UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 1 Article 11

12-1-1956

Banks and Banking -- Survivorship in Joint Accounts

Calvin W. Bell

NOTES AND COMMENTS

Banks and Banking—Survivorship in Joint Accounts

Today the proceeds of numerous joint bank accounts lie dormant in banks due to the fact that the law regarding the right of survivorship in joint bank accounts in North Carolina is marked with uncertainty. Administrators and executors of the estates of deceased parties to these accounts are uncertain whether to retain the funds for the estates or whether to award them to the surviving parties to the accounts.[1] In a recent law review note the author discusses the problem of an attempted transfer of the proceeds of a joint bank account to the survivor of the parties to the account, but at the time of that writing there were no North Carolina holdings regarding joint bank accounts executed with a contract for the right of survivorship.[2] The purpose of this note is to discuss the development of the law since the last writing on the subject and to answer, in so far as possible, the questions raised in that note. For the purposes of this note joint checking accounts and joint savings accounts will be treated alike since by both devices it is possible to create a joint tenancy in the account.

At common law the right of survivorship was an incident of joint tenancy in real property, and under this rule, the surviving party would be automatically entitled to the property on the death of the other party. That rule has been destroyed in North Carolina by statute,[3] but the supreme court has pointed out that the statute does not prohibit joint tenants from making contracts to provide for survivorship both as to personalty and realty.[4]

The law is generally settled as to joint accounts which do not contain a clause designating survivorship. When the sole owner of the fund can be ascertained, he, or his estate, will be awarded the entire fund.[5] But when the evidence does not establish sole ownership, a presump-

[1] Professor Fred B. McCall will deal with the problem from the administrator's point of view in an article to be published in a later issue of this volume of the LAW REVIEW.

[2] Note, 31 N. C. L. REV. 95 (1952).

[3] N. C. GEN. STAT. § 41-2 (1950).

[4] Taylor v. Smith, 116 N. C. 531 at 535, 21 S. E. 202 at 204 (1895). "The Act of 1784 (code, section 1326) abolishes survivorship where the joint tenancy would have otherwise been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship."

[5] Hall v. Hall, 235 N. C. 711, 71 S. E. 2d 471 (1952); Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. 2d 222 (1946); Nannie v. Pollard, 205 N. C. 362, 171 S. E. 341 (1933).

tion of co-ownership arises and distribution is made accordingly.[6] The normal effect of depositing money in the name of the owner and another is to make that other person merely the owner's agent with power to draw on the account and upon the death of the owner, the agency is revoked. Thus, the agent has no right to any part of the account after the owner's death.[7] The courts of North Carolina hold that such a deposit does not create a gift nor does it establish a trust, for the owner does not make a valid delivery of the fund nor does he relinquish control over the fund.[8]

It is when the joint account contains a provision for survivorship that the confusion in the law begins, and this is especially significant in light of the fact that most, if not all, banks today have such a provision in their standard signature cards for accounts. Since the gift, trust, and agency theories will not support the survivor in his claim for the entire fund, he must resort to a contract with a survivorship clause to maintain his claim for the whole amount.[9] The contract theory originated with *Chippendale v. North Adams Savings Bank*.[10] In that case the depositor made an agreement with the bank that in the event of his death, his wife was to receive the entire fund in the account. Both husband and wife were named in the account and either was authorized to withdraw any or all of the fund. In awarding the fund to the widow the court stressed the fact that the agreement with the bank was a valid contract between the bank and the depositor, and discounted the contention that the issue was whether or not there was a valid gift.

In a leading case[11] the agreement contained the usual statement that the depositors were joint tenants with the right of survivorship, and not tenants in common, with the further provision that upon the death of either party, the fund would become the absolute property of the survivor. The court upheld this agreement and declared the survivor absolute owner of the balance in the account, emphasizing the contract saying that there was an agreement made by the bank with its depositors and that the bank and the depositors were bound by the contract.

North Carolina first recognized the contract theory of survivorship in *Taylor v. Smith*[12] in which two sisters who were joint owners of a

[6] Smith v. Smith, 190 N. C. 764, 130 S. E. 614 (1925); Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923). "Under the law of this jurisdiciton, nothing else appearing, the money to the joint credit in the bank belonged equally to plaintiff and defendant." Smith v. Smith, *supra* at 767, 130 S. E. at 615.

[7] Hall v. Hall, 235 N. C. 711, 71 S. E. 2d 471 (1952); Nannie v. Pollard, 205 N. C. 362, 171 S. E. 341 (1933).

[8] Jones v. Fulbright, 197 N. C. 274, 148 S. E. 229 (1929); Thomas v. Houston, 181 N. C. 91, 106 S. E. 466 (1921).

