

Family Banking: The Perils of Powers of Attorney and Joint Bank Accounts

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Overview of Presentation

- Profiles of real cases
- Brief look at laws
- Analysis of common facts
- Available remedies
- What “more” can we do?
- Is this an “American” problem?
 - Are lawyers (and laws) part of the problem?
 - Are bankers (and banks) part of the problem?

Tales of Two Families

Facts in Common:

Older adult grants authority to another to act on elder's behalf – agent uses authority to benefit self.

But are agents' actions properly characterized as exploitation in both cases?

Bertha Trout

- At age 94 ...
- Great-niece promised to care for her if she moved in with family
- Power of Attorney
- Joint Bank Accounts
- In two and a half years...

**\$850,000+ ... gone
(cars, jewels, furs)**



“Mrs. Jones”



- Age 82, progressive dementia
- Niece promised her mother she would care for aunt
- Power of Attorney
- Niece becomes ill ...
- Aunt's application for Medicaid denied because...

\$20,000 in CDs cashed out . . . Gone
– Niece says money used to pay herself for costs of care

Are these cases unique?

- **Brooke Astor**, NY philanthropist/socialite:
 - September 2009: Son (age 85) and attorney convicted of fraud by misusing Power of Attorney and alteration of wills -- five month long trial
- **Clara Philpot**, Clackamas County, Oregon:
 - September 2009: Daughter and son-in-law convicted of aggravated theft from 87 year old mother, via Power of Attorney to borrow close to \$1 million
- **Evelyn Roth**, Multnomah County, Oregon:
 - August 2009: 35-Count Felony Charges, pending against cousin and niece involving alleged misuse of Power of Attorney to dispose of assets of 83 year old relative

Overview: Powers of Attorney

- Legal document, usually governed by state statutory law, granting general or specific powers to an agent
- Key document in elder law and estate planning
- Long debate over whether “abuse” is too easy
- AARP Public Policy Institute Research Report, Nov. 2008, “Power of Attorney Abuse: What Can States Do About It?”
- Key Legal Question: When (ever?) is agent’s “self-gifting” appropriate?

Overview: Joint Bank Accounts

- Governed by state law, federal law AND contract between depositor and bank
- Different types of “joint” accounts are available
- Long history of banks trying to protect themselves from liability caused by misuse
- Key Question: What does customer “really” want when agreeing to “joint account”?

Powers of Attorney

- Recommendations (including Uniform Laws Commission proposals):
 - Create a Statutory Presumption of “Limited” Gifting Power
 - Adopt Express Fiduciary Duties for Agents under Powers of Attorney
 - Question: Can Principal “waive” duties?
 - Create Clear Path for Compelled “Accountings” by Agents upon request

Multiple-Party Accounts Act (MPAA)- Before Death, creates a presumption

Uniform Act, adopted in many states, e.g., 20
Pa.C.S.A. §6303(a):

- “A joint account belongs, **during the lifetime of all parties**, to the parties in the proportion to the net contributions by each to the sum on deposit, **unless** there is clear and convincing evidence of a contrary intent.”

Civil Liability under MPAA

- *Deutsch, Larrimore & Farnish, P.C. v. Johnson*, 848 A.2d 137, 140 (Pa. 2004) (civil case, holding that joint accounts under the MPAA are a testamentary transaction where no interest in the property is transferred until the death of the transferor)
- *Lessner v. Rubinson*, 592 A.2d 678, 681 (Pa. 1991) (describing standard for inter vivos gifts, contrasting “gift” of a check with facts surrounding certificate of deposit in joint name, and holding that creation of joint account for CD was not inter vivos gift, citing “plain language” of MPAA)
- *Cannuni v. Schweiker*, 740 F.2d 260, 264-5 (3rd Cir., 1984) (tracing the history of the MPAA in Pennsylvania, concluding that the parents’ “mere creation of multiple-party savings account or certificate of deposit did not transfer ownership of any part of the funds” to their son, and distinguishing this conclusion from what would have happened at common law)

Criminal Liability for Jt. Acct Holders:

- *State v. Mora*, 43 P.3d 38 (Wash. Ct. App. 2002) (finding criminal liability for misuse of joint accounts under that state's MPAA)
- Guilt for theft of “property of another” *is* possible “regardless of fact that actor also has an interest in the property” – Example: 18 Pa.C.S.A. § 3901 (Definitions)



What is the Role of the Bank?

