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Virginia B. Lyness

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COMMENT

EFFECT OF JOINT ACCOUNTS WITH RIGHT OF SURVIVORSHIP IN WASHINGTON

The recent passage in Washington of Initiative No. 208 providing for creation of joint tenancies in real and personal property provides the occasion for a reconsideration of the current status of the statutory and case law in Washington relating to the effect given to "joint tenancy" accounts with right of survivorship. Such an account¹ typically takes the form of a deposit opened in the name of the depositor and another, payable to either or to the survivor. Does such an account, by virtue of present statutes, in fact create a joint tenancy with all its incidents as known to the common law? Or does it assume a modified form, with unique characteristics, distinguishable from common law concepts? If the latter is true, what impact, if any, may the new enactment² have on expectable results under the present holdings? The prevalence of accounts of the type under discussion indicates that the answers to these questions, in terms of practical result, may be of importance to a substantial number of people.

The joint account with right of survivorship, if used with an awareness of its inherent anomalies, contains the potential for considerable utility to those wishing to accomplish the transfer of a beneficial interest in a fund on deposit, at the death of the depositor, while retaining the right during life to draw upon such sums at will.³ That such purpose has occasionally been denied effectuation is due in some part at least to a general haze of confusion, beclouding court, counsel and co-depositors⁴ alike, as to the basic nature of such accounts. The variant theories, upon which the survivorship element of multi-party accounts is sought to be sustained, offer further proof that the area is one which eludes simple definition.⁵

¹ In the interest of brevity, the terms "account" and "depositor" as used in this comment refer inclusively to commercial and savings bank accounts, savings and loan association shares, and credit union shares. The substantive differences, while not germane to the topic herein considered, should nonetheless be kept in mind.

² Wash. Sess. Laws 1961, ch. 2.

³ See, e.g., Note, *Disposition of Bank Accounts: The Poor Man's Will*, 53 COLUM. L. REV. 103 (1953).

⁴ It is obvious that rarely is advice of counsel sought before opening an account; the large majority of depositors will therefore rely upon their personal understanding of what an account provides, or the advice of tellers.

⁵ For a comprehensive comparison of variations in the law of joint bank accounts, covering all jurisdictions, see (generally) Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953).

The appeal of the joint-survivorship account lies chiefly in a belief that by its use the creating depositor will be enabled to withdraw his funds throughout his lifetime as need or desire dictate, while at his death the balance remaining in the account will vest in the named co-depositor without the delay ordinarily incident to probate procedure. Collateral considerations are provided by a wish to dispense with the formalities requisite to making or changing a will, or a necessity to provide a source of readily available cash during the period immediately following death.⁶ To catalogue the purposes is to indicate the problems. Immediately apparent is a transaction which, almost by definition, attempts to circumvent substantive and procedural provisions relating to testamentary disposition.⁷

In general, the most usual approach of courts confronted with a controversy involving rights asserted under a joint-survivorship account has been to fall back upon one of four traditional common law concepts⁸ to explain the basis of the right of the survivor to the fund created; having done this, logically the body of substantive law associated with the chosen concept will then be applied to the factual situation at bar. Unhappily, the application does not always result in a perfect fit.

Briefly, the most common theories employed to determine the validity of the asserted transfer (most of which have been considered at one time or another by the Washington court)⁹ are as follows:

Gift: Under this approach, the deposit by one party of his own funds in a joint account with right of survivorship is looked upon as an attempt to effectuate an inter vivos gift to the co-depositor. Application of the settled principles of the law of gifts¹⁰ necessitates a finding of intent to make a gift, coupled with a divestiture by the donor of dominion and control over the subject matter of the gift. A third requisite, acceptance by the donee, may usually be inferred where the subject matter is by its nature beneficial to the donee.¹¹

⁶ The latter difficulty has been obviated to some extent in Washington by virtue of RCW 30.20.020 (commercial banks); RCW 32.12.020(5) (mutual savings banks); and RCW 33.20.080 (savings and loan associations); which provide, with some restrictions as to persons and proof, for payment of limited amounts from accounts of deceased depositors without requiring probate. Compliance with the statute provides acquittance to the paying institution. These statutes do not deal with joint-survivorship accounts.

