 (1933).

40. *Snidow v. Brotherton*, 140 Va. 187, 124 S.E. 182 (1924).

41. *Tygard v. McComb*, 54 Mo. App. 85 (1893); *Snidow v. Brotherton*, 140 Va. 187, 124 S.E. 182 (1924).

42. 215 S.W.2d 477 (Mo. 1948).

43. 190 Mo. 640, 89 S.W. 629 (1905); see also *St. Louis Uniformed Firemen's Credit Union v. Haley*, 190 S.W.2d 636 (St. L. Mo. App. 1945).

and assigned the certificate of deposit to his housekeeper, stating that he wanted her to have the money. He showed her the certificate and told her that it was hers, but that he wanted to use it while he lived for the purpose of drawing the interest for his own use. He asked the housekeeper to take possession of the certificate and upon her refusal, he retained possession and the certificate was found in his possession at his death. The trial court held that there was a valid executed gift to the housekeeper. The Missouri Supreme Court held the evidence insufficient to establish a gift because of failure of delivery, but affirmed the result on the ground that the facts established an executed parol trust.

VI. DEPOSIT OF FUNDS TO THE CREDIT OF THE DEPOSITOR AND ANOTHER⁴⁴

As was pointed out in the introduction, the form of a deposit is usually made so that it is in the names of *A* "and" *B*, jointly, with or without words of survivorship; to *A* "or" *B*, with or without words of survivorship; or to *A* "and/or" *B*, with or without words of survivorship. These forms are extremely important, as will later become evident. In most cases *A* has contributed all of the funds. Courts have used the theories of gift, trust, joint-tenancy or contract in upholding the validity of these deposits.

A. *As a Gift*

In absence of statute, where money belonging to *A* is deposited to an account payable to himself and another, the relation thereby created depends to a great extent upon the intention of the depositor.⁴⁵ Where there is no statute creating a joint tenancy relationship, the better reasoned cases consider the relationship secondary, in that there must have been a gift or a trust created by the depositor in order to establish the joint tenancy relationship. Thus in the recent case of *In Re Patterson's Estate*⁴⁶ the Supreme Court of Missouri has observed:

While there has been difficulty on the part of some courts in determining exactly how to classify a joint account or deposit with right of survivorship, it is generally, and we think properly, held to result in a gift on the part of the joint depositor who contributed the money to the other depositor, at least in the absence of clear, cogent and convincing evidence that a trust or some other disposition was intended. . . . The transfer of money to or the creation of a joint account is not necessarily a gift of the entire account or all of the money there on deposit, but it is a present donation of a partial interest in the form of a right to withdraw and the right of survivorship.⁴⁷ (Citations omitted)

44. In general, see 7 AM. JUR. *Banks* § 426 (1937); BROWN, *PERSONAL PROPERTY*, § 65 (2d ed. 1955); Havighurst, *Gifts of Bank Deposits*, 14 N.C. L. Rev. 129-59 (1936).

45. *Clabbey v. First National Bank*, 320 S.W.2d 738 (K.C. Mo. App. 1959); see also *Commonwealth Trust Co. v. DuMontimer*, 193 Mo. App. 290, 183 S.W. 1137 (1916); BROWN, *LAW OF PERSONAL PROPERTY*, 2d ed. § 65 (1955).

46. 348 S.W.2d 6 (Mo. 1961).

47. *Id.* at 10.

If there is no evidence available as to the donor's intent, it is generally held that when an account is in the name of two parties with no right of survivorship or joint tenancy expressly provided, the donee has the burden of proving that the donor intended a gift to be effected.⁴⁸ But if words of survivorship or joint tenancy are included, the inference of a gift is much stronger.

In Missouri cases where the gift theory was relied upon, intention of the depositor appears to be the essential factor in determining whether or not a gift has been completed.⁴⁹ As for the requirement of delivery, a reading of the cases does not reveal exactly what the courts base a finding of delivery upon, but apparently the deposits have been sustained as valid gifts of a present joint interest.⁵⁰ The majority of jurisdictions apply ordinary gift requirements to joint bank deposits.⁵¹ While manual delivery of the subject of the gift is not required, courts do require that the donor divest himself of dominion and control of the deposit and place the same in the donee. One thing is certain—failure to deliver the passbook is not fatal in Missouri.⁵²

The first case decided by a Missouri court without the aid of a statute, wherein the claim of a survivor to the funds in a joint bank account was upheld, was *Commonwealth Trust Co. v. DuMontimer*.⁵³ The deceased opened a savings account in a trust company in his own name. Thereafter, he requested the account be made joint in favor of himself and his sister. Appropriate changes were made in the trust company's books, changing the account from decedent's name to decedent and his sister and the words "either or survivor to draw" were stamped on the identification card. A signature card was sent to the sister which she signed and returned. Although decedent retained possession of the passbook and had the right during his life to withdraw the whole fund, he did not do so. The trust company filed a bill of interpleader to have the court determine the ownership of the account as between the sister-survivor, the sole legatee, and the executor. The trial court awarded the fund to the decedent's executor. The appellate court, in reversing and holding for the sister, stated:

In the case at bar there was a completed transaction; a donation of the fund; a transfer of the account on the books of the bank from the name of the depositor to himself and another by direction of Fitzpatrick. Although Fitzpatrick retained possession of the pass book and had the right during his life to withdraw the whole fund, he did not do so but left

48. *Princeton State Bank v. Wayman*, 271 S.W.2d 600 (K.C. Mo. App. 1954); *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1079 (En Banc 1932).

