

LITIGATING ACCOUNTS WITH RIGHTS OF SURVIVORSHIP IN TEXAS

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I. INTRODUCTION¹

This article is meant to be a practical guide for attorneys who must deal with issues concerning accounts with rights of survivorship ("JTROS"), whether that is in a joint account, a payable on death ("P.O.D.") account, or a trust account. There can be disputes regarding whether accounts have rights of survivorship, who owns the funds in accounts, and whether financial institutions are responsible for improperly setting up accounts. This paper attempts to address these and other issues that arise from litigating accounts in Texas.

II. VALID SURVIVORSHIP ACCOUNTS

A. Background Regarding Texas Probate Code Section 439

Parties can own property in either joint tenancy or in tenancy in common. *See Holmes v. Beatty*, 290 S.W.3d 852, 857-58 (Tex. 2009). A joint tenancy carries rights of survivorship, whereas tenancy in common does not. *See id.* Joint tenancy is a "[f]orm of ownership where two or more individuals hold shares as joint tenants with right of survivorship. When one tenant dies, the entire tenancy remains to the surviving tenants." *Id.* (citing SEC. TRANSFER ASSOC., Guidelines of the Securities Transfer Association AV-1 (Oct. 2005)). "[A] joint tenancy cannot be held without rights of survivorship; such a joint agreement would be a tenancy in common." *Id.*

However, "the right of survivorship as an essential legal incident of joint ownership has not been favored in this country and consequently has been abolished in most American jurisdictions." *See Stauffer v. Henderson*, 801 S.W.2d 858, 860 (Tex. 1990). Texas eliminated automatic survivorship in 1848. *See id.* "Elimination of the right of

survivorship as a necessary, legally imposed element of joint estates does not prohibit joint owners from agreeing that each will take the other's interest in the property at the other's death." *Id.*

The parties to a joint account at a bank may make a valid and enforceable written agreement that funds deposited by either of them will belong to the survivor. *See id.* at 862-63. But, regarding joint bank accounts, there has historically been "considerable confusion" regarding the effect of particular agreements. *Id.* at 860. As the Texas Supreme Court described:

This confusion is due in part to the very different reasons parties have for opening joint accounts. It is not at all unusual for a person to deposit his or her funds into an account upon which another person is authorized to draw merely for the convenience of the depositor. The owner of the money intends only to facilitate disbursement of the funds for his or her own purposes, not to transfer title to the co-signator on the account. It is no less common for a depositor of funds into a joint account to intend that at some point in time, at the depositor's death if not before, those funds will become the property of the co-signator. Thus, both common experience, as well as the express language of section 46, prohibit an inference from the mere creation of a joint account that the parties intend for ownership of the funds to pass automatically upon the death of one of them.

Id. at 861.

¹ This presentation is intended for informational and educational purposes only, and cannot be relied upon as legal advice. Any assumptions used in this presentation are for illustrative purposes only. This presentation creates no attorney-client relationship.

B. Texas Probate Code Section 439 Provides Strict Requirements For Creation Of Survivorship Accounts

To assist with the confusion regarding joint accounts, the Texas Legislature has enacted a statute that dictates the type of language that is required to create survivorship rights. *See* TEX. PROB. CODE ANN. § 439.² In 1979, the Legislature added chapter XI entitled "Nontestamentary Transfers" to the Probate Code. *See id.* There are three types of accounts included under this chapter: joint accounts, P.O.D. accounts, and trust accounts. *See* TEX. PROB. CODE ANN. § 436(5); *Stogner v. Richeson*, 52 S.W.3d 903 (Tex. App.—Fort Worth 2001, pet. denied).

"Joint account" means an account payable on request to one or more of two or more parties whether or not there is a right of survivorship." *See id.* at 436(4). Certificates of deposit (CDs) are accounts for purposes of Texas Probate Code Section 436(1) and can be joint accounts for purposes of Section 436(4), where they are payable on request to one or more of two or more parties. *See Bandy v. First State Bank*, 1992 Tex. LEXIS 37 (Tex. 1992), *opinion withdrawn by, substituted opinion at* 835 S.W.2d 609 (Tex. 1992).

"P.O.D. account" means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees." *See id.* at 436(10); *Punts v. Wilson*, 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.).

A "Trust account" means:

[A]n account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by

the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. It is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

Id. at 436(14); *Otto v. Klement*, 656 S.W.2d 678 (Tex. App.—Amarillo 1983, no writ).

The definition of a trust account requires that: (1) the account be in the name of one or more parties as trustee for one or more beneficiaries; (2) the trust be established by the form of the account and the deposit agreement with the financial institution; (3) there be no subject of the trust other than the sums on deposit on account; and (4) the account not be a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account. *Id.* § 436(14). *See also Stogner v. Richeson*, 52 S.W.3d at 903; *Cweren v. Danziger*, 923 S.W.2d 641, 644 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Isbell v. Williams*, 705 S.W.2d 252, 255 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.); *Otto v. Klement*, 656 S.W.2d 678, 682 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

There is also a convenience account that does not provide for any survivorship effect. *See* TEX. PROB. CODE ANN. §438A.

Section 439 provides the exclusive means for creating a right of survivorship in joint, P.O.D., and trust accounts in Texas. *See id.* This includes checking accounts, savings accounts, certificates of deposit, share accounts, and other like arrangements. *See* TEX. PROB. CODE ANN. §§ 436(1), 450. Section 439 of the Texas Probate Code currently states:

² It should be noted that the current Probate Code provisions will be repealed as of January 1, 2014. The provisions will be recodified in an "Estates Code."

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party or parties. Notwithstanding any other law, an agreement is sufficient to confer an absolute right of survivorship on parties to a joint account under this subsection if the agreement states in substantially the following form: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate." A survivorship agreement will not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 438 of this code augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death, and the right of survivorship continues between the surviving parties if a written agreement signed by a party who dies so provides.

(b) If the account is a P.O.D. account and there is a written agreement signed by the original payee or payees, on the death of the original payee or on the death of the survivor of two

or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more P.O.D. payees die before the original payee. If two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account and there is a written agreement signed by the trustee or trustees, on death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more beneficiaries die before the trustee dies. If two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

TEX. PROB. CODE ANN. §439. "Transfers resulting from the application of Section 439 of this code are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to the testamentary provisions of this code." *Id.* at §441; *In re Ernst*, 2011 Tex. App. LEXIS 182

(Tex. App.—San Antonio January 12, 2011, no pet.).

C. Statutory Requirements For Creating Survivorship Accounts

Whether an agreement adequately describes the "survival" language is often an area of litigation. Statutory requirements for the creation of a right of survivorship for an account are that there be (1) a written agreement, (2) signed by the decedent, (3) which makes his interest "survive" to the other party. *See id.*; *Kennemer v. Fort Worth Community Credit Union*, 335 S.W.3d 843, 846 (Tex. App.—El Paso 2011, pet. denied).

Although there must be a written agreement, the bank does not have to retain a copy of the agreement. *See Cweren v. Danziger*, 923 S. W.2d at 644. A copy of an account agreement held by a customer or his or her attorney is still effective. *See id.* Similarly, a party does not have to retain all of the account agreement for it to be effective. *See Allen v. Wachtendorf*, 962 S.W.2d 279, 282 (Tex. App.—Corpus Christi 1998, pet. denied) (bank's electronic version of second page of signature card was sufficient to prove survivorship account even where party did not retain a copy of same).

In 1993, the Texas Legislature enacted Section 439A, entitled "Uniform Single-Party or Multiple-Party Account Form," as a supplement to Section 439(a)'s acceptable forms of survivorship language. *See Kennemer*, 335 S.W.3d at 846; *In re Estate of Dellinger*, 224 S.W.3d 434, 438 (Tex. App.—Dallas 2007, no pet.). Although Section 439A provides form language to establish particular types of accounts, it also states that a financial institution may vary the format of the form and "make disclosures in the account agreement or in any other form which adequately discloses the information provided in this section." TEX. PROB. CODE § 439A(b), (c). This provision is a "supplement to section 439(a), adding alternative acceptable forms of survivorship language." *Allen v. Wachtendorf*, 962 S.W.2d at 283.

D. *Stauffer v. Henderson*: Party Cannot Use Parol Or Extraneous Evidence To Create Survivorship Account

The issue of adequate "survival" language comes up when the parties diverge from the statutorily approved forms. The leading case interpreting survivorship accounts is the Texas Supreme Court's opinion in *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex.1990). In that case, the Court held that language on a signature card did not create rights of survivorship. *See id.* The Court noted that the legislature has made a written agreement necessary to create a right of survivorship in a joint account and that it has undertaken to specify language that will meet its requirement. *See id.* The Court said: "First, section 439 provides the exclusive means for creating a right of survivorship in joint accounts.... Second, the necessity of a written agreement signed by the decedent to create a right of survivorship in a joint account is emphatic...." *Id.* at 862-63. If the agreement is unambiguous and complete, parol evidence is inadmissible to establish the intent of the parties. *See id.* at 863-64. The Court held that under Probate Code Section 439(a), concerning survivorship rights between non-spouses, parties could only establish survivorship using the statute's language (or language "substantially" similar to it), and a court could not consider other evidence to ascertain the parties' intent. *See Stauffer*, 801 S.W.2d at 863-65 (citing TEX. PROB. CODE § 439(a)).

Regarding the use of extraneous evidence of intent, the Court stated:

Section 439(a) makes a written agreement determinative of the existence of a right of survivorship in a joint account. If such agreement is complete and unambiguous, then parol evidence is inadmissible, as with written agreements generally, to vary, add to or contradict its terms. Furthermore, no presumption can be created to contradict the

agreement or to supply a term wholly missing from its provisions. Any such presumption would violate both the parol evidence rule by necessitating admission of extrinsic evidence to rebut the presumption, and the express prohibition of section 439(a) against inferring a right of survivorship from the mere creation of a joint account. Thus, if the terms of an agreement pertaining to a joint account are clear, the parties may not introduce extrinsic evidence of the parties' intent. Section 439(a) effectively overrules prior case law to the contrary.

Id. at 863-64. See also *Clark v. Wells Fargo Bank, N.A.*, 2008 Tex. App. LEXIS 2211 (Tex. App.—Houston [1st Dist.] Mar. 27, 2008, no pet.) ("Claimants cannot use extrinsic evidence in an attempt to get around the four corners of the ... CDs."). But see *In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied) (court of appeals affirmed trial court's determination that account with appropriate survivorship language was estate property due to parol evidence by beneficiary); *Richardson v. Laney*, 911 S.W.2d 489 (Tex. App.—Texarkana 1995, no writ) (without discussing *Stauffer* or Section 439(a), court affirmed a jury finding that father did not intend to gift funds in JTROS accounts to children listed on account agreements).

At least one court has interpreted the *Henderson* opinion as abrogating all basic contract principles such that only the statute controls the interpretation of a survivorship agreement relating to a joint account. See *Shaw v. Shaw*, 835 S.W.2d 232, 234 (Tex. App.—Waco 1992, writ denied) (citing Philip M. Green, Note, *Extrinsic Evidence Is Not Admissible To Determine Parties' Intent Regarding Right Of Survivorship On Joint Bank Accounts: Stauffer v. Henderson*, 801 S.W.2d

858 (Tex. 1990), 22 TEX. TECH L. REV. 1237, 1251 (1991)). The court held that the language of an account agreement either does or does not create a right of survivorship as a matter of law, and that a determination of ambiguity is not allowed. See *id.*

Accordingly, under that theory, oral statements by bank representatives or others that an account had rights of survivorship are not admissible. See *Estate of Brown*, No. 04-11-00541-CV, 2012 Tex. App. LEXIS 5087 (Tex. App.—San Antonio June 27, 2012, pet. denied) (affidavit of bank representative that 0% beneficiary designation was a computer glitch was properly excluded); *Nipp v. Broumley*, 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.); *Punts v. Wilson*, 137 S.W.3d 889, 893 (Tex. App.—Texarkana 2004, no pet.) (parol evidence is inadmissible to vary, add to, or contradict an account agreement's terms); *Kitchen v. Sawyer*, 814 S.W.2d 798, 801 (Tex. App.—Dallas 1991, writ denied) (holding that extrinsic evidence from bank officer that all the bank's joint accounts were required to be JTROS could not be used to prove intent where signature card did not have box for JTROS marked).

