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## WILLS-ADVANCEMENTS-JOINT BANK DEPOSIT AS ADVANCEMENT TO CHILD

James F. Gordy S.Ed.  
*University of Michigan Law School*

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WILLS—ADVANCEMENTS—JOINT BANK DEPOSIT AS ADVANCEMENT TO CHILD—Decedent opened a joint bank account in the name of himself and his daughter. Only two deposits were made, both by him, and solely from his funds. Decedent died intestate before any withdrawals had been made. The administratrix of his estate contended that the funds remaining in the joint bank account constituted an advancement to the daughter, and sought to have them brought into hotchpot in determining the distributive shares of the other heirs. A Colorado statute<sup>1</sup> provided, inter alia, that when such a joint deposit is made, it may be paid to any one of the joint depositors whether the other is living or not, and shall be deemed owned in joint tenancy with the right of survivorship. The lower court held that the joint deposit constituted an advancement to the daughter and must be brought into hotchpot as part of decedent's estate. On appeal, *held*, reversed. Such a joint bank account is not an advancement in the absence of an indication by the parent to make an irrevocable gift and surrender of all possession and control of the account. Nothing in the record indicated any intent on the part of decedent to make such a gift. Further, by virtue of the statute, decedent retained control of the account with the absolute right of withdrawal. *Albers v. Young*, (Colo. 1948) 199 P. (2d) 890.

The court's conclusion that this joint deposit did not constitute an advancement seems consistent with conventional advancement concepts.<sup>2</sup> The courts and writers indicate three fundamental requirements in the creation of an advancement. In the first place, whether a particular transfer by a parent to his child is to be regarded as an advancement depends primarily on the intention of the parent at the time of the transfer.<sup>3</sup> An intention to make an advancement

<sup>1</sup> Colo. Stat. Ann. (1935) c. 18, §45.

<sup>2</sup> 4 PAGE, WILLS, 3d ed., c. 44 (1941); ATKINSON, WILLS, 674 (1937); Grady v. Sheehan, 256 Pa. 377, 100 A. 950 (1917); Daly v. Pacific Savings & Loan Assn., 154 Wash. 249, 282 P. 60 (1929); 45 MICH. L. REV. 1051 (1947).

<sup>3</sup> Nobles v. Davenport, 183 N.C. 207, 111 S.E. 180 (1922); Holland v. Bonner, 142 Ark. 214, 218 S.W. 665 (1920); Taylor v. Grimes, 223 Iowa 821, 273 N.W. 898 (1937); 26 A.L.R. 1101.

is indispensable. Second, since all advancements are gifts<sup>4</sup> the requirements of a valid gift must be present.<sup>5</sup> Thus there must be a complete and irrevocable surrender of all control of the subject matter of the advancement.<sup>6</sup> In the absence of any further showing of decedent's intent than the mere establishment of the joint account, this requisite has not been fulfilled, since the applicable Colorado statute gives either joint depositor the absolute right of withdrawal. Third is the requirement that the gift must have been made during the lifetime of the donor.<sup>7</sup> This is because the nature of an advancement is an anticipation of what the child would otherwise receive on the death of the parent intestate; it is a settlement during the parent's lifetime, to allow the distributee the present use and enjoyment of that which under ordinary circumstances he would not secure until the donor's death.<sup>8</sup> Without some showing of the parent's intent to part irrevocably with all control of the funds on deposit when the joint deposit is created, he has, under the statute, an equal right to withdraw, and the funds therefore do not become the absolute property of the co-depositor until his death. The cases do not deny that under the proper circumstances the creation of a joint bank account may constitute a valid gift and also an advancement. It is said by some courts that to perfect a gift of a deposit it must appear that the depositor intended a gift and also that he executed such intention and completed the gift by divesting himself of all control of the fund.<sup>9</sup> On the other hand, some courts take the view that the donor need not part with dominion of a gift involving an estate in joint tenancy for the gift to be consummated, but that it need only be done insofar as the circumstances permit.<sup>10</sup> The basis of this view is that the creation of a joint bank account, payable to the order of either or the survivor, made with donative intent, vests in the donee a joint interest with the depositor in the fund, so as to entitle the donee to the amount on deposit at the time of the depositor's death.<sup>11</sup> The distinction between a gift of the entire account and a gift of a joint interest therein is thus posed, but it seems clear that on no view could creation of the joint account dispense with any necessary

<sup>4</sup> *Hanssen v. Karbe*, 234 Mo. App. 663, 115 S.W. (2d) 109 (1938). But all gifts are not advancements, since a gift may be absolute or by way of advancement. The intention of the donor is the distinguishing feature.

<sup>5</sup> *In re Moran's Will*, 136 Misc. 615, 241 N.Y.S. 648 (1930).

<sup>6</sup> *Nobles v. Davenport*, supra, note 3; *Greene v. Greene*, 145 Miss. 87, 110 S. 218 (1926); *Stacy v. Stacy*, 175 Ark. 763, 300 S.W. 437 (1927).

<sup>7</sup> *Nobles v. Davenport*, supra, note 3; *Fennell v. Henry*, 70 Ala. 484, 45 Am. Rep. 88 (1881); *Page v. Elwell*, 81 Colo. 73, 253 P. 1059 (1927); *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726 (1856).

<sup>8</sup> *McClellan v. McCauley*, 158 Miss. 456, 130 S. 145 (1930); *Booth v. Foster*, 111 Ala. 312, 20 S. 356 (1896); 12 A.L.R. 568.

<sup>9</sup> *Taylor v. Grimes*, supra, note 3; *In re Gallagher's Estate*, 109 Pa. Super. 304, 167 A. 476 (1933).

<sup>10</sup> *Phoenix Title & Trust Co. v. King*, 58 Ariz. 477, 121 P. (2d) 429 (1942); *Battles v. Millbury Savings Bank*, 250 Mass. 180, 145 N.E. 55 (1924).

<sup>11</sup> *Beach v. Holland*, 172 Ore. 396, 142 P. (2d) 990 (1943); *In re Lorch's Estate*, 33 N.Y.S. (2d) 157 (1941); *Raferty v. Reilly*, 41 R.I. 47, 102 A. 711 (1918).

formalities for completion of the gift.<sup>12</sup> Even the more liberal approach, that a gift may be made of a joint interest, recognizes that the mere opening of a joint account on which each owner has an equal right to draw does not of itself establish a gift, as the depositor's intent is controlling, and such a gift, if intended to take effect only after the depositor's death, is ineffectual as an attempted testamentary disposition of property.<sup>13</sup> Some intention must therefore be shown, for the mere establishment of a joint bank account with the right of survivorship does not ipso facto constitute a gift inter vivos.

*James F. Gordy, S.Ed.*

<sup>12</sup> Havighurst, "Gifts of Bank Deposits," 14 N. C. L. REV. 129 (1936).

<sup>13</sup> Phoenix Title & Trust Co. v. King, *supra*, note 10.