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Multiple Party Accounts: Georgia Law Compared with the Uniform Probate Code

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MULTIPLE PARTY ACCOUNTS: GEORGIA LAW COMPARED WITH THE UNIFORM PROBATE CODE

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Joint accounts established in financial institutions have become increasingly popular as inexpensive and convenient means of nontestamentary disposition of wealth. Varied and often unsuitable legal theories which have been relied upon to validate such attempts have, however, resulted in inconsistent case results in what should otherwise be a fairly simple area. In their article, Professor Wellman and Mr. Clark explain this disparate treatment and demonstrate the desirability of Article VI, Part 1 of the Uniform Probate Code as a statutory solution for the problems presented.

Multiple-party accounts[1] arise when demand or time deposits designating two or more persons as owners or beneficiaries are made in banks, credit unions, savings and loan associations or other financial institutions. Litigation in Georgia has involved three distinct forms of multiple-party accounts. One is the joint account where, with or without explicit mention of joint tenancy or survivorship rights, two or more persons are jointly or severally entitled to demand payment from the account. Accounts in the name of one person as apparent trustee for a disclosed beneficiary constitute a second category, usually called trust accounts. A third category, labeled pay-on-death accounts, includes deposits payable to

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[1] The term "multiple party accounts" is derived from the heading of Art. VI, pt. 1 of the UNIFORM PROBATE CODE (hereinafter referred to as the UPC proposal or UPC).

one person on demand during his lifetime, with the balance remaining at his death to be paid according to the express terms of the account. In varying degrees, these three forms of accounts appeal to persons seeking a probate-free method of transferring demand and time account balances remaining at death to successors of their choice.[2]

The pay-on-death account, which explicitly purports to aid the purpose of probate avoidance without appearing to create a present trust or the present relation of co-owners, has not been widely used because decisions have nullified the death benefit as being testamentary.[3] The other two account forms are popular in and out of Georgia and have been the subject of much discussion concerning the problems that arise when a transaction describes present interests for one who is named only so that he may receive a testamentary benefit.[4]

In terms of results, Georgia courts have tended to implement the typical testamentary purpose behind the trust and joint account forms. The evolution of coherent theories to explain these results has, however, lagged behind case results, though to a lesser degree in relation to the trust account than the joint account where competing gift, joint tenancy and contract theories still obscure analysis.

The authors recommend enactment in Georgia of Article VI, Part

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[2] These accounts are often referred to as "poor men's wills" since they facilitate the effort by decedent to control the distribution of a part of his estate at his death without the necessity of a formal will, while maintaining control over the assets during his life. The famous case of *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904), is frequently referred to in this connection. The New York court said:

> When a deposit is made in trust, and the depositor dies intestate leaving it undisturbed, in the absence of other evidence the presumption seems to arise that a trust was intended in order to avoid the trouble of making a will.

Id. at 124, 71 N.E. at 752.

As evidence of the widespread use of the joint and survivorship account, see: Jones, *The Use of Joint Bank Accounts As A Substitute For Testamentary Disposition of Property*, 17 U. PITT. L. REV. 42 (1955); Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1955); Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953); Treat, *Joint Bank Accounts—Poor Man's Will or Everyman's Snare?*, 112 TRUSTS & ESTATES 558 (1973); Wellman, *The Joint and Survivorship Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629 (1965).

[3] *E.g., In re* Brown's Estate, 343 Pa. 230, 22 A.2d 821 (1941); Tucker v. Simrow, 248 Wis. 143, 21 N.W.2d 252 (1946).

[4] *See* note 2 *supra*. *See also* R. BROWN, PERSONAL PROPERTY § 65 (2d ed. 1955); Havighurst, *Gifts of Bank Deposits*, 14 N.C.L. REV. 129 (1936); Comment, *Bank Accounts: Transfer of Property at Death*, 23 U. CHI. L. REV. 289 (1956); Note, *The Theories of Joint Bank Accounts*, 42 KY. L.J. 125 (1953).

1 of the Uniform Probate Code as the most efficient way of stabilizing theory and clearing remaining doubts about various aspects of all forms of multiple-party accounts.

I. PAY ON DEATH ACCOUNTS IN GEORGIA

Unlike death beneficiary designations in life insurance contracts[5] and instruments governing employee benefits,[6] bank accounts naming beneficiaries whose only apparent interest is that of being entitled to amounts remaining on deposit at the death of the primary depositor have not fared well in the courts of Georgia or elsewhere.[7] The Georgia case in point is *Guest v. Stone*,[8] where the decedent had made a deposit in his own name using a slip that bore his signature and stated: "Mrs. Leslie Stone, beneficiary in case of death." After finding the transaction ineffective as a gift inter vivos or causa mortis, or as a trust, the supreme court turned to the claim that Mrs. Stone might retain the sums received from the debtor company after the donor's death on the theory that she had a contract right under the account transaction. Speaking through Justice Atkinson, the court said:

> This contention is without merit. Under the deposit agreement, Mrs. Stone, though a beneficiary, was not a party or privy, but a mere stranger . . . she would have no right of recovery thereunder. While the recent act of the General Assembly, Ga. L. 1949, p. 455, amending Code, §3-108, was apparently enacted to permit a beneficiary under a contract between other parties to recover, yet it could be given no effect in this case. To do so, would violate the provisions of the United States Constitution, art. 1, §10, cl. 1, Code §1-134, and the State constitution, art. 1, §3, par. 2, Code §2-302, as to impairing the obligations of contracts. It would be creating a right for one to recover under an existing contract where he previously had no such right; and at the same time subject a party to an existing contract to liability to a third person who previously

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[5] *See* Wages v. Wages, 202 Ga. 155, 42 S.E.2d 481 (1947).

[6] *See* Pate v. Citizens & S. Nat'l Bank, 203 Ga. 442, 47 S.E.2d 277 (1948).

[7] This is certainly not to say that Georgia is unique in its dilemma. For cases and commentaries depicting the identical problem in other states, see Johnson, *Joint, Totten Trust, and P.O.D. Bank Accounts: Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973); Kepner, *supra* note 2; Sayre, *A Review of Iowa Contract Law*: 1942-52, 38 IOWA L. REV. 506 (1953); Wellman, *supra* note 2.

[8] 206 Ga. 239, 56 S.E.2d 247 (1949).

> had no right under the contract. A vested ground of defense is protected from being destroyed by an act of the legislature.[9]

Though far from so holding, the court's opinion provides a basis for speculating that a death beneficiary designation in an account contract created after 1949 would not be held testamentary in Georgia. The speculation probably will remain untested, however, for financial institutions are unlikely to offer accounts involving uncertainties in regard to their own liability. Courts in other states have divided on the question of whether a bank incurs liability for payment to one who, although named in a deposit contract, is held to be without right as against the estate of a deceased depositor whose funds created the account.[10] Hence, unless the Georgia Legislature acts to extend existing bank protective legislation[11] to cover pay-on-death arrangements, or to declare death benefit provisions in account contracts to be non-testamentary, depositors who seek account arrangements that will avoid probate must continue to look to inherently ambiguous trust and joint accounts.

II. Trust Accounts in Georgia

Application of the law of trusts in support of multiple-party accounts is appropriate for accounts that appear in the name of one person as trustee for another as beneficiary. A deposit by "*A*" as trustee for "*B*" is an example. This form of account suggests either that an existing trustee has made a properly earmarked deposit of trust funds or, assuming that no showing of a trust that antedates the opening of the account is made, that a donor has given away the equitable interest in a deposit contract by the process of gratuitous declaration of trust. The latter possibility forms what is referred to here as a "donor-trustee" account. Accounts opened in the name of one that are later made the subject of an attempted assignment to another, and joint accounts where two or more persons become apparent owners of an account resulting from the contributions of one of them, do not even appear to result in trusts and may be distin-

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[9] *Id.* at 243, 56 S.E.2d at 250. *See* note 56 *infra*.

[10] *Compare* Second Nat'l Bank v. Wrightson, 63 Md. 81 (1884); Leib v. Genesee Merchants Bank & Trust Co., 371 Mich. 89, 123 N.W.2d 140 (1963); Smith v. Planter's Sav. Bank, 124 S.C. 100, 117 S.E. 312 (1922) *with* Landretto v. First Trust & Sav. Bank, 333 Ill. 442, 164 N.E. 836 (1928); Sawyer v. National Shawmut Bank, 306 Mass. 313, 28 N.E.2d 455 (1940). *See also* Note, 9 Cornell L.Q. 48 (1923).

[11] *See* notes 78-80 and accompanying text *infra*.

guished.[12] In *Spivey v. Methodist Home of the South Georgia Conference*,[13] the court distinguished between an account entitled "Dawkins, Mrs. Virginia N. or Methodist Orphanage" and one carried under the heading "J.B. Nunez, by Virginia N. Dawkins."[14] The former was allowed to pass the account balance remaining at Mrs. Dawkins' death to the Methodist Orphanage under the contractual joint tenancy theory discussed later; the latter, aided perhaps by testimony of Mr. Nunez that he had an agreement with the decedent by which money of the claimant was to be held in the decedent's name, was upheld as a "donor-trustee" account.[15]

When words indicative of a declaration of trust appear in an account contract, the Georgia authorities provide for the presumption of a present trust, thereby appearing to align closely with cases in other states[16] and the *Restatement of Trusts*,[17] which have followed the important dictum of the New York Court of Appeals in *In re Totten*.[18] For example in *Wilder v. Howard*,[19] the court, after referring to the *Restatement* and cases from New York and elsewhere, stated:

> In the light of these authorities, we hold that neither the retention of the passbook, the absence of notice to the beneficiary, nor the withdrawals from and additions to the deposit had the effect of disproving an intention on the part of the depositor

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[12] *See* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 20 (5th ed. 1973); 1 A. SCOTT, THE LAW OF TRUSTS § 58.6 (3d ed. 1967); Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953).

[13] 226 Ga. 100, 172 S.E.2d 673 (1970).

[14] *Id.* at 101, 172 S.E.2d at 674.

[15] *Id.* at 101-02, 172 S.E.2d at 674-75. The tendency to avoid resort to the trust theory except in those cases in which the account is created in express trust language is typical of the Georgia cases. *See* Calhoun, *Jus Accrescendi and Joint Bank Accounts: A Look at the Georgia Story*, 7 GA. ST. B.J. 370 (1971).

[16] *See* Brucks v. Howe Fed. Sav. & Loan Ass'n, 36 Cal. 2d 845, 228 P.2d 545 (1951); Seymour v. Seymour, 85 So.2d 726 (Fla. 1956); *In re* Estate of Petralia, 32 Ill. 2d 134, 204 N.E.2d 1 (1965); Hale v. Hale, 313 Ky. 344, 231 S.W.2d 2 (Ct. App. 1950), *In re* Estate of Damanto, 86 N.J. Super. 107, 206 A.2d 171 (1965); *In re* Estate of Paulinko, 399 Pa. 536, 160 A.2d 554 (1960); Leader Fed. Sav. & Loan Ass'n v. Hamilton, 46 Tenn. App. 368, 330 S.W.2d 33 (1959).

