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JOINT, TOTTEN TRUST, AND P.O.D. BANK ACCOUNTS: VIRGINIA LAW COMPARED TO THE UNIFORM PROBATE CODE.†

*J. Rodney Johnson**

Litigation involving the survivorship rights of parties to joint accounts has been before the Supreme Court of Virginia on ten occasions since 1955.¹ These ten cases, plus one older one,² constitute all of Virginia's case law on this subject. Instead of attempting a chronological analysis of the development of this case law, it is proposed to state such rules as now exist and compare them with the results that would be obtained under the new Uniform Probate Code.³ In addition, attention will be focused on the statutes that deal with the rights of parties and financial institutions in deposit accounts to see how they compare with their counterparts under the UPC. Finally, an attempt will be made to explore certain omissions in Virginia's law and to see what relief the UPC might provide.

JOINT ACCOUNTS

The law is now settled in Virginia that two persons may open a

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1. *Robbins v. Grimes*, 211 Va. 97, 175 S.E.2d 246 (1970); *Campbell v. Campbell*, 211 Va. 31, 175 S.E.2d 243 (1970); *Cooley v. Cox*, 209 Va. 811, 167 S.E.2d 317 (1969); *Haynes v. Hurt*, 209 Va. 447, 164 S.E.2d 671 (1968); *Wilkinson v. Witherspoon*, 206 Va. 297, 142 S.E.2d 478 (1965); *Stevens v. Sparks*, 205 Va. 128, 135 S.E.2d 140 (1964); *Quesenberry v. Funk*, 203 Va. 619, 125 S.E.2d 869 (1962); *Johnson v. McCarty*, 202 Va. 49, 115 S.E.2d 915 (1960); *Wrenn v. Daniels*, 200 Va. 419, 106 S.E.2d 126 (1958); *King v. Merryman*, 196 Va. 844, 86 S.E.2d 141 (1955).

2. *Deal's Adm'r. v. Merchants and Mechanics Sav. Bank*, 120 Va. 297, 91 S.E. 135 (1917).

3. The UNIFORM PROBATE CODE (hereinafter cited as UPC) was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August, 1969. In addition to influencing recent legislation in Maryland and Wisconsin, it has been adopted virtually intact in Idaho, Alaska, Arizona (effective January 1, 1974) and North Dakota (effective July 1, 1975). It was introduced as legislation in Colorado, Michigan, and Texas in 1972, and it either has been introduced or will be introduced as legislation in the following states in 1973: California, Delaware, Florida, Hawaii, Minnesota, Missouri, Montana, Nebraska, Ohio, South Dakota, Vermont, Washington, and Wisconsin. Straus, *Is the Uniform Probate Code the Answer?* 111 TRUSTS & ESTATES 870 (Nov., 1972); 4 UPC NOTES 5 (March, 1973); 5 UPC NOTES 1, 3 (June, 1973).

deposit account in such a way that they will be regarded as joint owners so long as the both of them shall live, with the survivor taking the balance on hand at the death of the other.⁴ These accounts may be divided into four separate categories for the purposes of convenient treatment. The first category deals with accounts opened in what might be classified as a "short-form" designation. For instance, the account might be opened in the form of "A or B, and subject to the check of either of us or the survivor",⁵ "A or B or survivor",⁶ "A and B as joint tenants with right of survivorship, and not as tenants in common",⁷ or the deposit contract might provide that the deposit is owned "jointly, with right of survivorship and be subject to the check or receipt of either of them or the survivor. . . ."⁸ In all of these "short-form" cases, regardless of whether dealing with a savings account in a bank⁹ or savings and loan association¹⁰ or a checking account in a bank,¹¹ the quoted language, standing alone, has not resulted in the incident of survivorship attaching.

Survivorship has been abolished between joint tenants in Virginia by a statute¹² that has been held applicable to deposit accounts.¹³ While another statute creates an exception to this rule ". . . when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others",¹⁴ the court has felt that the language quoted in the "short-form" cases above has failed to meet the test of this exception. The court has, however, recognized the possibility that one might transfer a beneficial interest in such an account on the theory of a common law gift.¹⁵ Here, though, the presumption has been made that

4. *Wilkinson v. Witherspoon*, *supra* note 1.

5. *King v. Merryman*, *supra* note 1.

6. *Wrenn v. Daniels*, *supra* note 1.

7. *Stevens v. Sparks*, *supra* note 1.