⁷ Jones, *The Use of Joint Bank Accounts As a Substitute for Testamentary Disposition of Property*, 17 U. PITT. L. REV. 42 (1955).

⁸ 7 AM. JUR. BANKS § 426 (1937).

⁹ See, e.g., *In re Ivers' Estate*, 4 Wn.2d 477, 104 P.2d 467 (1940) (contract); *In re Peterson's Estate*, 182 Wash. 29, 45 P.2d 45 (1935) (joint tenancy); *Daly v. Pacific Savings and Loan Ass'n*, 154 Wash. 249, 282 Pac. 60 (1929) (gift).

¹⁰ BROWN, PERSONAL PROPERTY § 37, at 84 (2d ed. 1955).

¹¹ *Id.* § 50, at 146.

The intent may be found by extrinsic proof¹² or, arguably, may be inferred from the act of the original depositor in setting up the account in joint form.¹³ The necessity of relinquishment of control, however, presents analytical difficulties; since the donor retains the right to draw upon the account during his lifetime, he has not accomplished that complete divestiture of dominion over the account which would meet the substantive requirements of an inter-vivos gift at common law. If the gift is thought to take effect only upon death, it of course falls afoul of the Statute of Wills, as an attempted testamentary disposition lacking the formalities of execution required by the statute.

It has been suggested that the gift involved in a joint transaction in reality consists only of a partial interest, in the form of a present right to make withdrawals, together with the right of survivorship.¹⁴ The jurisdictions accepting this interpretation then relate the necessary divestiture to the renunciation of *exclusive* control over the account.¹⁵

The above argument has been before the Washington court on at least two occasions, neither of which, however, involved the current statutes. In *Meyers v. Albert*¹⁶ *W* claimed a community interest in real estate purchased with funds (originally separate property of *H*) deposited in the joint account of *W* and *H*. The court, applying the common law requisites, refused to find an effective delivery in the giving of a right to withdraw from the account. The account involved had been in an Oregon bank; hence the Washington statutes had no bearing on the outcome of the case. The court in *Daly v. Pacific Savings and Loan Ass'n*¹⁷ found no delivery, and therefore no passage of title, to a joint account opened by a father in the names of himself and son. The court said: "The fact that . . . (the son) had a right to draw upon the account did not pass title to him thereto from his father, who supplied the funds upon which the son had a joint right to draw."¹⁸ The pertinent statute in effect at that time¹⁹ was construed to have as its purpose merely protection to the paying institution, rather than the embodiment of a rule of property. That the present statute applicable to savings and loan associations²⁰ extends further

¹² *Sinift v. Sinift*, 229 Iowa 56, 293 N.W. 841 (1940).

¹³ *In re Green's Estate*, 46 Wn.2d 637, 283 P.2d 989 (1955). *Contra*, *Daly v. Pacific Savings and Loan Ass'n*, 154 Wash. 249, 282 Pac. 60 (1929).

¹⁴ Kepner, *supra* note 5, at 598.

¹⁵ *State Board of Equalization v. Cole*, 122 Mont. 9, 195 P.2d 989 (1948).

¹⁶ 76 Wash. 218, 135 Pac. 1003 (1913).

¹⁷ 154 Wash. 249, 282 Pac. 60 (1929).

¹⁸ *Id.* at 252, 282 Pac. at 62.

¹⁹ Wash. Sess. Laws 1919, p. 499, § 5.

²⁰ RCW 33.20.030.

than a mere protective enactment appears from subsequent cases.²¹ No case appears, however, which makes the present Washington statute depend for its validity upon the common law theory of gift.

Trust: A second approach entails borrowing from a variation of trust law. Proponents of this theory develop the idea that the original depositor, by opening an account in joint and survivorship form, has manifested an intent to vest in the donee an equitable interest in the account, to become possessory at the death of the original depositor. The difficulties in attempting conformation of this theory to the realities of the situation are manifold, and it appears that only one jurisdiction (Maryland) now subscribes to the trust rationale.²² Chief among the criticisms leveled against acceptance of the trust theory are the following: (1) the original depositor in the usual case has no intent to constitute himself a fiduciary with relation to his donee; (2) the depositor's right to withdraw and use the sums on deposit for his own purposes does not correspond with the duty of the traditional trustee with respect to the subject of the trust; (3) if the depositor's intent in fact had been to create a trust, he could have done so by expressly denominating the account to be such.²³

