SMU | Dedman School of Law

SMU Law Review

Volume 21
Issue 1 *Annual Survey of Texas Law*

Article 24

1967

Donee Beneficiary Contracts as Applied to Joint Survivorship Accounts

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Mrs. Lutz told Gibralter Savings Association that she wanted to open three new savings accounts of $5,000.00 each and that upon her death she wanted the money to be divided among her niece and nephews, the respondents. Gilbralter recommended joint accounts with right of survivorship because either party could make withdrawals upon presentation of the account book and any balance remaining upon the death of one would belong to the surviving owner. Mrs. Lutz gave Gibralter her personal check for $15,000.00 and accepted three signature cards and three passbooks naming herself and the respondents as joint tenants with the right of survivorship. Mrs. Lutz later signed all three cards; however, the cards were not signed by the respondents nor were they returned to Gibralter as requested.[1] As directed, Gibralter sent the dividend checks on these accounts to Mrs. Lutz. After the death of Mrs. Lutz, the respondents sued Quilter, the independent executor of the estate of Mrs. Lutz, seeking a judgment declaring that they were the owners of these savings accounts. The court of civil appeals affirmed the judgment of the trial court, holding that the respondents owned these funds by right of survivorship.[2] *Held, affirmed:* Where the depositor creates a joint savings account with the right of survivorship, but only the depositor signs the signature card, there is a completed third party beneficiary contract which entitles the donee to recover upon the depositor's death even though the signature cards were not signed in accordance with the depository's requirements. *Quilter v. Wendland,* 403 S.W.2d 335 (Tex. 1966).

I. Joint Survivorship Accounts—Theories of Recovery

An individual often can profit by depositing funds to a joint account with right of survivorship in the name of himself (the donor) and another (the donee). Since a joint tenancy constitutes one estate, the interest of the deceased tenant does not pass to the survivor but merely ceases to exist.[3] As a result, by creating a joint tenancy form of account, the donor can avoid the Texas inheritance tax and the need for a probate proceeding as to the deposit.[4] Where the estate is small, relatively expensive attorney's fees can be eliminated, and, regardless of the size of the estate, an immediate source of funds will be available to pay debts or taxes.

Depending on the jurisdiction and the facts, courts have applied four theories—trust, gift, joint tenancy, and contract—in allowing the surviv-

[1] One of the nephews, Patrick M. Wendland, had signed the wrong card by mistake.
[2] Quilter v. Wendland, 387 S.W.2d 440 (Tex. Civ. App. 1965).
[3] Tex. Att'y Gen. Op. No. WW-262 (1957).
[4] *Ibid.*

ing donee to take the entire account upon the death of the donor.[5] Under each of these theories, courts require that the donor intend to give the account proceeds to the donee, but often the necessary intent may be inferred from the facts.[6] In trying to analyze the different approaches used to allow the donee's recovery, one must first distinguish the "four theories" from the "deposit contract" concept—the deposit of funds in a bank or savings and loan association constitutes a contractual relationship whereby the bank is the debtor and the depositor is the creditor.[7] Notice also should be taken of the difficulty involved in distinguishing the gift theory as a separate theory, since donative intent is the underlying basis for any recovery by the donee.[8]

Trust A few jurisdictions have upheld the donee's right to the joint account upon the theory that the depositor intended to create a trust with respect to the deposit.[9] However, in most cases where the trust theory has been applied, the account itself has indicated that the donor is the trustee for the donee. These decisions rely upon the principle that a valid trust can be created by the declaration of a property owner that he holds the property in trust for another.[10] Usually, the validity of such "savings bank trusts" or "Totten trusts"[11] has not depended upon either the beneficiary's

[5] Annots., 33 A.L.R.2d 569 (1954) (parol evidence rule as applied to deposit of funds in name of depositor and another), 23 A.L.R.2d 1171 (1952) (necessity of delivery of stock certificate to validity of gift of stock), 168 A.L.R. 1324 (1947) (effect of donee's lack of knowledge), 168 A.L.R. 1273 (1947) (bank deposits in ordinary form as voluntary trusts), 164 A.L.R. 881 (1946) (validity of nontestamentary trust reserving settlor's power to consume), 161 A.L.R. 304 (1946) (rights of beneficiary of government bonds), 161 A.L.R. 71 (1946) (power of one party to joint account to terminate other's interest), 159 A.L.R. 997 (1945) (grantee's oral promise giving rise to trust), 149 A.L.R. 879 (1944) (deposits in name of depositor and another); Comment, *The Law of Joint Bank Accounts in Texas*, 11 Sw. L.J. 483 (1957).