8. *Quesenberry v. Funk*, *supra* note 1. The Court does not supply the quoted language in its decision but it was before the Court in Record No. 5419 at page 3.

9. *King v. Merryman*, *supra* note 1; *Quesenberry v. Funk*, *supra* note 1, and *Stevens v. Sparks*, *supra* note 1.

10. *Stevens v. Sparks*, *supra* note 1.

11. *Stevens v. Sparks*, *supra* note 1; and *Wrenn v. Daniels*, *supra* note 1.

12. VA. CODE ANN. § 55-20 (1950).

13. *King v. Merryman*, *supra* note 1.

14. VA. CODE ANN. § 55-21 (1950).

15. *King v. Merryman*, *supra* note 1.

the one despoiting the funds did not intend to make a gift to his cotenants, but instead created the account for his own convenience,¹⁶ that is, the one furnishing the funds for the deposit merely wished to put his cotenant in a position where the cotenant, acting as agent, could obtain funds from the joint account for the depositor. This presumption of convenience is said to become stronger if the depositor is ill or infirm at the time of creating the account.¹⁷ Of course this presumption may be rebutted by the surviving tenant establishing that the subjective intent of the depositor was to make a donative transfer to him. In the resolution of this factual issue, parol evidence is admissible to show the true intent of the depositor,¹⁸ and, if the surviving tenant testifies, the hearsay rule is relaxed and “. . . all entries, memoranda, and declarations . . . (of the depositor) relevant to the matter in issue may be received as evidence.”¹⁹ The outcome of the cases in this “short-form” category, then, will depend on the resolution of a factual issue in each case—the subjective intent of the depositor.

The second category of cases deals with accounts opened in what might be classified as a “long-form” designation. When the first of these cases arose in 1965, it caused the court to remark that “. . . never before, in the cases coming before us, have we encountered language in a signature card as conclusive as (this)”²⁰ There, in addition to the account card containing the ordinary language of “joint tenants with right of survivorship,” the card contained the following language which the court classified as “crucial”:²¹

. . . [I]t is agreed by the signatory parties with each other and by the parties with you that any funds placed in or added to the account by any one of the parties *is and shall be conclusively intended to be a gift and delivery* at that time of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account. . . (Emphasis in original)²²

16. *Id.*

17. *Id.*

18. *Quesenberry v. Funk*, *supra* note 1.

19. VA. CODE ANN. § 8-286 (1950).

20. *Wilkinson v. Witherspoon*, *supra* note 1, at 301.

21. *Wilkinson v. Witherspoon*, *supra* note 1, at 304.

22. *Id.*

Although the court stated that the quest was still for the true intent of the depositor, as it was in the "short-form" cases, the court went on to hold that in the face of such express language of intent contained in the account card in these "long-form" cases, the presumption of convenience adopted in the "short-form" cases would "pale."²³ Following what it referred to as a "contract-theory," to distinguish those previous cases that had been decided on the common law gift theory, the court announced that since the language adopted by the depositor in these "long-form" cases is a clear manifestation of intent on his part that the account should belong to the cotenant on the death of the depositor, the requirements of Va. Code Ann. § 55-21 (Repl. Vol. 1969)²⁴ are satisfied, and the incident of survivorship attaches to the account without the necessity of supplying external evidence of intent.²⁵

There is one fairly recent case²⁶ that fails to fit neatly into either of the two categories described above. The account designation in *Colley v. Cox* would cause it to be classified as "short-form" due to the absence of the "crucial" language referred to above. In this case the court stated that "[o]ur decision here is controlled by *King v. Merryman*. . ."²⁷ which was the case in which the court recognized the common law gift theory with its attendant presumption of convenience. However, the court, in *Colley*, went on to hold that ". . . under the facts of this case the presumption never comes into play. The rights of the parties here must be determined by the rules pertaining to the interpretation of contracts."²⁸ Although the court recognized that if the presumption had come into play the testimony relied upon by the surviving cotenant to rebut it ". . . would be persuasive . . ."²⁹, the court concluded that:

23. *Wilkinson v. Witherspoon*, *supra* note 1, at 305.

24. This is the section requiring that the intent to have survivorship must "manifestly appear" from the tenor of the instrument in order to escape the statutory abolition provided for in VA. CODE ANN. § 55-20 (1950).

25. While the court, in *Wilkinson*, did go on to note that the evidence before it was consistent with an intent to make a gift, in the next two cases to be decided on the contract theory, *Campbell v. Campbell*, *supra* note 1, and *Robbins v. Grimes*, *supra* note 1, the court disposed of the issue on the basis of the deposit card language alone.

