
LAW AND THE FAMILY

"Convenience Bank Accounts"

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"CONVENIENT ONE-STOP shopping ... A convenience card ... An inconvenient love affair ... Conveniently located to your home ... " No doubt about it, we are a society built on convenience. From production to consumption and every point in between, consumers prefer convenience. Creative marketing forces enabling products, companies, yes, even professionals, to hook the public are all geared to easing the workings of our daily lives. Small wonder. Throughout the country, millions of people are relentlessly in search of the "perfect" convenience. So why not a "convenience bank account?" The all-new, gender neutral, environmentally sound, all-American "convenience account" has been established by the Banking Law recently enacted and effective Jan. 10, 1991. [FN1] It is, among other things, an attempt to put to an end the tireless struggle of separating the "haves" from the "have nots."

By providing for convenience accounts to be established after Feb. 10, 1991, our legislators have heightened the obstacle to rebutting the presumption provided for in s675 of the Banking Law (for new joint accounts), which says "what's yours is mine" if you put it in a joint tenancy/survivorship account. In contrast, new "convenience" accounts, if funded by "separate property," will remain the separate property of the depositor. A gift may not be inferred from the opening of such an account. By providing that the opening of these accounts are strictly for the convenience of the depositor, and that the depositor shall not be considered to have made a gift to another of half the deposits, accruals or additions, Albany hopes to put a cease-fire to those wearisome wars (and endless billable hours) over who stole the cookie from the cookie jar.

Common Law

Naturally, this statute is the outgrowth of the earliest murmurings of significant law that preceded it, all of which had its beginnings deeply rooted in history, which took a dramatic turn around 1965.

Our frontier justice began long ago with the common law. The common law rule in New York held that a gift was not established when A made a deposit in a savings account payable to A and B or the survivor. [FN2] Moreover, this rule was applied even where A delivered the passbook to B. [FN3] It was not presumed from the type of account that a gift was intended. Although the elements of delivery and acceptance were demonstrated, the element of donative intent was regarded as ambiguous. The possibility that the joint account may have been used for convenience was sufficient to defeat the inference to be drawn from the form of the account. A few examples show what they mean.

In *Beaver v. Beaver* [FN4] a deposit was made by a father to the credit of his son. The court held title did not pass to the son because "We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. Therefore, upon the father's death, his estate was held to include the deposit."

In *Re Bolin*, [FN5] delivery of the passbook to a joint savings account in the name of a mother and daughter was similarly ineffectual. The court concluded the only presumption from the form of deposit was that of convenience and that delivery of the passbook was an equivocal act in that it might have been made either to consummate a gift or merely to satisfy purposes of convenience. A fortiori, a mere deposit in a joint account of the mother and daughter, "or the survivor of them," was insufficient to constitute a gift.

Law of Contracts

These illustrations are drawn from the law of gifts. One might question whether a different result would occur were the law of contracts or that pertaining to testamentary substitutes used. We can all agree on the subjective character of the all important element of donative intent. The New York Courts are free to disregard probable intent and to raise possible intent from the "equivocal" delivery. Of course, in the process, more often than not the real intention of the depositor is defeated because of the mere possibility of a contrary intention.

The common law situation in New York was changed in 1909 in a curious way. [FN6] In effect, contract principles were infused into the law relating to the situation under discussion by a change in the banking laws. Although the 1909 Banking Law was intended to afford banks protection when they paid a co-depositor or survivor, its secondary effect was to "reverse the common law rule and to make a deposit in the statutory form presumptive evidence of an intent to make a gift." [FN7]

Thus, in *Clary v. Fitzgerald*, [FN8] a deposit in a savings bank was made to the credit of "Mrs. Kate Connelly or Mrs. Kate A. Fitzgerald, either or survivor may draw." After the death of Mrs. Connelly, the depositor, her estate, sued to recover withdrawals made by Mrs. Fitzgerald. The complaint was dismissed, the court saying that "if any effect is to be given the statute (Banking Law of 1909), this deposit presumptively at least, became the property of the designated depositors as 'joint tenants.'" [FN9]

A dramatic change in the law had taken place, and the contract between the depositor and the bank, designed for the latter's benefit, had become the basis for a presumption inuring to the benefit of the co-owner of the joint account, in effect reversing prior common law. Moreover, the court went out of its way to stress that a deposit in a joint account with rights of survivorship created a joint tenancy even without delivery of the passbook, and that once the estate of joint tenancy was created, the depositor was accountable to the donee as any other joint tenant of personal property would be. [FN10] A further mutation of common law and statutory law occurred due to the enactment of the Banking Law of 1914. [FN11]

Although s144 of the 1909 law was carried over into the 1914 statute, the latter was made applicable only to savings banks, whereas the 1909 measure applied to all banks. Most important, the 1914 law (applicable only to savings banks) provided that "the making of the deposit in such form (joint account with rights of survivor), shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding in which either such savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor."