[6] 149 A.L.R. 879 (1944).

[7] TEX. REV. CIV. STAT. ANN. art. 342-707 (1943); Trinity Universal Ins. Co. v. First State Bank, 179 S.W.2d 391 (Tex. Civ. App.), *rev'd on other grounds*, 143 Tex. 164, 183 S.W.2d 422 (1944).

[8] 149 A.L.R. 879 (1944).

[9] *In re* Kellogg, 41 Cal. App. 2d 833, 107 P.2d 964 (1940); Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1922); *cf.*, Steiner v. Fecycz, 72 Ohio App. 18, 50 N.E.2d 617 (1942). (The donor changed his account to joint tenancy form relying upon the donee's false representation that he would pay the donor's funeral and burial expenses. The court held that the facts raised a "constructive trust" in favor of the donor's estate.)

[10] TEX. REV. CIV. STAT. ANN. art. 7425b-7 (1943); BOGERT, TRUSTS § 10 (4th ed. 1963).

[11] The term "Totten trust" originated in the leading case of *In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904). There the court held:

> A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, 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 passbook or notice to the beneficiary. In case 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.

Id. at 752. See also BOGERT, TRUSTS § 21 (4th ed. 1963). The "savings bank trust" is also called the "poor man's will," since persons of modest means can use it to achieve practically the same results as they would by executing a will.

knowledge of the account or delivery of the passbook to the donee, although both notice and delivery are evidence of the donor's intent to create a trust.[12] The rule in Texas appears to be that a savings bank trust can be created, but only if the equitable title passes immediately to the donee so that the donee might maintain an action for conversion of the property.[13] The donor must intend to part with all dominion and control over the funds, except the dominion and control necessary to his fiduciary capacity as trustee. The mere receipt of dividends by the donor may be sufficient dominion and control to invalidate the trust in Texas.[14]

Gift Most jurisdictions judge the donor's deposit to the joint account by standards of gift—a present, gratuitous transfer of an interest in property.[15] The donor must clearly manifest his intent to make a gift of the property; however, in many instances the joint account form alone is held to provide at least presumptive evidence of the donor's intent.[16] In addition to donative intent, a valid gift requires the elements of delivery and acceptance.[17] Actual or constructive delivery is important because it provides both a clear expression of the donor's intent and a relinquishment of exclusive control of the account.[18] The execution of the deposit contract may take the place of delivery, and, if so, actual delivery of the passbook is merely evidence of donative intent.[19] Although the donee must accept the gift, the donee's execution of the signature card can indicate an acceptance, or the court can presume an acceptance from the nature of the gift, being a benefit without burden.[20]

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[12] Milholland v. Whalen, 80 Md. 212, 43 Atl. 43 (1899); BOGERT, TRUSTS § 23 (4th ed. 1963).

[13] Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943). Since the donor had exercised complete dominion and control over the account, retaining the dividend checks and making withdrawals for personal uses, the court held that the account was not a valid trust. Comment, *The Law of Joint Bank Accounts in Texas*, 11 Sw. L.J. 483, 508 (1957) cites the *Fleck* case for the proposition that the Texas Supreme Court has rejected the doctrine of Totten trusts. However, the validity of Totten trusts in Texas is unsettled. See 164 A.L.R. 881, 910 n.17 (1946).

