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PROPERTY LAW: *Requirements for Certificates of Deposit and Bank Accounts Held in Joint Tenancy with Right of Survivorship in Indiana*

INTRODUCTION

An increasingly popular device for the transfer of personal property is the joint bank account with right of survivorship.[1] The use of survivorship accounts has precipitated considerable litigation due to disapproval of joint tenancies generally, and the problems inherent in establishing the donee-survivor's right to the property under traditional theories of gift, trust or contract.[2] Indiana permits the transfer of personal property through the use of joint bank accounts, but the decisions concerning such accounts reveal no single consistent judicial standard.[3] At the present time, persons establishing a joint bank account with right of survivorship are not assured that satisfaction of the statutory requirements and common bank practice will be sufficient to sustain the rights of the survivor should there be a contest.

A recent decision of the Third District Court of Appeals of Indiana illustrated the problems confronting a donee-survivor in establishing his right to the *res* of a survivorship joint account following the death of the donor.[4] In a two to one decision, the court upheld the trial court's finding that four certificates of despoit made payable to Eli F. Zehr, the depositor, or Donald E. Zehr, the appellant, as joint tenants with the right of survivorship, were assets of the estate of the depositor, Eli F. Zehr. The case was tried on the theory of an inter vivos gift, and the court held the gift invalid because of a lack of delivery. The court relied on these facts: no signature cards were executed; the funds deposited were the property of the depositor; the appellant made no contribution; the depositor apparently maintained exclusive possession of the certificates in his lock box at the bank, to which only he had keys and

1. Hines, *Personal Property Joint Tenancies*, 54 MINN. L. REV. 509 (1970); Kepner, *Joint Bank Account Muddle*, 26 U. CHI. L. REV. 377 (1959) [hereinafter cited as Kepner, *Joint Bank Account Muddle*]; Kepner, *The Joint and Survivorship Bank Account*, 41 CALIF. L. REV. 596 (1953) [hereinafter cited as Kepner, *The Joint and Survivorship Bank Account*].

2. *See* articles cited in note 1, *supra*; Wilt v. Brokaw, 96 F.2d 69 (7th Cir. 1952) (court applied Indiana law).

3. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972); Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955); Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).

4. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972).

which keys remained in his possession until his death; and during the lifetime of the depositor the interest payments were paid directly to the depositor.[5]

The dissenter in *Zehr* believed that a narrow and illiberal construction of the delivery requirement necessary to sustain a valid inter vivos gift should not be used to thwart the clear intention of the donor-depositor.[6] The dissenting judge felt that the signature card argument was at best an artificial requirement[7] and that the gift requirement of delivery should not be enforced arbitrarily to defeat what the donor intended and deemed a sufficient delivery.[8] Indiana case law was cited to support this position.[9]

The decision in *Zehr v. Daykin* illustrates the problems existing in Indiana for the person who seeks to transfer property through a joint bank account with right of survivorship. The purposes of this comment are to consider the rights of a surviving tenant in light of the existing statutes, to examine the basis for the decision in *Zehr* and to attempt to reconcile the conflicting Indiana case law.[10]

The Indiana Statute and the Court Required Gift, Trust or Contract

Indiana statute recognizes the creation of a joint tenancy in personal property with right of survivorship. Indiana Code § 32-4-1-1 reads:

> Except as to obligations of the United States government, held jointly or on which there appears the name of a surviving co-owner . . . the survivors of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument.

The courts have held that a survivorship right in a *joint tenancy* must be expressly stipulated in the instrument creating the estate;[11]

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5. *Id.* at ____, 288 N.E.2d at 175.
6. *Id.* at ____, 288 N.E.2d at 177.
7. *Id.*
8. *Id.*
9. *Id.*; *see* Ross, Executor v. Watkins, 80 Ind. App. 487, 141 N.E. 477 (1923).
10. For the purpose of this comment, only the rights of a donee-survivor are considered. There has been no question of the rights of a survivor who was also the donor.
11. Salvation Army v. Hart, 239 Ind. 1, 154 N.E.2d 487 (1958); Johnson v. Johnson, 128 Ind. 93, 240 N.E. 340 (1891); Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).

if the surviving joint tenant is to take the entire *res*, this must be noted.