26. *Colley v. Cox*, *supra* note 1.

27. *Colley v. Cox*, *supra* note 1, at 815.

28. *Colley v. Cox*, *supra* note 1, at 814.

29. *Id.*

In the absence of such intention (to create a right of survivorship), manifestly appearing, either from the tenor of the instructions given to the bank at the time the deposit was made, or in the form of the deposit, no survivorship account was created.³⁰

Whether this case represents a temporary departure from the previously established gift theory, whether it represents a complete abandonment of the gift theory in favor of the contract theory, or whether it merely adds another requirement to the gift theory, *viz.*, that the intent to make a gift must be disclosed to the bank upon creation of the account, is uncertain.

The third category of cases deals with accounts which, although in "short-form" designation, consist of funds belonging to both of the tenants rather than to one alone. In such a case, instead of the presumption of convenience being applicable, no presumption exists in favor of either tenant, and the burden of proving that the deceased tenant deposited his funds in the account for his convenience only falls on those claiming through him.³¹

The fourth category of cases deals with joint accounts between a husband and wife that are payable to either, or payable to the survivor. In this class of cases, statutes provide that the balance on hand at the death of the first to die shall vest in the surviving spouse if the account happens to be in a bank,³² trust company,³³ or industrial loan association.³⁴ However, there are no corresponding statutes in those sections of the Virginia Code dealing with joint accounts in savings and loan associations or credit unions. Since the Virginia Supreme Court has held that in the absence of a statutory presumption, succession to the balance of a joint account depends on the intent of the depositor,³⁵ it would seem that these latter cases (joint accounts between husband and wife in a savings and loan association or a credit union) would have to fall into category one, absent the use of a long form card. It should be much easier to

30. *Colley v. Cox*, *supra* note 1, at 817, 818.

31. *Haynes v. Hurt*, *supra* note 1.

32. VA. CODE ANN. § 6.1-73 (1966).

33. The Virginia Banking Act is expressly made applicable to trust companies by VA. CODE ANN. § 6.1-4 (1966).

34. Industrial Loan Associations are made subject to the Virginia Banking Act by VA. CODE ANN. § 6.1-228 (1966).

35. *King v. Merryman*, *supra* note 1.

overcome the presumption of convenience in these cases because of the special relationship between the parties.³⁶ Thus, this statutory discrepancy in the treatment of identical deposits, in different financial institutions, will probably cause no harmful consequences other than putting the surviving spouse to the necessity of proving intent as a condition precedent to having a right to withdraw. It does serve, however, to point up a lack of consistency between these articles, that has no apparent justification for existing.

TOTTEN TRUSTS

In order to illustrate a statutory discrepancy in the deposit account area that does make for different results, we might consider the following case: Tom, Dick, and Harry are good friends who have each inherited \$10,000 and each of them, having no present need of the funds, decides that he would like to place his money in such a way that he could be assured of having access to it for the remainder of his life and the balance on hand at his death would pass to his son. As the men discuss their common desire, one mentions a magazine article he has just read that describes a Totten trust.³⁷ As he explains it, this device seems to fit their needs perfectly, and the next day each of the men goes to a financial institution and opens an account in the form of "Father, in Trust for Son." The next week Tom, Dick, and Harry are killed in a boating accident. Their sons, who are each sixteen years old, go to their fathers' financial institutions to claim their Totten trust accounts and find that (1) Tom, Jr., whose father opened his account in a credit union, can immediately withdraw the \$10,000, even though he is a minor;³⁸ (2) Dick, Jr., whose father opened his account in a savings and loan association, must wait until he is eighteen years old in order to withdraw

36. This statement assumes that parol evidence is still admissible to show the subjective intent of the depositor. See *Quesenberry v. Funk*, *supra* note 18. It further assumes that the holding in *Colley*, *supra* note 30, will not be followed literally.

37. A trust created by the deposit by one person of his own money in his own name as a trustee for another and it is a tentative trust revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as delivery of the pass book or notice to the beneficiary and if the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor. BLACK'S LAW DICTIONARY 1682 (4th ed. 1951).

