CHAPTER XVII

Joint Accounts with Right of Survivorship and Payable on Death Accounts

John N. Hutson, Jr.
Young Moore & Henderson, PA
Raleigh, North Carolina

Chadwick I. ("Chad") McCullen
Young Moore & Henderson, PA
Raleigh, North Carolina

This page is left blank intentionally.

CHAPTER XVII

Joint Accounts with Right of Survivorship and Payable on Death Accounts

John N. Hutson, Jr. & Chadwick I. ("Chad") McCullen

This page is left blank intentionally.

CHAPTER XVII

Joint Accounts with Right of Survivorship and Payable on Death Accounts

A. INTRODUCTION

It has been said that bank tellers conduct the majority of estate planning in the United States. With the increasing prevalence and simplicity of survivorship and payable on death features of financial products and accounts, online will and estate planning document providers, and the general desire for "probate avoidance" among a large segment of the American public, there is much truth in that statement. The availability of joint ownership, survivorship and payable on death features with bank accounts oftentimes leads to unintended circumstances, and thus significant litigation, regarding the disposition of a decedent's assets. There are literally hundreds of reported cases regarding the depositor's intent in creating a joint account with rights of survivorship or adding another individual as an additional signer to an account. Gregory Eddington, *Survivorship Rights in Joint Bank Accounts: A Misbegotten Presumption of Intent*, 15 Marquette Elder's Advisor (Issue 2 Spring) 176 (2014).

For instance, consider the common example of an elderly person who lives alone and desires some assistance with the payment of bills. The elderly person, rather than seeking legal advice, discusses the problem with the teller at the local bank branch, who suggests adding a child or relative as an additional signer on his or her bank accounts — an easy fix. If the bank teller simply adds the individual as an authorized signer on the account (absent concerns of abuse during the elderly person's lifetime), this may be a perfectly workable solution to the problem. Suppose, on the other hand, that the bank teller, eager to be helpful, also suggests adding the additional signer as a joint owner with right of survivorship to make things "simple" in the event of the elderly person's death. Such a change, even if made with innocent intentions, can have disastrous consequences and unwittingly alter the disposition of the elderly person's estate in a manner he or she never intended.

At the death of the elderly person, the personal representative of the estate must determine the ownership of the funds in the account. Are the funds the property of the estate or do the funds belong to the joint owner? May the funds be used to pay claims against the decedent's estate? The decedent's heirs or estate beneficiaries will likely contend that the funds belong to the estate, while the joint owner may contend that the decedent, fully aware of the consequences of the account designation, intended to make him or her a joint owner, and that he or she is the rightful owner of the account as the surviving joint tenant; litigation ensues. The results of such litigation may vary, but absent questions of incapacity, undue influence, constructive fraud and the like, North Carolina courts strictly follow a statutory scheme that hinges on the written account agreement with the financial institution and do not consider extrinsic evidence. *See Powell v. First Union Nat'l Bank*, 98 N.C. App. 227, 229, 390 S.E.2d 461, 462 (1990).

Joint accounts with rights of survivorship and payable on death features can create difficult issues upon death of the account owner. In addition to disputes over ownership, if properly created, the accounts do not immediately become property of the decedent's estate, but can be added to the estate to pay claims and debts, if necessary. *See* N.C.G.S. §§ 28A-15-10(a) and 41-2.1(b). This chapter reviews the classification of joint accounts with rights of survivorship or accounts with

payable on death designations in the context of estate administration, the creation of joint accounts with rights of survivorship, payable on death accounts and tentative or "totten" trusts, and the recovery of the funds of such accounts by the personal representative of the estate.

B. JOINT AND PAYABLE ON DEATH ACCOUNTS – CLASSIFICATION

1. Property of Decedent Compared to Property of Estate

All real and personal property of a decedent shall be assets available for the discharge of debts and claims against the estate in the absence of an express statutory exclusion of such property or property that is not immediately available for the discharge of debts and claims. N.C.G.S. § 28A-15-1(a). After payment of debts, claims and the costs of administration, property of the estate passes in accordance with the laws of intestacy or the decedent's last will, as applicable. N.C.G.S. § 28A-22-1. In the context of personal property, property of the estate will include property owned solely by the decedent (such as bank accounts with no designated beneficiary or joint owner), the decedent's undivided interest in property owned by the decedent with other person(s) as tenants in common or as joint tenants where no right of survivorship exists.

Certain items of personal property that are not part of the decedent's estate may be added to the estate for the purpose of paying debts, claims and expenses of the estate. N.C.G.S. §§ 28A-15-10(a) and 41-2.1(b). These include joint accounts with right of survivorship, securities owned jointly with right of survivorship or passing directly to a beneficiary and payable on death accounts. N.C.G.S. §§ 28A-15-10(a), 41-2.1(b), 53C-6-6(c), 53C-6-7(a)(2), 54-109.58(a), 54B-129(a), and 54C-165(a). While these assets may be added to the estate for the payment of claims, the beneficial disposition of these assets is not controlled by the decedent's will or the laws of intestacy, but rather by the instrument creating the right of survivorship. *See In re Estate of Francis*, 327 N.C. 101, 109, 394 S.3.2d 150, 155 (1990) (holding that funds in joint accounts with right of survivorship do not pass according to the decedent's will or the laws of intestacy, but pursuant to the surviving tenant in accordance with account agreement). Only the amount necessary to pay claims can be added to the estate and any funds in excess of the amount needed to pay claims remain outside of the decedent's probate estate. N.C.G.S. § 28A-15-10. Meredith Stone Smith, *Estate Administration: Joint Accounts with A Right of Survivorship*, Estate Admin. Bull. No. 2014/02 (UNC School of Government, March 2014).