At common law, it was necessary to have the "four unities"—time, title, interest and possession—for a joint tenancy.[12] Under Indiana statutory provisions, none of the four is listed as being necessary for a joint tenancy;[13] however, Indiana courts have held that common law requisites are necessary for the creation of a joint account in real property under a similar statutory provision.[14] Thus, in determining the rights of a surviving joint tenant of personalty, problems may arise when one of the joint tenants was the sole owner of the property before the creation of the joint tenancy;[15] this goes to the issue of time. When the *res* is intangible, this goes to the issue of possession.[16] Moreover, there is the question of unity of interest when the donor-depositor retains control over the account, including the power to revoke.[17] It has been suggested that in states having the type of statute found in Indiana, the parties should not be regarded as joint tenants, but as joint depositors.[18] The Indiana courts require that if the funds are deposited by one party in a joint bank account, the other's interest must be based on a gift, trust or contract.[19]

Gift

To sustain a valid inter vivos gift in Indiana, there are five legal requirements. These are 1) a donor competent to contract; 2) freedom of will; 3) completion with nothing left undone; 4) delivery by the donor and acceptance by the donee; and 5) immediate and absolute effect.[20] The delivery may be actual, constructive or symbolic.[21] The signing of signature cards apparently satisfies the deliv-

12. Case v. Owen, 139 Ind. 22, 38 N.E. 395 (1894). *See generally* 2 H. TIFFANY, REAL PROPERTY § 418 (3rd ed. 1939).

13. IND. CODE § 34-4-4-1 (1973).

14. IND. CODE § 32-1-2-7 (1973). *See* Case v. Owen, 139 Ind. 22, 38 N.E. 395 (1894); Richardson v. Richardson, 121 Ind. App. 523, 98 N.E.2d 190 (1951).

15. Wilt v. Brokaw, 96 F.2d 69 (7th Cir. 1952) (court applied Indiana law); Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955); Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).

16. Wilt v. Brokaw, 96 F.2d 69 (7th Cir. 1952) (court applied Indiana law).

17. Kepner, *The Joint and Survivorship Bank Account*, at 601.

18. *Id.* at 602.

19. Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).

20. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972).

21. Crawfordsville v. Elston Bank & Trust Co., 216 Ind. 596, 25 N.E.2d 626 (1940).

ery requirement for a joint bank account.[22]

Trust

If the survivor relies on the trust theory, it is necessary to prove an express trust arrangement.[23] It may be difficult to establish an unequivocal act manifesting an intent to create a trust, rather than an attempted testamentary transaction.[24] It is well settled that the trust device will not be used to perfect an imperfect gift.[25]

Contract

To establish survivorship rights through the use of contract theory, the survivor must prove the existence of a valid contract.[26] With passbook accounts, the contract is between the bank, the donor and the donee, using signature cards or other standard forms as a memorialization of the agreement.[27] There is evidence that in the jurisdictions applying contract theory, donative intent is still the most important element in the transaction.[28] In addition, questions may arise as to the presence of fraud, undue influence, duress or mistake at the time the contract was made.[29] In the absence of the above, however, there seems to be no legal obstacle to the enforcement of the contract.

Bank Protection Statute

Indiana has adopted a bank protection statute for the protection of banks when payment is made to the survivor of a bank account joint tenancy with right of survivorship. Indiana Code § 28-1-20-1(a) provides in part:

> When a deposit is made in any bank or trust company, in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or

22. Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).

23. First & Tri-State National Bank & Trust Co. v. Caywood, 95 Ind. App. 591, 176 N.E. 871 (1931).

24. This may be accomplished easily through the tentative or Totten trust, but few states have recognized it and it is not recognized in Indiana. Kepner, *Joint Bank Account Muddle*, at 377.

25. First & Tri-State National Bank & Trust Co. v. Caywood, 95 Ind. App. 591, 176 N.E. 871 (1931).

26. Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).

27. *Id.*

28. Kepner, *Joint Bank Account Muddle*, at 389.

29. Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).

> any interest thereon may be paid to either of such persons, whether the other be living or not, and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to such bank or trust company for any payment so made.

While this statute does not raise a presumption of the validity of such a survivorship account, it does indicate that the Indiana legislature approves of such accounts. It is only by being protected in this manner that banks would be willing to establish survivorship joint tenancies since, given the uncertain status of such accounts, banks could never release the funds to a donee-survivor without fear of a successful law suit against them. It is apparent that if § 32-4-1-1(a) concerning the creation of such interests is to have any effect on joint bank accounts with right of survivorship, § 28-1-20-1(a) is necessary to protect banks.

