Kentucky Law Journal

Volume 47 | Issue 2 Article 12

1958

Property--Gifts--The Practical Status of the Joint Bank Account With Right of Survivorship in Kentucky

Carl R. Clontz
University of Kentucky

PROPERTY—GIFTS—THE PRACTICAL STATUS OF THE JOINT BANK ACCOUNT WITH RIGHT OF SURVIVORSHIP IN KENTUCKY—In 1940 Iva Coy Hays purchased, with her own money, eight $1,000 United States bonds. These bonds were made payable to her or to her husband, J. Smith Hays. In 1950 Mr. Hays cashed the bonds and deposited the proceeds in a bank to the account of "Iva Coy Hays or J. Smith Hays, joint tenants with the right of survivorship." Mrs. Hays signed the signature card. After Mrs. Hays' death, this action was brought to settle the conflicting claims between the administrator of her estate and Mr. Hays to the money in the joint bank account. The Circuit Court of Clark County ruled in favor of the administrator and Mr. Hays appealed. *Held:* Affirmed. There was some evidence that Mrs. Hays did not intend to made a gift inter vivos of this money to her husband. However, the court said that regardless of this evidence, there was not such clear and convincing evidence of a donative intent as is necessary to sustain an inter vivos gift that is first asserted after the death of the donor, when a close and confidential relationship existed between the parties. There was no effective third party beneficiary contract between Mrs. Hays and the bank because there was no intent to create a binding obligation, and there was no mutual valuable consideration to support the contract. Judge Hogg dissented saying that there was expressly created a joint bank account with right of survivorship, and that the controlling question was whether or not Mrs. Hays intended to create the account. *Hays* v. *Hays' Adm'r.*, 290 S.W. 2d 795 (Ky. 1956).

This is a case of first impression in Kentucky[1] and as such may have effects in the future which are disproportionate to the actual scope of the decision. The validity of the claim of a survivor to the money in a joint bank account with survivorship, when the account was created by the deceased depositor, has been considered by most of the other jurisdictions, but their results have differed greatly.

The majority of states have held that the deposit of money in a joint bank account with right of survivorship, without further evidence of intent, is not such manifestation of donative intent as will sustain a gift inter vivos.[2] However, a substantial minority have held that such

[1] There is no other Kentucky case which considers the gift theory in determining the right of a survivor to a joint bank account with right of survivorship. Two cases have upheld the survivor's claim on a contractual basis, but both appear to have been decided upon third-party creditor beneficiary contract principles. In the first, the obligation owing from the depositor to the survivor seems to have been only a moral obligation. See Armstrong's Ex'r v. Morris Plan Industrial Bank, 282 Ky. 192, 138 S.W. 2d 359 (1940). In the second both parties contributed to the account, and thus there was consideration furnished by each of them, although the court indicated that this was unnecessary. Bishop v. Bishop's Ex'r, 293 Ky. 652, 170 S.W. 2d 1 (1943).

[2] 7 Am. Jur. *Banks* sec. 428 (1938); Annot., 135 A.L.R. 993 (1941); Annot., 48 A.L.R. 189 (1927). See, *e.g.*, Albers v. Young, 119 Colo. 37, 199 P. 2d 890

a deposit is prima facie evidence of donative intent,[3] while a few others seem to hold that it is conclusive evidence of such intent.[4]

Although most states still apply principles of gift law to the determination of the right of a survivor to a joint bank account,[5] an increasing number of states are deciding the issue on the basis of third-party beneficiary contract law concepts.[6] Generally these jurisdictions hold that the survivor takes the account, if it is shown that the depositor had an intent to confer a gift or benefit at the time he entered into the contract with the bank.[7] The courts which so decide the question are seemingly more prone to find that the contract was made with donative intent than are courts which look to gift law as a basis for their holding.[8] Most of these courts appear to hold that the creation of a joint bank account with the right of survivorship is at least presumptive evidence of donative intent.[9] And a few seem to hold that such an account raises a conclusive presumption of donative intent, in the absence of fraud or duress.[10]

The one element of general accord among all the jurisdictions is that the controlling question is the intention with which the deposit was made, and this is true regardless of whether the decision is based on gift law or contract law.

