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Expert Analysis

Joint Bank Accounts: Friend or Foe?

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Many of us have joint bank accounts, and have clients who own joint bank accounts. Joint accounts can be useful in many instances, including where multiple parties want ownership of and access to the funds in the account (for example, spouses share a checking account or brokerage account), or where an elderly or infirm account owner wants assistance with bill pay, check writing or other banking functions (for example, a daughter is added to her mother's checking account to pay mom's monthly utility bills). While both of these scenarios are common, there is an important consideration for account owners and their estate planning attorneys—is the account in question truly a joint account, or is it merely a convenience account? While this may appear to be a simple question, this issue is ripe for litigation and frequently plays out in the courts after one of the account owners passes away.

Banking Law §675 provides that a "deposit of cash, securities, or other property … in the name of such depositor or shareholder and another person and in form to be paid or delivered to either, or the survivor of them, such deposit … shall become the property of such persons, as joint tenants … and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them." BL §675(a). The statute further provides that the making of such a deposit shall, "in the absence of fraud or undue influence, be prima facie evidence … of the intention of both depositors … to create a joint tenancy and to vest title to such deposit … and additions … in such survivor." BL §675(b).

Therefore, when a deposit is made or an account formed in accordance with the statute, there is a rebuttable presumption that the parties intended to create a joint account, with right of survivorship upon a co-tenant's death. This means that the surviving co-tenant "is entitled to the account proceeds unless the heirs of the deceased can rebut the presumption of joint tenancy or show fraud or undue influence, a burden that is often difficult to meet." Biagi, James B., *Effect of Signature Card on Disposition of Joint Bank Account upon Death or Co-Owner under New York Banking Law*, 5 Beijing L. Rev. 260, 261 (2014).

To the contrary, a mere "convenience account" does not provide the same rights of survivorship to a co-tenant. Banking Law §678 provides that when a deposit is made "in the name of a depositor and another person and in form to be paid or delivered to either 'for the convenience' of the depositor, the making of such deposit … shall not affect the title to such deposit or shares and … the other person shall have no right of survivorship in the account." BL §678(1). Convenience accounts are frequently created to give the co-tenant access to the funds to pay bills or make other financial transactions on behalf of the account owner, as a matter of convenience. The co-tenant does not have the right to withdraw funds from the convenience account, except to benefit the depositor.

It is important to note that the statutory presumption of joint tenancy established in BL §675 "will not be triggered unless the signature card for the account in question specifically references rights of survivorship." *Matter of Estate of Farrar*, 129 A.D.3d 1261, 1263 (3d Dept. 2015); *see also Matter of Klecar*, 207 A.D.2d 732 (1st Dept. 1994).

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Language such as "payable to either or the survivor" would suffice (Biagi, supra at 261), but just the word "or" between the two named account owners would not. *Matter of Timoshevich*, 133 A.D.2d 1011 (3d Dept. 1987). If the presumption does not apply, the burden is on the surviving account owner to establish, by clear and convincing evidence, that a joint tenancy with right of survivorship was intended by the decedent. Biagi, supra at 262.

Even if the presumption of joint tenancy is triggered by language on the signature card, other evidence may be used to rebut the presumption in favor of a finding that the account was established for mere convenience. The burden to do so is upon the estate or surviving heirs of the deceased account owner. Factors to be considered include the source of the assets used to fund the account; whether the decedent had exclusive possession of the checkbook for the account; whether account statements were received by one or both parties; whether the surviving co-tenant ever withdrew funds to pay his or her own expenses; and whether a subsequently-executed will or other testamentary plan demonstrates a contrary intent. *Matter of Timoshevich*, 133 A.D.2d at 1012; *Matter of Corcoran*, 63 A.D.3d 93 (3d Dept. 2009). Other evidence of fraud, undue influence by the surviving co-tenant, or lack of capacity of the decedent may also be probative. *Matter of Johnson*, 7 A.D.3d 959 (3d Dept. 2004), lv. to app denied, 3 N.Y.3d 606 (2004).

Practically, these issues should be considered in all stages of estate planning and post-death estate administration. When meeting with a new estate planning client, attorneys should request information about all of the client's assets, including joint accounts. Consider probing the client about the circumstances of the joint account, particularly if the account constitutes a significant portion of the client's estate or if the account is titled in the name of one intended beneficiary, to the exclusion of others. The following questions may be useful during these discussions:

- Why did you establish this joint account?
- What is the source of the funds in this account?
- Does your joint tenant make deposits or withdrawals?
- Who has possession of the checkbook and account statements?
- Request a copy of a recent account statement to examine the title of the account, including whether any survivorship language is included (such as "JTWROS" or something similar).

Is the account in question truly a joint account, or is it merely a convenience account? While this may appear to be a simple question, this issue is ripe for litigation and frequently plays out in the courts after one of the account owners passes away.

It is also important to ascertain the client's intent with respect to the account, and to explain that by naming a co-tenant, they may be disposing of the account in a manner inconsistent with their will. If the account is intended as a convenience account, consider whether a power of attorney may provide another alternative for the co-tenant to assist the client with banking.

After a client passes away, these issues should be re-examined in the context of the administration of the estate. Children of the decedent may be surprised to learn that a sibling received a larger portion of the estate because the sibling was named as a co-tenant on a joint account. If the estate is subject to federal or state estate tax, surviving co-tenants may also be surprised to learn that they are responsible for a larger share of the estate taxes. These issues may lead to litigation within the estate, including claims of undue influence or fraud. Objections may be filed in the judicial accounting proceeding, alleging that joint assets were mere convenience accounts and should be brought back into the estate for distribution to the beneficiaries.

When Banking Law §678 was being considered by the Legislature, the Advisory Committee to the Legislature on EPTL and SCPA (which Judge Radigan chaired) was in favor of its enactment and many Surrogates hoped that a statutory provision allowing for convenience accounts would reduce the possibility of litigation within the estate. Unfortunately, banking institutions hesitate to offer convenience accounts and you will find very few banks that offer them in the State of New York. Notwithstanding, it is important to evaluate all circumstances surrounding the creation of the account to ascertain the true intent of the depositor, because establishing an account as a "joint account" at a banking institution will not prevent other beneficiaries from making a claim that the account was actually intended to be a convenience account.