Certificates of Deposit and Third Party Beneficiaries

A certificate of deposit in Indiana is deemed to be a promissory note.[30] It is regarded as an absolute promise made by the bank to pay on demand the party, parties or the survivor—if so noted—listed on the face of the instrument.[31] Indiana has recognized a certificate of deposit as a written contract between the bank and the depositor;[32] and, as such, it contains the only competent evidence of the agreement between the parties.[33]

Indiana has long recognized that a contract may be made for the benefit of a third party who is a stranger to the contract and the consideration therefor.[34] The rights of the third party beneficiary are determined by the contractual intent of the parties contracting.[35] Such intent is found in the terms of the writing and testimony

30. Lang, Ex'r v. Straus, 107 Ind. 54, 7 N.E. 763 (1886); Long v. Straus, 107 Ind. 94, 6 N.E. 123 (1886); Brown v. McElroy, 52 Ind. 404 (1876); National State Bank of Lafayette v. Rengel, 51 Ind. 393 (1875). *See also* UNIFORM COMMERCIAL CODE § 3-104, enacted in Indiana in 1963 as Acts 1963 c. 317 § 3-104. A certificate of deposit may, or may not, be a negotiable instrument.

31. Brown v. McElroy, 52 Ind. 404, 408 (1876).

32. *Id.*

33. Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).

34. Voelkel v. Tohulka, 236 Ind. 588, 141 N.E.2d 344 (1957); Freigy v. Gargaro, 223 Ind. 342, 60 N.E.2d 288 (1945); Loper v. Standard Oil Co., 138 Ind. App. 84, 211 N.E.2d 797 (1965); Blackard v. Monarch's Mfgs. & Distributors, Inc., 131 Ind. App. 514, 169 N.E.2d 735 (1960).

35. Loper v. Standard Oil Co., 138 Ind. App. 84, 211 N.E.2d 797 (1965).

related thereto.[36] At the creation of a contract made for the benefit of a third party beneficiary, a legal interest arises in the third party, and he may maintain an action to enforce that interest.[37] It is not necessary that the contract instrument be delivered to the third party;[38] delivery to the promisee is sufficient.[39] Nor does the third party need to be aware of the promise;[40] if it is beneficial to the third party, acceptance will be presumed.[41]

Since a certificate of deposit is a written contract,[42] and Indiana recognizes the right of a third party beneficiary to a contract,[43] the creation of a certificate of deposit by a bank and a depositor for the benefit of a third party should create an enforceable right in the third party. In the absence of fraud, undue influence, duress or mistake, the right of the third party should be enforced by the court.

ZEHR V. DAYKIN

In affirming the trial court's decision in *Zehr v. Daykin*, the court of appeals held that there was not a valid inter vivos gift of the certificate. The gift theory was apparently the only theory argued by the appellant's attorney.[44] It was indicated above that in seeking to prove a joint tenancy of personal property, three basic theories—gift, trust or contract—are used. Because of the problems inherent in relying on any one of them, all should be pleaded when the facts in a case may sustain more than one theory.

As noted above, to sustain a valid inter vivos gift in Indiana, there are five legal requirements. The court of appeals in *Zehr* sustained the trial court's finding that since there was not a valid delivery of the certificates, the gift failed.[45] The court made no special findings on the issues of the donor's competency to contract or whether he acted under duress or fraud—factors affecting the valid-

36. *Id.*
37. Voelkel v. Tohulka, 236 Ind. 588, 141 N.E.2d 344 (1957); Freigy v. Gargaro Co., 233 Ind. 342, 60 N.E.2d 288 (1945); Blackard v. Monarch's Mfgs. & Distributors, Inc., 131 Ind. App. 514, 169 N.E.2d 735 (1969).
38. Copeland v. Summers, 138 Ind. 219, 35 N.E. 514 (1893).
39. *Id.* at 223, 35 N.E. at 515.
40. Waterman v. Morgan, 114 Ind. 237, 8 N.E. 590 (1887).
41. *Id.* at 240, 8 N.E. at 592; Copeland v. Summers, 138 Ind. 219, 35 N.E. 514 (1893).
42. *See* cases cited note 30 *supra*.
43. *See* cases cited note 34 *supra*.
44. Zehr v. Daykin, ___ Ind. App. ___, ___, 288 N.E.2d 174, 177 (1972).
45. *Id.* at ___, 288 N.E.2d at 177.

ity of an inter vivos gift.[46] As no mention is made of these factors, it appears that either no evidence was introduced on these points (which tends to indicate their non-existence) or if such evidence was introduced, it did not satisfy the court.

