LITIGATION ISSUES IN ESTATE PLANNING AND ADMINISTRATION

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I. CONTRACTS TO MAKE A WILL

A. OVERVIEW

The principle that contracts to bequeath or devise real property are enforceable was handed down to us from the common law of England. Goilmere v. Battison, 1 Vern. 48, 23 Eng. Rep. 301 (1682); Wall v. Scales, 16 N.C. 472, 1 Dev. Eq. 472 (1830). Our Supreme Court has explained the doctrine as follows:

> There can be no question that a contract upon a sufficient consideration to devise lands is valid and may be enforced in a court of equity, the decree being so drawn as to declare the parties to whom the land is devised, or, in the event of a failure to devise, the heirs at law to hold such lands in trust for the persons to whom the testator had contracted to devise them. It is settled by a line of authorities which are practically uniform, that while a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement cannot be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will.

Chambers v. Byers, 214 N.C. 373, 377-78, 199 S.E. 398, 401(1938).

The elements for a cause of action for a breach of contract to devise or bequeath property under a will are the same as for any other action for breach of contract. These elements include:

1. Offer;
2. Acceptance;
3. Capacity of the parties to contract;
4. Consideration;
5. Certainty of the terms;
6. Performance by the complaining party; and
7. Good faith.

NORMAN ADRIAN WIGGINS, WILLS AND ADMINISTRATION OF ESTATES § 2:6 p.40 (4th Ed. 2005).

B. CONSIDERATION.

The consideration for contracts to make a will is often services provided for the decedent. In the case of an adult child there is a rebuttable presumption that services rendered to a parent were intended to be a gift; however, there is no such presumption

when the adult child is married and has assumed the responsibility for his or her own family. Brown v. Williams, 196 N.C. 247, 145 S.E. 233 (1928). In Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945), the Court refused to enforce the husband's promise to devise the family home place to his wife because the only consideration for the promise was the wife's domestic services provided to her husband.

A contract to make a will may be enforced by the heirs of the beneficiary of the agreement. In Tyndall-Taylor v. Tyndall, 157 N.C. App. 689, 580 S.E.2d 58 (2003), a husband and wife executed a separation agreement in which both agreed to devise their interest in a 280 acre farm to their son, Richard III. Richard III later married and had a son, Richard IV. Richard III died. A few years after Richard III died the husband died intestate. The Court of Appeals held that Richard IV had standing to enforce Richard III's rights under the contract made between his parents. Id. In so doing the court cited Rape v. Lyerly, 287 N.C. 601, 215 S.E. 2d 737 (1975) (enforcing a contract to make a will by the deceased parents of the plaintiff).

C. ONCE MADE, THE CONTRACT IS IRREVOCABLE

Our Supreme Court has noted,

> The general rule is, therefore, that a will executed pursuant to a contract cannot be revoked so as to relieve the testator of its contractual obligation.

Rape v. Lyerly, supra, 287 N.C. at 619, 215 S.E.2d at 748.

D. STATUTE OF FRAUDS

N.C. Gen. Stat. § 22-2 states,

> All contracts to sell or convey any lands, tenements or hereditaments or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by other person by him thereto lawfully authorized.

A contract to bequeath only personal property is not within the statute of frauds. Neal v. Wachovia Bank & Trust, Co., 224 N.C. 103, 29 S.E.2d 206 (1944). A contract to devise real property or indivisible contract to devise both real and personal property comes within the statute of frauds. McCraw v. Llewellyn, 256 N.C. 213, 123 S.E.2d 575 (1962). A noted commentator described the elements necessary to make a note or memoranda sufficient under the Statute of Frauds as follows:

> The Statute of Frauds requires certain contracts be evidenced by a writing. Obviously, a formal written contract duly executed by all the parties to the agreement will suffice. However, a "memorandum or note" of the agreement is also permitted. How formal and extensive must such a writing be to satisfy the Statute of Frauds? Not very. A memorandum or note is an "informal and imperfect instrument." Informality is appropriate in a document that has as its purpose "to furnish aid to the memory of a transaction." Thus, the writing is evidential in nature such that the memorandum or note is not the contract being sued upon but is instead the promissor's admission that the contract was made.
>
> Although formalities are few, the writing must fulfill two fundamental requirements: it must offer some evidence of the promissor's contractual intent and it must contain the essential elements of the particular type of agreement that is in dispute.

JOHN N. HUTSON, JR. AND SCOTT A. MISKIMMON, NORTH CAROLINA CONTRACT LAW, § 4-11 (2001).

A satisfactory memorandum may take many forms, including: a letter, Hines v. Tripp, 263 N.C. 470, 139 S.E.2d 545 (1965), a telegram, Yaggy v. BVD Co., 7 N.C. App. 590, 173 S.E.2d 496 (1970), an undelivered deed, Austin v. McCollum, 210 N.C. 817, 188 S.E. 646 (1936), a check, Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589, *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), pleadings filed with a court,, McCall v. Lee, 182 N.C. 114,108 S.E. 390 (1921), , or a printed advertisement. Proctor v. Finley, 119 N.C. 536 (1896). (The preceding discussion was borrowed liberally from HUTSON AND MISKIMMON, supra § 4-11-3). A writing which seeks to repudiate a parol agreement may satisfy the Statute of Frauds. RESTATEMENT (SECOND) OF CONTRACTS §133 Cmt. C (1981).

