

FUNDAMENTALS OF TEXAS MULTIPLE-PARTY ACCOUNTS

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**September 16, 2010
Lubbock, Texas**

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Professor, St. Mary's University School of Law (1981-2005)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
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Outstanding Professor Award – Phi Alpha Delta (Texas Tech University chapter) (2010) (2009) (2007) (2006)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Outstanding Faculty Member – Delta Theta Phi (St. Mary's University chapter) (1989)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
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State Bar College – Member since 1986
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

SELECTED PUBLICATIONS

Author and co-author of numerous law review articles, books, and book supplements including *WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS* (4th ed. 2007); *TEACHING MATERIALS ON ESTATE PLANNING* (3d ed. 2005); *9 & 10 TEXAS LAW OF WILLS* (Texas Practice 2002); *TEXAS WILL MANUAL SERVICE*; *12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS* (1996); *19-19A WEST'S LEGAL FORMS — REAL ESTATE TRANSACTIONS* (2002); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Estate Plans: The Durable Power of Attorney For Property Management*, 59 TEX. B.J. 314 (1996); *Estate Plans: Enhancing Estate Plans with Multiple-Party Accounts*, 57 TEX. B.J. 360 (1994); *Enhancing Self-Determination Through Guardian Self-Declaration*, 23 IND. L. REV. 71 (1990); *Statutory Will Methodologies — Incorporated Forms vs. Fill-in Forms: Rivalry or Peaceful Co-Existence?*, 94 DICK. L. REV. 231 (1990); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990); *The Will Execution Ceremony — History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1988); *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).

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FUNDAMENTALS OF TEXAS

MULTIPLE-PARTY ACCOUNTS

I. INTRODUCTION

Multiple-party accounts, such as checking accounts, savings accounts, and certificates of deposit, are contractual arrangements for the deposit of money with financial institutions such as state or national banks, savings and loan associations, and credit unions. The disposition of the funds remaining in these accounts upon the death of one of the depositors depends on the type of account, the account contract, and the applicable state law.

Multiple-party accounts are important non-probate transfer mechanisms because these accounts are used widely, easy to understand, and inexpensive to obtain. This article discusses the four commonly recognized types of multiple-party accounts: (1) the *joint account*, which may transfer ownership rights to the account's balance to the surviving party; (2) the *agency or convenience account*, which does not transfer the account's balance upon the death of one of the parties; (3) the *payable on death account*, which causes the balance to belong to the surviving pay on death payees upon the death of the depositors; and (4) the *trust account*, under which the beneficiaries receive the account's balance upon outliving all trustees.

All statutory citations in this article are to the Texas Probate Code as amended through the 2009 Texas Legislature unless otherwise expressly indicated.

II. JOINT ACCOUNTS

A. Definition

A joint account is an account that is payable on request to one or more of two or more parties. § 436(4). A typical designation would read, "Payable to Party One or Party Two."

B. Effect During Lifetime

1. Ownership

While all parties to a joint account are alive, the parties own the funds in the account in proportion to their net contributions unless there is clear and convincing evidence of a different intent. § 438(a). A party's net contributions are determined by adding all of the party's deposits, subtracting all of the party's withdrawals not made for the benefit of another party, and then adding a proportionate share of the interest earned on the deposit. § 436(6). Note that net contributions may be difficult to determine if the parties do not keep careful records.

A joint account does not operate to transfer current ownership of deposited funds to the other joint parties. Contrast this result with the consequence of creating a joint tenancy, that is, the contributing joint tenant is treated as making an immediate gift to the non-contributing joint tenant. The contributing depositor to a joint account does not make a gift to another party until that party withdraws more than that party's net contributions and the contributing depositor has the intent to make a gift of this excess. See also *In re Marriage of Case*, 28 S.W.3d 154 (Tex. App.—Texarkana 2000, no pet.).

2. Right to Withdraw

Any party may withdraw any or all of the funds in the account even if the withdrawal is in excess of the party's net contributions. The financial institution is not required to inquire as to the proposed application of any sum withdrawn from the account. § 444. See *Archer v. F.D.I.C.*, 831 S.W.3d 483 (Tex. App.—Houston [14th Dist.] 1992, no writ).