2. Joint Accounts Without Right of Survivorship

In all property interests, real or personal, held in joint tenancy without a specific right of survivorship, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the deceased joint tenant, in the same manner as estates held by tenancy in common. N.C.G.S. § 41-2(a). Thus, joint accounts established by two or more persons with a financial institution in which there is no right of survivorship created pursuant to an applicable statutory provision will be deemed to be held as tenants in common by each owner. Unless individuals establishing a joint account have agreed with the financial institution otherwise, any joint tenant may withdraw funds from the account, and the payment by the financial institution to or at the direction of the joint tenant shall be a full discharge of the financial institution's obligation to the amount paid regardless of the

amount a joint tenant contributed to the account. N.C.G.S. §§ 53C-6-6, 53C-6-7, 54-109.58, 54B-129, and 54C-165. In practice, the portion of an account contributed by a deceased joint account owner will become property of his or her estate and the balance will be paid to the surviving owner or owners. Andrew L. Nesbitt, *Handling Assets: Bank Accounts, Certificates of Deposit and Other Depository Accounts, in* NORTH CAROLINA ESTATE ADMINISTRATION MANUAL IX-24 (Jessica M. Hardin & Heidi E. Royal eds. 2014 & Supp. 2016).

This, of course, can lead to factual disputes regarding the source of funds, though a rebuttable presumption arises that the account is owned equally by the parties as tenants-in-common. *Powell*, 98 N.C. App. at 229, 390 S.E.2d at 462, citing *McAuliffe v. Wilson*, 41 N.C. App. 117, 254 S.E.2d 547 (1971). When a controversy arises with respect to the ownership of the funds in a joint account without right of survivorship, ownership is determined based upon several factors:

(1) The facts surrounding the creation of the account;
(2) The source of funds;
(3) The intent of the depositor;
(4) The nature of the financial institutions' transactions with the parties; and
(5) Whether the depositor of the funds intended to make a gift to the other person named on the account.

See Mut. Cmty. Sav. Bank, S.S.B. v. Boyd, 125 N.C. App. 118, 122, 479 S.E.2d 491, 494 (1997) (internal citations omitted).

C. CREATION OF JOINT ACCOUNTS WITH RIGHT OF SURVIVORSHIP

1. Generally

The vast majority of personal property can be held with a right of survivorship if the document creating the joint ownership or survivorship interest meets the applicable statutory requirements. N.C.G.S. §§ 41-2, 41-2.1, 53C-6-6, 53C-6-7, 54-109.58, 54B-129, and 54C-165. Retirement accounts and other types of deferred compensation accounts cannot be held jointly with a right of survivorship. Retirement accounts are typically inherited by a transfer on death designation. If a joint account is subject to a right of survivorship, the funds automatically become the property of the other joint account owner(s) upon the death of another joint account owner. Similarly, the payable on death beneficiary of an account automatically becomes the owner of the funds in the account upon the death of the account holder. In each case, the funds are not property of the estate, but may be added to the estate if needed to pay claims. *Id.* As discussed above, under North Carolina law, survivorship is not an incident of joint tenancy and, in order to create a survivorship right, the agreement creating the joint account must comply with certain statutory requirements.

2. Requirements for Creation

In order to create a joint account with right of survivorship, the account holder(s) must comply with one or more of the following statutes, as applicable:

- N.C.G.S. § 41-2.1, relating generally to joint deposit accounts at any financial institution;
- N.C.G.S. § 53C-6-6, relating to joint deposit accounts at a bank;
- N.C.G.S. § 53C-6-7, relating to joint payable on death accounts at a bank;
- N.C.G.S. § 54-109.57A, relating to joint payable on death accounts at a credit union;
- N.C.G.S. § 54-109.58, relating to joint deposit accounts at a credit union;
- N.C.G.S. § 54B-129, relating to joint withdrawable accounts at a savings and loan association;
- N.C.G.S. § 54B-130.1, relating to joint payable on death accounts at a savings and loan association;
- N.C.G.S. § 54C-165, relating to joint deposit accounts at a savings bank; and
- N.C.G.S. § 54C-166.1, relating to joint payable on death accounts at a savings bank.