At a minimum, a memorandum of a contract to devise real property must include the names of the parties to the agreement, the terms of the agreement and a description of the land to be conveyed. Smith v. Joyce, 214 N.C. 602, 200 S.E. 431 (1939). In addition, the writing must describe the consideration flowing from the party to be charged under the agreement. HUTSON AND MISKIMMON, supra § 4-36.

North Carolina does not recognize the doctrine of part performance as an exception to the Statute of Frauds. Grantham v. Grantham, 205 N.C. 363, 171 S.E.331 (1933). However, in a proper case the plaintiff may recover on quantum meruit for the value of services rendered pursuant to an oral contract to devise land. McCraw v. Llewellyn, 256 N.C. 213, 123 S.E. 2d 575 (1962). In such a case the measure of damages is the value of the services rendered to the promissor-testator, less any benefits received by the promissee. Doub v. Hauser, 256 N.C. 331, 123 S.E.2d 821(1962).

E. JOINT AND MUTUAL WILLS

A "joint will" is a single testamentary instrument which is executed by two or more persons as their separate wills. Olive v. Biggs, 276 N.C. 445, 173 S.E.2d 301 (1970). "Mutual wills" are separate wills of two or more testators whose provisions substantially mirror one another. Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456(1963). Joint wills are enforceable as the separate wills of the respective parties under North Carolina law. Ginn v. Edmondson, 173 N.C. 85, 91 S.E. 696 (1917). Nothing else appearing, either signer of a joint will may revoke it in any manner permitted by the statute. Olive v. Biggs, supra. This revocation may occur while both parties are still alive and may also occur after one party has died and the instrument probated as the deceased party's last will and testament. Id.

A signer's power to revoke does not exist if the joint will is sufficient to serve as a memorandum of an agreement between the parties that the party will not revoke the document as his or her own will. Id. The determination of whether a joint will is also enforceable as a contract to make a will is accomplished by analyzing the language in the joint will. For example, where the joint will declares that the parties, "in consideration of each making this our last will and testament... declare this instrument to be jointly as well as severally our last will and testament", the language is sufficient to show a contract to make a will. Id., 276 N.C. at 462, 173 S.E.2d at 313. However, the existence of a joint will, nothing else appearing, is not sufficient evidence of contract. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

F. LOST OR DESTROYED INSTRUMENTS

If the memorandum evidencing the parol agreement is destroyed, the agreement may be enforced with parol proof of the making of the memorandum. Pope v. McPhail, 173 N.C. 238, 91 S.E. 947 (1917) (deed executed by defendant but subsequently destroyed by him satisfied the Statute of Frauds). In modern cases, this issue is governed by N. C. R. Evid.1004 which states:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
> **(1) Original is lost or destroyed**. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
> **(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or
> **(3) Original in possession of opponent.** At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing.

G. STATUTE OF LIMITATIONS

If there is a breach of a contract to make a will, the remedy is not to probate the improperly revoked will. Olive v. Biggs, supra. Rather, such contracts are enforced by a suit in equity for specific performance or an action at law for monetary damages. Id. Stockard v. Warren, 175 N.C. 283, 95 S.E. 579 (1918).

A cause of action for breach of a contract to devise or bequeath property arises when the recipient dies without having made the agreed testamentary provision and the Statute of Limitations begins to run at that time. Doub v. Hauser, 256 N.C. 331, 123 S.E.2d 821 (1962). However, if there is an anticipatory breach or repudiation of the contract, the cause of action arises at the time of the abandonment or breach. Id.

II. JOINT ACCOUNTS WITH RIGHT OF SURVIVORSHIP AND TRANSFER ON DEATH ACCOUNTS

A. JOINT BANK ACCOUNTS WITH RIGHTS OF SURVIVORSHIP

Parties seeking to create a joint bank account with a right of survivorship must comply with either the requirements of N. C. Gen. Stat. § 41-2.1(2007); or N.C. Gen. Stat. § 53-146.1(a) (2007) (Governing bank accounts); or N.C. Gen. Stat. § 54B-129(a) (2007) (Governing savings and loan associations); or N.C. Gen. Stat. § 54-109.58(a) (2007) (Governing credit unions). These laws generally provide that parties may create rights of survivorship in all types of bank accounts, including savings accounts, checking accounts and certificates of deposit. Mutual Community Savings Bank, S.S.B. v. Boyd, 125 N.C. App. 118, 121, 479 S.E.2d 491, 493 (1997).