[17] RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).

[18] 179 N.Y. 112, 71 N.E. 748 (1904).

[19] 188 Ga. 426, 4 S.E.2d 199 (1939). Prior to her death, the testatrix had deposited a sum of money in the defendant bank. At her direction, the bank issued her a passbook in the name of "Mrs. D.R. Wilder, trustee for Alice Frances Wilder." *Id.* The testatrix subsequently made both withdrawals from and deposits to the account. *Id.* at 426-27, 4 S.E. at 199-200. Nonetheless, the court ruled that the beneficiary (Alice Frances Wilder) was entitled to the account upon the testatrix's death. *Id.* at 433, 4 S.E. at 203.

> to create a trust; and we further hold, in harmony with the over-whelming weight of authority, that the deposit here involved is presumptively a tentative trust, and in the absence of evidence to rebut this presumption the beneficiary is entitled to the fund. The evidence for the defendants clearly failed to disprove an intention on the part of the depositor to create a trust, while the evidence for the plaintiff in error tended to prove that the intention of the depositor was to create a trust in her favor.[20]

The primary advantage of the presumption of a present trust is that, absent evidence to the contrary, it avoids the requirement of the Statute of Wills. As stated in *Guest v. Stone*:[21]

> [I]f a trust was intended to be created, but such intended trust was not to arise and come into effect until the creator's death, it would be testamentary and fail for the lack of the formalities of a will. But if during the life of the creator a trust was created and became effective, it would not . . . take effect in enjoyment and possession before the death of the creator . . . .[22]

The 1970 decision in the *Spivey* case might be viewed as qualifying the holding in *Wilder* regarding the inference of trust intention to be drawn from the opening of a trust account. Two accounts in issue in *Spivey* were entitled "Methodist Orphanage, Macon, Ga., by Virginia N. Dawkins." Unlike the account in the name of "J.B. Nunez, by Virginia N. Dawkins," which was upheld as a trust account (meaning that the balance of the account at Mrs. Dawkins' death belonged to Mr. Nunez), the above described accounts for the Methodist Orphanage were held to belong to Mrs. Dawkins' estate. The court explained its affirmance of the trial court on this point as follows:

> The trial court's findings with respect to Accounts Nos. C-244 and 2005 (the Methodist Orphanage accounts) are not inconsistent with its findings on the other accounts for the reason that the testator made no declaration of trust with respect to these accounts nor is there any evidence showing that she in-

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[20] *Id.* at 432, 4 S.E.2d at 202.

[21] 206 Ga. 239, 56 S.E.2d 247.

[22] *Id.* at 242, 56 S.E.2d at 249.

> tended to establish a trust therein. The mere fact that these accounts were opened in the name of third parties "by" the testator is insufficient to create the presumption of a trust.[23]

Although the opinion in the *Spivey* case does not make the distinction as explicit as might be desired, the holding is consistent with the more elaborately explained result in *Wilder*. The account forms before the court in *Spivey*, e.g. "A by B," do not appear to be trusts, but rather credits in the name of one person ("A") that are controlled by his agent ("B"). Of course, it is doubtful that Mrs. Dawkins realized that the cryptic verbal signals on the several accounts she controlled would produce different legal results, but the law frequently respects differences in verbal signals and, in this instance, her words signified agency rather than trust.[24] Mr. Nunez's claim to the account in his name was buttressed by his testimony of a prior agreement with the decedent; the same form of account in the name of the Methodist Orphanage failed because it did not mention a trust, no other evidence of a trust existed and the transaction could have been a step toward a possible gift that failed because not completed prior to death.

Arguably, an account in the correct donor-trustee form should be viewed as evidence of a substantial interest in the beneficiary instead of one which is merely hypothetical or tentative, becoming real as to balances remaining at death if no contradictory evidence is offered. The declaration purports to create an irrevocable interest and is spread on the records of the financial institution,[25] but the courts in Georgia and elsewhere have cut through mere words on account contracts in the donor-trustee cases to find and uphold testamentary intentions that have not been expressed as required for wills.[26] It is curious that the legal community has been slower to implement the same purpose when expressed in the "pay-on-death" form of account. The contrast points up the fact that courts have found it easier to uphold unattested testamentary intention concealed in transfers that appear to be present and irrevocable than to validate contingent, contractual rights which explicitly duplicate the function of a will.

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[23] Spivey v. Methodist Home of the S. Ga. Conf., 226 Ga. 100, 102, 172 S.E.2d 673, 675 (1970).

[24] G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 8 (5th ed. 1973); SCOTT, *supra* note 12, at § 8 (3d ed., 1967).

[25] *See In re* Estate of Hoffman, 175 Ohio St. 363, 195 N.E.2d 106 (1963).

[26] *See* note 16 and accompanying text *supra*.

To date, the few Georgia cases involving the tentative trust created by a trust deposit have involved only the questions of whether an inter vivos trust arises from the mere fact of a trust deposit and whether it is irrevocable. The opinion in the *Wilder*[27] case quotes approvingly and extensively from comments in the *Restatement*, but the facts presented only the question whether the trust was revoked as to amounts withdrawn by the decedent during her lifetime. Hence, the position of the *Restatement*,[28] that a tentative trust can be revoked by any manifestation of intention indicating that the depositor did not mean for the beneficiary to receive the proceeds of the account at death, has not been tested in Georgia. If the *Restatement*'s view is accepted, a provision in a will of the depositor might also serve to revoke a bank account trust.[29]

III. JOINT ACCOUNTS

A. *Gift Theory*

At first glance, the creation of a joint account to which but one depositor contributes funds appears to constitute a gift; the donor's money becomes an account which, on its face at least, involves some

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[27] 188 Ga. 426, 4 S.E.2d 199 (1939).

[28] RESTATEMENT (SECOND) OF TRUSTS § 58 (1959) provides:

> Where a person makes a deposit in a savings account in a bank or other savings organization in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust.

[29] In this connection, it is interesting to note that the New York Law Revision Commission recently recommended legislation that would clarify three areas of uncertainty about Totten trusts that have been left open by the case law in that state. These concern: (1) whether delivery of a savings passbook by the trustee to the beneficiary completes the gift as an irrevocable, inter vivos transfer; (2) the effect of mere statements by the donor-trustee that the trust is not intended to be a gift at death; and (3) whether the will of the donor-trustee can revoke a tentative trust. The Commission's recommendation to the New York legislature is that it enact legislation providing explicitly that title to a trust deposit remains in the donor-trustee until his death, when it vests in the beneficiary if he survives, and that the title controlled by the trust cannot be altered from its course of devolution at death except by withdrawals from or charges against the account by the donor-trustee during his lifetime.

As stated by the Commission: "Since the Totten trust device is used by many persons as a substitute for a testamentary disposition, frequent litigation is unfortunate." RECOMMENDATIONS OF THE NEW YORK LAW REVISION COMMISSION—BANK ACCOUNTS IN TRUST FORM, New York SEN. DOC. No. 8100 (1974). Perhaps Georgia authorities can benefit from the New York experience and cause the law of such transactions in this state to vary from that suggested by the *Restatement of Trusts* as recommended by the New York revisors now seek.

type of interest for the donee. Nonetheless, as noted in relation to the Totten trust situation, courts have been slow to give full, literal effect to apparent donations effected by the simple act of placing another's name on a bank deposit.[30] In fact, the law of gifts frequently has been viewed as a source of additional safeguards against the possibility of separating one from his money before he means to give it away.

The common law recognizes two types of gifts: gifts causa mortis and gifts inter vivos. The former are gifts made under apprehension of impending death which, if death eventuates as feared, causes the donee's title to become complete. Joint accounts are usually opened at times and under circumstances that are quite unlike those surrounding the gift causa mortis. Donor-depositors who remain in control of their savings after the two party account is opened need not wait until the last minute to open joint accounts. Also, the typical purpose of a donor-depositor is to pass some interest to the donee upon the donor's death at any time and from any cause. In sum, joint accounts do not fit within the gift causa mortis classification.[31]

The rules for inter vivos gifts encompass technical requirements that are difficult to align with a donative joint account transaction. These standards include required findings of intent by the donor to make a present gift, acceptance of the benefits by the donee, and delivery of the *res* to the donee.[32] If the existence of the account is known to the donee, as will be the case if he has signed a signature card, acceptance is no problem. Moreover, even in those cases where the gift is unknown to the donee, the beneficial nature of the trans-

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[30] *See* text at note 25-26, *supra*.

[31] Only two Georgia cases have been found that mention the possibility of such accounts being gifts causa mortis; one avoided the question, the other decided it negatively. In Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927), the issue of whether a joint and survivorship account might constitute a gift causa mortis was one of several questions certified by the court of appeals to the Georgia Supreme Court; the court, however, decided the case on another issue. In Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247 (1959), a soldier had made a deposit with the notation "Mrs. Leslie Stone beneficiary in case of death." *Id.* at 249. The court rejected the application of the gift causa mortis theory since the deceased donor was not in his last illness or immediate peril at the time of the transaction. *Id.*

[32] *See* BROWN, *supra* note 4, at § 37 (1936). These requirements have now been codified in GA. CODE ANN. § 48-101 (1965):

> To constitute a valid gift, there shall be the intention to give by the donor, acceptance by the donee, and delivery of the article given or some act accepted by the law in lieu thereof.

action explains the common law[33] and statutory[34] presumption of acceptance. The requisites of donative intent and delivery are, however, more troublesome. Under traditional concepts, the donor must part with his dominion over the *res* and indicate his intention that control has been transferred to the donee. In settings other than those involving donative joint accounts, concepts of constructive and symbolic delivery have accommodated the old rules requiring physical transfer of possession for delivery to cases involving joint control of tangibles, and to cases involving intangibles and other items where manual transfer is difficult or unnatural.[35] But, the typical Georgia joint account case involving analysis in terms of the common law gift theory has not featured relaxation of the delivery requirement.[36] Indeed, the usual result where gift analysis is deemed to control is invalidation of any claim by the donee. The standard reasoning is that, since the donor can withdraw part or all of the account funds at will, he has not parted with dominion; hence, requirements of donative intent and delivery are not fulfilled.

An example is provided by *Clark v. Bridges*,[37] where the deceased deposited her own money in a savings bank from which she received a deposit ticket indicating that the account was to be of the joint and survivor variety; her daughter who knew nothing of the account was the donee. The court stated:

> It appears . . . that the depositor retained for herself unlimited right to check against the account. This would include the right to withdraw the deposit altogether; thus removing it from any dominion by the third party. In this particular the transaction

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[33] *See* C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 469 (2d ed. 1971).

[34] GA. CODE ANN. § 48-102 (1965) provides:

> If the donation shall be of substantial benefit, the law will presume the acceptance, unless the contrary shall be shown. A parent, guardian, or friend may accept for an infant. The officers of a corporation may accept for it.