[14] TEX. REV. CIV. STAT. ANN. art. 7425b-1-47 (1943). Unthank v. Rippstein, 386 S.W.2d 134 (Tex. 1964); Schwartz v. Jacob, 394 S.W.2d 15 (Tex. Civ. App. 1965) *error ref. n.r.e.*; Williams v. Krueger, 351 S.W.2d 932 (Tex. Civ. App. 1961), *rev'd*, 163 Tex. 552, 359 S.W.2d 48 (1962); Cook v. Cook, 331 S.W.2d 77 (Tex. Civ. App. 1959); Hilley v. Hilley, 327 S.W.2d 467 (Tex. Civ. App. 1959), *aff'd*, 161 Tex. 569, 342 S.W.2d 565 (1961); Schmidt v. Schmidt, 261 S.W.2d 892 (Tex. Civ. App. 1953) *error ref.* Note, however, that in Fleck v. Baldwin, note 13 *supra*, the court failed to state whether the mere receipt of dividends by the donor was sufficient control in itself to invalidate the trust.

[15] BROWN, PERSONAL PROPERTY §§ 37, 65 (2d ed. 1955); 149 A.L.R. 879 (1944).

[16] Trenton Sav. Fund Soc'y v. Byrnes, 110 N.J. Eq. 617, 160 Atl. 831 (Ch. 1932); Commonwealth Trust Co. v. Grobel, 93 N.J. Eq. 78, 114 Atl. 353 (Ch. 1921); *cf.*, Whalen v. Milholland, 89 Md. 199, 43 Atl. 45 (1899).

[17] BROWN, PERSONAL PROPERTY §§ 37-57 (2d ed. 1955).

[18] Benavides v. Laredo Nat'l Bank, 91 S.W.2d 372 (Tex. Civ. App. 1936).

[19] Beach v. Holland, 172 Ore. 396, 142 P.2d 990, 149 A.L.R. 866 (1943).

[20] *In re* Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935). See also Beach v. Holland, note 19 *supra*, a leading case on the gift theory, which held that where the donor transferred an account to her own name and the name of the donee, a gift *in praesenti* of an interest in the account was made to the donee, and a joint tenancy with right to survivorship was created. The Oregon

Joint Tenancy The Texas courts consistently have held that the donor's deposit, in itself, does not evidence an intention to make a gift.[21] Instead, like many courts,[22] where both parties sign they generally have applied the joint tenancy theory in order to allow the surviving donee to take the joint account.[23] In applying the joint tenancy theory, the court determines whether donative intent existed or whether the donor merely intended the account to be a convenience arrangement (*e.g.*, for the payment of the donor's funeral expenses).[24] Although section 46 of the Texas Probate Code abolished joint tenancies where they would have been created by law,[25] the section allows joint owners to create, by written agreement, a joint tenancy with right of survivorship.[26] The recent Texas cases indicate that where the donor deposits money in a joint account with right of survivorship, and *both* the donor and the donee sign the signature card, the surviving donee has the legal right to the funds in the joint account under the joint tenancy theory.[27] There are two basic exceptions to the rule. First, if the donor intends the account to be merely for his own convenience, the joint tenancy apparently will fail.[28] Second, *Williams v. Mc-*

Supreme Court found that the elements of a valid inter vivos gift were established, despite the fact that no withdrawals were permitted without the passbook, which remained in the donor's possession. The court held that the provision giving the donee the right to withdraw was evidence of the donor's intent to make a present gift. The court also held that the execution of the deposit contract took the place of the delivery. Since the donee had signed the signature card, there was no question as to acceptance.

[21] There is authority in Texas that if the donor divests himself of exclusive dominion and control over the account he may create a valid gift. However, the Texas decisions have refused to accept the gift theory where the donor has retained the passbooks and the beneficial enjoyment of the account, or where the donor creates the account as a convenience arrangement. Krueger v. Williams, 359 S.W.2d 48 (Tex. 1962); Turner v. Merchants & Planters Nat'l Bank, 392 S.W.2d 889 (Tex. Civ. App. 1965); Ottjes v. Littlejohn, 285 S.W.2d 243 (Tex. Civ. App. 1956) *error ref. n.r.e.*; Olive v. Olive, 231 S.W.2d 480 (Tex. Civ. App. 1950); Pruett v. First Nat'l Bank, 175 S.W.2d 658 (Tex. Civ. App. 1943); Benavides v. Laredo Nat'l Bank, 91 S.W.2d 372 (Tex. Civ. App. 1936); *cf.*, Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943).