Another court has held that normal rules of contract construction apply to account agreements. See *Evans v. First Nat'l Bank*, 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.] 1997, writ denied). That court noted that "the Texas Supreme Court did not address in *Stauffer* the reciprocal question of whether extrinsic evidence may be introduced when the joint account agreement is ambiguous." *Id.* at 375 (citing Robert N. Virden, *The Final(?) Word on Joint Tenancy with Right of Survivorship Accounts*, 55 TEX. B.J. 24, 26 (1992)). The court held:

agreements relating to joint accounts are to be interpreted according to contract rules generally. Where no ambiguity exists, parol evidence is improper. Extrinsic evidence is permissible, however, to explain an ambiguity where the signature card or other

agreement is unclear as to some aspect of the parties' agreement, other than their intent to create a survivorship account.

Id. Then court then limited its holding to situations where the intent to create a survivorship account is clear and unambiguous, but what funds are subject to the survivorship agreement is ambiguous: "We hold that extrinsic evidence may be considered, however, to determine which CDs are subject to the survivorship agreement. Our holding in this case is limited to circumstances such as these where a party has expressed a clear intent to create a survivorship account, but additional evidence is required to determine what funds are properly subject to the survivorship agreement." *Id.* (citing *In re Estate of Gibson*, 893 S.W.2d 749, 753 (Tex. App.—Texarkana 1995, no writ) (holding that a signature card created a survivorship account and remanding for a determination of which funds in the account were after-acquired separate property not subject to a joint will and could pass by nontestamentary transfer to joint tenants)). After reviewing extrinsic evidence, the court determined that there was a fact issue on whether certain CDs were covered by the survivorship agreement. *See id.*

Similarly, in *Cummings v. Cummings*, the court of appeals reversed a summary judgment based on a signature card not containing sufficient language to create survivorship status. 923 S.W.2d 132 (Tex. App.—San Antonio 1996, writ denied). The court held that the signature card was ambiguous where it indicated that it was an "individual" account but also listed a person for payable on death status. *See id.* The court did not really go into whether an account agreement could be ambiguous for the purposes of survivorship status and seemingly made a distinction between joint accounts with rights of survivorship and payable on death accounts that were created before the amendment to Section 439(a) and 239(b). *See id.*

In *Stogner v. Richeson*, the court of appeals held that an account agreement was

ambiguous as to whether it was a trust account and affirmed a jury's verdict that the party setting up the account intended it to be a trust account. 52 S.W.3d 903 (Tex. App.—Fort Worth 2001, pet. denied). The noted that:

N.E. did not check the printed box on the agreement specifically providing that the account was a trust account. Nor did N.E. specifically designate Richeson as the beneficiary in the box provided on the form. Instead, N.E. checked the "OTHER" box and typed in "TRUST."

...

[T]he trial court determined that an ambiguity existed in the language of the deposit agreement. Neither party argues on appeal that the language was unambiguous. Therefore, a question of fact exists as to the interpretation of the agreement's true meaning.

Here, the face of the deposit agreement was entitled: "N E STOGNER IN TRUST FOR BETTIE RICHESON." N.E. also provided in the deposit agreement's account ownership section that the account was established as a "TRUST." Campbell testified that, at the time N.E. established his CD, the bank used the "OTHER" category on the depository agreement to allow customers to be insured by FDIC insurance. However, on cross-examination, Campbell conceded that it was possible that typing "TRUST" in the "OTHER" category could be used to form true trusts aside from the FDIC insurance. Campbell also testified that

there was nothing magical about the bank's deposit agreement form in setting up trust accounts and there were a lot of forms a customer could use to set up a trust account.

Id. at 906-07. Based on this evidence, the court affirmed the judgment finding it was a trust account.

E. Interpretation Of Bank Agreements

Under Texas Probate Code Section 439(a), a survivorship agreement will not be inferred from the mere fact that the account is a joint account. *See Ephran v. Frazier*, 840 S.W.2d 81 (Tex. App.—Corpus Christi 1992, no writ); *Otto v. Klement*, 656 S.W.2d 678 (Tex. App.—Amarillo 1983, writ ref'd n.r.e). The agreement established must show the clear and unequivocal intent of the parties to create a joint account with rights of survivorship. *See Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied).

An account signature card, being a type of contract, must be "read, considered, and construed in its entirety in keeping with the general principles of contract interpretation." *Allen v. Wachtendorf*, 962 S.W.2d 279, 282 (Tex. App.—Corpus Christi 1998, pet. denied). *See also Kennemer*, 335 S.W.3d at 846; *Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.); *Whitney Nat'l Bank v. Baker*, 122 S.W.3d 204, 208 (Tex. App.—Houston [1st Dist.] 2003, no pet.). When construing a contract, courts must strive to give effect to the written expression of the parties' intent. *See In the Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied) (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)). To do so, they must read all parts of a contract together. *See id.* Courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract. *See id.*

In *Allen v. Wachtendorf*, the court scrutinized an account signature card on which a

box was checked for a "Multiple-Party Account-With Survivorship." 962 S.W.2d at 283. The definition for this term was provided on a second page. *See id.* at 282. The court reasoned that a contract must be "read, considered, and construed in its entirety" in accordance with general principles of contract construction. *Id.* Accordingly, the court held the combined language from the two pages of the account signature card established a joint account including a right of survivorship. *See id.*

In *Kennemer*, the court determined that appropriate rights of survivorship language in an application for membership card was sufficient to create survivorship rights in every account created under that agreement. 335 S.W.3d at 846. *See also Armstrong v. Roberts*, 211 S.W.3d 867, 872-73 (Tex. App.—El Paso 2006, pet. denied) (the nature of a joint account with survivorship rights was explained on the back of the signature card as an account owned by more than one individual and that upon an individual's death, all the money in the account passes to the survivor(s)); *McNeme v. Estate of Hart*, 860 S.W.2d 536, 539 (Tex. App.—El Paso 1993, no writ) (language in the account expressing that sums shall be owned jointly with rights of survivorship established ownership of the funds in the survivor); *Shaw v. Shaw*, 835 S.W.2d 232, 235 (Tex. App.—Waco 1992, writ denied) (the example given by Section 439(a) need not be followed exactly, but must be "substantially" followed to create a joint account with rights of survivorship).

In *Punts v. Wilson*, the court held that the account was a valid P.O.D. account. 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.). The payee initialed beneath the language of the bank agreement that designated the ownership of the account as P.O.D. and signed the member application and agreement at the bottom. *See id.* The box that designated the account as "SINGLE-PARTY ACCOUNT WITH 'P.O.D.' (Payable on Death) DESIGNATION" was checked, and a person was listed as the P.O.D. beneficiary. *See id.* Later language in the agreement also described P.O.D. accounts with the statutorily required language. *See id.* The court concluded that

"[t]his agreement created a valid P.O.D. account with Wilson as the beneficiary. As the P.O.D. beneficiary, any sums remaining on deposit at Kelly's death belonged to Wilson and were not part of Kelly's estate." *Id.*

In *Ivey v. Steele*, the signature card signed by decedent specified that upon the death of one of the parties the account was owned by the survivor. 857 S.W.2d 749, 751 (Tex. App.—Houston [14th Dist.] 1993, no writ). The court of appeals held that this language was sufficient to create a right of survivorship. The court rejected the argument that an account agreement had to use the "operative words" that the account "vests in and belongs to" the surviving party "as his or her separate property and estate." *Id.* The statute does not create any magic words.

Moreover, when the signature card incorporates a deposit agreement, that agreement is also a part of the deposit contract between the parties. See TEX. FIN. CODE § 34.301(a); *In the Estate of Wilson*, 213 S.W.3d 491 (Tex. App.—Tyler 2006, pet. denied). "[I]t is uniformly held that an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged." See *McNeme v. Estate of Hart*, 860 S.W.2d 536, 541 (Tex. App.—El Paso 1993, no writ) (citing *Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex. 1968)). Therefore, if an account signature card references and incorporates another document, that document must also be reviewed to determine whether appropriate rights of survivorship language exist. See *In re Estate of Dellinger*, 224 S.W.3d 434 (Tex. App.—Dallas 2007, no pet.); *In the Estate of Wilson*, 213 S.W.3d 491, 494 (Tex. App.—Tyler 2006, pet. denied); *Herring v. Johnson*, No. 14-03-00266-CV, 2004 Tex. App. LEXIS 2087 (Tex. App.—Houston [14th Dist.] Mar. 4, 2004, pet. denied).

In *Estate of Dellinger*, the court found that an account signature card and an account agreement, incorporated into the signature card, created rights of survivorship. 224 S.W.3d at 439-40. The agreement stated that unless otherwise provided, joint accounts would be with rights of survivorship and then defined

what that meant. See *id.* The court rejected that the payee's omission of a payable on death beneficiary meant that he did not want survivorship effect. See *id.* The court reasoned that a joint account with rights of survivorship and a payable on death designation were different issues in the account agreement, and therefore the lack of a payable on death beneficiary did not indicate that the account was to not have survivorship effect. See *id.*

A decedent need not make a declarative sentence describing the survivorship intention. See *In the Estate of Wilson*, 213 S.W.3d at 494. Rather, a joint account with rights of survivorship can be established by placing an "X" in the box next to that statement on the signature card. See *id.* In *Estate of Wilson*, the account agreement defined what right of survivorship meant, and stated "[r]ight of survivorship means that when a co-owner dies, the balance in the account belongs to the surviving co-owner(s), subject to our right to charge the account for any amount the deceased co-owner or a surviving co-owner owes us." *Id.* The court held that that statement expanded upon what the payee meant when he put the "X" in the box with "Joint with Right of Survivorship." *Id.*

Moreover, in *Banks v. Browning*, the court held that a party does not need to prove when the "X" was placed on the agreement or that the signer knew and intended that the "X" create a survivorship account – indeed, that would be impermissible extrinsic evidence. 873 S.W.2d 763, 765 (Tex. App.—Fort Worth 1994, writ denied).

However, the decedent must affirmatively place an "X" by the appropriate survivorship option. See *In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied). For example, in one case on the back of the signature card there were three boxes for the account holder to check to indicate whether the account was to be single party, multiple party with survivorship, or multiple party without survivorship. See *id.* None of the boxes were checked. See *id.* Rather, a signature

appeared on one line, to the right of the boxes, to the right of the box marked "Multiple Party with Survivorship." *Id.* The court held that the decedent "may or may not have intended to designate the account as a joint account with right of survivorship." *Id.* "On its face the card is not a clear written contract establishing the right of survivorship, as required by section 439(a) of the Probate Code." *Id.* The court also held that placing an "X" above a box for survivorship option was not sufficient to create a survivorship account. *See id.*

F. Decedent (Payee) Must Sign The Account Agreement

The statute requires that the original payee or payees sign the account agreement. *See* TEX. PROB. CODE § 439(b); *Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. denied). Where a decedent fails to sign the required deposit agreement, the decedent never creates an account that passes the funds outside of probate and to other parties to the account. *See Parker v. JPMorgan Chase Bank*, 95 S.W.3d 428, (Tex. App.—Houston 1st Dist. 2002, no pet.).

For example, in *Parker*, the court granted a summary judgment holding that the estate owned the proceeds of accounts that were presumed to be P.O.D. accounts where the signature cards did not evidence the decedent's signature. 95 S.W.3d at 428. The court stated:

Parker argues that the trial court erred in granting the motion for summary judgment because Chase failed to establish that the "defendant [Chase] did not sign the certificates of deposit as a matter of law." Parker concludes that, because "an action was taken by Ms. Eva Lee Burrell to establish a P.O.D. account, . . . the Defendant established the accounts."

Chase argues that a P.O.D. account was never created because the decedent failed to

sign the required P.O.D. agreement. We agree. . . .

Chase presented summary judgment proof that decedent did not sign any agreement and, thus, did not fulfill the statutory requirements necessary to create a P.O.D. account. The summary judgment evidence, thus, disproves as a matter of law at least one element of Parker's cause of action. As a result, the burden shifted to Parker to present evidence creating a fact issue.