No Washington cases have been found which imply that any reliance has been or will be made upon the trust theory to sustain the validity of joint account transfers in this jurisdiction.²⁴

Contract: A third theory which has been utilized to determine the property rights in a joint and survivorship account is based upon contract principles. The typical rationale is grounded upon the contract between the depositor as creditor and the bank as debtor. If the depositor then orders the bank to pay to himself and to the order of another, a contractual interest vests in the co-depositor as donee beneficiary by virtue of the terms of the contract between the original depositor and the bank.²⁵

²¹ *In re Green's Estate*, 46 Wn.2d 637, 283 P.2d 989 (1955).

²² Kepner, *supra* note 5, at 600, n. 16. It would appear that Maryland has a special statutory provision which compels this result.

²³ See, with respect to accounts expressly stated to be held in trust, RCW 30.20.035 (banks and trust companies); RCW 32.12.030(2) (mutual savings banks); RCW 33.20.070 (savings and loan associations).

²⁴ The variety of trust known as the "Totten" or "tentative" trust is not within the scope of this comment, and is not discussed herein. For a Washington case involving this concept, see *In re Madsen's Estate*, 48 Wn.2d 675, 296 P.2d 518 (1956). See, (generally), 1 RESTATEMENT, TRUSTS, § 58, comment *b* (2d ed. 1959). See also *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

²⁵ For a more detailed analysis of the operation of this theory in jurisdictions applying it, see Note, *Joint Bank Accounts—Joint Tenancy—Survivorship*, 8 OHIO ST. L.J. 124 (1941-42); Note, *Joint Bank Accounts in Wisconsin*, 37 MARQ. L. REV. 306 (1953-54).

The principal weakness of the above reasoning centers in the difficulty of applying contract law to get a property result. No transfer of interest has actually been effected by creating a contractual right.²⁶ Thus it would appear that, *absent a statute*, upon the death of the owner-depositor his estate should be entitled to the balance in the account, since nothing in the nature of "title" has ever passed from the original depositor to the donee beneficiary. As one writer has put it, "The bank credit belongs to the one who furnishes the consideration for it, even if the contract with the bank entitles another to draw upon that credit."²⁷

Two variants relating to the effect of a contract in creating survivorship rights should be pointed out. First, if a contract is found to exist *between the co-depositors* which purports to create specific property interests in the account, no conceptual difficulties arise. This position has been sustained a number of times by the Washington court.²⁸ Second, in dealing with the rights asserted to arise by virtue of the "joint tenancy" account statutes, it would appear that the contract between the debtor institution and the original depositor, creating a joint account in statutory form, will in itself trigger the operation of the evidentiary rules as to presumptive intent, which are built into such a statute.²⁹ This is a far cry, however, from an assertion of survivorship rights arising by virtue of such a contract per se, without reliance upon a supporting statute.

Joint Tenancy: As a descriptive term, "joint tenancy" is commonly applied to bank accounts held in two or more names. At common law, however, the estate known as joint tenancy has, of course, a particularized meaning, fraught both in creation and in effect with numerous technicalities. The valid creation of an estate held in joint tenancy at common law is dependent upon the unities of time, title, interest and possession.³⁰ If these unities are present, the "great incident" of the tenancy, survivorship, automatically follows. The result is that since both tenants, during life, hold the entire interest, the death of one does not vest any new interest in the survivor; he holds what he

²⁶ Wolfe v. Hoefke, 124 Wash. 495, 214 Pac. 1047 (1923).

²⁷ Rutledge, *Joint Tenancy in Washington Bank Accounts*, 26 WASH. L. REV. 116 (1951).

²⁸ *In re Webb's Estate*, 49 Wn.2d 6, 297 P.2d 948 (1956); *Tacoma Savings & Loan Ass'n v. Nadham*, 14 Wn.2d 576, 128 P.2d 982 (1942); *In re Ivers' Estate*, 4 Wn.2d 477, 104 P.2d 467 (1940).

²⁹ *In re Green's Estate*, 46 Wn.2d 637, 283 P.2d 989 (1955).