The consequence of the 1914 statute for savings banks was to create a joint tenancy as to all deposits in joint accounts, the donee depositor being deemed to be the owner of at least half of the joint property from the date of the tenancy. [FN12]

On June 1, 1965, however, a further modification occurred, when Banking Law s 675 [FN13] came into effect. Section 675 of the Banking Law established that the opening of a joint account with right of survivorship creates a rebuttable presumption of a joint tenancy in the account. The statute applies retroactively to joint accounts created before 1965, [FN14] and it applies to deposits in any banking organization in New York, [FN15] extending to joint savings and other bank accounts.

In effect, s675 creates two rebuttable presumptions. First, that an account in such form as "pay to A or B or survivor" was intended to create a joint tenancy, and, second, that the right of survivorship was contemplated, so that on A's death, the whole deposit remaining passes to B. [FN16]

Where it is claimed that neither a joint tenancy nor right of survivorship in fact was intended, as where it is alleged that the deposits were made in such form merely as a matter of convenience because of problems of proof, the result may hinge upon whether the contributing depositor is alive or dead at the time that issue arises.

During the lifetime of the co-depositors, the testimony of the contributing depositor A may be sufficient to rebut the presumptions and to prove he intended a "convenience" account and, in any event, as a practical matter retention of a passbook may prevent B from withdrawing from a joint savings account without A's consent. Apparently, there has been very little litigation of joint tenancy problems where both A and B are alive. [FN17]

Where A, the contributing depositor dies, and an issue as to his or her intention in creating the joint account arises, it is difficult to rebut the above presumptions because of the dead man's statute [FN18] and because of the hearsay rule, which precludes introduction of A's out-of-court declarations. [FN19]

If a joint tenancy of the account is established, there are two important legal consequences under existing New York law. The first is that there is a transfer by the contributing depositor to the co-depositor of a half interest in the fund on deposit. Each joint tenant, A and B, become owners of a moiety in the fund, and each may withdraw, unilaterally, without the consent of the other, up to half the fund. In short, B becomes the legal owner of half the fund. [FN20]

The second legal consequence under New York law is that upon the death of the first joint tenant, the survivor becomes entitled to the whole fund. Such is deemed to be a present but inchoate right until

the contributing depositor dies, which neither joint tenant can unilaterally destroy. For example, A may not, without the consent or ratification of B, withdraw more than half the fund, nor may A substitute C for B as the joint tenant. [FN21]

If the contributing depositor does not intend or wishes to avoid the above legal consequences, he or she had best choose some other form of account. In New York, until 1991 there was only the option of a Totten trust. [FN22] Standing alone, it does not establish an irrevocable trust during A's lifetime. It is a tentative trust merely, revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of a passbook or notice to the beneficiary.

Separate Property

We did make progress.

In *Wiercinski v. Wiercinski*, [FN23] the Appellate Division held that Social Security disability payments that had already been paid to the husband and were accumulated in a joint family bank account were marital property. Assuming the payments were "compensation for personal injuries," and thus originally the husband's "separate property," they became "marital property" subject to equitable distribution when placed in the joint account, as the husband failed at trial to rebut the presumption that a gift was made.

The statutory definition of "separate property" for equitable distribution purposes in Domestic Relations Law s236(B)(1)(d) is narrow. The public policy expressed in the law affects judicial construction of it in the application of the "separate property" exceptions that remove such assets from the "marital pot." The theoretical goal of New York's Equitable Distribution Law (EDL) is to achieve equity in the distribution of assets produced by the marital partnership during the marriage.

DRL s236 Part B(1)(d) contains the statutory definition of "separate property." It provides:

d. The term separate property shall mean:

(1) Property acquired before marriage or property acquired by bequest, devise or descent, or gift from a party other than the spouse;

(2) Compensation for personal injuries;

(3) Property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;

(4) Property described as separate property by written agreement of the parties pursuant to Subdivision Three of this part" (emphasis supplied).