49. *Masterson v. Plummer*, 343 S.W.2d 352 (Spr. Mo. App. 1961); *Clabby v. First National Bank*, 320 S.W.2d 738 (K.C. Mo. App. 1959); *In re Geel's Estate*, 143 S.W.2d 327 (St. L. Mo. App. 1940); *Eschen v. Steers*, 10 F.2d 739 (Cir. Ct. App., 8th Cir. 1926); *Martin v. First National Bank*, 206 Mo. App. 629, 227 S.W. 656 (1921); *Commonwealth Trust Co. v. DuMontimer*, 193 Mo. App. 290, 183 S.W. 1137 (1916).

50. *Infra* note 53.

51. See BROWN, *LAW OF PERSONAL PROPERTY*, § 65 (2d ed. 1955) and cases cited therein.

52. *Infra* note 53.

53. 193 Mo. App. 290, 183 S.W. 1137 (St. L. Ct. App. 1916).

a large amount standing to the joint account when he died. The transaction was accepted, acquiesced in and acknowledged by the savings bank, here the Trust Company. The fact of transmission of the card by the Trust Company, by direction of Fitzpatrick, to Mrs. DuMontimer and her subsequent return of it to the Trust Company with her signature and identification data filled in, evidenced not only her knowledge of the transaction but acquiescence in it; acceptance by her.⁵⁴

This case arose before the statutes applicable to joint deposits in financial institutions were enacted. It would seem that § 363.740, RSMo 1959 would be applicable to a case such as this arising today and would create a rebuttable presumption of ownership of the fund on deposit by the sister. Due to the fact that the statutes have pre-empted the use of the *DuMontimer* case as authority when the form of the deposit is such as to raise the statutory presumption, its use is now generally limited to forms of deposit falling outside of the purview of the statutes. Thus in *Murphy v. Wolfe*⁵⁵ the deceased wife owned two time deposit certificates, each payable to the order of herself. Subsequently, she and her husband appeared at the issuing bank and told the cashier she wanted the certificates changed so that the money would be her husband's if she predeceased him. Upon surrendering the two old certificates, two new ones were issued payable to the order of herself or her husband. Each certificate was handed to the husband and were in his possession at his wife's death. The husband, as administrator of his wife's estate, did not inventory the certificates because he considered them as his under the right of survivorship. A distributee brought suit to compel the administrator to inventory the bank deposits as assets of the estate. The Supreme Court of Missouri, relying on the *DuMontimer* case, held the wife had made a completed gift of the bank deposits. Since the deposits were not made in a form payable to either or the survivor, no statutory presumption of joint tenancy with right of survivorship arose. In absence of this presumption the burden was upon the administrator-husband to prove the wife intended to create a joint tenancy with right of survivorship. The court thought the evidence in the case was sufficient to sustain the husband's burden of proof.

The *DuMontimer* case was relied upon to support a finding of no gift in *Martin v. First National Bank*.⁵⁶ There the plaintiff's brother deposited money in a checking account, leaving with the bank a writing as follows: "I have this day deposited for the use of Mrs. Lydia Martin, the sum of . . . to be drawn out only on check signed by J. W. Sulzer and Lydia Martin." Thereafter plaintiff withdrew from the account at different times. J. W. Sulzer withdrew the balance of the account with three forged checks purportedly signed by him and Lydia Martin. Thereupon, the plaintiff sued the bank to recover the balance of the account. The appellate court held the alleged gift by Sulzer to be imperfect because essential elements of a perfect gift were lacking. In reversing a judgment for the plaintiff, the court said:

54. *Id.* at 305-06, 183 S.W. at 1141.

55. 329 Mo. 545, 45 S.W.2d 1079 (En Banc 1932).

56. 206 Mo. App. 629, 227 S.W. 656 (K.C. Ct. App. 1921).

By the limitation placed by the alleged donor upon the use by plaintiff of the alleged gift, in that she could not withdraw the money without their joint signatures, it seems clear to us that J. W. Sulzer held the gift within his dominion; and under the terms of the instrument of writing by which transfer of the funds on the books of the bank was directed, the gift was not unconditional and was not a completed gift.⁵⁷

In *Clabbey v. First National Bank*⁵⁸ the court reached the result that neither a gift nor a trust had been effected. An elderly lady sent a letter to a bank stating she had sustained a bad fall, that she was nervous and was sending a sum of money for deposit which she desired in an account in her name and her son's and that both would sign checks. Before any withdrawals or additional deposits were made, she sent another letter to the bank requesting the joint account be changed to an individual one, with which the bank complied. Thereafter, she made various deposits and withdrawals, finally closing the account. After her death the son made demand on the bank for the money deposited in the account. When the bank refused, he brought an action for damages for breach of contract against the bank, seeking one-half of the account in his individual capacity and one-half as executor. The trial court entered a judgment for the bank, which was affirmed on appeal. The court held that no gift was intended; that the deposit created a creditor-debtor relationship between the bank and the mother, with the son as cosigner for convenience. In reaching this result the court rejected the arguments that the evidence revealed the establishment of a joint account requiring joint signatures on checks or established a donative intent on the part of his mother.

B. *As a Trust*

A few states have upheld the interest acquired by the survivor to a joint bank account upon the theory that a trust in his favor had been created by the depositor. This is not a deposit made in trust for another, but a joint account upheld as a trust on the theory that the form of the account showed an intent, by the donor, to give the donee an equitable interest.⁵⁹ Most courts have rejected this theory as unsound. There are some Missouri cases involving the trust theory, but a careful analysis will reveal that the cases were not decided on the theory that the form of the deposit showed an intent to give the donee an equitable interest, but rather upon the theory that the depositor's words, acts, and the surrounding circumstances were sufficient to show a manifestation by the depositor to create a trust in the funds. This is very different from saying that the form of the deposit showed an intent to create a trust.