C. Effect After Death

1. Ownership

a. Presumption

The net contributions of the deceased party pass into the deceased party's estate and then pass by intestacy to the deceased party's heirs or to the deceased party's beneficiaries named in a valid will. § 439(a). Unlike many states, the presumption in Texas is that an account in two or more names does not have the survivorship feature.

b. Exception

The net contributions of the deceased party will pass to the surviving parties only if the account contains an express survivorship agreement. § 439(a). The survivorship agreement must (a) be in writing, (b) be signed by the deceased party (if community property is involved, both spouses must sign under § 451), and (c) contain language expressly making the deceased party's interest survive to the surviving party.

Survivorship is not inferred from the mere fact that the account is in joint form if the account contains the property of an unmarried person (individual property) or the separate property of a married person. However, if the account contains community property and is held as joint tenants, the survivorship feature is deemed included by the Texas Supreme Court case of *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009), even if that feature is not expressly stated or intended by the spouses.

Disputes between the surviving joint party and the deceased joint party's heirs or beneficiaries are apt to arise after the death of a party to ascertain whether a survivorship agreement exists. The courts carefully examine the precise language of the account contract to determine whether the account has the survivorship feature.

(1) Language Sufficient to Create the Survivorship Feature – Statutory “Safe Harbor”

It is prudent practice for a financial institution to use the “safe harbor” language found in the Probate Code.

- “On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate.” § 439(a).
- “On the death of a party, the party's ownership of the account passes to the surviving parties.” § 439A(b) (Uniform Single-Party or Multiple-Party Account Form).

(2) Language Sufficient to Create the Survivorship Feature – Judicial Decisions

- “JT TEN” – The Texas Supreme Court in *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009), held that this designation was sufficient to prove that an account containing *community property* had the survivorship feature even if that feature is not expressly stated in the account agreement or intended by the spouses.

- “Joint account with rights of survivorship.” See *Banks v. Browning*, 873 S.W.2d 763 (Tex. App.—Fort Worth 1994, writ denied) (holding that signature cards with an “x” in a box next to lines containing survivorship language was sufficient to create survivorship rights).
- “Account holders own this account as joint tenants with right of survivorship. Upon the death of one of us, the survivor(s) shall own the entire balance.” See *Ivey v. Steele*, 857 S.W.2d 749 (Tex. App.—Houston [14th Dist.] 1993, no writ).
- “As joint tenants with right of survivorship and not as tenants in common and not as tenants by the entirety.” See *In re Estate of Gibson*, 893 S.W.2d 749 (Tex. App.—Texarkana 1995, no writ).
- “Multiple Party Account—With Survivorship” box marked with an “x” coupled with a detailed explanation of the survivorship right on another page of the signature card See *Allen v. Wachtendorf*, 962 S.W.2d 279 (Tex. App.—Corpus Christi 1998, pet. denied) (holding that the indicated box plus an explanation stating “[a]t death of party, ownership passes to surviving parties” was sufficient to create survivorship rights).
- “Joint (WROS)” and following their names on the account title, the initials “JTWROS.” See *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009) (court explained that these were common abbreviations for “with rights of survivorship” thereby sufficiently demonstrating an intent for the account to have survivorship rights).
- Incorporation by reference of survivorship agreement. See *In re Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.) (court explained that although the account application was silent, it expressly incorporated by reference the account agreement; this agreement had clear language providing for survivorship rights; the fact that the deceased joint party did not sign this agreement was irrelevant because “an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged”).

(3) *Language Insufficient to Create the Survivorship Feature*

- “Upon the death of either of us, any balance in said account or any part thereof may be withdrawn by, or upon the order of the survivor.” See *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990) (holding that a mere authorization of payment of funds to the survivor does not create the survivorship feature).
- Payable to “either of the undersigned regardless of the original ownership of the funds so deposited * * *. In the event of death of either person, the funds shall be payable to the survivor.” See *Arline v. Omnibank, N.A.*, 894 S.W.2d 76 (Tex. App.—Houston [14th Dist.] 1995, no writ).
- The account signature card has checkboxes next to paragraphs describing individual joint accounts and joint tenancy with right of survivorship accounts. Neither box was checked. See *Kitchen v. Sawyer*, 814 S.W.2d 798 (Tex. App.—Dallas 1991, writ denied) (presumption of no survivorship rights applied); *Ephran v. Frazier*, 840 S.W.2d 81 (Tex. App. – Corpus Christi 1992, no writ).
- Adding a party to an existing survivorship account without following proper formalities. For example, in *Rogers v. Shelton*, 832 S.W.2d 709 (Tex. App.—Eastland 1992, writ denied), that court stated that “[t]he mere addition of a typed name and signature on the bank’s signature

card was not a ‘written order’ given by a party to the bank to change the ‘form of the account’ or to ‘vary payment’ under the terms of the account. There was no order or request signed by a party and received by the bank during the party’s lifetime.” Accordingly, the right of survivorship which had been created between the original two parties to the account did not attach to the person later added to the account.