(1948); Ogle v. Barker, 224 Ind. 489, 68 N.E. 2d 550 (1946); Drain v. Brookline Sav. Bank, 327 Mass. 435, 99 N.E. 2d 160 (1951); Nashua Trust Co. v. Heghene Mosgovian, 97 N.H. 17, 79 A. 2d 636 (1951); Green v. Comer 193 Okla. 133, 141 P. 2d 258 (1943). *But see* Brown, Personal Property sec. 65 (2d ed. 1955).

[3] 7 Am. Jur. *Banks* sec. 428 (1938). See, e.g., *In re* Lewis Estate, 194 Miss. 480, 13 So. 2d 20 (1943); Commercial Trust Co. v. Watts, 360 Mo. 971, 231 S.W. 2d 817 (1950); Link v. Link; 3 N. J. Super. 295, 65 A. 2d 89 (1949); Holbrook v. Hendrick's Estate, 175 Ore. 159, 152 P. 2d 573 (1944); *In re* Fell's Estate, 369 Pa. 597, 87 A. 2d 310 (1952).

[4] State Board of Equalization v. Cole, 122 Mont. 9, 195 P. 2d 989 (1948); *In re* Holtz's Will, 82 N.Y.S. 2d 362 (Surr. Ct. 1948).

[5] Brown, Personal Property sec. 65 (2d ed. 1955).

[6] See First Nat. Bank of Aurora v. Mulich, 83 Colo. 518, 266 Pac. 1110 (1928); Illinois Trust & Savings Bank v. Van Vlack, 319 Ill. 185, 141 N.E. 546 (1923); Malone v. Sullivan, 136 Kan. 193, 14 P. 2d 647 (1932); Kittredge v. Manning, 317 Mass. 689, 59 N.E. 2d 261 (1945); Rhorbacker v. Citizens Bldg. Ass'n Co., 138 Ohio St. 273, 34 N.E. 2d 751, 135 A.L.R. 988 (1941); *In re* Edwards' Estate, 140 Ore. 431, 14 P. 2d 274 (1932); Deal's Adm'r v. Merchants' & Mechanics' Savings Bank, 120 Va. 297, 91 S.E. 135 (1917); Wisner v. Wisner, 82 W. Va. 9, 95 S.E. 802 (1918); *In re* Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935); see also 9 C.J.S. *Banks and Banking* sec. 286 (1938), Annot., 103 A.L.R. 1123 (1936).

[7] 7 Am. Jur. *Banks* sec. 436 (1937).

[8] See cases cited in notes 9 and 10 *infra*. *Compare* Drain v. Brookline Sav. Bank, 327 Mass. 435, 99 N.E. 2d 160 (1951), *with* Kittredge v. Manning, 317 Mass. 689, 59 N.E. 2d 261 (1945).

[9] 9 C.J.S. *Banks and Banking* sec. 286 (1938). See Kittredge v. Manning and *In re* Edwards' Estate, *supra* note 6. See also Malone v. Sullivan, First Nat. Bank of Aurora v. Mulich, and Wisner v. Wisner, *supra* note 6, for cases in which the courts have seemingly inferred intent from the deposit alone since no mention of the requisite of donative intent is made.

[10] See Rhorbacker v. Citizens Bldg. Ass'n Co., *In re* Staver's Estate, and Illinois Trust & Savings Bank v. Van Vlack, *supra* note 6.

The presence of Mr. Hays' name on the bonds seems to have diverted the court's attention from the actual issue of the case, since it held that the controlling question was whether or not Mrs. Hays *intended* to make a gift of the *bonds* to her husband. It is submitted that the controlling question was not whether Mrs. Hays intended to make a gift of the bonds to her husband, but rather, whether she intended to make a gift to her husband of either the bonds *or* the proceeds thereof when placed in the joint bank account. Mrs. Hays could have intended to make a gift of the proceeds of the bonds, regardless of a lack of such intent at the time she purchased the bonds.

The court found a lack of intent to make a gift of the bonds from the following evidence: (1) Mr. Hays testified that at no time did his wife state or express[11] any intention of giving him the bonds; (2) in her will, Mrs. Hays listed the bonds as part of her investments; and (3) Mr. Hays testified that on numerous occasions his wife had expressed her desire that the $8,000 be used for the expenses of the last illnesses and burials of herself and her husband.