A Not-So-Hypothetical Hypo

- Bank Client asks Bank's Lawyer:
 - "Oh Mrs. Smith has been a regular customer – always moving money around to get best rates. Lately niece is making a lot of cash withdrawals and writing checks for what look like personal expenses. I've talked to Mrs. Smith on the phone – she says everything is 'fine.'"
 - "I'm not so sure – but what else can I do?"



Bank Liability Issues (cont.)

- Legal bases:
 - Article 4 of the UCC
 - State's Banking Code
 - MPAA – Usually adopted as part of a state's Trusts & Estate's Code
 - **The deposit account agreement**
 - Privacy Laws



Article 4 of the UCC

- Section 4-401(a) – Bank may only charge account for checks that are properly payable. To be properly payable, check must be authorized by the customer *and* not in violation of any agreement between customer and Bank.
- *Application to the Hypo:*
 - Was the daughter authorized to issue checks?
- **Note distinction between being a “named account holder” and an “authorized signer”**

Article 4 of the UCC (cont.)

- §4-402 – Bank is liable for wrongfully dishonoring a check that is properly payable, unless honoring would create an overdraft
- *Application to the Hypo:* Were there sufficient funds to cover the checks issued by the niece?

Article 4 of the UCC (cont).

- §4-406 – Bank may avoid liability for honoring unauthorized checks if it made a statement available to the customer, and the customer did not promptly review the statement and notify the bank
- *Application to the Hypo:* Even if the niece is not an authorized signer, were the checks listed on statements – and thus should have prompted the customer to discover the withdrawals?

State Banking Code

- Example: 7 Pennsylvania Statutes §604 – Joint Deposits (1965)
 - An institution may pay deposits to one or more of multiple account holders, even though:
 - one of the account holders has died
 - one of the account holders has become incompetent (*unless incompetence has been adjudicated by a court and a guardian has been appointed, unless the account agreement provides otherwise*)
 - Payment must be consistent with terms of deposit account agreement

State Banking Code (cont.)

- *Application of Joint Deposit Statute to Hypo:*
 - Even if the Bank is concerned that the aunt is incompetent, does the Bank have notice of a court adjudication or guardian appointment?
 - Was payment of withdrawals and checks in accordance with the deposit account agreement (i.e., was the niece an authorized signer)?

Tension Between State Laws?

- Juxtaposition of Joint Deposit Statute in Banking Code and Ownership Provisions of MPAA
 - Bank is not obligated to resolve disputes about or make determinations of ownership interests in paying withdrawals by or checks issued by one of multiple account holders
- *Application to Hypo:* Not necessary for Bank to determine niece's ownership interest in account

“Joint Accounts” – What does Customer *Really* Want?

- – Example: “Tentative Trusts” (e.g., 7 P.S. §605)
 - Authorizes institutions to receive deposits in the name of one or more individuals described as trustees for up to two individuals
 - Commonly referred to as “in trust for” (ITF) accounts, “payable on death” (POD) accounts or “Totten Trusts”
 - Parallels the “trust account” provisions of the MPAA
 - Balance of account payable to the beneficiary(ies) upon satisfactory proof of the death of the trustee(s)
 - May provide benefits in terms of deposit insurance coverage

Deposit Account Agreement

- *First Federal Savings and Loan Ass'n of Hazleton v. Office of the State Treasurer*, 669 A.2d 914 (Pa. 1995)
 - relationship between a financial institution and its customer is contractual
 - the contract consists of the signature card and deposit account agreement

Deposit Account Agreement (cont.)

- Sample provisions:
 - “We may setoff funds in your account to pay any debt You may owe Us. If the account is held jointly, we may offset funds for the debt of any one of the joint owners.”
 - “Requirements for dual signatures on checks do not apply to the Bill Payment Service.” (taken from a typical Internet Banking Services Agreement)

Deposit Account Agreement (cont.)