While there are multiple statutes that allow for the creation of a joint account with right of survivorship, each statute employs essentially the same requirements to create a right of survivorship in the joint account (except those governing the creation of joint accounts with right of survivorship among multiple beneficiaries of payable on death accounts, discussed at section E infra). North Carolina courts require strict compliance with these statutory requirements, and if these requirements are not met, a right of survivorship will not exist in the account. *See Mut. Cmty. Sav. Bank, S.S.B. v. Boyd*, 125 N.C. App. at 121, 479 S.E.2d at 493 (holding that statutory requirements must be met to create right of survivorship); *In re Estate of Heffner*, 99 N.C. App. 327, 328–29, 392 S.E.2d 770, 773 (1990) (highlighting the necessity of statutory compliance to establish a right of survivorship).

a. Instrument Creating Joint Account Must Be in Writing and Must Generally or Specifically Identify the Account

The instrument establishing the joint account must be written; most often, the signature card or separate account agreement serves as this writing. *See* N.C.G.S. §§ 41-2, 41-2.1, 53C-6-6, 53C-6-7, 54-109.58, 54B-129, and 54C-165. The instrument must contain some indication that the instrument was intended to govern the joint account at issue, either pursuant to its own terms or pursuant to other documents creating the account. *See Napier v. High Point Bank & Trust Co.*, 100 N.C. App. 390, 393–94, 396 S.E.2d 620, 621 (1990). Generally, each time two or more persons open a joint account with right of survivorship, the account agreement or signature card will contain the account number to which it relates. If the same parties desire to open a new account with right of survivorship, a new account agreement or signature card is required, as survivorship rights do not transfer from one account to another, even if the accounts are at the same financial institution. *See Horry v. Woodbury*, 189 N.C. App. 669, 659 S.E.2d 88 (2008), *rev'd* 363 N.C. 7, 673 S.E.2d 127 (2009) (per curiam) (adopting McCullough, J. dissenting).

Nor does a right of survivorship remain with funds if transferred from one account to another and the right to survivorship terminates when the account that created such right is closed. *See Napier*, 100 N.C. App. at 393–94, 396 S.E.2d at 622 (holding that no survivorship right existed

in funds withdrawn from certificate of deposit with right of survivorship and used to purchase second certificate of deposit with no designated right of survivorship and where no indication in the signature card of the first CD purported to govern the second); *Horry*, 363 N.C. 7, 673 S.E.2d 127. In *State ex rel. Pilard v. Berninger*, the court of appeals held that survivorship rights of the surviving spouse were extinguished with respect to the joint account at the time the funds in the joint account were converted and the account closed, thus the surviving spouse could not claim a survivorship interest in the converted funds. 154 N.C. App. 45, 56, 571 S.E.2d 836, 844 (2002). Prior to the decedent's death, the decedent and his wife owned various certificates of deposit with a right of survivorship, as well as a demand deposit account. *Id.* at 48, 571 S.E.2d at 838. Pursuant to the bank's original regulations, the demand deposit account would be paid fifty percent (50%) to the decedent's estate and fifty percent (50%) to the surviving spouse. During the decedent's incapacity, his wife forged the decedent's signature on a signature card to change the demand deposit account to a one hundred percent (100%) survivorship account. *Id.* at 49, 571 S.E.2d at 839. Days before the decedent's death, the wife then transferred $225,000.00 from the demand deposit account into certificates of deposit solely in her name. *Id.* The wife argued that her conversion of the funds was of no consequence because the demand deposit account was an account with right of survivorship. *Id.* at 56, 571 S.E.2d at 843. However, the court held that the forgery invalidated the more recent signature card, and therefore, no survivorship right was held in the new demand deposit account.

An exception does exist with respect to this requirement when a master account agreement creating a joint account by its terms applies to multiple specific accounts or generally to all accounts of the depositor with the financial institution. In *Albert v. Cowart*, the parties had executed separate agreements with a financial institution that served as master agreements for all accounts of the parties with the financial institution and provided that all joint accounts opened with the institution would incorporate right of survivorship. 200 N.C. App. 57, 58, 682 S.E.2d 773, 775 (2009). The purpose of the master agreement was to eliminate the necessity of additional signature cards for subsequent accounts. *Id.* at 65, 779. Each master agreement contained the requisite statutory language for the creation of a right of survivorship, but the agreements were executed separately. The court held that the separate master agreements were sufficient to establish a right of survivorship with respect to any joint account opened by the parties. *Id.* A critical fact in *Albert* is that both of the parties had executed a master agreement; had only one party executed a master agreement, the result likely would have been different.

b. All Joint Owners Must Sign the Written Instrument

Survivorship rights may not be created by oral agreement and, in order to create survivorship rights, all joint owners of an account must sign the account agreement creating the survivorship right. *See O'Brien v. Reece*, 45 N.C. App. 610, 613, 263 S.E.2d 817, 819 (1980). Each account owner must sign a written agreement evidencing their intent to create a right of survivorship in the joint account. *See Heffner*, 99 N.C. App. 327, 392 S.E.2d 770; *Horry*, 363 N.C. 7, 673 S.E.2d 127 (holding all account owners must sign statement creating account); *Powell v. First Union Nat'l Bank*, 98 N.C. App. 227, 229, 390 S.E.2d 461, 462 (1990) (holding that no right of survivorship was created, despite clear intent, where one joint account owner died before execution of the signature card).

