Joint Tenancy Bank Accounts Inter Vivos Rights

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Joint Tenancy Bank Accounts Inter Vivos Rights—The purposes of this article are to examine a recent case decided by the Texas Supreme Court dealing with the taxability of joint tenancy bank deposits upon the death of a joint tenant, and to set forth and evaluate the inter vivos rights of control exercised by the “donee-beneficiary”. The “donee-beneficiary”, as used herein, will represent the individual who does not initially open the joint account with his funds and who does not own any possessory interest in the funds before they are deposited.

It should be noted in the beginning that this article will not consider community property questions regarding joint tenancy bank accounts. Hilley v. Hilley and Williams v. McKnight should be used as the authoritative guides to community property questions involving survivorship rights.  

Another situation that this article will not discuss is the “presumption” created by the language of a joint tenancy recital in a situation similar to Kruger v. Williams. The presumption arises when A and B open a joint bank account with right of survivorship expressed by a recital similar to “A or B or the survivor of them.” The Texas Supreme Court held that the language “falls short of expressing a clear intention to vest the absolute right of ownership” and merely creates a presumption of such intention. This problem is dealt with in 20 Baylor L. Rev. 192 (1968). Only accounts which are unambiguous and clear in their recital will be discussed herein.

In November 1965, Mr. Maurice Wallrath opened a checking account at a bank in San Antonio, Texas; then, in January 1966, he opened a savings account at the same institution. At this later date, Mr. Wallrath and his sister, Miss Virginia Wallrath, signed and returned two bank signature cards. These signature cards stipulated that the funds were owned jointly with right of survivorship, and payable to either of them upon demand. The funds were owned entirely by Mr. Wallrath before being deposited.

Before Miss Wallrath died, she made no deposits or withdrawals to or from these accounts. Upon her death, the Comptroller of Public Accounts included one-half of the current balances in both accounts in her taxable estate. Mr. Wallrath paid the inheritance

1161 Tex. 569, 342 S.W.2d 565 (1961); 402 S.W.2d 505 (Tex. 1966).
2163 Tex. 545, 359 S.W.2d 48 (1962).
taxes under protest and brought this suit to recover the amount paid.

The trial court gave judgment for the State, and found that one-half of the total amounts in both of the accounts were taxable for inheritance purposes under Art. 14.01, Taxation-General, Tex. Rev. Civ. Stat., 1969. This article provides for taxing the following:

All property . . . which shall pass absolutely . . . by deed, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall, upon passing to or for the use of any person . . . be subject to a tax.

In *Wallrath v. Calvert*, the Court of Civil Appeals reversed and remanded the case, holding that the trial court erred in not admitting a parol conversation between Mr. Wallrath and his deceased sister. The finding of facts concerning the conversation in question was as follows:

That prior to the death of Virginia Wallrath, Maurice Wallrath had a conversation with her and told her he wanted her to be able to pay any personal obligations of his that become due if and when he might become incapacitated because of illness.

In holding that the conversation was properly admissible the court cited *Ottjes v. Littlejohn* for the proposition that parol evidence was admissible to vary the terms of the written agreement. The *Ottjes* case was an action by the administrator of the deceased uncle's estate to recover joint bank account funds withdrawn by a niece after her uncle's death. In the *Ottjes* case, the court construed the instrument creating the joint account to be prima facie evidence of a gift by Mr. Littlejohn to Mrs. Ottjes. The court, in discussing the elements of a valid gift, recites that the intention of the donor and the complete divestment of dominion and control over the funds are the two requisites. The court allowed parol evidence to be admitted for the purpose of clarifying the donor's intent.

The Court of Civil Appeals' opinion in the *Wallrath* case raised

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4285 S.W.2d 243 (Tex. Civ. App. 1956, writ ref'd, n.r.e.).
three important questions: (1) Will parol evidence be admitted to alter or contradict the joint bank agreement when it is clear and unambiguous? (2) Will the Texas Supreme Court continue to adhere to the “contract theory” in determining the method or mode by which the “donee-beneficiary” acquires his initial interest in the funds, or will the court use the “gift” theory in determining how he obtains his interest? (3) What are the inter vivos rights of the “donee-beneficiary”? At what moment in time do his rights arise? What are the implications arising therefrom?