The first exemption from distribution is contained in DRL s236 [B](1)(d)(1), which exempts, among other things, property acquired by gift from a party other than the spouse.

The common thread boldly running through Subdivision (1) is that the items described were not produced by a functioning marital partnership. Property that was separate property before marriage was not produced during the marital partnership. [FN24] Likewise, as to inheritances and gifts from a party other than a spouse. [FN25] Notably, interspousal gifts are not included in Subdivision (1) and, therefore, are deemed to be "marital property." [FN26]

An interesting problem is rebutting the presumption that placing "separate" money in a joint bank account "payable to either or the survivor" constitutes an interspousal gift so as to deem that spouse's "separate property" as "marital property" subject to equitable distribution.

When a depositor creates or makes a deposit in a joint account with right of survivorship, the transaction may be viewed from the standpoint of the laws of gifts, contracts or wills. "The difficulty the Courts have had with joint accounts can be traced primarily to the insistence on forcing an essentially novel ownership arrangement into the mold of an existing set of legal principles. The joint account is fundamentally neither a common law joint tenancy, an ordinary inter vivos gift, a trust nor a will, yet it partakes of the features of all of these." [FN27] In other words, we have a hybrid.

Now there is a definitive solution to the problem. Effective last Jan. 10, the Banking Law [FN28] was amended to allow depositors to establish accounts "for the convenience" of the depositor. The making of a deposit into such an account does not affect the title to the deposit, the depositor is not considered to have made a gift of half the deposit or any additions or accruals on it to the other person, and on the death of the depositor the other person does not have a right of survivorship in the account. [FN29] If an addition is made to the account by anyone other than the depositor, the addition is considered to have been made by the depositor. However, the

deposit and any additions or accruals to it may be paid to the other person at any time before the receipt by the bank of written notice from the depositor not to pay to the other person.

The new law is clear, precise and to the point. No doubt this will soon be all the rage.

FN1 Banking Law 678, Laws of 1990, Ch 436, s1.

FN2 See Kelly v. Beers (1909), 194 NY 49, 86 NE 980; Re Bolin (1892), 136 NY 177, 32 NE 626.

FN3 Re Bolin (1892), 136 NY 177, 32 NE 626.

FN4 (1889), 117 NY 421, 22 NE 940.

FN5 (1892) 136 NY 177, 32 NE 626.

FN6 In 1909, the New York Legislature passed Ch 2, Consolidated Laws, entitled "Banking Law" (Laws 1909, Ch 10). s144 in effect provided that the bank was not liable when it paid out of a joint account with right of survivor to either co-depositor or the survivor.

FN7 See Moskowitz v. Marrow (1929), 251 NY 380, 167 NE 506, 66 ALR 870.

FN8 (1913) 155 AD 659, 140 NYS 536, affd 213 NY 696, 107 NE 1075.

FN9 Clary v. Fitzgerald (1913), 155 AD 659, 663, 140 NYS 536, affd 213 NY 696, 107 NE 1075.

FN10 Clary v. Fitzgerald (1913), 155 AD 659, at 662, 140 NYS 536, affd 213 NY 696, 107 NE 1075, quoting from Brady on Bank Deposits, 46 (1911).

FN11 Banking Law of 1914, 249 (Laws 1914, Ch 369).

FN12 See Re Tilley's Estate (1915), 166 AD 240, 151 NYS 79, affd 215 NY 702, 109 NE 1094, and Re McKelway's Estate (1917), 221 NY 15, 116 NE 348.

FN13 Laws 1964, Ch 157, s9 eff June 1, 1965.

FN14 See 4 McKinney's Consol Laws of New York, Annotated, historical note to Banking Law, 675.

FN15 See Re Estate of Reardon (1966), 52 Misc2d 371, 275 NYS2d 727, affd 29 AD2d 630, 285 NYS2d 568, affd 22 NY2d 928, 295 NYS2d 54, 242 NE2d 88.

FN16 See Sobel, Joint and Totten Savings Accounts, 171 NYLJ, May 8, 1974, P 1, Cols 5, 6; P 4, Cols 1, 2.

FN17 Sobel, Joint and Totten Savings Accounts, 171 NYLJ, May 8, 1974, P 1, Cols 5, 6; P 4, Cols 1, 2.