38. VA. CODE ANN. § 6.1-207 (1972).

his \$10,000 without the intervention of a guardian;³⁹ and (3) Harry, Jr., whose father opened his account in a bank, may not get anything, at any time.⁴⁰

Although it is possible to offer an argument in favor of any one of these three results, the average person might consider it indefensible that all three exist and that the determination of which applies in any given case revolves around the character of the financial institution in which the deposit is made, rather than the character of the deposit itself. This is true especially when there is a complete absence of any advance warning to the unwary depositor. Even if he inquires at his financial institution, it is doubted that the average employee will be aware of this inconsistency. Instead of these statutes accomplishing a desirable social end, then, they represent a potential source of real injustice.

P.O.D. ACCOUNTS

Suppose, in the above case, that Tom, Dick, and Harry had each gone to his respective financial institution and opened the accounts in question in the following form: "Father, payable on death to Son." What result now, assuming again the deaths of the depositors while their sons are minors? When Harry, Jr., whose father deposited his funds in a bank, inquires about his rights, he will learn that the bank has the power to turn over the \$10,000 to him immediately, if it wishes too, even though he is a minor.⁴¹ However, while the bank will be protected if it pays Harry, Jr., immediately, he does not have any right to require the bank to make payment to him without a judicial determination that he is the present owner. While the statute provides that a P.O.D. account "vests" in a P.O.D. beneficiary who is a surviving spouse,⁴² in all other cases the statute merely provides that the bank "may" pay the balance on hand to the

39. VA. CODE ANN. § 6.1-195.23 (1972).

40. VA. CODE ANN. § 6.1-73.1 (1972). The operative language of this ambiguous section reads as follows:

[U]pon the death of the trustee, if such deposit does not exceed five thousand dollars (it) may be withdrawn by the beneficiary, if he is eighteen years of age or over, without the intervention of a guardian.

41. VA. CODE ANN. § 6.1-77 (1966).

42. *Id.* This is the only instance in the Code where a positive statement is made concerning succession to a P.O.D. account.

P.O.D. beneficiary, whose receipt, even though a minor, will be a release for the bank.⁴³

When Dick, Jr., whose father deposited his funds in a savings and loan association, inquires about his rights, he also will learn that he has no right of withdrawal from the P.O.D. account, absent a judicial determination that he is the present owner. Even if the savings and loan association is willing to pay over the \$10,000 to Dick, Jr., it must wait until sixty days⁴⁴ have passed from the death of Dick, Sr., or it will lose the protection of the statute.⁴⁵

When Tom, Jr., whose father deposited his funds in a credit union, inquires about his rights, he will learn that there is no statute in the Code dealing with P.O.D. accounts in credit unions, not even a protective statute for the credit union that is willing to pay in the absence of a court order vesting the \$10,000 in Tom, Jr. Thus, Tom, Jr., seems to have no recourse except to turn to the courts.

Here again it is assumed that one could make an argument justifying the result in any of these three cases. But surely one cannot justify different treatment among the three cases purely because of the different nature of the financial institutions involved.

Assuming, *arguendo*, that these conflicting results should be eliminated, one possible way to achieve consistency would be by harmonizing the many existing code sections. Although this would settle the immediate problem at hand, it would not begin to assist in the resolution of the many potential conflicts that can arise in areas where there is no existing law to harmonize, such as, for example, the rights of parties to joint accounts during their lifetimes.⁴⁶

43. *Id.* In passing on this same form of permissive language contained in the predecessor of VA. CODE ANN. § 6.1-72, the court has held that "[I]t is manifestly for the protection of the bank and not declaratory of the rights of the depositors in the fund as between themselves." *King v. Merryman*, *supra* note 1, at 850.

44. This sixty day waiting period is eliminated if the P.O.D. beneficiary is a surviving spouse.

45. VA. CODE ANN. § 6.1-195.30 (1972).

46. There is no case law and only two statutes that deal with the rights of parties to joint accounts while both parties are alive. VA. CODE ANN. § 6.1-73 (1966) provides that, in the absence of any specific order of the court involved, upon the delivery of a certified copy of a divorce decree to a bank, the interest of the parties is transformed from a joint tenancy to a tenancy in common. There is no comparable section for savings accounts in savings and loan associations or credit unions. VA. CODE ANN. § 6.1-195.26 (1972) provides that when two or more persons open an account in a savings and loan association that provides for withdrawals

UNIFORM PROBATE CODE

Another way to eliminate the present conflicts that would also fill the vacuums that now exist as well as update this branch of Virginia's law would be by adopting Article VI of the Uniform Probate Code, entitled Non-Probate Transfers.⁴⁷ Part 1 of Article VI deals with "multiple party accounts" which are defined to be joint accounts,⁴⁸ P.O.D. accounts,⁴⁹ and Totten trust accounts,⁵⁰ when used for non-business purposes.⁵¹ The definition encompasses all types of deposits, whether checking, savings, certificate of deposit, share account, or other like arrangement,⁵² so long as the deposit is made in an "organization authorized to do business under state or federal laws relating to financial institutions."⁵³

to be made by either or the survivor ". . . such savings account shall be vested in such persons as joint tenants . . .".