PAROL EVIDENCE

There are basically three areas that parol evidence questions will be most frequently encountered: (1) Hearsay statements which reflect on the purpose of entering the joint account agreement, (2) Statements in violation of the Dead Man’s Statute, and (3) Testimony which contradicts the written agreement and violates the Parol Evidence Rule.

In answering the hearsay question, resort should be made to the case of Ottjes v. Littlejohn. It should be noted that this case was decided on a “gift” theory and an impelling reason for admitting the testimony in evidence was to clarify the donor’s intent. It is beyond the scope of this article to examine further the question of hearsay, except to note that in many cases the testimony will come within an exception to the Hearsay Rule—“admissions.”

Another problem area is that of the admissibility of statements or transactions with the deceased joint tenant. Article 3716, Tex. Rev. Stat. 1925 provides for the following: “neither party shall be allowed to testify as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party.”

Since the donor’s intent is of primary importance, it would seem appropriate to note that in Dean v. Dean the court allowed testimony by the husband concerning his intent in having land deeded to his deceased wife. The court held that since the testimony did not refer to a “transaction,” but rather to his intent, it was admissible. Therefore, it would seem that the Dead Man’s

5Id.
7214 S.W. 505 (Tex. Civ. App. 1919, n.w.h.).
Statute would not be applicable to a situation where the surviving joint tenant testified as to his intent in entering the agreement. 8

The Parol Evidence Rule denies efficacy to and regards as inadmissible any prior or contemporaneous expressions or agreements of the parties relating to the subject matter of a writing intended as a completed memorial of their transaction. The general rule in Texas has been expressed as follows:

Parol evidence is not admissible to alter or contradict a written contract in the absence of showing fraud, accident or mistake, and if admitted under such circumstances, the evidence is without probative value and will not support a verdict. 9

The Texas Supreme Court delivered its' opinion on the Wallrath case in 13 Texas Supreme Court Journal 488. In deciding the case, the court stated that the issue of parol evidence was not a primary consideration, and turned the case on other grounds.

In summarizing this section, it is important to emphasize that the three aforementioned areas are but different examples of the all-encompassing question of parol evidence. An attempt has been made to allow the reader a brief glance at the most common areas in which parol evidence questions and problems manifest themselves. The general rule notwithstanding, the too-often posed question of parol evidence and joint bank accounts remains unclear. For an extensive treatment of the problem prior to the Wallrath case, reference should be made to 20 Baylor L. Rev. 192 (1968).

Gift or Contract

Generally there are two major theories that courts employ to describe the means by which an interest in the account is transferred from the donor to the "donee-beneficiary." These theories are commonly known as "gift" and "contract."

The gift theory is employed when the transfer of interest is analogized to the common law property gift. The common law elements of a completed delivery and relinquishment of control over the property are not required. The reasoning is that these elements would be inconsistent with joint ownership of the funds.

The contract theory states that the "donee-beneficiary" acquires his interest through the written deposit agreement. Most jurisdictions view the contract as a three-party instrument instead of a two-party one between only the donor and the bank.

A short chronological review of the modern Texas approach to this question is now appropriate. Twenty-five years ago in *Edds v. Mitchell*\(^{10}\) the Texas Supreme Court held that U.S. Savings Bonds, which were jointly owned, passed to the named survivor by means of a third-party beneficiary contract.

In *Ottjes v. Littlejohn*\(^{11}\) the Court of Civil Appeals held that a written agreement was prima facie evidence of a gift by the donor. This case, when affirmed by the Texas Supreme Court, clouded the position of the Texas courts because the supreme court had apparently given its approval to both of the theories. The only reasonable explanation was that the particular theory which was to be applied to a case would be decided by the peculiar facts and circumstances surrounding the transfer of interest, with particular emphasis being placed on the donor's intent.