[35] BROWN, *supra* note 4, at § 41 (2d ed. 1955); SMITH & BOYER, *supra* note 33, at 469 (2d ed. 1971). Outside Georgia, authority exists to the effect that the requirements of intent and delivery are met by acts as notorious, enduring and unequivocal as the opening of a joint account. *See* Columbus Nat'l Bank v. Kean, 165 F. Supp. 466 (D.C.R.I. 1958); *In re* Richardson, 28 Ill. App. 2d 20, 171 N.E.2d 94 (1960); Haller v. White, 228 Md. 505, 180 A.2d 689 (1962); *In re* Patterson, 348 S.W.2d 6 (Mo. 1961); *In re* Voegeli, 108 Ohio App. 371, 161 N.E.2d 778 (1959).

[36] Stewart v. Stewart, 228 Ga. 517, 186 S.E.2d 746 (1972); Jackson v. Jackson, 209 Ga. 85, 70 S.E.2d 592 (1952); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927); Harnell v. Nicholson, 119 Ga. 548, 46 S.E. 623 (1903).

[37] 163 Ga. 542, 136 S.E. 444 (1927).

> fails to measure up to the legal requisites of a valid gift as provided by our law.[38]

Clark v. Bridges was cited as controlling in 1960 when the Court of Appeals decided that a donee's claim was vulnerable to an allegation that the decedent opened the account solely for the purpose of increasing the deposit insurance available to him and without intention to make a gift.[39]

The use in Georgia of gift law principles to defeat survivors' claims in joint account cases is unfortunate. Gift law authority that a donor's retained control and dominion of a joint account prevents a gift, frustrates claims to death benefits that were intended along with those that were not. Although no quarrel can be made with the results of cases preventing unintended testamentary transfers, it may be hoped that Georgia lawyers and courts can articulate theories for defeating unintended benefits that do not jeopardize the typical intention of a joint account donor who does not intend a present gift but intends and expects that his donee co-depositor will be able to receive and keep balances on hand at death.

B. Trust Theory

The trust theory has not been generally accepted as a means of supporting the joint account in this state[40] or in other jurisdictions.[41]

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[38] *Id.* at 546, 136 S.E. at 445. The same reasoning applied in Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247 (1949).

[39] Brannen v. Cubbedge, 101 Ga. App. 393, 114 S.E.2d 152 (1960).

[40] Calhoun, *supra* note 15, at 373 (1971). *See* Spivey v. Methodist Home of the S. Ga. Conf., 226 Ga. 100, 172 S.E.2d 673 (1970). Indeed, in most cases the trust theory could not have been validly applied in Georgia before 1950 because of the existence of GA. CODE ANN. § 108-114 (1973) which provided that a trust could be created only if the beneficiary was a minor, mentally deficient, or habitually intemperate or wasteful person. In 1950, the section was impliedly repealed by GA. CODE ANN. § 108.111.1 (1973).

[41] *E.g.*, Packard v. Foster, 95 N.H. 47, 56 A.2d 925 (1948); Howard Sav. Institution v. Kielb, 66 N.J. Super. 98, 188 A.2d 452 (1961); *In re* Hoffman's Estate, 175 Ohio St. 363, 195 N.E.2d 106 (1963). The courts and commentators generally take the position that if a trust is created it is the donor-depositor who becomes the trustee and the donee who becomes the beneficiary. It could be argued, however, that the typical donor, though he realizes that he has conferred a present power of revocation on the donee, really intends that his donee have no right to the benefits of the account until the donor's death. This theory suggests that the transaction be viewed as making the donee the trustee of the donor's power to withdraw from the account. Thus, a beneficial life estate and general power remain in the donor; the donee receives a non-beneficial, present power and a beneficial future interest in a trust that is partly for his own use. *See* Wellman, *supra* note 2, at 661 (1965). This rationale has been expressly adopted by one court, Greenwood v. Beeson, 253 Ore. 318, 454 P.2d 633 (1969), and rejected by another, O'Hair v. O'Hair, 16 Ariz. App. 565, 494 P.2d 765 (1972).

In a few states, however, courts have concluded that the form of a joint account indicates an intent by the donor to retain legal ownership, while giving the donee an equitable interest in the funds.[42] Since a trust settlor can create rights in the beneficiary merely by declaring his intent to do so, the requirements of delivery and intent that are so troublesome under the gift theory are effectively avoided. This approach would, nonetheless, founder in Georgia where trusts of personalty as well as of realty are required to be evidenced by a writing.[43]

C. Contract and Contractual Joint Tenancy Theories

1. In General—The contractual nature of the joint account transaction is obvious. Each deposit is made pursuant to a detailed written deposit agreement between the depositor and a bank or savings and loan association, executed when the account is created. The debtor-creditor relationship that arises between bank and donor-depositor appears to extend to all persons named as depositors. Further, usually an understanding of some kind between the depositors can be related to the transaction. It is thus not surprising that many courts have considered the law of contracts in their efforts to explain the joint account.[44]

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[42] *E.g.*, Booth v. Oakland Bank of Sav., 122 Cal. 19, 54 P. 370 (1898); Bath Sav. Inst. v. Fogg, 101 Me. 188, 63 A. 731 (1906); Arbaugh v. Hook, 254 Md. 146, 254 A.2d 187 (1969); Hoboken Bank for Sav. v. Schwoon, 62 N.J. Eq. 503, 50 A. 490 (ch. 1901).

[43] GA. CODE ANN. § 108-105 (1973) provides that all express trusts must be in writing. The Georgia provisions for implied trusts focus on situations of fraud, inequity or oversight and are not a sound basis for establishing a trust from joint account agreements. *See* GA. CODE ANN. § 108-106 (1973). Moreover, the trust approach has been severely criticized for reasons that have no connection with statutes of frauds. *See* note 40 *supra*. One leading article identifies three objections: (1) the creation of a trust necessarily imposes fiduciary duties upon the depositor, duties which he neither contemplated nor desired; (2) although the depositor may have wished to postpone enjoyment by the donee, no evidence exists that he meant to separate legal from equitable interests, or place any restrictions on his own use of the funds; (3) the "donor-trustee" type of account has existed much longer than the joint account; thus, if the donor had really intended to create a trust, that form was readily available to him. Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596, 599 (1953). In his treatise on trusts, Professor Scott makes the additional point that, instead of creating a trust, the donor was merely "paying consideration to the bank for its promise made to him and the other." SCOTT, *supra* note 12, at § 58.6 (3d ed. 1967).

[44] *E.g.*, Spicer v. United States, 217 F. Supp. 44 (D. Kan. 1963); Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951); Bishop v. Bishop, 293 Ky. 652, 170 S.W.2d 1 (1943); Keller v. Collison, 395 S.W.2d 729 (Mo. Ct. App. 1965); Nashua Trust Co. v. Mosgovian, 97 N.H. 17, 79 A.2d 636 (1951); Chadrow v. Kellman, 378 Pa. 237, 106 A.2d 594 (1954); Johnson v. National Bank, 213 S.C. 458, 50 S.E.2d 177 (1948).

The reasoning of most courts that have relied on the "contract theory" is that the deposit creates a contract obligating the bank to pay as provided in the account.[45] The account provisions directing the bank to honor requests for withdrawals by the donor or his co-depositor, the donee, constitute contract terms creating rights in both parties. Assent to the arrangement by the donee, though possibly required by the bank so that it will have the protection of his signature on file, is unnecessary if third party beneficiary concepts are accepted.[46] If the donor and donee have concurred with the bank in the formation of the account, it would, of course, seem unnecessary to resort to third party beneficiary concepts.

Advantages of the contract approach include relief from gift law's requirements of delivery and donative intent, and a defense against charges that the transaction is testamentary since the interests of all parties arise at the time the account is created.

Certain drawbacks do, however, exist. For example, some courts adopting the contract analysis have applied the parol evidence rule to exclude evidence that the donor's intent was contrary to that expressed in the deposit agreement.[47] This is an unnecessary and unfortunate application of the parol evidence rule which should never be a bar to showing the reason for a transaction. The older idea that names on bank accounts are a peculiarly unreliable source of evidence regarding donative intention is preferrable to any notion that an apparent gift effected through the opening of a bank account cannot be explained away.[48]

Professor Kepner concluded that the deposit contract is inadequate as the sole means of validating a joint account because it merely instructs the bank as to the payments to be made and contains nothing determinative of the rights between donor and donee.[49] This point which is reflected in the Georgia cases discussed

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[45] *See* Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951); Bishop v. Bishop, 293 Ky. 652, 170 S.W.2d 1 (1943).

[46] Professor Corbin in his work on the law of contracts suggests the application of third party beneficiary theory to uphold the donee's rights as a beneficiary of the deposit contract between the donor and the bank. 4 CORBIN, CONTRACTS § 783 (1951).

[47] *E.g.*, Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955); Burns v. Nemo, 105 N.W.2d 217 (Iowa 1960); Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951); Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W.2d 817 (1950); Stanger v. Epler, 382 Pa. 411, 115 A.2d 197 (1955); First Security Bank v. Burgl, 122 Utah 445, 251 P.2d 297 (1952); Annot., 33 A.L.R.2d 569 (1954).

[48] *See generally* Bauer v. Crummy, 56 N.J. 400, 267 A.2d 16 (1970).

[49] Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953).

below, suggests that one should look beyond the contract between co-depositors and a bank in order to determine the full nature of the relationship between the parties. It is not a reason for denying the protection of explicit account terms to the bank[50] or for concluding that the donee-party may not point to the account as the source of some intended benefit.

2. Georgia Cases.—The clearest Georgia articulation of the contract theory for validating survivorship benefits in a money obligation in favor of "A or B," involved U.S. savings bonds instead of a bank account. Eschewing the opportunity to conclude that ownership of the bonds was determined by federal law, the court in *Knight v. Wingate*,[51] speaking through Chief Justice Duckworth, observed:

> The law of this State recognizes legal and equitable interests in contracts, and even though a third person is not a party to a contract, if he has an interest therein he may maintain an action in equity thereon. . . . We know of no law which would prevent an actual party to a contract from maintaining an action thereon, either in law or equity, to protect such interest as such party may have therein. His right is not impaired by the fact that another instead of himself paid the consideration for the contract. In the field of life insurance the law of this State recognizes the right of the insured to purchase with his own funds an insurance policy on his own life, to name a beneficiary to the proceeds of the policy payable at his death, and to reserve the right to change the beneficiary at any time during his life. In such a contract the beneficiary has no vested interest, but a mere expectancy, subject to be withdrawn by the insured at any time during his lifetime. . . . But when the insured dies without changing the beneficiary, the person named in the policy as beneficiary has a vested title to the proceeds. . . . We are unable to see any substantial difference on principle in the case of an insurance policy as just discussed and in the present case.[52]

Later in the opinion, Justice Duckworth attempted to narrow the

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[50] *Contra*, Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W.2d 140 (1963).

[51] 205 Ga. 133, 52 S.E.2d 604 (1949).

