WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 67 | Issue 1 Article 10

December 1964

Property--Cancellation of Note at Payee's Death Not Testamentary Gift

Ralph Judy Bean Jr.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Estates and Trusts Commons, and the Property Law and Real Estate Commons

Recommended Citation
Ralph J. Bean Jr., *Property--Cancellation of Note at Payee's Death Not Testamentary Gift*, 67 W. Va. L. Rev. (1964).
Available at: https://researchrepository.wvu.edu/wvlr/vol67/iss1/10

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

In the principal case it was common knowledge that rocks occasionally fell from the cliff. Because of the apparent danger, warning signs had been erected and maintained since 1935. The plaintiff testified that he had knowledge of the fact that rocks fell intermittently and that he knew the situation was dangerous. From these facts it is possible that a jury might find that a person was himself negligent by driving an automobile into the area, or that a person knowingly entering into a dangerous situation has assumed the risk. It is for these reasons that the Supreme Court of Appeals of West Virginia held the trial court in error for refusing instructions as to these defenses.

Although W. VA. CODE ch. 17, art. 10, § 17 (Michie 1961) seemingly imposes absolute liability upon municipalities for disrepair of its public streets, our appellate court has held otherwise. The only way that the term "absolute liability" can properly be used when referring to the court's interpretation of section seventeen is when speaking of liability without negligence. Even when used in this sense the term is not literally correct because before liability will attach the city must fail to comply with the standard as set forth in the *Burdick* case. This suggests that the court might refrain from the use of the term completely. Nevertheless the decisions are sound. Few can doubt the inherently undesirable consequences which would result if the appellate court did not carefully govern the application of the statute. The cost of maintaining public streets would be extravagant if the statute were construed otherwise.

Charles Ellsworth Heilmann

Property—Cancellation of Note at Payee's Death Not Testamentary Gift

A note was given as part payment for the purchase of a restaurant. The note contained a condition which specified that if the payee, who was the maker's partner in operating the restaurant, predeceased the maker while the note was unpaid, the outstanding balance would be considered paid and cancelled. Suits by residuary legatees of the payee on the note were dismissed by the lower court. *Held,* dismissal affirmed. The court found that no liability existed on the note following the death of the maker. Since the condition was contractual and not testamentary in character, this was not an invalid attempt to make a testamentary disposition. The formalities of the Statute of Wills had no application. *Nunally v. Wilder*, 330 F.2d 843 (D.C. Cir. 1964).

This case raises the question of how far the courts will allow a person to go in making a gift of property without incorporating the gift in a will. The principal case seems to be indicative of the tendency of some courts to avoid the proposition that an attempted gift is testamentary and void. By construing the condition in the note as contractual, the court was able to say that the Statute of Wills was inapplicable. Whether the result would have been the same if the maker and payee had not been business partners or whether other courts would have disregarded the Statute of Wills is questionable. However, at least one case has been found where another court's holding was analagous on a similar set of facts. *In re Estate of Lewis*, 2 Wash. 2d 458, 98 P.2d 654 (1940). In that case a decedent, during his lifetime, conveyed land to his son, taking back a purchase money mortgage. The mortgage provided that any amount due on the mortgage at the time of the mortgagee's death should be cancelled and considered paid by his executors. The court held that the provision in the mortgage was not an invalid testamentary disposition but a binding contract between the mortgagor and mortgagee.

There is authority that the outcome in the instant case would have been different had the court looked at the transaction as a gift subject to a condition precedent rather than a contract. *Kimmey v. Kimmey*, 273 App. Div. 142, 77 N.Y.S.2d 374 (Sup. Ct. 1948). In the *Kimmey* case the payee of certain notes delivered them to the maker, telling him that the notes should be considered a gift in the event the payee's wife should predecease the payee. The court found that the transaction did not establish a valid gift inter vivos even though the payee's wife predeceased him, because there was no intent to make a present gift.

There are several analagous situations which are in the nature of testamentary dispositions and which illustrate the extent to which a person may go in disposing of property without having to comply with the statutes governing wills. The question frequently arises where gifts of real or personal property are contemplated, particularly where the subject matter involves savings accounts. In addition, the "Totten trust" doctrine, which has been adopted by several jurisdictions, has been attacked as an attempted testamentary disposition.

The common law inter vivos gift has four strict requirements: present donative intent, delivery, relinquishment of dominion by the donor and acceptance by the donee. *Beaver v. Beaver*, 117 N.Y. 421, 22 N.E. 940, 6 N.Y. Supp. 586 (1889). Unless the alleged donee takes a present interest in the subject matter, the gift is unenforceable. BROWN, PERSONAL PROPERTY § 48 (2d ed. 1956). However, the rule that a gift to take effect in the future is void can be avoided by finding a present gift of the right to the subject matter, with only the enjoyment postponed to the future.