In *Citizens National Bank v. McKenna*,⁶⁰ deceased deposited money in a savings account, taking a certificate of deposit payable to the order of himself or

57. *Id.* at 634, 227 S.W. at 657.

58. 320 S.W.2d 738 (K.C. Mo. App. 1959).

59. See *Broth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370 (1898); *Bath Savings Institution v. Fogg*, 101 Me. 188, 63 Atl. 731 (1906); *Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43 (1899); *Hoboken Bank for Savings v. Schwoon*, 62 N.J.Eq. 503, 50 Atl. 480 (Ch. 1901).

60. 168 Mo. App. 254, 153 S.W. 521 (K.C. Ct. App. 1913).

William McKenna. Deceased made statements that he wanted the money to go to William in the event of his death or anything happening to him. The bank brought an action of interpleader to determine ownership of the deposit as between William and the decedent's administrator. William took the position that a trust was created in his favor. The Kansas City Court of Appeals held that the deposit did not create a trust for William, but showed an intention to make a testamentary disposition to become effective upon the death of the decedent. The court distinguished the *Harris Banking* case on its facts, pointing out that in that case the creation of the trust was in the present tense and a completed transaction. A different result was reached in *Masterson v. Plummer*,⁶¹ which involved an action by the deceased's son against the deceased's administrator to determine title to two time certificates of deposit. One was "payable to the order of the deceased or her son, beneficiary"; the other was "payable to the order of the deceased if living; if not living to her son, beneficiary." The administrator, a banker, had inserted the language in the certificates in an attempt to give the son an interest therein, but found himself (ironically enough) in an adversary role when he took the position that the certificates reflected an attempted, but invalid, testamentary disposition. The probate court found for the son and upon appeal to the circuit court the decision was upheld. The Springfield Court of Appeals affirmed, holding that from all surrounding circumstances the deceased's intention was to create a trust. The court thought the language of the certificates was indicative of a trust and that reservation of control over the fund and the right to use the same, with the interest therefrom, was not inconsistent with a trust. Relying on the *Duncan* case,⁶² the court attempted to distinguish the *Kutz* case,⁶³ as had been done in the *Duncan* case.

*In re Geel's Estate*⁶⁴ was a proceeding wherein it was alleged that assets of decedent's estate were being wrongfully withheld. The decedent died with a savings account being carried in the names of herself and her daughter, payable to either or survivor. There was testimony to the effect that decedent wanted the account to be joint, so that if she became ill someone might draw upon the account for her and that she further wanted to reserve the right to draw the interest and principal if needed, with the balance remaining at her death to be her daughter's. The daughter also testified that decedent retained possession of the passbook and that during decedent's lifetime, she (daughter) claimed no right to the money. The St. Louis Court of Appeals held that as to the issue of the statutory presumption arising when funds are deposited in a joint account, the testimony of the witnesses, coupled with the daughter's own statement, served to rebut the presumption. However, the court affirmed the lower court's granting of a new trial because there was abundant evidence, if believed by a jury, to establish a parol trust in the daughter's favor.

61. 343 S.W.2d 352 (Spr. Mo. App. 1961).

62. *Supra* note 27.

63. *Supra* note 26.

64. 143 S.W.2d 327 (St. L. Mo. App. 1940); *Compare* *Mercantile Bank v. Haley*, 179 S.W.2d 916 (St. L. Mo. App. 1944).

Whether *Masterson v. Plummer* and *In re Geel's Estate* were decided correctly is subject to doubt. If only the form of the deposit is looked to for a determination of the depositor's intention both cases appear to involve attempted testamentary dispositions. In both cases the courts went a long way to sustain the right of the survivor. It would seem that in both cases the courts circumvented established principles of law to reach desirable results. This is especially true in *In re Geel's Estate* where there was no evidence that the decedent intended to establish a trust.

C. *As Creating a Joint Tenancy*⁶⁵

The creation of a joint tenancy, by the opening of a joint bank account, has generally been recognized in those jurisdictions having statutes concerning the effect of bank deposits in the names of two persons.⁶⁶ Most states have enacted such statutes, but the construction given them is not uniform.⁶⁷

1. *Where the statutory presumption exists*

The Missouri statute applicable to joint deposits in "banks" provides:

When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, 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 said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of such joint tenants not to pay such deposit in accordance with the terms thereof.⁶⁸

An understanding of the operation of this statute can best be obtained by an examination of the Missouri cases construing it. The first case was *Ball v. Mer-*

65. In general, see Jones, *Use of Joint Bank Accounts as a Substitute for Testamentary Disposition of Property*, 17 U. Pitt. L. Rev. 42 (1955); Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 Calif. L. Rev. 596-637 (1953) cited by the Missouri supreme court in *In re Patterson's Estate*, 348 S.W.2d 6 (Mo. 1961); Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. Chi. L. Rev. 376 (1959); Comment, 60 Mich. L. Rev. 972 (1962).

66. The cases are collected in annotations in 149 A.L.R. 879 (1944), 135 A.L.R. 993 (1941), 103 A.L.R. 1123 (1936), 66 A.L.R. 881 (1930), 48 A.L.R. 189 (1927), L.R.A. 1917 C, 550.

67. Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 Calif. L. Rev. 596-637. This law review article contains a thorough and excellent discussion of the joint deposit statutes of every state in which such statutes have been enacted.

68. § 362.470, RSMo 1959 (banks). Note that § 363.740, RSMo 1959 applicable to deposits in trust companies is identical with § 362.470; see also § 369.150, RSMo 1959 (savings & loan associations).

