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Bruno W. Tabis Jr.

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ILLINOIS CONSERVATOR'S RIGHT
TO INVADE JOINT SAVINGS ACCOUNT

INTRODUCTION

The joint tenancy or joint and survivorship bank account has enjoyed widespread use for many years. One may surmise from this continued use that the law surrounding these accounts is uniform and clearly settled. Quite to the contrary, the treatment of these accounts in the courts has been varied, and is confusing.

The basis of the confusion is the privilege of each co-depositor to withdraw funds from the account on his own signature, without the approval of the joint tenant. This privilege, by which each co-depositor may consume funds held in it, distinguishes the joint bank account from a true joint tenancy in which "under property law the right of the co-tenants is confined to a common use."

A particularly baffling problem arises when one of the joint depositors is adjudicated incompetent and the conservator of his estate attempts to withdraw funds in the account from the bank or have the balance transferred to an account in the name of the estate. Illinois banks and savings and loan associations currently meet this problem in a variety of ways. Some institutions, on the assumption that the conservator acquires the same rights in the account as his ward had while the latter was competent, require only a presentation of the letters of office before allowing the funds to be removed, while others require either an order from the probate court or a joining of the co-depositor in the transaction.

Two Illinois decisions, In re Estate of Cook and Manta v. Kahl, have dealt with the problem. In each case, the conservator had withdrawn the balance of the joint account. The other co-depositor sued the conservator in the first case and the bank in the second. Both suits were unsuccessful. The court in Manta said that the conservator succeeded to the same rights as the incompetent had previously held under the depositor agreement. These decisions provide support for the policy of those institutions which pay the joint account to a conservator upon the mere presentation of his letters of office. One writer believes that allowing a conservator to step into the shoes of his ward and giving him power to withdraw from the joint account is consistent with the Illinois statute covering joint bank accounts.

2 282 Ill. App. 412 (1934).
5 Ill. Rev. Stat., ch. 76, § 2(a) (1969) reads as follows:

When a deposit in any bank or trust company transacting business in this state has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any
Another writer believes that these cases were decided on grounds other than the issue of the conservator’s right to invade. The petition in *Cook* sought a division of the joint account and payment to her of one half of the balance. The court decided the case under contract principles. The contract in question among the parties and the bank provided that each of the co-depositors could withdraw from the account, but did not provide for any division. The court’s opinion was that to allow a division would be to interject into the contract a provision which was not within the intention of the parties.

In *Manta* plaintiff claimed the entire balance of a joint account which the conservator had withdrawn prior to the death of the incompetent. Plaintiff based his claim on the allegation that the bank had negligently and wrongfully paid the account which would have belonged to plaintiff by way of his right of survivorship after the incompetent’s death. Plaintiff’s failure to show that he contributed to the account is probably a significant factor in the decision, but the court decided against him because of a failure in pleading. Plaintiff did not allege (1) that he was entitled to demand the fund at the time payment was made, (2) that any demand had been made, (3) that such demand was in compliance with the by-laws, rules and regulations of the bank, and (4) that the bank owed a duty to plaintiff which was breached by its payment to the conservator. In light of the reasons for the decision, the court’s statement that the conservator succeeded to the incompetent’s rights appears to be only dicta.

The opinions in *Cook* and *Manta* do not establish a rule in Illinois that an estate conservator has all the rights of his ward to invade joint bank accounts. They merely demonstrate that one particular form of relief is unavailable, and that the absence of certain allegations is fatal to a co-depositor’s pleadings. Little likelihood exists that these cases would be decisive in determining the outcome in a properly pleaded case seeking a reasonable relief.

**Personal Rights, Powers and Elections**

The position of conservator of an incompetent’s estate is created by, and the broad powers it encompasses are defined by, statute. The courts have from time to time found that the best interests of the incompetent could best be served only by placing certain limitations on the conservator’s power.

Generally speaking, a conservator is entrusted with the care and management of his ward’s estate. However, his powers are not plenary; he does not
become an "alter ego." His powers do not extend to those situations which require the exercise of a right, power, or election contingent upon personal judgment or discretion. Nonetheless, if a personal right can be shown to be beneficial to the incompetent, the courts in proper cases will authorize the conservator to exercise the right.

