Proving a Joint Account with Right of Survivorship or Totten Trust Account without the Benefit of the Signature Card

By Brian P Corrigan

A frequent dispute arising in the administration a decedent's estate concerns the interest of a surviving co-tenant in an account alleged to have been joint with right of survivorship. Similar issues arise as to the interest of a beneficiary to an alleged Totten Trust account. The analysis of the interests of the decedent's estate vis-à-vis the surviving co-tenant/beneficiary begins with a review of the signature card establishing the account at issue. The signature card, specifically the language on the signature card identifying the interests of the parties in the account, has been recognized as the best evidence of the decedent's intent at the time the account was established. [1] As a consequence of mergers or otherwise, banks sometimes cannot locate the signature card. This article examines the evidence Courts regard as probative in deciding whether a joint account with right of survivorship or Totten Trust account has been established when that important piece of evidence is unavailable.

JOINT ACCOUNTS WITH RIGHT OF SURVIVORSHIP

With respect to joint accounts, New York Banking Law § 675 provides, in relevant part, that when a deposit is made in the name of the depositor and another person to be paid to either or the survivor of them that the "making of such deposit…shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding…of the intention of both depositors…to create a joint tenancy and to vest title to such deposit or shares, and additions and accruals thereon, in such survivor. The

burden of proof in refuting such prima facie evidence is upon the party or parties challenging the title of the survivor."

Thus, an executed signature card containing language complying with the statute, exonerates the bank from liability and creates a rebuttable presumption[2] that the surviving co-tenant is entitled to the entire account.

In *Estate of Butta*, *supra*, the interest of decedent's great nephew, Nicholas, in an account he claimed to be joint with a right of survivorship with his deceased aunt was tried before the Surrogate without a jury. The facts established that the decedent's estate was almost $4,000,000 and Nicholas was not a beneficiary of the trust (executed the same day as decedent's will) into which decedent's probate estate poured over. The subject bank account was opened with a $240,000 deposit supplied by the decedent. On the date of the decedent's death, the balance was $151,485.75. All withdrawals from the account, whether by check or by ATM, were made by Nicholas solely for his own benefit. All of the statements and canceled checks for the account were mailed to the decedent and she reported all of the interest earned on the account on her income tax returns.

The bank was unable to produce the signature card. The bank representative who opened the account testified that she had probably opened between 500 and 1,000 accounts for customers. Although she did not remember any specific conversation with the decedent and Nicholas on the date the account was opened, she did recall that she told them that the account would be payable to the survivor of them upon the death of the other. The bank representative further testified that she knows that she advised the decedent and Nicholas that the account was a survivorship account because, when the

subject account was opened, the bank would not open an account in two names unless it was a survivorship account.

The bank was able to produce an "electronic signature card summary" containing the account number, the names of both the decedent and Nicholas under the "Account Title", the letter "J" under the "Account Type" and the electronic signatures of both the decedent and Nicholas.

i. *The Statutory Presumption under Banking Law § 675 and Common Law Principles*

The Surrogate acknowledged the line of cases holding that survivorship language on the signature card suffices to establish a prima facie case under Banking Law § 675, but noted it does not follow from those cases, or the statute, that the statutory presumption is restricted to cases where the signature card contains survivorship language. Thus, Surrogate Holzman held:

> while survivorship language on the signature card itself is the best evidence to give rise to the statutory presumption, and, perhaps, in most cases the only practical way, it is not the exclusive way. The statutory presumption arises upon any proof that clearly establishes the deposit was made and credited in the name of both parties to be paid to either or the survivor of them.
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> *Butta*, 192 Misc. 2d at 619.

The Surrogate's analysis continued by noting it is well established that the surviving tenant will prevail, without the benefit of the statutory presumption, by establishing a common law joint account with right of survivorship citing, *inter alia*, Matter of Antoinette, 291 A.D.2d 733 (3d Dept. 2002), *lv. to app. den*. 98 N.Y.2d 604 (2002) and Matter of Coon, 148 A.D.2d 906 (3d Dept. 1989).

ii. *Evidence Establishing Joint Account With Right of Survivorship*

The Surrogate held, in the alternative, that Nicholas was entitled to the presumption under Banking Law § 675 *or* that he adduced sufficient proof to meet his burden of proof under common law principles that his deceased aunt intended the account to be joint with survivorship rights. The Court referred to the following facts in support of its holding:

- the redacted electronic signature card reflects that the type of account was "J", a joint account;
- the only type of account that the bank would open at the time the account was opened in the names of two depositors was a joint account with survivorship rights; and
- the bank representative who opened the account told the decedent and Nicholas that the account was payable to the survivor.