³⁰ 14 AM. JUR. *Cotenancy* §§ 6, 7 (1938); 48 C.J.S. *Joint Tenancy* § 3(a), (c) (1955).

always had—the entire interest—now free of the possibility of assertion of equal rights of the deceased tenant.³¹

The dangers attending the application of a specialized term to a generic entity become apparent, however, when one attempts to tailor the specific requirements of common law joint tenancy to the practical truths of a multiple party account. The unity of time may become suspect in the not-uncommon situation where a depositor converts a presently existing account into one which carries the names of one or more co-depositors.³² The unity of interest is questionable in view of the right of either depositor to withdraw the entire balance without rendering an accounting. Possession too would seem to be incompatible with the factual situation. If one of the unities were found to have failed at the inception of the account, then that account was never one held in true joint tenancy, and therefore the incident of survivorship could never have attached. Further, if one or more of the unities were to be destroyed (as, for instance, by assignment to a third party), a severance would be effected which would end the joint tenancy as such—thus also destroying the right of survivorship.

The above discussion, however, can become meaningful in a given jurisdiction only when superimposed upon the statutory configuration of that particular state. In Washington, survivorship as an incident of joint tenancy was abolished by statute in 1885,³³ which statute, as amended,³⁴ remained in force until repealed in 1961 by the Joint Tenancy Act.³⁵ The “joint account” statutes have long been construed as abrogating the earlier rule with respect to their specific subject matter. It is questionable, however, whether creation by legislative fiat of a right of survivorship as to accounts jointly held has had the effect of revivifying the traditional common law estate of joint tenancy, with the necessary annexation thereto of the adjunctive incidents of that estate. Rather it is suggested that something less than this was intended, and has indeed resulted, both by virtue of the wording of the statutes themselves and by the constructive implications given them by the court.

The relevant statutes, as currently in effect, are set out in full below.³⁶ All four provide in effect that a deposit made in statutory

³¹ *In re Peterson's Estate*, 182 Wash. 29, 36, 45 P.2d 45, 48 (1935).

³² Kepner, *supra* note 5, at 601.

³³ Wash. Terr. Sess. Laws 1885, § 1, p. 165.

³⁴ Wash. Sess. Laws 1953, ch. 270, § 1.

³⁵ Wash. Sess. Laws 1961, ch. 2, § 4.

³⁶ RCW 30.20.015. “Joint deposits with right of survivorship. After any commercial or savings deposit shall be made in a national bank, state bank, trust company or any

form becomes the property of the co-depositors as joint tenants with right of survivorship. The statutes relating to commercial banks and to mutual savings banks provide further that the death of one depositor shall raise a conclusive presumption of intent to vest title in the survivor. If the presumption raised by the statute becomes conclusive only upon death, it follows that during the lives of the named depositors the effect of the preceding language of the statute could at most raise a rebuttable presumption as to intent. Therefore no *inter vivos* property rights are fixed by the statute, if evidence of a contrary intent is introduced.³⁷

The savings and loan association statute³⁸ does not contain the "conclusive evidence" language referred to above. In the case of

banking institution subject to the supervision of the supervisor of banking of this state, by any person in the names of such depositor and one or more other persons and in form to be paid to any of them or the survivor of them, such deposit and any additions thereto made by any of such persons after the making thereof, shall become the property of such persons as joint tenants with the right of survivorship, and the same, together with all interests thereof, in the case of savings accounts, shall be held for the exclusive use of such persons and may be paid to any of them during their lifetimes or the survivor or survivors. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor is a party, of the intention of the depositors to vest title to such deposit and the additions thereto in the survivor or survivors."

RCW 32.12.030(3). "After any deposit shall be made by any person in the names of such depositor and one or more other persons and in form to be paid to any of them or the survivor of them, such deposit and any additions thereto made by any of such persons as joint tenants, and the same, together with all dividends thereon, shall be held for the exclusive use of such persons and may be paid to any of them during their lifetimes or to the survivor or survivors, and such payment and the receipt of acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to such savings bank for all payments made on account of such deposit prior to the receipt by such savings bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such savings bank or the surviving depositor is a party, of the intention of all depositors to vest title to such deposit and the additions thereto in the survivor or survivors." (Mutual Savings Banks).

RCW 33.20.030. "Joint tenants. Savings may be received by an association in the name of two or more members as joint tenants with right of survivorship. In such case, payment to either member shall discharge the association from liability upon such savings account and, upon the death of either of such joint tenants, the association shall be liable only to the survivor or survivors." (Savings and Loan Associations).

