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Introduction

In the ten years that have now elapsed since work on the Uniform Probate Code (UPC) was begun,[1] it has been adopted by the National Conference of Commissioners on Uniform State Laws, accepted by the House of Delegates of the American Bar Association, and enacted by the states of Idaho[2] and Alaska.[3] By some standards, this may seem a meager track record for ten years' work; and it must be admitted, even by the most optimistic observer, that it falls short of a precipitous movement toward adoption. Nevertheless, one should note that proposals of extraordinary magnitude and far-reaching impact of this type tend to be viewed with an initial caution that melts away as the plan proves workable in the early adopting states. For example, the Uniform Commercial Code was adopted by only six states during the first seven-year period following its adoption by Pennsylvania (1953-1960); and then the following

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[1] The UPC had its genesis during meetings of the Real Property, Probate and Trust Law Section of the American Bar Association in 1962, when a subcommittee was created to revise the Model Probate Code. For background information on this project, as well as a UPC bibliography by the Code's Chief Reporter, see Wellman, "Law Teachers and the Uniform Probate Code," 24 J. Legal Ed. 180 (1972).

[2] Idaho Code §§ 15-1-101 to 15-7-307, eff. July 1, 1972.

[3] Alaska Stat. §§ 13.06.005-13.36.100, eff. Jan. 1, 1973.

seven years (1961-1967) saw forty-three jurisdictions falling into line.

Therefore, although only two states have adopted the UPC intact at this point, the following facts suggest a track record which is much better than adoptions alone might indicate:[4]

(1) The UPC had a strong influence on the new Maryland probate code, with which it is substantively identical in most provisions;

(2) The new Pennsylvania codification has been along UPC lines;

(3) New Jersey, now in the middle of probate reform, has legislation before it which will cause its new probate code to be virtually the same as the UPC; and

(4) The UPC, or major portions thereof, is currently before the legislatures of Colorado, Texas, and Michigan.

In addition, the Joint Editorial Board for the UPC has recently announced that the UPC either has been or will be introduced in each of the following states in 1973: Arizona, California, Delaware, Florida, Hawaii, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, South Dakota, Vermont, Washington, and Wisconsin.[5] Thus, all indications lead one to conclude that the UPC will be a major national document in the near future.

The UPC is structured along the same lines as the UCC, with which bankers are already familiar. That is to say it follows a division into separate articles dealing with different, though allied, subject matters; these articles are in turn further broken down into parts and sections in order

[4] Straus, "Is the Uniform Probate Code the Answer?" 111 Trusts & Estates 870 (1972).

[5] UPC Notes 5 (March 1973).

to facilitate treatment of the problems involved. The seven articles of the UPC are:

I. General Provisions, Definitions and Probate Jurisdiction of Court
II. Intestate Succession and Wills
III. Probate of Wills and Administration
IV. Foreign Personal Representatives; Ancillary Administration
V. Protection of Persons Under Disability and Their Property
VI. Non-probate Transfers
VII. Trust Administration
VIII. Effective Date and Repealer

Importance of the UPC to Banks

Part One of Article VI, "Multiple-Party Accounts," is of greatest importance to bankers because it will enable them to increase the services that they now offer to their customers, thereby attracting new accounts, while at the same time gaining virtually complete protection in an area where numerous dollars have been spent on litigation in the past.

Some eight years ago, Norman Dacey published his best-selling book, *How to Avoid Probate* (1965) which, though oft maligned, did at least prove, in becoming a best-seller, how many people are concerned with avoiding the high cost of probate as well as its attendant delays. Anyone knowledgeable in the area of estate planning can testify that this is not a new development. For a variety of reasons, some legal and some not—cutting costs, shrouding dispositions with secrecy, eliminating taxes, hindering creditors, etc.—people have been seeking to avoid probate through some testamentary substitute ever since the Statute of Wills

in 1540 gave individuals the privilege of making a testamentary disposition of their property.

It would seem that these individuals have been highly successful in this regard. During the first half of 1971, for example, 552 estates were admitted to probate in the City of Richmond, Virginia, while (according to the Virginia Bureau of Vital Records and Health Statistics) 1,542 Richmond residents died.[6] Thus, approximately 64 percent of the estates during this period were settled without any probate proceedings. And a number of the estates that were probated contained assets that passed outside of the probate proceedings due to some kind of contractual, trust, survivorship, or similar arrangement.