If a true joint tenancy does exist in any of these joint account cases, there is a resultant gift tax exposure for the depositor if the value of the interest that passes to his cotenant exceeds the amount of the \$3,000 annual exclusion. 26 CFR 25.2511-1(e) and 25.2511-1(h)(5). The creation of a true joint tenancy would also leave the original depositor vulnerable in an action of conversion brought by his cotenant if the original depositor should withdraw over one-half of his deposits. See Surrogate Nathan R. Sobel's discussion of New York law in *Joint Property: Its Virtues and Vices* (panel discussion), 111 TRUSTS & ESTATES 446 (June 1972).

47. The official policy statement of the UPC's Joint Editorial Board declares that "[t]he ultimate objective of the Uniform Law Commissioners and others who support the Uniform Probate Code is the uniform adoption of the Code in all states. Adoption of parts of the Code is approved in states in which a pragmatic decision suggests that this is a necessary step toward the ultimate goal." 1 UPC NOTES 2 (July, 1972).

48. UPC 6-101(4). The section provides that a joint account is "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship."

49. UPC 6-101(10). The section provides that a P.O.D. account is "an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees."

50. UPC 6-101(14). While the UPC is dealing with the traditional Totten trust account, it refers to such an account simply as a "trust account" which means "an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account." The definition goes on to specifically exclude "regular" trust accounts and fiduciary accounts.

51. UPC 6-101(5). Specifically excluded from this category are "accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization."

52. UPC 6-101(1).

53. UPC 6-101(3). This section provides in part:

[i]ncluding, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.

The first section of Article VI consists of fifteen definitions which are included in order to eliminate a number of questions that might arise due to the many forms of multiple party accounts that exist. Several of these definitions have already been noted and more will be referred to later as specific matters are treated.

After settling this basic definitional matter, the UPC proceeds to announce a division of its following sections into two groups and to specifically provide that there is no interrelation between the two groups.⁵⁴ Group one contains the rules that are applicable in determining the rights of the parties,⁵⁵ P.O.D. payees, Totten trust beneficiaries, their successors and credits as among themselves,⁵⁶ while group two contains the rules that are applicable in determining the rights of these persons vis-a-vis the financial institution.⁵⁷ This separation is intended to result in maximum flexibility as between those using these types of accounts in order that they may achieve a variety of results, while insuring that the financial institution has the absolute certainty needed in order to be able to protect itself at all times.⁵⁸

OWNERSHIP DURING LIFETIME

Having thus charted its course, the UPC begins by dealing with ownership rights in multiple party accounts during the lifetime of the parties. Turning first to joint accounts, the UPC rejects the concept of a present joint tenancy. Instead, acting on the assumption that when one creates a joint account he ordinarily does not intend a gift, *in praesenti*, of any interest in the deposit,⁵⁹ the UPC provides that, in the absence of clear and convincing evidence to the contrary, a joint account belongs to the parties in proportion to their "net contributions" thereto.⁶⁰ The UPC deliberately omits any provision for those cases where the parties are unable to establish the amount of their net contributions. The drafters believed that, under these circumstances, the court would ordinarily divide the account

54. UPC 6-102.

55. UPC 6-101(7). A party is one who has a present right of withdrawal.

56. UPC 6-103 to 6-105.

57. UPC 6-108 to 6-113.

58. Official Comment to UPC 6-102.

59. Official Comment to UPC 6-103.

60. UPC 6-103(a).

balance equally. However, the drafters were apprehensive that a specific rule requiring this result might have the undesirable effect of limiting one in his attempt to prove partial contributions as well as involving potential gift tax liability.⁶¹

These same rules would also apply where two or more depositors create a P.O.D. account. For instance, if John and Mary open an account in the form of John and Mary Jones, P.O.D. Sam Jones, then so long as John and Mary keep this deposit their rights, *inter se*, will be determined the same as any joint account. Where the account is opened by one party, e.g., "John Jones, P.O.D. Mary Jones", the account of course belongs to the depositor during his lifetime. The P.O.D. payee(s) never have a right of withdrawal while an original payee is alive.⁶²