*mercantile Trust Co.*⁶⁹ where an executor sued a trust company and the decedent's niece to recover a sum of money which was deposited in a joint account. The decedent, bedfast and in ill health, had authorized his niece to open a joint savings account payable to herself or to decedent as joint tenants, either or the survivor to draw. Both parties signed the signature card. The St. Louis Court of Appeals, in upholding a decision for the niece, stated:

. . . under the provisions of our statute . . . the deposit in the bank in the form in which it was made was sufficient, in the first instance, to establish in this action a joint ownership in the fund with all the incidents attached to such ownership, including the attendant rights of survivorship therein. Also, that the depositors or their representatives, as between themselves, may be permitted to introduce other competent evidence that the actual agreement, if any, as between the parties was that title to joint ownership was not intended to be established, nor in fact conferred.⁷⁰

Because the Missouri statute was patterned after New York legislation, the court followed New York decisions in its construction. Since these statutes are in derogation of the common law, they are strictly construed.⁷¹ Thus, if the form of a deposit does not comply with the statutory language (providing for survivorship), the statute is inapplicable and the statutory presumption does not arise. The construction given by the court in the *Ball* case has been adopted in all subsequent Missouri decisions.⁷² In *Mississippi Valley Trust Co. v. Smith*,⁷³ deceased opened a savings deposit account with a trust company in her own name. The next year the account was made a joint account in the names of S. S. Smith or deceased. The trust company then stamped upon its ledger sheets and the pass-book the words "either or the survivor to draw." The trust company's rules

69. 220 Mo. App. 1165, 297 S.W. 415 (St. L. Ct. App. 1927).

70. *Id.* at 1174, 297 S.W. at 418.

71. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6903, at 346 (3d ed. 1943).

72. *Cranford v. Langston*, 356 S.W.2d 581 (St. L. Mo. App. 1962); *In re Patterson's Estate*, 348 S.W.2d 6 (Mo. 1961); *Dalton v. Amer. National Bank*, 309 S.W.2d 571 (Mo. 1958); *Princeton State Bank v. Wayman*, 271 S.W.2d 600 (K.C. Mo. App. 1954); *Connor v. Temm*, 270 S.W.2d 541 (St. L. Mo. App. 1954); *Clay County State Bank v. Simrall*, 259 S.W.2d 422 (K.C. Mo. App. 1953); *State Bank of Poplar Bluff v. Coleman*, 241 Mo. App. 600, 240 S.W.2d 188 (1951); *In re Kaimann's Estate*, 360 Mo. 544, 229 S.W.2d 527 (1950); *Commerce Trust Co. v. Watts*, 360 Mo. 971, 231 S.W.2d 817 (1950); *Weber v. Jones*, 240 Mo. App. 914, 222 S.W.2d 957 (1949) (Construing Savings & Loan Assoc. statute); *Clevidence v. Mercantile Home Bank & Trust Co.*, 355 Mo. 904, 199 S.W.2d 1 (1947); *Mercantile Bank v. Haley*, 179 S.W.2d 916 (St. L. Mo. App. 1944); *In re Geel's Estate*, 143 S.W.2d 327 (St. L. Mo. App. 1940); *Simon v. St. Louis Union Trust Co.*, 346 Mo. 146, 139 S.W.2d 1002 (1940); *Melinik v. Meier*, 124 S.W.2d 594 (St. L. Mo. App. 1939); *Bunker v. Fidelity National Bank & Trust Co.*, 335 Mo. 305, 73 S.W.2d 242 (1934); *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1079 (en banc 1932); *Schnur v. Dunker*, 38 S.W.2d 282, (St. L. Mo. App. 1931); *Ambruster v. Ambruster*, 326 Mo. 51, 31 S.W.2d 28 (1930); *Lafayette-South Side Bank & Trust Co. v. Siefert*, 223 Mo. App. 431, 18 S.W.2d 572 (1929); *Mississippi Valley Trust Co. v. Smith*, 320 Mo. 989, 9 S.W.2d 58 (1928) (construing trust co. statute).

73. 320 Mo. 989, 9 S.W.2d 58 (1928); *Accord*, *Dalton v. American National Bank*, 309 S.W.2d 571 (Mo. 1958); *Gordon v. Erickson*, 356 Mo. 272, 201 S.W.2d 404 (1947); *Melinik v. Meier*, 124 S.W.2d 594 (St. L. Mo. App. 1939).

and regulations required presentation of the passbook to make a withdrawal. Some 12 years later the deceased died and the passbook was found among her belongings. The trial court found for the survivor, Smith. The Supreme Court affirmed, holding that Rev. St. 1919 #11840 (now § 363.740, RSMo 1959) announced a rule of evidence and was applicable to accounts that were individual when the statute was enacted, but later made joint. The court considered the applicability of the statute and concluded that regardless of the statute, Smith had sustained the burden of proof upon him to show deceased had intended the deposit to become a joint account.

Notwithstanding the construction given the statute in the above and subsequent cases, the Supreme Court of Missouri held in *In re Kaimann's Estate*⁷⁴ that each deposit transaction must be viewed as a separate transaction. This case involved a statutory action in probate court to discover assets of a decedent's estate. The decedent had opened a joint account payable to himself or his son, the agreement with the bank being that all deposits made by either party should be owned by them jointly with right of survivorship. All deposits except the last were made with the decedent's money. The decedent was an elderly man and his son kept his books and assisted his father with his affairs. In affirming a trial court finding that the son was wrongfully withholding assets from the estate, the Supreme Court held that, as to the deposits made prior to decedent's last illness, the un rebutted presumption arising from Sections 7996 and 8070 RSMo 1939 (now §§ 362.470 and 363.740, RSMo 1959) was sufficient to establish title in the son. But as for the deposits made during decedent's last illness, the son had not satisfied the burden of proof resting upon him to show absence of undue influence, and that decedent had authorized the deposits.