A joint account with a right of survivorship gives all parties to the account the right to add to or draw upon any part or all of the deposit account and the bank or depository institution cannot be held liable on account of such deposit or withdrawal. N.C. Gen. Stat. § 41-2.1(b)(1) (2007); N.C. Gen. Stat. § 54B- 129(a) (2007); N.C. Gen Stat. § 54-109.58(a) (2007); N. C Gen. Stat. § 53-146.1(a) (2007). Importantly, however, the depositing of funds into a joint account does not, by itself, does not constitute a gift of the funds in the account to the other parties to the joint account. Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984). A party to a joint account may be held liable for conversion for withdrawing sums from a joint account belonging to another party. Id.

Upon the death of a party to an account with a right of survivorship, the proceeds in the account pass directly to the survivor without passing through the deceased person's estate. N.C. Gen. Stat. § 41-2.1 (2007); N.C. Gen. Stat. § 54 B-129(a), etc. A joint bank account with a right of survivorship will pass to a survivor notwithstanding language to the contrary in an antenuptual agreement or will. Harden v. First Union Bank of North Carolina, 28 N.C. App. 75, 220 S.E.2d 136 (1975). The proceeds in an account subject to a right of survivorship are not part of the deceased person's estate for the purpose of computing the spouse's elective share. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990). However, The portion of the proceeds in an account subject to a right of

survivorship, which would have belonged to the decedent had the account been divided equally among all the joint tenants, is subject to claims for the year's allowance to the surviving spouse, the funeral expenses of the deceased, the cost of administrating the estate of the deceased, the claims of creditors of the deceased and "governmental rights". N.C. Gen. Stat. § 41-2.1(3) (2007); N.C. Gen. Stat. § 28A-15-10(a) (2007). However, the amounts in the survivorship account shall only be used to pay such claims after all other assets of the estate have been exhausted. N.C. Gen. Stat. § 41-2.1(4) (2007); N.C. Gen. Stat. § 28A-15-10(a) (2007).

B. THERE ARE STRICT RULES GOVERNING ACCOUNTS WITH RIGHTS OF SURVIVORSHIP.

Under the common law any conveyance or devise to unmarried persons created a joint tenancy, *i.e.* an estate held by joint tenants collectively rather than by each joint tenant individually. 2 BLACKSTONE, *Commentaries on the Laws of England* 182 (1776). A consequence of holding property in a common law joint tenancy was that upon the death of a joint tenant, the interest of the deceased joint tenant passed to the survivor and did not pass through the deceased's joint tenant's estate. In 1784, the right of survivorship was abolished by statute in North Carolina. Act of 1784, Ch. 22 § VI (the predecessor to N.C. Gen. Stat. § 41-2 (2007). In 1991 the legislature restored the right of survivorship to the estate of joint tenancy. [*See, generally* Orth, The Joint Tenancy Makes a Comeback in North Carolina, 69 N.C.L. Rev. 491 (1991).] N.C. Gen. Stat. § 41-2 now provides that a right of survivorship will be recognized, "if the instrument creating the joint tenancy expressly provides for a right of survivorship." N.C. Gen. Stat. § 41-2 (2007). N.C. Gen. Stat. § 41-2.1 further provides that with respect to bank accounts, a right of survivorship may only be created in a writing "signed by both or all parties." N.C. Gen. Stat. § 41-2.1(a). The statute also contains suggested language to be used to create such a right.

Similarly, N.C. Gen. Stat. § 54B-129 provides that a right of survivorship can only be created in a writing signed by the "[p]ersons establishing an account under this section." N.C. Gen. Stat. § 54B-129. Similar provisions are found in N.C. Gen. Stat. § 53-146.1(a) governing bank accounts and § 54-109.5A(a) governing credit unions.

It is well-settled that, "the signature card is important because it constitutes the contract between the depositor of money and the bank in which it is deposited, and it controls the terms and disposition of the account." O'Brien v. Reece, 45 N.C. App. 610, 616-17, 263 S.E.2d 817, 821 (1980). The courts have been very stringent in requiring that the signature cards are completed properly before determining that an account is a joint account with a right of survivorship. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990) (a card with only one signature insufficient to create a joint account with a right of survivorship); O'Brien v. O'Brien, 45 N.C. App. 610, 263 S.E. 2d 817 (1980) (signature card without block indicating an intention to create right of survivorship not sufficient to do so). The courts are unwilling to consider extrinsic or parol evidence to prove the intent of the parties. "Extrinsic or parol evidence... of the parties' intent to establish a joint tenancy with rights of survivorship is not admissible."

Mutual Community Savings Bank, SSB v. Boyd, 125 N.C. App. 118, 122, 479 S.E.2d 491, 493 (1997). The above statutes require that all the parties seeking to establish an account with a right of survivorship must sign a written statement expressly showing their election of the right of survivorship. Mutual Community Savings Bank, SSB v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1997). The reason for this rule is:

> To allow subjective determination of the party's intent to govern rather than the strict requirements of the statute would have the effect of creating uncertainty and increased litigation for both depositors and for banking institutions called upon to pay out funds from joint accounts.

In re Estate of Heffner, 97 N.C. App. 327, 330, 392 S.E.2d 770, 772 (1990).

In O'Brien v. Reese, 45 N.C. App 610, 263 S.E.2d 817 (1980) the certificate of deposit at issue contained the following language:

> Payable to said depositor, or if more than one, to either or any of said depositors or the survivor, or survivors.