(4) *Circumstances With Problematic Effect*

- “Joint with survivorship.” See *Shaw v. Shaw*, 835 S.W.2d 232 (Tex. App.—Waco 1992, writ denied), in which the court held that this language was insufficient to imbue the account with the survivorship feature. The court indicated that the designation on this account was factually similar to the account in *Stauffer* which stated “payable to either or survivor.” The court, however, did not make a distinction between the different uses of the word “survivor” in these account contracts. In the *Stauffer* account, “survivor” referred to the *person* who had the right to receive payment (although not ownership) of the account funds. However, in the *Shaw* account, the term “survivorship” referred to a right in the account, not a particular person.
- Survivorship language contained in unsigned deposit agreement. In *McNeme v. Estate of Hart*, 860 S.W.2d 536 (Tex. App.—El Paso 1993, no writ), the only relevant language in the signed account card was “or with right of survivorship.” The court did not decide whether this signature card language alone was sufficient to create survivorship rights. Instead, the court relied on the “safe harbor” language in the unsigned deposit agreement. Although the deposit agreement itself was not signed, the court held that the signed signature card could incorporate by reference the terms of the deposit agreement.
- Survivorship language in a written agreement not in the financial institution’s files. See *Cweren v. Danziger*, 923 S.W.2d 641 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding that all agreements signed by the depositor may be considered to determine whether there are survivorship rights, not just contracts in the bank’s custody).

c. *Use of Extrinsic Evidence*

(1) *To Obtain Account Funds*

Extrinsic evidence is *not* admissible to establish whether or not the account has the survivorship feature. See *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990).

Extrinsic evidence, however, that impacts the deceased party’s ability to enter into the survivorship agreement may prevent the agreement from being enforced. For example, the deceased party may have lacked capacity to enter into the account contract or have been subjected to undue influence, duress, or fraud.

Likewise, extrinsic evidence may be used to show that the depositor did not actually enter into the account contract. For example, in *Pressler v. Lytle State Bank*, 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no writ), the court found that the Xs in the check box on the signature card by survivorship language were not placed there by the deceased depositor or with the depositor’s consent.

Extrinsic evidence may also be used to connect a survivorship agreement to a particular account. For example, in the case of *In re Estate of Dillard*, 98 S.W.3d 386 (Tex. App.—Amarillo 2003, pet. denied), Husband and Wife opened an account with a brokerage firm and signed an agreement containing clear survivorship language. The agreement, however, expressly referred to a different account number than

the number which was on the account when Wife died. The trial court found that the current account was also controlled by the survivorship agreement. The appellate court agreed. The evidence showed that the two numbers actually referred to the same account. The numbers changed when the account was transferred from the brokerage's office in one city to an office in another city. Accordingly, the funds in the account were still governed by the original agreement containing the survivorship language.

(2) *To Recover Damages*

Although the survivorship feature of a joint account may not be established by extrinsic evidence to claim the funds in the account itself, such evidence may be used to show the depositor's intent in an action against the financial institution. The case of *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704 (Tex. 2007), is instructive.

Father and Daughter established a joint account with rights of survivorship. For tax reasons, the account was converted into a single party account in Father's name. Later, Father told Broker over the telephone that he wanted Daughter's name added back to the account. Broker prepared documents reflecting the change and delivered them to Daughter who then gave them to Father who signed them. Daughter left the documents with Broker's receptionist. Later, Broker could not locate the new joint account agreement despite a diligent search. Before father could sign a replacement agreement, he lapsed into a coma and died. A dispute arose over whether the balance of the funds in the account, over \$1 million, belonged to Daughter or passed to Father's six children by intestacy. Daughter settled the dispute with her siblings by agreeing to share the account equally with them.

Daughter then sued Brokerage Firm for the difference between the balance in the account and the one-sixth share she received. The jury determined that Brokerage Firm was liable under six theories. Daughter elected to recover under contract. Brokerage Firm appealed, the intermediate appellate court affirmed, and Brokerage firm appealed again.

The Texas Supreme Court affirmed. Brokerage Firm argued that the trial court improperly admitted extrinsic evidence of Father's intent for the account to have the survivorship feature. The court recognized that Texas courts consistently hold that in the absence of a written agreement described in Probate Code § 439(a), extrinsic evidence is inadmissible to prove rights of survivorship against the depositor's estate. See *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990). However, Daughter was not seeking a recovery from Father's estate or against a party to the joint account. Instead, she was attempting to recover from Brokerage Firm for losing the survivorship agreement thereby breaching its contract with Daughter and Father to create a joint account with rights of survivorship.