The relationship between conservator and incompetent is one of trustee and cestui que trust. As implied from the title of his office, the function of a conservator is to conserve the incompetent's estate. These words imply managerial and preservative functions.

Many rights too personal to be exercised by a conservator are found in the area of domestic relations. Nevertheless, a conservator may seek an annulment of a marriage entered into by his ward during the period of incompetency. He can with the court's approval make an election between alimony and a lump settlement in a divorce case. However, he cannot seek a divorce for his ward.

Changes in insurance contracts are almost exclusively contingent upon personal elections which a conservator cannot exercise. He cannot change the beneficiary, even when the purpose is to protect the incompetent's estate from

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8 In re Estate of Hirsh, 27 Ill. App. 2d 228, 169 N.E.2d 591 (1960); 44 C.J.S., Insane Persons § 49; supra n.6 at 110.
12 Supra n.6 at 110.
13 In Ertel v. Ertel, 313 Ill. App. 326, 40 N.E.2d 85 (1942), an Illinois court applied Missouri law in allowing the conservator to seek an annulment of a marriage entered into by his feeble-minded ward. The court added by way of dictum that the conservator would not be able to enter into a marriage contract on behalf of his ward because of the personal nature of such a contract. Pyott v. Pyott, 191 Ill. 280, 61 N.E. 88 (1901) held that a guardian can maintain a bill in equity to have declared a nullity the marriage of his ward on grounds of mental incapacity.
14 Newman v. Newman, 42 Ill. App. 2d 203, 191 N.E.2d 614 (1963). The court stated that the election was not personal as such. However, a matter of necessity was involved in the case. The election had to be made, and it was made with court approval. Had it held the election personal, the court would have had little choice but to hold the election invalid.
15 Iago v. Iago, 168 Ill. 339, 48 N.E. 30 (1897). The court allowed a guardian ad litem to pursue the annulment in incompetent's name. The vacating of a divorce decree would seem to be a personal right. However, considerable property rights are at stake and the court no doubt allowed exercise of a personal right as a matter of necessity.
16 Bradford v. Abend, 89 Ill. 78, 31 Am. Rpts. 67 (1878). The incompetent cannot give consent. However, his conservator can petition to vacate a divorce decree.
17 See, In re Wainman's Estate, 200 N.Y.S. 893, 121 Misc. 318 (1923). In Kay v. Erickson, 209 Wis. 147, 244 N.W. 625 (1932), the court held void the conservator's attempt to have the ward's estate named as beneficiary after the named beneficiary had died. In In re Seller's Estate, 154 Ohio St. 483, 96 N.E.2d 595 (1951), the court held void a guardian's change of beneficiary to the estate of the incompetent although the incompetent had expressed a similar intention prior to adjudication. Although this problem has not been litigated in Illinois, the power involved is so personal that our courts probably would have to concur that a conservator cannot exercise it. The lone dissenting voice to the overwhelming majority of authority is Salvato v. Volunteer State Life Insurance Co., 424 S.W.2d 1 (Ct. Civ.
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insolvency. Similarly he cannot change from quarterly to lump sum the method of payment to be used upon the incompetent's death.

Elections under a will or trust agreement are considered personal and outside the scope of the conservator's authority. Also too personal to be exercised by a conservator without the consent of the court are a lease of the incompetent's real estate and consent to a judgment or compromise. Nor can a conservator, absent a showing that funds are needed for the maintenance of the incompetent, vary the property in the estate so as to alter the succession to the property.

Because a joint bank account can be used as an instrument of testamentary transfer and because the balance struck between the two co-depositors during their lifetime is a personal one, any withdrawals from the account would have