Id. at 617, 821.

Notwithstanding this language, the Court of Appeals held, as a matter of law, that no right of survivorship had been created because the signature card signed by the depositors contained no reference to a right of survivorship. Id. at 616, 617. Uncontradicted proof that the parties had the subjective intent to create a right of survivorship is not sufficient to create such a right if the statutory requirements were not fulfilled. Powell v. First Union National Bank, 98 N.C. App. 227, 390 S.E.2d 461 (1990).

C. PAY ON DEATH BANK ACCOUNTS

A pay on death bank account differs from a joint bank account with a right of survivorship. With joint bank accounts, all parties to the account have access to the funds in the account. In addition, the funds in the account may be reached by the creditors of one of the parties to the account. Further, the terms of the account can only be changed with the consent of all of the parties to the account. On the other hand, the owner of a POD account, while living, has exclusive custody and control over the funds in the POD account. (N.C. Gen. Stat. § 53-146.2(a)(1), (2)(2007)). The beneficiary only has an interest in the account after the death of the account's owner. (Id. § 53-146.2(a)(6)(2007)). Thus, POD accounts are true will substitutes allowing the owner of the account to avoid probate while maintaining unfettered control over the account while alive. Upon the death of the last surviving owner of the account, the funds in a POD account shall belong to the designated beneficiary or beneficiaries. Pursuant to N.C.G.S. § 28A-15-10 (2007) the funds in the POD account may be acquired by the deceased's personal representative if the funds are needed to satisfy claims against the decedent's estate. POD accounts may only be created by a written agreement executed by all of the

owners of the account. (N.C. Gen. Stat. § 53-146.2 (2007). The writing must contain conspicuous language "substantially similar" to the following:

BANK (or name of institution)
PAYABLE ON DEATH ACCOUNT
G.S. 53-146.2

I (or we) understand that by establishing a Payable on Death account under the provisions of North Carolina General Statute 53-146.2 that:

1. During my (or our) lifetime I (or we), individually or jointly, may withdraw the money in the account; and
2. By written direction to the bank (on name of institution) I (or we), individually or jointly, may change the beneficiary or beneficiaries; and
3. Upon my (or our) death the money remaining in the account will belong to the beneficiary or beneficiaries and the money will not be inherited by my (or our) heirs or be controlled by will.

_____

_____

POD accounts are governed by statute. This paper has quoted the rules governing joint deposits in banks, N.C. Gen. Stat. § 53-146 *et. seq.* In addition a virtually identical set of statutes governs accounts in credit unions, N.C. Gen. Stat. § 54-109.57 *et. seq.*, and another group of statutes governs POD accounts in savings and loan associations. N.C. Gen. Stat. § 54B-130 *et. seq.* Like joint accounts with a right of survivorship, these statutes are strictly construed. Holloway v. Wachovia Bank and Trust Co, N.A., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

D. RIGHT OF SURVIVORSHIP IN SECURITIES

There are two common forms of ownership of investment securities. The first is to hold securities issued in the name of the holder of the securities. The second and most common is to issue the securities in the "street name" of a stock broker to be held in a brokerage account. Holding securities in brokerage accounts is the most common form of securities ownership today. The creation of a right of survivorship for both types of security ownership is governed by N.C. Gen. Stat. § 41-2.2 (2007).

To create a right of survivorship in securities held in the name of the owner, the security must "clearly indicate an intention that upon the death of either party the interest of the decedent shall pass to the surviving party." N.C. Gen. Stat. § 41-2.2(b)(1) (2007). To create a right of survivorship in securities held in a brokerage account there must be a "book entry" which "clearly indicates" the securities are owned with a right of survivorship. N.C. Gen. Stat. § 41-2.2(b)(2)(2007). There is no requirement of a writing signed by all of the members of the account in this statute as there is in N.C. Gen. Stat. § 41-21.1 (governing bank accounts). However, it is not expected that this will affect the

result of most cases. While a discussion of securities laws is beyond the scope this manuscript, generally to obtain a security issued in one's name requires the execution of a signed writing requesting the issuance of the security. ("Endorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer or redeem it. N.C. Gen. Stat. § 25-8-102(a)(11) (2007)). Similarly, the creation of a brokerage account usually involves the execution of a signed writing. In both cases it is the signed writing which must clearly indicate the owner's intention to create a right of survivorship.

While there are no North Carolina cases construing N.C.G.S. § 41-2.2 (Governing securities), it is logical to assume that this statute will be strictly construed as its companion statute N.C.G.S. § 41-2.1 (governing bank accounts). See, *e.g.*, Holloway v. Wachovia Bank and Trust Co., N.A., 104 N.C. App. 631, 410 S.E.2d 915 (1991). A case from the Supreme Court of Mississippi is instructive. Like North Carolina, Mississippi's law provides:

> When there is a clear intention to create a right which embraces the essential element of joint ownership and survivorship in respect to a particular account, the intention, when lawfully evidenced, will be given effect and the survivor held entitled to the fund.

