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Issues of Ownership, Control, and Entitlement: Toward a More Pragmatic Analysis of the Law Governing Joint Deposit Accounts in West Virginia

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ISSUES OF OWNERSHIP, CONTROL, AND ENTITLEMENT: TOWARD A MORE PRAGMATIC ANALYSIS OF THE LAW GOVERNING JOINT DEPOSIT ACCOUNTS IN WEST VIRGINIA

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I. INTRODUCTION ........................................... 288
II. AN OVERVIEW OF THE LAW GOVERNING JOINT DEPOSIT ACCOUNTS ........................................... 290
   A. The Deposit Account ................................ 290
   B. The Joint Deposit Account .......................... 291
   C. The West Virginia Banking Statute ............... 294
   D. The Joint Tenancy Account and the Case Law ...... 300
   E. Other Aspects of the Joint Tenancy Account ........ 307

III. VARIATIONS ON THE THEME OF OWNERSHIP, CONTROL AND ENTITLEMENT: OTHER FORMS OF JOINT ACCOUNTS . 313
   A. Tenancy in Common Accounts: Joint Ownership, but Questions of Control and Entitlement .... 313

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B. Accounts with Minors: Questions of Ownership and Control ................................... 317
C. Payable on Death and In Trust for Accounts: Sole Ownership and Control in One Party and Entitlement in Another ................................. 324
D. Depositors and Their Agents: Sole Ownership but with Control Shared by, or Vested Solely in, a Party Other than the Owner ............................... 329

IV. CONCLUSION: MELDING THE CUSTOMER'S INTENT INTO THE BANK'S DOCUMENTATION ........................................................................... 334

I. INTRODUCTION

Bonnie and Clyde are not the only individuals to have ever jointly conducted their banking business; they were simply the most notorious. Everywhere, and by almost everyone, deposits and withdrawals are being made to and from “joint deposit accounts.”

Individuals establish joint deposit accounts for varied reasons. The account may be established for the banking convenience of a couple. The account may be established by one person to deposit a cash gift for another, but over which the benefactor will retain control so that the other person named on the account will receive the money only for a specific purpose or at a specific time. The account may be “a poor man’s will;” that is, established so that upon the depositor’s death, the account will be paid to the other party named on the account. Again, the reasons for having two names on a deposit account are numerous.

For the sake of administrative ease, however, banks prefer to

1. See John W. Fisher, II, Joint Tenancy in West Virginia: A Progressive Court Looks at Traditional Property Rights, 91 W. VA. L. REV. 267, 287 (1989). Specifically, “[f]or more than half a century, the courts of this country have struggled to discover whether a joint deposit bank account with an extended right of survivorship, sometimes called a ‘poor man’s will,’ is a gift, trust, a contract, or joint tenancy, or a testamentary disposition.” Id. (quoting Kepner, Five More Years of the Joint Bank Account Muddle, 26 U. CHI. L. REV. 376, 401 (1958-1959)).

2. For the author’s convenience, the term “banks” will be used to refer, generally, to all financial institutions that accept deposits. The reader is cautioned, however, that the law
handle all deposits uniformly notwithstanding the intent of the depositor. This preference is not simply for the benefit of the bank. Lower administrative costs enable the bank to offer lower rates on loans because the margin required for a profit is lower when the bank’s expenses are lower. In the alternate, the bank can offer the avoided expenses of administration in the form of higher rates of interest on deposit accounts. Accordingly, uniformity in the treatment of deposit accounts benefits the customers of the bank as well as the bank.

A tension potentially exists between the bank and customer with respect to the joint deposit account: The customer may have a specifically intended purpose for his or her account that may conflict with the bank’s desire for uniformity in the handling of such accounts. For example, an elderly person may require the assistance of a relative, friend, or other person in the administration of the elderly person’s financial affairs. In the furtherance of such assistance, a deposit account is established at the elderly person’s financial institution in the name of both the elderly person and the individual who has been asked or who has volunteered to provide the needed assistance. While the elderly person intended to do no more than give the other individual a limited power to write checks on, or make withdrawals from, the account on the elderly person’s behalf, the bank’s standard form of contract for a joint account probably permitted the assisting individual to make withdrawals for any purpose and probably provided that the assisting individual would receive the balance of the account on the death of the elderly person. Again, a tension potentially exists between the customer and the bank because of a divergence between the customer’s intent in establishing a joint account and the bank’s intent in administering the account.

This Article focuses on this divergence. First, the law governing deposit accounts, generally, and joint deposit accounts, specifically, will be reviewed. Second, a different analysis of joint accounts will be proposed which focuses on the issues of ownership, control and entitlement. Third, a means of melding the customer’s intent in establishing an account on which other individuals will be named and the governing a specific type of institution should be consulted before accepting the author’s conclusions in this Article.
bank's ability to maintain the deposit account will be discussed, including the need for additional legislation to facilitate this result. And finally, a broad outline of a policy for banks to follow in establishing joint deposit accounts will be set forth.

II. AN OVERVIEW OF THE LAW GOVERNING JOINT DEPOSIT ACCOUNTS

A. The Deposit Account

A statutory definition provides that "deposit account means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit." This definition is not particularly meaningful. In fact, one senses that the drafters of the definition believed that a deposit account was known to all and need not be explained. This belief is well founded, for everyone's experience includes establishing and using an account at a bank, most typically a checking or a savings account.

From a legal perspective, a more meaningful definition of a deposit account is given by the Supreme Court of Appeals of West Virginia. In the case of Southern Electric Supply Co. v. Raleigh County, National Bank, the court decreed that "[a] bank account creates a

3. W. Va. Code § 46-9-105(e) (1993). This definition is principally provided to further the exception of the pledge of deposit accounts from governance by the provisions of the Uniform Commercial Code — Secured Transactions, W. Va. Code §§ 46-9-101 et seq. (1993). The exception to the definition for accounts which are evidenced by certificates of deposit is not significant in that the exception merely reflects that the effective pledge, or encumbrance, of certificated accounts will be governed by the Uniform Commercial Code. For purposes of this article, no difference exists between deposit accounts which are evidenced by a certificate and those accounts which are not.

4. As the Court in a seminal case on deposit-account law opined, "[m]odern society virtually demands that one maintain a bank account of some sort. 'In a sense a person is defined by the checks he writes. By examining them . . . [one] get[s] to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on Ad infinitum.'" Suburban Trust Co. v. Waller, 408 A.2d 758, 762 (Md. App. 1979) (quoting California Bankers Association v. Shultz, 416 U.S. 21, 85 (1974)).

5. Southern Elec. Supply Co. v. Raleigh County, Nat'l Bank, 320 S.E.2d 515 (W.
contractual debtor-creditor relationship between bank and depositor. A bank takes title to funds on deposit and becomes a debtor for that amount to the depositor, the customer, who becomes the bank’s creditor.  

In a more recent case, the court confirmed this definition, stating: “Where there is a general deposit of money in a bank, the title to and beneficial ownership of the money is vested in the bank, and the relation between it and the depositor is that of debtor and creditor.” The significance of the contractual nature of the relationship is that: “A deposit creates an ordinary debt, and not a privilege or right of a fiduciary character.”

The essence of a deposit account is the delivery by an individual of money or its equivalent to a bank. The customer expects repayment of the money, typically upon his or her demand and upon the terms and conditions set forth in a deposit contract. The consumer is a creditor; that is, a person to whom an obligation is owed. The bank is the debtor; that is, the one who owes the obligation. Interestingly, the term “account” is appropriate because the deposit creates, essentially, an account receivable for the depositor and an account payable for the bank.

The contractual nature of the depositor/bank relationship is most pertinent to the analysis of the joint deposit account.

B. The Joint Deposit Account

Tautologically, the “joint deposit account” is a type of deposit account. For this reason, the joint deposit account creates a contractual relationship between the bank and the depositors. For many individuals and banks, however, the joint deposit account is perceived as simply a deposit account for which two names are noted on the signature line of the deposit contract. The remaining provisions of the deposit contract are simply ignored by both parties. The customer leaves the bank be-
lieving that his or her unstated purpose in having two parties named to
the account will be served. The bank says “thank you” to the customer
intending to administer the account as it administers any such account,
unaware that the customer had other thoughts. Essentially, the deposit
contract serves solely as a signature card, and it is this “signature card
mentality” of both customer and bank that may very well put the bank
and customer at eventual odds.

Again, the joint account is a deposit account. As previously stated,
the principal interest of the owner of a deposit account is the contrac-
tual right to demand payment from the bank of the amount originally
deposited (the right of withdrawal) or to order the bank to pay an
amount to a third party (the right to draw checks upon the account).
Accordingly, a definition of a “joint deposit account” might be an
account for which two or more parties, jointly, are entitled to demand
or order the bank’s payment of the account balance. This restrictive
definition is probably not satisfactory to either the customer or the
bank.

A depositor may want another party to be able to write checks on
the account, but only for the depositor’s benefit. A depositor may want
another party to be able to withdraw funds from the account, but
again, only for the depositor’s benefit. A depositor may want the funds
in the account to go to another party for that party’s benefit, but only
after a condition has been met, perhaps the death of the depositor. A
depositor may, in fact, want another party to use the funds in that
party’s discretion and for that party’s own purposes. These varying
concepts must somehow be reconciled with the concept of a joint de-
posit account.

Similarly, the bank does not want to monitor the account to de-
termine if two signatures have been obtained in a transaction. Auto-
mation in the processing of checks would be hindered. Many checks
are processed on the faith that the necessary signatures are contained
on the checks and on the assumption that a certain amount of loss can
be tolerated. Two signature requirements amidst the large volume of
consumer accounts would truly be the administrative nightmare.

The obvious challenge in defining a joint deposit account, there-
fore, is accommodating all the various attributes that individuals desire
from such accounts while accommodating the bank’s desire for ease in the administration of such accounts. The basic truth which quickly emerges from this discussion is that a joint deposit account defies any simple description.

The author proposes that a more pragmatic analysis of the joint deposit account be undertaken in which the focus is on three issues — ownership, control and entitlement.

For the purposes of this analysis, “ownership” in the context of a deposit account refers to the interest of the person to whom the obligation of the bank represented by the account is owed. The “joint” ownership of an account means that two or more individuals are the creditors of the bank with respect to the account.

For the purposes of this analysis, “control” in the context of a deposit account means that an individual can demand or direct payment by the bank of its obligation to the depositor, either through withdrawal or by the writing of a check. An owner may have control, but not necessarily. For example, a minor may “own” the account, but the parent or other guardian may “control” the demand or order for the bank’s payment of the obligation to or on behalf of the minor.\footnote{Such an account will be discussed later in this Article.} Another example may be a person who is given authority to pay amounts on behalf of the owner, such as the neighbor who assists his or her elderly friend with the payment of bills, but who is not intended to have the use of the funds for his or her own benefit.\footnote{Such an account will be discussed later in this Article.} Essentially, control means the ability of an individual to demand the payment of an obligation on behalf of an owner, but not to demand payment for the individual’s own purpose or benefit unless the individual is also an owner.