2. Right to Withdraw

Any party to a joint account has the right to withdraw any and all of the funds on deposit, before or after the death of another party, even if the withdrawing party does not have ownership rights to the withdrawn funds. § 445. See *Mbank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724 (Tex. App.—Corpus Christi 1992, no writ) (holding that bank had right to pay entire balance of a non-survivorship account to the surviving party); *Bandy v. First State Bank, Overton, Texas*, 835 S.W.2d 609 (Tex. 1992).

If a surviving party to a non-survivorship joint account withdraws an amount in excess of the party's net contributions, the party will be liable to the estate of the deceased party for conversion.

D. Benefits

1. Convenience

The ability of several people to withdraw funds from a common account is often a considerable convenience, especially for spouses.

2. Probate Avoidance

Funds remaining on deposit in the account are immediately available for the survivor without the necessity of wading through a protracted will contest action or a lengthy and costly estate administration.

E. Disadvantages

1. Danger of Unauthorized Withdrawals

Because a joint account may be paid on request to any party, it is possible that contrary to expectations, one party could withdraw all or part of the funds on deposit before the death of the contributing party. For example, assume that Fiancé and Fiancée opened a joint non-interest bearing checking account. Fiancé deposited \$2,500 and Fiancée deposited \$7,500. No other deposit has been made. Fiancée withdrew \$2,500 to make a payment on her credit card. After a big fight, Fiancé withdrew the remaining balance of \$7,500 and left town.

Fiancée had the right to withdraw the \$2,500 used to pay her credit card. At the time of the withdrawal, Fiancée's net contributions were \$7,500 and thus Fiancée had ownership rights over that money and could use it in any way she desired.

Fiancé also had the right to withdraw the \$7,500 from the account and thus Fiancée does not have a claim against the bank, even though Fiancé withdrew more than his net contributions. Financial institutions are protected from liability for paying contrary to the parties' ownership rights unless they have received written notice prior to the withdrawal. § 448. Fiancée has a claim for conversion against Fiancé for the amount withdrawn that exceeds Fiancé's net contributions. Thus, Fiancé is responsible for \$5,000, the amount withdrawn in excess of his \$2,500 net contribution.

2. Lack of Understanding of Effect

Individuals using joint and survivorship accounts may not understand how they will take effect upon death and thus the resulting distribution of the deceased's funds in the accounts will not be what was intended.

3. Inability to Show Contrary Intent

If the account is in survivorship form, but was only set up as a matter of convenience to the depositor, evidence of such intention will not be admissible after the depositor dies, causing frustration of the decedent's actual intent.

III. CONVENIENCE ACCOUNTS

A. Definition

A convenience account is an account established by a party in the names of a *party* and a *co-signer*. § 438A(a). The terms of the account must provide that the sums on deposit are paid or delivered to the party or to the co-signer "for the convenience" of the party.

B. Effect During Lifetime

1. Ownership

The party is not considered to have made a gift of one-half of the deposit or of any additions or accruals to the deposit to the co-signer. § 438A(c). In addition, any deposits to the account by anyone other than the party are considered to have been made by the party. § 438A(e). It thus appears that the party is the owner of all funds in the account. However, the statute also states that "[t]he making of a deposit in a convenience account does not affect the title to the deposit." § 438A(b). Thus, if the co-

signer deposits funds into the account, it is unclear whether the co-signer has made a gift to the party or if the co-signer retains ownership of the deposited amount.

2. Right to Withdraw

Both the party and the co-signer have the right to withdraw any and all of the funds in the account while the party is alive. § 438A(f). This withdrawal right applies to the amounts deposited as well as to additions and accruals to the deposits.

“The financial institution is completely released from liability for a payment made from the account before the financial institution receives notice in writing signed by the party not to make the payment in accordance with the terms of the account. After receipt of the notice from the party, the financial institution may require the party to approve any further payments from the account.” § 438A(f). Thus, the financial institution may permit the co-signer to withdraw from the account without fear of liability unless the institution receives notice to the contrary from the party.

C. Effect After Death

1. Ownership

The entire balance remaining in the convenience account when the party dies passes into the party’s estate. § 438A(d). The co-signer has no survivorship rights.