[22] 149 A.L.R. 879 (1944).

[23] Brown v. Lane, 383 S.W.2d 649 (Tex. Civ. App. 1964) *error ref.*; Groos Nat'l Bank v. Norris, 384 S.W.2d 401 (Tex. Civ. App. 1964); Johnson v. Johnson, 306 S.W.2d 780 (Tex. Civ. App. 1957) *error ref.*; Adams v. Jones, 258 S.W.2d 401 (Tex. Civ. App. 1953); see also cases cited note 21 *supra*. *But see*, Davis v. East Tex. Sav. & Loan Ass'n, 163 Tex. 361, 354 S.W.2d 26 (1962).

[24] Ottjes v. Littlejohn, 285 S.W.2d 243 (Tex. Civ. App. 1955) *error ref. n.r.e.*; Olive v. Olive, 231 S.W.2d 480 (Tex. Civ. App. 1950), where donee made withdrawals for the convenience of the donor; Pruett v. First Nat'l Bank, 175 S.W.2d 658 (Tex. Civ. App. 1943) (donor had no intention to make a gift but merely allowed the donee to draw on the account).

[25] TEX. PROB. CODE ANN. § 46 (1961). For the application of § 46 to community property, see Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961); Williams v. McKnight, 402 S.W.2d 505 (Tex. 1966), 20 Sw. L.J. 221; see also Note, 19 Sw. L.J. 835 (1965). The *Hilley* case held that a husband and wife could not purchase property with community funds and have it transferred to them as joint tenants with right of survivorship. See text accompanying note 29 *infra* for a discussion of *Williams*.

[26] Chandler v. Kountze, 130 S.W.2d 327 (Tex. Civ. App. 1939) *error ref.*; TEX. PROB. CODE ANN. § 46 (1961).

[27] Notes 21 & 23 *supra*.

[28] See cases cited note 24 *supra*.

Knight[29] holds that a husband and wife cannot form a joint tenancy out of community funds without first reducing those funds to their separate estates according to statutory provision.[30]

The continued application of the joint tenancy theory in Texas has been confused by the Texas Supreme Court's opinion in *Davis v. East Tex. Sav. & Loan Ass'n.*[31] Although both parties had signed, the court ignored the trial court's application of the joint tenancy theory and instead held that the surviving donee took the proceeds as the beneficiary of a third party contract. However, under similar fact situations, subsequent opinions by the court of civil appeals have applied the joint tenancy theory;[32] furthermore, the supreme court in *Krueger v. Williams*[33] not only distinguished *Davis* on the terms of its contract, but also failed to cite *Davis* in *Quilter*, although applying the doctrine of third party contracts to a situation where the donee had not signed.

Contract In addition to the trust, gift, and joint tenancy theories, several courts have used the contract theory to enforce the donee's right to the funds deposited.[34] These courts hold that the donee derives his interest in the account through the execution of the deposit contract,[35] *i.e.*, his contract rights to the deposit arise at the time of the deposit and not at the donor's death; thus, the contract theory avoids the question of testamentary disposition.[36] Furthermore, some courts use the contract theory because common law joint tenancies have been abolished in their state.[37] The contract theory has been applied both when the donee has signed the signature card (and thus was a party to the contract of deposit)[38] and when he has not signed (the donee can then enforce the deposit contract as a third party donee beneficiary).[39] A person is a third party donee beneficiary when the promisee (the donor) contracts with the promisor (the

[29] 402 S.W.2d 505 (Tex. 1966).

[30] Note 25 *supra*.

[31] 163 Tex. 361, 354 S.W.2d 926 (1962).