In the leading case of *Innes v. Potter*, 130 Minn. 320, 153 N.W. 604 (1915), the donor delivered certain shares of stock to a third person with directions to deliver them to the donee on the death of the donor. The court held that even though the instrument postponed enjoyment of the subject matter until after the death of the grantor, it was not necessarily testamentary in character. The test was held to depend upon the intent of the maker. If the maker intends that the instrument have no effect until after his death, the transaction is testamentary and void; but if the intent is to transfer some present interest, the instrument is not a will and is irrevocable. The effect of such an interpretation is to reserve a life estate in the donor without invalidating the donation. A significant number of jurisdictions are in accord with the *Innes* case. *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255, 44 N.E. 251 (1896); *Howard v. Hobles*, 125 Md. 639, 94 Atl. 318 (1915); *Payne v. Tobacco Trading Corp.*, 179 Va. 156, 18 S.E.2d 281 (1942)

The West Virginia Supreme Court has applied a similar rule in regard to real property transactions. In *Lauck v. Logan*, 45 W. Va. 251, 31 S.E. 986 (1898), the grantors delivered a deed to the grantee, stipulating that the deed would be in full force and effect immediately after the death of the grantor and no sooner. The court found that this was a valid deed and not a testamentary paper. The grantee, in effect, received a vested remainder which was to ripen into enjoyment on the death of the grantor. The court stated that neither the belief of the maker as to the character of the instrument nor the type of language employed was necessarily controlling. In the final analysis the intention of the grantor was held to be decisive, and this had to be ascertained from all the surrounding circumstances. In another West Virginia case, a father granted a tract of land to his daughter, specifying that the deed was not to take effect until after his death, even though the grantee was allowed to make improvements on the land. The court found that an interest passed to the daughter, subject to a life estate in the father. *Rust v. Commercial Coal & Coke Co.*, 92 W. Va. 457, 115 S.E. 406 (1922).

More recently the West Virginia Supreme Court has held that the rule of the *Lauck* and *Rust* cases was binding. *Ligett v. Rohr*, 122 W. Va. 166, 7 S.E.2d 867 (1948). In that case the grantor deeded a certain tract of land to her children, providing that the deed was not to take effect until the death of the grantor. The majority of the court ruled that the deed created an immediate estate in the grantee which would come into full enjoyment when the grantor died. Judge Kenna, in a dissenting opinion, stated that the conveyance was an attempted testamentary disposition and that it was apparent from the language used in the conveyance that the grantor did not intend for anything to vest in the grantee when the deed was executed and delivered. Thus, the deed was not good as a will and therefore of no effect.

Joint bank accounts are a common device used by persons in an attempt to arrange their property in such a manner that title to their property will pass automatically upon the death of the owner with no need for an administration of his estate. Typically, an account is opened in the name of the depositor and another as co-depositor, or perhaps the account was originally opened as an individual account and is subsequently changed into a joint account. Because the money deposited is owned at the time of the deposit by the depositor, the question is what effect does the deposit in the joint account have on the title to the funds.

Many courts have considered the transaction as testamentary in nature and governed by the law of wills, *Bachmann v. Reardon*, 138 Conn. 665, 88 A.2d 391 (1952), while others have classified it as involving the law of gifts. *Johnson v. Savings Inv. & Trust Co.*, 107 N.J. Eq. 547, 153 Atl. 382 (1931). Comparison of two cases in this area reveals how the courts can reach different results on substantially the same set of facts. In *Tygard v. McComb*, 54 Mo. App. 85 (1893), a father deposited certain sums in a savings bank to the credit of his minor daughters, retaining the passbook in his possession. During his life he treated the account as his own, and there was evidence that he wanted his daughters to have the money in the event of his death. The court held that since the money deposited was subject to the father's control and was not intended to vest in the children until his death, it was merely an attempted testamentary disposition. In *Malone v. Walsh,* 315 Mass. 484, 53 N.E.2d 126 (1944), the decendent, during her lifetime, made three joint deposits in her name and that of her brother. The decedent retained possession of the bank books at all times and made withdrawals for her own purposes, but none were made by her brother. The court held that the deposits had vested a present interest in decedent's brother as a joint tenant which would ripen into complete ownership and enjoyment in the event the decendent predeceased him.

Many states have sustained the joint account as a valid gift by modifying or abandoning some of the traditional common law requirements as expressed in *Beaver v. Beaver, supra.* In several jurisdictions delivery of the passbook has been held to be unnecessary on the theory that if either account holder may have the book, then both cannot, and the donor's retention of it does not defeat the gift. *Commercial Trust Co. v. White,* 99 N.J. Eq. 119, 132 Atl. 761 (1926). It also has been held that the donor's retention of the right to withdraw the deposit does not defeat the gift because the donee has the same right. *Burns v. Nolette,* 83 N.H. 489, 144 Atl. 848 (1929). In addition, a few courts have found intent to make a gift unnecessary. *Bark v. Mulich,* 83 Colo. 518, 266 Pac. 1110 (1928); *Beach v. Holland,* 172 Ore. 396, 142 P.2d 990 (1943).