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21 Such election could only be made by the court. McCartney v. Jacobs, 288 Ill. 568, 128 N.E. 557 (1919); The test to be applied by the court is the best interests of the incompetent. Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962); The court will also look to a clear intention expressed by the ward prior to his incompetency. First National Bank v. McMillan, 12 Ill. 2d 61, 145 N.E.2d 60 (1957); Despite incompetency an election not exercised within the lifetime of a ward is lost. Rock Island Bank & Trust v. First National Bank, 26 Ill. 2d 32, 185 N.E.2d 877 (1962). See 21 A.L.R. 3d 320 (1968) for a general discussion.
22 See, Wilmerton v. Wilmerton, 176 F. 896 (7th Cir. 1910) which applied Illinois law. See also In re Grant's Estate, 122 Misc. 491, 204 N.Y.S. 238 (1924). However, under Bradshaw v. Lucas, 214 Ill. App. 218 (1919) when the only discretion retained by a trustee is the method of payment of income, the conservator has a right to the payments. Elections and powers governing the sale and investment of trust assets are personal and cannot be made by an incompetent's trustee or committee. See, Chase National Bank of City of New York v. Ginnel, 50 N.Y.S.2d 345 (S. Ct. 1950); Equitable Trust Co. v. Union National Bank, 25 Del. Ch. 281, 18 A.2d 228 (1941).
23 See, O'Brien, Re-evaluation of a Conservator's Right to See the Will of His Ward Held by a Third Person, 54 Ill. Bar. J. 128, 131 (Oct. 1965). One case, In re Zaring's Estate, 93 Cal. App. 2d 577, 209 P.2d 642 (1949), held that a guardian's taking charge of joint tenancy realty does not destroy the four unities, and any joint property sold retains its joint character in the proceeds. No ademption takes place in property, the nature of which has been so altered by the conservator as to change its succession, unless the conservator can show that such change was necessary for the maintenance of the incompetent. See also Wilmerton v. Wilmerton, 176 F. 896 (7th Cir. 1910); Lewis v. Hill, 317 Ill. App. 531, 47 N.E.2d 127 (1943). However, a court has upheld a purchase by a conservator of a renunciation of the right to inherit of a devisee under the incompetent's will in McCarthy v. McCarthy, 9 Ill. App. 2d 462, 133 N.E.2d 763 (1956).
to result from personal discretion. A conservator, therefore, should not be in the same position as his ward in being able to withdraw from the account.

TOTTEN TRUST SAVINGS ACCOUNTS

A deposit in the name of one person as trustee for another creates a "Totten Trust" account. The depositor-trustee has full discretion to withdraw funds during his lifetime, may expend the proceeds as he sees fit, and is accountable to no one as a result of the form of deposit. Upon the death of the trustee the beneficiary acquires ownership of the account. Being payable to the beneficiary only upon the trustee's death, the "Totten Trust" account is an instrument of estate planning.

Recognizing this notion, the courts have been reluctant to allow a conservator or committee trustee to invade the account.25 The reason given is that a personal discretion is necessary for any withdrawal.26 However, where the funds are necessary for the support of the trustee, the court can authorize the conservator to withdraw.27 The court may also permit a committee to invade the account when the evidence shows that the incompetent would have withdrawn funds,28 specifically where the assets consist of both a "Totten Trust" account and real estate, especially when the incompetent is residing on the real estate.29 The court's right to authorize invasion is premised upon the revocability of the account.30 If a beneficiary can show for some reason the account is an irrevocable trust, the court is powerless to allow the committee to make withdrawals.31

Similarly, the committee acting on behalf of an incompetent may apply to the court to withdraw from a federal savings and loan association trust account, but only to the extent necessary for the welfare and support of the depositor.32

The testamentary aspect of a "Totten Trust" account is clearly analogous to the right of survivorship in a joint account. The primary difference between the two is the present ownership and right to withdraw from the joint account.

27 Application of National Commercial B. & T. Co., 50 N.Y.S.2d 274 (S. Ct. 1944); Rickel v. Peck, 211 Minn. 576, 2 N.W.2d 140 (1942). The case of In re Rasmussen's Estate, 147 Misc. 564, 264 N.Y.S. 231 (1933) limits the conservator's right to invade to the necessities of the case and the specific requirements of the incompetent and his dependents.
30 Brooklyn Trust Co. v. Smart, 161 Misc. 857, 293 N.Y.S. 823 (1937).
Therefore, the law governing a committee's right to invade a "Totten Trust" account should be weighed in any determination of a conservator's right to invade a joint account.

**United States Savings Bonds**

The law governing co-ownership savings bonds is particularly useful in trying to determine a conservator's rights in a joint bank account because the bonds are payable to either party and contain a right of survivorship.