2. Where statutory presumption rebutted

The first case to hold that the presumption had been rebutted was *Schnur v. Dunker*.⁷⁵ There, a creditor, seeking payment of decedent's funeral expenses, filed statutory affidavits in probate court for the concealment of assets by the administratrix of the estate. Decedent had carried an account in her own name for some time, but the account had been made joint two days before her death. At her death the account was in the names of decedent and her niece, either or the survivor. Under the depositor's agreement used by the bank, the money was to be the joint property of the depositors, payable on the check of either or the survivor, the amount to the credit of the account on the death of either depositor to be the absolute property of the other. A trial in the circuit court resulted in a verdict for the creditor against the administratrix and her daughter, the survivor of the joint account. The appellate court conceded the applicability of sections 5400 and 5465 RSMo 1929 (now §§ 362.470 and 363.740, RSMo 1959) but affirmed the verdict below, stating:

74. 360 Mo. 54, 229 S.W.2d 527 (1950).

75. 38 S.W.2d 282 (St. L. Mo. App. 1931); see, *Clay County State Bank v. Simrall*, 259 S.W.2d 422 (K.C. Mo. App. 1953); *Weber v. Jones*, 240 Mo. App. 914, 222 S.W.2d 957 (1949); *In re Geel's Estate*, 143 S.W.2d 327 (St. L. Mo. App. 1940).

However, it must be borne in mind that it is only a presumption of joint ownership which is raised by the form of the deposit, as all the cases have been careful to point out, the decisions holding that such presumption may be overcome by competent evidence showing an intention contrary to the idea of joint ownership, and that depositors having joint bank accounts, or their representatives as between themselves, may be permitted to introduce evidence that the actual agreement between the parties was that title to joint ownership was not intended to be established, nor in fact conferred.⁷⁶ (Citations omitted)

The court concluded that there was sufficient evidence to submit to the jury the issue of the deceased's intention.

*Weber v. Jones*⁷⁷ involved a declaratory judgment action to determine ownership of a bank account. The decedent died with an account in a federal savings and loan association in the names of herself or Mrs. Louise B. Jones, or either of them, or the survivor as joint tenants. Evidence was offered to show that no joint interest in the fund was intended and that the designation as a joint account was procured by undue influence over decedent. A jury trial resulted in a judgment for the decedent's executor and the Kansas City Court of Appeals affirmed, holding the jury's verdict was justified by the evidence.

3. Where the statute is inapplicable

*Princeton State Bank v. Wayman*⁷⁸ was an interpleader action to determine ownership of a checking account. A joint checking account was set up in the names of decedent or his sister. The joint depositors previously had personal checking accounts and in opening this account they merged their funds into one account. The deposit was not in a form to be paid to either or the survivor of them. The trial court found the sister was entitled to the fund as sole survivor. The appellate court affirmed, saying:

The deposit to "Coleman Wayman or Anna Wayman" does not fall within the purview of Section 362.470 RSMo 1949, V.A.M.S. It was not in "form to be paid to either, or the survivor of them." *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1079, 1081. Thus the presumption which that statute gives rise to that a deposit made within its purview becomes the property of the depositors as joint tenants with the attendant right of survivorship does not arise in the instant case. However, as the *Murphy* case says: "It may very well be that the depositor by the use of the words, 'payable to herself or G. N. Wolfe', intended the deposits to be paid to either or the survivor of them . . ." But there being

76. 38 S.W.2d 282, 284 (St. L. Mo. App. 1931).

77. 240 Mo. App. 914, 222 S.W.2d 957 (K.C. Ct. App. 1949). It should be noted that in this case the Court construed the joint deposit statute applicable to deposits in Federal Savings and Loan Associations and in so doing followed the construction previously made and subsequently adhered to by courts in dealing with deposits in banks and trust companies.

78. 271 S.W.2d 600 (K.C. Mo. App. 1954). For other cases wherein the statute was held inapplicable see *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1079 (en banc 1932); *Cranford v. Langston*, 356 S.W.2d 581 (St. L. Mo. App. 1962); *Merchants & Planters Bank of Hornersville v. Brewer*, 177 S.W.2d 540 (Spr. Mo. App. 1944).

no statutory presumption, the burden was upon respondent to show by a preponderance of the evidence that the deposits were made with the intention of creating a joint tenancy therein between Coleman Wayman and herself with right of survivorship.⁷⁹

The statute was also held inapplicable in *Mercantile Bank v. Haley*.⁸⁰ That case involved rival claims to a checking account. The decedent, an elderly man, had originally carried his account in his individual name, but because of ill health, he arranged with his brother-in-law to have the account changed to a joint account in the names of "W. J. Wamsley or John Tucker Mackey or survivor (No checks signed by Mr. Mackey until after death of Mr. Wamsley)." There was evidence in the case that decedent treated the money as his own and Mackey so regarded it. The trial court held Mackey was entitled to the fund on the ground that Wamsley intended to, and did create a joint tenancy. The St. Louis Court of Appeals held that Sec. 7996 RSMo 1939 (now § 362.470, RSMo 1959) would not resolve the case. Had the form of the account been limited to "W. J. Wamsley or John Tucker Mackey or survivor," the statute would have applied and raised a rebuttable presumption of joint tenancy. But, since the decedent limited the account by the direction "no checks signed by Mr. Mackey until after death of Mr. Wamsley," this nullified the presumption and the case had to be decided on the evidence of Wamsley's intention. The court concluded that the evidence would not support a completed gift to Mackey of a present joint interest in the account and thus the transaction was testamentary.