For the purposes of this analysis, “entitlement” in the context of a deposit account means the right to receive payment from the bank of an account balance due to the fulfillment of a condition to such payment. The individual with such entitlement is not an owner until the condition is satisfied and is unable to control the payment of the obligation until, again, the condition is satisfied. An obvious example of
such an entitlement is the person who is entitled to payment from the bank of an account balance by reason of the death of the owner.\textsuperscript{11}

Using the concepts of ownership, control and entitlement, the author believes that a more pragmatic analysis of the joint deposit account can be undertaken.

\textbf{C. The West Virginia Banking Statute}

Justice Neeley referred to the provisions of \textsc{W. Va. Code} \textsection{} 31A-4-33 as the “West Virginia Banking Statute” and, indeed, all case law concerning joint deposit accounts begins with the review of, and ends with the application or distinction of, this statute.\textsuperscript{12} The statute provides, in pertinent part:

\begin{quote}
When a deposit is made by any person in the name of such depositor and another or others and in form to be paid to any one of such depositors, or the survivor or survivors of them, such deposit, and any additions thereto, made by any of such persons, upon the making thereof, shall become the property of such persons as joint tenants. All such deposits, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any one of them during the lifetime of them, or to the survivor or survivors after the death of any of them.\textsuperscript{13}
\end{quote}

The Supreme Court of Appeals of West Virginia has found the West Virginia Banking Statute to be “clear, unambiguous and . . . [in need of] no construction” and, furthermore, has determined that the provisions were enacted to “protect banking institutions.”\textsuperscript{14} But from what exactly does the statute protect the bank? The answer to this question is facilitated by reviewing the provisions of the statute in terms of ownership, control and entitlement.

\textsuperscript{11} Such an account will be discussed later in this Article.
\textsuperscript{12} Peters, 443 S.E.2d at 217.
\textsuperscript{13} \textsc{W. Va. Code} \textsection{} 31A-4-33(b) (Supp. 1994).
\textsuperscript{14} Lett v. Twentieth St. Bank, 77 S.E.2d 813, 814 (W. Va. 1953). Lett dealt with the provisions of the West Virginia Banking Statute before the statute’s present codification in chapter thirty-one-a of the Code. The recodification of the statute left intact the provisions to which reference has been made in the text.
By its terms, the statute requires that certain conditions must first be met before the statute applies to a joint deposit account. Specifically, the statute requires that the deposit have (i) the attribute of "joint" ownership — "a deposit is made by any person in the name of such depositor and another or others;"15 (ii) the attribute of "joint" control — "in form to be paid to any one of such depositors;"16 and (iii) the attribute of "joint" entitlement — "in form to be paid to . . . the survivor or survivors of [any one of such depositors]."17 Essentially, the West Virginia Banking Statute contemplates that a joint deposit account is, for the statute's purposes, an account in which all parties to the deposit contract have a coincidence of ownership, control and entitlement.

Because the statute contemplates a coincidence of ownership and entitlement between or among the depositors, it is not surprising that the West Virginia Banking Statute provides that the interest in the account becomes property of the depositors as joint tenants, for the well-settled definition of a "joint tenancy with right of survivorship" is "an estate in West Virginia where '[e]ach joint tenant owns the whole estate subject to the equal rights of ownership of his cotenants. They all own the property as an entity and when one dies those left still own it as an entity.'"18 Again, the West Virginia Banking Statute requires, for the application of its provisions, that all parties to the account have the attribute of ownership and the attribute of entitlement (that is, the right of survivorship) — thus mirroring the attributes of a joint tenancy with a right of survivorship.

The Supreme Court of Appeals of West Virginia has credited the West Virginia Banking Statute with "creat[ing] certain property rights in all of the depositors named in a savings account."19 The court has also credited the statute with "restor[ing] the element of survivorship as

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15. W. VA. CODE § 31A-4-33(b) (Supp. 1994).
16. Id.
17. Id.
18. Fisher, supra note 1, at 268 (quoting Brown, Some Aspects of Joint Ownership of Real Property in West Virginia, 63 W. VA. L. REV. 207 (1961)).
to joint deposits made in a bank."\textsuperscript{20} The statute does not deserve this lavish credit.

The "primary feature of joint tenancy is survivorship."\textsuperscript{21} However, a general statutory presumption is that:

When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descend or be disposed of as if he had been a tenant in common.\textsuperscript{22}

The Supreme Court of Appeals of West Virginia has affirmed that the "substance of . . . [this statute] has been the law of this State since its formation."\textsuperscript{23} Restated, before and after the enactment of the West Virginia Banking Statute,\textsuperscript{24} the statutory presumption was that the interest of a joint tenant would pass to the heirs of the tenant, not to the surviving tenant. No right of survivorship was presumed to exist in a joint tenancy. Essentially, the primary feature of the common-law joint tenancy, \textit{i.e.}, survivorship, was seemingly abrogated by this statute.

The Legislature ameliorated the effect of this provision by enacting the further provision that:

[T]he preceding section [§ 36-1-19] shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others.\textsuperscript{25}

The substance of this provision has also been in existence since the "formation of the State."\textsuperscript{26}

Accordingly, the statutory law of this state was, at the time the West Virginia Banking Statute was enacted, and remains, that a joint tenancy was governed by the statute unless it was

\textsuperscript{20} \textit{Id.} at 815.

\textsuperscript{21} Brown, \textit{supra} note 18, at 208.

\textsuperscript{22} W. VA. CODE § 36-1-19 (1985).

\textsuperscript{23} DeLong v. Farmers Bldg. & Loan Ass'n, 137 S.E.2d 11, 14 (W. Va. 1964).

\textsuperscript{24} The West Virginia Banking Statute was codified in 1919.

\textsuperscript{25} W. VA. CODE § 36-1-20(a) (1985).

\textsuperscript{26} \textit{DeLong}, 137 S.E.2d at 14.
tenancy does not create a right of survivorship, unless the intent to create such a right is expressly stated. The West Virginia Banking Statute requires, however, the expression of a survivorship interest in the making of the deposit before its application. Therefore, the statute cannot be said to have actually restored the right of survivorship, for it is the expression of the intent to create such a right that, under the provisions of W. VA. CODE § 36-1-20, creates the right of survivorship.

If the statute does not restore the element of survivorship as the court proclaimed, does it create certain property rights as the court further proclaimed?

The Supreme Court of Appeals of West Virginia has dictated that “[W. VA. CODE §§] 36-1-19 and 20, [the aforementioned provisions] do not abolish the common law requirement of the four unities in a joint tenancy.”27 Restated, both provisions only apply to a joint tenancy, and, therefore, the expression of intent to create a right of survivorship can be effective only if the required elements of a joint tenancy exist. The four “unities” to which the court made reference have been described as follows:

[U]nity of time, unity of possession, unity of title and unity of interest. To have the unity of time the interests of the tenants must vest at the same time. To have the unity of possession the tenants must have undivided interests in the whole estate so that each can be said to have an interest in every square inch of the land. Unity of title means that the tenants must have obtained their title by the same instrument or by joint adverse possession. Unity of interest means that the tenants must have estates in the property of the same type, duration and amount.28

The West Virginia Banking Statute requires for its application that three of the four unities exist; that is, unity of time, possession and interest. However, because one party is making a deposit of funds to which it must be typically assumed the party had the sole interest before making the deposit, unity of title is missing for the joint depos-

itors do not receive title to the deposit under the same instrument, *i.e.*, the deposit contract.

Unity of title with respect to the deposited funds could be created by a "straw" conveyance in which the depositor divests his or her interest to a third party who, by design, immediately reconveys the funds to the depositor and the other tenants jointly. Having divested himself or herself of the funds, the depositor regains title under the same instrument as the other parties to the account.

By declaring that a joint tenancy exists without an unity of title, the West Virginia Banking Statute essentially eliminates the requirement of the straw conveyance. Indeed, the Legislature in 1981 eliminated this need for all transactions, mandating:

Any conveyance or transfer of property, or any interest therein, creating a joint tenancy with right of survivorship together with the person or persons conveying or transferring such property, executed by such person or persons to or in favor of another shall be valid to the same extent as a similar transfer or conveyance from a third party or by a straw party deed.29

In this fashion, the statute did not create any property rights; it simply facilitated the parties' intended creation of such rights.

While the court may have overstated the effect of the West Virginia Banking Statute with respect to joint tenancy, the statute did create an interest in each joint tenant that did not previously exist; that is, the attribute of "joint" control. In other words, the statute contemplates that the deposit will be made in a form "to be paid to any one of such depositors." Each joint tenant is to have the ability to demand from the bank payment of the balance of the account that is owed to all the tenants or to order the bank's payment to a third party of the account balance. From the bank's perspective:

> Payment to any joint depositor and the receipt or the acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge for all payments made on account of such deposit, prior to the receipt by the banking institution of notice in writing, signed by any

one of such joint tenants not to pay such deposit in accordance with the
terms thereof. Prior to the receipt of such notice no banking institution
shall be liable for the payment of such sums.30

Again, this statutory provision gives each tenant the ability to control the other tenants’ interest in the joint deposit account. Typically, a tenant should only be able to convey his or her interest in the jointly-held property; that is, an undivided one-half interest.31 Accordingly, the West Virginia Banking Statute does introduce a new concept into the joint tenancy — the ability of each tenant to control the payment of the bank’s obligation to all the tenants.32

The West Virginia Banking Statute’s addition to the joint tenancy of the right of each tenant, independently of the other, to control the payment of the bank’s entire obligation is obviously for the bank’s ease in the administration of such accounts. As Justice Neeley has noted, to not provide for such right of control “would place a heavy burden on a bank to mediate between co-depositors, one of the burdens which the legislature obviously sought to remove by enacting [W. VA. CODE § 31A-4-33 [1933] [the West Virginia Banking Statute].”33 Simply, a bank is not required to demand that all tenants of the account act jointly, but may follow the instructions of any one of the tenants and by doing so, satisfy its obligation to all the tenants. This enables a bank to process such accounts as if one depositor existed and the automation of such processing carries no more risk than the processing of a solely owned account.