To support her argument, Parker reasserts Chase's original claim that decedent created a P.O.D. account. Parker argues that, "Based upon the pleadings of the defendants, the plaintiffs could only assume that there was a valid 'P.O.D.' account." Further, Parker notes that "Upon establishing the account and subsequent death of Ms. Burrell [decedent], Defendants [Chase] made judicial assertions that the P.O.D. accounts were established and they were mistakenly closed."

The intent of the decedent must be determined from the agreement, and extrinsic evidence may not be offered to prove intent. Therefore, in making our decision, we do not consider Parker's arguments that she could "only assume that there was a valid 'P.O.D.' account," and that Chase "made judicial assertions that the P.O.D. accounts were established and they were mistakenly closed." Parker's argument, thus, must be restricted to the information contained within the P.O.D.

agreement itself. . . . After indulging every reasonable inference in favor of Parker, we hold that she has not met her burden to present evidence creating a fact issue about whether a P.O.D. account was created.

Id. at 431-32.

Even if the decedent signs the signature card, if she does not sign in a space provided next to the survivorship option, the account will not be a survivorship account. *See Herring v. Johnson*, No. 14-03-00266-CV, 2004 Tex. App. LEXIS 2087 (Tex. App.—Houston [14th Dist.] Mar. 4, 2004, pet. denied). "Not only does the signature card require a signature to create a joint account with right of survivorship, but both Sections 439(a) and 439A require a signature or initials by the deceased party to create a right of survivorship." *Id.*

However, a party does not need to sign a new account agreement every time an account is renewed. *See In re Estate of Patterson*, No. 11-03-00070-CV, 2003 Tex. App. LEXIS 8480 (Tex. App.—Eastland Oct. 2, 2003, no pet.). One court held that the original account agreements concerning CDs were valid as to renewed CDs. *See id.* The court stated: "Nothing in the record suggests that a new signature card would be required upon renewal of the certificates of deposit, nor can we find any statute or precedent imposing any such requirement." *Id.* at *2-3.

The original payee must sign the agreement, and a party with the original payee's power of attorney cannot create a survivorship account or designate beneficiaries. *See Armstrong v. Roberts*, 211 S.W.3d at 870-71.

One court has held that a party does need to create a new account agreement if a new party to the account is added. *See Rogers v. Shelton*, 832 S.W.2d 709 (Tex. App.—Eastland 1992, writ denied). In *Rogers*, a couple entered into a valid joint account with rights of survivorship. *See id.* Six years later, their son's

name was typed onto the signature card and the son signed the card. *See id.* The court held that the son was not a valid party to the account and the survivorship language was not operative as to him. *See id.*

Further, where there is sufficient evidence to prove that an account had been renamed or renumbered, the original account agreement will be sufficient to create survivorship effect. *See Estate of Dillard*, 98 S.W.3d 386, 396-97 (Tex. App.—Amarillo 2003, pet. denied).

What constitutes a signature is not all that strict. *See TEX. BUS. & COM. CODE ANN. § 1.201(39)*. In one case, the court held that the account agreement was "signed" where the party simply initialed the signature card. *See McNeme v. The Estate of Anna Mae Hart*, 860 S.W.2d 536 (Tex. App.—El Paso 1993, no writ).

G. Absent Appropriate Language, An Account Will Not Have Survivorship Effect

Unless an account is a joint account with right of survivorship, a pay-on-death account, or a trust account, "the death of any party to [the] account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate." TEX. PROB. CODE ANN. § 439(d). Accordingly, at a depositor's death, his or her account passes to his or her estate unless another party establishes the account is one of the types encompassed by sections 439(a)-(c). *See id.* Absent the appropriate language, the funds in an account will not transfer to the surviving member of the account, but will transfer to the original owner's estate. *See, e.g., Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990); *Koonce v. First Vict. Nat'l Bank*, 2011 Tex. App. LEXIS 7198 (Tex. App.—Corpus Christi Aug. 31 2011, no pet.); *Malone v. Malone*, No. 10-04-00011-CV, 2005 Tex. App. LEXIS 4254 (Tex. App.—Waco June 1, 2005, pet. denied) (the words, "'or' with right of survivorship" in a signature card was insufficient); *See In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied);

Banks v. Browning, 873 S.W.2d 763, 765 (Tex. App.—Fort Worth 1994, writ denied); *Mbank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 1992 Tex. App. LEXIS 2651 (Tex. App.—Corpus Christi 1992, no writ); *Ephran v. Frazier*, 840 S.W.2d 81, 83 (Tex. App.—Corpus Christi 1992, no writ); *Shaw v. Shaw*, 835 S.W.2d 232 (Tex. App.—Waco 1992, writ denied) (a bank signature card that used the language "Joint with Survivorship," was insufficient to create an ownership interest); *Kitchen v. Sawyer*, 814 S.W.2d 798 (Tex. App.—Dallas 1991, writ denied); *Martinez v. Martinez*, 805 S.W.2d 873 (Tex. App.—San Antonio 1991, no writ).

For example, one court held that where the agreement merely stated that an account was a "Joint Account with Right of Survivorship," that language alone did not substantially comply with Section 439(a) and was insufficient to establish rights of survivorship. See *Ivey v. Steele*, 857 S.W.2d 749, 751 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In *Pressler v. Lytle State Bank*, a party attempted to prove that funds in a joint account belonged to her instead of the estate of the deceased joint owner due to right of survivorship language on the signature card. 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no pet.). The signature card had the survivorship language marked with an "X" on the card, but there was no evidence that the deceased owner marked the "X". See *id.* A jury held that the funds were the property of the estate, and the other owner appealed. See *id.* The court of appeals affirmed the judgment awarding the funds to the estate.

In *Norman v. Finley*, the court held that where there was no signature card for an alleged survivorship account, the funds therein belonged to the estate despite after-the-fact research showing that the account was set up as a survivorship account:

Kimberly contends that the only evidence presented regarding ownership was Kimberly's testimony that based on her research, the account was a joint

account with right of survivorship. Because no contrary evidence was presented, Kimberly asserts that the probate court could not disregard her testimony. The appellees counter that the probate court was free to disregard Kimberly's testimony based on her failure to produce the written joint account agreement.

Section 439 of the Texas Probate Code governs the right of survivorship in accounts. Section 439 provides that sums remaining on deposit will belong to the surviving party against the estate only if the interest of the decedent is made to survive to the surviving party by a written agreement. Accordingly, "for proving a right of survivorship in a joint account ... the Legislature has determined that ... a written agreement signed by the decedent is required." Because Kimberly failed to introduce a written agreement signed by Theresa into evidence, she failed to establish a right of survivorship in the account.

No. 04-01-00394-CV, 2002 Tex. App. LEXIS 1646 (Tex. App.—San Antonio March 6, 2002, no pet.) (not. design. pub.) (internal citation omitted).

H. Method To Revoke Or Amend Survivorship Accounts

"Once [a] survivorship agreement [is] in place, the only means of revoking it [is] pursuant to [Section 455 of the Texas Probate Code], i.e., through a subsequent written agreement or a disposition of the assets covered by the agreement." *Holmes v. Beatty*, 290 S.W.3d 852, 861-62 (Tex. 2009). See also TEX. PROB. CODE ANN. § 455 (revocation of agreement to create

survivorship rights in community property); *Asafi v. Rauscher*, No. 14-10-00606-CV, 2011 Tex. App. LEXIS 7424, at *13(Tex. App.—Houston [14th Dist.] Sept. 13, 2011, pet. denied). Moreover, provision 440 states:

The provisions of Section 439 of this code as to rights of survivorship are determined by the form of the account at the death of a party. Notwithstanding any other provision of the law, this form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime.

TEX. PROB. CODE ANN. §440; *Rogers v. Shelton*, 832 S.W.2d 709 (Tex. App.—Eastland 1992, no writ) (survivorship effect did not apply to a party later added to account where neither of the original parties to the account, prior to their deaths, had ever given the bank a written order changing the form of the account to include the heir).

III. JOINT ACCOUNTS BETWEEN SPOUSES

Texas has not always allowed spouses to create rights of survivorship in community property. In *Hilley v. Hilley*, the Texas Supreme court held that it was unconstitutional for spouses to hold community property with rights of survivorship. 342 S.W.2d 565, 568 (Tex. 1961). See also *Allard v. Frech*, 754 S.W.2d 111, 115 (Tex. 1988) ("This holding is based on a firmly rooted principle of community property law which requires the actual partition of community property before a valid joint tenancy with the right of survivorship can be created."); *Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex.

1981) (same); *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966) (any statutory attempt to grant survivorship rights in community property would be unconstitutional). The only way for a couple to create survivorship rights was to partition their community property into separate property and then execute survivorship agreements for that separate property. See *Williams*, 402 S.W.2d at 508. This process came to be known among practitioners as the "Texas Two-Step." See, e.g., Robert N. Virden, *Joint Tenancy with Right of Survivorship & Community Property with Right of Survivorship*, 53 TEX. B.J. 1179, 1179 (1990).

In 1987, Texas approved a constitutional amendment authorizing rights of survivorship in community property. See *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009). The amendment provided that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." *Id.* (citing TEX. CONST. art. XVI, § 15). Two years later, the Legislature amended the Probate Code to reflect this change. See *id.* This new section governs "[a]greements between spouses regarding rights of survivorship in community property." TEX. PROB. CODE § 46(b).

Probate Code section 451 states: "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse." TEX. PROB. CODE § 451. Section 452 provides the formalities of effectuating section 451:

(a) An agreement between spouses creating a right of survivorship in community property must be in writing and signed by both spouses. If an agreement in writing is signed by both spouses, the agreement shall be sufficient to create a right of survivorship in the community property described

in the agreement if it includes any of the following phrases:

- (1) "with right of survivorship";
 - (2) "will become the property of the survivor";
 - (3) "will vest in and belong to the surviving spouse"; or
 - (4) "shall pass to the surviving spouse."
- (b) An agreement that otherwise meets the requirements of this part, however, shall be effective without including any of those phrases.
- (c) A survivorship agreement will not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.

TEX. PROB. CODE § 452.

The purpose of the amendment and accompanying legislation "was to provide '[a] simple means . . . by which both spouses by a written instrument can provide that the survivor of them may be entitled to all or any designated portion of their community property without the necessity of making a will for that purpose.'" *Holmes*, 290 S.W.3d at 856. "[M]any banks and savings and loans associations have often failed to provide forms by which their customers can create effective joint tenancies out of community property," and the amendment addressed these concerns by removing the constitutional hurdles to creating rights of survivorship in community property. *Id.*

After the amendment, spouses' attempts to create joint accounts with rights of survivorship were enforced. *See Haas v. Voight*, 940 S.W.2d 198 (Tex. App.—San Antonio 1996, writ denied). However, nonspouses can

still not create a joint account with rights of survivorship over community funds. *See id.* To do so, the property must first be partitioned or gifted and thus transitioned into separate property. *See id.* So, for example, a father and son cannot create a survivorship account based out of community funds owned by the father and mother. *See id.*

In *Holmes v. Beatty*, there was a dispute regarding whether certain accounts with spouses listed on them had survivorship effect. 290 S.W.3d 852 (Tex. 2009). The court of appeals had held that the strict parol evidence rule set forth in *Stauffer v. Henderson* would apply to this dispute: "if we must look outside the written instrument to determine that a term used therein means 'right of survivorship,' the parties have not expressed their intent within the written instrument." *Id.*

The Texas Supreme Court disagreed. *See id.* at 858. It held that section 439(a) required that a survivorship agreement between non-spouses use either the statute's language or a substitute that is "in substantially the [same] form." *Id.* Therefore, the Court noted that section 452 is less restrictive, presumably because agreements between spouses are less vulnerable to fraud. *See id.* The Court also stated that "the constitutional amendment permitting survivorship agreements in community property was intended to facilitate the creation of such agreements . . . and the Legislature's use of less confining language comports with that goal." *Id.*

The Court found that a "Joint (WROS)" designation on an account was sufficient to create rights of survivorship in community property. *See id.* Because the agreements' survivorship language conferred survivorship rights in the securities certificates until the decedents' disposed of them, the certificates passed to the surviving spouse pursuant to those rights. *See id.*

In *Phillips v. Ivy*, there was a dispute between a daughter and a surviving spouse regarding funds from eleven CDs. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex.