[9] Note, 31 N. C. L. Rev. 95 (1952).

[10] 222 Mass. 499, 111 N. E. 371 (1915).

[11] Hill v. Havens, 242 Iowa 920, 48 N. W. 2d 870 (1951).

[12] 116 N. C. 531, 21 S. E. 202 (1895).

note made a verbal agreement that the survivor was to be the sole owner of the note on the death of the other. The court said that the right to the fund in case one survives the other was a valuable assignable interest, and there was then a valid contract with the mutual rights of survivorship being the consideration. The same result has been reached as to stocks,[13] and in a later case, *Jones v. Waldroup*,[14] the court seems to have gone a step further in applying the contract theory. In this case the husband, Mr. R. M. Waldroup, had stock certificates which were made out to himself alone. He subsequently executed a paper under seal authorizing the issuing association to transfer the certificates to the names of "R. M. Waldroup or Mrs. Hattie L. Waldroup, either or the survivor." There was evidence introduced to show that Mr. Waldroup changed the names so that "if anything should happen the other would cash in without the usual red tape." Witnesses said that Mr. Waldroup told them he wanted the stock to go to the survivor. In commenting on this the court said: "We construe the conveyance . . . as creating a common ownership in the property which is its subject until one of them should die, with the right of survivorship."[15] The court denied the plaintiff's contention that the wife was merely an agent of her husband saying that the husband's intent was clearly to provide for the right of survivorship in his wife.

Although the North Carolina Supreme Court has recognized the contract theory in joint tenancies in some instances, there is some question as to how far the court will go in allowing persons to contract for the right of survivorship. Will the court allow one party who has deposited money in an account in his own name create by contract the right of survivorship in another person? Will the court allow a contractual right of survivorship where one party deposits his own money in an account in his own name and that of another? Finally, where the contract is allowed, what form must it take?

North Carolina has recognized third party beneficiary contracts in other areas of the law, but the same is not true with regard to joint bank accounts. In *Wescott v. First & Citizens National Bank of Elizabeth City*[16] the court struck down an attempt to create the right of survivorship in one not a party to the account. A soldier in Italy had sent money to the bank with a letter stating: "I wish to establish an account with your bank. . . . In case I become deceased

[13] Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796 (1926). Two brothers owned stock in a bank and made an agreement that upon the death of either, the stock was to go to the survivor at par. The court stated that the agreement "is a contract made by each and both parties . . . to sell to the survivor. . . ." *Id.* at 683, 132 S. E. at 799.

[14] 217 N. C. 178, 7 S. E. 2d 366 (1940).

[15] *Id.* at 188, 7 S. E. 2d at 371.

[16] 227 N. C. 39, 40 S. E. 2d 461 (1946).

I would like to make an agreement with you so as to make my beneficiary my grandfather . . . to receive the money. . . ." It was also stated that this was to be an "in trust for account," and the court denied the grandfather's claim due to the failure of the trust. No mention was made of an attempted contract for survivorship nor of a contract to establish a trust though the bank had accepted the deposit along with the letter containing the agreement. Thus, this might be considered authority for the proposition that our court will not recognize a third party beneficiary contract in regard to joint bank accounts where both parties are not named in the account.

Where both parties are named in the account, but it is determined that one party is the sole owner of the fund, North Carolina authority is to the effect that the sole owner, or his estate, will be awarded the fund though there be a clause providing for survivorship.[17] Thus, there is an apparent requirement that the parties must not only be named in the account, but that they must also be joint owners of the fund.

In the latest case in North Carolina, *Bowling v. Bowling*,[18] there were four funds in question. The first was a joint savings account opened by Mrs. Bowling with funds she had withdrawn from an account in her own name. Later funds from another joint account of Dr. and Mrs. Bowling were added to the savings account. The source of all the other deposits and withdrawals is not determinable from the record. This account initiated by Mrs. Bowling was recorded in the following name: "Mrs. Agnes P. Bowling and/or Dr. W. W. Bowling, 1017 Demerius Street." Through error there was no joint account card executed, but the bank had recognized the account as joint with the survivor having a right to withdraw the entire fund.

The second account was an optional savings account opened by a cash deposit and execution of a written agreement with respect to such account. The agreement was as follows: "It is understood and agreed that the shares hereby subscribed for are issued by the association, and all moneys paid or that may hereafter be paid thereon are held by the association for our account, as joint tenants with right of survivorship and not as tenants in common, and that said shares may be resold subject to the by-laws of the association, by either before or after the death of either, and either is authorized to pledge the same as collateral security to a loan." Both Dr. and Mrs. Bowling signed the agreement. Money deposits were made by Mrs. Bowling, but the source of all deposits is undetermined.