30. W. VA. CODE § 31A-4-33(c) (Supp. 1994).
31. “Although a joint tenant does not have an inheritable or devisable interest in the land, he does have an interest which he can convey. So, if three persons own land as joint tenants and one of them conveys his interest to a fourth person, the grantee takes a one-third undivided interest as a tenant in common with the two remaining joint tenants.” Brown, supra note 18, at 211 (footnotes omitted). This was subsequently affirmed by the Supreme Court of Appeals of West Virginia which, by Justice Miller, noted that “[w]e have not had occasion to directly determine if a joint tenant of real estate may convey his undivided interest,” but opined that “[i]t is generally, if not universally, recognized elsewhere that a joint tenant may convey his undivided interest in real property to a third person.” Herring, 300 S.E.2d at 632.
32. Of course, the tenant is still liable to the remaining tenants for the interests over which he or she exercised control.
33. Peters, 443 S.E.2d at 217.
In short, the West Virginia Banking Statute contemplates the creation of a deposit account that has the attribute of joint ownership and the statute facilitates the creation of a joint tenancy without the need for a straw conveyance so that the deposit account also has the attribute of a joint entitlement, or rather, the right of survivorship. The statute further gives each tenant control over the account which relieves the bank of the administrative requirement that the tenants act jointly with respect to the bank's repayment of its obligation.

This joint account as contemplated by the West Virginia Banking Statute, with the joint attributes of ownership and entitlement, will be referred to as the "Joint Tenancy Account." And again, the significance of such an account is that the banking statute provides for the control of the deposit account by any one of the tenants, thereby easing the bank's burden of administering the account.

D. The Joint Tenancy Account and the Case Law

Professor Fisher, in his 1989 law review article, thoroughly described the debate that raged in the case law and academic literature about whether the Joint Tenancy Account constituted a "new concept outside the law of gifts and trusts" or whether it could be construed under "common law gift terminology." As previously explained, the West Virginia Banking Statute merely facilitates the creation of a joint tenancy in a deposit when unity of possession, time, and interest exists by eliminating the need for an unity of title. This does not create a property right, but rather pays homage to the common-law form of a joint tenancy. The statute's elimination of the need for a straw conveyance in order to create an unity of title is not unique either, for such a statute existed in 1974 with respect to property of married couples and currently exists for all transfers of property. Accordingly, the argument that a new concept has been created with respect to the Joint

34. Fisher, supra note 1, at 287.
35. W. VA. CODE § 36-1-20a (1985) (Editor's notes — Former, similar law, applicable only to married couples, was codified in former § 48-3-7a). The substance of the statutory provision is set forth infra note 73 and accompanying text.
Tenancy Account is unfounded except, as discussed, for the right of control by each tenant over all the jointly-held property.

On the other hand, the scrutiny of the Joint Tenancy Account under common-law gift terminology seems natural, for the West Virginia Banking Statute contemplates that "a deposit is made by any person in the name of such depositor and another or others."\footnote{W. VA. CODE § 31A-4-33(b) (Supp. 1994).} By depositing his or her funds to an account held by him or her and others, the depositor is evidencing an intent to transfer, potentially without consideration, interests in the funds.

A careful review of the various court decisions concerning Joint Tenancy Accounts reveals, however, that the focus on the provisions of the West Virginia Banking Statute was misplaced, and that what the court truly was struggling with was the stated focus of this Article. Did the depositor intend to make the deposit in the form contemplated by the statute? Restated, did the depositor intend that the remaining parties to the account have the attributes of ownership and entitlement and, as a result, the attributes of control provided by the West Virginia Banking Statute?

The seminal case is \textit{Lett v. Twentieth Street Bank.}\footnote{Lett v. Twentieth St Bank, 77 S.E.2d 813 (W. Va. 1953).} In \textit{Lett}, a husband and wife added a third party, the husband's sister, to their deposit account by having the sister execute a signature card for the account. As a result, the passbook for the account read, essentially, "husband or wife or husband's sister." As the court noted, "[t]he record does not show, but it is probable that all of the money so deposited belonged to Boyd Wilson, and that neither his wife nor his sister . . . owned any part thereof."\footnote{Id. at 814.} Most significantly, however, the court noted that "the record fails to show expressly that there was an intention on the part of Boyd Wilson to create a survivorship for the benefit of his sister, though there is some indication from the testimony . . . that Wilson intended that his sister was to receive the money so deposited."\footnote{Id.} The question upon the death of the husband and his

\footnotesize\textit{\textsuperscript{36}} W. VA. CODE § 31A-4-33(b) (Supp. 1994).
\textsuperscript{37} Lett v. Twentieth St. Bank, 77 S.E.2d 813 (W. Va. 1953).
\textsuperscript{38} Id. at 814.
\textsuperscript{39} Id.
wife was whether the estate of the wife, who survived the husband by one month, should receive the balance of the account or whether the sister should. The issue in the case was solely over the issue of entitlement, and not ownership or control as defined for the purposes of this Article. The court ruled that “[t]he applicable statute requires no construction, and creates a joint tenancy in the deposits made.” The court also noted that “[i]n this situation, unless there is some other reason for denying the plaintiff recovery,” the sister held a recognized entitlement to the account due to the survivorship feature of a joint tenancy.41

As previously discussed, the West Virginia Banking Statute did not create the joint tenancy, but merely facilitated the creation of such when the intent of the depositor to create a joint tenancy was evidenced by the form of the deposit and the terms of the deposit contract. In Lett, the court did not find any reason to believe that the brother did not effectively make a gift to his sister of some interest in the money which he deposited. In fact, the court gave significance to the fact that, in the one month period between the husband’s and the wife’s death, the wife did not attempt to withdraw the funds from the account. The court found that the intent of the depositor was to create a joint tenancy in the amount deposited and, indeed, having acknowledged the joint tenancy, the court confirmed that the “right of survivorship follows as a matter of course.”42

The next significant case with respect to the West Virginia Banking Statute was Dorsey v. Short.43 In Dorsey, the Supreme Court of Appeals of West Virginia reviewed a joint account maintained by a bank in the name of a mother and daughter to which deposits had been made by the mother of money to which she clearly held title before the deposit. The daughter subsequently withdrew the funds from the account, or more precisely, demanded payment by the bank of the obligation which the bank owed jointly to the mother and the daughter pursuant, presumably, to the contract governing the deposit. The moth-

40. Id. at 816.
41. Id. at 815.
42. 77 S.E.2d at 816.
er sued the daughter and the bank, alleging that the money was her sole and separate property and that the account was opened in the name of the mother and daughter at the insistence of the daughter. The mother further alleged that the daughter encouraged the opening of the account in this fashion so that the daughter could assist the mother in the management of the mother’s affairs in the event of the mother’s illness. Restated, the mother insisted that only control was to be shared and that she did not intend to transfer ownership or give an entitlement to her daughter.

The daughter alleged that the mother had insisted that the account be opened in both names for the reason that the mother wanted the daughter to use the money for the construction of a new home. While the daughter stated that she promised not to use the money in the account unless absolutely necessary, the necessity apparently arose. In the language of this article, the daughter insisted that she had joint ownership and entitlement to the account and control if it became necessary.

The court in Dorsey repeated the language in Lett that the controversy “cannot be determined under the common law rules relating to gifts but must be resolved under the provisions” of the West Virginia Banking Statute.44 As Professor Fisher correctly emphasizes in his review of the case, however, the court proceeded to discuss the controversy in terms of the “donor” and “donee,” which is consistent with common-law gift terminology.45

The court reviewed various decisions reported in American jurisprudence and determined that “[a]ll American courts ruling on similar statutory language have held that such establishment of statutory joint tenancy can be conditional and that, if the conditions imposed on the joint deposit are not met, the donor may retain control and even complete ownership of the deposit during the donor’s lifetime.”46 The

44. Dorsey, 205 S.E.2d at 689.
45. Professor Fisher specifically states: “While the court in Dorsey was attempting to follow the conceptual basis of the Lett decision, its word selection and use of terminology associated with gifts sowed the seeds for subsequent confusion.” Fisher, supra note 1, at 281.
46. Dorsey, 205 S.E.2d at 691.
Dorsey court then emphasized that in Lett the court had "indicated there may be some reason for holding no intent to create an unqualified joint inter vivos property right in the joint bank account." The court finally opined that, "[s]ince the essential facts determining whether conditions were placed on the joint account are in dispute, the principal issue in this case can only be resolved by a trier of fact."

Although Professor Fisher believes the two cases are inconsistent in their conceptual basis, the court's decisions can be easily reconciled. Again, the West Virginia Banking Statute merely facilitates the creation of a joint tenancy when the depositor has intended the creation in another party of the incidences of entitlement and ownership. The statute merely gives effect to what, from the deposit contract, must be presumed to be the intent of the depositors. The reconciliation of the Lett and Dorsey decisions can be made by use of the concepts of ownership and entitlement. In Lett, the discussion concerned the entitlement; that is, whether a right of survivorship existed in the sister after the death of the husband and wife parties to the contract. The court, having presumed that joint ownership was intended, properly ruled that a right of survivorship followed. The court in Lett simply found no reason to question the original intent of the husband to transfer to his sister an interest in the ownership of, and entitlement to, the amounts deposited in the bank account.

In Dorsey, the discussion concerned ownership; that is, whether ownership of the deposited funds and resulting account balance was intended to be transferred by one depositor to the other party to the account. Did the mother, by making deposits to the account to which her daughter was a party, intend to transfer ownership in the account to the daughter and thus create a joint tenancy? For the Dorsey court, the significance of the West Virginia Banking Statute was that it created a presumption of a gift when a deposit was made by "any person in the name of such depositor and another or others."

Indeed, a syllabus point of the court in Dorsey was that:

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47. Id. at 691.
48. Id. at 692.
49. W. VA. CODE § 31A-4-33(b) (Supp. 1994).
[W. Va. Code §] 31A-4-33 [1931,] as amended, creates, in the absence of fraud, mistake or other equally serious fault, a conclusive presumption that the donor depositor of a joint and survivorship bank account intended a causa mortis gift of the proceeds remaining in the account after his death to the surviving joint tenant.\(^{50}\)

Again, this is an overstatement of the effect of the statute, for the requirement of the statute is that the deposit be "made by any person in the name of such depositor and another or others" and it is the form of the deposit, not the statute, which creates the presumption.\(^{51}\)

Essentially, no conflict between *Lett* and *Dorsey* exists. *Lett* did not question the co-ownership of the funds, but whether the right of survivorship existed between the two joint tenants. The *Lett* court determined that under the provisions of the West Virginia Banking Statute a joint tenancy existed and, therefore, a right of survivorship followed. The *Dorsey* court was faced with whether the statute had application at all, because the intended ownership of funds was at question, and this issue necessarily gave rise to whether the mother had intended the gift of her money to the daughter. The court ruled that if the mother had established a condition to the gift, then the daughter would have no incident of ownership. Without such an incident of ownership, the West Virginia Banking Statute would not apply and no joint tenancy with right of survivorship could be created.\(^{52}\)

Therefore, the issue in these cases both came down to the intent of the depositor — was ownership intended to be transferred, or rather, was a gift of an interest of one party to the remaining parties intended? This same question was answered yes in *Lett* and no in *Dorsey*, but the significance is that essentially the same question was asked.