App.—Waco Aug. 18 2004, pet. denied). The jury found that eleven CDs had rights of survivorship effect and that the funds should go to the surviving spouse. *See id.* On appeal, the surviving spouse pointed to no evidence, documentary or otherwise, that suggested any agreement connected to the eleven CDs was signed by the deceased spouse. *See id.* Given those facts, the appellate court concluded that the jury could not reasonably have formed a firm belief or conviction that any of the eleven CDs were joint tenancies with rights of survivorship. *See id.* The court of appeals held for the daughter.

So, property owned by spouses as joint tenants with a right of survivorship is a nontestamentary asset and is governed by chapter XI of the Probate Code concerning nontestamentary transfers. *See Rowsey v. Matetich*, No. 03-08-00727-CV, 2010 Tex. App. LEXIS 6532, at *23 (Tex. App.—Austin Aug. 12, 2010, no pet.). And, the standard for proving right of survivorship for those accounts is much less strict than for accounts involving non-spouses. *See Willy v. Winkler*, No. 01-10-00115-CV, 2010 Tex. App. LEXIS 10118, n.3 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.).

The statute does provide that both spouses have to sign the account agreement. Where only one spouse signs the agreement, a court will not give the account survivorship effect. *See Phillips v. Ivy*, No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco August 18, 2004, pet denied).

IV. BURDEN OF PROVING ENFORCABLE SURVIVORSHIP ACCOUNTS

Funds in an account that were owned by a decedent are presumed to be assets of the decedent's estate, and a party asserting a right to funds from an account has the burden to prove otherwise by producing a valid and enforceable agreement. *See Pressler v. Lytle State Bank*, 982 S.W.2d 561 (Tex. App.—San Antonio 1998, no pet.) (citing *Union City Transfer v. Adams*, 248 S.W.2d 256, 260 (Tex. Civ. App.—Fort Worth

1952, writ ref'd n.r.e.)). The burden is by a preponderance of the evidence. In *Pressler*, the court stated:

Pressler concedes J.D. Weaver owned the funds in Account 508845 before his death. Accordingly, at Weaver's death, if there were no evidence the account was a joint account with a right of survivorship, the funds in the account would pass to his estate. As a result, a party who claims to own an account as the survivor of a joint account with right of survivorship bears the burden of proving her claim. Pressler was therefore correctly made to bear the burden of proving the facts necessary to establish her ownership of the account.

In short, Pressler was no more entitled to a presumption that Account 508845 was a joint account with a right of survivorship because she was in possession of the funds than was Mary K. Stauffer, who also withdrew funds shortly after her co-signatory's death. Regardless of who possessed the funds, they belonged to the Estate of J.D. Weaver unless Pressler introduced a valid written agreement creating a joint account with right of survivorship. Pressler was thus properly made to bear the burden of proving the validity of the agreement by which she contended she owned the account.

Id. at 264-65.

Lost documents provide a wrinkle to the burden of proof. One court held that to prove the contents of a lost bank agreement, the plaintiff has the burden to establish same by

clear and convincing evidence: "When a written, signed contract is lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the existence and terms of the written contract may be shown by *clear and convincing* parol evidence." See *Bank of America, N.A. v. Haag*, 37 S.W.3d 55, 58 (Tex. App.—San Antonio 2000, no writ) (emphasis added).

In *Phillips v. Ivy*, the court of appeals questioned whether the clear and convincing standard should apply to an agreement that does not involve real property. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539, at *5-6 (Tex. App.—Waco Aug. 18 2004, pet. denied). Because the parties submitting the issue of the lost account documents in the charge based on a clear and convincing evidence standard, the court applied that standard. See *id.* The court set forth that standard as follows:

[B]ecause the burden of proof at trial was clear and convincing evidence, on appeal we apply a higher standard of legal sufficiency review than is ordinarily employed in civil cases. In reviewing the evidence for legal sufficiency, we must determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction" that each account had a right of survivorship provision. We must review all the evidence in the light most favorable to the finding and judgment. This means that we must assume that the factfinder resolved any disputed facts in favor of its finding if a reasonable factfinder could have done so. We must also disregard all evidence that a reasonable factfinder could have disbelieved. We must consider, however, undisputed evidence even if it does not support the finding.

Id. (internal citation omitted).

V. PROVING CONTENTS OF LOST BANK AGREEMENTS

The rule excluding extrinsic evidence to prove the survivorship effect of a bank agreement may not apply where the agreement is a lost document. In *Bank of America, N.A. v. Haag*, a depositor created a trust account for his son's education, but the signature card was lost. 37 S.W.3d 55, 58 (Tex. App.—San Antonio 2000, no writ). Later, his son withdrew all of the money in the account without the depositor's permission. See *id.* The depositor testified that he signed a signature card and testified to its contents, i.e., he was the only one on the signature card and that his son was not allowed to withdraw the money. See *id.* The trial court awarded judgment to the depositor and against the bank. See *id.* The bank appealed and argued that its statements and after-the-fact documents proved that the account allowed the son to withdraw funds from the account. See *id.* The court of appeals, however, dismissed this argument:

Bank of America seeks to rely on the account statements that commenced in 1990 as an unambiguous written agreement which the parol evidence rule prohibits from being contradicted or varied by extrinsic evidence. However, the account statements do not evidence the creation of the account, but simply record the information that was transferred to Bank of America's system from University Savings' system. The account statements are not the operative legal document that created the account.

Id. at 58. The court of appeals approved the trial court's admission of Haag's parol testimony because there was evidence that a signature card existed at one time but was lost. See *id.* The court stated: "When a written, signed contract is

lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the existence and terms of the written contract may be shown by clear and convincing parol evidence." *Id.* (citing *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 267 n.1 (Tex. App.—Corpus Christi 1994, writ denied); *Chakur v. Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App.—San Antonio 1950, no writ); Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 734-35 (1997)). The court concluded: "Because the written contractual documents evidencing the creation of Haag's account were not introduced into evidence, the trial court did not err in admitting Haag's testimony regarding the terms of the account." *Id.* Based on the testimony of the plaintiff, the court affirmed the jury's verdict that a trust account had been created and that the beneficiary had no right to withdraw the funds as the only person that may withdraw money from a trust account is the person claiming to be the trustee unless that person dies. *See id.* (citing TEX. FIN. CODE ANN. § 65.106(a)). *See also Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. denied) (testimony of bank's representative regarding contents of missing second page of account agreement was sufficient to support trial court's finding that account had survivorship effect).

In *Phillips v. Ivy*, the bank destroyed the CD after a spouse cashed it after the death of the other spouse. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco Aug. 18 2004, pet. denied). At trial, the surviving spouse was allowed to admit an "exemplar" CD of the type used during the relevant time. *See id.* at *10-11. But, the court of appeals ultimately ruled for the estate because there was no evidence, documentary or testimonial, that the deceased spouse ever signed the original agreement. *See id.* *See also In re Estate of Berger*, 174 S.W.3d 845, 846 (Tex. App.—Waco 2005, no pet.) (parol evidence admissible to prove contents of a trust agreement). Even though the surviving spouse testified that all of

the CDs were joint with rights of survivorship, her testimony was conclusory in that she did not testify that she had knowledge of all of the required elements for survivorship effect. *See id.* (Grey, J., concurring).

In *A.G. Edwards & Sons Inc. v. Breyer*, the Texas Supreme Court upheld the trial court's and the court of appeals' holding that allowed the plaintiff to introduce extrinsic evidence that proved the existence of a missing account agreement to establish the defendant bank breached a contract. 235 S.W.3d 704, 708 (Tex. 2007). The Texas Supreme Court allowed extrinsic evidence to prove a breach of contract claim when defendant bank was responsible for losing the agreement. *See id.* at 709.

VI. OWNERSHIP OF FUNDS IN A JOINT ACCOUNT

Disputes can arise between parties to an account regarding the right to withdraw money from the account. Initially, either party to a joint account has the authority to withdraw or encumber the account. *See* TEX. PROB. CODE ANN. §442; *McConathy v. McConathy*, No. 05-95-01036-CV, 1997 Tex. App. LEXIS 1592 (Tex. App.—Dallas April 1, 1997, no writ) (not design. for pub.); *Fain v. Texas Commerce Bank N.A.*, No. 05-95-01085, 1996 Tex. App. LEXIS 5860 (Tex. App.—Dallas December 4, 1996, writ denied). *But see Miller v. Unger*, No. 03-10-00795-CV, 2011 Tex. App. LEXIS 6125 (Tex. App.—Austin August 4, 2011, no pet.) (payable on death beneficiary has no right to withdraw funds from CD). Therefore, a third party can rely on the fact that a party to an account has authority to dispose of the funds. *See Fain*, 1996 Tex. App. LEXIS 5860. But, that does not answer the question: between the parties to the account, who owns the funds?

Joint accounts are considered "multiple-party accounts." TEX. PROB. CODE ANN. § 436(5). A "party" to such an account is defined as "a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account." *Id.* § 436(7). Section 438(a) states, "[a] joint account belongs, during the lifetime of all parties, to the

parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." *Id.* § 438(a). Section 437 explains that the pertinent statutes concern only the beneficial ownership of such accounts and have no bearing on the right of withdrawal:

The provisions of Sections 438 through 440 of this code that concern beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts.

Id. § 437.

For example, in *Nipp v. Broumley*, the case involved whether an estate or the son of the decedent owned funds that were in CDs that the son withdrew days before the decedent's death. 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.). Walterine Broumley purchased three CDs. They were payable to her or Terry Broumley, her son. *See id.* Eight days before her death, Terry cashed in all three CDs, worth about \$76,000. *See id.* Walterine Broumley's daughter, Nipp, learned about the existence of the CDs while caring for her mother. *See id.* After Nipp discovered that the CDs were not listed on the estate's inventory, she filed suit seeking a declaration that the CDs were property of the estate and an order requiring Terry to reimburse the estate for their value. *See id.* The trial court ruled for Terry after a bench trial. Nipp appealed. *See id.*

The court of appeals began its analysis by discussing the rules for ownership over the money in accounts. *See id.* After citing various Probate Code and UCC provisions, the court of appeals noted that it was undisputed that Mrs. Broumley was the sole source of the funds in the

CDs, and therefore, she retained beneficial ownership of these funds at the time of the withdrawal unless Terry Broumley could prove that she gifted these funds to him. *See id.*

The elements for a gift are: (1) the donor's intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. Donative intent must exist at the time of the transfer, not at the time of a subsequent event. *See id.* Terry Broumley's burden was to prove a gift by clear and convincing evidence. *See id.* The requisite donative intent is established by, among other things, evidence that the donor intended an immediate and unconditional divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee. *See id.*

The evidence showed that Terry testified that there were several instances over the years when his mother discussed with him her intent that he have the funds from the CDs to use as he needed or as he pleased. *See id.* The last time that they had such a conversation was an unspecified time before the bad days of her illness, when she started receiving hospice care. *See id.* Terry admitted that during this same time period, his mother retained the authority to cash the CDs herself. In fact, she kept the CDs in a lock box in her house where they remained until Terry retrieved them and cashed them at the bank. *See id.*

The court determined that this was not sufficient evidence to support a gift. *See id.* First, the evidence established that days or weeks passed between the date of Terry's last conversation with his mother about the CDs and the date he cashed them. *See id.* And second, his mother retained control over the funds until the date Terry withdrew them. *See id.* Thus, the court concluded that no reasonable factfinder could have formed a firm belief or conviction that an immediate and unconditional divestiture of his mother's ownership occurred on the occasion of their last conversation regarding her intentions about the CDs. *See id.* Therefore, the court reversed the trial court's judgment awarding the funds to Terry and rendered that

the funds from the CDs were the property of the estate. *See id.*

Assertions of gifts often arise in the context of a joint account. In *Oadra v. Stegall*, the second party to a trust account asserted that the first party intended to gift the funds in the account. 871 S.W.2d 882 (Tex. App.—Houston [14th Dist.] 1994, no pet.). The jury returned a verdict that there was no gift. The court of appeals affirmed. The court emphasized that to have a gift there has to be some immediate divestiture of rights of ownership and a release of dominion and control. *See id.* at 890. The court pointed to the following evidence in the record to support the jury's answer: the first party funded the entire account, was a trustee on the account, did not remove his name from the account, and continued to exercise exclusive control over the account. *See id.* Indeed, simply adding someone to a joint account is not sufficient to prove donative intent to create a gift of the funds in the account. *See McNair v. Deal*, No. 13-05-264-CV, 206 Tex. App. LEXIS 10274 (Tex. App.—Corpus Christi November 30, 2006, pet. denied); *McConathy v. McConathy*, 1997 Tex. App. LEXIS 1592. Regarding trust accounts, the death of one party to the trust account does not create survivorship rights in the remaining trustee absent language that expressly so provides. *See Stegall v. Oadra*, 868 S.W.2d 290 (Tex. 1993).