According to the government statutes by which disposition of these bonds is determined, the representative of an incompetent's estate may receive full payment of a co-ownership bond. However, only upon payment to one of the co-owners is the interest of the other extinguished. A number of cases seem to have adopted the logic that payment to a co-owner differs from payment to a conservator and, therefore, the other co-owner retains an interest in the bond. Although these bonds involve a contract with the government, once they are redeemed state law governs the proceeds.

The states' treatment of the cases has not depended on whether the bonds were registered "or" or "and." The right of survivorship is valid and, absent notice to the co-owner of the redemption and a need for the incompetent's maintenance, the co-owner may have a recovery from the estate of the proceeds of co-ownership bonds redeemed by the conservator.

The only recognized method for a third party to obtain the proceeds of a co-ownership bond is under a constructive trust theory. Consequently, the argument that the incompetency of one of the parties terminated the joint tenancy relationship and converted the funds in the bonds to a tenancy in common is without merit. Similarly a conservator cannot destroy the relationship in a payable on death bond unless he can show that the funds were necessary for the support of the incompetent.

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33 31 C.F.R. 315.50 (a).
34 31 C.F.R. 315.60.
35 In re Estate of Johnson, 351 Ill. App. 111, 113 N.E.2d 590 (1953). The case of Morris v. Morris, 195 Tenn. 133, 258 S.W.2d 732 (1953), held that although a conservator has the legal right to redeem, he is legally bound to re-invest the proceeds in accordance with the terms of the original bonds.
36 Chamberlain v. Robinson, 305 S.W.2d 817 (Tex. Civ. App. 1957); In re Damon's Guardianship, 238 Iowa 570, 28 N.W.2d 48 (1947).
37 In re Barnes' Will, 4 Wis. 2d 22, 89 N.W.2d 807 (1958).
38 In re Peters, 50 N.Y.S.2d 573 (S. Ct. 1944).
39 In re Church's Estate, 141 F. Supp. 703 (D.D.C. 1956); In re Estate of Hirsh, 27 Ill. App. 2d 228, 169 N.E.2d 591 (1960); In re Barletta's Estate, 2 Misc.2d 135, 150 N.Y.S.2d 479 (1956).
40 Levites v. Levites, 27 Ill. App. 2d 274, 169 N.E.2d 574 (1960). Otherwise the court says that it is well settled that a co-owner or death beneficiary acquires a present interest in the bond despite its retention by the purchaser.
The general rule in various jurisdictions has been that the conservator, guardian, or committee does not succeed to the full discretionary rights of his ward, but, at best, to the privilege of withdrawing, when necessary, that amount of money essential to maintain the incompetent.\textsuperscript{43}

Ohio originally adopted the position that an adjudication of incompetency terminated the joint relationship and, therefore, the joint agreement. The court said that, unless "extraordinary circumstances" could be shown, the guardian and the co-depositor were each entitled to one half the balance in the account.\textsuperscript{44} The next case in this jurisdiction upheld this reasoning but said that a husband-wife relationship is one of the "extraordinary circumstances" which requires special treatment.\textsuperscript{45} Two subsequent cases established a right of survivorship in the co-depositor.\textsuperscript{46} Finally, the original rule was supplanted by the idea that a guardian could not destroy the joint and survivorship relationship.\textsuperscript{47}

New York's rule is that a joint tenancy is to be presumed during the lifetimes of the parties and be conclusive upon the death of either.\textsuperscript{48} Consequently, a bank with notice of the incompetency which pays the account to the co-depositor is liable to the incompetent's estate for one half of the joint tenancy funds.\textsuperscript{49}

Massachusetts has held that where a gift to the co-depositor of the funds in the joint account can be shown, the conservator may not invade except for the needs of the incompetent.\textsuperscript{50}

\textsuperscript{43} See generally, 62 A.L.R.2d 1091 (1958); 10 Am. Jur. 2d, Banks § 371; supra n.4 at 618.

\textsuperscript{44} Abrams v. Nickel, 50 Ohio App. 500, 198 N.E. 887 (1935). This case has received much criticism.