\(^{50}\) *Dorsey*, 205 S.E.2d at 687, Syl. Pt.2.

\(^{51}\) In fact, one form of deposit contract expressly provides that "any funds placed in or added to the account by any one of the parties are and shall conclusively be intended to be a gift and delivery at the time of deposit of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account."

\(^{52}\) Of course, one significant difference between *Lett* and *Dorsey* was that in *Lett*, the original depositor was not alive and, thus, could not indicate that his intent was other than to make a gift of the funds. In *Dorsey*, the mother was alive and could speak to the issue of whether it was her intent to make an unconditional gift.
Another common thread between the two cases is very significant and should not be ignored. In neither case did the bank apparently incur liability. This presumably has to do with the fact that the West Virginia Banking Statute permitted the bank to deal indiscriminately with either of the parties in discharging its liability with respect to the accounts.

In recognizing, however, that both cases dealt with the intent of the depositors, the question arises: What if a depositor discusses with the bank that it is not his or her intent to give an ownership or entitlement interest to an account, but, instead, the intent is merely to give control to the other party? If the bank then executes the standard form of contract providing for joint ownership and entitlement, a contract has been executed which does not reflect either the intent of the depositor or the promise of the bank.

In the case of *Webb v. Williams*, the issue was whether the son, who was a party to a depository account jointly with his father, should receive the balance of the account after his father’s death or should the son and two other heirs receive the balance of the account under the provisions of the father’s will. Evidence was presented that, “it had not been the policy of the bank, until very recently, to explain in detail the nature of a joint account with the right of survivorship.” Moreover, the bank’s representative testified that the depositor was laboring under the misimpression that “it was necessary to place someone else’s name on the account to prevent it from ‘going to the State.’” The court determined that if a mistake was made, whether it was a mistake of law or fact, the presumption of the deposit contract and the West Virginia Banking Statute that ownership rights were transferred and that survivorship existed would be rebutted. The court upheld the lower court’s determination that it was an issue for the jury whether the depositor “intended a gift” or evidence of “fraud, mistake or equally serious fault” existed to “rebut the presumption of a gift.” The bank was not a party to the case and while the facts do not specifically

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54. *Id.* at 486.
55. *Id.*
56. *Id.* at 489.
state, the assumption is that the bank had not yet paid the account balance to anyone. If, however, the bank had paid the account balance and had failed to initially warn the father as to the significance of his actions when his actual intent had been expressed, a basis for liability might have existed.

For this reason, it is incumbent upon the bank to ascertain the intent of a depositor to an account on which two parties are named. Does he or she intend to create a joint tenancy or, more pragmatically, does he or she intend to jointly share ownership and entitlement? If so, the West Virginia Banking Statute provides that the requirements for a joint tenancy are met and the entitlement, or rather, the right of survivorship will naturally follow. In fact, a checklist for the depositors might be prepared asking the basic questions: (i) Do you each intend that the other have a one-half interest in the account balance no matter who makes the deposit and no matter the source of the funds?; (ii) Do you each intend that the other can make a withdrawal from, or write a check upon, this account for the full balance of the account without the other’s signature or approval?; and (iii) Do you each intend that the other be entitled to the full balance of the account upon your death? If these questions are answered affirmatively, then a joint tenancy is intended to be created and the West Virginia Banking Statute will have application.\footnote{If the deposit contract conforms with this expressed intent, then the West Virginia Banking Statute will give rise to the conclusive presumption that a gift and a right of survivorship was intended. Customers may yet make the claim that they did not intend such a gift. In the face of such claims, the bank can invoke the statutory presumption, bolstered by the parties’ own affirmation of their intent in response to the checklist.}

If the intent of the depositors is not to have complete unity of ownership, control and entitlement, then the bank must determine if it can accommodate the customer’s or customers’ intended use of the account and, if so, how it can properly document the accommodation.

E. Other Aspects of the Joint Tenancy Account

An interest in a Joint Tenancy Account is a property interest which can be used to satisfy the claims of creditors of a tenant. The
effect of a levy or execution against property held by a joint tenancy is the destruction of some of the unities of the joint tenancy, reverting the joint tenancy to a tenancy in common and thereby abrogating the right of survivorship. A creditor will petition the court for a partition of the judgment debtor’s interest and the remaining tenants’ interests.58

For some individuals, this right of a creditor works a hardship. A person deposits funds into a joint account, only to find that the amount deposited is suggested by a creditor in satisfaction of a debt owed by the other party named on the account. This also puts the bank in a difficult situation administratively, for the bank must determine what amount of the account balance to pay a creditor of only one of the joint tenants.

The Legislature has provided, however, that:

A banking institution may pay the entire amount of a deposit account created pursuant to this section to a creditor or other claimant of any of the joint tenants in response to legal process employed by the creditor including, but not limited to, garnishment, suggestion, or execution, regardless of any notice received from any of the joint tenants. Upon such payment, the banking institution shall be released and discharged from all payments on account of such deposit.59

This provision permitting the bank’s payment of the entire account balance to a levying creditor is obviously for the ease of the bank’s ad-

58. See, e.g., Harris v. Crowder, 322 S.E.2d 854, 861 (W. Va. 1984) ("In the ordinary course of events, the judgment creditor of one joint tenant can, under [W. VA. CODE §] 38-3-9 [1923], cause the sale of that joint tenant’s interest. The purchaser at such a sale would then be a cotenant with the remaining cotenants in the property. Under our partition statute, [W. VA. CODE §] 37-4-1 [1936], the purchaser at the judgment lien sale, after becoming an owner of an interest in the property, could, by meeting the requirements of the statute and showing the reasonableness of the sale, partition the property."). Of course, the property interest of a tenant in a joint deposit account against which action can be taken is the bank’s obligation to pay the account balance. The suggestion process would be used and, presumably, the payment of one-half of the amount to the creditor would be easily done in conformance with the court’s order. See W. VA. CODE §§ 38-5-10 et seq. (1993). It is most likely, however, that the creditor will be confronted with issues regarding the ownership of the funds, similar to the issues raised in Lett and Dorsey.

ministration,\textsuperscript{60} as ownership interests are presumably held by all the joint tenants and the creditor is not entitled to the interest of the owner who is not the judgment debtor. The fact that more than the judgment debtor's interest can be affected was recognized by the Legislature which stipulated that, notwithstanding the bank's payment to the creditor of the entire balance of the account, "payment by a banking institution to any such creditor shall be without prejudice to any right or claim of any joint tenant against the creditor or any other person to recover his interest in the deposit."\textsuperscript{61}

The potential hardship to a joint tenant is obvious. However, a bank is obligated as follows:

\begin{quote}
[W]hen any joint deposit account is opened on or after the first day of July, one thousand nine hundred ninety-four, the owners thereof shall be given written notice either on a signature card or in connection with the execution of a signature card, on a form to be approved by the banking commissioner, that the entire balance of any such account may be paid to a creditor or other claimant of any one of the joint tenants pursuant to legal process, including, but not limited to, garnishment, suggestion, or execution, regardless of the receipt of any notice from any of the joint tenants.\textsuperscript{62}
\end{quote}

When so advised, prospective joint tenants may reevaluate the opening of a joint deposit account.

The right of the non-debtor owner of the account with respect to the creditor of the debtor owner is, in itself, an interesting issue. Obviously, the non-debtor owner will claim ownership of either one-half of the account balance if the non-debtor owner was not the person making the deposits or of the entire amount if he or she was making the deposits. The first issue between the parties, therefore, is who made the actual deposits and in what amount? Assuming that the evidentiary hurdles to establishing this fact can be cleared, the second issue becomes, did one owner intend to convey a one-half interest in the deposit to

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\textsuperscript{60} Indeed, the author of this article, in his capacity as in-house counsel for a bank holding company, proposed the amendment due to the almost daily questions arising from creditors' actions against only one owner of a joint account.
\textsuperscript{61} \textsc{W. Va. Code} § 31A-4-33(f) (Supp. 1994).
\textsuperscript{62} \textsc{W. Va. Code} § 31A-4-33(d) (Supp. 1994).
\end{flushright}
the other owner? Of course, the deposit contract presumptively answers the question as yes. But if the deposit is a transfer effectively constituting a gift, can the gift be revoked? The Supreme Court of Appeals of West Virginia has recognized that:

Decisions holding that there may be conditions placed on joint bank accounts wherein the donor depositor retains control or ownership during his lifetime are consistent with this Court's language in [an earlier case]. This Court there indicated there may be some reason for holding no intent to create an unqualified joint inter vivos property right in the joint bank account.6

But if it is truly a joint tenancy account, no conditions on ownership will exist. Restated, the transfer of an ownership interest will be unqualified and, therefore, the gift, if any, of the funds placed on deposit will not be revocable.

If the non-debtor owner deposited the funds, he or she will claim that no unqualified gift to the debtor was intended and, therefore, the creditor cannot proceed against any balance in the account. If the non-debtor owner did not deposit the funds, he or she will claim that an unqualified gift to him or her was intended by the debtor and the creditor cannot proceed against the non-debtor owner's one-half of the account balance.

As in the discussion regarding the respective interest of the various parties named on a joint deposit account, the focus of this discussion on creditors' rights is also necessarily on the issue of intent. The intent of the depositor is first presumed from the manner of the deposit and, therefore, the presumption is that each tenant has an undivided one-half interest in the account balance. The affected depositor or creditor can then attempt to rebut the presumption, offering evidence of the depositor's actual intent in opening and using the joint deposit account.

63. Dorsey, 205 S.E.2d at 691 (emphasis added). If a condition is placed on the right of ownership of the funds, then a "joint tenancy account" is not created. In fact, the depositor's intent may be to give an "entitlement" upon the depositor's death or at a specific time instead of the right of ownership. A type of account that more appropriately honors this intent will be discussed later in this Article.
Creditors often emphasize the fact that the owner of the account who is the debtor could have conceivably withdrawn the entire balance of the account and deposited the money into a sole account. For this reason, the creditor should be entitled to the entire balance of the account notwithstanding the objections of the remaining parties to the account. This position improperly mixes the concepts of "ownership" and "control." The ability of one of the joint tenants to make a withdrawal or write a check goes to control. The fact that this ability discharges completely the bank's liability to both tenants is a protection solely of the bank and is not intended to be determinative of who actually owns the right to the bank's payment. Both tenants have the right to payment, but each also has the right to demand or order the bank's payment of the entire account balance. Indeed, since each joint owner has the right of control, creditors for each owner could claim that the entire balance of the account is available to satisfy each owner's obligations and that it is merely who wins the race to the courthouse that determines who gets paid. This result is untenable and demonstrates the fallacy of the creditors' arguments.64

Another aspect of ownership is the ability to offer a property interest to a creditor as security for the payment of an obligation. As the ownership interest of a tenant in a Joint Tenancy Account is an undivided one-half interest in the account balance, the immediate reaction is that only the one-half interest of the depositor can be effectively pledged to secure the repayment of that depositor's obligation to the bank. However, from the bank's perspective, one-half of an account cannot be effectively frozen. Administratively, it is an impossible task.