Other questions have arisen concerning the applicability of the joint deposit statutes to related situations. Thus in a recent case a question was raised as to whether the joint tenancy statute applies to three-party accounts where there will normally be more than one survivor.⁸¹ A court also refused to decide whether the statute was applicable where U.S. Government bonds were deposited as the property of A or B or survivor under a special bank offer to hold the bonds for safe keeping, to collect the interest, and to credit same to the depositor's account.⁸²

D. *As a Contract*

The most recent theory used by courts to uphold the interest of the survivor of a joint bank account is the contract theory.⁸³ The courts adopting this theory have viewed the transaction between the bank and a depositor as creating a present contractual right. When the depositor orders the bank to pay himself and another upon the order of either party, secures the signature of the second party evidencing assent to the arrangement and notifies the other party of the completed transaction, he has created in the other party, by contract, a joint interest in the

79. 271 S.W.2d 600, 603 (K.C. Mo. App. 1954).

80. 179 S.W.2d 916 (St. L. Mo. App. 1944).

81. Clay County State Bank v. Simrall, 259 S.W.2d 422 (K.C. Mo. App. 1953).

82. Bunker v. Fidelity National Bank & Trust Co. 335 Mo. 305, 73 S.W.2d 242 (1934).

83. In general, see 4 CORBIN, CONTRACTS §§ 783, 814 (1951); 7 AM. JUR. BANKS § 436 (1937).

account equal to his own. In construing the depositor's agreement with the bank, money cases hold that the parol evidence rule prohibits the introduction of evidence to vary the terms of the agreement,⁸⁴ although recent cases show a retreat from this earlier position.⁸⁵ Although some courts have utilized the contractual obligation to uphold the interest of the survivor, the transaction is generally considered today as a gift of a property interest to the depositor, not originally owning the money and thus, there must be an intention to make a gift.⁸⁶

The first case in Missouri decided by reliance upon the contract theory was *Commerce Trust Co. v. Watts*.⁸⁷ This case arose as an interpleader action to determine ownership of funds in a joint account. The decedent and another had opened a joint bank account in the names of both, payable to the survivor of them. They executed a writing which said in effect that the parties had agreed between themselves and the trust company that all sums deposited by either should be owned jointly, with right of survivorship, subject to check or order of either. Upon the decedent's death the survivor claimed the fund, as did decedent's executor. A trial without a jury resulted in a judgment for the executor, which was affirmed by the Kansas City Court of Appeals. The case was transferred to the Missouri Supreme Court, which reversed the judgment below and held that neither parol evidence nor evidence of extrinsic circumstances was admissible to contradict or vary the intention of the parties as expressed in their contract.⁸⁸

The rule of the *Watts* case does not prohibit the introduction of evidence to show fraud, or undue influence in the establishing of a joint account with right of survivorship.⁸⁹ Thus in *In re Patterson's Estate*,⁹⁰ deceased, an elderly man living in a rest home and physically incapable of caring for himself, became sole owner of a checking account and two savings and loan accounts upon the death of his mother. Mrs. Golding, his cousin, was taking care of him and handling his business affairs. Each executed and signed printed deposit agreements purporting to transfer each account to joint accounts in the names of Mr. Patterson and Mrs. Golding, payable to either or survivor. All the money in each joint account came

84. *Commerce Trust Co. v. Watts*, 360 Mo. 971, 231 S.W.2d 817 (1950); *Connor v. Temm*, 270 S.W.2d 541 (St. L. Mo. App. 1954); see Annots., 149 A.L.R. 862 (1944), 33 A.L.R.2d 569 (1954).

85. See the cases in 33 A.L.R.2d 569 (1954). See also *Murray v. Gadsden*, *infra* note 88; *In re Schneider's Estate*, *infra* note 88.

86. *In re Patterson's Estate*, *infra* note 90.

87. 360 Mo. 971, 231 S.W.2d 817 (1950); *Accord*, *Connor v. Temm*, 270 S.W.2d 541 (St. L. Mo. App. 1954).

88. See *Mathews v. Moncrief*, 77 App. D. C. 221, 135 F.2d 645 (1943) and *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N.E. 546 (1923). Both of these cases were relied upon in the *Watts* decision. The *Moncrief* case was seriously limited on the issue of parol evidence by the later case of *Murray v. Gadsden*, 91 App. D. C. 38, 197 F.2d 194 (1952); the *Van Vlack* case being overruled by *In re Schneider's Estate*, 6 Ill.2d 180, 127 N.E.2d 445 (1955). Though apprised of the above in the case of *In re Patterson's Estate*, *infra* note 90, the Missouri supreme court didn't reconsider the soundness of the *Watts* case.

89. *In re Patterson's Estate*, 348 S.W.2d 6 (Mo. 1961); *Krummenacher v. Easton-Taylor Trust Co.*, 306 S.W.2d 593 (St. L. Mo. App. 1957).

90. 348 S.W.2d 6 (Mo. 1961).

from the accounts previously owned by Mr. Patterson. Mrs. Golding, the survivor, brought this action to determine ownership of the accounts. The administrator *ad litem* argued that there was no intention to give plaintiff an interest as joint tenant, but rather the purpose was to permit the plaintiff to handle the business affairs and for convenience of the decedent, and that the deposit agreements in the form in which they were signed were a result of undue influence arising out of a confidential relationship to decedent. The trial court held for the plaintiff-survivor, but in a memorandum, the judge indicated he felt bound by earlier decisions. The Supreme Court of Missouri reversed, holding that the plaintiff had not overcome the presumption of invalidity based on the confidential relationship between the decedent and the plaintiff.