[52] *Id.* at 139, 52 S.E.2d at 608 (citations omitted).

gap between implications of his opinion and prior Georgia rulings:

> While this court, in *Bowen v. Holland*, 182 Ga. 430 (185 S.E. 720) . . . held, with reference to joint bank deposits or transactions where the relationships were similar to those here presented, that the law of gifts applied and that the survivor did not have title, yet in *Compton v. Hendricks*, 154 Ga. 808 (115 S.E. 645), by a unanimous decision, without an explanation of the reason for the judgment, it affirmed the judgment of the trial court in favor of the husband, where it appeared that with the wife's money the husband procured two bank time certificates of deposit, payable to the husband and wife, in a contest between the representative of the deceased wife and the husband over such certificates. The result there supports the ruling we now make.[53]

Knight v. Wingate was decided in the January Term, 1949; *Guest v. Stone*, discussed earlier in this article, was decided in the September Term of the same year. Presiding Justice Atkinson, who dissented in *Knight v. Wingate*, wrote the opinion in the later case and used different Georgia precedents than those relied upon by Justice Duckworth to demonstrate that a contract beneficiary had no right of recovery against the promisor, at least until the 1949 amendment to Code §3-108.[54] None of the cases relied on by Justice Duckworth are mentioned; indeed, no mention of *Knight v. Wingate* is to be found in *Guest v. Stone*.[55] This paradox may help explain why Georgia lawyers have not attempted to make direct use of the

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[53] *Id.* at 141, 52 S.E.2d at 610.

[54] GA. CODE ANN. § 3-108 (1962) provides:

> As a general rule, the action on a contract . . . shall be brought in the name of the party in whom the legal interest in such contract is vested. . . . The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract.

Prior to 1949 third party beneficiaries had no express statutory rights to bring such actions on the contract. The last sentence of § 3-108 was added by [1949] Ga. Laws 455 to provide such a right of action.

[55] Justice Duckworth in *Knight* relied on the following cases to support a third party's right to a cause of action in equity when he has an interest in a contract: Reid v. Whisenant, 161 Ga. 503, 131 S.E. 904 (1926); Stonecypher v. Coleman, 161 Ga. 403, 131 S.E. 75 (1925); Carruth v. Aetna Life Ins. Co., 157 Ga. 608, 122 S.E. 226 (1924); Sheppard v. Bridges, 137 Ga. 615, 74 S.E. 245 (1924). Without reference to *Knight* or its supportive authority, Justice Atkinson in *Guest* found no such cause of action prior to the amendment to § 3-108 by relying on the following cases: Veruki v. Burke, 202 Ga. 844, 44 S.E.2d 906 (1947); Ragan v. National City Bank, 117 Ga. 686, 170 S.E. 889 (1933); Gunter v. Mooney, 72 Ga. 205 (1883); Waxelbaum v. Waxelbaum, 54 Ga. App. 623, 189 S.E. 283 (1936).

contract analysis in later cases involving joint deposit agreements.

As conceded in the opinion in *Knight*, most Georgia precedents involving joint savings and checking accounts have framed the question whether the survivor-donee acquired an inter vivos interest in a joint account in terms of gift and joint tenancy theories instead of contract. Nonetheless, Georgia references to the joint tenancy concept are usually accompanied by assertions that it is a creature of contract. Consequently, the contract banner has been in evidence in joint account controversies and, as will be noted later, its presence has aided some opinions that have emphasized the intention of the parties as being of more importance than property law niceties. Indeed, as the materials that follow may demonstrate, the Georgia precedents come quite close to upholding Justice Duckworth's contract analysis. At the same time, they also continue to refer to gifts of joint tenancy interests; accordingly, much confusion of basic analysis remains.

3. Contractual Joint Tenancies in Georgia.—Several factors have led lawyers and courts to view the joint account as amounting to a joint tenancy, and not a mere three-party contract. Gift law rather than the law of contracts was once the only analysis that could explain how beneficiaries could derive rights from non-trust transactions between two other persons.[56] Also, the joint tenancy concept approximates the basic pattern in joint accounts which appear to give the co-depositors co-equal rights, with full rights for the survivor. Further, since joint tenants have co-equal rights of possession, the joint tenancy analysis offers an explanation of the phenomenon that a gift of an interest—that of a joint tenant—may have occurred between two persons even though the donor has retained a right to possess or control the subject matter. Hence, the old spectre of non-delivery can be met if the court is of a mind to uphold the transaction.

The push for a common law explanation of the relationship between joint depositors is furthered when, as in Georgia, the statutes governing joint accounts are viewed as bank protective only, and thus without meaning in disputes between co-depositors.[57] The re-

[56] The concept of third party beneficiaries having legal interests in contracts was not recognized in Georgia until 1949. *See* note 54 *supra*.

[57] *E.g.*, Georgia Sav. Bank & Trust Co. v. Sims, 332 F. Supp. 1306 (N.D. Ga. 1971); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927); Leonas v. Johnson, 122 Ga. App. 160, 176 S.E.2d 506 (1970); Quinn v. Forsyth, 116 Ga. App. 611, 158 S.E.2d 686 (1967); Nash v. Martin, 90 Ga. App. 235, 82 S.E.2d 658 (1954). *But see* Sams v. McDonald, 117 Ga. App. 336, 160 S.E.2d 594 (1968).

sultant question regarding ownership is not resolved by the anomolous right in the alternate apparently arising from a bank's promise to pay "A or B." The gap has been filled, not by primary inquiry as to what was intended or by explicit recognition of a new concept, but by application of the nearest analogy from existing patterns. Future developments may prove that a new concept actually has evolved, but the Georgia cases still describe it as a "joint tenancy."[58]

Indeed, the pressure to find some common law rationale to explain and uphold the joint account has brought the joint tenancy concept into Georgia although joint tenancies that are unaided by an obvious contractual context never have been accepted in the state and are explicitly rejected by the present Code, which provides: "Joint tenancy shall not exist in this State, and all such estates . . . shall be held to be tenancies in common."[59] A series of cases beginning with *Equitable Loan & Security Co. v. Waring*[60] makes it quite clear, however, that the ban against the survivorship feature is not absolute and that private parties may, by contract, provide for survivorship between themselves. In *Waring*, the court said:

> While the doctrine of survivorship as applied to joint tenancies has been distinctly abolished and does not exist in this state, there is no law of this state that we are aware of which prevents parties to a contract . . . from expressly providing that an interest in property shall be dependent upon survivorship. Of course, all presumptions are against such an intention; but where the contract or will provides, either in express terms or by necessary implication, that the doctrine of suvivorship shall be recognized, we know of no reason why [it] may not become operative under the laws of this State.[61]

It may be noted that the *Waring* case does not describe the relationship between parties to a joint account as a joint tenancy; rather, a contractual agreement for a right of survivorship is sug-

[58] *See, e.g.*, Taylor v. Citizens & S. Bank, 226 Ga. 15, 172 S.E.2d 617 (1970); Sams v. McDonald, 117 Ga. App. 336, 160 S.E.2d 594 (1968); Nash v. Martin, 90 Ga. App. 235, 82 S.E.2d 658 (1954).

[59] GA. CODE ANN. § 85-1002 (1970).

[60] 117 Ga. 599, 44 S.E. 320 (1903). *See also* Taylor v. Citizens & S. Bank, 226 Ga. 15, 172 S.E.2d 617 (1970); Wilson v. Brown, 221 Ga. 273, 144 S.E.2d 332 (1965); Sams v. McDonald, 117 Ga. App. 336, 160 S.E.2d 594 (1968); Nash v. Martin, 90 Ga. App. 235, 82 S.E.2d 658 (1954).

[61] 117 Ga. at 676, 44 S.E. at 353.

gested. It has been pointed out that no necessary connection arises between contingent rights of survivorship and the joint tenancy concept.[62] In spite of this fact, most other Georgia cases on the point appear to assume that the survivor takes, not merely because survivorship was intended, but because survivorship is a part of a joint tenancy which may be created by contract.[63] If the language of the *Waring* case had been followed more closely, no apparent reason would exist as to why a right of survivorship, without co-equal rights between the depositors before the donor's death, should not be fully recognized in Georgia today. In fact, the Georgia authorities dealing with the rights of joint owners in cases where one party has become incompetent or where the non-contributing party has made an unauthorized withdrawal reach precisely this result.[64]

It is unfortunate that the joint tenancy rhetoric continues to be prominent in Georgia joint account cases. If the typical joint and survivor account really is to be treated as a joint tenancy, as the cases and the statute[65] formerly governing joint deposits in savings and loan associations might lead one to believe, then the rights of the donee inter vivos would in all cases be equal to those of the donor. He would be entitled absolutely to withdraw or encumber one-half of the account balance. If he or the donor withdraws more than his share, an apparent right to an accounting would arise.[66] Clearly, these inter vivos consequences of the common law joint tenancy are not intended by the usual donor of a joint and survivorship account.

It is almost equally clear to one who looks to case results that the courts in Georgia will not foist these unwanted consequences on parties to joint deposits. One case that is of particular importance in demonstrating that the joint tenancy talk is not to be taken too seriously is *Georgia Savings Bank & Trust Co. v. Sims*.[67] Here, the court considered the effect on both a certificate of deposit and a joint passbook savings account in the name of the donor "or" Mrs. Lloyd of the appointment of a guardian for the originating deposi-

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[62] Agnor, *Joint Tenancy in Georgia*, 3 GA. ST. B.J. 29 (1966).

[63] *See* note 60 *supra*.

[64] Georgia Sav. Bank and Trust Co. v. Sims, 332 F. Supp. 1306 (N.D. Ga. 1971).

[65] GA. CODE ANN. § 16-431 (1971). The general protective provision for savings and loan associations offering joint accounts is found in the new Georgia Financial Institutions Code, [1974] Ga. Laws 705, to be codified as GA. CODE ANN. § 41A-3521.

[66] *See generally* Wood v. Wright, 238 Ark. 1004, 386 S.W.2d 248 (1965); Fecteau v. Cleveland Trust Co., 171 Ohio St. 121, 167 N.E.2d 890 (1960); Lucchetti v. Lucchetti, 85 R.I. 112, 127 A.2d 244 (1956); Jezo v. Jezo, 23 Wis.2d 399, 127 N.W.2d 246 (1964).

[67] 332 F. Supp. 1306 (N.D. Ga. 1971).

tor, Mrs. Sims. Mrs. Lloyd was held to have no interest in the certificate because of a finding that the bank lacked authority from the donor to issue the certificate in joint ownership form. The joint form of the savings account was authorized, however. As to this account, the court said:

> Mrs. Lloyd may not take the proceeds of the passbook account, even to the extent of one-half, because the survivorship clause was intended to be effective upon the death of Mrs. Sims, if not changed prior thereto. Mrs. Sims not being deceased, the Court follows the reasoning in the cases cited above to the effect that the joint tenancy was terminated upon the adjudication of incompetency.[68]

The idea that only one of two living, joint depositors may have any real, beneficial interest in the account is obviously inconsistent with the idea that they are joint tenants and, arguably, destructive of the chance of the donee party to receive anything as a survivor. Nonetheless, as pointed out by Chief Justice Duckworth in *Knight v. Wingate*, the idea that a present contract may create contingent rights that become enforceable at death if not altered by revocation or failure of the beneficiary to survive another is not a novel one. Hence, one can explain the result in the *Sims* case as a ruling in effect that joint accounts involve contingent contractual benefits for the donee-survivor, not present joint tenancies.