The question, then, primarily concerns delivery of the certificates. The court stressed the lack of bank signature cards, deposit agreements, or other writings signed by either party; the court also stressed that the decedent-depositor retained the certificates in his exclusive possession, and that during his lifetime all interest payments were made directly to him.[47] Each of these considerations must be analyzed to understand the court's action.

Bank Signature Cards and Other Writings

It is established law in Indiana that the delivery requirement for a valid inter vivos gift may be satisfied by an actual, constructive or symbolic delivery.[48] It has been shown that signed bank signature cards satisfy the gift requirement of delivery.[49] The chief issue is the parties' intention when the account is created;[50] when there is the necessary intent, a gift will be found.[51]

The lack of bank signature cards could be a significant factor in a case involving a passbook account, where such cards are routinely used.[52] However, it is the standard policy of Indiana banks not to use such cards when creating a certificate of deposit.[53] Banking regulations require no such cards and in fact discourage their use.[54] The standard procedure for certificates of deposit was followed in *Zehr*; the bank wrote on the face of the certificate that it was to pay Eli F. Zehr or Donald E. Zehr or the survivor. Nothing further was required, nor was there anything further, which the bank could do to make the agreement between itself and Eli F. Zehr more binding according to existing regulations and practice.

The dissent stated that signing signature cards or other stan-

46. *Id.* at ____, 288 N.E.2d at 174.
47. *Id.*
48. Crawfordsville v. Elston Bank & Trust Co., 216 Ind. 596, 25 N.E.2d 626 (1940).
49. *See* note 22 *supra* and accompanying text.
50. *Id.*; Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).
51. Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).
52. Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).
53. Interview with officials of the Northern Indiana Bank & Trust Co. and of the 1st National Bank & Trust Co., Valparaiso, Indiana, October 11, 1973.
54. *Id.*

dard forms "is at best an artificial distinction."[55] This is especially true when no such cards are required or even encouraged. What the result of a lack of signature cards would be in a case involving a joint bank account which required such cards is not at issue.[56] The question left by the *Zehr* decision is whether the court may require forms to be completed which are *not recognized* by banking procedure as being valid or necessary for the creation of an account. It leaves both the bank and the depositor in an uncertain relationship.

The signing of bank signature cards, when required, satisfies the requirements of a constructive delivery in Indiana.[57] The *Zehr* court stated that when signature cards or deposit agreements are executed with the bank,

> our courts have ignored the formal requirements for inter vivos gifts and instead have used the contract theory and held that signature cards, deposit agreements, or other writings are binding contracts and constitute conclusive proof of a gift.[58]

Although the above quote indicates the court's confusion concerning the application of either gift or contract theory to joint bank accounts, it seems that the signing of signature cards by the donor and the donee meet the delivery requirements of an inter vivos gift. In *Zehr* the writing on the certificate, authorizing the bank to pay either tenant or the survivor, should satisfy the requirements for a constructive delivery. The certificate of deposit was a written contract; at its creation Donald E. Zehr became a third-party beneficiary who held an enforceable right against the bank, which had made a promise to pay him.[59] Should the certificate of deposit *not* be evidence of a written contract, it would be controlled by the following:

> "Where the evidence is sufficient to show an intention to make a gift inter vivos of a chose in action, arising from a debt *not evidenced in writing*, an unqualified direction by the donor to the debtor to pay the debt to the donee, instead of the creditor is a sufficient delivery of the gift, when the

55. Zehr v. Daykin, ___ Ind. App. ___, ___, 288 N.E.2d 174, 177 (1972).

56. *But see* Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).

57. Wilt v. Brokaw, 96 F.2d 69 (7th Cir. 1952) (court applied Indiana law).

58. Zehr v. Daykin, ___ Ind. App. ___, ___, 288 N.E.2d 174, 177 (1972) (citations omitted).

59. *See* notes 34-41 *supra* and accompanying text.

> debtor accepts the arrangement and agrees to carry out the wish of the donor." [Ogdon v. Washington National Bank, 82 Ind. App. 187, 191, 145 N.E. 514, 515] Oral direction and acceptance of that direction are sufficient to constitute delivery.[60]

Thus, even if the certificate of deposit is not held to be a written contract, Indiana law would recognize a valid delivery of the subject matter. It would seem that the court should have determined whether the certificate of deposit was evidence of a written contract or of an oral promise to pay. This determination might not alter the result, but it would clarify the position of the bank and the depositor. Regardless of whether a certificate of deposit is a written or oral contract, it seems that creation of such certificates, for the benefit of a third party, satisfies the delivery requirement for a gift. It should also satisfy the requirement that the gift be complete and nothing left undone.