In *Davis v. East Texas Savings & Loan Association*\(^{12}\) the joint deposit agreement was construed to be a valid and enforceable third-party beneficiary contract.

Again, in *Quilter v. Wendland*\(^{13}\) the Texas Supreme Court affirmed the existence of a third-party beneficiary contract while holding that under the "contract theory it was unnecessary for either the donor or the donee to sign the signature card to enable the donee to collect the proceeds upon the death of the donor.

Justice Smith, delivering the *Wallrath* opinion, commented upon the present status of the situation in Texas:

> And compare *Edds v. Mitchell*, 184 S.W.2d 823 (Tex. 1945), in which we squarely rejected the proposition that a surviving joint tenant takes full ownership by gift intended to take effect

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\(^{10}\) 184 S.W.2d 823 (Tex. 1945).

\(^{11}\) Note 4, supra.

\(^{12}\) 163 Tex. 361, 354 S.W.2d 926 (1962).

\(^{13}\) 403 S.W.2d 335 (Tex. 1966).
at death. The property in question in that case was U.S. Savings Bonds which were jointly owned, and we held that the survivor took full title under the valid third party beneficiary contract which was complete when the bonds were purchased. See also Chamberlain v. Robinson, 305 S.W.2d 817 (Tex. Civ. App. 1957, writ ref'd).

This language clearly re-affirms the position of the Texas Supreme Court as employing the third-party beneficiary contract theory respecting the rights of survivorship of the co-depositors. It should be remembered that, although the contract theory is the general rule in Texas, many situations could lend themselves to be decided on a gift theory if the facts and circumstances of the case justified such an approach. It is not illogical to submit that if the facts were such that a presumption existed that a gift was the mode of transfer intended, (instead of a third-party beneficiary contract) a court would employ the gift theory. There also is a good chance that the court would admit parol evidence to aid the clarification of the donor's intent.

The language of the court of civil appeals in the Wallrath case would seem to indicate that the question of the inter vivos rights of the co-depositors would be approached on the gift theory. Since the supreme court did not comment on the particular theory to be used in an inter vivos question, the dictum of the court of civil appeals is the only basis for this conclusion. If this is correct, a double standard would exist in Texas: the contract theory would be the approach for survivorship questions, and the gift theory would be the method for inter vivos questions. The major distinction that would be drawn from such a situation is that parol evidence would be more likely to be admitted to clarify the donor's intent in a case that employed the gift theory.

**INTER VIVOS RIGHTS**

The question of inter vivos rights of the "donee-beneficiary" revolves centrally around the donor's intent in executing the agreement with the donee. The written deposit agreement may or may not be a valid indication of the intended arrangement of the account because, in the majority of instances, the recital will
not divulge the intent of the donor. Actually, the majority of recitals used are pre-determined by the bank and leave little or no choice to the parties.

The inter vivos rights are to be distinguished from the rights of survivorship, because the inter vivos interest is one which vests the donee with a right to withdraw and appropriate the funds for any use that he may desire during the joint lives of the co-depositors. The survivorship right deals only with the right of the surviving joint tenant to acquire title to the funds upon the death of the other co-depositor.

In the *Wallrath* case, the State asserted that if the contract of joint tenancy transferred any interest in the funds, then the “donee-beneficiary” received title to the interest that was actually transferred. Accordingly, upon the death of the “donee-beneficiary”, the portion of the funds that the donee received reverted or passed back to the donor, and was therefore taxable for inheritance purposes.

The court of civil appeals’ opinion stated:

> The defeasible interest or ownership which Miss Wallrath acquired in these accounts upon the execution of the agreement described reverted to Maurice Wallrath upon her death, which event, in this case, was the generating cause of such reversion. The sum which reverted was *one-half* of the joint account. . . .