A summary of the construction and application of the Missouri joint deposit statutes can be set out in the following manner. If a deposit in a bank is made payable to A "and" B, to A "or" B, or to A "and/or" B, it will raise the statutory presumption providing words of survivorship are included. Where words of survivorship are not included, the statutory presumption does not arise in any of the above situations. Even where the statutory presumption exists, the burden of proving that a joint tenancy relationship was intended is upon the person claiming as survivor. But, where the survivor can avail himself of the presumption, the burden of coming forward with evidence shifts to the party attacking the joint tenancy relationship. Thus, if the party attacking the survivor's joint tenancy cannot rebut the presumption, the presumption will carry the burden of proof. Where the statutory presumption does not arise or where the presumption is rebutted, the person claiming as survivor must prove his right to the funds on deposit, without aid of a presumption. This he must do by resort to a gift theory (*Du Montimer* case), a trust theory (*Geel's Estate*), or a contract theory (*Watts* case). If he cannot persuade the court to sustain his interest upon one of these three theories, his suit is lost.

E. *Where joint depositors are husband and wife*⁹¹

One of the most confusing areas in the law of joint deposits in Missouri involves deposits of husband and wife. Until recently, it was not clear whether they held as joint tenants with right of survivorship, or as tenants by the entirety. The confusion has stemmed in part from such language as that in *Clevidence v. Mercantile Home Bank & Trust Co.*:⁹²

It is not necessary to say whether the joint ownership in this case is based upon a gift, a trust, or a tenancy by the entirety. . . . It is sufficient here to say, in view of the presumption,⁹³ the conduct of the co-depositors and all the circumstances that Mr. and Mrs. Forster in making the deposits and in establishing the accounts thereby intended to and did create a present joint ownership or joint tenancy, with the attendant right of survivorship, in the bank accounts and that thereby their absolute owner-

91. The cases are collected in an annotation in 64 A.L.R.2d 8, 79 (1959).

92. 355 Mo. 904, 199 S.W.2d 1 (1947).

93. The Court is referring to the presumption arising by virtue of Mo. R.S.A. § 7996 (1939).

ship passed to Mr. Forster upon his wife's death.⁹⁴ (Citations omitted) and as in *Cullum v. Rice*:⁹⁵

The fact that an estate by the entirety is in fact a joint ownership of a husband and wife brings confusion unless we keep in mind that in spite of all legislative enactments touching joint tenancy, an estate in entirety in Missouri, and many other states, remains as at common law. . . .

It is quite uniformly held by the courts of the United States, where in the common law as to estates by entirety exists, that bank deposits and like choses in action, payable to husband and wife, are tenancies by the entireties wherein the husband and wife have the same status as existed at common law . . .

Following the common law as we do in Missouri, we cannot escape the conclusion that all choses in action, payable to husband and wife or to husband or wife are presumed to be estates by the entirety.⁹⁶ (Citations omitted)

However, in the recent case of *In re Baker's Estate*,⁹⁷ the Springfield Court of Appeals went a long way toward reconciling the cases when Judge Ruark said:

Whether a deposit in two names is a joint tenancy or a tenancy by the entirety usually depends upon the intention of the parties. Whether the deposit is made in husband "and" wife or in husband "or" wife does not seem to be the controlling factor. In *Longacre v. Knowles*, Mo., 333 S.W.2d 67, it was held that in a relationship between uncle and nephew, where notes and bonds were "or", the use of the disjunctive was incompatible with a joint tenancy. And in those cases where the deposit arrangement carries "no provision for survivorship" as provided in Section 362.470, V.A.M.S., a deposit in husband "or" wife creates no presumption of joint tenancy. On the other hand, a deposit arrangement in the form of the statute (providing for survivorship) raises a presumption in favor of the joint account. And a deposit to husband "or" wife where the deposit or signature card shows right in the survivor raises a presumption of joint tenancy or estate by the entirety. Of course, the estate by the entirety continues in personal property, and a deposit made to husband "and" wife, regardless of lack of the survivorship provision, will be presumed to be a tenancy by the entirety.⁹⁸ (Citations omitted)

Where a creditor of either the husband or the wife is attempting to reach the funds on deposit, the determination becomes extremely important. Under the early language of the common law, joint tenants held "per my et per tout" or "by the moiety or half and by the whole." This language has been interpreted to mean that both tenants are seized of the entire estate for purposes of tenure

94. *Supra* note 92 at 913, 199 S.W.2d at 4.

95. 162 S.W.2d 342 (K.C. Mo. App. 1942).

96. *Id.* at 344.

97. 359 S.W.2d 238 (Spr. Mo. App. 1962). An interesting observation about *Longacre v. Knowles* (referred to in the quotation by Judge Ruark) is that in the *Knowles* case the court points out that the language "and/or" is confusing and contradictory when used in bonds and notes. The significance of this lies in the fact that it is common bank practice to open new joint accounts with depositors' agreements in precisely this form.