2. Right to Withdraw

The co-signer may continue to make withdrawals from the account after the party dies. § 438A(g). If the co-signer withdraws funds from the convenience account after the party’s death but before the financial institution has received written notice of the party’s death, the financial institution is completely released from liability for the payment. “If a financial institution makes payment to the personal representative of the deceased party’s estate after the death of the party and before service on the financial institution of a court order prohibiting payment, the financial institution is released to the extent of the payment from liability to any person claiming a right to the funds. The receipt by the representative to whom payment is made is a complete release and discharge of the financial institution.”

D. Benefits

1. Simple Agency Arrangement

A convenience account may be used by a party to establish a simple method for the co-signer to pay the party’s bills under a variety of situations, e.g., the party has difficulty writing due to age, accident, or physical challenge, is out of the country for a prolonged period, or is incarcerated.

2. Clarity of Ownership

There is usually no doubt that all funds in a convenience account belong to the party, not the co-signer. The co-signer should not be successfully able to claim that the party’s deposit is a gift to the co-signer. § 438A(c). Consequently, the use of a convenience account, rather than a joint account without survivorship rights, is better practice.

E. Disadvantages

As with joint accounts, the major potential problem with convenience accounts is the risk that the co-signer will make unauthorized withdrawals.

F. Convenience “Signers”

The 2009 Legislature enacted new provisions to authorize convenience signers on accounts that are not expressly labeled as convenience accounts. § 438B. A person who opens a single-party or multiple-

party account that is not expressly deemed a convenience account under § 438A now has the option of indicating a convenience signer who has the ability to make withdrawals but does not have ownership or survivorship rights. The Uniform Single-Party or Multiple-Party Account Form was modified to provide for convenience signers on all types of accounts. § 439A.

IV. PAY ON DEATH ACCOUNTS

A. Definition

A pay on death account is an account payable on request to one person during lifetime and on that person's 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. § 436(10). A written agreement signed by all of the original payees is required. § 439(b). See *Parker v. JPMorgan Chase Bank*, 95 S.W.3d 428 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (holding that the depositor did not create a P.O.D. account because she did not sign the agreement).

B. Effect During Lifetime

1. Ownership

A P.O.D. account belongs to the original payee during the payee's lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, during their lifetimes, rights between them are governed by the rules applicable to joint accounts and belong to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. § 438.

A couple of examples in this combination joint/P.O.D. situation are instructive. If the account contract provides "A or B pay on death to C" and A dies, A's net contributions will pass through A's estate because there is no survivorship agreement between A and B. A's share does not pass to C because C has no rights until *all* original payees die.

If the account contract instead provides "A or B with right of survivorship, pay on death to C" and A dies, A's net contributions are now owned by B. B has full authority to close the account and cut off C's ability to receive any of the funds because, again, C has no rights until *all* original payees die.

2. Right to Withdraw

During the lifetime of the payee or payees, a P.O.D. account may be paid, on request, to any original party to the account. § 446. No notice to or consent of the P.O.D. payee is required. The P.O.D. payees have no withdrawal rights while any original party is alive.

C. Effect After Death

1. Ownership

On the death of the original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee. § 439(b). There is no authority to introduce evidence to show that the original payee(s) had a contrary intent.

If two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them. § 439(b). For example, assume that a certificate of deposit provides "A pay on death to B and C." After A dies, B and C agree not to close the CD because they are pleased with the interest it is earning. Prior to maturity, B dies. One-half of the CD will pass through B's estate and C will retain

ownership of the other half. B's share would not pass to C unless the account contract specifically provided for survivorship rights between B and C.

2. Right to Withdraw

After the death of all original payees, payment from a P.O.D. account may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. § 446.

Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that the decedent was the survivor of all other persons named on the account either as an original payee or as a P.O.D. payee. § 446.

D. Benefits

1. Probate Avoidance

Funds remaining on deposit in the account are immediately available for the survivor without the necessity of wading through a protracted will contest action or a lengthy and costly estate administration.

2. Inexpensive Will Substitute

A P.O.D. account has been called a "poor person's will" because it is an inexpensive and simple method to provide for the disposition of account funds upon the depositor's death. A very common arrangement of parties is "Husband or Wife, with rights of survivorship, pay on death to Children."

3. Depositor Gives Up No Control

The depositor gives up no control over the funds while alive. Thus, a P.O.D. account is much "safer" than a joint account with rights of survivorship because there is no risk that the P.O.D. payee will make unauthorized withdrawals or abscond with the funds.