RCW 31.12.140. "Joint tenants. Two or more eligible persons may jointly become depositors or members in a credit union and such persons shall enjoy the same rights as though the deposits had been made by, or the shares issued to, an individual member, and unless written instructions to the contrary are given to the credit union relative to such account, and written receipt thereof acknowledged by such credit union, any of such persons may exercise the rights of ownership, transfer and withdrawal incidental to such ownership without the other joint holders joining therein, and in the event of death, the survivor or survivors may exercise all rights incidental to such deposits or shares." (Credit Unions).

³⁷ *Winner v. Carroll*, 169 Wash. 208, 13 P.2d 450 (1932).

³⁸ RCW 33.20.030.

In re Green's Estate,³⁹ the court construed the omission of such language to mean that the presumption relative to the right of survivorship which arises out of the contract between the depositor and the association is therefore rebuttable even after the death of the first to die. Therefore it appears that as to savings and loan accounts, the rights presumptively created by the opening of an account in statutory form are subject to modification *both* inter-vivos and as to survivorship, where evidence is shown of a contrary intent. In the absence of such a contrary showing, the statute will be operative to evidence an intent on the part of the depositor to vest the right of survivorship in the named co-tenants.

A further qualification upon the absolute title of the survivor is furnished by the proviso in both "bank" (as distinguished from savings and loan association and credit union) statutes relating to the effect of fraud or undue influence. It has been held⁴⁰ that where the named co-depositor had procured the account to be opened by taking advantage of the weakened physical and mental condition of the owner-depositor, a mere agency for collection was created, despite the joint and survivorship form of the agreement with the bank.

The impact of the community property laws upon the area of rights incidental to joint bank accounts is a problem which has as yet received no definitive solution by the courts of this state. In the case of *Toivonen v. Toivonen*⁴¹ a wife sought to recover funds deposited by her deceased husband in the names of himself and his father in a joint account with a savings bank. The trial court had concluded that the husband had no right to dispose of community funds by means of a joint account in such a way as to deprive the wife of her community interest. The opinion on appeal quoted with approval the holding in *Winner v. Carroll*⁴² which construed the savings bank act (substantially the same as the present statute) as creating upon the death of either depositor a conclusive right of survivorship in the survivor. However, the court, "assuming the correctness of the court's view as to the want of power in the husband to deposit community funds in a joint account, in the name of a person other than a member of the community,"⁴³ found it unnecessary to resolve the conflict, since

³⁹ 46 Wn.2d 637, 283 P.2d 989 (1955).

⁴⁰ *In re Bush's Estate*, 195 Wash. 416, 31 P.2d 271 (1938).

⁴¹ 196 Wash. 636, 84 P.2d 128 (1938).

⁴² 169 Wash. 208, 13 P.2d 450 (1932).

⁴³ *Toivonen v. Toivonen*, 196 Wash. 636, 642, 84 P.2d 128, 131 (1938).

it was concluded that the funds involved were in fact not community but separate.

The case of *In re Ivers' Estate*⁴⁴ would seem to cast some doubt upon the efficacy of community property concepts to prevail over a joint tenancy. In that case funds constituting community property were found to have been converted to joint tenancy with right of survivorship by virtue of the deposit agreements signed by the husband and wife with the bank. The daughter of the deceased husband had challenged the right of the surviving wife to exclude the bank accounts from the estate inventory. It is to be noted that no statute was here involved; the holding is based entirely upon the *contract* which the majority of the court found to exist between the parties.⁴⁵ Four members of the court dissented, saying:

Certainly it cannot be the law that husband and wife may open a joint account, even in a mutual savings bank, with community funds, and the property be transmuted the next day into the separate property of one spouse upon withdrawal of the deposit by that spouse and a new deposit, in his or her own name, opened in another bank.⁴⁶

The hypothetical posited by the dissenters in the *Ivers* case was closely paralleled by the facts of *Munson v. Haye*.⁴⁷ The wife in this case withdrew monies from a joint account with her husband and deposited them in a joint account with a third party. Here the rights of the third party were asserted, not by virtue of contract, but directly under a statute⁴⁸ which was construed, by analogy to the mutual savings bank statute, to raise only a rebuttable presumption of joint tenancy, as to inter-vivos rights. The court went on to say,⁴⁹ "That presumption was met and destroyed when proof was presented that the funds deposited were community property."