In *Heffner*, the decedent-husband opened an account in the name of his wife and himself and "checked the box" on the account signature card that the account would have a right of survivorship among the account owners. 99 N.C. App. 327, 392 S.E.2d 770. The decedent's wife, however, did not execute the signature card. Upon the death of the decedent, the wife asserted ownership of the account by virtue of the "checked box" indicating that a right of survivorship was elected in the account. The court declined to find that a right of survivorship existed because the wife had not executed the signature card. *Id.* In this instance, when there are two parties to an account but one does not sign the account agreement, then a rebuttable presumption arises that the account is owned equally by the parties as tenants-in-common. *Powell*, 98 N.C. App. at 229, 390 S.E.2d at 462, citing *McAuliffe v. Wilson*, 41 N.C. App., 117, 254 S.E.2d 547 (1971).

c. Survivorship Must Be Stated Manifestly on the Face of the Instrument Creating the Account

The account agreement or signature card must expressly state that a right of survivorship is intended by the parties. *See* N.C.G.S. §§ 41-2.1(a) (which requires that the instrument creating the joint account must explicitly state that a right of survivorship is intended), 53C-6-6(f), 53C-6-7, 54-109.58, 54B-129, and 54C-165 (each statute provides that all parties to the account must sign a statement evidencing their election of a right of survivorship). The name of the account or designation of a certificate of deposit as subject to a right of survivorship is insufficient to establish such right if it is not stated in the account agreement; the right of survivorship must be clearly stated in the account agreement. *Obrien*, 45 N.C. App. at 617, 263 S.E.2d at 822.

In *Obrien*, two depositors opened an account with a bank and deposited a certificate of deposit with the bank in the account that was designated as having survivorship rights among the parties. *Id.* at 617–18, 263 S.E.2d at 821. The parties both executed the signature card for the account, but failed to check the box indicating that they had elected a right of survivorship in the account. *Id.* The court declined to find a right of survivorship, holding that the signature card, not the certificate of deposit, served as the governing document for the account, and without an express election of survivorship, no such rights existed. *Id.*

An important distinction exists between N.C.G.S. § 41-2.1 and N.C.G.S. §§ 53C-6-6(f), 53C-6-7, 54-109.58, 54B-129, and 54C-165, in that the former does not require any particular language to create a right of survivorship, but the latter all contain specific language that must be clearly and conspicuously stated in the account agreement in substantially the same language as appears in the statutes. N.C.G.S. § 41-2.1(g) contains suggested language that may be utilized to create a joint account with right of survivorship, but it has been held that suggested language is not required for the right of survivorship to be effective. *Harden v. First Union Nat'l Bank*, 28 N.C. App. 75, 78, 220 S.E.2d 136, 138 (1975). With respect to accounts created under N.C.G.S. §§ 53C-6-6(f), 53C-6-7, 54-109.58, 54B-129, or 54C-165, if the signature card or account agreement fails to include substantially the same language as required in each of those statutes, a right of survivorship may not be created unless the agreement provides that the account is also governed by N.C.G.S. § 41-2.1, which must be expressly stated.

d. Extrinsic Evidence is Not Admissible to Demonstrate Intent to Establish Survivorship

Parties may not present extrinsic evidence of their intent to create right of survivorship if the right of survivorship is not clearly contained in the account agreement. *See Powell*, 98 N.C. App. at 229, 390 S.E.2d at 462 (holding that even where it was the clear intention of the parties to create a right of survivorship, none existed for failure to comply with the applicable statute); *Heffner*, 99 N.C. App. 329–30, 392 S.E.2d at 771–72 (holding that allowing the parties' subjective intent to govern rather than the strict requirements of the statute would create uncertainty and increased litigation for financial institutions and depositors); *Mut. Cmty. Sav. Bank, S.S.B.*, 125 N.C. App. at 122, 479 S.E.2d at 493 (holding that extrinsic evidence is inadmissible, even where some ambiguity existed in signature cards).

In *Mut. Cmty. Sav. Bank, S.S.B. v. Boyd*, the court held that the testimony of a bank employee and an affidavit from the surviving joint account owner regarding the intent of parties to create a right of survivorship in the account was not admissible and the ownership of the account at issue must be determined solely on the basis of the signature cards. 125 N.C. App. at 122, 479 S.E.2d at 493. At issue in the case were two certificates of deposits (CDs). The signature cards for the CD contained two boxes, one indicating that the account was an "individual account" and another indicating that the account was "joint." Underneath the box labeled "joint" was a paragraph with language that stated the parties intended the account to be joint with right of survivorship and presumptively complied with N.C.G.S. § 41-2.1. Neither of the boxes were checked on either signature card, and while the court stated this created an ambiguity on the face of the signature cards, the parties clearly failed to comply with the statutory requirements as a result of the ambiguity, and thus extrinsic evidence would not be considered. *Id.* Meredith Stone Smith, *Estate Administration: Joint Accounts with A Right of Survivorship*, Estate Admin. Bull. No. 2014/02 (UNC School of Government, March 2014).

D. TOTTEN TRUSTS

1. Generally

Tentative or "Totten" trusts are established when a person opens a deposit account in his or her own name in trust for another person. Totten trusts were initially available under common law and later codified by statute. Before October 1, 2001, Totten trusts could be established under N.C.G.S. §§ 53-146.2 (banks), 54-109.57 (credit unions), 54B-130 (savings and loan associations) or 54C-166 (savings banks). The statutes were all amended effective October 1, 2001, and accounts established pursuant to the statutes were then referred to as "Payable on Death Accounts." The statutes were then repealed and re-codified as N.C.G.S. §§ 53C-6-7 (banks), 54-109.57A (credit unions), 54B-130.1 (savings and loan associations) and 54C-166.1 (savings banks). In addition to statutory codification as "payable on death accounts," an individual may establish a Totten trust pursuant to common law requirements. *See Nelson v. State Employees' Credit Union*, 775 S.E.2d 334 (2015). The distinguishing feature of a tentative trust is that the "the depositor retains complete control over the funds until his death, the trust is fully revocable and is revoked in part each time the settlor withdraws funds from the account." *Id.* at 340, quoting *Jimenez v. Brown*, 131 N.C. App. 818, 824–25, 509 S.E.2d 241, 246 (1998). Andrew L. Nesbitt, *Handling Assets: Bank Accounts,*

Certificates of Deposit and Other Depository Accounts, *in* NORTH CAROLINA ESTATE ADMINISTRATION MANUAL IX-24 to -25 (Jessica M. Hardin & Heidi E. Royal eds. 2014 & Supp. 2016).