4. Small Gifts in Complex Estate

A person who has already created a sophisticated estate plan may wish to add a nominal gift to a friend or long-time employee. This person may use a P.O.D. account to make this type of gift without the cost or inconvenience of redoing the will.

E. Disadvantages

1. Lack of Professional Management

A P.O.D. account does not secure professional management of the deposited funds as may be achieved by using other estate planning techniques such as a traditional trust.

2. No Tax Benefits

A P.O.D. account will not secure tax benefits for the depositor. The depositor will pay income tax on any interest earned by the account. The account will be included as part of the depositor's gross estate for federal estate tax purposes.

V. TRUST ACCOUNTS

A. Definition

A trust depository account is 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. § 436(14). A written agreement signed by all of the trustees is required. § 439(b). It is not essential that payment to the beneficiary be mentioned in the deposit agreement. See *Stogner v. Richeson*, 52 S.W.3d 903 (Tex. App.—Fort Worth 2001, pet. denied) (holding that the depositor’s failure to check a box by trust account language or to name a beneficiary in the indicated box did not prevent the account from being deemed a trust account because the depositor had made his intention clear from other indications on the signature card such as by checking the box marked “other” and filling in the word “trust”).

A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relationship such as attorney-client.

Trust accounts, also called *Totten trusts*, *savings account trusts*, or *tentative trusts*, operate in much the same way as P.O.D. accounts, that is, upon the death of all trustees, the surviving beneficiaries divide the balance remaining in the account.

B. Historical Note

Despite their resemblance to P.O.D. accounts, trust accounts have a totally different history because they evolved from trust law rather than contract law. In the past, courts took several approaches to cope with trust accounts, most of which prevented the account from operating as the depositor intended. Some common examples included: (1) the depositor lacked the intent to create a real inter vivos trust and thus the court did not recognize the existence of a trust; (2) the depositor intended to create a trust, but the trust was invalid because the depositor retained complete control over the account and did not assume the fiduciary duties required of a trustee; and (3) the true purpose of the arrangement was to effectuate an at-death transfer of property and thus the account would not operate to do so because it did not comply with the formalities of a valid will.

On the other hand, some courts held that the depositor created a valid revocable trust. Thus, the depositor could make withdrawals at any time but, upon death, the balance would pass to the beneficiary. The landmark New York case of *In re Totten*, 71 N.E. 748 (1904), adopted this latter approach and thus trust accounts are often referred to as *Totten trusts*.

Texas, in accordance with modern law, has now stripped trust accounts of their trust law components. Trust accounts are treated as contractual arrangements providing for payment of the balance upon the death of all trustees to the surviving beneficiaries. Because of this tremendous similarity to P.O.D. accounts, many states (but not Texas) and the Uniform Probate Code have abandoned the distinction and now treat trust accounts just like P.O.D. accounts. See UPC § 6-201(8).

For a detailed discussion of Texas cases prior to the enactment of Chapter XI of the Probate Code, see GERRY W. BEYER, TEXAS LAW OF WILLS § 62.2 (10 Texas Practice) (3d ed. 2002).

C. Effect During Lifetime

1. Ownership

All funds in a trust account belong beneficially to the trustee during the trustee’s lifetime. § 438(c). If there is more than one trustee, each owns the account funds in proportion to his or her net contributions. The trustees have the unrestricted right to withdraw all funds and close the account without approval of or notice to the beneficiaries.

Generally, the beneficiaries have no rights during the lifetime of the trustees. However, the deposit agreement or other clear and convincing evidence could demonstrate otherwise, e.g., the trustee physically delivered the passbook to the beneficiary. This rarely occurs as trust accounts are typically

used in situations in which the depositor does not want the beneficiaries to have rights while the depositor is alive.

2. Right to Withdraw

During the lifetime of the trustee or trustees, a trust account may be paid, on request, to any trustee. § 447. No notice to or consent of a beneficiary is required. The beneficiaries have no withdrawal rights while any trustee is alive.

D. Effect After Death

1. Ownership

A beneficiary has no rights until all trustees have died. A beneficiary must outlive all trustees to have any rights. § 439(c). Upon the death of the sole or surviving trustee, the account is divided among the surviving beneficiaries.

If two or more beneficiaries survive the trustees, there is no right of survivorship in the event of death of any beneficiary thereafter, unless the instrument expressly provides for survivorship between them. § 439(c).

2. Right to Withdraw

Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees. § 447.

After the death of all trustees, and unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon the beneficiary surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that the decedent was the survivor of all other persons named on the account either as trustee or beneficiary. § 447.