Other indirect support exists for the proposition that Georgia authorities may now discard the joint tenancy concept in relation to joint account controversies. In *Taylor v. Citizens & Southern Bank*,[69] the Georgia Supreme Court reversed the court of appeals which had denied survivorship benefits to a donee-depositor on the apparent ground that the deposit contract as signed by the donee did not contain any reference to a joint tenancy or to survivorship rights. Applying contract principles—that the intention of the parties should prevail in spite of the absence of a written reference to joint tenancy or survivorship—the court ruled that a conversation between the donor-depositor and a bank officer, in which the donor was assured that the "A or B" account format would serve his pur-

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[68] *Id.* at 1311. It should be noted that in *Sims* the court placed principal reliance on cases from Ohio where, as in Georgia, the common law joint tenancy concept has not been accepted. Ohio cases upholding survivorship rights in joint accounts have referred entirely to contractual principles, rather than to the "joint tenancy by contract" that has been described in Georgia cases.

[69] 226 Ga. 15, 172 S.E.2d 617 (1970).

pose of arranging for survivorship benefits, provided a basis for concluding that donor, donee and bank were parties to an agreement that included suvivorship benefits.

Also, in a 1970 decision[70] the court of appeals stated:

> Whether a joint tenancy, a tenancy in common, or some other relationship was intended to be created by the depositors as between themselves will appear from a contract, express or implied, between them, and this may be shown by circumstances such as the language on the signature card creating the deposit and indicating who is authorized to withdraw funds therefrom.[71]

Unfortunately, this language was uttered in an opinion that reversed a judgment on the pleadings in favor of a surviving co-depositor. Still, it can be pointed to as further proof of an era in Georgia in which courts and lawyers may describe survivorship rights in joint accounts as incidents of contracts that need not involve co-equal rights between living depositors.[72]

IV. Strength of Presumption of Survivorship Rights

The confusion over whether the contract or joint tenancy theory, or some combination of the two, provides the appropriate way of explaining how joint accounts may confer some right on donees has little to do with the principal, practical question regarding the Georgia joint account. Essentially, this question is: How reliable is the deposit transaction when a surviving donee-depositor's claim to the account balance remaining at death is challenged by the donor's estate? The question invites a look at the Georgia statutes dealing with joint accounts.

A. Georgia statutes

Until changed by a recent revision of the state's banking laws, the

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[70] Leonas v. Johnson, 122 Ga. App. 160, 176 S.E.2d 506 (1970).

[71] *Id.* at 161, 176 S.E.2d at 508.

[72] A trust theory for explaining why the only substantive right acquired by a joint account donee is the right to collect whatever remains in the account when and if he becomes the survivor, is described in note 41 *supra*. In Georgia, however, Ga. Code Ann. § 108-105 (1973), which requires trusts of personal property to be evidenced by a writing, would block use of this approach in the ordinary case where the application provided by the bank and the account provide the only written evidence of the understanding. On the other hand, the analysis might be useful in a case where correspondence or other writings was exchanged between co-depositors to express the usual understanding regarding a joint account.

Georgia Code offered inconsistent statutory treatment for joint accounts in banks, on the one hand, and savings and loan associations, on the other.[73] Code section 13-2039, dealing with bank accounts, tracks a familiar, national pattern by providing that a deposit made jointly in the names of two or more persons is payable to either, and that the payment of one party totally discharges the bank from liability for a withdrawal. Georgia cases uniformly have held that §13-2039 is purely bank protective and has no bearing on the rights of the parties to the account as between themselves.[74] The former savings and loan account provision was known as a "joint tenancy" type statute; it provided that a deposit made by any person in the name of himself and another, to be paid to either or the survivor, creates a joint tenancy with its incident right of survivorship.

Perhaps, the different treatment resulted from the history of the savings and loan association.[75] Originally, these organizations were uniquely local institutions, chiefly patronized by the smaller saver who well may have intended in the ordinary case that his joint account serve as his "poor man's will." Evidently, personnel in the savings and loan companies were more sensitive to the personal and estate planning needs of individual customers than were banking officials, possibly because the latter's customers included those with larger accounts whose joint owner arrangements may have involved joint ventures, and other, more varied purposes. In any event, treat-

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[73] The two code sections in question are GA. CODE ANN. § 13-2039 (1969) relating to commercial banks and GA. CODE ANN. § 16-431 (1969) relating to savings and loan associations. GA. CODE ANN. § 13-2039 (1969) provides:

> When a deposit has been made, or shall hereafter be made, in any bank in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons, whether the other be living or not; and the receipt or acquittance of the persons so paid shall be a valid and sufficient release and discharge to the bank for any payment so made.

GA. CODE ANN. § 16-431 provides:

> A State-chartered association or a Federal savings and loan association may issue accounts to two or more persons, as A or B, or as A or B or C (using the names of such persons) in which event any of such persons who shall first act shall have power to act in all matters related to such account whether the other person or persons named on such account be living or not. The title hereby contemplated and created shall be the full equivalent of the common law joint tenancy with right of survivorship.

Recent revision of the state's banking laws resulted in the 1974 enactment of the Georgia Financial Institutions Code, the new title 41-A discussed in notes 78-80 and accompanying text *infra*.

[74] *See* note 57 and accompanying text *supra*.

[75] *See generally* A. TECK, MUTUAL SAVINGS BANKS AND SAVINGS AND LOAN ASSOCIATIONS: ASPECTS OF GROWTH (1968).

ing banking customers differently from customers of savings and loan associations is currently unjustifiable insofar as the characterization of the relationship between co-depositors is concerned.[76] The recent statutory change should serve to reduce confusion among depositors.

Looking back, however, the old statutory dichotomy has served to heighten confusion in an already troubled area. Since it is construed as merely bank protective, §13-2039 has not been used to supply guidelines for disputes concerning ownership of the account balance after the donor's death. As suggested above, this circumstance may have spurred judicial efforts to fit the joint account into the traditional pattern of joint tenancy. Paradoxically, the potential of the explicit reference to joint tenancy in §16-431 as an obvious aid to upholding a donee's right of survivorship in a savings and loan account has been ignored in several cases.[77] If used, it might have had the effect not only of supplying the joint tenancy rationale for survivorship rights, but also of obviating discussion of whether a gift had occurred.

The recent revision of the Georgia Banking Laws[78] should exclude

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[76] Dramatic increases in the number of savings and loan association shareholders and the value of the assets involved has effectively obliterated any such distinction today. *Id. See also* Link, *Probate and Administration of Small Estates in Georgia: Some Proposals for Reform*, 6 GA. L. REV. 74 (1971). Yet the new Georgia Financial Institutions Code maintains the dual approach to the protective statutes, one for joint accounts in commercial banks—the new GA. CODE § 41A-1603—and another for joint depositors in savings and loan associations—the new GA. CODE § 41A-3521. *See* notes 78-80 *infra*.

[77] Wilson v. Brown, 221 Ga. 273, 144 S.E.2d 332 (1965) (court used "joint tenancy" theory); Brannen v. Cubbedge, 101 Ga. App. 393, 114 S.E.2d 152 (1960) (court used "gift" theory to defeat the survivor's interest); Nash v. Martin, 90 Ga. App. 235, 82 S.E.2d 658 (1954) (joint tenancy used to support the survivor's interest). Recently, however, the courts have become aware of the existence of section 16-431 and are applying it where appropriate. *E.g.*, Spivey v. Methodist Home of the S. Ga. Conf., 226 Ga. 100, 172 S.E.2d 673 (1970); Taylor v. Citizens & S. Bank, 226 Ga. 15, 172 S.E.2d 617 (1970); Bracewell v. Bracewell, 117 Ga. App. 553, 161 S.E.2d 390 (1968); Sams v. McDonald, 117 Ga. App. 336, 160 S.E.2d 594 (1968).

Another factor producing confusion is the use in § 16-431 of the term "joint tenancy" when that estate has been specifically abolished in Georgia. *See* GA. CODE ANN. § 85-1002 (1970). The statute explicitly "contemplates" the creation of a joint tenancy between the parties, the apparent purposes being to validate statutorily the right of survivorship in these cases. *See* note 57 *supra*. As previously noted however, the right of survivorship is not the only incident resulting when a conveyance is classified as creating a joint tenancy, and, while the donor usually intends to create the survivorship right, he rarely intends the other incidents such as joint inter vivos ownership. "Joint tenancy" should not be used as a short hand means of providing for survivorship when that is all that is intended. Preferable alternatives will be seen to exist in the UPC proposal.

[78] The new Financial Institutions Code of Georgia was passed on March 25, 1974. Title 41A, [1974] Ga. Laws 705.

these laws from controversies between co-depositors. The new statutes, apparently applicable to accounts opened before as well as after the effective date of April 1, 1975, continues the distinction between joint accounts in commercial banks and savings and loan associations by treating the two in different code sections. For accounts in commercial banks, it is provided:

> When a deposit has been made or hereafter shall be made in a bank in the names of two persons, payable to either, or to either or the survivor, such deposit or any part thereof, and interest or dividend thereon may be paid to either of said persons or to their order, and the receipt or order of the party so paid shall be a valid and sufficient release to discharge the bank from liability for payment. The foregoing right to pay either party shall not be terminated by the death or incompetency of the other party.[79]

In spite of its separate location in the Code, the new language applicable to joint accounts in savings and loan associations is different in only minor and insignificant details.[80]

Hence, as of April 1, 1975, both kinds of accounts are to be governed by statutes which are still basically bank protective. The new language provides greater protection for financial institutions than was previously available; both sections expand the bank shield provisions to include payments made to either party when the other party has died or become incompetent, and the commercial bank section even insures protection when the bank pays out to the order of either of the parties.

Regrettably, the new legislation does nothing for joint depositors who become embroiled in survivorship or other controversies between themselves or involving their estates. This failure of the recent statutes is somewhat curious, for surely banks as well as savings and loan associations have had to expend much time and money as they have sought to disentangle themselves from contro-

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[79] § 41A-1603, [1974] Ga. Laws 705.

[80] § 41A-3521, [1974] Ga. Laws 705 provides:

> When deposit has been made, or shall hereafter be made, in any building and loan association in the names of two persons, payable to either or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons; and the receipt or acquittance of the persons so paid shall be valid and sufficient release and discharge to the association for any payment so made. The foregoing right to pay either party shall not be terminated by the death or incompetency of any other party.

versies between depositors regarding ownership of joint accounts. The do-nothing approach of financial institutions to the problem of defining property interests in the very popular joint account can be justified only on the basis of an assumption that satisfactory legislation on the subject has not been developed. The authors submit that Part 1 of Article VI of the Uniform Probate Code offers a better idea. It is described subsequently in this article.