64. The bank's right of set off with respect to joint accounts is affected by the joint tenancy. Set off requires a "mutuality of matured indebtedness," see Southern Elec. Supply Co., 320 S.E.2d at 519, and with two depositors, but only one debtor, the mutuality is not complete. Arguably, the analysis for the bank's right should not differ from the discussion with respect to the depositor's other creditors. This means that the bank should presumptively be entitled to one-half of the account balance subject to rebuttal by both the bank and the affected depositor of this presumption. The West Virginia Banking Statute does not address the issue of set off. However, the statute does address the pledge of an account. See discussion infra. Therefore, banks may consider simply taking a security interest, as a matter of course, in any joint account it opens for any obligation of each depositor presently owing to the bank. In this fashion, the bank will have the benefit of the West Virginia Banking Statute's favorable treatment of the pledge of joint accounts. See discussion infra.
Moreover, the bank's further understandable presumption is that persons who maintain a Joint Tenancy Account have a basic identity of interest. Accordingly, banks have willingly accepted one tenant's pledge of an entire account balance as security for an obligation of only that tenant.

The author was involved in several disputes over this facet of the Joint Tenancy Account and assisted in the drafting and advocacy of a statutory provision that would preserve the banks' historical course of conduct. In 1993, the Legislature provided that:

[I]f a pledge or encumbrance of any joint account created pursuant to this section is made to a banking institution and the banking institution has not received, prior to the date of the pledge, any written notice signed by any one of the joint tenants prohibiting such a pledge or encumbrance, the banking institution shall not be liable to any one of the joint tenants for its recourse against the deposit in accordance with the terms of the pledge.65

The reconciliation of this provision with traditional ownership concepts is simply impossible. As established in the discussion about the rights of creditors, the ability to "control," or the ability to order the payment by the bank of the entire amount of the account balance, does not provide the necessary ownership interest for purposes of execution or levy.

A possible rationale for the ability of a joint tenant to pledge the entire account balance and not just one-half of the balance is that the pledge by one of the joint tenants presumably benefits, directly or indirectly, both tenants and, therefore, one tenant should be able to bind the other tenant under the control facet of the account. This supports a "presumption," however, and the statute provides an "absolute" right to accept one tenant's pledge.

The only rationale, therefore, is that the ease of the bank's administration prevails in the balancing of the bank's interests with the interests of the non-pledging account owner. The harshness of this provi-

65. W. VA. CODE § 31A-4-33(e) (Supp. 1994).
sion has been somewhat lessened by the Legislature by requiring that a banking institution give notice:

[O]n a form to be approved by the banking commissioner, that the “entire balance of any such account may be . . . pledged as security to a banking institution by any of the named joint tenants; or otherwise encumbered at the request of any of the named joint tenants unless written notice is given to the banking institution, signed by any one of the joint tenants, not to permit such payment, pledge or encumbrance.”

Significantly, “the giving of the notice required by this section to any of the joint deposit account owners shall be deemed effective notice to all owners of the joint deposit account.”

In short, individuals who are named on joint accounts must seriously reexamine their intent and must determine that their intent is to create a true joint tenancy account, with the attributes of ownership, control and entitlement accruing to each joint tenant such that one tenant may subject every tenant’s interests to claims of that tenant’s creditors.

III. VARIATIONS ON THE THEME OF OWNERSHIP, CONTROL AND ENTITLEMENT: OTHER FORMS OF JOINT ACCOUNTS

A. Tenancy in Common Accounts: Joint Ownership, but Questions of Control and Entitlement

As previously discussed, the Joint Tenancy Account means a coincidence of ownership and entitlement in each of the parties to the deposit contract. The West Virginia Banking Statute provides the additional element of control, in that it empowers each tenant to direct the bank’s payment of the entire account balance.

If the element of survivorship is removed, then the result is, effectively, a tenancy in common. Each of the depositors has an equal

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67. Id.
68. As Professor Brown noted, “[i]t is submitted that a joint tenancy without survivorship is essentially the same as a tenancy in common.” Brown, supra note 18, at 210.
pro-rated interest, but upon the death of a depositor, the entitlement to the interest of the deceased depositor is in the heirs of the depositor, whether determined by will or the intestacy statutes.

In fact, the actions of a joint tenant can convert a joint tenancy with a right of survivorship into a tenancy in common. As the Supreme Court of Appeals of West Virginia has decreed:

A joint tenant may convey his undivided interest in real property to a third person. When one of two joint tenants conveys his undivided interest to a third person the right of survivorship is destroyed. Such third party and the remaining joint tenant hold the property as tenants in common.\textsuperscript{69}

The principal effect of the absence of a right of survivorship is that a necessary condition to the application of the West Virginia Banking Statute is not met; that is, the deposit is not “in [a] form to be paid to any one of such depositors, or the survivor or survivors of them.”\textsuperscript{70} For this reason, the bank would not be afforded, arguably, the protection of the provision that payment to one depositor discharges the liability to all the joint depositors. Accordingly, the bank would not make a payment to any one tenant, but instead, to all the tenants jointly. Of course, the contract for deposit might provide for the same protection as the statute, effectively making each of the tenants in common an agent for the other tenant upon whom the bank may rely unless and until the agency was revoked by a writing delivered to the bank.

The bank’s further dilemma is what to do when one of the tenants dies. With a Joint Tenancy Account, the account balance immediately is vested in the remaining tenants who then continue to claim ownership, control and entitlement among themselves. However, the tenancy in common account lacks the element of entitlement, and therefore, the death of a tenant means that the heirs of the deceased depositor take an ownership interest in the account. The bank is potentially in the position of honoring the request of the surviving tenant during the period of time after the death of the other tenant and before the bank

\textsuperscript{69} Herring, 300 S.E.2d at 629, Syl. Pt. 4.

\textsuperscript{70} W. VA. CODE § 31A-4-33(b) (Supp. 1994).
learns of the death. In this situation, the bank cannot rely any longer upon the agency provision in a contract because the agency was necessarily revoked upon the death of the principal.

Accordingly, the tenancy in common account hinders the ease of administration of deposit accounts and banks may determine, as a matter of policy, not to operate such accounts or to close Joint Tenancy Accounts which are converted into tenancy in common accounts by an action of a tenant. 71

The banks which permit such a tenancy in common account attempt to distinguish the account by using an “and” as a conjunction of the names of the tenants rather than using the disjunctive “or.” This designation merely creates confusion in most instances because the body of the deposit contract will, nonetheless, provide for the right of survivorship and for the payment at the instructions of one tenant rather than both.

In fact, this apparent or potential conflict between the body of the deposit contract and the titling of the account gives rise to the question: Which controls? In the case of the use of the designation “and” as a variance from the usual designation “or,” the compelling argument is that both the bank and the customer intended to change the standard terms and it is quite likely that the courts would determine the intent of the parties from the variation without reference to the standard terms of the contract.

Confronted with the use of the word “and” to join two owners of an account, the court would seemingly be compelled to determine that a “tenancy in common” has been created. This is because a tenancy in common is presumed unless survivorship is expressly preserved. The Legislature provided for the following means of rebutting the presumption: “[w]hen the instrument of conveyance or ownership in any estate, whether real estate or tangible or intangible personal property, links multiple owners together with the disjunctive ‘or,’ such ownership shall be held as joint tenants with the right of survivorship, unless expressly stated otherwise.” 72 Accordingly, the purposeful use of the word “and”

71. See supra note 69 and accompanying text.
by the bank and customer and an owner's testimony that a "right of survivorship" was not intended to be created would be particularly compelling evidence for a court or trier of fact.

As a note, banks also create joint accounts and use the designation "or" with the additional language "with right of survivorship." The additional language is unnecessary for two reasons. One, the use of the disjunctive "or" creates the presumption of a right of survivorship. Two, the contract itself provides, typically, for the right of survivorship.

If a bank uses an "and" in its joinder of the owners of the account and the contract of deposit does not speak to the manner in which interests in the account will pass upon the death of an owner, then the designation of "with right of survivorship" with the conjunction "and" would seemingly create a right of survivorship. The "and" still effectively creates a joint tenancy, and while the immediate presumption is that a tenancy in common is intended, the purposeful use of the additional description falls squarely within the statutory provision that survivorship is preserved "when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others."


Essentially, to create a true tenancy in common account with no uncertainty as to intent, the bank and depositor should first execute an account agreement which is consistent with the attributes of the tenancy in common and which expressly addresses the issue of control because the West Virginia Banking Statute, as discussed, does not govern. However, if owners truly desire a joint account that requires both parties to act in concert and contains no entitlement or right of survivorship, then the most sensible step for the parties is to partition their interests, which can easily be done with money or its equivalent, and thereafter maintain separate accounts. No purpose is seemingly served by such a cumbersome joining of interests.
B. Accounts with Minors: Questions of Ownership and Control

The Legislature has provided statutory guidance on the ability of minors to contract. Specifically:

[No person who is eighteen years of age or older shall lack legal capacity, by reason of his age, to enter into contracts, sell or purchase real or personal property, create a lien, execute any legal or other written instrument, prosecute or defend legal actions, assert claims or deal in his own affairs in any manner whatsoever.]

The necessary application of this statute is that a person who is not yet eighteen generally lacks a legal capacity to contract.

With respect to banking transactions, however, the following provision has applicability:

Whenever any minor shall make, or have credit for, a deposit in any banking institution, in his or her name, the money so deposited may be paid out on the check or order of such depositor the same as in case of a depositor of legal age, and such payment shall be in all respects valid, except when such banking institution has been specifically directed in writing by the parent or guardian of such minor not to make such payment.

An immediate observation is that the Legislature has determined that, again, a bank’s ease in administering such accounts is more important than maintaining the general proposition that a minor cannot sufficiently form the necessary capacity to contract.

