OPINION
44-29

April 25, 1944 (OPINION)

BANKS

RE: Joint Deposits Right of Survivorship

This is in reply to your letter relative to the right and liability of banks with reference to payments to survivors of deposits in joint accounts with right of survivorship.

Joint tenancies are recognized by statute in the State of North Dakota. Section 5262 of the Compiled Laws of North Dakota for 1913 provides that:

> "A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants".

The Estate Tax Law of this State as amended by chapter 251 of the Session Laws of 1933 deals with joint interest as follows:

> "JOINT INTEREST.) The gross estate of the decedent shall include the value of interests in property held as joint tenant or deposited in banks or other institutions in the joint names of the decedent and any other person and payable to either or the survivor. In all such cases the value of the decedent's interest shall be determined by dividing the value of the entire property by the number of joint tenants, joint depositors, or persons interested therein."

As a general rule courts have held that joint deposits in a bank may be made by two or more persons, and such a deposit ordinarily creates a joint tenancy between the depositors. The intent of the parties may indicate and determine the right of survivorship and the form of deposit usually controls, especially where a written agreement is entered into and signed by the parties at the time of making the deposit providing for a joint tenancy and not tenancies in common, with the right of survivorship.

It should be borne in mind that when a deposit is made by joint tenants with the right of survivorship, it is in fact, a gift inter vivos by one to the other; that is, each one of the depositors gives to the other the amount so deposited and each depositor has the absolute right during the lifetime of both to withdraw the entire amount, or if a balance remains after the death of one, the survivor owns the balance and has a perfect right to withdraw the same.

It is true that chapter 251 of the Session Laws of 1933 makes provision with reference to the balance of the account of joint tenants after the death of one of such joint tenants. This provision, however, is for the purpose of insuring collection of any estate tax that may be assessed against such balance. Subdivision d(3) of chapter 251 of the Session Laws of 1933 deals with contracts in contemplation of death and reads as follows:

> "CONTRACTS IN CONTEMPLATION OF DEATH.) The gross value of the estate shall not be diminished by reason of any transfers due to the claim or any creditor against the estate arising from a contract made after the passage of this Act payable by the term of such contract at or after death, of the decedent, except insofar as it may be affirmatively shown by competent evidence, that such claim was legally due and payable in the lifetime of the decedent or was supported by a consideration of equivalent monetary value. This shall not, however, bring within the meaning of the statute any antenuptial agreements which shall for the purpose of this Act be considered as contracts creating a debt against the estate."

You will note that the statute just quoted excepts from this provision any transfer which is legally due and payable in the lifetime of the decedent.

As I have already pointed out where a deposit is made by joint tenants under the usual deposit agreement with the right of survivorship, there is a complete transfer by one to the other and the right to withdraw the deposit by either one is not dependent upon the death of the other, because each one has, as I have already pointed out, the absolute right to withdraw the entire amount while the other joint tenant is living. The survivor's right to withdraw the balance is acquired in praesenti and is irrevocable after the death of the other depositor.

See 9 C.J.S. 286, page 585.

The Supreme Court of the State of California has passed on this question in a number of cases and among them are the following:

In the case of Kennedy v. McMurray, 146 Pac. 647, it was held that:

> "The question involved in cases of this character is the intention of the parties making the deposit and where such intention is evidenced by a written agreement, as was done in the case at bar, the question of intention ceases to be an issue, and the courts are bound by the written agreement".

Likewise, in the case of In re Edwards Estate, 14 Pac. (2d) 274, it was held that:

> "Intention of depositors concerning right of survivor controls, and courts are bound by intention expressed in written agreement with bank."

The Supreme Court of the State of North Dakota has also passed upon this question in the case of First National Bank and Trust Company of Fargo v. Green, 66 North Dakota 160. In that case the Court held that:

> "A deposit of money in a banking institution to the credit of depositor or another, payable on the order of either before or after the death of the other constitutes a completed gift by the depositor, and on the death of either, the survivor takes the whole of the deposit remaining at that time."

The North Dakota case cites with approval the case of Kennedy v. McMurray which I have cited herein. Among other things, the North Dakota Supreme Court said:

> "Since we hold that in the instant case there was a completed gift by Carlisle to Mrs. Green, it is immaterial as to whether a joint tenancy within the contemplation of the statute, section 5262, supra, was created by Carlisle when he made the deposit here involved. If there was a joint tenancy there was a right of survivorship, whether that right was expressly declared or not. Such a right is incident to the status."

It is my opinion, therefor, that a surviving joint tenant has a right to withdraw any balance in the joint tenancy account and the bank has the right and it may safely honor any check drawn by such survivor against the joint tenancy account.

Of course, the bank may, as a matter of precaution, if deemed advisable, withhold a sufficient amount to cover any estate tax that might possibly attach to the balance withdrawn, by the surviving joint tenant. However, if the bank does not withhold such amount, nevertheless, the administrator or executor of the deceased joint tenant would be liable for any tax that might be assessed against the share of the surviving tenant and the same would be a charge against the estate of the deceased joint tenant, if any estate he had.

While it is not within the official duties of this office to give advice on questions like the one involved here, nevertheless, since it is of general public interest, we have expressed the views of this office on the proposition involved.

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