Similarly, a Totten trust account belongs to the depositor/trustee during his lifetime and not to the beneficiary. If there are multiple trustees then, again, their rights, *inter se*, will be determined by the provisions dealing with joint accounts. This section of the UPC also recognizes the possibility of creating an irrevocable trust, either by the terms of the account or other clear and convincing evidence, in which case the account would belong to the beneficiary immediately.⁶³

While these rules governing the rights of the parties during the lifetime of all the parties are relatively simple and are thought to carry out the intent of the average depositor, they do not in any way affect the rights of the financial institution involved.⁶⁴

SURVIVORSHIP RIGHTS

The Supreme Court of Virginia has recognized that joint accounts are sometimes referred to as a "poor man's will" due to their frequent use for the purpose of eliminating the need for a will.⁶⁵ This fact of life has also been recognized by the draftsmen of the UPC who have made the assumption that, although most individuals using joint accounts do not intend to transfer any immediate benefi-

61. Official Comment to UPC 6-103.

62. UPC 6-103(b).

63. UPC 6-103(c).

64. See note 79, *et seq.*, *infra*.

65. King v. Merryman, *supra* note 1.

cial interest in the account to the non-depositing cotenant, they do intend the survivor to have the balance on hand at the death of the first to die.⁶⁶ Accordingly, it is provided that, in the absence of clear and convincing evidence to the contrary at the time a joint account is created, “[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent.”⁶⁷ In those cases where there may be more than one survivor, *e.g.*, “John and Mary and Alice,” and John dies, then Mary and Alice will continue to own their previous shares in proportion to their net contributions, and each will also succeed to an equal share of the decedent’s interest. The right of survivorship will then continue on between Mary and Alice.⁶⁸

While the ordinary P.O.D. account will normally involve only two persons, the UPC takes into account the possibility of there being two or more original payees as well as two or more P.O.D. payees. For instance, an account could be taken out in the form of “Tom and Dick and Harry, P.O.D. John and Ken and Larry.” If there are multiple original payees, then there is survivorship among them the same as described with ordinary joint owners. After the death of the last original payee, the balance on hand in the account vests in the P.O.D. beneficiaries alive at this time. Assuming that there are multiple P.O.D. beneficiaries alive at this time, the account vests in them equally, and, in the absence of a term in the deposit agreement or account designation expressly providing for the contrary, there is no longer any right of survivorship among them. In other words, there is survivorship among P.O.D. beneficiaries during the lifetime of the original payees, but when the account vests in the P.O.D. payees upon the death of the last original payee, the incident of survivorship ceases to operate.⁶⁹

The survivorship aspect of Totten trust accounts is treated in the same manner as P.O.D. accounts, insofar as the parties are concerned, that is, the incident of survivorship obtains as between multiple trustees. However, instead of an absolute vesting in the surviving beneficiaries upon the death of the last surviving trustee, the UPC provides that there will be such a vesting “unless there is clear

66. Official Comment to UPC 6-104.

67. UPC 6-104(a).

68. *Id.*

69. UPC 6-104(b).

and convincing evidence of a contrary intent.”⁷⁰ Lastly, it is provided that there is no survivorship as between beneficiaries, after the account vests in them upon the death of the last trustee.⁷¹ The UPC does not contain any presumption of survivorship in this latter case for the same reason that it omits the presumption in the P.O.D. cases. Since, in the ordinary case, neither the beneficiaries nor the P.O.D. payees will have participated in the creation of the account, there is no justification for a belief that they would want the incident of survivorship to attach.⁷²

While the draftsmen of the UPC believed that most persons would want the incident of survivorship to attach, they realized that this desire would not be universal. Thus, provision is made for the use of an account form that negates any intent that survivorship attach.⁷³ This power to negate an intent that survivorship exist may be exercised upon opening the account or any time thereafter. It must, however, be exercised during the lifetime of the creator of the multiple party account because the question of survivorship will be determined by the form of the account at the time of his death. In order to affect a change in the form of an account, the financial institution must receive a written order during the lifetime of the party requesting the change.⁷⁴ Moreover, it is specifically provided that rights of survivorship, Totten trust beneficiary designations, and P.O.D. payee designations cannot be changed by a will.⁷⁵