The court then held admissible parol testimony of Mr. Wallrath concerning his mental reservation at the time of entering the joint tenancy agreement. Upon this testimony the court found that the funds were merely a convenience account for Mr. Wallrath, and that his intent was not to transfer any present interest in the funds to his sister. The court of civil appeals concluded that since the sister never acquired any “present” interest in the bank funds, there was never any ownership, no funds reverted to Mr. Wallrath by the medium of the survivorship clause, and there was no taxable transfer for inheritance purposes. Such was the status of the case when it came to the Texas Supreme Court.
Justice Smith, in delivering the opinion of the court, said:

Plaintiff, upon the death of his sister, was again the sole owner of the funds in this account. Clearly he did not become so under a power of appointment by his sister’s will or the laws of descent and distribution, and there was no transfer in contemplation of death. If, therefore, the inheritance tax statute reaches plaintiff’s interest in the funds, it must be that he acquired his interest as a gift intended to take effect at his sister’s death. We hold that he did not acquire any interest in the fund, and that the surviving joint tenant’s is not taxable under the statute above.

The court then cites the case of In Re Tilley’s Estate\(^\text{14}\) which involved a similar question. The Texas Supreme Court adopted the following language as controlling:

The right of survivorship vests in the creation of the joint tenancy, and the only question determined by death is which shall take the entire estate. Under such circumstances, it is clear that there is no succession to be taxed, for it was not made in contemplation of death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. The possession is given upon the creation of the estate, the rights are absolutely and conclusively fixed, and the only question which is contingent is which of two or more joint tenants shall eventually own the entire estate. But each is in full possession, each has full ownership as against all the world, with the exception of the equal right of the other, and the transfer which becomes final at the death of one of two joint tenants, relates back to the creation of the estate. It was then that the rights vested, and the death only determines which shall be the gainer by the transaction. . . . can not be presumed that there was any other intention than that which the law ascribes to such an act. . . .

By this language, the court found that the survivorship rights of the “donee-beneficiary” vest absolutely at the time of the making of the contract of joint tenancy. The court also held that the donee has co-ownership of the funds deposited in the account.

These questions relating to inter vivos rights are the most frequently raised in that area: (1) What is the effect of a withdrawal

by the donee? (2) Is the donee’s interest defeasible as to the
donor? (3) May creditors of the donee satisfy their claims by
attaching the joint funds?

The effect of a withdrawal by the “donee-beneficiary” is viewed
differently in various jurisdictions. The New Jersey courts have
held that the withdrawal is a severance of the joint tenancy. The
donee was deemed to be a tenant in common of the funds to the
extent of his half interest therein and held the other one-half as
the constructive trustee.15

Still other jurisdictions hold that the withdrawal is not a seve-
rance, and the joint tenancy relationship is traced into whatever
property is subsequently purchased with the withdrawn funds.
The co-depositors would then own the newly-acquired property
as joint tenants.16

It should be noted that in the two above jurisdictions the in-
ter vivos rights do not appreciably change. In the case of either
a tenancy in common or a tracing theory, the donee retains a
present one-half interest in the funds.

The Montana courts differ in their approach in holding that
each co-depositor has an unqualified right to withdraw all of the
funds in the account. The first joint tenant to withdraw the funds
acquires the full title to them.17

According to the dicta in the Wallrath case, the Texas posi-
tion is that each joint tenant owns one-half of the total amount
of the funds. Since each joint tenant independently owns his one-
half, it is a reasonable conclusion that either the donee or the
donor could withdraw his interest at any time and make any dis-
position of the funds that he wishes. The donee’s interest vests
immediately upon the creation of the joint tenancy agreement.
It would follow that the donee has a proportional one-half in-
terest in the dividends or interest earned from the bank. If such
interest was co-mingled with the original funds, then it would
assume the same characteristics as the funds — that is to say,
the interest or dividend earned from the funds would be subject

15Steinmetz v. Steinmetz, 130 N.J. Eq. 176, 21 A.2d 743 (1941); Goc v.
Goc, 134 N.J. Eq. 61, 33 A.2d 870 (1943).
16Armbruster v. Armbruster, 326 Mo. 51, 31 S.W.2d 28 (1930); State v.
Grateski’s Estate, 176 Ore. 448, 159 P.2d 211 (1945).
to the joint tenancy ownership of the co-depositors, but each would gain a present one-half ownership in the newly-acquired interest or dividend.