98. *Id.* at 243.

and survivorship, but of only a half interest for purposes of alienation.⁹⁹ However, where the parties are husband and wife and hold as tenants by the entirety, the estate they hold is "per tout et non per my" or as a whole and not by moieties.¹⁰⁰ Thus in *Cullum v. Rice*,¹⁰¹ the plaintiffs had judgment against the husband in another action. A writ of garnishment was served upon the bank and interrogatories were filed against it. The bank answered the interrogatories whereby it was elicited that the bank held a joint account of the husband and wife; that such depositors had the right of survivorship and held the same as tenants by the entirety. Plaintiffs, claiming the sum was the property of the husband individually and not as tenants by the entirety with his wife, sued the garnishee for the balance of the account. The trial court found for the garnishee. In affirming the finding, the appellate court held that where the common law as to estates by the entirety exists, bank deposits payable to husband or wife are tenancies by the entirety, in spite of legislative enactments. The court pointed out that it makes no difference whether the chose in action is payable to husband *or* wife, or to the husband *and* wife, because there is a presumption of an estate by the entirety in either case.¹⁰²

In *Feltz v. Pavlik*,¹⁰³ plaintiff and her deceased husband had maintained a joint checking account in the names of "William A. Pavlik or Viola Pavlik," payable to either or the survivor, under a depositor's agreement signed by both of them in which they agreed with each other and the bank as to the rights of the parties. Prior to his death decedent signed a check, without plaintiff's consent, payable to his brother (defendant), withdrawing the funds from the joint account. The brother then opened a joint account in the names of himself and the decedent. This account was closed and the brother deposited the sum to the joint credit of himself and his wife (defendant). Plaintiff's husband died and she sued in equity to impose a constructive trust on the sum deposited in the defendants' names. A trial court finding for the plaintiff was affirmed. The appellate court held that the husband had no power to divest the plaintiff of her joint ownership of the bank account. Where a husband and wife hold as joint tenants there is a presumption they hold as tenants by the entirety. While either tenant of a joint bank account may, without the other's consent, withdraw all or part of the fund, a joint owner may not assign the entire account so as to divest the other joint tenant of his right to the funds.

Based upon Judge Ruark's analysis in *Baker's Estate*, the cases where the depositors are husband and wife can be reconciled in this manner. Where the deposit arrangement carries "no survivorship provision," a deposit to husband *or* wife creates no presumption of joint tenancy.¹⁰⁴ But a deposit arrangement in the

99. See 14 AM. JUR., *Cotenancy* § 8 (1938).

100. See 26 AM. JUR., *Husband & Wife* § 66 (1940).

101. *Supra* note 95.

102. *Cullum v. Rice*, 162 S.W.2d 342, 344 (K.C. Mo. App. 1942); *Compare* *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1097 (En Banc 1932); *Merchants & Planters Bank of Hornersville v. Brewer*, 177 S.W.2d 540 (Spr. Mo. App. 1944).

103. 257 S.W.2d 214 (St. L. Mo. App. 1953).

104. *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1097 (en banc 1932); *Merchants & Planters Bank of Hornersville v. Brewer*, 177 S.W.2d 540 (Spr. Mo. App. 1944).

statutory form (providing for survivorship) raises a presumption in favor of the joint tenancy,¹⁰⁵ whereas a deposit to husband or wife, where the deposit or signature card shows a right of survivorship, raises a presumption of an estate by the entirety.¹⁰⁶ Where there is lack of the survivorship provision, a deposit to husband and wife will raise a presumption of tenancy by the entirety.¹⁰⁷

VII. CONCLUSION

In its present form the law of Missouri regarding the disposition of bank deposits is not satisfactory because it is too complicated for use by a layman. If the services of a lawyer are necessary, the individual would be better advised to have a will prepared. Even when the services of a lawyer are obtained, the depositor's desires may not be given effect by our courts. Most depositors do not obtain a lawyer's assistance before attempting to dispose of their property in this manner, and after they are dead it is often too late to remedy the problem they themselves have created.

Courts, in an attempt to carry out the depositor's wishes, have thus been prone to hang their decisions, so to speak, on any theory they could discover which would fit the needs of justice. This practice has necessarily failed to foster uniformity of decisions. Moreover, the law does not give lawyers much of a guide for ascertaining, with any degree of accuracy, the probable result in a given case. In most cases the outcome turns upon some factual detail or some technicality involving the form of the deposit, which in any event has no bearing upon the depositor's intention.

Nor is this a problem that is peculiar to Missouri. The fact is that the disposition of bank deposits at death (especially joint deposits) is currently an important subject of litigation nationwide.

If bank deposits are really desirable methods of disposing of property at death, it would seem that the solutions to the problem must come from the legislature in the form of better legislation. Most legal scholars who have studied the problem agree that legislation is needed to remedy the present situation.¹⁰⁸ The type of legislation usually recommended is a statute that would provide separate forms to be used by a depositor to create accounts with varying legal character-

105. *Clevidence v. Mercantile Home Bank & Trust Co.*, 355 Mo. 904, 199 S.W.2d 1 (1947).

106. *Ambruster v. Ambruster*, 326 Mo. 51, 31 S.W.2d 28 (1930); *Hanebrink v. Tower Grove Bank & Trust Co.*, 321 S.W.2d 524 (St. L. Mo. App. 1959); *Feltz v. Pavlik*, 257 S.W.2d 214 (St. L. Mo. App. 1953).

107. *Simon v. St. Louis Union Trust Co.*, 346 Mo. 146, 139 S.W.2d 1002 (1940); *State Bank of Poplar Bluff v. Coleman*, 241 Mo. App. 600, 240 S.W.2d 188 (1951); *Cullum v. Rice*, 162 S.W.2d 342 (K.C. Mo. App. 1942); *Craig v. Bradley*, 153 Mo. App. 586, 134 S.W. 1081 (1911).

108. See the suggestions in *Jones, The Use of Joint Bank Accounts as a Substitute for Testamentary Disposition of Property*, 17 U. Pitt. L. Rev. 42 (1955); *Kepner, The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 Calif. L. Rev. 596 (1953); *Note, Disposition of Bank Accounts: The Poor Man's Will*, 53 Colum. L. Rev. 103 (1953).

istics designed to fulfill the desires of depositors in all of the situations previously discussed. When such a form was employed, it would be conclusive as to the rights of the parties and the depositor would know that his desires had been achieved. Unless legislation of the kind suggested is adopted, there is little chance for any real improvement in the present state of the law.

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