If one accepts the premise that the controlling issue was the intent Mrs. Hays had when she signed the signature card creating the account, it is evident that a finding of lack of donative intent was not supported by the evidence upon which the court relies. This is true because: (1) a verbal intent to make a gift is unnecessary, since intent may be manifested by acts or words or it may be inferred from the relation of the parties and the surrounding facts and circumstances;[12] (2) the reference to the bonds in Mrs. Hays' will only goes to show that she did not intend to make a gift at the time she purchased the bonds, for by the reference in the will to the bonds as such, it is clear that the will was made before the bank account was created; hence, such reference could have no probative value in showing Mrs. Hays' intention when she signed the signature card; and (3) the desire that the $8,000 be used for the expenses of the last illnesses and burials of herself and her husband hardly gives evidence that she did not intend to make a gift of the money. Such expressions could just as plausibly indicate how Mrs. Hays wished her husband would spend the money, which would be entirely his, if she were to predecease him.[13]

What the court means by a lack of mutual valuable consideration to support the contract is unclear. The only mutual consideration

[11] It would seem that Mr. Hays should have argued that the act of signing the signature card creating the account was an *expression* of an intention to donate the money.

[12] 24 Am. Jur. *Gifts* sec. 21 (1939); 38 C.J.S. *Gifts* sec. 15 (1943).

[13] How could this desire better be carried out, in so far as Mr. Hays' last illness and burial is concerned, by leaving the money to her administrator and hence to her heirs?

necessary to sustain third-party donee beneficiary contracts is that between the donor and the promissor,[14] which in this case would be Mrs. Hays and the bank. That there is mutual consideration sufficient to support a contract between a depositor and a bank cannot be doubted. There need be no consideration running from the donee in such a contract. Moreover, the donee need not even know of the contract at the time of its creation in order for it to be valid; he can enforce it upon learning of its existence.[15] The only valid issue here, as in the gift considerations is whether or not the alleged donor intended to make a gift or confer a benefit.[16]

The principal case is not strong precedent, and the effect of the decision on future litigation is difficult to evaluate. The decision of the case necessarily rests on the holding that Mrs. Hays did not have the donative intent necessary to sustain an inter vivos gift at the time the deposit was made. However, there is no direct evidence in the opinion that this was the real basis for the decision because as previously mentioned the court's attention had been diverted to determining Mrs. Hays' intention with respect to the gift of the bonds. In holding that there was no effective third-party beneficiary contract, the court also seems to have carried the finding of a lack of intent at the time the bonds were purchased over to the time of the deposit, without further consideration of the question of intent. It is submitted that this was a compounding of the original error. But by so finding a lack of donative intent, the questionable statements as to mutual valuable consideration are relegated to the status of dictum and are not binding in the future. Thus it appears that both branches of the case were primarily decided upon the basis of the intention of Mrs. Hays at the time she purchased the bonds.

The questionable and indirect manner in which the controlling issue was resolved makes the effects of this decision unclear. In the future the court may look upon this case as precedent for a number of conclusions. Some examples of the possibilities are: (1) The court may interpret the case as holding that the act of creating a joint bank account with survivorship, in and of itself, is not sufficient manifestation of donative intent to sustain a gift inter vivos, or a third-party donee

[14] Bishop v. Bishop's Ex'r, 293 Ky. 652, 170 S.W. 2d 1 (1943) (dictum); Restatement, Contracts sec. 133 (1932); Simpson, Contracts sec. 81 (1954).

[15] 12 Am. Jur. *Contracts* sec. 288 (1938).

[16] To sustain a gift, in addition to donative intent, there must be effective delivery and acceptance by the donee. 24 Am. Jur. *Gifts* sec. 22 (1937). The delivery to the bank is held to be sufficient, and the acceptance presumed. Brown, Personal Property sec. 65 (2d ed. 1955). The contract theory requires a valid contract created with donative intent. The contract with the bank is valid. Thus the only requirement generally in issue, under either theory, is the intention of the depositor at the time of the deposit.

beneficiary contract. (2) The dictum as to requiring mutual valuable consideration between the depositor and survivor could easily be construed to mean that Kentucky will not recognize such a deposit as an enforceable third-party donee beneficiary contract. (3) The opinion could manifest a policy of the court against allowing survivorship in such cases.[17] (4) The court could feel that this decision should have no value as a precedent since the controlling issue was not directly decided.