Stephens v. Stephens, 193 Miss. 98, 8 So.2d 462 (1942).

In In re Estate of Baker, 760 So. 2d 759 (Miss. 2000), the Baker's personal account bore the initials "J T W R O S" which the court accepted meant "Joint Tenancy with Right of Survivorship." Id. at 762. However, there was no evidence that Mr. Baker ever executed a written account agreement establishing the account as one having a joint tenancy with a right of survivorship. Under these facts, Mrs. Baker could not meet her burden of proving that she had a right of survivorship in the account. Thus, the Mississippi Supreme Court upheld the trial court's finding that the assets in Mr. Baker's brokerage account passed to his estate as a matter of law. Id. at 764.

There are two potential differences in N.C. Gen. Stat. 41-2.1 (Governing bank accounts) and N.C. Gen. Stat. § 41-2.2 (Governing securities). The first relates to N.C. Gen. Stat. § 41-2.2's reliance upon securities laws for the contents of the writing necessary to create a right of survivorship. For bank accounts, N.C.G.S. 41-2.1 requires that all parties to a bank account execute the writing creating the right of survivorship. This same requirement may not exist under applicable securities law. Thus, it may be possible for an individual to grant a right of survivorship in an account with his own signature without having the joint member of the account also sign. The second potential difference arises out of the peculiar language of N.C.G.S. § 41-2.2(c) which states:

> (c). Upon the death of a joint tenant his interest shall pass to the surviving tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of

> the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is sufficient to satisfy such debts.

N.C. Gen. Stat. § 41-2.2(c).

This provision is internally inconsistent. It first states that the assets in the joint account, "remains liable for the debts of the decedent in the same manner as the personal property included in his estate". This seems to say that the assets of a joint account may be used to satisfy the debts of an estate on a basis equal to other personal property owned by the decedent. However, the end of that same sentence appears to say that the assets in a joint account may only be used to pay debts, "when the decedent's estate is insufficient to satisfy such debts." Id. It remains for future courts to resolve this inconsistent language.

E. THE UNIFORM TRANSFER ON DEATH SECURITY REGISTRATION ACT

In 1991 North Carolina adopted the Uniform Transfer of Death Securities Registration Act, N.C. Gen. Stat. § 41-40 *et. seq.* (2007). Similar statutes have now been adopted in virtually every state. Under this Act the owner of securities or of a securities account may provide that another person will become the owner of the securities or account upon the death of the owner. N.C. Gen. Stat. § 41-40(1), (9) (2007). To create this right the registration of the certificate or account must include "a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners." N.C. Gen. Stat. § 41-43 (2007). The registration may be shown by the words "transfer on death" or "TOD" or by other words such as "Pay of Death" or the abbreviation "POD" after the name of the registered owner or owners and before the name of the beneficiary. N.C. Gen. Stat. § 41-44 (2007). As with the right of survivorship in securities accounts under N.C. Gen. Stat. § 41-2.2, the Uniform Transfer on Death Securities Registration Act looks to securities laws for the requirement of a signed writing to effect the registration of the security or brokerage account. The designation of TOD has no effect on the ownership of the security until the owner's death and may be changed at any time by the owner or owners without the consent of the beneficiaries. N.C. Gen. Stat. § 41-45 (2007). On the death of the owner or owners the ownership of a security or account passes to the beneficiary per N.C. Gen. Stat. § 41-46, and does not pass through the estate of the owner or owners. N.C. Gen. Stat. § 41-48 (2007). Just as with securities accounts with rights of survivorship, the extent to which TOD accounts can be used to satisfy claims against the estate is not clear. N.C. Gen. Stat. 41-48 provides:

> The interest of a deceased sole owner or the last to die of several owners, remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the [TOD] beneficiary when the decedent's estate is insufficient to satisfy the debts.

N.C. Gen. Stat. § 41-48(b)(2007). This provision contains the same inconsistencies as discussed above regarding right of survivorship in securities accounts.

III. COMPETENCY

A. IN RE WILL OF JONES

The recent case of In re Will of Jones, 655 S.E.2d 407 (N.C. App. 2008) is a must read for anyone interested in issues of lack of mental capacity and/or undue influence in creating a will. John A. (Buck) Jones was born on August 6, 1929. He was a majority shareholder in Carolina Packers, Inc. a closely held corporation. In 2004 Mr. Jones met with Jeff D. Batts and Michael S. Batts of Batts, Batts & Bell and asked them to draft a will. He asked that his shares of Carolina Packers stock be placed in a trust for the benefit of his wife during her lifetime. Upon her death, the stock was to be delivered to Carolina Packers employees, Denning, Hayes and Thompson. A will containing these provisions was drafted and executed on March 3, 2005 (the "March Will").