The last chapter to date on the question of community property versus joint property is presented by *In re Webb's Estate*.⁵⁰ A single man and a married man established a joint account to which both contributed, their expressed purpose being to save toward the purchase of a chicken farm. Upon the death of the single man, his co-depositor

⁴⁴ 4 Wn.2d 477, 104 P.2d 467 (1940); Comment, 16 WASH. L. REV. 105 (1941).

⁴⁵ The case involved accounts in commercial banks, and predated the passage of RCW 30.12.015.

⁴⁶ *In re Ivers' Estate*, 4 Wn.2d 477, 493, 104 P.2d 467, 474 (1940).

⁴⁷ 29 Wash.2d 733, 189 P.2d 464 (1948).

⁴⁸ Wash. Sess. Laws 1933, ch. 183.

⁴⁹ *Munson v. Haye*, 29 Wn.2d 733, 743, 189 P.2d 464, 470 (1948).

⁵⁰ 49 Wn.2d 6, 297 P.2d 948 (1956); Note, 32 WASH. L. REV. 66 (1957).

withdrew the funds, claiming under the right of survivorship provided by the deposit agreement. The court upheld his right so to do, basing its holding, not upon statute,⁵¹ but again upon the contract between the parties as evidenced by the signature cards. The court then stated:⁵²

. . . (W)here community funds have been deposited in a joint account with a right of survivorship in a person not a member of the community and the deposit agreement is in all other respects valid, the agreement will be given effect at least up to the point at which the rights of the survivor might have to yield to the superior right of the surviving member of the community. . . .

Analytically and as a practical matter, this pronouncement perhaps creates more problems than it solves. Taken with the intimations of the prior cases, however, one may at least speculate that in the area of joint bank accounts the right of survivorship accruing to a surviving co-depositor by virtue of the form of the account may be less than "conclusive" where such right collides with the policy embodied in community property concepts. Such a result would be in harmony with the general disposition of our courts to accord community property a favored position in the law.

SUMMARY

It appears well settled that as between themselves, parties may *contract* with respect to the creation of a right of survivorship in a jointly held bank account.⁵³ If such an express contract is established, there is no need to resort to statutory aid in maintaining the right of the survivor to take the balance remaining in the account at the death of the first to die.

If no express contract between the parties exists, resort must be had to the relevant statute to determine what property rights will be enforced. The statute itself would not appear to be determinative of these rights, however. Consider the following forms in which conflict may arise, and the differing effect of the statute on the outcome:

(1) Where the contest is between the paying institution and the estate of the first depositor to die, the statute, by virtue of its acquit-

⁵¹ The deposits had been made prior to the effective date of RCW 30.20.015. The court held that the statute was not retroactive.

⁵² *In re Webb's Estate*, 49 Wn.2d 6, 12, 297 P.2d 948, 952 (1956).

⁵³ *In re Webb's Estate*, 49 Wn.2d 6, 297 P.2d 948 (1956); *In re Ivers' Estate*, 4 Wn.2d 477, 104 P.2d 467 (1940). See generally 7 AM. JUR. BANKS § 425 (1937).

tance provisions, will be determinative of the question, since it provides absolute protection to the bank for payment to a named survivor.⁵⁴

(2) Where the contest is between living co-depositors, the statute merely creates a rebuttable presumption of intent to hold jointly.⁵⁵ Either party may defeat the claim of the other by a showing of a contrary intent—for instance, it may be shown that the account was opened as a matter of convenience to the depositor in facilitating withdrawals.