Retention of Possession and Receipt of Interest Payments by Donor

The majority in *Zehr* relied on the absence of signature cards in ruling against the appellant-donee. The trial court stated that the following factors were also considered: the depositor received the interest due on the certificates during his lifetime, and the depositor maintained exclusive possession of the certificates in his lock box at the bank, for which he had the only key.[61] It is necessary to determine if these facts supplied other grounds on which the trial court's decision could have been sustained.

As to the depositor's reservation of the interest due on the certificates during his lifetime, Indiana has long recognized that the donor of a gift can reserve the interest during his lifetime.[62] It is settled law that such a reservation will not defeat a valid gift.[63]

The maintenance of possession by the depositor goes to the question of whether both joint tenants could have had possession of the instrument evidencing the property at the same time. It is clear that, given the subject matter (*i.e.*, certificates of deposit), they could not. In a joint tenancy, possession by one joint tenant should

60. Ogle v. Barker, 224 Ind. 489, 501, 68 N.E.2d 550, 556 (1946) (emphasis added).
61. Zehr v. Daykin, ___ Ind. App. ___, ___, 288 N.E.2d 174, 175 (1972).
62. Grant Trust & Savings Co. v. Tucker, 49 Ind. App. 345, 353, 96 N.E. 487, 489 (1911).
63. *Id.*

be possession by all.[64] The possession by one joint tenant of the only passbook has not defeated the claim of the surviving joint tenant.[65] Since there had been a valid constructive delivery of the property upon issuance of the certificate, the possession of the certificates was immaterial.

The court did not mention that during the depositor's lifetime he acted in a manner consistent with an executed gift.[66] Extrinsic evidence is admissable to demonstrate that the depositor's conduct following the act of donation is consistent with a completed gift.[67] The depositor in *Zehr* had not cashed the certificates, nor, apparently, had he attempted to alter the certificates during his lifetime. The first three certificates were purchased six years before the depositor's death, the fourth two and one-half years before his death. The depositor's conduct during that six-year period was relevant to whether the depositor had done anything more than reserve the interest during his lifetime.[68] If he had acted in an inconsistent manner, that evidence must have been presented to the trial court. Such evidence was not presented.

Cases Cited by the Court

In reaching its decision, the majority cited nine Indiana cases. None of the decisions cited supports the finding of the majority. Each case is distinguishable on its facts or on the basis upon which it was decided.

Two of the cases cited by the court, *Bulen v. Pendleton Banking Co.* (joint savings account)[69] and *1st & Tri-State National Bank & Trust Co. v. Caywood* (certificates of deposit),[70] were decided on the court's finding that the donor intended the donee to receive the money after the donor's death. In both cases, the donor had made statements at the time the account was created that the donee was to receive the property when the donor died.[71] They were held to be promises to make future gifts which failed for lack of consideration;

64. *See* note 12 *supra* and accompanying text.
65. Wilt v. Brokaw, 96 F.2d 69 (7th Cir. 1952) (court applied Indiana law).
66. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972).
67. Grant Trust & Savings Co. v. Tucker, 49 Ind. App. 345, 353-54, 96 N.E. 487, 490 (1911).
68. *Id.*
69. 118 Ind. App. 217, 78 N.E.2d 449 (1948).
70. 95 Ind. App. 591, 176 N.E. 871 (1931).
71. *See* cases cited notes 69 and 70 *supra*.

and, therefore, they did not constitute valid inter vivos gifts.[72]

The question in two cases cited by the court concerned tangible personal property which was capable of manual delivery: *Zorich v. Zorich* (a box full of money; the court found no donative intent);[73] and *Lewis v. Burke* (a house full of furniture given by a written deed drawn up in a lawyer's office and witnessed, the letter being in the possession of the donee).[74] The Indiana Supreme Court in *Lewis* phrased the issue before the court as: "Is a gift by deed or other instrument under seal of *physical* personal property valid in the state of Indiana?"[75] By dicta, the court refused to distinguish intangible personal property, saying a writing would also be sufficient to convey title if intangible personal property were involved without physical delivery of the subject matter.[76] The court went no further and nothing was said concerning other constructive or symbolic means for delivering intangible personal property.