Only five months later, on August 1, 2005, Mr. Jones called Michael Batts and told him he was in the hospital with a tumor pressing on his spine. Mr. Jones asked Michael Batts to meet with him in the hospital to discuss his will and power of attorney. Michael Batts met with Mr. Jones and his wife on August 5, 2005. During this meeting Mrs. Jones stated that she believed that she believed that the March Will should be changed so that all of Mr. Jones' property would be left to her. Mr. Jones disagreed, saying that his cattle should go to Bob Valor. He told Mr. Batts that he wanted a new will drafted leaving everything except his cattle to his wife. Michael Batts then met privately with Mr. Jones to determine whether this was what Mr. Jones wanted to do. In this private conversation, Mr. Jones instructed Michael Batts to "just do what his wife wanted". Michael Batts then arranged for Mr. Jones to meet with his personal physician. After this meeting, Mr. Jones' physician concluded that Mr. Jones was alert and oriented and of sound mind on the day of his examination.

Michael Batts remained concerned that the terms of the proposed will represented the desires of Mrs. Jones, and not Mr. Jones. As a result of these concerns, the firm of Batts, Batts & Bell, LLP declined to prepare a new will for Mr. Jones.

On August 31, 2005, Mr. Jones met with attorney James Narron and asked him to prepare a new will and trust. Mr. Narron did so, and on September 1, 2005 Mr. Jones executed a new will (the "September Will"). Mr. Jones' September Will expressly revoked all earlier wills and codicils. Mr. Jones died on October 11, 2005.

A will contest rapidly ensued. On October 20, 2006, the Trial Court entered summary judgment directing the Clerk of Court to accept for probate the September Will. The Court of Appeals upheld the Trial Court's ruling. In holding, as a matter of law, there was no evidence of undue influence or lack of mental capacity, the Court of Appeals emphasized the following:

1. Mr. Jones sought independent advice from two lawyers.

2. Mrs. Jones was not present to counter or inhibit the lawyers' advice.

3. Even though his lawyer recommended it, Mr. Jones refused to sign a health care power of attorney because he didn't wasn't any one else deciding whether he lived or died. This demonstrated to the Court that Mr. Jones kept his free will.

4. Mr. Jones continued to handle business transactions, including a $4,000,000 Lear Jet sale, around the time he executed the September Will.

5. Mr. Jones' doctor testified that Mr. Jones was competent and "didn't seem to have trouble making decisions about what he wanted to do".

6. The Court held that propounder's lay evidence is not sufficient to counter the expert testimony of Mr. Jones' doctors. (This factor is new in the law. If followed in future cases, it could radically change will contests.)

7. The Court held that Mr. Jones was not isolated from others in that he transacted business with a number of people around the time the Will was executed.

8. Mr. Jones did not agree with all of his wife's requests. He refused to leave his cattle to her.

9. The Court finally looked to the testimony of attorney James Narron who drafted the September Will. Mr. Narron testified that Mr. Jones possessed the mental capacity to understand what a will was, to know what his property was, to understand the effect of making a will on his property, to understand who his family was and to express his belief and intention on all such issues at the time he signed the will. Further, Mr. Narron testified that Mr. Jones did not appear to be under undue influence of anyone at the time he signed the Will.

Judge Stroud of the Court of Appeals dissented. She believed that the following created an issue of fact regarding undue influence and lack of mental capacity:

1. Mr. Jones was suffering from terminal illness, which included mental weakness related to multiple lesions in his brain compatible with metastatic disease.

2. Mr. Jones' medical records noted that he was profoundly weak and confused in July of 2005.

3. In August and September Mr. Jones was taking multiple pain medications, including methadone and hyracodone. These medications can affect a patient's thinking.

4. Mr. Jones was confined in the home with Mrs. Jones and subject to her near constant association and supervision. At times, Mrs. Jones interfered with Mr. Jones' ability to communicate with others and even intercepted his phone calls.

5. Some of Mr. Jones' friends testified that in August his personality had greatly changed, his spirit was gone and the fight was out of him.

6. Just after the March Will was signed, Mrs. Jones told a friend that the March Will was wrong and she was going to have someone look into a new will.

7. Mr. Jones told a friend that the March Will was exactly what he wanted.

8. The September Will not only revoked the March Will, it changed the general testamentary plan that Mr. Jones had in place since 1992.

9. Mrs. Jones listened to Mr. Jones' private communications with attorney Batts over a baby monitor, and when she returned to the room she insisted on being told everything that was discussed while she was out of the room.

10. After his private meeting with Mr. Jones, Mrs. Jones followed Mr. Batts and reiterated her desire that her husband draft a simple will leaving everything to her.

11. Ms. Jones told Michael Batts that she would fire the Carolina Packers employees if they contested any new will.

12. Mr. Batts concluded that Mrs. Jones was pushing so hard for a new will, he could not believe it was Mr. Jones' idea. As Mr. Batts stated, "She's worn him out." Mr. Jones told Mr. Batts to, "Just do what she wants and after I get back on my feet I'll take a look at it again and make sure it's what I want to do." Id. at 422. However, at the time he made this statement, Mr. Jones knew he had a terminal disease.

13. Mr. Batts, a well-regarded attorney, who had previously represented Mr. Jones on estate planning issues refused to prepare a new will.