This survivorship feature of multiple party accounts will undoubtedly reduce the need for a will in a number of instances and it is because of this use as a will substitute that the next problem arises. Courts have sometimes refused to give effect to survivorship accounts because they viewed these transactions as essentially testamentary and thus defective since not created in accordance with the formalities prescribed by the Statute of Wills.⁷⁶ In order to prevent such a holding in the adopting states, the UPC expressly pro-

70. UPC 6-104(c).

71. *Id.*

72. Official Comment to 6-104.

73. UPC 6-104(d).

74. UPC 6-105.

75. UPC 6-104(e).

76. T. ATRINSON, WILLS 40 (2d ed., 1953).

vides that the multiple party accounts contemplated by it are not to be considered as testamentary.⁷⁷

While the UPC insulates these multiple party accounts from claims that they are testamentary, insofar as the Statute of Wills is concerned, it is recognized that what is involved is a transfer that doesn't occur until the death of a party. As a consequence of this realization, the transfer of a party's interest, pursuant to the survivorship feature, is ruled ineffective to defeat the rights of the decedent's creditors, of every description, if the other assets of his estate are insufficient to discharge all valid claims. A transferee liability is created against any successor in interest to a multiple party account, in favor of the decedent's personal representative. This transferee liability is in the amount necessary to discharge the claims involved, or the amount passing to the successor in interest, whichever is less. The personal representative has no authority to assert this transferee liability unless he receives a demand in writing from a creditor within two years of his decedent's death, and then only after all the remainder of the deceased party's estate has been exhausted. Lastly, it might be noted that the initiating creditor does not thereby obtain any priority in the recovery since the UPC provides that any sums recovered are treated as a part of the decedent's estate for purposes of administration. Here again, it might be well to emphasize that this is an *inter partes* conflict which does not represent any exposure for the financial institution involved. A financial institution has no liability for paying over to a successor in interest, pursuant to the terms of the account, unless it has been served with process prohibiting such payment.⁷⁸

FINANCIAL INSTITUTION PROTECTION

Having thus attended to the rights of the parties, their successors in interest, and creditors generally, the UPC next turns its attention to the protection of the financial institution and begins by noting that although the substantive rights of the parties, *inter se*, are determined by their respective net contributions, the financial institution has neither a duty to make inquiries concerning the source of funds offered for deposit in a multiple party account nor a duty

77. UPC 6-106.

78. UPC 6-107.

to query any party making a withdrawal as to its application in order to establish the parties' net contributions.⁷⁹ It is expressly provided that the financial institution may pay all or any part of the account to any of the parties at any time, and such payment will be a complete discharge for the amounts paid regardless of whether or not the withdrawing party may thereby be wronging his fellow parties.⁸⁰ The only instance in which the financial institution is not protected is if it pays over to a party after having received written notice from another party to stop payment.⁸¹ "No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here."⁸² In addition to these general rules, the UPC has specific sections providing protection for the financial institution when dealing with the several forms of the multiple party account.

Looking first to the area of joint accounts, one notes that the financial institution is always protected when paying to a party, even though the other parties be deceased⁸³ or under an incapacity at the time of such payment. However, the financial institution is not protected if it pays over to the heirs or personal representative of a deceased party unless the incident of survivorship has been negated, as previously discussed,⁸⁴ or unless the heirs or personal representative involved present proof of death establishing that their decedent was the last surviving party to the account.⁸⁵

The balance in a P.O.D. account may safely be paid to any origi-

79. UPC 6-108.

80. UPC 6-112.

81. VA. CODE ANN. §§ 6.1-195.26 (1972) and 6.1-208.2 (1968), dealing with joint accounts in savings and loan associations and credit unions, respectively. Each provides that where a party issues a written stop payment order, the financial institution may refuse, without liability, to honor another party's withdrawal request while the parties are determining their rights. Under existing Virginia law, then, the financial institution is protected whether it chooses to honor the stop payment request or not, whereas the UPC would not protect the financial institution that chose to ignore a stop payment request properly made by any of the parties. There is no comparable section in the Virginia Code that deals with this problem if the account is in a bank or trust company as opposed to a savings and loan association or a credit union.

82. UPC 6-112.

83. To this extent the Virginia law concerning joint accounts is in accord with the UPC. VA. CODE ANN. § 6.1-72 (1966), banks and trust companies; 6.1-195.26 (1972), savings and loan associations; § 6.1-208.2 (1968), credit unions.

84. *Supra* note 73.