Although the bank representative's recollection of the account opening was shown not to be perfect, the Surrogate found no reason to doubt her credibility. The Court analogized the representative's testimony to that of an attorney who supervises the execution of numerous wills and can be positive that a particular will was executed with the required statutory formalities without necessarily being accurate as to all of the other details regarding the execution ceremony.

Having found a joint account with right of survivorship, the Court next addressed, and rejected, the executor's claim that the account was a convenience account, citing the following evidence:

- the statements and canceled checks were mailed to the decedent's home from the time the account was opened in January, 1996 until her death in August, 1999 and there is no reason to believe that she did not read them;
- the statements/cancelled checks reflect that Nicholas had issued more than 100 checks and made more than 100 ATM withdrawals solely for his benefit;
- although Nicholas assisted the decedent with chores, there was no proof that she relied solely upon him or that she was in any way incompetent;
- the decedent lived by herself, consulted with her accountant without anyone else being present and, more than three years after the account was opened, she executed both a lifetime trust and a will under which her great-nephew did not receive any portion of her substantial estate.

The First Department affirmed holding:

> The testimony of a bank employee that the signature cards used by the bank when the subject account was opened contained right of survivorship language was, in the face of the bank's inability to produce the actual signature card for the account, sufficient proof that such language in fact appeared on the signature card with which the account was opened. It is therefore unnecessary to determine whether the presumption of a joint account with rights of survivorship (Banking Law § 675[b]) may arise from other proof.
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> *Butta*, 3 A.D.3d at 347.

Thus, the Appellate Division's decision leaves open, at the appellate level, whether the statutory presumption may arise from proof other than the signature card.

Matter of Jelnek, 3 Misc. 3d 725 (Sur. Ct. Queens Co. 2004),[3] also involved a Surrogate finding a joint account with right of survivorship had been created although the signature card could not be produced.

The decedent was a partner at Cantor Fitzgerald and died intestate on September 11, 2001 in the attack on the World Trade Center. He was survived by his minor son from a prior marriage (who was his sole distributee) and his fiancé, Anna, with whom he had lived for over four years immediately prior to his death.

Decedent had $656,944.36 in three bank accounts and banked at the World Trade Center branch. After September 11, 2001, Anna closed the accounts. The administrator of Decedent's estate (the maternal grandmother of decedent's son) commenced a turnover proceeding against Anna, and the bank, alleging the estate's entitlement to the proceeds of the accounts.

The signature cards were maintained at the bank's World Trade Center branch and destroyed on September 11, 2001. The bank and Anna moved separately for summary judgment. The administrator contended that because the signature cards could not be produced, the respondents cannot satisfy the requirements under Banking Law § 675 and, therefore, neither the bank nor Anna was entitled to the statutory presumption.

The bank and Anna relied on *Butta* and submitted the deposition testimony of three different bank employees that at the time the accounts were established the following language "accounts with multiple owners are joint, payable to either owner or the survivor" would have appeared on what was signed. As the administrator submitted no evidence to rebut this testimony, the Surrogate found the statutory presumption under Banking Law § 675 applied.

The Court next rejected the administrator's allegation that the accounts were merely of convenience finding: "Decedent was a bright, educated stock trader who was in no need to have convenience accounts created on his behalf. The bank statements and

cancelled checks indicated that the decedent knew that [Anna] used the accounts for her own benefit and he did not object." *Jelnek*, 3 Misc. 3d at 728.

TOTTEN TRUST ACCOUNTS

EPTL § 7-5.1 *et seq*. governs Totten Trust or "in trust for" bank accounts and provides for a financial institution's release from liability for making payment to the beneficiary in accordance with the statute (EPTL § 7-5.4).

In *Estate of Posch*, NYLJ 8/12/2002, p. 26 col. 3, 2002 NY Misc. LEXIS 984 (Sur. Ct. Nassau Co.), the bank's computer records listed Helen as beneficiary of a trust account established by the decedent. There was, however, no signature card, or any other document signed by the decedent, in the bank's possession designating a beneficiary. In the turnover proceeding commenced against Helen by the administrator of the estate, a bank employee testified that it was the bank's policy not to require a signature card when an individual account was converted to a trust account. The administrator of the estate and Helen each moved for summary judgment.