The statute provides that, if a minor has the ownership interest in the account, then the minor automatically has the control over the account notwithstanding that the depositor is not of legal age. However, the parent or guardian of the minor can remove the minor’s control over the account by delivery of a notice to the bank. The presumption is then that the minor may have ownership of the account, but the

75. W. VA. CODE § 31A-4-34 (1988). This provision shall be referred to in this Article as the “Minor’s Control Provision.”
parent or guardian has the control, as is the constant bane of many adolescents’ existence.

The author’s experience is, however, that many parents or guardians use a joint account in the name of the “minor” “or” the “parent” to reflect, in the parents’ minds, the minor’s ownership of the account, but to maintain the parent’s guardianship, or rather, control over the account. The problem is, of course, that the standard form of contract sets forth, and the West Virginia Banking Statute conclusively presumes, that a joint account is a joint tenancy with attributes of joint ownership, joint entitlement, and joint control, which is absolutely inconsistent with the parent’s or guardian’s intent. Again, the parent intends ownership to be solely in the minor, but control to be solely in the parent or perhaps the parent and the minor jointly.

Banks must determine if a minor’s account is to be offered to customers. The establishment of such accounts is fraught with problems. For larger institutions, notice to the bank from the parent may be delayed or lost while the instructions of the minor may be automatically processed. Or generally, the parents may not be aware that the minor has control of the account under the provisions of state law and the minor may very well expend the funds from the account in a manner of which the parent or guardian is disapproving. The most likely result is the parent’s or guardian’s frustrated exclamation to the bank of “how could you let him or her do that” or the lawyer’s similar dramatic exultation before a jury.

If a bank is to offer such accounts, then the bank must determine how it will title the accounts so that the issues of control and ownership are readily ascertainable by the representatives of the bank who will transact the business of the bank with respect to the account. Moreover, the bank must determine if it is the parent’s or guardian’s intent to permit the minor to control the bank’s repayment of the obligation to the minor.

The title to the account should obviously reflect that ownership is in a minor and then should further set forth the name of the parent or guardian of the minor who will provide the oversight of, or will accept the parental or custodial responsibility for, the minor’s account. Accordingly, the bank may establish the account as “A, a minor, by B,
parent or guardian." This form of the title reflects that ownership is in "A." The issue of control is not yet fully addressed, however. The bank should immediately upon opening the account determine whether the parent will permit the minor's control of the account. In fact, the advice of the author has been to include in the title line for the account, if the fields in the bank's electronic system will permit such an entry, a box that describes that "if checked, the parent/guardian instructs bank not to honor any request of the minor for payment of the account." If not checked, then the minor will have control; however, this is not sole control, but joint control because the parent or guardian, by reason of their capacity, retain control over the account as well. The bank should also establish in the contract a provision for the parent's or guardian's acknowledgement regarding the form and manner of the notice which the parent may send if the minor's control of the account is to be revoked. Again, the notice should be directed to the attention of someone who can automatically enter the instructions into the bank's processing system and establish that no unreasonable time lapsed between the bank's receipt of the notice and the bank's action upon the notice.

Another issue arises with respect to these accounts: What happens when the minor reaches the age of majority? The capacity of the parent or guardian depends, presumably, upon the mere age of the charge. This capacity changes when the minor reaches the age of majority and, therefore, ownership and control merge solely in the newly matured

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76 If the bank desires to reduce all risk with respect to the account, the bank should, of course, confirm in some manner that the capacity of the adults on the account is correct; that is, the parent is a parent or the guardian is a guardian. The bank may decide, however, that the risk that a person would misrepresent their capacity is less than the customer's inconvenience and dissatisfaction that may arise from such a challenge.

Moreover, another issue which is raised is whether a parent, other than the parent on the account, or another guardian can assert control over the account even though they are not listed on the account. Legally, the answer is yes for their capacity is to exercise judgment for the minor assuming that such parental responsibility has not been severed by a custody order or other process. The bank must make a difficult choice in such a matter; that is, to ignore the legal capacity of the non-listed parent or guardian or to potentially face the wrath of the listed parent or guardian. The better exercise is to list in the title to the account all parents and guardians and to refuse an account if one parent, without a supporting court order, requests the bank to not recognize the parental or custodial rights of another person.
account owner. The bank must make some provision, therefore, for changing the account title when the minor reaches eighteen so that the parent or guardian is no longer reflected as having control over the account. Again, an administrative issue arises and the bank must determine if it will offer such an account.

The parent or guardian should reflect upon the reasons for not permitting the minor’s control over the account. If the funds deposited with the bank for credit to the minor’s ownership represents a gift to the minor for use when the minor reaches a certain age, perhaps for college or to buy the necessary means of transportation from home to the store on Saturday nights, then other statutorily-contemplated account arrangements do exist.

In 1986, the Legislature enacted the “Uniform Transfers to Minors Act.” The statute’s title belies its true purpose in that it does not govern transfers to minors, but, instead, governs transfers to custodians on behalf of minors. The statute generally provides that: (i) a person who has the “right to designate the recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary upon the occurrence of the event;” (ii) “[a] person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor;” (iii) “a personal representative or trustee may make an irrevocable transfer . . . to a custodian for the benefit of a minor as authorized in the governing will or trust;” (iv) “a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor . . . in the absence of a will or under a will or trust that does not contain an authorization to do so;” (v) “a conser-

78. W. VA. CODE § 36-7-3(a) (Supp. 1994) (emphasis added). The revocable nature of this right is merely a recognition that the person having the power of designation can change his or her mind until the condition to the transfer of the property is satisfied and “the nominating instrument becomes irrevocable.” W. VA. CODE § 36-7-3(c) (Supp. 1994).
80. W. VA. CODE § 36-7-5(a) (Supp. 1994).
81. W. VA. CODE § 36-7-6(a) (Supp. 1994). The personal representative or trustee may make such a transfer only if “the personal representative [and] trustee . . . considers
vator may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor,\(^{2}\) or (vi) "a person . . . who holds property of or owes a liquidated debt to a minor . . . may make an irrevocable transfer to a custodian for the benefit of the minor."\(^{3}\) The property which may be so transferred to a custodian for the benefit of a minor includes an "uncertificated security,"\(^{4}\) a "certificated security,"\(^{5}\) a "life or endowment insurance policy or annuity contract,"\(^{6}\) an "irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract,"\(^{7}\) an "interest in real property,"\(^{8}\) a "certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property,"\(^{9}\) and, most relevant to this article, "money . . . paid or delivered to a broker or financial institution for credit to an account."\(^{10}\) Essentially, the statute contemplates a gift to a minor by a transfer that, in most instances, is to be irrevocable, but for which delivery is made to a custodian. This gift can be the deposit of monies to which ownership will be in the minor, but control will be in the custodian.

The effect of a transfer in this manner is described, thusly:

A transfer made pursuant to . . . [the operable provisions of the act] is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties and authority provided

\(^{1}\) W. VA. CODE § 36-7-6(c) (Supp. 1994).
\(^{2}\) W. VA. CODE § 36-7-6(b) (Supp. 1994).
\(^{3}\) Id.
\(^{4}\) W. VA. CODE § 36-7-9(a)(1) (Supp. 1994).
\(^{5}\) Id.
\(^{6}\) W. VA. CODE § 36-7-9(a)(3) (Supp. 1994).
\(^{7}\) W. VA. CODE § 36-7-9(a)(4) (Supp. 1994).
\(^{8}\) W. VA. CODE § 36-7-9(a)(5) (Supp. 1994).
\(^{9}\) W. VA. CODE § 36-7-9(a)(6) (Supp. 1994).
\(^{10}\) W. VA. CODE § 36-7-9(a)(2) (Supp. 1994).
in this . . . [act] and neither the minor nor the minor's legal representative has any right, power, duty or authority with respect to the custodial property [i.e., the deposit account] except as provided in this article.\textsuperscript{91}

The custodian's power and authority over the property is described broadly. Specifically, "[a] custodian, acting in a custodial capacity, has all the rights, powers and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers and authority in that capacity only."\textsuperscript{92}

The statute defines a minor as "an individual who has not attained the age of twenty-one years"\textsuperscript{93} and therefore, "[t]he custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of: (1) the minor's attainment of twenty-one years of age . . . or (3) [t]he minor's death."\textsuperscript{94} Again, in terms of the author's vernacular, the minor has sole ownership, but the custodian has control until the minor's death or until the minor attains the age of twenty-one years.

The bank must establish such an account consistent with the minor's ownership and the custodian's control. Significantly, the form of the transfer of funds to a deposit account is expressly mandated in the West Virginia Uniform Transfers to Minors Act, in that the transfer

\footnotesize{91. W. VA. CODE § 36-7-11(b) (Supp. 1994).}
\footnotesize{92. W. VA. CODE § 36-7-13(a) (Supp. 1994). Strictures on the custodian's care of property are expressly set forth, including the requirements that the custodian "shall observe the standard of care that would be observed by a prudent person dealing with property of another," "shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor," and "shall keep records of all transactions with respect to custodial property . . . and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of fourteen years." W. VA. CODE § 36-7-12 (Supp. 1994).}
\footnotesize{93. W. VA. CODE § 36-7-1(11) (Supp. 1994). The "West Virginia Uniform Transfers to Minors Act," W. VA. CODE § 36-7-24 (Supp. 1994), effectively repealed the provisions of the "West Virginia Uniform Gifts to Minors Act." Acts of the Legislature of West Virginia 1957, c. 86. A significant difference between the two acts is that the existing act raised the age of the minor from eighteen to twenty-one. Another difference was that additional property was expressly added to the existing act as eligible for transfer to a custodian for the benefit of a minor.}
\footnotesize{94. W. VA. CODE § 36-7-20 (Supp. 1994).}
is to be delivered to the financial institution for credit to an account "in the name of the transferor," or an adult other than the transferor or a trust company, followed in substance by the words: 'As custodian for . . . (name of minor) under the West Virginia Uniform Transfers to Minors Act.' Moreover, such an account may be made "only for one minor, and only one person may be the custodian." For all other purposes, however, the deposit account may be maintained by the bank as any other deposit account. Indeed, the statute expressly dictates that:

A third person in good faith and without court order may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining: (1) The validity of the purported custodian's designation; (2) The propriety of, or the authority under . . . [the act] for, any act of the purported custodian; (3) The validity or propriety under . . . [the act] of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or (4) The propriety of the application of any property of the minor delivered to the purported custodian.

Accordingly, the bank should not be troubled by the offering and administering of this particular account and the parents of the minor should be comforted by the control which is retained over the minor's use of the funds that were deposited into the account.