[32] Turner v. Merchants & Planters Nat'l Bank, 392 S.W.2d 889 (Tex. Civ. App. 1965); Groos Nat'l Bank v. Norris, 384 S.W.2d 401 (Tex. Civ. App. 1964); Brown v. Lane, 383 S.W.2d 649 (Tex. Civ. App. 1964) *error ref.*

[33] 163 Tex. 545, 359 S.W.2d 48 (1962); see text accompanying note 51 *infra*.

[34] 149 A.L.R. 879, 897 (1944). This theory originated in Chippendale v. North Adams Sav. Bank, 222 Mass. 499, 111 N.E. 371 (1916). The beneficiary of a third party contract may be a creditor of the promisee. For a discussion of the rules applicable in this situation see text accompanying note 46 *infra*.

[35] *Ibid.* See also Quigley v. Quigley, 85 F.2d 300 (D.C. Cir. 1936); *In re* Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935).

[36] *Cf.*, TEX. PROB. CODE ANN. § 59 (1961); Olive v. Olive, 231 S.W.2d 480 (Tex. Civ. App. 1950).

[37] *E.g., In re* Hutchinson's Estate, 120 Ohio St. 542, 166 N.E. 687 (1929).

[38] Annot., 149 A.L.R. 879 (1944).

[39] Rhorbacker v. Citizens Bldg. Ass'n Co., 138 Ohio St. 273, 34 N.E.2d 751, 135 A.L.R. 988 (1941); *In re* Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935).

bank) to have performance rendered to the donee, thereby conferring a gift upon the donee.[40]

The doctrine of third party contracts is a principal exception to the general rule that only the parties to a contract can enforce it.[41] In allowing the donee to sue, the courts either establish privity of contract by operation of law or dispense with the necessity of privity entirely.[42] As noted, above,[43] where the donee has signed the signature card, the Texas courts, with the exception of *Davis*, have applied the joint tenancy theory instead of the contract theory. But when the donee has not signed the signature card, the Texas courts have begun to classify the donee as the third party beneficiary of the deposit contract.[44]

II. Third Party Contracts in Texas

The beneficiary of a third party contract may be either a creditor or a donee.[45] The leading Texas case on creditor beneficiaries is *Hill v. Hoeldtke*,[46] decided in 1912. The court held that once the creditor of the promisee accepts the performance of a contract made for his benefit, the contract cannot be revoked without his approval. Although the court did not decide whether the creditor's acceptance was necessary to prevent revocation, the general rule is that the creditor's acceptance will not be presumed.[47]

Davis v. East Tex. Sav. & Loan Ass'n,[48] the first Texas Supreme Court decision to consider the surviving donee as the beneficiary of a third party contract, held that when both the donor and donee signed a signature card in joint tenancy form, a contract was made by the donor with the association which created a presently vested though defeasible interest in the deposit. This interest ripened into full and absolute title upon the donor's death. Although the donee's interest vested immediately, it would have been defeated if the donor had withdrawn the deposit before his death or if

[40] Williston, Contracts §§ 347, 357 (3d ed. 1959); Simpson, Contracts § 116 (2d ed. 1954).

[41] *Ibid.* See also Wolters Village Management Co. v. Merchants & Planters Nat'l Bank, 223 F.2d 793 (5th Cir. 1955).

[42] Williston, Contracts § 347 (3d ed. 1959); Simpson, Contracts 243 (2d ed. 1954). See also Turner v. Merchants & Planters Nat'l Bank, 392 S.W.2d 889 (Tex. Civ. App. 1965) where the court held that the donee is in privity with the donor and that the donor's interest vests in the donee at the time of deposit, subject to the survivorship contract; *cf.*, Free v. Bland, 369 U.S. 663 (1962), which held that Texas law governing purchases with community funds as applied to United States savings bonds taken in the name of husband *or* wife was inconsistent with and must yield to federal law conferring right of survivorship.

[43] Notes 23 & 27 *supra.*

[44] Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962); Benavides v. Laredo Nat'l Bank, 91 S.W.2d 372 (Tex. Civ. App. 1936).

[45] Williston, Contracts §§ 347-403 (3d ed. 1959).

[46] 104 Tex. 594, 142 S.W. 871 (1912).