\textsuperscript{46} In re Estate of Jones, 68 Ohio L. Abs. 282, 122 N.E.2d 111, (1952); National City Bank of Cleveland v. Hewes, 90 Ohio L. Abs. 372, 186 N.E.2d 644, (1962). These two cases distinguished Abrams and Ulmer as dealing only with the rights between the two parties while they were living. In re Estate of Jones, infra, criticizes as not quite accurate the statement in Abrams that a joint and survivorship account must come to an end upon the appointment of a guardian.

\textsuperscript{47} Miller v. Yocum, 18 Ohio App. 2d 52, 246 N.E.2d 594 (1969), aff'd 21 Ohio St. 2d 162, 256 N.E.2d 208 (1969); Guerra v. Guerra, 25 Ohio Misc. 1, 265 N.E.2d 818 (1970). The view now is that each case must be decided on its own facts. Apparently the presumption is that a joint and survivorship account was intended. This change of attitude came quickly after the decision of In re Webb, 18 Ohio App. 2d 287, 249 N.E.2d 83 (1969). In this case a most inequitable result befell the wife of an incompetent decedent when the rule in Abrams was applied.


Most jurisdictions are in accord with Massachusetts that a guardian or conservator should not be allowed to withdraw from joint bank accounts. Wisconsin, California, Michigan, and apparently Alabama find that the form of deposit raises a presumption that the intention of the parties was to create a right of survivorship; and as a result, withdrawal from the account is an exercise of personal discretion not to be made by the conservator unless he can show need. One Oklahoma case does not follow the presumption theory. However, if other evidence establishes the intention to create a joint certificate of deposit with a right of survivorship, the Oklahoma court follows the majority and will not allow the guardian to invade the fund.

Many jurisdictions, however, treat the problem differently. Pennsylvania and Delaware both recognize tenancies by the entirety. A withdrawal of the balance in the account by one spouse after the other spouse and co-depositor is adjudicated incompetent is without legal effect to destroy the right of survivorship to the funds. Both husband and wife must join in the act which destroys a tenancy by the entirety.

A Nebraska case appears to deal with the account as a contract with the bank which evidences a completed gift of an interest in the account upon the making of the deposit. However this position is not entirely clear from the opinion.

One Minnesota case determined the rights in two certificates of deposit which had been renewed for a number of years in the joint names of the plaintiff and the incompetent with the right of survivorship. The court held that the guardian was without power to change one certificate during its term, but was obligated to redeem the other which was at maturity, and transfer the balance to his guardian's account.

51 Boehmer v. Boehmer, 264 Wis. 15, 58 N.W.2d 411 (1953); Plainse v. Engle, 260 Wis. 506, 56 N.W.2d 89 (1952). Wisconsin recognizes a difference between a guardian and a conservator. The latter is appointed upon the voluntary application of a person who believes he is unable to manage his own property. Because no adjudication is made regarding competency, the applicant is designated conservatee and may revoke the conservatorship at will. As a result the Wisconsin Supreme Court has allowed a conservator to establish a joint account when such a result was clearly intended by the conservatee. In re Evans' Estate, 28 Wis. 2d 97, 135 N.W.2d 832 (1965).


57 In re Griffith, 33 Del. Ch. 387, 93 A. 2d 920 (1953).


59 Hagen v. Rekow, 253 Minn. 341, 91 N.W. 2d 768 (1958).
New Jersey courts have twice ruled on situations in which one spouse has transferred the balance from a joint account to an account in his name alone, after the other spouse and co-depositor had been adjudicated incompetent. The court held in both cases that the closing of the account severed the joint tenancy and created a tenancy in common. Therefore, each party or his estate was entitled to one half the balance in each account.\(^6\)

The variance among the courts which have considered the problem stems from the general confusion surrounding joint accounts.\(^6\) Although a majority rule may be emerging, no uniform rule could be brought before an Illinois court to aid in its determination of the problem.