85. UPC 6-109. "Proof of death" requires no more than a death certificate. UPC 6-101(9).

nal payee at any time. The financial institution may also safely make payment to a P.O.D. payee upon his presentation of proof of death establishing the death of all original payees.⁸⁶ If the P.O.D. payee fails to withdraw all of the funds during his lifetime, the financial institution must require his heirs or personal representative to present proof of death establishing the fact that the P.O.D. payee survived all the original payees in order to guarantee the safety of payment to such claimants. In the event that all the P.O.D. payees predecease the original payee, he of course can withdraw the account at any time during his life, and the financial institution is protected upon paying to his personal representatives or heirs upon presentation by them of proof of death establishing that their decedent survived all other original payees as well as all P.O.D. payees.⁸⁷

The financial institution's position, when faced with a request for a withdrawal from a Totten trust account, is much the same as in the P.O.D. cases just discussed. Payment can safely be made to any trustee during his lifetime. So also, the personal representative or heirs of a deceased trustee can be safely paid upon their presentation of proof of death establishing that their decedent survived all other trustees as well as all beneficiaries. The financial institution acquires full protection on payment to any beneficiary if he presents proof of death establishing that all trustees are deceased.⁸⁸

As a last measure of protection, the UPC recognizes a right of set-off in all cases where a party to a multiple party account is indebted to a financial institution. The amount of this set-off is limited to that portion of the account to which the debtor is, or was at the time of his death, beneficially entitled. This, as we have seen, is dependent upon the net contributions of the party involved. However, in order to prevent the financial institution from being defeated due to a lack of evidence as to the sources of the deposits, it is presumed

86. VA. CODE ANN. § 6.1-77 (1966), protects the bank that pays the balance in such an account to the P.O.D. beneficiaries on the death of the depositor. VA. CODE ANN. § 6.1-195.30 (1972) protects the savings and loan association that pays the balance in such an account to the P.O.D. beneficiaries after waiting for sixty days after the death of the depositor. There is no comparable section dealing with P.O.D. accounts in credit unions.

87. UPC 6-110.

88. UPC 6-111. Those sections of the Virginia Code dealing with Totten trusts, see notes 38-40 *supra*, are not cast in terms of "bank protection." Instead, they deal with the rights of the beneficiaries of these accounts.

that all parties having a present right of withdrawal own in equal shares for purposes of this set-off. It is then up to the other parties to the account to prove that their net contributions are larger, if that is the case. Since this is intended by the UPC to be a cumulative, as opposed to an exclusive, remedy for the financial institution, it is provided that the granting of this remedy does not qualify any other statutory liens nor does it qualify any contractual provision agreed to by the parties.⁸⁹

While the UPC's treatment of multiple party accounts may seem to exhaust all possible uses of accounts as will substitutes, the draftsmen of the UPC recognized that it is possible to have a number of contractual agreements concerning passage of property at death and that among these agreements may be found accounts other than multiple party accounts. In the past such agreements have regularly been struck down as being testamentary in nature and failing to comply with the Statute of Wills.⁹⁰ Drawing on experience gained from the use of multiple party accounts, revocable living trusts, and U.S. government bonds, the draftsmen determined that the specter of fraud that some see looming in the distance if the Statute of Wills is not strictly enforced in this area is really an illusory peril.⁹¹ Therefore, Part 2 of Article VI specifically provides that a provision in any deposit agreement that the balance is to be paid to someone named in a writing, whether on the account or separate, and whether made concurrently with the deposit or later, is deemed to be nontestamentary.⁹²

CONCLUSION

As previously noted, a great deal of interest is being shown in the UPC on the national level.⁹³ This display of interest is due to the realistic solutions offered by the judges, lawyers, and academics who

89. UPC 6-113. VA. CODE ANN. § 6.1-195.26 (1972), establishes the validity of a pledge of a joint account to a savings and loan association, when made by any party. VA. CODE ANN. § 6.1-206 (1968), gives a lien on the account of any depositor as security for the depositor's obligations to the credit union. The common law banker's lien or right of set-off is recognized in Virginia. *Reserve Bank v. State Bank*, 150 Va. 423, 143 S.E. 697 (1928).

90. *Tucker v. Simrow*, 248 Wis. 143, 21 N.W.2d 252 (1946).

91. Official Comment to UPC 6-201.

92. UPC 6-201.

93. See note 3 *supra*.

spent some six years working on the great variety of troublesome problems that exist in the probate area. It is suggested that the solutions offered in the field of multiple party accounts would immediately eliminate the existing conflicts and vacuums in Virginia's law as well as making this law correspond more closely to the expectations of the average depositor.