[47] Simpson, Contracts § 122 (2d ed. 1954).

[48] 163 Tex. 361, 354 S.W.2d 926 (1962).

the donee had died before the donor.[49] The court did not follow the trial court's application of the joint tenancy theory, but instead, applied the third party contract theory. Although achieving the same result, the supreme court apparently ignored the fact that the donee had signed and was thus a party to the deposit contract. However, subsequent Texas cases, including one to which the supreme court refused error, have applied the joint tenancy theory where both sign.[50]

Where only the donor has signed the signature card, the Texas decisions have begun to classify the surviving donee as the beneficiary of a third party contract. In *Krueger v. Williams*,[51] the donor, using community funds, purchased an investment share account, payable to the survivor, in his name and the name of his daughter by a prior marriage. The donor signed both his name and that of his daughter, and upon his death, the daughter withdrew the proceeds. The court stated that this transaction did not constitute a present gift to the donee[52] but recognized that in the absence of fraud upon the wife, the husband can dispose of the community property as he sees fit. The court ruled that the receipt card created a presumption that the ownership of the account vested in the survivor. *Edd v. Mitchell*[53] was cited as authority for the rule that the beneficiary can enforce the third party contract. *Krueger* also cited *In re Staver's Estate*,[54] but did not discuss the part of the *Staver* decision which held that the beneficiary's rights vested upon the making of the contract.[55] Under similar circumstances, *Staver* had held that if the account is not established merely for convenience, "the rights of such donee beneficiary arise upon the making of the contract and not upon a ratification or assent to it; the latter elements being presumed from the fact of the benefit without burden."[56]

[49] On the donor's death, East Texas filed an interpleader suit to determine the ownership of the account. The court held that East Texas was not justified in filing the interpleader suit and thus denied East Texas recovery of its attorney fees and court costs. Articles 342-710 (banks) and 852a, §§ 6.08, 6.09 (savings and loan associations) allow the depository to make payments to either of the joint depositors, before or after death of the other, without incurring any liability for such payments. Reed v. Reed, 283 S.W.2d 311 (Tex. Civ. App. 1955) held that articles 342-710 and 881a-23 (the predecessors of article 852a, §§ 6.08, 6.09) merely protected the bank in its payments and did not determine ownership of such funds. TEX. REV. CIV. STAT. ANN. arts. 342-710 (1943), 852a, §§ 6.08 (1965), 6.09 (1963).

[50] See cases cited at note 32 *supra*. In *Davis* the court may have intended to describe the contract as one between three parties rather than as a third party contract.

[51] 163 Tex. 545, 359 S.W.2d 48 (1962).

[52] The issue in this case was the validity of the survivorship right where the husband had purchased such an account with community funds, naming himself and a third party as co-owners. The supreme court had expressly reserved this question in its decision in Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961).

[53] 143 Tex. 307, 184 S.W.2d 823 (1945).

[54] 218 Wis. 114, 260 N.W. 655 (1935).

[55] Despite the fact that the opinion cited *Edds* and *Staver*, the *Krueger* court did not designate the donor's daughter as a third party beneficiary although holding that she had the contractual right to the proceeds as survivor. In *Quilter* the same court pointed out that the daughter recovered as a third party beneficiary of the deposit contract. 403 S.W.2d 335, 337 (Tex. 1966).

[56] 260 N.W. 655, 658 (1935).

Krueger also distinguished *Davis* because the facts did not involve similar contractual terms.