The control of the account by the custodian does raise interesting questions for the bank. What if the custodian pledges the account for an obligation of the custodian to the bank? The above-quoted provisions suggest that the bank is not responsible for "determining" the "propriety of the application of any property of the minor delivered to the purported custodian." A bank might argue that it could indiscriminately accept the pledge of the account for the custodian's obligation. However, the provision provides that the bank must be without

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95. This clarifies that a parent making a gift to a child can act as the child's custodian for the purpose of controlling the deposit account.
97. W. VA. CODE § 36-7-10 (Supp. 1994).
98. W. VA. CODE § 36-7-16 (Supp. 1994).
99. Id.
“knowledge” of the impropriety of the act. The bank is aware of the custodian’s capacity and, therefore, arguably has knowledge that the custodian’s use of the account for his or her own personal obligation is improper. However, the custodian is empowered to:

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\text{Expend for the minor’s benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.}^{106}
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Accordingly, the bank is in a position to accept a pledge of the account if the loan which it secures is for the ultimate benefit of the minor. The bank should require written acknowledgment from the custodian that it is, indeed, for the benefit of the minor.

The parent or other person making such a gift to a minor must be aware of its irrevocable nature. Accordingly, a parent or guardian of a minor who wants to retain effective ownership of the funds, through the power of revocation of the gift, should not use an account which indicates that it constituted a transfer to a custodian for the benefit of the minor. Perhaps the parent or guardian would rather expressly retain ownership and control of a deposit account and merely give the minor an entitlement. This type of account will be discussed in the following section.

C. Payable on Death and In Trust for Accounts: Sole Ownership and Control in One Party and Entitlement in Another

For many individuals, the automatic transfer to another person of the right to receive payment from a bank upon their death is a desirable feature. The account does not require probate and the beneficiary has immediate use of the funds upon the death of the depositor. As discussed earlier, such an account has often been described as the “poor man’s will.”^{101}

\footnote{100. W. VA. CODE § 36-7-14(a) (Supp. 1994).}
\footnote{101. See supra note 1.}
The Legislature has provided for such an automatic transfer in, ironically, two different, yet very similar, ways. First:

If any deposit in any banking institution be made by any person describing him or herself in making such deposit as trustee for another, and no other or further notice of the existence and terms of a legal and valid trust than such description shall be given in writing to the banking institution, in the event of the death of the person so described as trustee, such deposit, or any part thereof, together with the interest thereon, may be paid to the person for whom the deposit was thus stated to have been made.\(^\text{102}\)

These accounts have variously been described as “in trust for” accounts. The distinguishing characteristic of the account is that the deposit is made “as trustee for another.” To make a deposit in such a form requires that the contract reflect the depositor’s intent. The title to the account is the most convenient aspect of the account in which to reflect such intent and could be stated as “A in trust for B.”

A second distinguishing feature of the account is that the bank does not have knowledge of an actual trust agreement. This feature goes to the issue of ownership. If an actual trust exists, then the trustee has legal title, but the ownership interest more truly lies with the beneficiary. The “in trust for” account provision seemingly contemplates that ownership of the account resides with the depositor until the death of the depositor and no fiduciary obligation exists on the part of the depositor to the beneficiary. Restated, the depositor retains ownership and control of the deposit account, but has given an entitlement to another person.

The bank need not be concerned with the depositor’s use of the money. An act of the depositor repugnant to the person for whom the account is “in trust for” can be treated by the bank as merely reflective of the depositor’s ownership or as evidence of the depositor’s intent to revoke the future gift. Again, the depositor has the ownership and the control while the entitlement, albeit potentially attenuated, is given to the other person.

\(^{102}\) W. VA. CODE § 31A-4-33(a) (Supp. 1994).
This "in trust for" statutory provision is seemingly obscure. The author's experience was that only a few small community banks offered such accounts. The obscurity of this provision may be the reason that the Legislature created the "payable on death" account which, in terms of the attributes of ownership, control and entitlement, is identical to the "in trust for" account, but the statutory provisions for the "payable on death" account do not repeal, or make any reference to, the "in trust for" provisions.

Specifically, the Legislature provided:

Any person may enter into a written contract with any banking institution located in this state to establish a payable on death bank account, which may be abbreviated as a "p.o.d." account. A payable on death account contract shall provide that upon the death of the account owner the balance of any such account shall be paid to the beneficiary or beneficiaries specifically designated by the owner of the account who are surviving at the time of the owner's death.103

While the "in trust for" provisions only specifically address the issue of entitlement upon the death of the depositor, the "payable on death" provisions specifically discuss the issues of ownership and control.

With respect to ownership, the "payable on death" statute provides that "[t]he owner of a payable on death account shall maintain all right, title and interest in the banking account, including principal and interest, during his or her lifetime."104 Two other provisions make certain that the person receiving an entitlement has no ownership or control. The first provision states "[t]he account owner may change the designated beneficiary at any time."105 The second provision emphasizes that "[d]esignated beneficiaries have no rights or claims to a payable on death account until the death of the last surviving owner of such account."106

103. W. VA. CODE § 31A-4-33a(a) (Supp. 1994).
104. W. VA. CODE § 31A-4-33a(b) (Supp. 1994).
105. W. VA. CODE § 31A-4-33a(c) (Supp. 1994). This statute further provides that, to change a beneficiary, "[s]uch change must be in writing and executed in the form and manner prescribed by the bank. Any such change of beneficiary must be delivered to the bank prior to the death of the payable on death account owner in order to be valid." Id.
106. W. VA. CODE § 31A-4-33a(d) (Supp. 1994). Pursuant to the provisions of W. VA.
Interestingly, the statute contemplates the possibility of a joint ownership in the account. However, the designated beneficiary is not entitled to payment from the bank until both of the joint owners die. Accordingly, if an account is opened as a joint tenancy with right of survivorship, the right of survivorship still remains in a surviving tenant notwithstanding the instructions about the payment upon death to the designated beneficiary. Moreover, the statute contemplates the possibility of joint beneficiaries and "[u]nless otherwise provided in the written contract, where two or more beneficiaries are designated, upon the death of the account owner, each surviving beneficiary shall be paid a per capita share of the account balance."\textsuperscript{107}

The statute further provides direction and protection to the bank by stipulating that "[u]pon the death of the last surviving account owner, delivery of moneys in a payable on death account to the designated beneficiary or beneficiaries pursuant to the terms of the written contract shall fully and completely discharge the banking institution of all obligations under said contract."\textsuperscript{108}

From the bank’s perspective, the “in trust for” and “payable on death” accounts are identical in terms of ownership, control and entitlement. However, the “payable on death” provisions are more explicit about the nature of such an account and the respective obligations and rights of the depositor, the bank, and the beneficiary. Accordingly, no reason can be given for offering the “in trust for” account as an alternative to, or in lieu of, the “payable on death” account.

One requirement of the “payable on death” provisions should be noted. The statute sets forth a condition that “a payable on death account contract shall provide that upon the death of the account owner the balance of any such account shall be paid to the beneficiary or

\textsuperscript{107} W. Va. Code § 31A-4-33a(d) (Supp. 1994). The statute further provides that “[i]f no designated beneficiary survives the last account owner, any account balance shall become a part of the last surviving account owner’s estate.” \textit{Id.}

\textsuperscript{108} W. Va. Code § 31A-4-33a(f) (Supp. 1994).
beneficiaries specifically designated by the owner of the account.\textsuperscript{109} The account title should certainly reflect that it is a payable on death account. As an example, “A, p.o.d. to B” or, as previously discussed, “A or B, p.o.d. to C (and/or D).”\textsuperscript{110} However, does this satisfy the requirement that the deposit contract “provide” for this result? Arguably, it does; however, two possible steps can be taken to remove the uncertainty. One step is to provide in the contract that the account title shall constitute part of the contract. However, a danger lurks in such a provision. In the event of an inconsistency between the title and the contractual provisions, the bank is bound by the argument that the contract itself is ambiguous because the title is incorporated into the contract and the rules of resolving ambiguity come in to play. Therefore, the second step may be the wiser course, which is to include in the deposit contract a provision that repeats the payable on death provisions. One standard form of contract with which the author is familiar contains the following language:

[If two or more of you create such an account [that is, a p.o.d. account], you own the account jointly with survivorship. Beneficiaries acquire the right to withdraw only if: (1) all persons creating the account die, and (2) the beneficiary is then living. If two or more beneficiaries are named and survive the death of all persons creating the account, such beneficiaries will own this account in equal shares, without right of survivorship. The person(s) creating this account type reserves the right to: (1) change beneficiaries, (2) change account type, and (3) withdraw all or part of the deposit at any time.

The title to the account will serve to identify the account as a “p.o.d. account” and this clause, which fairly addresses all the points raised with respect to such accounts, will satisfy the statutory requirement regarding the necessary provisions that must be set forth in the deposit contract.

\textsuperscript{109} W. VA. CODE § 31A-4-33a(a) (Supp. 1994).
\textsuperscript{110} The designation of the account as “p.o.d.” is a permissible abbreviation under the statute. Id. The designation of joint beneficiaries by the disjunctive “or” or the conjunctive “and” should make no difference, for the governing statute makes certain that a beneficiary who does not survive the depositor does not have an entitlement to the account upon the death of the depositor.
D. Depositors and Their Agents: Sole Ownership but with Control Shared by, or Vested Solely in, a Party Other than the Owner

The intent of many joint depositors, as previously discussed, is not that the parties have joint ownership, but that one named party be able to assist the other party in the transaction of business with the bank. This commonly arises with the elderly, who request or require the assistance of family, friends or neighbors. Again, the intent is that one person have ownership, but that both have control of the account.

Unfortunately, this intent may never be expressed to the bank or the bank may not understand the import of the depositor’s instructions in establishing the account. Instead, the title reflects a joint account with right of survivorship and the terms of the executed deposit contract reflect joint attributes of ownership, control and entitlement.

For the bank to accurately reflect the depositor’s intent, the bank must title the account in the depositor’s name and then merely reflect the interest of the remaining party as that of control, but not of ownership or entitlement. In effect, the person with whom the depositor desires to share control is acting as an agent of the depositor. Two remedies are available to the bank.

The first remedy is to require the presentation of a written agreement between the depositor and the party with whom control is to be shared. In fact, one readily available form of agreement is the power of attorney. The power of attorney has been defined as an “instrument authorizing another to act as one’s agent or attorney.” A limited power could be given to the controlling party detailing the ability of the party to act on behalf of the depositor with respect to the deposit account.