2. Requirements for Creation

The implementation of payable on death account statutes did not abrogate the common law with respect to the creation of Totten trusts. *See Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 286, 547 S.E.2d 62, 65 (2001); *Nelson*, 775 S.E.2d at 338–39. The payable on death statutes each provide that such statutes shall not be deemed to be exclusive, and nonconforming deposit accounts shall be governed by other statutory provisions and the common law, as applicable. N.C.G.S. §§ 53C-6-7(b), 54-109.57A(b), 54B-130.1(b), or 54C-166.1(b).

In order to create a Totten trust, the depositor must comply with the same common law requirements that are needed to establish any other valid trust. *Nelson*, 775 S.E.2d at 339–40. Specifically, it must be shown "(1) [that there] are sufficient words to show the intention to create a trust; (2) a definite subject; and (3) an ascertained object." *Id.*, quoting *Bland*, 143 N.C. App. at 288–89, 547 S.E.2d at 67. Courts may consider extrinsic evidence in addition to account signature cards when determining whether a tentative or Totten trust was created. *See Nelson*, 242 N.C. App. at 454, 775 S.E.2d at 340.

In *Nelson*, the decedent failed to properly establish a payable on death account pursuant to N.C.G.S. § 54-109.57 (subsequently repealed and replaced by N.C.G.S. § 54-109.57A), but the court found that the decedent did create a valid tentative trust. *Nelson*, 775 S.E.2d at 340. The facts of *Nelson* are as follows: In 2008, the decedent contacted his local State Employee's Credit Union (SECU) branch by phone and directed a financial services officer to transfer $85,000 from his revocable trust account and place the funds in a new account with his daughter as the sole beneficiary. The financial services officer collected the necessary information to open a payable on death account pursuant to N.C.G.S. § 54-109.57 and filled out the account processing form indicating the new account was "payable on death" and the decedent's daughter was the beneficiary. The form was then mailed to the decedent for signature and the signature line indicated that decedent had received a copy of and read the rules and regulations governing the account, but these rules and regulations were not mailed to the decedent. The decedent signed and returned the form to the SECU branch. *Nelson*, 775 S.E.2d at 337.

The court held that the failure of SECU to mail the account rules and regulations did not comply with N.C.G.S. § 54-109.57 to create a valid payable on death account, but that the language of the account form and clear intention of the decedent to make his daughter the beneficiary satisfied the requirements to establish a valid tentative trust for the benefit of the daughter in the account. *Id.* at 340. Specifically, the decedent "expressed his intent to create a trust, identified a specific sum of money to be placed in the trust account, and identified the beneficiary of the trust." *Id.*

E. PAYABLE ON DEATH ACCOUNTS

1. Generally

Under the current North Carolina statutes, payable on death accounts may be created by one or more persons who own the account. The owner(s) may name one or more individuals or one entity as beneficiary(ies) of the account. N.C.G.S. §§ 53C-6-7, 54-109.57A, 54B-130.1 and 54C-166.1. If there are multiple owners of a payable on death account, the account is joint with right of survivorship. *Id.* With respect to the account, any owner may (1) change or revoke the beneficiary of the account during his or her lifetime by written direction to the financial institution and (2) withdraw funds from the account. *Id.* If all beneficiaries who are natural persons or an entity beneficiary cease(s) to exist, the account will lose its payable on death status and will be deemed a single account (if only one account owner) or a joint account with right of survivorship (if there are multiple account owners). *Id.*

The beneficiary of a payable on death account has no ownership interest in the account before the death of all owners of the account. Upon the death of all owners of the account, the surviving beneficiary will become the owner of the account. *Id.* If there are multiple surviving beneficiaries, they will own the account as joint tenants with right of survivorship. Upon receipt of proof of death of all owners, the financial institution will pay the account to the surviving beneficiary(ies). *Id.* Andrew L. Nesbitt, *Handling Assets: Bank Accounts, Certificates of Deposit and Other Depository Accounts, in* NORTH CAROLINA ADMINISTRATION MANUAL IX-24 to -25 (Jessica M. Hardin & Heidi E. Royal eds. 2014 & Supp. 2016).