B. WHAT SHOULD YOU DO?

The ABA offers the following advice to an attorney who finds himself confronted with a situation similar to that presented by the In re Will of Jones case:

> Although not expressly dictated by the model rules, the principle of respecting the client's autonomy dictates that the action taken by the lawyer who believes that a client can no longer adequately act in his or her own interest should be the action reasonably viewed as the least restrictive action under the circumstances.

A.B.A. Formal Ethics Opinion 96-404.

There really is nothing you can do to totally eliminate the possibility of a will contest in some families. I recommend that an estate planner consider the following steps:

1. Obtain a doctor's opinion. One would expect that the testimony of a physician, especially a treating physician, would be given a great deal of weight by a finder of fact. However, a doctor's opinion is not always dispositive. As the dissent in In re Will of Jones demonstrates, lay persons may testify about the testator's competency. The jury may also consider any drugs that the testator was taking at the time the document in question was executed, and the testator's general health.

2. Examine the testator yourself and keep a record of the results of your examination. The factors for determining whether a person is competent to make a will are well-known. The testator must have the mental capacity to:

    a. Understand what a will is;
    b. Know what his property is;
    c. Understand the effect of making a will on his property;
    d. Understand who his family is;
    e. Have the ability to express his belief and intention on all such issues at the time of the execution of the will.

    Interrogate the testator on these issues. In addition, ask the testator why he or she is changing their will, or favoring someone, or writing someone out of their will. Document the answers to these questions in a memorandum. You can also have members of your staff who witnessed the will witness these questions and answers.

3. Video tape the testator while he or she answers the above questions. Such a video tape will be powerful evidence to disgruntled family members and to the Court. Note that In re Estate of Baker, 760

So.2d 759 (2000), the Mississippi Supreme Court upheld the Trial Court's admittance into evidence of a tape recording of the deceased in which the deceased stated that he didn't want any fighting among his heirs and that he wanted his securities to be divided equally among his children from a prior marriage. However, the Court also allowed the testator's second wife to testify that the testator told her that she should throw the tape away because he was drunk when he made it. The second wife did not have a tape recording of this conversation.

IV. POWERS OF ATTORNEY

A. DRAFTING POWERS OF ATTORNEY TO AVOID DISPUTES

The following is a list of some of the more common strategies to be used when drafting a power of attorney to avoid later conflicts. However, while these strategies prevent some conflicts, they often raise their own issues.

1. Impose a duty to provide a written accounting on the attorney-in-fact. The accounting may be required to be submitted under one of the following scenarios.
    a. Account to the administrator upon the death of the principal. (Make sure the person receiving the accounting is someone other than the attorney in fact).
    b. To a specific family member each year.
    c. To a class of family members each year (*i.e.* all children).

(One problem with requiring an accounting is that it gives the other family members an opportunity to torment the holder of the power.)

2. Include a provision automatically revoking the agent's status upon legal separation or divorce.
(One problem with this provision is that third parties may not be aware of the separation or divorce).

3. Use joint agents who are required to act together for all actions or just certain actions, such as gifting.
(This may be cumbersome and may not be practical for many families for the agents may not live in the same city with each other or in the same city with the principal.)

4. Require a special agent to concur or consent to certain transactions such as gifts. The special agent is often an attorney or accountant.
(Problems can arise if the attorney-in-fact acts in good faith but does not obtain the required approval.)

5. Require the consent of all members of a class (such as all children) for any gifts.

(Sometimes a provision like this will generate more controversy than it will avoid.)

6. Limit certain powers, such as gifting, to the primary holder of the power and not to contingent holders of the power.
(While this may be advisable in certain situations, it is often the primary attorney-in-fact who is the problem.)

7. Provide limitations on the ability of the holder of the power to manage a business.
(It is impossible to predict future needs. This may interfere with the attorney-in-fact's ability to manage the principal's affairs.)

8. Use a springing power rather than one that takes immediate effect.
(While this certainly avoids problems prior to the event that triggers the power, it may just delay a problem, not prevent it.)

I recommend that in every case in which a power of attorney is drafted the following steps should be taken:

1. Choose the attorney-in-fact carefully.

2. Take steps to insure that the attorney-in-fact understands his or her fiduciary duties and any limitations on his or her powers.

3. Encourage transparency. Most of the problems that I deal with happened in secret, not in the open.

B. HORRY V. WOODBURY

In Horry v. Woodbury, 659 S.E.2d 88 (N.C. App. 2008), Woodbury was the executor of the estate of Ruth Horry. He was also her attorney-in-fact under a durable power of attorney signed by the decedent. The durable power of attorney did not allow the attorney-in-fact to make gifts of the decedent's property to himself. In the years prior to her death, the Decedent and Woodbury properly opened several bank accounts at Mechanics and Farmers Bank, which were joint with a right of survivorship. All of the money in the accounts was owned by the Decedent. On May 30, 2003, Woodbury closed one of these joint bank accounts and used the proceeds to open a new joint account with a right of survivorship in himself. Woodbury executed the account documents on behalf of the Decedent as her attorney-in-fact. Woodbury's reason for changing the account was to reduce the bank's service fees. The Decedent died only two days later, on June 1, 2003. Woodbury asserted ownership of the two joint bank accounts. The plaintiff, a beneficiary of Horry's estate filed suit, alleging the creation of the new bank accounts with the Decedent's money constituted conversion. The Court of Appeals upheld the Trial Court's entry of summary judgment dismissing the plaintiff's claim. The Court reasoned that merely moving money from one account with a right of survivorship to another

account with the same right of survivorship did not constitute conversion as a matter of law.