Restricted to its facts, the present case holds that a survivor's claim to money in a joint bank account with survivorship cannot be maintained upon evidence of the creation of the account alone, when there is some evidence that the depositor did not intend to confer a gift. From the court's language, it is impossible to say what evidence of lack of donative intent, if any, is necessary to defeat a survivor's claim based solely upon the deposit. What additional evidence of donative intent would have been necessary before the court would have sustained the gift or contract?

The effect of this decision is so speculative that a Kentucky bank, if well advised, will be reluctant to take a joint account with survivorship, if it will accept it at all. Since it is difficult to say what evidence of donative intent would satisfy the Kentucky Court, a bank could not safely deliver the balance of the account to either the survivor or administrator prior to a judicial determination of their rights. Yet a bank could not with impunity refuse to deliver the money to the party entitled to it.[18] It would seem, therefore, that this decision has made it rather imprudent for a bank to take such an account, and that in the future banks will be hesitant to commit themselves by taking survivorship accounts.[19]

What effect should a court give the *act* of creating a joint bank account with the right of survivorship? There is no public policy against allowing survivorship in such cases as this,[20] and there is no

[17] If so, the court would seemingly not be in accord with the express intent of the legislature. See Ky. Rev. Stat. sec. 381.130 (1959).

[18] It might be argued that a bank could bring an action of interpleader and pay the money into court and absolve itself of liability. See Kentucky Rules of Civil Procedure, rule 22 (1956). However, it is believed that a bank would avoid this expensive and cumbersome method of doing business, and would simply refuse to take an account if it felt that there would be a possibility of such controversy after the death of one of the parties.

[19] This is assuming that banks will view this case in its worst possible light, and proceed accordingly. A bank if pressed by a depositor could *probably* protect itself by requiring the depositor to execute a written declaration of intention which expressly manifests an unequivocal intention to make a gift and authorizes the bank to pay the money to the survivor. This might be supplemented by oral questioning by a teller or other employee to make absolutely certain that the depositor understood the meaning of the written declaration.

[20] See Ky. Rev. Stat. sec. 381.130 (1959) which expressly provides for survivorship between joint tenants if the intention is properly manifested.

reason why a party should not be able to dispose of his money in such a manner if he so desires. Generally, unequivocal acts are given more weight than verbal expressions in going to prove the intent of the actor. One who intentionally does an act will not be heard to say that he did not intend the legal consequences of that act. The same should apply here. The act of Mrs. Hays, in creating the account, was not ambiguous.[21] She clearly intended to sign the signature card, and in the absence of a showing of fraud or duress, her administrator should be bound thereby. The legal results necessarily flowing from an intentional act should in no way be affected by verbal protestations that these results were not intended.

The Kentucky Court *seems* to have promulgated an undesirable doctrine. Whether it has done so depends upon its future construction of this case. There is no valid reason why such an account as in the principal case should not be given the effect which is normally intended by the depositor. In the absence of fraud or duress, such an account can have but one purpose—to permit both parties to draw upon the account during their joint lives, with the balance to go to the survivor upon the death of either party. It is hoped in the future, that the court, if faced with a similar case, will not permit a survivor's claim to the balance of an account to be defeated so easily.

Unless fraud or duress is shown, a bank paying an account to a survivor should be protected against claims such as the administrator in this case asserted. If the court will not protect the bank, and thus give effect to such an account, the General Assembly should take cognizance of the problem and enact appropriate legislation.[22]

Carl R. Clontz

WORKMEN'S COMPENSATION—INSURANCE—"FULL COVERAGE"—The employee was killed while driving a taxicab for his employer who operated a theater, garage and taxi service in connection with the garage. The deceased did general work around the garage, was carried on the garage payroll, and customarily operated his employer's one-car taxi service when a fare called. The "risk classifications" in the employer's insurance policy related to automobile salesmen and garage chauffeurs. Since the activity of the deceased at the time of the

[21] If the account was merely a joint account, it might be argued that it was created for business convenience only. But this argument is of no avail when survivorship is added, since the addition could in no way facilitate any business purpose.

[22] Many states have to protected their banks. Brown, Personal Property sec. 65 (2d ed. 1955).