2. Requirements for Creation

Payable on death accounts are statutory creatures and therefore are governed entirely by statute. In order to create an account with a payable on death beneficiary, the owner must create the account pursuant to N.C.G.S. § 53C-6-7, 54-109.57A, 54B-130.1 or 54C-166.1. Under each of N.C.G.S. § 53C-6-7, 54-109.57A, 54B-130.1 or 54C-166.1, language that is substantially similar to that appearing in the respective statutes must be set forth in a conspicuous manner on the signature card or other account agreement or instrument governing the account, and the signature card, agreement or instrument must be signed by all owners of the account. As discussed above with respect to joint accounts with right of survivorship, strict compliance with the statutory requirements is necessary to create a payable on death account. If an account owner does not strictly comply with statutory requirements, a payable on death beneficiary will not be found.

F. RECOVERY OF FUNDS

As discussed above, upon the death of a co-owner of a joint account with right of survivorship, the funds in the account become the property of the other joint owner(s), and upon the death of an account owner of a payable on death account or Totten trust, the funds in the account become the property of the account beneficiary(ies). Notwithstanding this automatic transfer of ownership, the funds of such accounts are still subject to recovery by the personal representative of the estate for the payment of debts and claims if other assets of the estate are insufficient. N.C.G.S. §§ 28A-15-10(a) and 41-2.1(b)(3). The personal representative may either initiate a civil action in superior court pursuant to N.C.G.S. § 28A-15-12 (a1) or an estate proceeding pursuant to N.C.G.S. § 28A-15-12(b1) in order to recover the funds sufficient to pay the claim.

1. Recovery of Funds in Accordance with N.C.G.S. § 41-2.1(b)(3)

Although the surviving owners of a joint account with right of survivorship become the owners of the funds in an account created pursuant to N.C.G.S. § 41-2.1, such funds remain subject to the right of the personal representative of the deceased account owner's estate to recover the funds for payment of the following claims:

(a) The allowance of the year's allowance to the surviving spouse of the deceased;
(b) The funeral expenses of the deceased;
(c) The cost of administering the estate of the deceased;
(d) The claims of the creditors of the deceased;
(e) Governmental claims, including federal and state taxes and other amounts due to the government under federal or state law.

N.C.G.S. § 41-2.1(b)(3).

The amount of the account available for payment of such claims is limited to the amount of the unwithdrawn deposit at the time of the decedent's death, divided equally among all of the joint owners, including the decedent. *Id.* Based on the language in the statute requiring an equal division, it appears that the source of funds is irrelevant when determining the portion of the funds available for the payment of claims if the account is governed by N.C.G.S. § 41-2.1. The funds are available only to the extent that the other personal assets of the estate are exhausted. N.C.G.S. § 41-2.1(b)(4). If, after the payment of claims, funds of the decedent's portion of the account remain, the remainder is paid equally to the surviving account owners and not to the heirs or beneficiaries of the estate. *Id.*

N.C.G.S. § 41-2.1(b)(4) provides a specific procedure for financial institutions to follow upon the death of a joint account owner (sometimes referred to as a "joint tenant") of an account governed by § 41-2.1(b)(4). At the death of one of the joint tenants, the financial institution shall pay the funds to the clerk of court if the decedent's portion of the funds available for payment is less than $2,000.00, and if the decedent's portion of the funds is greater than $2,000.00, the financial institution shall pay (i) an amount of the funds equal to the portion available for the payment claims designated under N.C.G.S. § 41-2.1(b)(3) to the personal representative, and (ii) the balance to the surviving joint tenants. N.C.G.S. § 41-2.1(b)(4). The personal representative shall hold this amount unless all other assets of the estate have been exhausted and the funds are needed to pay claims. *Id.* Any part of the funds not used for the payment of claims shall be disbursed to the surviving tenant or tenants upon settlement of the estate. *Id.* The statute creates potential liability for the financial institution if it were to pay the balance of the joint account to the surviving joint tenants, and the financial institution may be named in an action by the personal representative to recover funds.

Due to the risks associated with payment to the surviving joint tenants, financial institutions often do not rely on N.C.G.S. § 41-2.1 to establish and manage joint accounts and generally create joint accounts under one of the other joint account statutes. Each of N.C.G.S. §§ 53C-6-6, 53C-6-7, 54-109.58, 54B-129 and 54C-165 expressly provides that accounts created pursuant to those statutes are not governed by N.C.G.S. § 41-2.1 unless the signature card or account agreement provides that N.C.G.S. § 41-2.1 applies. In accounts created pursuant to N.C.G.S. §§ 53C-6-6, 53C-6-7, 54-

109.57A, 54-109.58, 54B-129, 54C-165 or 54C-166.1, the financial institution is authorized to pay the balance of the account to the surviving joint owners and/or designated beneficiaries, and such payment is a full discharge of the financial institution with respect to the funds paid. While such payment eliminates the ability of the personal representative to pursue the financial institution for recovery of the funds, it does not preclude recovery of the funds from the surviving joint owner(s) or payable on death beneficiary(ies) pursuant to N.C.G.S. §§ 28A-15-10(a), 28A-15-12(a1) and 28A-15-12(b1).

2. Personal Representative's Right to Recover under N.C.G.S. § 28A-15-10(a)

In the event an estate has insufficient assets for the payment of debts and expenses, the personal representative has the right to recover survivorship and payable on death funds pursuant to N.C.G.S. § 28A-15-10(a). *See also* N.C.G.S. §§ 53C-6-6, 53C-6-7, 54-109.57A, 54-109.58, 54B-129, 54C-165 and 54C-166.1. In order to recover the funds, the funds must be needed for payment of claims and only used for the satisfaction of claims. None of the survivorship or payable on death funds are available for distribution to heirs or beneficiaries of the estate.