E. Benefits & Disadvantages

The discussion with respect to P.O.D. accounts is applicable to trust accounts as well. See page 9.

Note that a P.O.D. account is normally a better estate planning tool than a trust account because clients have an easier time understanding how a P.O.D. operates. A client may find it confusing that the word “trust” in the term “trust account” has a very different meaning from when the word is used in other contexts. For example, a trustee of a trust has fiduciary duties and cannot engage in self-dealing while a trustee of a trust account may in most cases withdraw the money at any time and for any (or no) reason.

VI. ISSUES COMMON TO ALL MULTIPLE-PARTY ACCOUNTS

A. Definition of “Account”

A wide-variety of arrangements are encompassed by the term “account” under § 436(1) including, but not limited to, the following types of deposit contracts:

- Checking account,
- Savings account,
- Certificate of deposit, and
- Share account.

However, the following types of arrangements are specifically *excluded* from coverage by the multiple-party account provisions of the Probate Code under § 436(5):

- Business accounts (e.g., accounts for partnerships, joint ventures, associations, corporations, unincorporated associations, charitable or civic organizations, etc.)
- Account maintained by the trustee of a trust where the relationship is established other than by the deposit agreement, and
- Other fiduciary accounts (e.g., an attorney’s trust account containing client funds).

B. Definition of “Financial Institution”

The term “financial institution” is broadly defined to include “an organization authorized to do business under state or federal laws relating to financial institutions.” § 436(3). Examples of financial institutions include, but are not limited to, the following organizations:

- Banks,
- Trust companies,
- Savings banks,
- Building and loan associations,
- Savings and loan companies/associations,
- Credit unions, and
- Brokerage firms that deal in the sales and purchases of stocks, bonds, and other types of securities.

C. Effect of Divorce

What is the effect of a divorce on the individuals involved in a multiple-party account? Will ex-Husband still take as the surviving party of a joint account with ex-Wife? Will ex-Wife take as a beneficiary on a P.O.D. account created by ex-Husband? The answer under Texas law appears to be “yes” because there is no statute automatically voiding a multiple-party account designation upon divorce.

D. Conflicting Disposition by Will

It is unlikely that a will provision expressly gifting the account or account funds would be sufficient to alter the terms of an account contract providing for survivorship rights or for payment to a P.O.D. payee or beneficiary. Wills control the disposition of property in a decedent’s probate estate; the proceeds of a joint account with survivorship rights, P.O.D. account, or trust account never reach the estate but instead pass directly to the surviving joint parties, P.O.D. payees, or beneficiaries.

E. Survival

The survival statute, § 47(d), imposes a 120 hour survival period for joint owners. However, the statute is silent regarding situations where the person who receives the property is not an “owner,” such as the P.O.D. payee or the beneficiary of a trust account. It thus appears that unless the account contract provides otherwise, there is no requirement beyond mere survival for the P.O.D. payee or trust account beneficiary to be entitled to the account funds.

F. Effect of Depositor's Incapacity

When a depositor becomes incompetent, the depositor no longer has the ability to manage the depositor's property, including multiple-party accounts. Management duties may then pass to a court appointed guardian of the estate or conservator. Assume that Depositor has two accounts: Account One in Depositor's name alone, and Account Two which has a P.O.D. provision in favor of Payee. Guardian needs money to pay Depositor's expenses and thus starts spending the money in Account Two. What right, if any, does Payee have to complain and to force Guardian to use the funds in Account One first? There is no clear resolution of this issue. For a discussion of this issue, see Glenn M. Karisch, *Multi-Party Accounts in Texas* 25-28 (2003), available at <http://www.texasprobate.com/articles/accounts.sa2003.PDF>.

G. Rights of a Living Party's Creditors

Multiple-party accounts are generally not an effective method of avoiding creditors. While the depositor is alive, the depositor's creditors may reach the account to the extent of the depositor's net contributions. Generally, however, creditors of an agent, P.O.D. payee, or trust account beneficiary have no right to reach account funds.

H. Rights of Deceased Party's Creditors

1. General Creditors

Funds in a multiple party account are available to pay the debts of a deceased depositor but only as a last resort after all other estate assets are exhausted. § 442. Multiple-party accounts are not effective against the estate of a deceased party to transfer to the surviving party or parties sums needed to pay debts, taxes, and expenses of administration (including statutory allowances to the surviving spouse and minor children) if other assets of the estate are insufficient. Accordingly, the use of a multiple-party account is not a total probate avoidance technique; probate will be avoided only if the estate is solvent without taking into consideration the amounts in the account to which the deceased party was beneficially entitled.