The Surrogate noted that EPTL § 7-5.1(d) provides that a trust account is established "by the depositor describing himself as trustee for another" and, under common law, a trust of personal property can be established by parol with no particular form of words being necessary, provided the expression of intent is unequivocal. The Court observed that EPTL § 7-5.1 left the common law standard for establishing a trust chiefly intact.

While the revocation of a trust account requires a writing (*see* EPTL § 7-5.2), EPTL § 7-5.1 makes no mention of a writing requirement for the creation of a trust

account. Thus, the question of law is whether the decedent's direction to the bank met the statutory requirements, and the question of fact is what the decedent communicated to the bank.

The Surrogate concluded that the bank's computer entry is admissible as a business record, but it has no more probative value than any other evidence and, therefore, the "unsigned bank records alone are not conclusive evidence of the transaction". *Posch*, *supra*. The Court denied the summary judgment motions and held that the administrator is entitled to test the credibility and accuracy of the bank employee who generated the computer record at trial.

Estate of Tate, NYLJ, 11/5/2001, p. 28, col. 4 (Sur. Ct. New York Co.), involved a dispute among the decedent's three children as to the beneficiary of a Totten Trust account. The administrator of decedent's estate, one of the children, petitioned to have her sister return funds withdrawn from the account. The bank was unable to produce the signature card.

At trial, the petitioner testified that she was present with the decedent when the account was opened in 1984, with proceeds from decedent's lottery winnings, and observed decedent designating all three of her children as beneficiaries. She further testified that her mother never changed the designations. During the last year of her life, the decedent's health deteriorated and she could no longer handle her financial affairs. Petitioner testified that her mother gave her the checkbook for the account in question so she could pay decedent's expenses. The Court observed the records support petitioner's testimony as all of these checks were numbered sequentially and followed numerically from the checks signed by decedent.

Petitioner further testified that her mother suspected the respondent was siphoning money from the account. Petitioner observed respondent, who lived in a basement apartment at the mother's home, receiving shipments of new furniture and other purchases at a time when respondent was on public assistance. Decedent was not receiving bank statements and believed respondent was intercepting them to cover up withdrawals. The bank records revealed that respondent wrote checks on the account to various credit card companies, clothing stores and furniture stores totaling thousands of dollars. None of these checks were in in the proper numeric sequence.

The Court noted that respondent, who claimed she accompanied decedent to the bank in 1984 and that decedent designated her as sole beneficiary, testified in an "evasive and reluctant manner". Respondent admitted to writing the checks, but claimed decedent gave her authority to do so.[4]

The Court credited petitioner's testimony and concluded a Totten Trust account was established for the benefit of all three of decedent's children. The Court held:

> "The fact that the bank statements only list respondent's name as beneficiary, although of some relevance, is clearly outweighed by the testimony of petitioner, the circumstances surrounding the creation of the account, and the lack of original signature cards to support that this was the only name on the actual account. As such, respondent is entitled to a one-third interest in the account."
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> *Tate*, *supra*.

In *Clinton, supra,* the administrator of Carrie Clinton's estate commenced a turnover proceeding against a bank and Shirley Sidbury who claimed to be the beneficiary of several accounts shown on the bank's records as "Carrie Clinton ITF Shirley Sidbury". All three parties moved for summary judgment. After finding issues of fact and denying the motions of the administrator and Sidbury, the Court turned to the

bank's motion seeking a determination that it was merely a stakeholder with no liability in the turnover proceeding.

As it was unable to produce the signature card, the bank relied on an affidavit from the manager of the bank branch where the transaction occurred. The branch manager testified that on March 6, 1998 the account titles were changed from decedent's name alone to Totten Trust accounts payable to Sidbury. The manager further testified that bank's computer records identified the customer service representative who handled the change of account (who was no longer employed by the bank) and that it was the bank's procedure to require proof of identification from the customer. The bank also relied on the fact that the statements thereafter listed the account title as "Carrie Clinton ITF Shirley Sidbury".

The evidence showed that a year before the Totten Trust accounts were established the decedent's doctor noted that the decedent, in her mid-80s, had early organic mental syndrome, a deterioration of mental function that occurs with aging. The doctor was concerned about decedent's ability to administer prescribed medication. Further, the decedent told her doctor she didn't have the means to buy the medication despite, although unknown to the doctor, having over $500,000 in the bank.