Testamentary Substitute Bank Accounts

One of the most popular testamentary substitutes involves a bank account[7] which may be in any one of a number of forms, all having the same substantive goal—allowing the depositor to retain complete control over the account during his lifetime and passing the balance on hand at the date of the depositor's death to a named individual without the intervention of any probate proceedings. However, a look at a digest of the cases shows that in many instances when the depositor dies, the survivor finds the administrator or executor of the depositor's estate (or possibly a creditor) asserting a claim to the balance left in the account at the depositor's death.[8] In the absence of any

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[6] Johnson, "The Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation," 7 U. Rich. L. Rev. 99 (1972).

[7] This popularity is due to a widespread misconception, viz., " 'I want Nora to have that money. You know, a bank account with two names is iron-clad.' " Kittredge v. Manning, 317 Mass. 689, 691, 59 N.E.2d 261, 262 (1945). It is probable that the large-scale advertising of the survivorship feature of United States Savings Bonds, when registered in joint ownership, has encouraged this misconception.

[8] See generally 10 Am. Jur. 2d, "Banks" §§ 369-389.

controlling statute, the courts have sometimes decided these cases on an inter vivos gift theory, sometimes on a trust theory, and sometimes on a third-party beneficiary contract theory.[9] In addition, various courts indulge a variety of presumptions (of gift, of gift in certain cases involving related depositors, of convenience only, etc.).[10] Thus, it is no surprise to find that the cases are not consistent from one jurisdiction to another, sometimes holding for the survivor and sometimes holding for the depositor's personal representative on basically the same facts. On occasion, this inconsistency between the cases occurs within the same jurisdiction, leaving the status of the law extremely unsettled.[11]

Although some states have enacted legislation to control these accounts, too often this legislation is in the form of "bank protection" statutes that omit any treatment of the rights of the parties to the account. That is, the statute will typically provide that if the bank makes a good faith payment to the survivor after the death of the original depositor, the bank cannot be forced to pay again if it is determined in later proceedings that the survivor was not entitled to the balance in the account after all. But the statute says nothing about the rights to the account as between the depositor and the personal representative of the decedent.[12]

The UPC seeks to eliminate the inextricable confusion that attends this area of the law with a comprehensive plan that involves giving full effect to the depositor's intent while also giving absolute protection to the financial institution involved, as the following discussion will attempt to show.

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[9] Atkinson, *Wills* § 40 (2d ed. 1953).

[10] Kepner, "The Joint and Survivorship Bank Account—A Concept Without a Name," 41 Calif. L. Rev. 596 (1953); Kepner, "Five Years More of the Joint Bank Account Muddle," 26 U. Chi. L. Rev. 376 (1959).

[11] Note, 53 Colum. L. Rev. 103 (1953).

[12] Note 10 *supra.*

Definitions

It is traditional for a code to begin with a listing of definitions, and the UPC is no exception to this necessary procedure. However, while the article under consideration contains fifteen separate definitions, three will suffice for the purposes of this discussion. The phrase "multiple-party account" is restricted to the three following types of account when they are used for a personal, nonbusiness purpose: (1) joint accounts, whether or not any mention is made of any right to survivorship; (2) P.O.D. accounts; and (3) trust accounts where the relationship is established by the form of the account and the deposit agreement with the financial institution.[13] In the last case there is no subject of the trust other than the sums on deposit in the account —sometimes referred to as a "Totten" trust, "savings bank" trust, or "tentative" trust.

The UPC uses the word "account" very broadly to include any deposit of funds between one or more depositors and a financial institution, in one of the three forms listed above, whether it be a checking account, savings account, certificate of deposit, share account, or other like arrangement.[14] Finally, the phrase "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.[15]

Organization of the Sections Relating to Multiple-Party Accounts

Having established its basic definitions, the UPC next proceeds to alert the reader to a division of its sections,

[13] UPC § 6-101(5).
[14] UPC § 6-101(1).
[15] UPC § 6-101(3).

identifying those sections that apply to the parties, payees, or beneficiaries of multiple-party accounts when they are in controversy with each other, as distinguished from those sections that govern the liability of financial institutions that make payment pursuant thereto and their right of setoff.[16] The UPC expressly provides that there is no cross-application of these sections. That is, those sections dealing with the rights and duties of the parties, payees, and beneficiaries have no effect on the position of the financial institution presented with a request for a withdrawal and vice versa.[17]

The drafters of the UPC believed that separating these relationships would enable the UPC to better serve its constituents (depositors and financial institutions) who have different goals and problems.[18] The UPC seeks to accomplish this dual service by making the form of the account govern when dealing with the rights and duties of the financial institution. There is thus afforded the element of certainty required in order for financial institutions to handle multiple-party accounts on the volume basis indispensable to an efficient and profitable operation. On the other hand, it allows inquiry into the substance of the matter —regardless of the form—when dealing with the immediate parties, payees, or beneficiaries of the multiple-party account in order to attain as just a result as possible. Similarly, the discussion that follows will first examine the rights and duties of the parties, payees, and beneficiaries during their lifetimes and as they die, and then will focus on the role of the financial institution vis-à-vis multiple-party accounts.