If a joint account is determined to not have survivorship language, then before a court can award the money in the account to an estate, the estate representative has to prove that the funds in the account were all the decedent's funds. *See In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied). Any funds that were deposited by the beneficiary into a joint account without survivorship effect belongs to the beneficiary after a co-party's death. *See id.*

Moreover, if a party withdraws money from a joint account without permission from the true owner, then that party may be criminally charged and convicted of theft. *See Gurrola v. State*, No. 08-01-00107-CR, 2003 Tex App.

LEXIS 8913 (Tex. App.—El Paso October 16, 2003, pet. ref'd) (court affirmed niece's conviction for felony theft from withdrawing aunt's funds from joint account).

It should be noted that an estate may use funds in a joint account where estate assets are not sufficient to pay expenses. *See* TEX. PROB. CODE ANN. §442 ("No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse and minor children, if other assets of the estate are insufficient."); *Estate of Preston*, 346 S.W.3d 137 (Tex. App.—Fort Worth 2011); *In re Harden*, 2004 Tex. App. LEXIS 6413 (Tex. App.—Fort Worth July 15 2004, original proceeding).

VII. BANK'S ABILITY TO OFFSET FUNDS IN JOINT ACCOUNT

Texas Probate Code section 449 provides:

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

TEX. PROB. CODE ANN. §449.

Banks have a right to offset and apply a depositor's general deposit to an indebtedness the depositor owes the bank on another account. *See Bandy v. First State Bank*, 835 S.W.2d 609 (Tex. 1992); *First Nat'l Bank v. Winkler*, 139 Tex. 131, 161 S.W.2d 1053, 1056 (1942); *Security State Bank & Trust Co. v. Texas Bank & Trust Co.*, 466 S.W.2d 590, 592 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.). Accordingly, a bank can offset a debt by applying funds in a joint account.

Trust accounts add an additional wrinkle to this analysis. A bank cannot offset a debt owned by one person by funds in an account owned by another. *See Soto v. First Gibraltar Bank*, 868 S.W.2d 400 (Tex. App.—San Antonio 1993, writ ref'd). Texas courts have held that where the trust account is a revocable tentative trust, then the creditor can reach the funds in the account. *See id.* at 402. Even if a settlor intends for a trust account to be a final disposition of property, it is the account agreement that controls. *See id.* at 403-04. If the account agreement states that the trust is a tentative trust where the settlor has the power to withdraw the funds, the bank can use those trust funds to offset other debts owed by the settlor. *See id.*

VIII. SAFE HARBOR PROVISION PROTECTING A FINANCIAL INSTITUTION FOR PAYING FUNDS IN ACCOUNTS

A financial institution has a statutory protection from account holders' claims arising from the bank paying a party to the account. Section 444 of the Texas Probate Code provides:

Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. A multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party

account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

TEX. PROB. CODE ANN. § 444.

Section 445 provides in pertinent part, "Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded." *Id.* § 445. And, section 448 provides in pertinent part: "Payment made as provided by Section 444, 445, 446, or 447 of this code discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors." *Id.* § 448. Therefore, a financial institution cannot be liable for paying funds in an account to a party on the account.

For example, once again, in *Nipp v. Broumley*, the court of appeals noted that the defendant, as a party to the account, had a right to withdraw all of the money in the CDs he held with his mother and that the bank could not be held liable for allowing him to do so even though the son did not have any beneficial ownership in those funds. 285 S.W.3d at 552. The estate's only claims were against the defendant, not the bank. *See id.* *See also Bandy v. First State Bank*, 835 S.W.2d 609, 615-16 (Tex. 1992) (holding bank is not liable for paying funds to one of named holders of a joint account, even after executor of other named holder's estate demanded payment); *Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887-CV, 2010 Tex. App. LEXIS 4376, at *12-13 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.); *MBank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1992, no writ) ("Thus, between competing interests in a joint account, the bank is fully discharged from liability when it pays the other party on the account, unless one of the parties gives written notice to the bank that no payment should be made").

IX. ARBITRATION

Most account agreements contain arbitration clauses. Courts routinely require parties to an account agreement to arbitrate disputes that fall within the scope of the arbitration clause. *See Prudential Securities Inc. v. Banales*, 860 S.W.2d 594 (Tex. App.—Corpus Christi 1993, original proceeding).

X. CLAIMS AGAINST BENEFICIARIES OF ACCOUNTS

A. Estate Representative May File Claims

Where there is a dispute regarding the withdrawal of funds in an account or the creation of the account itself, a representative of an estate has a statutory duty to raise claims on behalf of the estate. Texas Probate Code section 233(a) states: "every personal representative of an estate *shall* use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title. . . ." TEX. PROB. CODE § 233(a). Moreover, if the personal representative fails to do so, it can be liable to the estate for such failure. *See id.* Further, Texas Probate Code § 233A states:

Suits for the recovery of personal property, debts, or damages and suits for title or possession of lands or for any right attached to or growing out of the same or for injury or damage done thereto may be instituted by executors or administrators appointed in this state; and judgment in such cases shall be conclusive, but may be set aside by any person interested for fraud or collusion on the part of such executor or administrator.

TEX. PROB. CODE § 233A. Indeed, the representative of a decedent's estate is the correct party to file claims on behalf of the estate. *See Frazier v. Wynn*, 472 S.W.2d 750 (Tex. 1971) (holding that heir did not have

standing to file claim of decedent where it was not shown that an administration was not necessary). *But see In re Estate of Graffagnino*, 2002 Tex. App. LEXIS 6930, at *5 (Tex. App.—Beaumont Sept. 26, 2002, pet. denied) (heirs had standing to file declaratory relief claims against account beneficiary regarding survivorship status of account).

Furthermore, the representative of an estate does not owe any duty to a person listed on a joint account as those funds pass outside of probate. *See In re Ernst*, No. 04-10-00319-CV, 2011 Tex. App. LEXIS 182, at *4-5 (Tex. App.—San Antonio Jan. 12, 2011, no pet.).

Rather, the representative owes fiduciary duties to the beneficiaries of the estate. *See Wells Fargo Bank, N.A. v. Crocker*, No. 13-07-00732-CV, 2009 Tex. App. LEXIS 9791 (Tex. App.—Corpus Christi December 29, 2009, pet. denied). An executor owes the same fiduciary duties that are applicable to trustees. *See id.* (citing *Lesiker v. Rappeport*, 33 S.W.3d 282, 296 (Tex. App.—Texarkana 2000, pet. denied)). This includes the duty of full disclosure of all material facts known to it that may affect the beneficiary's rights. *See id.* A fiduciary also "owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Punts v. Wilson*, 137 S.W.3d 889 (Tex. App.—Texarkana 2004, no pet.) (citing *Ludlow v. DeBerry*, 959 S.W.2d 265, 279 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

In *Crocker*, the court of appeals affirmed a jury's finding that a corporate executor breached its fiduciary duty by failing to disclose to beneficiaries that there was a joint account with an issue regarding survivorship status. 2009 Tex. App. LEXIS 9791. Ultimately, the executor prevailed because the court held that the beneficiaries did not prove causation, that the account did not have survivorship status and that the estate had a right to the funds. *See id.*

But, an estate representative does not breach a duty to seek the return of funds in a valid survivorship account, as those funds pass

outside of probate. See *Punts v. Wilson*, 137 S.W.3d at 893.

B. Representative May Not Obtain Non-Probate Funds Until Proper Determination Is Made

Texas Probate Code section 442 authorizes the use of multi-party account funds to pay debts, taxes, and expenses of administration under certain circumstances. TEX. PROB. CODE ANN. § 442. Three of the circumstances that must exist are that (1) the assets of the estate must be insufficient to pay the debts, taxes, and expenses of administration; (2) the estate's personal representative must have received a written demand by a surviving spouse, a creditor, or one acting for a minor child of the decedent; and (3) a proceeding to assert the liability of a multi-party account to an estate must be commenced no later than two years following the death of the decedent. See *id.* Absent this showing, a trial court has no discretion to require a party to forward joint account funds to an estate's representative. See *In re Harden*, No. 02-04-122-CV 2004 Tex. App. LEXIS 6413 (Tex. App.—Fort Worth July 15, 2004, no pet.).

Moreover, in *In re Harden*, the court of appeals held that a trial court abused its discretion in allowing an estate to fund the cost of obtaining medical records regarding the issue of whether the decedent was of sound mind to execute joint account agreements. See *id.* at *8-9. "We hold that the trial court abused its discretion by authorizing the Temporary Administrator to expend estate funds to obtain copies of Ellen's medical records to discharge a nonexistent fiduciary obligation concerning nonprobate assets." *Id.*

C. Breach of Fiduciary Duty Claim

The representative of the estate may raise a breach of fiduciary duty claim against the party improperly creating a joint account with rights of survivorship or improperly withdrawing funds. See, e.g., *Porter v. Denas*, No. 2006 Tex. App. LEXIS 5259 (Tex. App. San Antonio June 21, 2006, pet. denied); *Hooks*,

v. Hooks, No. 2-03-263-CV, 2004 Tex. App. LEXIS 6679 (Tex. App.—Fort Worth July 22, 2004, pet. denied) (party liable for breach of fiduciary duty and exemplary damages for improperly using joint account); *Evans v. First Nat'l Bank*, 946 S.W.2d 367 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (fact issue on whether party breached fiduciary duty by being named survivorship beneficiary).

There are two types of fiduciary relationships in Texas: (1) a formal fiduciary relationship arising as a matter of law, such as between partners or an attorney and a client, and (2) an informal or confidential fiduciary relationship arising from a moral, social, domestic, or merely personal relationship where one person trusts in and relies upon another. See *Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). For example, a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law. See *Vogt v. Warnock*, 107 S.W.3d 778, 782 (Tex. App.—El Paso 2003, no. pet.); *Plummer v. Estate of Plummer*, 51 S.W.3d 840, 842 (Tex. App.—Texarkana 2001, pet. denied); *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied). A fiduciary owes her principal a high duty of good faith, fair dealing, honest performance, and strict accountability. See *Sassen*, 877 S.W.2d at 492.

When the transaction is between the principal and the fiduciary, the fiduciary must show proof of good faith and that the transaction was fair, honest, and equitable. See *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507-08, 23 Tex. Sup. Ct. J. 149 (Tex. 1980); *Miller v. Miller*, 700 S.W.2d 941, 946-47 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). A transaction is unfair if the fiduciary significantly benefits from it at the expense of the beneficiary, as viewed in the light of circumstances existing at the time of the transaction. See *Miller*, 700 S.W.2d at 947; *Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "The fiduciary must show proof of good faith and that the transaction was fair, honest, and equitable." *Collins*, 53 S.W.3d at 840.

This presumption of unfairness applies to account transactions. *See, e.g., Porter v. Denas*, 2006 Tex. App. LEXIS 5259 (the court of appeals affirmed a finding that two attorneys breached their fiduciary duty to their client by being listed as beneficiaries of a survivorship account.); *Alford v. Marino*, No. 14-04-00912-CV, 2005 Tex. App. LEXIS 10162 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no pet.) (requiring the fiduciary to rebut the presumption the withdrawals he made from the principal's account during her lifetime were unfair); *Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 379-80 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (stating that the presumption may apply when ownership of the CDs is resolved); *Townes v. Townes*, 867 S.W.2d 414, 417-18 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (applying the presumption after the fiduciary, and also a signatory on the CDs owned by the decedent, made withdrawals before the decedent's death).