- “**Joint Account.** If this is a joint account, all deposits are the property of the person(s) indicated on the account and we may release all or any part of the amount in the account to honor checks, withdrawals, orders or requests from any person named on this account. Any person named on the account is liable for the amount of any overdraft regardless of whether he or she signed the item or benefited from the proceeds of the item. Upon receiving written notice from any person named on the account, we may freeze the account. The account may be frozen until we receive written notice, signed by all parties named in the account, as to the disposition of funds. We may use the funds to satisfy a debt or judgment of any person named on this account if ordered to do so by a court of law.”

Privacy Laws

- 12 USC §§ 3401, et seq. – Right to Financial Privacy Act
 - Generally prohibits disclosure of bank account information to the federal government, except in response to subpoenas or with the consent of the customer
- 15 USC §§ 6801 – 6827 – Gramm Leach Bliley
 - Generally requires financial institutions to safeguard the confidentiality of nonpublic personal information
 - Enforceable by the banking regulators

Privacy Laws – Protection for Whom?

- McGuire v. Shubert, 722 A.2d 1087 (Pa. Super. 1998) – Banks have an implied contractual duty to keep a customer’s bank account information confidential
- **But Note Key Exceptions:**
 - Federal Reserve Board Reg. P (12 C.F.R. §216.15) – to prevent actual or potential fraud
 - State Laws giving immunity for reporters of suspected fraud. E.g., Pennsylvania’s Older Adults Protective Services Act (35 P.S. §10225.302) – immunity for persons that report to the local agency that an “older adult” (60+) needs protective services, as long as the reporter did not act in bad faith or with malicious purpose

Privacy Laws (cont.)

- *Application to Hypo*
 - If Mrs. Smith is 60+, and the Bank believes the niece is a caretaker who is exploiting Mrs. Smith, the Bank *should* provide information regarding Mrs. Smith's account to the local Area Agency on Aging

Are “all” agents “at fault” when money is “gone”?

- “When she gave me Power of Attorney over her property, in good faith, I thought the property was mine. I was going to receive it anyway after she passed.”
- “I had expenses to meet and she knew that. I didn’t think it was possible to be guilty of stealing money from a joint account that I’m named on.”
- “I can’t be expected to work for free . . . she knew I was using the money to pay my bills.”

Are all principals “innocent” victims?

- “I might have given my niece permission to use my money for the home repairs . . . But I’m sure I never agreed they could buy a Mercedes with my money. I’m too stingy for that.”
- “I didn’t care about that [one expenditure]. . . I cared about the fact they used ALL of my money and now I’m in a nursing home on Medicaid.”
- “I trusted them. I had no one else to trust.”

Key Concept: “Fiduciary Duty”

- Arises upon agreement **OR** by operation of law, when one person (principal) depends upon another (agent) to act in principal’s best interest
- Duty of **loyalty** to act only for principal’s benefit
- Duty to act with **good faith** in furthering and advancing principal’s interests
- Duty to disclose to principal all relevant information

Education Needed? Guidelines to be Adopted?

- **If elder insists on a multiple party account:**
 - Consider a POD/ITF account
 - Does elder understand consequences of signing authority; consider not having the joint tenant on the signature card
 - Does elder understand risk of exposure of the account to claims by the joint tenant's creditors
 - Can elder exercise vigilance in reviewing the account statements?
- **If elder insists on Power of Attorney:**
 - Who is responsible for counseling agent on meaning of "fiduciary duty"?
 - Will the Agent consent to a Third-party "Watchdog"?

Final Questions

- Are attorneys thinking carefully about “who” is their client when preparing Powers of Attorney or advising clients about use of joint accounts?
- Do attorneys – and bankers – have conflicts of interest when advising clients? Can either resist the subtle pressures to follow directions of younger person, rather than elder?
- No single solution – cooperative approach needed to discourage, prevent and catch exploiters

Your Comments and Stories?

- My email: kcp4@psu.edu
- My website:
http://law.psu.edu/faculty/resident_faculty/pearson/articles

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