The third account was a savings share certificate account opened by a deposit and the execution of a written agreement with the association

[17] See note 5 *supra*.
[18] 243 N. C. 515, 91 S. E. 2d 176 (1955).

which read as follows: "Membership of joint holders (with right of survivorship) of a share account. The undersigned hereby apply for a membership and for a JOINT share account in the FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF DURHAM and for the issuance of evidence of membership in the approved form in the joint names of the undersigned as joint tenants with the right of survivorship and not as tenants in common." There is no record of the source of the deposits in this account.

The fourth fund in question was One Hundred Twenty Five shares of common stock of Life & Casualty Company of Tennessee and was registered as follows: "William W. Bowling and Mrs. Agnes Paulk Bowling, as joint tenants with the right of survivorship and not as tenants in common." There is no record of who purchased or possessed the stock. Thus, whether there was sole ownership or joint ownership of the fund is undeterminable.

As to the first account, the lower court said: ". . . the facts are insufficient to establish that either the estate of William W. Bowling, deceased, or Agnes P. Bowling is the sole owner of the entire fund in this account. A presumption of equal ownership by the co-depositors of said funds applies to the account."[19] The account was awarded one-half to Dr. Bowling's estate and one-half to Mrs. Bowling. For identical reasons, the court reached the same result in regard to the fourth fund, common stock of Life & Casualty Company of Tennessee.

As to the second and third accounts, the lower court awarded the entire funds to Mrs. Bowling saying: "There was a valid written contract covering this account which was executed by W. W. Bowling and Agnes P. Bowling. . . . By the terms of said contract it was agreed that the survivor . . . would be the sole owner of the funds on deposit. . . ."[20]

The supreme court affirmed the judgment of the lower court in essentially the same language. As to the second and third accounts the court made the following comment: ". . . and since the parties having contracted and agreed that the savings accounts described hereinabove as the second and third items, respectively, were held by them as joint tenants with the right of survivorship, and not as tenants in common, the right of survivorship existed. . . ."[21]

The court in refusing to award Mrs. Bowling the entire amount in the first and fourth funds, has in effect, denied the validity of a survivorship clause which does no more than say that the fund is payable to "either or the survivor." Though this clause was not present in the

[19] Bowling v. Bowling, Record on appeal at page 19 (1955).
[20] *Id.* at 20.
[21] Bowling v. Bowling, 243 N. C. 515 at 520, 91 S. E. 2d 176 at 180 (1955).

first account, the account was recognized by the bank as one with the right of survivorship in it. The clause was expressed in the stock certificate as quoted above. The court in failing to recognize the clause standing alone has followed its decisions of the past.[22]

In the *Bowling* case it was shown that the surviving wife had contributed to the first account, but still the court ignored the survivorship clause standing alone. Perhaps this was because she did not contest the lower court's ruling giving her one-half the account, but it seems safe to say that the court probably will continue to ignore such clauses which might well be a result of banking practice rather than an honest attempt by the depositors to contract for the right of survivorship. In the two accounts which the court did award the widow in the *Bowling* case there were express contracts executed with the opening of the accounts. These agreements specifically and unequivocally designated the survivor as having sole rights to the funds. The language is that usually seen in specific and detailed contracts. The court seems to require that the parties spell out the meaning of the clause, "payable to either or the survivor." Though this seems to be merely an academic distinction, the detailed form leaves no room for doubt that the parties intended for the survivor to take the balance of the account.

The two accounts which the court awarded the widow were composed of deposits made by both parties to the account; there was no question as to the parties being co-owners. Where sole ownership has been established, the court has consistently given the remainder to that party, or his estate, who was the sole owner of the fund in the account.[23] Only where there was joint ownership did the court allow a contract for survivorship in a joint account.[24] Thus, we apparently have two prerequisites to the formation of a valid contract as to joint bank accounts. The parties must be co-owners, and they must execute a contract spelling out their intent to create a right of survivorship in the survivor. Anything less has yet to succeed in securing that right in North Carolina. The exact form which the contract must take is not specified in the *Bowling* case or any other case, but in the opinion of the Attorney General the following has been held to be sufficient under *Taylor v. Smith*[25] and *Jones v. Waldroup*[26] to vest title in the survivor of the joint account:

[22] Pope v. Burgess, 230 N. C. 323, 53 S. E. 2d 159 (1949); Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. 2d 222 (1946). In Buffaloe v. Barnes *supra*, the court said there was no agreement nor oral evidence of an agreement. Evidently the court simply refuses to see an agreement in an account labled as a joint account with the right of survivorship. Also in that case the stock was purchased with the husband's money and undoubtedly this had a bearing on the court's decision in that it spoke of the absence of any consideration flowing from the wife.