Lifetime Ownership of the Multiple-Party Account

In some jurisdictions the law recognizes the creation of a joint bank account as the creation of a true joint

[16] UPC § 6-102.
[17] UPC §§ 6-102, 6-112.
[18] Official Comment to UPC § 6-102.

tenancy with each of the tenants owning an equal share of the account, regardless of who might have made the deposit.[19] This, of course, results in a gift tax exposure if the amount of the interest in the deposit that passes to the other joint tenant exceeds the amount of the annual exclusion.[20] It also results in liability on the part of the original depositor who, ignorant of the legal ramifications involved, is charged with making an excessive withdrawal after taking out over one-half of *his* (so he thinks) money.[21]

Under the UPC, joint accounts are *not* treated as creating a joint tenancy between the parties thereto insofar as ownership of the deposit is concerned. Instead, the deposit belongs to the parties in proportion to their net contributions thereto unless there is clear and convincing evidence of a different intent.[22] It is believed that this more nearly conforms to the intent of the average depositor who opens a joint account with another.

Looking at the other multiple-party accounts, the UPC provides that P.O.D. accounts belong to the depositor during his lifetime and that the P.O.D. payee has no rights therein unless he survives the depositor.[23] Similarly, the tentative or Totten trust belongs to the depositor/trustee during his lifetime, and the beneficiary has no rights therein unless there is evidence of intent to the contrary on the face of the account. Of course, if the evidence is clear and convincing that an irrevocable, rather than Totten, trust is intended, the account belongs beneficially to the beneficiary.[24]

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[19] Ison v. Ison, 410 S.W.2d 65 (Mo. 1967).

[20] Reg. §§ 25.2511-1(e), 25.2511-1(h)(5).

[21] See Surrogate Nathan R. Sobel's discussion of New York law in "Joint Property: Its Virtues and Vices" (Panel Discussion), 111 Trusts & Estates 446 (1972).

[22] UPC § 6-103(a).

[23] UPC § 6-103(b).

[24] UPC § 6-103(c).

Survivorship Rights in Multiple-Party Accounts

The right of survivorship is the grand incident of joint bank accounts that has made them so popular as testamentary substitutes. It has already been noted that the desire for survivorship is currently subject to being defeated in a number of jurisdictions. The UPC provides that in the absence of clear and convincing evidence of a different intent at the time the parties open a joint account, a decedent's interest passes to his joint tenant at death instead of to his estate.[25] If there is more than one joint tenant surviving, the decedent's interest passes in equal shares to the survivors.[26] As to the P.O.D. accounts, the UPC provides that on the death of the depositor/creator of such an account (or death of the last depositor, if more than one), the P.O.D. payee or payees then alive succeed to the account in equal shares.[27] Should one of the payees die after the account has thus vested and remains unwithdrawn, his interest passes to his estate. In other words, there is no survivorship between P.O.D. payees after the depositor's death has vested the account in them, unless the terms of the deposit agreement expressly provide for survivorship.[28]

Similarly, in the Totten trust cases, the sum on deposit goes to the beneficiaries surviving at the death of the last depositor/trustee, absent clear and convincing evidence of a contrary intent.[29] As in the P.O.D. cases, there is no survivorship between beneficiaries after the depositor's death has vested the account, unless the terms of the account or deposit agreement expressly provide for survivorship.[30]

The drafters of the UPC did want to give effect to the

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[25] UPC § 6-104(a).
[26] *Id.*
[27] UPC § 6-104(b).
[28] *Id.*
[29] UPC § 6-104(c).
[30] *Id.*

desire for the benefits of a survivorship account. However, it was not their purpose to force the incident of survivorship on every multiple-party account. Accordingly, provision is made for use of a deposit form negating survivorship between the parties.[31] The depositor who does not wish the incident of survivorship to attach may use such a form at the time he opens the account. He may also take steps during his lifetime to effect a change in the account designation if he has a change of mind.[32] It cannot be done thereafter, because the UPC prohibits the change of beneficiary or defeat of survivorship by will.[33]

Financial Institution's Protection During Lifetime of Parties

After having established that the ownership of the sums on deposit in the multiple-party account during the lifetime of the parties is a matter of fact which will be determined by the parties' net contributions or intent, these questions naturally arise: "How is the financial institution going to protect itself when one of the parties requests a withdrawal of all or a part of the deposit? Will the financial institution be liable if a party withdraws more than his proportionate share?"