Whether or not the interest acquired by the donee-beneficiary is defeasible is unclear. In the Wallrath opinion, the Texas Supreme Court quoted the following excerpt from the case of Davis v. East Texas Savings & Loan Association.\(^\text{18}\)

When the contract was made by L. L. Davis with East Texas, Mrs. Davis was thereby vested with a present, though defeasible interest in the deposit. Her interest would have been defeated if the certificate had been changed by (Mr.) Davis or if the deposit had been withdrawn before his death, or if Mrs. Davis had predeceased him.

This quoted portion of the Davis case seems to be in direct conflict with the remaining dictum in the Wallrath case which provides that “...the rights are absolutely and conclusively fixed”. It would seem that the court has indirectly modified its position on the donee’s defeasible interest. If logical reasoning is to be applied, then since the donee has an inter vivos interest in one-half of the funds that is “conclusively fixed” and also has “full possession” of the transferred interest, the conclusion is that the donee’s interest is not defeasible by the donor. Of course the survivorship provision could be defeated by either the donee or donor upon the subsequent withdrawal of his one-half interest.

The question of whether creditors can reach the funds held in a joint tenancy bank account has never been decided in Texas. Other jurisdictions have usually held that the donee is presumed to possess an inter vivos right to one-half of the funds. The burden of proof is then placed upon the party contesting the presumption. Since this presumption is difficult to rebut, the creditor usually can reach the funds.\(^\text{19}\)

There is a strong implication, based upon the Wallrath case, that creditors in Texas would be allowed to attach up to one-half

\(^{18}\)Note 12, supra.
\(^{19}\)American Oil Co. v. Falconer, 136 Pa. Super 598, 8 A.2d 418 (1939); Neill v. Royce, 101 Utah 181, 120 P.2d 327 (1941).
of the joint tenancy funds in satisfaction of their claims against either the donee or the donor. Since the donee acquires "full possession and ownership as against all the world" (except the other joint tenant), it would be logical to state that this "present and vested" interest could be attached by his creditors.

**Taxation**

The Texas Supreme Court held that the funds in the joint tenancy bank account were not taxable for inheritance purposes, unless a gift, which was to take effect at death, was intended by the donor. The modern view is that the transfer is to be regarded as a third-party beneficiary contract and not a gift. Therefore, in the usual case, the burden of proving that the transfer was a gift will fall upon the taxing authority. The opinion of the court made no distinction between the donor and the donee with respect to taxation. Therefore, the donor's interest would not be taxable under the inheritance tax statute.

The possibility of individuals utilizing joint accounts as a will substitute in order to avoid inheritance tax is a first hand problem. Although the supreme court recognized this, it responded.\(^{20}\)

This Court is without power to enlarge upon the scheme of taxation. It is a matter strictly for the Legislature to consider. The New York Legislature did respond to the Tilley case and comparable cases by enacting a statute which deems the acquisition of full title by survivorship to be a transfer under the inheritance tax statute. That statute and similar statutes of other states have been upheld. Annotation, 1 A.L.R.2d 1101. Such a remedial statute is the appropriate method to avoid tax evasion and should be followed rather than adopting a rule by this Court which would ignore a major element of joint tenancy, that all joint tenants take full title to the property by the instrument creating the joint tenancy.

Conclusion

In conclusion, the Texas Supreme Court has held that upon the death of a co-depositor, the funds which pass to the surviving joint tenant are non-taxable for inheritance purposes. In turn, this holding has shed the first ray of light on an area heretofore undecided in Texas jurisprudence. It is herein submitted that by the medium of a joint bank account agreement the “donee-beneficiary” is presumed to be vested with an inter vivos interest in the funds which is non-defeasible by the donor and subject to liability for the debts incurred by the donee. It is further speculated that the donee has the right to sever the joint tenancy account at his will and make any disposition of his one-half interest that he may desire.

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