A party who receives payment from an account after the death of another party is liable to the deceased party's personal representative to the extent necessary to discharge the debts, taxes, and expenses of administration. No proceeding to assert this liability may be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor, or one acting for a minor child of the deceased party. The statute of limitations for such an action is two years after the party's death. A financial institution will not be liable for making payment to a surviving party unless it received written notice from the personal representative before payment was made that such sums are needed to pay debts, taxes, or expenses of administration.

2. Secured Creditors

No multiple-party account is effective against the claim of a secured creditor who has a lien on the account. § 442. Any party, except a convenience signer to a convenience account, may use the account as collateral without the joinder of any of the other parties. If the secured creditor is a financial institution, the creditor must give written notice sent by certified mail to the other party that the account was used as collateral within thirty days of perfection. However, notice need not be given to parties who have no current ownership rights such as P.O.D. payees, trust account beneficiaries, and convenience signers.

3. The Financial Institution

If the deceased party was indebted to the financial institution, the financial institution has a right of set-off against the joint account up to the amount to which the deceased party was beneficially entitled

immediately before his or her death. In the absence of proof of net contributions, this amount will be deemed a pro rata share with all other parties having present rights of withdrawal. § 449.

A bank may setoff claims against a deceased customer's deposits without the necessity of complying with the claims procedures established by the Probate Code. The bank's right to setoff mature debts owed to the bank by the customer survives the customer's death and continues against the decedent's personal representative. The bank's setoff right exists even when the customer's debt to the bank matures after the customer's death. The right to setoff an unmatured claim exists without regard to the solvency of the deceased's estate. It remains undecided whether a court could order a bank to release funds to satisfy a family allowance if the statutory preference for the family allowance conflicts with the bank's setoff right. See *Bandy v. First State Bank, Overton, Texas*, 835 S.W.2d 609, 617-19 (Tex. 1992).

I. "Stopping" Payment from a Multiple-Party Account

Normally, a financial institution is protected if it pays the account according to the rules discussed in this article. The protection, however, "does not extend to payments made after a financial institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted." § 448. Constructive notice is insufficient; the financial institution's protection is not affected by any other type of notice or any other information available to the financial institution. See *Mbank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724 (Tex. App.—Corpus Christi 1992, no writ) (holding that the bank had the right to pay the entire balance of a non-survivorship account to the surviving party because the bank had not received the necessary notice not to pay) and *Bandy v. First State Bank, Overton, Texas*, 835 S.W.2d 609 (Tex. 1992) (holding that oral notice to the bank by party wishing to prevent the survivor of a non-survivorship account from making withdrawals was insufficient to comply with the statute).

J. "Old" Accounts

Chapter XI of the Probate Code took effect on August 27, 1979. What if the account in question was created before that date? The courts have held that the law in effect on the date of death is controlling; not the law when the account was opened and the account agreement signed. See *Sheffield v. Estate of Dozier*, 643 S.W.2d 197 (Tex. App.—El Paso, 1982, writ ref'd n.r.e.) (the joint account at issue was opened about three months before the effective date of the new provisions and the deceased party died over a year after the effective date).

VII. CONCLUSION

It is likely that the vast majority of your clients have one or more multiple-party accounts. This article provides basic guidance regarding the operation of these accounts, both while the client is alive and after the client has died, and discusses a variety of issues that may arise when distributing the remaining funds on deposit.

Depositors usually open multiple-party accounts without consulting an attorney. The depositor visits a financial institution and opens the account after speaking with a new accounts officer. This person, who is rarely legally trained, explains the alleged effect of the account, for example, that the balance will belong to the surviving party. The officer's advice could be incorrect and may even be the practice of law without a license. Thus, it is essential that you personally inspect all of your client's multiple-party account contracts to make sure they comply with the applicable law and carry out your client's intent.

Portions of this article are adapted from the following sources: GERRY W. BEYER, TEXAS LAW OF WILLS chs. 61-64 (10 Texas Practice) (3d ed. 2002 & 2009 Supp.); GERRY W. BEYER, TEXAS ESTATE

Fundamentals of Texas Multiple-Party Accounts

PLANNING STATUTES – WITH COMMENTARY (2009-2010) (*Statutes in Context* accompanying Prob. Code §§ 436-449); and GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES – EXAMPLES & EXPLANATIONS ch. 16 (3d ed. 2005).