B. Georgia Case Law Concerning Survivors' Rights

Assuming that the statutes governing joint accounts are useless, what help can a surviving joint account donee obtain from Georgia case law when he is confronted with a claim by the decedent's estate alleging that the funds in the account came solely from the decedent and that no gift of an interest in the account was intended or consummated?

In this type of case, the courts have stated that a question of fact arises as to the ownership of the accounts, and the critical issue concerns the amount of evidentiary weight, if any, which should be assigned the deposit agreement.[81] That it should be accorded controlling significance can be supported by the proposition that its express terms are a convenient method of solving such disputes, particularly when both parties have signed the agreement and have thus signified their consent to be bound thereto. If these terms include express reference to survivorship, considerable significance could be attached to this aspect of the relationship even though other details are lacking or are vaguely expressed.

On the other hand, it has been argued that the deposit contract is not a reliable source of the parties' intent since it is a standard form drafted by the bank primarily for the bank's own protection and is used in a context that is devoid of effective opportunity for explanation or variation. This argument has some merit, particularly if the account was opened primarily to permit another to manage an enfeebled donor's funds. Also, as mentioned earlier, the deposit agreement is determinative merely of the bank's nonliability for payments made to either party and contains no terms dealing with ownership interests passing from donor to donee.[82] The

[81] *See* Taylor v. Citizens & S. Bank, 226 Ga. 15, 172 S.E.2d 617 (1970); Compton v. Hendricks, 154 Ga. 808, 115 S.E. 654 (1923); Sams v. McDonald, 117 Ga. App. 336, 160 S.E.2d 594 (1968); Nash v. Martin, 90 Ga. App. 235, 82 S.E.2d 658 (1954).

[82] Kepner, *The Joint and Survivorship Bank Accounts—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953).

Georgia approach regarding the weight to be given the agreement terms mirrors these sources of doubt.

Prior to the case of *Sams v. McDonald*,[83] a line of cases agreed that Georgia Code §13-2039 was solely for the protection of the bank and had no particular effect on the title to the account as between donor and donee.[84] In the *Sams* case, however, the court used language that might have started an important shift in the application of those cases. The deposit agreement itself contained language paraphrasing the bank protection language of the statute, and the court cited the prior cases for the proposition that this language "is but a paraphrase of Code §13-2039, is *for the association's benefit*, and has no applicability to the title to the money as between" the donor and donee.[85] Thus, the earlier cases which held that the *statute* had no effect on the title as between the parties were used to support a holding that the *deposit agreement* was similarly ineffective when it used the statutory language.

Two years later, the Georgia Supreme Court in *Taylor v. Citizens & Southern Bank*[86] clarified the matter a bit by stating that, where the intention of the parties is to create actual joint interests in the account, "the fact that language used on the signature card may have been originally placed there by the bank to expressly provide it with the protection given by Code §13-2039 will not invalidate the intent of the parties."[87] This statement suggests that no negative inference is to be drawn from the incorporation of bank protective statutory language giving both parties the right of withdrawal.

Still, no affirmative rule exists as to what probative value can be assigned the agreement terms. As indicated by the earlier quotation from *Leonas v. Johnson*,[88] the bank contract appears to be just one of a host of factors that Georgia courts may consider. It is of little comfort to donor-depositors who seek a reliable vehicle for conferring death benefits, or to a surviving donee, to be told that the court will take account of all of the circumstances in determining who will get the money on the donor's death.

Is there anything more definitive in the cases? The previous discussion has suggested that Georgia courts are fond of using gift

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[83] 117 Ga. App. 336, 160 S.E.2d 594 (1968).

[84] *See* note 57 *supra*.

[85] 117 Ga. App. at 342, 160 S.E.2d at 598.

[86] 226 Ga. 15, 172 S.E.2d 617 (1970).

[87] *Id.* at 18, 172 S.E.2d at 620.

[88] 122 Ga. App. 160, 176 S.E.2d 506 (1970). *See* quotation in text at note 71 *supra*.

concepts when they have concluded that a donee should not prevail against the deceased donor's estate. The question thus arises as to what factors have led the courts to deny benefits to the survivors. Clearly, survivors' rights are most tenuous when the account was established at a time when the donor was old, infirm or otherwise unusually susceptible to influence by persons proffering assistance. Not only is the motive of convenience for the person whose money is used obvious in these cases, but, depending on the circumstances, undue influence may also become a factor.

In one case, the court appears to have been influenced by allegations to the effect that the account in question was opened by the decedent only in order to increase the amount of deposit insurance applicable to her savings.[89] Unless this point is coupled with non-availability of a form of joint account that does not involve survivorship rights, it hardly explains express inclusion of survivorship rights, for the donor's having had one reason for opening an account does not mean that others did not exist.

Although persons in confidential relationship to the decedent are most likely to be among those favored by testamentary gifts, if the bank account transaction is viewed as inter vivos, survivors in this category unfortunately may have to contend with a presumption of undue influence which is likely to arise because they sign signature cards or otherwise assist in establishing a joint account.[90] Of course, circumstances other than the co-depositor's bearing a relationship of trust and confidence to the donor may suggest that the account was solely for the donor's convenience.[91] At the same time, if the convenience purpose is not shown by direct proof, the fact that a confidential relationship exists between the parties should not be seen as a source of doubt about the donor's intent to create beneficial survivorship rights for the donee. The transaction is essentially testamentary and Georgia courts should not presume that undue influence was exerted by survivors who are, quite apart from their role in establishing the account, obvious, natural objects of testamentary gifts by the decedent.

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[89] Brannen v. Cubbedge, 101 Ga. App. 393, 114 S.E.2d 152 (1960).

[90] *See* G. PALMER, TRUSTS AND SUCCESSION 580-81 (1968); Note, *Undue Influence In Inter Vivos Transactions*, 41 COLUM. L. REV. 707 (1941).

[91] *See* McGahee v. Walden, 216 Ga. 352, 116 S.E.2d 559 (1960); Childs v. Shepard, 213 Ga. 381, 99 S.E.2d 129 (1957); Doudy v. Jordan, 128 Ga. App. 200, 196 S.E.2d 160 (1973); Granado v. Augusta Fire Dep't Credit Union, 118 Ga. App. 157, 162 S.E.2d 870 (1968); Brannen v. Cubbedge, 101 Ga. App. 393, 114 S.E.2d 152 (1960).

Whatever his relationship to the donor, a joint account donee would be well advised to refrain from hastily cleaning out a joint account when he learns of the donor's terminal illness, and to wait instead for death to occur. The donee who acts precipitously will have to establish that the donor intended an inter vivos give-away, not only of half, but of all if more than half is withdrawn.[92] This rule poses an extraordinarily difficult burden. Also, as to sums withdrawn, he will have destroyed the account contract that might have served as a will if it had been left intact.

In summary, the problems concerning the Georgia joint account that do not appear to be dealt with adequately by Georgia law, or that are covered by guidelines that are too indefinite to be of much use in contested cases, are as follows:

1. Does the donee-depositor obtain any beneficial interest in the account at the time of its creation other than a mere technical interest sufficient to avoid the Statute of Wills in survivorship cases? If so, is it the interest of a joint tenant, an interest that permits the donee to retain all sums withdrawn as against the protests of the donor, or some other?

2. Is a donor-depositor who withdraws all or more than half of a joint account accountable to the donee for any excess over half, or is the donor's right of withdrawal one that permits him to obtain and retain full beneficial ownership of all sums withdrawn?

3. May creditors of the living donor-depositor gain any interest in more than the donor's apparent pro-rata share of an account? What rights, if any, do the creditors of a donee-depositor have during the donor's lifetime? Is the ability of the donor to disprove any intention to make a gift of half or any other amount of the account balance cut off by process on behalf of the donee's creditors that establishes a lien on the account, or by assertion by the bank of a right of set-off against an apparent credit of the donee?

4. If it is conceded that a donor may revoke an apparent interest in the donee by withdrawal before death, may the donor exercise his power of revocation by will?

5. What, if any, account form is available to enable one person to gain access for convenience of the donor to his accounts, without creating a relationship that protects the bank if it pays account

[92] *See* McGahee v. Walden, 216 Ga. 352, 116 S.E.2d 559 (1960); Leonas v. Johnson, 122 Ga. App. 160, 176 S.E.2d 506 (1970).

balances to the assistant after notice of the death of the account owner? If the only available vehicle involves a power-of-attorney arrangement, is this arrangement safe for the banker who pays out as directed by an agent in fact without knowledge that the principal has become incompetent or has died?

6. What weight, if any, is to be given to the joint account form as against a contention of the estate of the deceased donor-depositor that the surviving depositor should not be able to receive or retain the balance in the account as of the donor's death?

7. Must a donee-depositor sign a joint account contract with the bank in order to have any rights therein?

8. Must a joint account contract mention survivorship or joint tenancy in order to involve survivorship rights?

9. If a deposit contract recites that the parties to a joint account are "joint tenants," does this language raise any added presumption of co-equal beneficial ownership?

It is submitted that until fairly definite answers to these and other questions concerning the rights of co-depositors are provided by Georgia law, the popular joint account will remain a device of sharply limited utility, safe for use only in cases involving sums of money that are too small to be worth a determined challenge by the personal representatives of a decedent, and in close family situations where the prospect of challenge is nil because of the reluctance of survivors to cause any family disruption.

In addition, several problems regarding the trust account are unresolved in Georgia, many of which are suggested by New York experience and the recent recommendations of the New York Law Revision Commission.[93] While these difficulties may be of less concern than the basic ambiguities surrounding the joint account, Georgia should certainly take advantage of the lesson from New York and improve the trust account before its uncertainties cause obvious problems.

Finally, it is believed that the time has come to extend full legislative recognition to the pay-on-death account. The current trend of Georgia law concerning this form of account is toward its recognition. Financial institutions need legislative protection in payments made under this form of account. If such protection were enacted, the citizens of Georgia would be provided an unambiguous, reliable and simple device for transferring account balances at death.

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[93] *See* note 29 *supra*.