Judge McCullough filed a well-reasoned dissent. In his dissent, Judge McCullough stated that since the power of attorney executed by the Decedent did not give the attorney-in-fact the power to make gifts to himself, he had no authority to execute bank documents giving himself a right of survivorship. This meant that Woodbury's signature as power of attorney was a nullity. Thus, the signature cards did not comply with the strict requirements of N.C. Gen. Stat. § 53-146.1. Therefore, no right of survivorship was created under North Carolina law.

The case has been appealed to the North Carolina Supreme Court.

V. DEAD MAN'S STATUTE

The Dead Man's Statute bars testimony of certain oral communications by a deceased or insane person. The Dead Man's Statute was intended "as a shield to protect against fraudulent and unfounded claims." In re Will of Lamparter, 348 N.C. 45, 49, 497 S.E.2d 692, 694 (1998). Our Supreme Court has explained the reasoning behind the Dead Man's Statute:

> Death having closed the mouth of one of the parties, (with respect to a personal transaction or communication) it is but mete that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence.

Id.

North Carolina's Dead Man's Statute is now found in Rule 601(c) of the North Carolina Rules of Evidence which states:

> **Disqualification of Interested Persons**. Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the parties exceeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning any oral communication between the witness and the deceased person or lunatic.

Generally, a witness is incompetent to testify under the Dead Man's Statute when it appears:

1. That such witness is a party or interested in the event (action),

2. That his testimony relates to a personal transaction or communication with a deceased person,

3. That the action is against the personal representative of the deceased person or a person deriving title or interest from, through or under the deceased, and

4. That the witness is testifying in his own behalf or interest. Goodwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963).

One common way of getting around the Dead Man's Statute is through the testimony of a witness who has no legal interest in the communication. It is important to note that a witness can have a large pecuniary interest in a communication but still not to be held to have a technically "legal" interest in the communication. One example of this is the spouse of an interested party can be competent to testify about oral communications with the deceased. Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937). However, a spouse with even a de minimus legal interest, such as a wife's inchoate dower interest, is disqualified from testifying. Id. In addition, an interested witness may testify about oral communications with the deceased if there is a surviving party to the communication whose interest is aligned with the interests of the deceased. Lambe-Young, Inc. v. Cook, 70 N.C. App. 588, 320 S.E.2d 699 (1984).

If the Dead Man's Statute bars testimony it can greatly affect, or even determine, the outcome of estate litigation. Consider the following common fact patterns:

A. POWERS OF ATTORNEY

An attorney-in-fact pursuant to a power of attorney is a fiduciary. Therefore, all transactions between the ward and the attorney-in-fact are presumed to be fraudulent. In such cases the attorney-in-fact has the burden of proving that any transactions between himself and his ward were open, fair and honest. In re Will of Sechrest, 140 N.C. App. 464, 537 S.E.2d 511 (2000). However, as discussed above, the Dead Man's Statute bars an attorney-in-fact from testifying about oral communications with the deceased. Imagine a situation where an attorney-in-fact has used the power of attorney to gift the principal's property to himself. If the attorney-in-fact's only justification for this is an alleged oral directive from the principal, and if there were no other witnesses to the alleged oral directive, then the attorney-in-fact may find that he or she has no defense to a lawsuit seeking to compel a return of the gifted property.

B. JOINT BANK ACCOUNTS

The fact that a person is a party to a joint bank account only gives that person the legal authority as the owner's agent to make withdrawals from the account. Smith v. Smith, 255 NC 152, 155, 120 S.E.2d 575, 580 (1961). Absent other evidence of gift, the funds in a joint bank account are owned by the person who deposited those funds in the joint bank account. Id. A party to a joint account who pays someone else's money to

himself/herself out of a joint bank account commits the tort of conversion. State ex. rel. Pilard v. Berringer, 154 N.C. App. 45, 571 S.E.2d 836 (2002). If the withdrawing party's only defense to a charge of conversion is an alleged oral directive from the deceased owner from the funds, and if there were no other witnesses, the withdrawing party may find that he has no defense to a suit for conversion.

C. WILL CAVEATS

Beneficiaries under a purported will may not offer testimony of oral conversations between themselves and the testator about his intent to make a new will or with regard to specific bequests contained in that will. In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998). Thus, the Dead Man's statute may bar interested parties from introducing important evidence in caveat proceedings.

D. CONTRACTS TO MAKE A WILL

The Dead Man's Statute bars a party from introducing evidence that his deceased father promised to will certain property to him. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524 (1976). Thus, if a party's only proof of a contract to make a will is a conversation with the deceased and there were no other witnesses to that conversation, the party will not be able to support a claim for breach of contract.