[23] Cases cited note 5, *supra*.

[24] Taylor v. Smith, 116 N. C. 531, 21 S. E. 202 (1895).

[25] *Ibid.*

[26] 217 N. C. 178, 7 S. E. 2d 366 (1940).

"We ———, and ———, the undersigned, do hereby apply for membership in the Federal Savings and Loan Association of ——— and for the issuance of evidence of membership in the approved form in the joint names of the undersigned who have and do hereby agree as between us that the same shall be held as joint tenants with the right of survivorship and not as tenants in common, regardless of who places the funds in said account. And it is definitely understood between us that in the case of death of either of us the survivor shall be the owner of this entire account, both principal and dividend which may be due at the time of the death of either of us. . . ."[27]

It will be noticed that the Attorney General's opinion was careful to state that the agreement was between the depositors; no mention was made of the bank as a party to the agreement. This is interesting in light of the fact that the court in the *Bowling* case did not mention G. S. 53-146.[28] Heretofore the statute served to protect the bank, but in light of the contract theory, it does not seem unreasonable to question its application where the court has found a valid contract. There would be no problem where the bank paid the survivor, but if the bank should pay the fund to the estate of the deceased, then there is an apparent breach of the contract with the surviving depositor. Thus, the question arises: is the bank protected by statute in an apparent breach of contract? Of course, there is the contention that the contract is between the depositors only and that the bank is not a party to such contract, but this position is logically untenable. When one man makes a deposit with the bank, the bank is bound to pay him, and only him, the fund on deposit. It is elementary that if the bank allowed a withdrawal by a stranger, it would be liable to the depositor for breach of its contract in the amount paid out. The same result would obtain where there are two depositors as well as where there is only one. When an agreement is excecuted at the time of deposit, the deposit should be construed in the light of that agreement. The bank is a party to the deposit, accepting it on the terms of the agreement. Contract law would not allow the bank to accept the deposit and yet assert that it was not a party to the agreement which controls the deposit. It seems to follow that when a valid agreement is found, the depositors and the depositary are all bound by it. One writer[29] in discussing such con-

[27] Opinion of Attorney General to Hon. W. E. Church, Clerk of Forsyth Superior Court, dated 9 October 1945.

[28] N. C. GEN. STAT. 53-146 (1950). The statute provides that when a deposit is made in names of two persons payable to either, or payable to either or the survivor, it is payable to either whether the other is living or not. Courts have consistently held that the statute is for the protection of the bank only and is not controlling as to ownership of the funds. 9 N. C. L. REV. 15 (1930).

[29] Note, 38 HARV. L. REV. 243.

tracts says: ". . . B's interest is not one transferred from A . . . but is a legal interest directly created in B by the depositary's promise to pay A or B, as joint obligees." It seems, the bank makes a direct promise to B when both A and B sign the signature card. If B does not sign, it still is the intention that the bank is obligated to pay B on A's death. The making of the deposit is certainly sufficient consideration flowing from both depositors for the obligation of the bank.

That the statute expressly protects the bank is not denied, but neither is it denied that G. S. § 41-2 expressly abolishes the right of survivorship in joint tenancies, and yet the Supreme Court has said many times that the statute (41-2) does not prohibit the making of contracts to provide for such a right.[30] Thus, there would seem to be nothing in G. S. § 53-146 to prohibit the banks from contracting away the protection which the statute confers upon them in the same manner. Further it does not seem a wrong to take away such protection where a bank has voluntarily chosen to accept a deposit which carries with it the obligation of the bank to pay the survivor and only the survivor. To do otherwise would be a clear breach of contract. Yet, such a construction of the statute and court decisions affecting it would place banks in the dubious position from which they were lifted with the initial passage of the statute. Banks would act at their peril when determining the validity of an agreement before paying the fund to anyone but the survivor.

The foregoing emphasizes the need for a standard form of contract which will be universally recognized in North Carolina as valid for creating the right of survivorship. A bill providing such a form was presented to the North Carolina General Assembly in 1953 and 1955,[31] and each time the bill was defeated for the reason that it might result in defeating creditor's rights. The Legislature should recognize that court decisions in time will effect the same result but amid much argument and confusion. Creditors' rights in this instance will eventually yield to those who form valid contracts with banks. There is no reason to make it an uneasy process for the depositor and the bank when all that can be gained is delay.

CALVIN W. BELL

[30] Jones v. Waldroup, 217 N. C. 178, 7 S. E. 2d 366 (1940); Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923); Taylor v. Smith, 116 N. C. 531, 21 S. E. 202 (1895).

[31] Address by William F. Womble, Thirty-seventh annual conference of the association of superior court clerks of North Carolina, July 7, 1955.