**Current Status of the Joint Savings Account in Illinois**

The status of the joint savings account has recently undergone a transformation in the Illinois courts.\(^6\) The former Illinois rule was based on a theory of contract. If the contract with the bank provided for a joint tenancy with the right of survivorship, then that was the type of account that was established.\(^6\) In 1955 the Illinois Supreme Court decided the case of *In re Estate of Schneider*\(^6\) under the theory that when a donor puts the name of the donee on his savings account as a joint owner, he has made a gift. Under the new gift theory as developed by later cases, the form of deposit is only presumptive as to joint ownership.\(^6\)

Although it has caused sweeping changes in some areas, the change from contract to gift theory should have little if any effect upon the right of a con-

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\(^6\) Stout v. Sutphen, 132 N.J. Eq. 583, 29 A. 2d 724 (1943); Steinmetz v. Steinmetz, 130 N.J. Eq. 176, 21 A. 2d 743 (1941).


\(^6\) Supra n. 61 at 383.

\(^6\) In re Estate of Wilson, 404 Ill. 207, 88 N.E.2d 662 (1949); Reder v. Reder, 312 Ill. 209, 143 N.E. 418 (1924); Illinois Trust & Sav. Bank v. Van Vlack, 310 Ill. 185, 141 N.E. 546 (1923); Swofford v. Swofford, 327 Ill. App. 55, 63 N.E.2d 615 (1945).

\(^6\) 6 Ill. 2d 176, 127 N.E.2d 445 (1955). Many observers have made note that this case dealt with a Savings and Loan Association joint account which was not covered under Ill. Rev. Stat., ch. 76, § 2 (a) (1955) as were bank accounts. The cases subsequent to *In re Estate of Schneider* have followed its rationale although Savings and Loan Association joint accounts are now covered by Ill. Rev. Stat., ch. 76, § 2 (c) (1969).

\(^6\) These cases establish a line of authority that Ill. Rev. Stat., Ch. 76, § 2 (a) and § 2 (c) (1969) are only protective of the institution and not determinative of the rights between the parties. Murgic v. Granite City Trust & Sav. Bk., 31 Ill. 2d 580, 202 N.E.2d 519 (1964); In re Estate of Mueth, 33 Ill. 2d 449, 179 N.E.2d 695 (1962); Frey v. Wubben, 26 Ill. 2d 53, 186 N.E.2d 49 (1962); In re Estate of Liberio, 43 Ill. App. 2d 261, 193 N.E.2d 482 (1963); In re Estate of Cronholm, 38 Ill. App. 2d 141, 186 N.E.2d 534 (1962); In re Estate of Corirossi, 36 Ill. App. 2d 249, 183 N.E.2d 305 (1961); In re Estate of Fitterer, 27 Ill. App. 2d 264, 169 N.E.2d 578 (1960); In re Estate of Deskovic, 21 Ill. App. 2d 209, 157 N.E.2d 769 (1959).
servator to invade a joint account. It would seem reasonable for Illinois to join the majority rule and deny the conservator the power to withdraw since a presumption is created that a joint account with the right of survivorship was intended.

**CONCLUSION**

The decisions in *In re Estate of Cook* and *Manta v. Kahl* do not settle the question of an Illinois estate conservator to invade joint savings accounts. The apparent trend in the Illinois courts is to hold that a deposit in a joint account is presumptive of an intention to create a joint tenancy with the right of survivorship. Absent a showing of need for the maintenance of the incompetent, the conservator should have no right to invade. Those savings institutions which require either a court order or joining of the co-depositor in withdrawals take the more reasonable approach.

The treatment of joint accounts is so diverse that a case with a peculiar factual situation could turn the Illinois rule in any direction. Furthermore, the cases of record do not indicate how a factual situation in which the competent co-depositor has provided a portion of the consideration would be handled. Neither have the cases examined the situation of a competent co-depositor who needs a portion of the joint funds for his own maintenance.

The legislature should, therefore, enact statutory measures to bring certainty to this area. Because of the mobility of our populace, the practice of maintaining accounts in various states is common. A uniform banking code could be a more desirable solution. This would not only define what a conservator's rights are with respect to joint accounts, but would clear up the general confusion in the law surrounding the status of bank accounts.

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66 Supra n.1 at 221:

If it appears that the intent of the original depositor was that the co-creditor should not draw upon the account, or should withdraw the funds only for the use of the depositor, then no gift results, and this is so whether the contract or the gift theory is applied.