Unlike N.C.G.S. § 41-2.1, which specifies that survivorship funds in joint accounts may be recovered after exhaustion of the personal property of the estate and provides the amount recoverable as an equal portion of the funds in the account at the time of death, N.C.G.S. § 28A-15-10(a) provides no guidance as to when the right of recovery arises or the amount recoverable. Thus, it is unclear from the statute if a personal representative must first exhaust real and personal property assets of the estate before seeking recovery from survivorship or payable on death funds, and whether the amount of funds is limited to an equal share of the account, the decedent's contribution to the account or the entire account.

Despite this lack of clarity from the statute, case law has recognized that all probate assets of an estate, including real property of a decedent, must be used for the payment of claims and expenses of the estate prior to recovery of funds in survivorship and payable on death accounts. *See Fortner v. Hornbuckle*, 235 N.C. App. 247, 265, 761 S.E.2d 683, 694 (2014) (*Fortner I*); *Fortner v. Hornbuckle*, 2017 WL 3864017 (unpublished) (*Fortner II*). In *Fortner I*, the court of appeals held that the question of whether an estate had sufficient assets to satisfy its claims was a factual issue and a jury would need to determine whether the remaining assets of a decedent's estate were sufficient to satisfy all claims against the estate prior to deciding whether the personal representatives were entitled to recover any or all of the funds held in a joint bank account with right of survivorship with the decedent. *Fortner I*, 235 N.C. App. at 265, 761 S.E.2d at 694. *Fortner II* confirms that real estate assets of the estate should be considered available for the payment of claims prior to the recovery of funds held in a joint account with right of survivorship pursuant to N.C.G.S. § 28A-15-10(a). *Fortner II*, 2017 WL 3864017 at 5.

Some commentators suggest that the legislature's silence on the amount recoverable means that the entire balance of the account is subject to recovery. *See* Meredith Stone Smith, *Estate Administration: Joint Accounts with A Right of Survivorship*, Estate Admin. Bull. No. 2014/02 (UNC School of Government, March 2014) p. 16, footnote 96 and 97. However, with respect to accounts established under N.C.G.S. §§ 53C-6-6, 53C-6-7, 54-109.57A, 54-109.58, 54B-129, 54C-165 and

54C-166.1, to which N.C.G.S. § 41-2.1 does not apply, the legislature has provided that the common law still governs such accounts, as applicable. It seems logical to argue that the factors regarding ownership of the funds enumerated in *Mutual Community Savings Bank, S.S.B.* also apply the right of recovery of the personal representative, including the facts surrounding the creation of the account, the source of funds, the intent of the depositor, the nature of the financial institutions' transactions with the parties, and whether the depositor of the funds intended to make a gift to the other person named on the account. 125 N.C. App. 118, 122, 479 S.E.2d 491, 494. Otherwise, the result would seem unduly harsh to the surviving joint owner if he or she contributed to any portion of the account.

For example, assume a decedent and another individual established a joint account with right of survivorship to which N.C.G.S. § 41-2.1 does not apply; the decedent contributed no funds to the account and there is no indication that the surviving joint owner intended to make a gift of the funds to the decedent. While the decedent may have the right to withdraw the funds during his or her lifetime and a survivorship right if the other joint depositor were to die, under common law, the decedent would likely have no ownership in the funds. If the decedent died before the other joint owner, and the decedent's estate is insolvent, then if all the funds of the account are available for the discharge of debts of the decedent's estate, the joint depositor effectively becomes liable for the decedent's debts simply for maintaining a joint account with right of survivorship with him or her. This appears to be an inequitable result to the joint depositor. If representing a surviving account owner or payable on death beneficiary, the practitioner should assert common law tracing requirements to protect their separate investment in the account. *See Jimenez v. Brown*, 131 N.C. App. 818, 509 S.E.2d 241 (1998) (holding that equitable ownership of a joint account limits the creditors of one account owner to the amount of the debtor's contribution in the account.)

3. Actions to Recover Survivorship and Payable on Death Funds Pursuant to N.C.G.S. § 28A-15-12

The personal representative's right to recovery survivorship or payable on death funds is enforced through an action on behalf of the estate pursuant to N.C.G.S. § 28A-15-12(a1) or (b1), either as a civil action in superior court or before the clerk as an estate proceeding.

a. Civil Action in Superior Court Pursuant to N.C.G.S. § 28A-15-12(a1)

N.C.G.S. § 28A-15-12(a1) permits the personal representative to sue for the recovery of any property belonging to the estate, including limited assets of the estate pursuant to N.C.G.S. § 28A-15-10 for the purposes of paying claims. The personal representative may utilize provisional remedies available to litigants under Subchapter 13 of Chapter 1 of the North Carolina General Statutes, such as temporary restraining orders and injunctions against the surviving account owner or payable on death beneficiary, to preserve the assets. If successful in the action, the personal representative will obtain a judgment against the surviving tenant or beneficiary and may enforce the judgment through execution procedures.

b. Estate Proceeding Pursuant to N.C.G.S. § 28A-15-12(b1)

N.C.G.S. § 28A-15-12(b1) permits the personal representative to institute an estate proceeding pursuant to Chapter 28A, Article 2 of the North Carolina General Statutes as an

alternative to superior court civil action. In the estate proceeding, the clerk permits the personal representative to examine the joint depositor or beneficiary before the clerk if the personal representative reasonably believes the person to be in possession of estate property. The estate proceeding may be transferred to superior court upon motion of any party or the clerk. N.C.G.S. § 28A-2-4(a)(4). In addition, the court may enter orders requiring the examination of such persons, and if it is determined that the funds are recoverable by the estate, the court has the authority to order recovery of the funds and delivery by the joint depositor or beneficiary. Such orders of the court are enforceable by contempt proceedings. N.C.G.S. § 28A-15-12(b1).