The UPC not only provides that 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;[34] it emphatically states that any multiple-party account may be paid, on request, to any one or more of the parties without any liability on the part of the finan-

[31] UPC § 6-104(d).
[32] UPC § 6-105.
[33] UPC § 6-104(e).
[34] UPC § 6-108.

cial institution, even though that party is making a wrongful withdrawal.[35] In other words, the bank may rely on the form of the account and ignore its substance. If the depositor is willing to trust his cotenant by placing his name on the account, then the depositor must assume full responsibility for his cotenant's dereliction and not expect the financial institution to protect him from the person he has enabled to commit the wrong against him.

Financial Institution's Protection on Death or Disability of Parties

When dealing with P.O.D. or Totten trust accounts, the financial institution is concerned with both its rights during the lifetimes of the parties, payees, and beneficiaries, and its rights arising after their deaths. However, in the joint account cases, the financial institution is concerned with the possibility that one of the cotenants may become incapacitated. What risk does the financial institution assume if it allows one tenant to withdraw all or a part of the joint account while the other tenant is under a legal disability?

Again, the financial institution gains virtually absolute protection under the UPC, which here provides that even though one of the parties to a joint account is incapacitated or deceased, the financial institution may properly honor the withdrawal request of any other party without regard to the death or incapacity.[36] If all of the parties to the joint account are dead and the personal representative of one of them is seeking to withdraw from the account, however, the financial institution must require him to present proofs of death establishing that his decedent was the last to die in order to gain complete protection.[37] The "proofs of death" referred to do not involve any kind of legal proceeding.

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[35] UPC §§ 6-108, 6-112.
[36] UPC § 6-109.
[37] *Id.*

The UPC expressly provides that exhibition of death certificates (or a variety of other proofs) will suffice.[38]

In much the same fashion, in the case of P.O.D. accounts, before payment can properly be made to any P.O.D. payee or his personal representative, the financial institution must require presentation of proofs of death showing that the P.O.D. payee survived all persons named as original payees.[39] In the event that the P.O.D. payee predeceases the original depositor/payee, the original depositor/payee may of course withdraw by simply making demand on the financial institution, since it is still regarded as his deposit during his lifetime. If he fails to make withdrawal before his death, however, his heirs or personal representative may withdraw upon presenting proofs of death to the financial institution showing that the decedent was the survivor of all other persons named on the account either as original payees or at P.O.D. payees.[40]

Lastly, in the Totten trust cases, the financial institution must require proofs of death establishing that the beneficiary survived all of the depositor/trustees as a condition of making a valid payment to the beneficiary.[41] If the depositor/trustee survives the beneficiary, he of course can withdraw at any time; but after his death the personal representative or heirs of a deceased depositor/trustee must present proofs of death establishing that their decedent was the survivor of all other persons named on the account, either as trustee or beneficiary.[42]

Financial Institution's Right of Setoff

The common law recognized a banker's right of setoff or lien when the bank occupied a creditor-debtor relation-

[38] UPC § 6-101(9).
[39] UPC § 6-110.
[40] *Id.*
[41] UPC § 6-111.
[42] *Id.*

ship with one of its depositors.[43] This right has been recognized and extended by legislation and is sometimes a matter of contract between the parties as well.[44]

While expressly refraining from qualifying any rights so established, the UPC goes on to provide that if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right of setoff against the account in which the party has or had immediately before his death a present right of withdrawal.[45] The amount of the account subject to setoff is that proportion to which the debtor is, or was immediately before his death, beneficially entitled.[46]

What if the financial institution is unable to prove the extent of the debtor's net contributions? In the absence of proof to the contrary, one is presumed to own an equal share with all parties having a present right of withdrawal.[47]

Conclusion

While the foregoing presentation is only intended as a summary of the UPC's provisions in the area of multiple-party accounts, as opposed to the definitive elucidation, it may be at least sufficient to suggest the much-needed certainty and uniformity which the UPC will bring to a confused and confusing area of the law. The beneficiaries of this advance will be the public, who will have another alternative to probate in appropriate cases, and financial institutions, who will have another service to market. For these reasons it is suggested that the banking community will want to lend its enthusiastic support when the UPC is introduced into any given jurisdiction.

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[43] Studley v. Boylston Nat'l Bank, 229 U.S. 523, 33 S. Ct. 806, 57 L. Ed. 1313 (1913).

[44] See generally 9 C.J.S., "Banks and Banking" §§ 296-309.

[45] UPC § 6-113.

[46] *Id.*

[47] *Id.*