For example, in *Texas Bank and Trust Company v. Moore*, the Texas Supreme Court found, as a matter of law, that a fiduciary relationship existed between a 96-year-old woman and a nephew who was helping handle her financial affairs and that the nephew breached the duties he owed to his aunt. 595 S.W.2d 502 (Tex. 1980). The Court described the facts as follows:

At age 90, in January 1967, Mrs. Littell suffered a broken hip and was hospitalized until March 30, 1967. She was then admitted to a Convalescent Center where she remained, with the exception of an interruption for further hospitalization, until her death on July 12, 1972, at age 96. During this time she was seriously incapacitated with respect to control of her bodily functions; she suffered from impaired hearing and eyesight; and she reached a state of confusion. Moore handled her financial affairs during this

period and progressively gained control of the funds in question: first, as her agent under a power of attorney in writing checks on her accounts; then by transfers to him as co-owner of her various accounts. Of specific concern in the posture of the case here, Moore was the beneficiary in the transfer by Mrs. Littell of two of her accounts to him, i. e., as joint tenants with rights of survivorship. He also took possession of her jewelry.

Id. at 505. The administrator of the decedent's estate filed suit for breach of fiduciary duty against the nephew, and the jury found that the decedent did not intend to make a gift to her nephew when she created the survivorship accounts. *See id.* The jury awarded the funds formerly in the accounts to the estate and awarded the estate punitive damages. *See id.*

The Texas Supreme Court affirmed this verdict. *See id.* The Court stated that when the nephew accepted transfers from his aunt to him as joint tenant with rights of survivorship, he consented to have his conduct "measured by the standard of finer loyalties." *Id.* The Court stated that the defendant did not rebut the presumption of unfairness, and found that allowing him to retain the funds in the accounts would frustrate her intentions as expressed in her will:

These testamentary dispositions of Mrs. Littell will be frustrated if Moore is not held to account for the funds of Mrs. Littell he took over after her death. These funds would constitute a part of the residuary estate of Mrs. Littell devised to other persons, the recovery of which is the stated purpose of the administrator of her estate in this suit.

Id. at 510. The Texas Supreme Court found that

the administrator proved a breach of fiduciary duty as a matter of law and affirmed the trial court's judgment on behalf of the administrator recouping the proceeds from the accounts and awarding punitive damages. *See id.*

Similarly, in *Porter v. Denas*, the court of appeals affirmed a finding that two attorneys breached their fiduciary duty to their client by being listed as beneficiaries of a survivorship account. 2006 Tex. App. LEXIS 5259. The court described the facts as follows:

In the judgment, the trial court stated that the Porters breached a fiduciary duty owed to Alice. The record shows that the Porters were named as the IRA beneficiaries on April 5, 1996. However, on this same day, a note was created which stated, "Change Beneficiaries to Stephanie and Steven Porter [on] all CD[s,] IRA...." The evidence suggested that this note was in Stephanie's handwriting, thus attesting to the Porters' knowledge that they were listed as the IRA beneficiaries. It was undisputed that Alice's intent was to leave nearly everything to James. After James divorced his first wife, Alice had her will changed to omit the trust and provide James with the estate outright. Despite Alice's changes to the will to reflect her intent, the Porters still remained as the IRA beneficiaries. An inventory and list of claims was created regarding Alice's assets which revealed that Alice's estate consisted of nearly \$ 114,000, excluding the \$ 54,000 IRA. However, added together, the IRA amounted to more than 32% of Alice's assets. Witnesses stated that after Alice's death, Stephanie said that the money in the IRA was not hers and even

inquired about changing the IRA beneficiary from herself to James.

As the fact finder, the trial court could have believed that the Porters' fiduciary duties included, within the scope of their relationship, advice regarding Alice's IRA. Additionally, the trial court could have determined that the Porters failed to deal fairly or in good conscience with Alice.

Id. at *9-10.

However, every self-dealing transaction does not establish a breach of fiduciary duty as a matter of law. In *Plummer v. Estate of Plummer*, a daughter sued her brother and sister for withdrawing all of the money in a CD, owned by their mother, where the plaintiff was a survivorship beneficiary and depositing those funds in a checking account where the brother and sister were survivorship beneficiaries. 51 S.W.3d 840 (Tex. App.—Texarkana 2001, no writ). The brother and sister owed fiduciary duties to the mother due to having her power of attorney. *See id.* The court described the issue of whether the brother and sister breached their duty to their mother: "whether ... transferring this money to an account in which they had the right of survivorship used their advantage, the power of attorney, to gain benefit for themselves at the expense of their mother and thus place themselves in a position where their self-interest conflicted with their obligations as a fiduciary." *Id.* The jury found that there was no breach of fiduciary duty. The court of appeals affirmed, finding that there was evidence in the record to support that result. The evidence showed that the brother and sister had made the transfer to consolidate the mother's funds to assist in paying medical and nursing home bills. *See id.* *See also Campbell v. Campbell*, No. 03-07-00672-CV, 2010 Tex. App. LEXIS 4598 (Tex. App.—Austin June 18, 2010, no pet.) (summary judgment in favor of executor on breach of fiduciary duty claim against beneficiary was reversed); *Jackson v. Smith*, 53 S.W.3d 832,

841 (Tex. App.—Houston [1st Dist] 2001, no pet.).

Before a party can be liable for breach of fiduciary duty, the party must owe fiduciary duties. In *In the Estate of Abernethy*, Achor was a certified public accountant who met Abernethy in 1998 and prepared tax returns for Abernethy from then until Abernethy's death in 2008. No. 08-11-00020-CV, No. 08-11-00020-CV, 2012 Tex. App. LEXIS 4272 (Tex. App.—El Paso May 30, 2012, no pet. history). Not only did Abernethy and Achor enjoy a business relationship, they enjoyed a social one. *See id.* Achor visited Abernethy in her home and sent her cards and notes, and likewise, Abernethy sent notes and cards to Achor, expressing Abernethy's gratitude to Achor for being her best friend and so intimately involved in her life. *See id.*

Abernethy designated Achor as the beneficiary of an IRA and several joint multi party bank accounts with right of survivorship. After Abernethy's death, the funds in the bank accounts and IRA passed to Achor, who received approximately \$1.2 million. *See id.* The independent administrator of Abernethy's estate sued Achor, alleging that Achor's relationship with Abernethy created a fiduciary relationship between them and that Achor breached that duty when she became the beneficiary of Abernethy's accounts. *See id.*

In the trial court, Achor moved for summary judgment, and the administrator responded attaching several exhibits, including depositions of witnesses and financial documents. *See id.* After sustaining many objections to the adequacy of the response, the trial court granted Achor's motion for summary judgment, and the administrator appealed. *See id.*

The court of appeals addressed whether Achor owed fiduciary duties to Abernethy. *See id.* The court stated that the term "fiduciary" refers to a person owing a duty of integrity and fidelity, and it applies to any person who occupies a position of peculiar confidence towards another. *See id.* According to the court,

there are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as attorney client, partnership, trustee, and principal agent relationships, and informal fiduciary relationships or "confidential relationships" that may arise from moral, social, domestic, or personal relationships. *See id.*

The court stated that the accountant client relationship does not always involve a fiduciary duty. *See id.* Whether a fiduciary duty exists in an informal relationship is to be determined from the actualities of the relationships between the persons involved. *See id.* The mere fact that one party subjectively trusts another party does not alone indicate that confidence is placed in another in a sense demanded by fiduciary relationships because something apart from the transaction between the parties is required. *See id.* Rather, a fiduciary relationship may arise if the dealings between the parties have continued for such a period of time and a party is justified in relying on another to act in his best interest. *See id.* A party is justified in placing confidence in the belief that another party will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party, and there exists a long association in a business relationship as well as personal friendship. *See id.*

The court found that while it was fairly obvious that Achor and Abernethy had a close personal friendship, the administrator failed to produce summary judgment evidence that they had a fiduciary relationship, informal or otherwise. *See id.* The administrator produced no evidence that Abernethy was accustomed to being guided by Achor's judgment and advice in legal, financial, and accounting matters. *See id.* In the absence of any such evidence, the existence of a lengthy, cordial, and close relationship between Achor and Abernethy, standing alone, did not establish a confidential relationship arising to the level of a fiduciary relationship. *See id.* The court acknowledged that the evidence that Abernethy designated Achor as a beneficiary of the IRA and established the joint accounts was sufficient to

show that Abernethy placed some degree of subjective trust in Achor; however, that evidence did not show the level of trust and reliance necessary to establish the existence of a fiduciary relationship. *See id.* The court of appeals affirmed the judgment in favor of Achor.

D. Mental Competence and Undue Influence

An estate representative can assert that a decedent did not have the mental capacity to execute bank agreements creating survivorship effect or can allege that a third-party unduly influenced the decedent. *See Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App.—Amarillo 2001, no pet.). Absent proof and determination of mental competence, a person who signs a document is presumed to have read and understood the document. *See id.* Elderly persons are not presumptively incompetent. *See id.* (citing *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998)). A person may be incompetent at one time and competent at other times. *See id.*

In deciding whether undue influence resulted in execution of a document, three factors are to be considered: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the grantor's mind when the document was executed; (3) whether the grantor would not have executed the document but for the influence. *See id.* (citing *Dulak v. Dulak*, 513 S.W.2d 205, 209 (Tex. 1974)).

For example, in *Dubree*, the court of appeals affirmed a jury's determination that a decedent had mental competence when she created a survivorship account. *See id.* The court noted that no one testified regarding the decedent's mental competence at the time that she signed the account agreement. *See id.* Though experts testified that the decedent had diminished capacity in general, they admitted that persons in that condition could have periods of lucidity. *See id.* at 290. There was also conflicting lay testimony regarding the decedent's mental competence and ability to

handle her financial affairs. *See id.* The court held that this was sufficient to support the jury's finding of competence. *See id.*

The court also affirmed the jury's finding that the decedent was not unduly influenced. *See id.* at 291. The evidence showed that the bank agreement was presented to the decedent by third parties, and there was no evidence of the decedent's mental incompetence at the time the agreement was signed. *See id.*

E. Statute of Limitations

Most claims regarding the proceeds from a joint account are raised by estate representatives. Section 16.003(a) of the Texas Civil Practice and Remedies Code provides that a suit for injuries caused to an estate or property of another must be brought within two years after the day the cause of action accrued. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a); *Washington v. Lackland Federal Credit Union*, No. 04-04-00416, 2004 Tex. App. LEXIS 10987 (Tex. App.—San Antonio December 8, 2004, no pet.) (statute of limitations barred representative's claim); *Estate of Lowrey*, No. 11-07-00033-CV, 2008 Tex. App. 9414 (Tex. App.—Eastland December 18, 2008, no pet.) (same). *But see Oadra v. Stegall*, 871 S.W.2d 882, 887 (Tex. App.—Houston [14th Dist.] 1994, no writ) (court stated that it was not necessary for an estate to file suit to claim what was, as a matter of law, its own property). Other individuals may have other statutes of limitations that apply depending upon the claims asserted.

In applying the statute of limitations, a cause of action accrues when facts come into existence that gives a claimant the right to seek a remedy in the courts. *See Estate of Lowrey*, 2008 Tex. App. LEXIS 9414 at *4. Regarding appropriating the funds in CD, one court held that the estate representative's claim accrued when the defendant cashed the CDs. *See id.*

One court has held that the discovery rule did not apply where the plaintiff had access to bank records and could have discovered the withdrawal of the funds. *See Urbanczyk v.*

Urbanczyk, No. 07-07-0077-CV, 2009 Tex. App. LEXIS 587 (Tex. App.—Amarillo January 29, 2009, no pet.). For the same reason, the court also rejected a fraudulent concealment allegation. *See id.*

XI. CLAIMS BY BENEFICIARIES AGAINST FINANCIAL INSTITUTIONS FOR NOT PAYING FUNDS IN THE ACCOUNT

Often a bank will have notice that various parties are fighting over the funds in an account. In that circumstance, the bank may elect to freeze the account and not pay those funds to any party. It may also elect to interplead the funds into the registry of the court. When it elects to not pay those funds to a demanding party to the account, the demanding party may assert claims.