FN18 CPLR 4519.

FN19 Sobel, Joint and Totten Savings Accounts, 171 NYLJ, May 8, 1974, P 4, Col 1.

FN20 Sobel, Joint and Totten Savings Accounts, 171 NYLJ, May 8, 1974, P 4, Col 1.

FN21 Sobel, Joint and Totten Savings Accounts, 171 NYLJ, May 8, 1974, P 4, Col 1.

FN22 Re Totten (1904), 179 NY 112, 71 NE 748. A Totten trust involves a deposit by A of his own money in his own name as trustee for B.

FN23 116 AD2d 789, 497 NYS2d 179 (3d Dept., 1986).

FN24 In Lipson v. Lipson, 134 Misc2d 1076, 514 NYS2d 158, the Court held that an engagement ring, given prior to marriage is separate property.

In Novak v. Novak, 135 Misc2d 909, 516 NYS2d 878, the Court held that where the husband conveyed title to the marital residence to himself and wife to be, "as husband and wife," ten days before they were married, the conveyance created a joint tenancy under EPTL 6-2.2(c) which remained such upon marriage. The husband had purchased his interest in the property two and a half months before the marriage.

FN25 In Romano v. Romano (1987 2nd Dept.), 133 AD2d 680, 519 NYS2d 850, the Appellate Division held that the trial Court correctly found that the marital home was the wife's separate property because it was a gift to her before the marriage and its appreciation was due to market forces. In Spector v. Spector (1988, 4th Dept.), 136 AD2d 939, 524 NYS2d 896, app dismd without op, 72 NYS2d 952, the Appellate Division modified the divorce judgment on the law and

held that certain personalty, including a manure spreader, tractor chains, plow frame, pony cart and various animals were not marital property. These items were purchased with Plaintiff's separate property acquired by her as a result of gifts or inheritance. In *Adams v. Adams*, -- AD2d --, 514 NYS2d 420 (2d Dept., 1987), Defendant received a Corvette automobile as a gift. When it was stolen, he bought a Trans Am with the insurance proceeds. It was held to be his separate property.

FN26 See *Coffey v. Coffey*, 119 AD2d 620, 501 NYS2d 74, where the husband's property which was inherited from his mother was initially his separate property but his conveyance to his wife and himself made it marital.

See also, *Wiercinski v. Wiercinski*, 116 AD2d 789, 497 NYS2d 179 (3rd Dept., 1986).

FN27 Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 Minn L Rev 509 (1970).

FN28 Banking Law 678, Laws of 1990, Ch 436, s1.

FN29 The statute provides in part:

"1. When a deposit of cash, securities or other property has been made, or shares shall be issued in or with any banking organization or foreign banking corporation transacting business in this state, in an account established after the effective date of this section, in the name of a depositor and another person and in form to be paid or delivered to either "for the convenience" of the depositor, the making of such deposit or the issuance of such shares shall not affect the title to such deposit or shares and the depositor shall not be considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and, on the death of the depositor, the other person shall have no right of survivorship in the account. If an addition is made to such an account by anyone other than the depositor, such an addition and accruals thereon shall be considered to have been made by the depositor. Such deposit or shares, together with all additions and accruals thereon, may be paid or delivered to the depositor or the other person, and such payment or delivery and the receipt or acquittance of the one to whom such payment or delivery is made, shall be a valid and sufficient release and discharge to the banking organization or foreign banking corporation prior to the receipt by the banking organization or foreign banking corporation of notice in writing signed by the depositor not to pay or deliver such deposit or shares and the

additions and accruals thereon in accordance with the terms thereof, and after receipt of any such notice, the banking organization or foreign banking corporation may require the receipt or acquittance of the depositor for any further payments or delivery. If the depositor is dead, such payment or delivery to the other person shall be a valid and sufficient release to the banking organization or foreign banking corporation prior to the receipt by the banking organization or foreign banking corporation written notice of the depositor's death. A banking organization or foreign banking corporation which, upon the death of the depositor and prior to service upon it of a restraining order, injunction or other appropriate process from a court of competent jurisdiction prohibiting payment, makes payment to the executor, administrator or other qualified representative of the deceased depositor's estate, shall, to the extent of such payment, be released from liability to any person claiming a right to the funds and the receipt or acquittance of the executor, administrator or qualified representative to whom payment is made shall be a valid and sufficient release and discharge of the financial institution.

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