For the bank to gain the release from liability under EPTL § 7-5.4, the Court stated "there must be a payment to a "beneficiary" which is defined as a "person who *is described by the depositor* as a person for whom a trust account is established." (EPTL § 7-5.1[a] [emphasis added])." The bank argued that its computer records would not reflect a Totten Trust account without one having been validly established by the depositor. Surrogate Preminger rejected this argument and held:

> "…the best evidence of such a transaction would be a signature card signed by the decedent, or at the very least, some other admissible indication of the decedent's intent to create the Totten Trust accounts [citing *Tate and Posch*]. [The bank], however, concedes it does not have signature cards corresponding to this account change transaction, and instead offers only its computer records and the statements of an employee who has no recollection of the transaction, nor personal knowledge of it. Having put forth essentially nothing but its computer account records, [the bank's] cross motion for summary judgment seeking stakeholder status should be denied."
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> *Clinton*, *supra*.

Matter of Wess, 1/28/2013, NYLJ 1202585573297, at *1 (Sur. Ct. New York Co.), involved a dispute between Wess, a long-time friend of the decedent who claimed to be a beneficiary of a Totten Trust account, and the executor who contended it was an estate asset. A bank employee testified at deposition that the bank could not find the signature card and that it had destroyed other related documents as part of its routine housekeeping procedure.

The decedent was a business woman who wholly owned a consulting company and died in 2009 at age 55 with an estate of approximately $9 million. The decedent and Wess were romantically involved having lived together for decade. They stopped living together around 2000, but remained friends. Indeed, in the last ten years of decedent's life, and up to a few months before her death, decedent gave Wess a number of generous gifts, not disputed by the executor.

In August 2009, after learning that she would likely die within the year, decedent executed a will (of which Wess was not a beneficiary) and made arrangements to seek medical treatment in Japan. On the same day that decedent flew to Japan, she added to the subject account approximately $370,300 from other accounts as well as a

payment from the decedent's consulting company, thereby increasing the balance to about $406,300. The account was approximately $441,500 when decedent died.

Having to overcome hearsay issues, CPLR 4519 and the missing signature card, Wess submitted the following evidence in support of his summary judgment motion:

(i) the 1099's for 11 years (1998 through 2009) showing the account as "I/T/F Frank Wess", addressed to the decedent, which she may be presumed to have seen without protest as to their accuracy;

(ii) the computer print-out of the bank records reflecting that the subject account was held "I/T/F" Wess; and

(iii) the deposition testimony of the bank employee, who confirmed that such data was, as a matter of company practice, entered into the bank's computer system at the time that the depositor supplied the information.

In opposition, the administrator argued that the account was never established, the decedent forgot about the account and intended to dispose of it by will and/or that account had been revoked by the decedent. Surrogate Anderson found none of these theories to be supported by anything other than bare speculation and granted Wess' summary judgment motion.

CONCLUSION

Based upon the foregoing cases, an attorney advising a client in a dispute over a Totten Trust or joint account for which the signature card is not available should consider whether statements showing the interest of the other party were sent to the decedent and whether decedent ever made an objection (*Butta*, *Jelnek* and *Wess*). A related consideration is whether there is reason to believe the decedent was not

receiving this mail (*Tate*) or that the decedent may not have been able to read or understand the statements (*Clinton*). Furthermore, rather than relying on bank records alone (*Posch*), a bank employee with direct knowledge, if not of the transaction itself then of the practice and procedure related to the transaction should be pursued in discovery. Finally, the proposed disposition of the subject account should be viewed in the context of any planning made by decedent and the disposition of other assets in the estate (*Butta* and *Wess*).

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[1] *See Estate of Butta*, 192 Misc. 2d 614 (Sur. Ct. Bronx Co. 2002), *aff'd*, 3 A.D.3d 347 (1st Dept. 2004) (as to joint accounts); *Matter of Clinton*, 1 Misc. 3d 913(A), 781 N.Y.S.2d 623 (Sur. Ct. New York Co.) (as to Totten Trust accounts).

[2] *See Fischedick v Heitmann*, 267 A.D.2d 592 (3rd Dept. 1999) (presumption rebutted); *Matter of McMurdo*, 56 A.D.2d 602 (2nd Dept 1977) (same).

[3] The author's law firm represented the bank in this case.

[4] All the parties apparently waived CPLR 4519.