A. Breach of Contract Claims

Whether a bank has breached a depository agreement is controlled by the language of the depository agreement. *See e.g., Rodriguez v. NBC Bank*, 5 S.W.3d 756, 764-65 (Tex. App.—San Antonio 1995, no pet.) (affirmed summary judgment for bank where depository agreement allowed bank to perform the challenged actions). For example, account agreements normally state that the bank has the right to withhold payment of funds from the accounts if it has oral or written notice of a claim against the accounts. The following is an example of such language:

This booklet contains the rules and regulations governing consumer and business accounts at bank. By signing a services application or deposit account signature card, or by otherwise opening or maintaining an account with bank, you accept and agree to be bound by the terms and conditions of this deposit account agreement.

Adverse Claims

Upon receipt of oral or written notice from any party of a claim regarding the account, the bank may place a hold on the account and shall be relieved of any and all liability for its failure or refusal to honor any item drawn on your account or any other withdrawal instruction.

Powers of Attorney

[T]he bank reserves the right to refuse to follow the instruction of an attorney-in-fact to designate the attorney-in-fact as a POD beneficiary to the account.

Legal Proceedings and Expenses

The bank may restrict the use of your account if the account is involved in any legal proceeding or, unless the laws of your state provide otherwise, if the bank reasonably deems such action necessary to avoid a loss. All expenses incurred by the bank as a result of any legal proceeding affecting your account including, but not limited to, court costs and attorney fees, may be charged against your account or billed to you separately.

After a bank learns of competing claims, it may put a hold on the disputed accounts, and in doing so, will not breach the contract.

B. Tortious Interference with Inheritance

A beneficiary may assert a claim for tortious interference with inheritance because the bank "interfered" with her inheritance rights by failing to forward the funds to her. This tort cause of action has had little discussion in Texas courts and has not yet been approved by the Texas Supreme Court. The first court to

recognize the tort was in *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ). In *Acker*, the court of appeals cited the Restatement (Second) of Torts 774B, which provided: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.*

In a similar claim, a party is not liable for tortious interference with contractual relations if the alleged interference was justified. *Friendswood Dev. v. McDade Co.*, 926 S.W.2d 280, 282-83 (Tex. 1996). The Texas Supreme Court held that justification is established as a matter of law when the defendant's acts, which the plaintiff claims constitute tortious interference, are merely done in the defendant's exercise of its own contractual rights, regardless of motive:

[I]f the trial court finds as a matter of law that the defendant had a legal right to interfere with a contract, then the defendant has conclusively established the justification defense . . . and the motivation behind assertion of that right is irrelevant. Improper motives cannot transform lawful actions into actionable torts. "Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right to a legal way, damage results to another, no cause of action arises against him because of a bad motive in exercising the right."

Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 211 (Tex. 1996). See also *Fin. Review Servs. Inc. v. Prudential Ins. Co. of Am.*, 50 S.W.3d 495, 504 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 29 S.W.3d 74 (Tex. 2000); *Abraham v. Ryland Mortg. Co.*, 995

S.W.2d 890, 895 (Tex. App.—El Paso 1999, no pet.).

It is unlikely that a beneficiary will be able to prove that the bank committed interference that constituted tortious conduct by failing to pay funds in an account where there is a dispute over the ownership of those funds. Where a bank acts pursuant to the parties' account agreement in withholding the funds after being advised that there were competing claims, the bank has a right to withhold payment and was justified in doing so.

C. Conversion

The tort of conversion is defined as the unauthorized and wrongful assumption and exercise of dominion and control over the property of another, to the exclusion of and inconsistent with the owner's rights. See *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 446 (Tex. 1971); *Cont'l Credit Corp. v. Wolfe City Nat'l Bank*, 823 S.W.2d 687, 688 (Tex. App.—Dallas 1991, no writ). Once again, if the account agreement gives the bank the contractual right to withhold the funds, the bank does not misappropriate the funds by following its agreement.

Moreover, a general deposit of money with a bank creates a creditor-debtor relationship between the depositor and the bank, and title to the money passes to the bank, subject to the depositor's demand for payment as a creditor. See *Mesquite State Bank v. Professional Inv. Corp.*, 488 SW.2d 73, 75 (Tex. 1972); *City Nat'l. Bank of Bryan v. Gustavus*, 106 S.W.2d 262 (Tex. 1937); *Hodges v. Northern Trust Bank of Texas N.A.*, 54 S.W.3d 518, 522 (Tex. App.—Eastland 2001, pet. denied); *Newsome v. Charter Bank Colonial*, 940 S.W.2d 157, 161 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

A suit for conversion will not lie where a debtor-creditor relationship is created by general deposit of money. See *Mauriceville Nat. Bank v. Zernial*, 892 S.W.2d 858, 860 (Tex. 1995); *Hodges*, 54 S.W.3d at 522 ("The designation of a deposit has great significance in

an attempted action for conversion. Because a general deposit becomes the property of the bank, the depositor has no action for conversion when the bank wrongfully pays out the deposit"); *First Nat'l. Bank of Bellaire v. Hubbs*, 566 S.W.2d 375, 377 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Collin County Savings & Loan v. Miller Lumber Co.*, 653 S.W.2d 114 (Tex. App.—Dallas 1983); *Williams v. Stansbury*, 634 S.W.2d 924, 928 (Tex. App.—El Paso 1982, no writ); *Crenshaw v. Swenson*, 611 S.W.2d 886, 891 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); *Graham v. Turner*, 472 S.W.2d 831, 839 (Tex. Civ. App.—Waco 1971, no writ); *Hull v. Freedman*, 383 S.W.2d 236, 238 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.); *Story v. Palmer*, 284 S.W. 331 (Tex. Civ. App.—El Paso 1926, no writ). See also *McNair v. Deal*, No. 13-05-264-CV, 206 Tex. App. LEXIS 10274 (Tex. App.—Corpus Christi November 30, 2006, pet. denied);

For example, in *Sam Texas v. Chase Securities of Texas, Inc.*, the court held that a depository was not liable under a conversion theory to a plaintiff for failing to pay funds from an account:

Although the testimony is conflicting as to what actually occurred on the day appellant requested liquidation of the account, it is undisputed that the account established at Chase Bank was for the purchase of mutual funds. The evidence shows the money was not required or intended to be kept segregated, nor was it deposited under a special agreement having the characteristics of a bailment contract or held in trust. Where no agreement requires money to be segregated or kept in a particular form, the requirements for "specific money" giving rise to a cause of action for conversion are not met. Therefore, no claim for conversion lies for the funds in the mutual account.

No. 14-00-01078-CV, 2002 Tex. App. LEXIS 194 (Tex. App.—Houston [14th Dist.] January 10, 2002, pet. denied) (not desig. for pub.). Where the accounts in dispute are general depository accounts a plaintiff cannot maintain a claim for conversion.

Furthermore, one court has held that where the parties' relationship is governed by a contract, that a party may not assert a conversion claim:

In the instant case, the JOAs and their appended GBAs state explicitly and in great detail the rights and duties of the parties with reference to the gas and gas condensate production and gas balancing. They contain express provisions that deal with the circumstances of this case. "If [as here,] a party must prove the contents of its contract and relies on the duties created therein, the action is in substance an action on the contract." *Morriss v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 869 (Tex. App.—San Antonio 1997, no writ). In the case at bar, the Long Trusts' loss was entirely economic loss to the subject matter of the contracts, the JOAs. The Long Trusts have not alleged or proven fraud. Consequently, we conclude that the Long Trusts are not entitled to recover on the theory of conversion. Castle's first issue is sustained.

Castle Texas Prod. L.P. v. Long Trusts, No. 12-0-00192, 2003 Tex. App. LEXIS 6640 (Tex. App.—Tyler July 31, 2003, pet. denied). Because the relationship between a depositor and a bank is controlled by a contract that addresses the bank's ability to withhold funds in accounts, a party should not be able to assert a tort conversion cause of action.

D. Breach of Fiduciary Duty

A party to an account may attempt to raise a breach of fiduciary duty claim for the bank's refusal to forward funds in an account. Fiduciary relationships arise when a party occupies a position of confidence toward another. See *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 416 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). A fiduciary relationship arises as a matter of law out of certain formal relationships, such as attorney-client, partners, and joint venturers. See *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Fiduciary relationships "may arise outside these usual situations when the dealings between the parties have continued for such a period of time that one party is justified in relying on the other to act in [its] best interest." *Blue Bell, Inc.*, 715 S.W.2d at 416. Generally, a lender has no fiduciary duty to its borrowers. See *Bishop v. First Interstate Bank, N.A.*, 1996 Tex. App. LEXIS 4109 (Tex. App.—Houston [14th Dist.] Sept. 12, 1996); *Nautical Landings Marina, Inc. v. First Nat'l Bank*, 791 S.W.2d 293, 299 (Tex. App.—Corpus Christi 1990, writ denied); *Thomas v. First City*, 1992 Tex. App. LEXIS 1629 (Tex. App.—Houston [14th Dist.] June 18, 1992). Additionally, as a general rule, the relationship between a bank and its customers does not create a special or fiduciary relationship. See *Thigpen*, 363 S.W.2d at 247; *Bank One N.A. v. Stewart*, 967 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1999, pet denied); *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 675 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Crutcher v. Continental Nat'l Bank*, 884 S.W.2d 884 (Tex. App.—El Paso 1994, writ denied); *Manufacturers Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 902 (Tex. App.—Corpus Christi 1989), *aff'd in part, rev'd on other grounds*, 811 S.W.2d 931 (Tex. 1991).

The only instances in which a court has found a special relationship between a borrower and lender have involved extraneous facts and conduct, such as excessive lender control over, or influence in, the borrower's business

activities. See *Greater S.W. Office Park, Ltd. v. Texas Commerce Nat'l Bank*, 786 S.W.2d 386, 391 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Therefore, it would be highly unlikely that a customer could assert a breach of fiduciary duty claim against a bank for failing to pay funds in an account where there is a dispute regarding the ownership of those funds.

E. Bad Faith

A party to an account may attempt to raise a bad faith claim for the bank's refusal to forward funds in an account. Ordinarily, when a depositor deposits funds into a bank account, a relationship of debtor and creditor arises. *Mauriceville Nat'l. Bank v. Zernial*, 892 S.W.2d 858, 860 (Tex. 1995); *Bandy v. First State Bank, Overton, Tex.*, 835 S.W.2d 609, 618-19 (Tex. 1992). The duty of good faith and fair dealing does not exist in Texas unless intentionally created by express language in a contract or unless a special relationship of trust and confidence exists between the parties to a contract. See *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 47, 52 (Tex. 1998) (there is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions); *Arnold v. Nat. County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

Specifically, no general duty of good faith and fair dealing exists between a lending institution and its borrower. See, e.g., *Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706, 709 (Tex. 1990) (where the court determined, among other things, that neither a secured creditor nor the FDIC owed guarantors a duty of good faith and fair dealing to foreclose promptly after default); *Eller v. NationsBank of Tex.*, 975 S.W.2d 884 (Tex. App. El Paso 1994, no writ); *Herndon v. First National Bank*, 802 S.W.2d 396, 399 (Tex. App.—Amarillo 1991, writ denied) (no duty of good faith between lender and customer under a note); *Thomas v. First City*, 1992 Tex. App. LEXIS 1629 (Tex. App.—Houston [14th Dist.] June 18, 1992). Therefore, it would be highly unlikely that a customer could assert a bad faith claim against a bank for

failing to pay funds in an account where there is a dispute regarding the ownership of those funds.