III. QUILTER v. WENDLAND

Unable to give effect to the joint tenancy theory because the donees had not signed the signature cards,[57] the court upheld the donor's intent by enforcing the deposit as a third party contract. In doing so, the court did not rely on, indeed did not cite, its earlier decision in *Davis*—apparently, because *Davis* had applied the rule of third party donee contracts where both parties had signed, while in *Quilter* only the donor had signed. The court devoted most of its attention to the question of whether there was a completed contract. It found that the contract originated with the transfer of the money and the acceptance of the passbooks in joint tenancy form. The fact that the signature cards were not properly signed and returned to Gibralter was held to have no bearing on the completion of the third party deposit contract. The majority also pointed out that retention by the donor of the passbooks was not controlling. Thus, the respondents qualified as the donee beneficiaries of the deposit contract, since the donor had contracted with the bank with intent to confer a gift upon the donee.[58]

Having found the existence of the third party contract, the court concluded that the respondents were entitled to the proceeds of the joint accounts upon the basis of the survivorship provisions. In conclusion, the opinion stated that section 46 of the Probate Code does not govern third party contracts but covers contracts "between joint owners of property" to establish the right of survivorship, thus implying that at the completion of the contract the donees were not "joint owners" of the accounts. This inference must be viewed in light of the court's citation of *Rhorbacker v. Citizens Bldg. Ass'n Co.*,[59] a leading Ohio case on the application of the contract theory, which held that the contract immediately vested joint and equal interests in the donor and the donee. There, neither the donor nor the donee executed the signature cards, nor did the donee have knowledge of the joint survivorship account. Although citing *Rhorbacker*, the *Quilter* opinion did not say when the contract rights vested in the donee or whether the donee could have withdrawn the funds before the death of the donor.

[57] Note 23 *supra.*

[58] See note 40 *supra.* The dissent argued that Mrs. Lutz had not completed the contract with Gibralter, because the signature cards were never properly signed and returned to Gibralter, nor were the passbooks delivered to the respondents. Since Gibralter had told Mrs. Lutz that it was necessary to return the cards, properly signed, the dissent felt that Mrs. Lutz knowingly had failed to complete the contract. The dissent approved the court's holding in *Krueger*, but distinguished the case on the fact that there the receipt card had been delivered to the savings and loan association.

[59] 138 Ohio St. 273, 34 N.E.2d 751, 135 A.L.R. 988 (1941).

IV. Conclusion

The *Davis* opinion may indicate that even where both the donor and the donee sign the signature card, the court would like to abandon the joint tenancy theory in favor of the contract theory. At least one reason favors the contract approach over a property concept; it avoids any possible problems in the langauge of section 46 of the Probate Code. Section 46 allows parties to contract to create a joint tenancy, but only if the parties are joint owners at the time of the contract—clearly not the situation where one party having complete ownership of a fund opens an account with right of survivorship in another.[60] However, the Texas courts of appeals have continued to allow the surviving donee to recover the proceeds under the joint tenancy theory where both the donor and donee have signed the signature card despite the court's use of third party language in *Davis*.[61]

Where only the donor has signed the signature card, as in *Quilter*, the court cannot give effect to the joint tenancy theory because there is no agreement in writing between joint owners as is required by section 46.[62] But if the donee has *no* vested rights until the donor's death, the contract is testamentary in nature, and the disposition fails because the instrument was not executed in conformity with the requirements of the wills statutes.[63] In *Davis* the court held that the survivor's contract rights had vested before the donor's death. The donee's contract rights are not transformed into a property interest until he actually receives funds from the account by enforcing the deposit contract—by making withdrawals. Although *Quilter* left unanswered the question of whether the donee may enforce the contract by making withdrawals during the donor's lifetime, *Davis* indicates that the donee beneficiary's rights vest immediately, thus creating a present though defeasible interest in the account.

The courts should clarify the Texas law as to joint survivorship accounts by treating the signing and non-signing donee alike, *i.e.*, recipients of enforceable contractual rights at the time the contract is made. Thus, the donee's rights to the proceeds, both during and after the donor's lifetime, would always be based on general contract rules, avoiding the questions arising under section 46 as to joint tenancies. This approach would simplify the law while allowing the same results—the donee's recovery of the proceeds of the joint survivorship account and the consequent fulfillment of the donor's intent.

William T. Carlisle

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[60] Notes 25 & 26 *supra*.
[61] See cases cited note 32 *supra*.
[62] Notes 25 & 26 *supra*.
[63] Tex. Prob. Code Ann. § 59 (1961); Olive v. Olive, 231 S.W.2d 480 (Tex. Civ. App. 1950).