V. ARTICLE VI OF THE UNIFORM PROBATE CODE: AN ATTRACTIVE ALTERNATIVE

Part 1 of Article VI of the Uniform Probate Code (hereinafter referred to as the UPC Proposal, or UPC) offers a legislative scheme that could accommodate existing Georgia joint account contracts, protect financial institutions, and achieve the other objectives just noted. The UPC proposal is designed so as to facilitate its enactment separately from the rest of the Code. It recognizes what very few courts or legislatures have been willing to concede[94]—that the multiple-party bank account, in all of its several possible forms, demands recognition as an independently valid form of testamentary transfer, unhampered by the rigid common law requirements associated with conventional classifications and free from the technicalities of the law of wills.[95] Acceptance of this basic proposition removes all pressure to articulate a new or complex rationale for determining inter vivos ownership questions that arise between living parties to accounts. Hence, the UPC provides that in inter vivos disputes the parties own the account balance in proportion to their

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[94] All of the Georgia cases consulted have relied on one of the traditional theories to validate the joint and survivorship account. This approach seems to have been the practice of most courts throughout the United States, very few evidencing the independent attitude toward joint bank accounts which was expressed in Menger v. Otero County State Bank, 44 N.M. 82, 87, 98 P.2d 834, 837 (1940):

> In creating a joint bank account with right of survivorship, it is of no importance that the particular terms "joint ownership" and "joint account" are used; but the controlling question seems to be whether the person opening the account intentionally and intelligently created a condition embracing the essentials of joint ownership and survivorship. No one formula is set up as controlling or required; the courts are controlled not by the name given the relationship or estate, but by the substance of the transaction.

Accord, O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943).

[95] UPC section 6-106 provides:

> Any transfers resulting from the application of Section 6-104 are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to Articles I-IV of this Code.

The UPC is the product of the National Conference of Commissioners on Uniform State Laws and is viewed by many as the organized bar's answer to charges made in the bestseller, How To AVOID PROBATE (1965) by N. Dacey, in which it was claimed that the bar refuses to modernize the antiquated and complicated probate laws of most states because of vested interests in the fees generated by cases governed by such time consuming procedures. Some of the topics covered by the UPC in an effort to provide a simplified and effective uniform probate statute are: Decedents' Estates, Executors & Administrators, Intestate Succession, Wills, Contracts for Wills, Ancillary Administration, Guardian & Ward, Conservators, Fiduciaries, Probate Courts, and Multiple Party Accounts. For a book that explains the operation of all of the provisions of the UPC see UNIFORM PROBATE CODE PRACTICE MANUAL (ACLEA, 1972).

respective contributions, except as otherwise indicated by special facts and gift law principles.

The UPC proposal also reflects the belief that many lawsuits involving joint accounts could be avoided if depositors were offered some comprehensible choices in forms of accounts. In Georgia, the donor-depositor is generally offered only one form of joint account. Normally, it is presented to him on a small, signature card on which microtechnology has produced printing that is well-nigh illegible without magnification, particularly as viewed with the aged equipment of the typical person who is moved to make estate plans. If he reads it at all, the depositor will find that the major thrust is that he and his co-depositors agree to release the bank from all liability for payments made to either of the named parties. The donor is neither required nor expected to inform anyone of his particular intentions concerning ownership and enjoyment of the funds during his life, or upon his death. It is little wonder that so many joint accounts end up in court for a costly and time consuming determination of intentions which should have been clearly provided for at the outset.

Aware of the variety of reasons that compel donors to open joint accounts with and without survivorship, the UPC drafters have provided three forms of accounts—"joint accounts," "P.O.D. accounts," and "trust accounts"—and have referred to them collectively as "multiple-party accounts." Each has its own set of rules regarding the rights of the parties during their lives and after the death of either, and the statute creates presumptions (conclusive in the case of the P.O.D. account) that the parties in fact intended the incidents of the chosen form.

The coverage of the UPC is fairly expansive. Unlike the Georgia statutory treatment, no distinction is made among accounts in commercial banks, savings and loan associations, credit-unions and other organizations defined by the legislation. Thus, section 6-101(c) of the UPC defines "financial institution" to include:

> any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitations, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions . . . .[96]

[96] UNIFORM PROBATE CODE § 6-101 (3).

The legislation is designed to apply to accounts created before its adoption as well as those created later. In fact, this feature of the legislation is the principal reason for describing both the trust account and the P.O.D. account although these forms reflect identical intentions. The proposal would permit admission of evidence of actual intent by a donor-depositor, differing from the rules set down for joint and trust accounts. Since these are the only accounts that have been prevalent until now and since actual intent rather than an intention prescribed by the statute will govern existing rights, the legislation should withstand attacks charging unconstitutional retroactivity.

The proposal contains separate provisions describing the rights of the three groups that become involved in account controversies. Sections 6-103 through 6-105 deal with the rights between the depositors, or as between the depositor and P.O.D. payees or trust beneficiaries. Section 6-107 describes the rights between creditors of a deceased depositor and surviving depositors or account beneficiaries, and the role *vis a vis* an account of the debtor's executor or administrator in cases involving unpaid creditors. Sections 6-108 through 6-113 assure the continued protection of the depositary financial institution. The official comments explain the drafters' purpose in providing these separations as:

> to achieve the degree of definiteness that financial institutions must have in order to be induced to offer multiple-party accounts for use by their customers, while preserving the opportunity for individuals involved in multiple-party accounts to show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter.[97]

A. *Rights of the Parties, P.O.D. Payees, and Beneficiaries*

The types of accounts expressly recognized by the UPC,[98] including the option of a joint account with or without survivorship, corre-

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[97] UNIFORM PROBATE CODE § 6-102, Comment.

[98] The joint account, P.O.D. account, and trust account each involve survivorship features. Section 6-104(d), however, recognizes that some donors may wish to limit the donee's interest only to his (donor's) lifetime and thus provides:

> In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

UNIFORM PROBATE CODE § 6-104(d).

spond to the general purposes for which donors typically create joint accounts. For each of these four account forms the rights of the parties (defined as those persons with present rights of withdrawal), P.O.D. payees, and beneficiaries are described, as well as the consequences of the death of any party. Thus, the "joint account" in the form "payable to John or Bob," regardless of whether it includes a right of survivorship, is presumed to belong:

> during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.[99]

Section 6-101(6) defines "net contributions" to be the sum of all deposits made to the credit of a party minus all withdrawals made by or on behalf of that party, plus his pro rata share of all dividends and interest. Although under this formula difficult problems of proof occasionally may arise as to the amounts of deposits and withdrawals to be charged to each depositor,[100] these problems exist at present. Since bank protection is achieved by other provisions, it is possible to avoid any rigid, conceptual compartments for resolving disputes between joint depositors regarding the myriad of possible relationships that they may have intended. Thus, co-depositors may "be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them".[101]

A surviving party's rights after the death of another party are described in section 6-104(a). In accordance with what is thought to be the intent of most creators of joint accounts, the provision creates the presumption that the balance on deposit belongs to the surviving party. Joint accounts that protect banks but expressly negate survivorship rights between the parties are, however, authorized and defined. The simple "A or B" account, as well as one in favor of "A and B," is presumed to be a survivorship account, but the account that proclaims itself to be "without survivorship" or uses other appropriate language to negate survivorship will not confer death benefits on anyone.

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[99] *Id.* § 6-103(a).

[100] Since section 6-101(b) provides that only the "withdrawals made by or for [a party] which have not been paid to or applied to the use of any other party" are to be charged to the party in question, it will sometimes be necessary for a party to establish for whose use particular withdrawals were made.

[101] UNIFORM PROBATE CODE § 6-103, Comment.

As noted earlier, evidence that survivorship was not intended may be introduced to rebut the statutory presumption that arises when a right of survivorship is not negated by the account language. In addition to aiding the statute's constitutionality as applied to pre-existing accounts, this concession to actual intent reflects the belief that the community needs time to adjust to the new idea that account forms will have an important bearing on beneficial ownership.

Does the concession to actual intention also serve to make the legislation useless? It is believed not. Survivorship is presumed. Moreover, as joint accounts which are explicitly without survivorship and single party accounts with valid P.O.D. provisions become familiar and more commonly used, instances where believable evidence that survivorship in a joint account was not intended though not expressly negated should become more difficult to generate. In time, the stability intended by the statute should be realized.

In the case of two or more surviving parties, the right of survivorship continues between them, their respective interests during life being the sum of their previous interests according to net contributions plus an equal share of the amount owned by the deceased party at the time of his death.

The second type of multiple-party account, the "P.O.D. account," normally will take the form of "John, P.O.D. Bob." In describing the inter vivos rights to the P.O.D. account, UPC section 6-103(b) provides:

> A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a) of this section.[102]

The P.O.D. account represents the most obvious departure from the traditional notions of what is and what is not to be governed by the requirements of the Statute of Wills. On the other hand, the Georgia authorities discussed earlier demonstrate that the "departure" in this state will be more apparent than real. The P.O.D. payee has no interest whatsoever in the account as long as the original payee is living. Yet section 6-106 provides that the transfer to the P.O.D. payee upon the original payee's death is not testamentary. The concept should become widely used if it is given legislative sanction.

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[102] *Id.* § 6-103(b).

If two or more original payees are named, section 6-103(b) provides that, upon the death of one, the rights of the surviving, original payee are governed by the provisions of section 6-103(a) for joint accounts. Similarly, section 6-104(b) provides that in the case of multiple, original payees no interest passes to the P.O.D. payee until the death of the original payee (or the last surviving one). Death benefits payable to two or more P.O.D. payees belong to them in equal shares with no right of survivorship among themselves unless the deposit agreement stipulates to the contrary.

Why, it might be asked, is survivorship between two or more P.O.D. payees rejected when survivorship continues as between two or more persons who survive the death of another party to a joint account? The UPC assumes survivorship only as between persons who, because of their original role in the account, either as donor-depositor or as donee-depositor with a co-equal present power over the account, are likely to have assented to the arrangement. P.O.D. payees, who cannot control the form of the account until the death of the original payee, should not be forced at that time to make an immediate withdrawal in order to avoid a survivorship relationship with another selected by the deceased donor. For the same reason, the UPC provides that the right of survivorship is not presumed between multiple beneficiaries of the trust account.

For example, given an account in the form "U, V, W; P.O.D. X, Y, Z," upon the death of "U", "V" and "W" would own the account in proportion to their own net contributions and each also would own one-half of the amount on deposit which was owned by "U" at his death. If "V" were the next to die, the entire account would pass to "W". When "W" finally dies, and not until then, ownership passes to the surviving P.O.D. payees. Thus, if "X" has died before "W" the balance, according to section 6-104(b), would pass equally to "Y" and "Z" only, nothing going to "X's" representatives. As between "Y" and "Z," a right of survivorship is not applicable; hence, upon "Y's" death after "W," his half of any remaining balance would remain as a part of his estate.

Neither section 6-103(b) governing the inter vivos ownership of the P.O.D. account nor section 6-104(b) concerning survivorship rights makes any mention of the possibility of the presumption created by those sections being rebutted by evidence to the contrary. The contrast with the provisions permitting rebuttal of the survivorship presumption between parties to a joint account makes it clear

that the drafters intended the survivorship rights of a P.O.D. beneficiary to be irrebutable. The reason should be obvious: Why would a depositor name another as P.O.D. beneficiary of his bank account unless he meant exactly what he said? Of course, instances where a P.O.D. account is found to have been created as the result of mistake, duress, fraud or undue influence can be remedied without opening the door in the ordinary case to evidence that the principal depositor did not mean what his contract said. The law of wills provides a useful analogy.