XII. TEXAS SUPREME COURT OPENS DOOR TO A FINANCIAL INSTITUTION'S POTENTIAL LIABILITY FOR FAILING TO SET UP ACCOUNT

Customers raise claims against banks for failing to properly create an account with rights of survivorship language. *See, e.g., Cweren v. Texas Capital Bank, N.A.*, No. 01-94-00995-CV, 1996 Tex. App. LEXIS 3319 (Tex. App.—Houston [1st Dist.] August 1, 1996, writ denied) (not design. for pub.). Historically in Texas, a customer, who allegedly was a party to a joint tenancy account with rights of survivorship, could not sue a bank for the funds in the joint account without tendering a valid written bank agreement with the appropriate language contained therein. *Stauffer v. Henderson* is the leading case on interpreting JTROS accounts. 801 S.W.2d 858 (Tex. 1990). In that case, the Texas Supreme Court held that language on a signature card did not create rights of survivorship and noted that under Texas Probate Code section 439(a), the Texas Legislature made a written agreement necessary to create a JTROS account. *See id.* The Court held that "the necessity of a written agreement signed by the decedent to create a right of survivorship in a joint account is emphatic...." *Id.* at 862-63. Furthermore, the Court found that a party could not introduce parol evidence, documents and oral communications before the account agreement was created, in an attempt to prove that the account was intended to be a JTROS account. Numerous Texas courts of appeals have applied this rather black-and-white rule to bar claims as to the ownership of funds in an account. But, does this rule stop claims against banks for failing to set up JTROS accounts? The answer is no, it does not.

A. A.G. Edwards Opinion – A Customer May Sue For Not Properly Creating A JTROS Account

In *A.G. Edwards & Sons Inc. v. Maria Alicia Beyer*, the Texas Supreme Court held that a customer can potentially raise a claim against a financial institution for failing to create a JTROS account. 235 S.W.3d 704 (Tex. 2007). The plaintiff was a daughter of a man who attempted to transfer the funds in a previous account into a new JTROS account with A.G. Edwards ("Bank"). *See id.* The daughter and father discussed the creation of a JTROS account with a Bank representative. *See id.* After the representative recommended that they create a new JTROS account, the daughter and father delivered all of the documentation necessary to create such an account. *See id.* However, the Bank lost the documentation and before new documents could be signed, the father fell into a coma and later died. *See id.* The Bank paid the funds, which it held in an older account that was not a JTROS account, to the father's estate. *See id.* The daughter sued the Bank for conversion, negligence, fraud, breach of contract, and breach of fiduciary duty. The jury found for the daughter and awarded her damages and attorney's fees, and the Bank appealed. *See id.*

In the Texas Supreme Court, the principal issue was whether Texas Probate Code section 439(a) barred extrinsic evidence regarding the creation of a JTROS account. *See id.* The daughter argued that section 439(a) only applied to multiple party disputes as to the ownership of the funds in a JTROS account and did not apply to disputes alleging a bank's malfeasance in failing to properly set up such an account. *See id.* The Texas Supreme Court agreed with the daughter: "Section 439(a) does not govern [the daughter's] claim against [the bank]. [The Bank's] failure to take sufficient steps to create the JTROS account necessary to establish [the daughter's] right of survivorship is a breach of a separate duty owed to [the daughter]." *Id.* The Court did not specify what "duty" it was referring to, but allowed extrinsic evidence of the bank's failure to create the account. *See id.*

The Court found that the evidence was sufficient to establish that the Bank had promised to create a JTROS account but failed to do so. *See id.* The Court then limited its prior Stauffer opinion to "ownership disputes over a joint account" and held that it did not apply to claims against a bank for failing to create a JTROS account. *Id.*

B. Courts Of Appeals' Application Of A.G. Edwards

In *Clark v. Wells Fargo Bank, N.A.*, the court of appeals held that a bank did not tortiously interfere with inheritance rights or act with negligence with respect to CDs. No. 01-08-00887-CV, 2010 Tex. App. LEXIS 4376 (Tex. App.—Houston [1st District] June 10, 2010, no pet.). In this case, in the 1990s, Parker Williams purchased six CDs that totaled over \$1.2 million and were marked as multi-party accounts with rights of survivorship. *See id.* These CDs listed multiple parties with rights of ownership. *See id.* In July 2004, the defendant informed Williams that the CDs were not fully covered by FDIC insurance. *See id.* Williams then purchased six new fully insured CDs that were set up in her name only and did not have any right of survivorship language on the account agreements. *See id.*

Williams then died intestate approximately one month later. *See id.* The plaintiffs were not Williams's heirs under the laws of intestate succession and would not receive any of the funds from the new CDs. *See id.* The plaintiffs filed claims for tortious interference with inheritance rights and negligence against the defendant bank. The trial court granted the defendant bank a summary judgment. *See id.*

The court of appeals first held that under Texas Probate Code Section 448, the plaintiffs had no claim regarding Williams cashing in the original CDs. *See id.* Texas Probate Code Section 448 provides that "payments made from a multi-party account to one or more of the individuals listed on the account discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent

with the beneficial ownership of the account as between the parties." TEX. PROB. CODE ANN. § 448. The appellate court held that the bank was discharged from claims for the payment it made to Parker as a joint owner when it closed the original CDs: "To the extent that any of claimants' causes of action relate to those original CDs or to actions taken before the original CDs were closed, those claims are ruled by Section 448." *Clark*, 2010 Tex. App. LEXIS 4376 at *12-13. The court then turned to the plaintiffs' tort claims based on the bank's actions that occurred after the original CDs were closed. *See id.*

The court acknowledged that a claimant can have a tortious interference with an inheritance claim: "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.* at *14. The court held that in order to have this cause of action the claimant must present some evidence that he or she would in fact inherit or receive the property at issue but for the interference. *See id.* The court held that the plaintiffs did not provide any evidence that they actually had an interest in the new CDs such that they could sustain a cause of action for tortious interference. *See id.* The court also held that the claimants provided no evidence that Wells Fargo acted with intentional tortious conduct. *See id.* The court therefore sustained the summary judgment on the tortious interference with inheritance claim. *See id.*

The plaintiffs also claimed that the bank was negligent when it failed to take sufficient steps to protect their inheritance rights when it opened the new CDs. *See id.* The court held that the plaintiffs did not establish that the bank owed them a duty: "Claimants' pleadings reveal that all of the actions for which Claimants seek to recover on their negligence cause of action were directed at Parker Williams and related to the duties the bank owed to Williams." *Id.* at *17. The court concluded that there was no evidence that the bank owed any duties to the plaintiffs. *See id.*

The court distinguished *A.G. Edwards & Sons v. Beyer*, 235 S.W.3d 704 (Tex. 2007). The court noted that in *A.G. Edwards & Sons*, the father and daughter both sought to open a joint account and both signed the account agreement with right of survivorship. "The context of the language in the opinion makes it clear that the Court was referring to the duties arising out of the contract signed by Alicia and her father." *Clark*, 2010 Tex. App. LEXIS 4376 at *18. In contrast, the court held that the claimants did not have any contractual relationship with the bank: "There is no evidence that they ever participated in the opening of the CDs or, as in *Beyer*, jointly executed any documents with Williams that would have given them any rights to the funds at issue." *Id.* at *19. Therefore, the appellate court affirmed the trial court's summary judgment. *See id.*

In *Koonce v. First Victoria Nat'l Bank*, the court of appeals reversed a summary judgment in part and found that there was a fact issue as to whether a bank breached a contractual duty to set up a POD account. No. 13-10-00282-CV, 2011 Tex. App. LEXIS 7198 (Tex. App.—Corpus Christi, August 31, 2011, no pet.). Robert Koonce opened a certificate of deposit account at the bank, and approximately two years later instructed the bank to change the CD to a POD account and to designate his son as the beneficiary. *See id.* The bank had Robert sign a file maintenance form that included the sole notation: "Add Beneficiary: Kenneth B. Koonce." *See id.* Two years later, Robert died, and his son took the CD to the bank, the bank distributed the funds of the CD to the son. *See id.* Robert's daughter later sued her brother and the bank claiming that the funds distributed to the son were an asset of Robert's estate and that there was no POD effect. *See id.* The trial court granted summary judgment in favor of the sister, determining that the CD funds were an estate asset. *See id.* Later, the son sued the bank in connection with that judgment alleging that the bank breached its contract with Robert, and with the son as third party beneficiary by failing to change the CD to a POD account. *See id.* He also alleged that the bank was negligent for failing to change the account designation as

directed by Robert and violated the DTPA by breaching its warranty that the account designation would be changed as directed by Robert. *See id.* The trial court granted the bank's motion for summary judgment on all of the son's claims. *See id.*

Regarding the breach of contract claim, the bank initially argued that the file maintenance form was sufficient to create a POD account. *See id.* The court of appeals disagreed stating that the probate code requires a "specific, definite written agreement before such property is allowed to pass outside a testamentary instrument." *Id.* The court found that there was no such specificity present. *See id.* The term "Payment on Death" or "POD" appeared nowhere on the form. *See id.* The term, "Add Beneficiary" on the file maintenance form could have referred to several different matters, and thus, the file maintenance form was simply too vague and ambiguous to comply with the written agreement requirement of the probate code. *See id.*

The court noted that in cases where the issue is ownership of the funds on deposit, the plaintiff may not use extrinsic evidence to show whether the account is a valid right of survivorship or a POD account. *See id.* However, in cases where the issue is whether the financial institution breached its agreement with the decedent in failing to set up the requested account, the plaintiff may utilize extrinsic evidence to prove its claim. *See id.* The court concluded that the bank failed to negate the breach element as a matter of law and that a fact issue existed on this element. *See id.* Therefore, the court of appeals held that the trial court erred in granting summary judgment on the son's breach of contract claim. *See id.*

The bank also challenged the son's negligence claim and asserted that there was no evidence that the bank owed any common-law negligence duty to the son. *See id.* The court of appeals stated: "If the defendant's conduct . . . would give rise to liability only because it breaches a party's agreement, the plaintiff's claim ordinarily sounds only in contract." *Id.* More specifically, "In the absence of a duty to

act apart from the promise made," mere nonfeasance under a contract creates liability only for breach of contract. *Id.* The court of appeals noted that it was the son's own contention that the bank owed him a duty arising out of its agreement with Robert to change the CD to a POD account with the son as a beneficiary. *See id.* The court held that the son had identified no duty separate from the contract and had produced no evidence of any such duty. *See id.* The court of appeals affirmed the trial court's summary judgment on the son's negligence claim. *See id.*

Finally, the court of appeals addressed the son's DTPA claim based upon the bank's failure to properly create the POD account. *See id.* The son contended that because he was a creditor beneficiary of Robert's account, he was a consumer as defined by the DTPA. *See id.* The court assumed, for the sake of argument, without deciding same, that a creditor beneficiary was a DTPA consumer but found that the son produced no evidence that he was a creditor beneficiary. *See id.* The court noted that the son produced no evidence that Robert made him a beneficiary of the CD account out of any legally enforceable duty by Robert to appellant, such as the satisfaction of a debt or contractual obligation. *See id.* The court of appeals thus affirmed the trial court's granting of summary judgment on the son's DTPA claim. *See id.*

C. Conclusion On A.G. Edwards

The *A.G. Edwards* opinion is a dangerous precedent for financial institutions. Because extrinsic evidence is not allowed, the issue of whether an account belongs to an estate or belongs to a listed beneficiary should be a rather straight-forward analysis. The issue is whether the appropriate language exists on the forms creating the account. If it does not, the money goes to the estate. Then the beneficiary can seek a damage award against the bank. So, in essence, the depositors' heirs will get a double recovery, the estate gets the money and a particular beneficiary also gets the money.

On what basis did the Texas Supreme Court create such a potentially unfair liability? Although the Texas Supreme Court did not clarify what "duty" the bank breached, a fair reading of *A.G. Edwards* would only support a potential breach of contract claim by a customer. The courts of appeals applying *A.G. Edwards* would agree with that conclusion. The end result of *A.G. Edwards* is that customers will now raise their claims arising out of alleged survivorship accounts against banks instead of other family members and will couch those claims in terms of the banks breaching agreements to create survivorship accounts. However, because the language in *A.G. Edwards* is somewhat ambiguous, plaintiffs may attempt to open the door to other tort-based claims, such as negligence and breach of fiduciary duty. If that were allowed, it would be an expansion of existing law.

Banks doing business in Texas should make every effort to properly handle survivorship account documents. Further, banks should revisit their account agreements so that defensive contractual and tort-based clauses may be implemented, such as no-prior representations clauses, arbitration clauses, damage waivers, etc.

XIII. CONCLUSION

Because joint accounts hold money, there will always be disputes over the ownership of that money. This paper was intended to give general guidance when these disputes arise.