The responsibilities of the bank with respect to a power of attorney have been variously defined by both case law and statute. In the

111. For the discussion of powers of attorney, the author is obligated to acknowledge the substantive contributions of Merrell S. McIlwain, II, Esq., practicing in Charleston, W. Va.

case of Milner v. Milner, the Supreme Court of Appeals of West Virginia was confronted with a set of facts in which a bank had been presented with a power of attorney that was improperly used for the benefit of the person to whom the power was granted, typically referred to as an "attorney in fact." The court expressed, as a general principal of law, that "when dealing with a broad power of attorney, there is no obligation on a third party to go behind the power." With respect to the facts of the case and the use of the power of attorney to misappropriate a bank account, the court applied this principle and then stated that the bank was to act "diligently . . . to make certain the document was authentic and legal." If, in the exercise of such diligence, the bank did not discover "circumstances which might place a reasonably prudent bank on notice that its fiduciary duty to its accountholder demands additional inquiry," then the bank "may rely on the terms of the power of attorney to discern the authority of the holder of such power demanding a withdrawal of funds."

The requirement that the document be authentic merely means that the document is what it purports to be. For a power of attorney, this translates into a requirement that the instrument grant the necessary power and is actually signed by the person granting the power, typically referred to as the principal. If the signature of the principal is notarized, then a presumption of authenticity exists. If the power of attorney is publicly recorded then, again, a presumption of authenticity exists if the clerk of the county commission authenticates a copy of the recorded instrument. If, however, the power merely contains a signature, then the bank must in some fashion verify the signature either by requiring the principal to verify the signature or by comparing the signature with specimens that the bank may have on file.

The requirement that the bank determine the legality of the document is problematic and, in fact, puzzling. Perhaps the court was refer-
ring to the competency of the principal when the power was granted, but this seemingly puts the bank in a very difficult situation. Perhaps the court was referring to the determination of whether the power of attorney was terminated or revoked. Termination occurs upon the death of the principal or as set forth in the instrument granting the power and, therefore, the bank should not be unduly burdened in making this determination. Revocation requires a further investigation about the principal’s intent and such an investigation may be difficult, for in many instances the power is granted due to the principal’s general unavailability.

The burden of determining the legality of a power of attorney was described by the Milner court, however, with respect to actions taken under a power of attorney issued in 1979. In 1986, the Legislature codified the “Uniform Durable Power of Attorney Act,” 119 which significantly lessened this burden. Specifically:

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal’s death, disability or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. 120

This affidavit of an attorney in fact answers many of the troublesome questions about the legality of a power of attorney.

Moreover, if the power of attorney is a durable one, the bank need not be concerned about the disability or incompetency of the principal. The Uniform Durable Power of Attorney Act provides:

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words “This power of attorney shall not be affected by subsequent disability or incapacity of the principal,” or “This power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words showing the intent of the principal that the authority con-

ferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.121

The issues about the legality of a power of attorney are significantly narrowed when a durable power of attorney is issued.

Even if the affidavit of the attorney in fact is received or a durable power of attorney exists, the bank is still confronted with the issue of legality arising from the principal's incapacity or disability when the power of attorney was originally executed. The protection of third parties who deal with powers of attorney that was expressly intended by the Milner opinion is seriously undermined if the bank is required to examine the circumstances surrounding the execution of the instrument. The only consistent application of the Milner opinion is that the bank has no duty to explore these circumstances until the bank has knowledge of circumstances that would put a "reasonably prudent bank on notice" that the principal may have been incompetent when the instrument was originally executed. Examples of such circumstances might include a statement by the principal's relative which raises the possibility. Or potentially, the document may show a "signature which is vague, wavering, and totally unlike the signature . . . as known to the banks from past transactions and their own records . . . [t]hat, in itself, was enough to put the defendants on notice that due care required further investigation by them before parting with the depositor's money."122

A remaining issue regarding "legality" is whether the transaction is within the scope of the power of attorney. This requirement translates into a requirement that the bank read the instrument granting the power of attorney. Generally, the powers are so broadly worded that no issue will arise with respect to the power of the attorney to, in fact, control the deposit account.123

123. One issue that might arise is a power of attorney that does not become effective until the occurrence of a future event, such as a durable power of attorney that will become effective only upon the disability or incompetency of the principal. If presented with such a power of attorney, the bank would need to determine the actual incapacity or incompetency
Accordingly, the bank is afforded broad protection regarding the power of attorney, but the bank is not entirely relieved of certain burdens. Intriguingly, a bank may not be able to refuse a power of attorney simply for ease of its administration. A person has the inherent right to delegate control of his or her affairs and the bank has no valid reason not to fulfill its contractual obligation to the depositor pursuant to the instructions of a duly designated agent unless, of course, the deposit contract expressly states that no agency will be permitted.

The bank is confronted with other issues with respect to the power of attorney. The power of attorney may be presented after the depositor opens the account or, in fact, may be used to open the account. The principal is the owner of the account and the attorney in fact merely has the power to control the account. However, the bank must not ignore the fact that the principal also retains the right of control. Restated, the principal does not relinquish control over his property simply because he or she has executed a power of attorney. Accordingly, the bank is obligated under the contract to pay at the demand of either the principal or the attorney in fact. Moreover, the principal may notify the bank that the power of attorney has been revoked and, thereafter, the bank may only allow the principal to control the account unless another power of attorney is executed. Be-
cause the attorney in fact may be removed by the principal from the account, the bank may not want to put the name of the attorney in fact in the title to the account. Rather, the account name would solely be in the principal’s name, but the signature authority of the attorney in fact would be reflected elsewhere, perhaps on the signature lines with the capacity of the attorney in fact clearly set forth.

A second remedy to the problem of the control of accounts by an agent is to enact a statute that permits “agency accounts.” The statute should require that the intent of the depositor to appoint an agent be expressly stated in the title to the account such as “A by agent.” The statute would, similar to other statutory provisions previously discussed, preserve the bank’s ease in administering the account. The statute might also require a notice in the deposit contract that explains the ability of the agent to effectively control the account. Finally, the statute would clearly state the mechanism by which the agency could be terminated requiring, for instance, a notice, in writing, to be delivered to the bank.

IV. CONCLUSION: MELDING THE CUSTOMER’S INTENT INTO THE BANK’S DOCUMENTATION

The previous discussion discloses that the term “joint deposit account” is improperly used to encompass many other intended arrangements. The contract’s title may reflect an intended joint ownership, control and entitlement and the contract’s provisions may support this joint ownership, control and entitlement, yet the depositor may unwittingly be maintaining an account in a form that does not serve the depositor’s intended purpose. How should a purported conflict between the manner in which an account is established and the depositor’s intent be resolved?

In the 1974 Dorsey opinion, the Supreme Court of Appeals of West Virginia discussed its precedent that “in the absence of fraud, mistake or some equally serious fault, . . . a conclusive presumption that the donor depositor of a joint account intended the money remain-
ing in the account after his death to belong to the surviving joint ten-
ant [is created].” And, in fact, the court in *Dorsey* remanded the case for further development of the facts regarding the mother’s contention that she had not “intended” to make her daughter a joint tenant.

If the customer clearly expresses to the bank that only control is to be established, yet the bank documents the creation of a joint tenancy, then the *Dorsey* opinion could be applied to rebut the conclusive presumption of a joint tenancy.

Moreover, if the title purportedly reflects the intent of the depositor, but the contractual provisions are inconsistent, which should prevail? As the general principle of contract law is to determine the parties’ intent, then seemingly a title which does this would control. The deposit contract is the bank’s standard form and it is most likely that neither the customer or the bank’s representative read the contract.

The solution to this problem is not legal argument; it is, instead, risk prevention. First, the bank’s management must determine what deposit products the bank will offer and in what form. This list of products should be generally available to customers so that no customer can legitimately claim that the account which was intended to be established is one that the bank has expressly documented will not be offered.

Second, the bank should adequately train, and document the training of, its tellers or other customer service representatives about the differing issues of ownership, control and entitlement. The tellers or other representatives should be familiar with the provisions of the deposit contract and how the issues of ownership, control and entitlement are described in the form of contract. Most importantly, the customer service representatives must be able to articulate these issues intelligibly to the customers.

Third, the bank must devise a mechanism by which the customer can clearly articulate his or her intent in establishing the account and the bank must be able to document the customer’s expression of intent.

126. *Dorsey*, 205 S.E.2d at 690.
127. Admittedly, rebutting a “conclusive” presumption seems a legal oxymoron.
The author recommends a questionnaire that would ask the customer in logical fashion about the issues of ownership, entitlement or control. An example might be a form which first asks whether the customer wants to be the sole owner of the funds on deposit or whether the customer wants others to have a prorated interested in the deposit account. The customer should be asked if the customer is opening the account for another person who actually owns the account and, if so, in what capacity. Is the customer a parent or guardian, a custodian under the West Virginia Uniform Transfers to Minors Act, a trustee, an executor, an administrator, or an attorney in fact? The customer should be asked who he or she wants to control the account; that is, who should have the right of withdrawal or the right to write checks. If another is to control but not own the account, then the customer should indicate whether this agency has been established in a writing that should be submitted to the bank. The customer should be asked who has an entitlement to the account. Does the customer want his or her will to determine who receives the funds? Does the customer want a joint owner to receive the funds upon his or her death? Does the customer want someone who does not have an ownership interest to have an entitlement to the funds upon the death of the depositor?

Once the questionnaire is finished, the bank’s representative can check the answers for inconsistencies and, if no inconsistency is found, can then determine what title and what contractual provisions satisfy the expressed intent of the customer. The questionnaire should be retained for it stands as a documentation of the depositor’s expressed intent in establishing the account.

The bank should further provide certain notices to the depositor about the effects of joint ownership, joint control and joint entitlement. Such notices are now required for the issue of joint control, in that the bank is required to state that any one party has the right of withdrawal until a written notice to the contrary is received, and that the creditors of one party to the account may attach both interests and that one party to the account may pledge both interests.

Once the questionnaire is submitted and the notices are given, the bank should receive the benefit of a conclusive presumption that the
account is opened and administered in accord with the customer's intent. A statutory provision to this effect would be appropriate.

Finally, the bank should encourage the customer to read the contract of deposit and to ask whatever questions he or she may have. In fact, the advice of the author has been that the customer should expressly acknowledge on the deposit contract that "the customer was encouraged to read, and was given a reasonable opportunity to read" the contract. Of course, the bank must ensure that the acknowledgement comports with the reality of the transaction with the customer. Moreover, the bank must ensure that the contract is readily understandable and not unduly burdened with the foreign language of lawyers.

In this fashion, and by mutually resolving the issues of ownership, control and entitlement, the intent of the customer in opening the joint account and the intent of the bank in administering the account should readily and satisfactorily meld.

128. The author has further advised that the bank obtain an acknowledgment from the customer that no other promises or representations regarding the deposit account have been made to the customer that are not set forth in the contract.

129. This "plain language" requirement would also facilitate the bank's representatives' understanding of, and explanation to customers of, the contractual provisions.