The third type of multiple-party account is the "trust account" in the form, "John in trust for Bob," or "John, as trustee for Bob." Inter vivos ownership of the trust account is described in section 6-103(c):

> Unless a contrary intent is manifested by the terms of the account or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.[103]

Thus, the inter vivos rights in the trust account are generally the same as those in the P.O.D. account except that the statutory presumptions, conclusive in the case of the P.O.D. account, are rebuttable for trust accounts. The section allows rebuttal of the presumptions by proof of contrary terms in the transaction or evidence of an irrevocable trust. Evidence of lack of intent to confer any benefit, either presently or at the "trustee's" death, should be admitted so that the statute may be applied to existing accounts. Evidence to show an intention to create an irrevocable trust is permitted because the account form suggests an irrevocable trust. An intention of the account trustee (donor) actually to divest himself permanently of beneficial ownership would most likely occur in trusts declared for young children.[104]

The details of the rights of survivorship in the trust account are set forth in section 6-104(c):

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[103] *Id.* § 6-103 (c).

[104] The safer way to provide for an apparently irrevocable gift to a child would be to comply with the terms of the Georgia Gift to Minors Act, GA. CODE ANN. §§ 48-301, *et seq.* (1969).

> [O]n the death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent; if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.[105]

As was true with respect to the parties' inter vivos rights, the rights to the account upon the death of the trustee follow those of the P.O.D. account[106] except that evidence may be introduced in rebuttal of the statutory presumptions. Thus, in the absence of evidence to the contrary, an account involving multiple trustees continues to belong to the trustees during their lives in accordance with the "joint account" rules of section 6-103(a) and passes to those beneficiaries surviving the last trustee, with no right of survivorship among them.

The final section dealing with the rights of the parties is 6-105 which provides that the form of the account as to the rights of survivorship under section 6-104. These rights cannot be altered by the will of the erstwhile beneficial owner, but any "party" [as defined in section 6-101(7)] may alter the form of the account by a signed order or request which is received by the financial institution during the party's lifetime, as well as by withdrawal.

B. Rights of Creditors

Recalling that "party" is defined to include only those persons presently entitled to payment from the account during their lifetimes, the ownership interest of any party to a multiple-party account will, of course, be subject to attachment by his creditors. Upon the death of a party, section 6-107 operates in some cases to defeat, or at least diminish, the interests of the survivors who, by the terms of section 6-104, normally would take the entire balance on deposit. To protect creditors of the decedent and the decedent's spouse and children to the extent that these family members may claim probate assets ahead of unsecured creditors, the drafters have

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[105] UNIFORM PROBATE CODE § 6-104 (c).

[106] *See* text at p. 772 *supra*.

provided in section 6-107[107] that no multiple-party account will be effective to transfer the decedent's beneficial ownership so as to defeat the claims of such persons. If the deceased party's estate is insufficient to cover debts, taxes, administration expenses, and the statutory allowances of the surviving spouse and minor or dependent children, a creditor may compel the estate representative to proceed against a surviving account party, a P.O.D. payee, or a beneficiary of a trust account to whom a transfer of the deceased's interest in the account was made pursuant to section 6-104. Recovery by the representative is limited to the lesser of the amount in the account that the defendant received from the decedent upon his death, and the amount necessary to discharge the outstanding claim. The section includes a two-year-from-death period of limitations on these proceedings, which means that those who take interests as survivor, P.O.D. payee, or beneficiary of multiple-party accounts will face a limited period of uncertainty as to whether multiple-party account benefits they may have withdrawn after death will be theirs to keep. Survivors of today's joint accounts have no assurance, however, that they will be able to keep balances attributable to contributions of a deceased co-depositor received from joint accounts, and their potential liability to the decedent's estate is not related to the insufficiency of normal probate assets to meet obligations of the decedent, nor to any clear period of limitations. Also, the benefits procured by section 6-107 in its protection of claimants, surviving spouses, and minor or dependent children would seem to outweigh any inconveniences caused to transferees.

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[107] UNIFORM PROBATE CODE § 6-107 states:

> No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to his personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party unless before payment the institution has been served with process in a proceeding by the personal representative.

After all, if it were not for recognition of the multiple-party account, the surviving co-depositor probably would have taken as a legatee under the deceased's will and thereby be subjected to the risks of expenses and inconveniences of probate administration.

C. *Financial Institution Protection*

The legislation makes it quite clear that the institution's right to make payments without fear of liability is not limited to payments according to the parties' proportional ownership of the account. Rather, any portion of the balance on deposit in a multiple-party account may be paid, upon a proper request,[108] to or for any party to the account. Thus, section 6-102 provides:

> [T]he provisions of Sections 6-103 to 6-105 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of Sections 6-108 to 6-113 govern the liability of financial institutions who make payments pursuant thereto, and their set-off rights.[109]

Section 6-108 further relieves the financial institution of responsibility to make inquiries concerning net contributions:

> A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.[110]

Sections 6-109 through 6-111 deal with financial institution pro-

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[108] "Request" is defined as:

> a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal of payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal.

Id. § 6-101(12).

[109] *Id.* § 6-102.

[110] *Id.* § 6-108.

tection in making payments from the three forms of accounts. In the case of a joint account, with or without survivorship, the debtor institution is absolutely protected by any payment made to any other party, but it may not safely pay the personal representative of a deceased party. Safe payment can be made to the personal representative of a deceased party only upon proof that the account expressly negates survivorship, or that the decedent in fact survived all other parties to the account and so became entitled to the entire account.

The institution's awareness of the incompetency of a party does not qualify its protection and its knowledge of a party's death does not affect its protection for payments to a surviving party even though the account explicitly provides against survivorship. The result is different in a case where the institution pays in disregard of a written notice by a party that it is not to pay in accordance with the contract, or where it has been served with process in a proceeding to prevent payment. By contrast, existing Georgia law does not extend clear protection to financial institutions in relation to a joint account that explicitly denies survivorship rights.

Payments of P.O.D. accounts are governed by sections 6-110. Payment may be made to any original party during his life without regard to his proportion of beneficial ownership. Upon the death of all parties and presentation of sufficient proof thereof, the institution may permit withdrawals by the P.O.D. payee. In the case of a P.O.D. account naming multiple P.O.D. payees, the financial institution apparently is protected in its payments to any P.O.D. payee who presents proof that he has survived all of the original parties, even though beneficial ownership may be shared by several P.O.D. payees. Finally, because the rights of one of several original payees are governed by the survivorship terms of section 6-103(a), payment may be made to the personal representative of a deceased original payee solely upon proof that his decedent survived not only the P.O.D. payee(s), but also all of the other original payees.

Section 6-111 contains the rules for payment of trust accounts. As in the case of the P.O.D. and joint accounts, payment may be made at any time to a party to the account, in this case any trustee, without fear of liability. Consistently with section 6-104(c), which provides that any sums remaining on deposit at the death of the trustee pass to the beneficiary, section 6-111 explains that payment may be made to a surviving beneficiary upon proof that he survived

the trustee or trustees. As was also the case in the P.O.D. account, the representatives or heirs of a deceased trustee may withdraw the funds only if able to supply proof that the decedent was the last survivor of all persons named on the account either as trustee or beneficiary. The financial institution may, however, be liable for payments made to the deceased trustee's representatives if it pays after receiving written notice from a beneficiary's representative claiming a vested interest in the account which is not subject to the condition of surviving the trustee.

It is to be noted that the restrictions on a bank's ability to make safe payment are correlated to circumstances involving an assurance of notice to the bank. Thus, because of the possibility that it will be unaware of the death, the bank is protected in paying a surviving joint account party even though the account specifies that it is not subject to survivorship. The personal representative of a deceased party whose letters are proof of death and of his office is not entitled to payment unless the account expressly negates survivorship or unless other special facts indicating ownership of the account by his decedent's estate are shown to the bank.

The final financial institution protective provision is section 6-113, wherein it is stated:

> Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.[111]

Not only is the financial institution permitted to set-off against the amounts of a multiple-party account to which its debtor is the beneficial owner, the latter portions of the section make it clear that if the net contributions cannot be proven, with the result that the portion of the account belonging to the debtor is unknown, the financial institution will be allowed to set-off according to the presumption that the account belongs equally to all parties having a

[111] *Id.* § 6-113.

present right of withdrawal. No protection of this sort is to be found in either the currently effective, or the recently enacted "bank protective" statutes in Georgia.

VI. CONCLUSION

The advantages of Part I of Article VI of the UPC over present Georgia law are obvious. Georgia decisions have discussed common law concepts of gift, contract, trust, and joint tenancy in relation to instances where multiple-party accounts appear to have been used primarily as will substitutes. These theories lead to inconsistent results and their continued use has led to uncertainty and confusion in what should be a relatively simple area. Legislation concerning multiple-party accounts that is designed solely with the interests of banking institutions in mind is clearly inadequate. It is time for the legislature to take more comprehensive action concerning the law of joint and survivor accounts and to aid Georgians who choose to use deposit contracts as a means of designating death beneficiaries of bank balances. The UPC provides a comprehensive and available model statute for our legislators. Its passage, which need not await acceptance of all or any other part of the Uniform Probate Code, not only would benefit individual depositors involved in joint accounts, but also would continue and strengthen the protection in relation to multiple-party accounts now extended to financial institutions. The choice of account forms contemplated by the UPC proposal should aid depositors to choose accounts appropriate to their purposes. If this occurs, Georgia law will provide a desirable degree of certainty and predictability for multiple-party accounts, thus reducing litigation and the number of instances when banks are called into depositors' lawsuits.[112] Finally, improved reliability of multiple party accounts as non-testamentary methods of passing money at death should enhance their popularity and bring consequent advantages to deposit institutions.

[112] It is interesting to note that despite the existence of the so-called "bank protection" statutes in Georgia, financial institutions frequently find themselves forced to appear in lawsuits arising out of joint accounts. *See, e.g.*, Georgia Sav. Bank & Trust Co. v. Sims, 332 F. Supp. 1306 (N.D. Ga. 1971); Taylor v. Citizens & S. Bank, 226 Ga. 15, 172 S.E.2d 617 (1970); Wilder v. Howard, 188 Ga. 426, 4 S.E.2d 199 (1939); First Nat'l Bank v. Langford, 126 Ga. App. 325, 190 S.E.2d 803 (1972); Savannah Bank & Trust Co. v. Keane, 126 Ga. App. 53, 189 S.E.2d 702 (1972); Granade v. Augusta Fire Dep't Credit Union, 118 Ga. App. 157, 162 S.E.2d 870 (1968); Greeson v. Farmers & Merchants Bank, 50 Ga. App. 566, 179 S.E. 191 (1935); Smith v. Gormley, 47 Ga. App. 823, 171 S.E. 735 (1933); First Nat'l Bank v. Sanders, 31 Ga. App. 789, 122 S.E. 341 (1924).