(3) Where the contest is between representatives of the estate of the first to die and the surviving co-depositor, and separate property of the decedent is involved, the conclusive presumption of the statute will operate to vest title in the survivor.⁵⁶

(4) Where the contest is between representatives of the estate of the first to die and the surviving co-depositor, and community property of the decedent is involved, indications are that the "conclusive" effect of the statute may be modified by reason of a conflict with rights established through the operation of community property principles.⁵⁷

(5) A contest between a creditor of one co-depositor and the other party named on the account has not yet been before the court.⁵⁸ It would seem that by analogy to the rule followed in inter-vivos disputes between co-tenants, the presumption of equal interest created by the statutes should be rebuttable, thus allowing the non-debtor party to prove the intent was in fact to create only an equal right of withdrawal, not a property interest. After the death of a depositor, his creditors would have no further rights against the account, since survivorship would obtain by virtue of the conclusive evidence provisions of the statutes.⁵⁹ An obvious complication could arise in the case of a community creditor seeking funds deposited in a joint and survivorship account by husband and wife. If such accounts, by their form, change the character of the funds to separate property at the

⁵⁴ *Nelson v. Olympia Fed. Savings & Loan Ass'n*, 193 Wash. 222, 74 P.2d 1019 (1938).

⁵⁵ *Munson v. Haye*, 29 Wn.2d 733, 189 P.2d 464 (1948).

⁵⁶ *In re Webb's Estate*, 49 Wn. 2d 6, 297 P.2d 948 (1956).

⁵⁷ *Ibid.*

⁵⁸ *Wolfe v. Hoefke*, 124 Wash. 495, 214 Pac. 1047 (1923) involved an attempt by a creditor of defendant to garnish a savings account maintained by an uncle in both names, but was denied under facts which did not raise the precise issue.

⁵⁹ Tax liability represented by state inheritance tax will not be avoided whether the property passes by inheritance or by some form of survivorship. RCW 83.04.020. *Nelson v. Olympia Fed. Savings and Loan Ass'n*, 193 Wash. 222, 74 P.2d 1019 (1938). Cf. *In re Peterson's Estate*, 182 Wash. 29, 45 P.2d 45 (1935) (decided before enactment of the special tax statute cited above).

inception of the account, they would be insulated from such creditors if the husband were to die first. The better policy would appear to be served by holding that the deposit itself does not operate as a conveyance of any interest in the account other than the right to make withdrawals. Thus the status of the account could be established in terms of the funds used in its creation.

CONCLUSION

The property results flowing from joint account statutes in Washington appear to create interests differing substantially from those associated with the common law estate of joint tenancy. The ability of either depositor to withdraw to the full extent of the account during life, without accounting, is inconsistent with the theory of joint tenancy that any type of destruction of a unity constitutes a severance.

In addition, since the opening of an account in joint form merely raises a presumption of the character of the holding,⁶⁰ it would seem that an action to partition, associated with common law joint tenancy, would result in proof of the original status of the funds, under Washington statutes, rather than the traditional concept by which each party would hold the same interest as before, but in several form rather than in joint form. The true force of the statutes, then, is not to create a common law joint tenancy.⁶¹ Its effect has been described as follows:

. . . the statute creates a right of survivorship in the balance upon survival, but . . . the preceding "estate" is not a joint tenancy in the common law sense, there being no rights of severance. Further, a deposit in the form prescribed by the statute raises only a presumption of whatever kind of joint tenancy there is.⁶²

EFFECT OF 1961 JOINT TENANCY ACT

Chapter 2, Laws of 1961 authorizes creation of joint tenancies which, if formed in accordance with the requirements of the act, shall have the incidents of survivorship and severability as at common law.⁶³ It has been suggested above that joint accounts as currently constituted under the existing statutes do not possess the attributes of common law joint tenancy. It could hardly be contemplated that the new

⁶⁰ *Munson v. Haye*, 29 Wn.2d 733, 189 P.2d 464 (1948).

⁶¹ *Holohan v. Melville*, 41 Wn. 2d 380, 249 P.2d 777 (1952) (dicta).

⁶² *Rutledge, Joint Tenancy in Washington Bank Accounts*, 26 WASH. L. REV. 116, 121 (1951).

⁶³ Wash. Sess. Laws 1961, ch. 2, §1.

legislation operates retroactively to reconstitute these accounts in a different form. The act itself provides: "The provisions of this act shall not restrict the creation of a joint tenancy in a bank deposit or in other choses in action *as heretofore* or hereafter provided by law . . ."⁶⁴ (Emphasis added) Therefore, the intention appears clear that the present joint account statutes are to retain their sui generis character. No authorization for a change in status is afforded by the act, and no reason suggests itself to anticipate a contrary construction by future court action.

VIRGINIA B. LYNESS

⁶⁴ Wash. Sess. Laws 1961, ch. 2, § 3.