A proceeding brought under N.C.G.S. § 28A-15-12(b1) is commenced by filing a verified petition by the personal representative setting forth the persons to be examined and reasons why the personal representative believes them to be in possession of estate property. The court also has the ability to enter orders requiring the examination of persons believed to be in possession of disputed funds. N.C.G.S. § 28A-15-12(b1).

An estate proceeding may not be an effective remedy for the recovery of liquid assets, such as survivorship or payable on death funds. While the remedy is intended to be a less cumbersome alternative to a civil suit, the personal representative is left without the ability to utilize injunctions or other equitable or ancillary measures to preserve the funds. Additionally, if the joint owner or beneficiary had spent or transferred the funds, the basis for the estate proceeding would no longer exist with respect to the individual. Meredith Stone Smith, *Estate Administration: Joint Accounts with A Right of Survivorship*, Estate Admin. Bull. No. 2014/02 (UNC School of Government, March 2014).

4. Other Actions to Recover Survivorship and Payable on Death Funds

Accounts with a right of survivorship are subject to challenge on the same grounds as are wills. These grounds include incompetence, undue influence and fraud. There are only a few cases in North Carolina in which a right of survivorship has been challenged on these grounds. In one case, a directed verdict was entered dismissing claims of mental incapacity and undue influence. *Mikeal v. First Fed. Sav. Bank & Loan Ass'n*, 16 N.C. App. 595, 192 S.E.2d 634 (1974). In another case, summary judgment was entered dismissing claims of fraud, constructive fraud, unjust enrichment and conversion. *Jordan v. Jordan*, 2015 W.L. 4430380 (2015) (unpublished). Finally, in *Barnes v. Barnes*, 6 N.C. App. 61, 169 S.E.2d 236 (1969), the court overruled a demurrer alleging misjoinder of parties.

Additionally, the claimant(s) can set aside a joint account by showing that the account was created unlawfully by an attorney-in-fact. Often, powers of attorney do not allow the attorney-in-fact to make gifts to himself or herself. North Carolina case law is clear "that a deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other." *Hutchins v. Dowell*, 138 N.C. App. 673, 678, 531 S.E.2d 900, 903 (2000) (holding that an agent's withdrawal of funds contributed solely by the other account owner was conversion, as the power of attorney did not give the agent to make gifts to herself). However, a distinction has been made where an attorney-in-fact creates a joint account with a right of survivorship between himself and a decedent, but makes no withdrawals during the decedent's lifetime and becomes an owner of the account on the decedent's death by operation of law. *See Albert v. Cowart*, 219 N.C. App. 546, 727 S.E.2d 564 (2012). In *Albert*, evidence was presented that the decedent intended to disinherit her

stepdaughter by transferring assets into a joint account to thwart contrary provisions in her will, that the attorney-in-fact was following the decedent's wishes and intended to use the account to pay for the decedent's and her husband's medical bills. The court found that the "deposit of funds into [the account] did not amount to a gift to himself because those deposits were made when Doris was alive and a joint tenant of [the account]." *Albert*, 219 N.C. App. at 557, 727 S.E.2d at 572, citing *Hutchins*, 138 N.C. App. 678, 531 S.E.2d at 903. Presumably, the court was satisfied that since the attorney-in-fact did not convert funds during the decedent's lifetime, unlike in *Hutchins*, the attorney-in-fact was acting in the best interests of the decedent and the transfer of assets into a joint account was proper.

Further, in *Cowart*, the decedent had personally executed a "Customer Access Agreement" prior to the creation of the account, which the Court of Appeals in an earlier appeal found satisfied the signature card requirements to establish a joint account with right of survivorship with the attorney-in-fact. *Albert v. Cowart*, 200 N.C. App. 57, 282 S.E.2d 773 (2009). Had the attorney-in-fact executed a signature card both personally and in his capacity as attorney-in-fact on behalf of the decedent, it is likely the result would have been different. *See Horry v. Woodbury*, 363 N.C. 7, 673 S.E.2d 127.

G. CONCLUSION

Survivorship and payable on death accounts are now ubiquitous in estates of all sizes and have become a testamentary substitute for a large portion of the general population. These types of accounts, while convenient and easy to establish, carry significant legal consequences that account owners do not always intend, and that serve as the bases for much litigation after the death of the account owner. North Carolina law requires strict statutory compliance for the creation of such accounts, but the easy "check the box" formats of many account agreements can oftentimes create a survivorship right where none was intended. As the types of arrangement become more prevalent, estate planners should take care to ensure that their clients' plans are not undermined by ill-advised or uninformed account titling or beneficiary designations.