A number of states avoid the gift theory by considering the transaction as a contract between the depositor, the bank and the co-depositor, creating rights enforceable by the co-depositor. *In re Estate of McIllrath,* 276 Ill. App. 408 (1934); *Chadrow v. Kellman,* 378 Pa. 237, 106 A.2d 594 (1954) (dissenting opinion); Jones, *The Use of Joint Bank Accounts as a Substitute for Testamentary Dispositions of Property,* 17 U. PITT. L. REV. 42 (1955). If the transaction is considered a contract, it then becomes presently operative. This negates the possibility of having the transaction attacked as testamentary in nature, and there are no requirements of acceptance and delivery as in the law of gifts. The enforcement of the co-depositor's right involves no violation of the Statute of

Wills, because the Statute is inapplicable to contracts. *Castle v. Wightmar*, 303 Mass. 74, 20 N.E.2d 436 (1939). The Virginia court took a slightly different approach in regard to the joint account transaction. *Deal's Adm'r v. Merchants & Mechanics' Bank*, 120 Va. 297, 91 S.E. 135 (1917). In that case a decedent, during her lifetime, deposited money in the bank to the joint account of herself and her sister. It was held that the deposits created the relation of debtor and creditor between the bank and the depositors, and when the decedent died, the balance of the account belonged to the sister.

In several jurisdictions the courts are able to rely on joint tenancy statutes designed to deal with joint bank accounts. The New York court, in interpreting its joint tenancy statute, has developed the following rule: As to money left in the account at the death of the depositor, there is a conclusive presumption that a joint tenancy was intended; but as to funds withdrawn prior to the death of the depositor, the presumption is rebuttable. Such a withdrawal does not destroy the tenancy; instead, it only "opens the door" to competent testimony that would show that no joint tenancy was intended to be created. *Bricker v. Krimer*, 13 N.Y.2d 22, 191 N.E.2d 795, 241 N.Y.S.2d 413 (1963). The New York statute is practically identical to the West Virginia joint tenancy statute which provides:

> "When a deposit is made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit, and any addition thereto made, by either such persons, upon making thereof, shall become the property of such persons as joint tenants. . . ." W. VA. CODE ch. 31, art. 8, § 23 (Michie 1961).

While the purpose for the enactment of the West Virginia statute was to protect bank institutions, it has been held to create property rights in the depositors. *Lett v. Twentieth St. Bank*, 138 W. Va. 759, 77 S.E.2d 813 (1953); 66 W. VA. L. REV. 252 (1964).

A similar problem is also encountered in the area of trusts. If an intended trust is revocable throughout the lifetime of the depositor, the question arises whether it is a testamentary trust and invalid under the Statute of Wills. In the leading case of *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904), it was held that a deposit of money by the owner in his own name as trustee for another does not necessarily establish an irrevocable trust during the lifetime of the depositor. Such a deposit was held to be "tentative trust", revocable at the will of the depositor. In the event the depositor dies before the beneficiary without having revoked the trust, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor. This "Totten trust" doctrine has been adopted elsewhere. *Bollack v. Bollack,* 169 Md. 407, 182 Atl. 317 (1936); *Walso v. Latterner,* 140 Minn. 455, 168 N.W. 353 (1918); *In re Estate of Scanlon,* 313 Pa. 424, 169 Atl. 106 (1933); RESTATEMENT, TRUSTS § 65 (1930). Although not having adopted the rule, California seems favorable to it. *Kuck v. Raftery,* 117 Cal. App. 755, 4 P.2d 552 (1931). The New Jersey court, however, has held that such an interpretation of the deposit would render it testamentary and void. *Nicklas v. Parker,* 69 N.J. Eq. 743, 61 Atl. 267 (1905).

If the courts which approve the "Totten trust" doctrine intend to imply that no trust arises until the death of the depositor, it would appear that the trust is testamentary, since the deposior's death is a condition precedent to the creation of the trust. On the other hand, it would seem more reasonable to assume that a trust is created at the time of deposit, even though it remains revocable in whole or in part by the depositor. Even so, it is hard to escape the fact that the depositor has complete control over the deposit, and that the trust in substance appears to be testamentary. If the subject of the trust were property other than a savings account in the bank, the trust clearly would be testamentary. Scott, *Trusts and the Statute of Wills,* 43 HARV. L. REV. 521 (1930). However, such a device offers a convenient method of disposing of relatively small amounts of money without having to resort to probate proceedings; thus, there seems to be no strong policy against the creation of these trusts.

It seems evident that the courts are becoming more liberal in sustaining transactions which are apparently testamentary and void. In reaching the desired result the courts have employed a variety of theories, ranging from the law of gifts to the law of contracts. The principal case appears to provide another example of the tendency to uphold such transactions.

Ralph Judy Bean, Jr.