One case is clearly distinguishable on its facts. *Kraus v. Kraus*,[77] involved postal bonds purchased by a son and daugher with their father's money, and there was clearly no donative intent. The court held that there had been an oral trust agreement for the benefit of the father.[78]

Donative intent, or the lack thereof, was the basis for the decision in *Ogle v. Barker*.[79] The *Ogle* decision is not an internally consistent decision; the questions concerning the necessary control and relinquishment of the corpus of a joint checking account are left in a highly uncertain state.[80] But the court does seem to decide the case on the question of donative intent.[81]

Finally, the last three cases on which the majority relies, *Estate*

72. *Id.*
73. 119 Ind. App. 547, 88 N.E.2d 694 (1949).
74. 248 Ind. 297, 226 N.E.2d 332 (1967).
75. *Id.* at 303, 226 N.E.2d at 333 (emphasis added).
76. *Id.*
77. 235 Ind. 489, 132 N.E.2d 608 (1956).
78. *Id.*
79. 224 Ind. 489, 68 N.E.2d 550 (1946). The *Ogle* case involved both a life estate in land and an attempted transfer by oral instruction from the husband of the right to withdraw money in a checking account to his wife. The court held that there was no donative intent.
80. *See* the discussion of *Ogle* in *Wilt v. Brokaw*, 96 F.2d 69, 75-76 (7th Cir. 1952) (court applied Indiana law).
81. Ogle v. Barker, 224 Ind. 489, 68 N.E.2d 550 (1946).

of Harvey v. Huffer,[82] *Clausen v. Warner*[83] and *Wilt v. Brokaw*,[84] all concerned joint bank accounts created by the use of signature cards. They are all distinguishable from a case involving a certificate of deposit—which is not and cannot be—created by signature cards.[85]

It is interesting to note that of the nine cases relied on by the majority in *Zehr*, five of them (*Bulen, Caywood, Zorich, Kraus* and *Ogle*) concentrated on the question of donative intent, a question which the majority did not address in *Zehr*.

Relevant Facts Not Considered in the Court's Opinion

A number of factors have been mentioned as having relevance in determining the rights of a surviving joint tenant in Indiana. Among them are that the donor is not required to relinquish the power to draw on the account,[86] that acceptance of a beneficial gift is presumed,[87] that there is existence of a donative intent,[88] that there is a close family relationship (a factor related to the determination of donative intent)[89] and that there is an unequivocal expression of intent on the part of the depositor.[90] These factors go towards showing the existence and manifestation of donative intent. Such intent is obviously at issue when a case is being tried on the gift theory. None of these factors was mentioned in the majority opinion in *Zehr*.

The donor in this case did instruct the bank to issue the certificate in his name and in the name of Donald Zehr, or the survivor.[91] There was no evidence that the donor did not understand the instruction he was giving to the bank. Since the corpus belonged to the donor, he must have had a purpose for giving the instruction, as this instruction was not necessary for the creation of the certificates. If the instruction were merely for the convenience of the donor (to enable someone else to withdraw the funds), then the survivor-

82. 125 Ind. App. 478, 126 N.E.2d 784 (1955).
83. 118 Ind. App. 340, 78 N.E.2d 551 (1948).
84. 196 F.2d 69 (7th Cir. 1952) (court applied Indiana law).
85. *See* note 53 *supra* and accompanying text.
86. Wilt v. Brokaw, 96 F.2d 69, 75-76 (7th Cir. 1952) (court applied Indiana law).
87. Grant Savings & Trust Co. v. Tucker, 49 Ind. App. 345, 353-54, 96 N.E. 487, 490 (1911).
88. Ogle v. Barker, 224 Ind. 489, 68 N.E.2d 550 (1946).
89. Wilt v. Brokaw, 96 F.2d 69, 73 (7th Cir. 1952) (court applied Indiana law).
90. Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1947).
91. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972).

ship clause was not necessary. The donor was not changing the title to existing certificates, but purchasing them, and there was no evidence that he intended to transfer an interest to the donee at any time but the time of purchase.[92]

The court did not specify what relationship existed between Eli F. Zehr and Donald E. Zehr. However, they share a common surname; Donald E. Zehr was named co-executor of Eli F. Zehr's estate, and the court indicated that Donald E. Zehr was a beneficiary under the will of Eli F. Zehr.[93] Since family relationship is a relevant fact, it should have been considered by the court in assessing donative intent. Consideration of the factors relevant to donative intent might have aided the court in deciding the case.

Questions Left Open

The majority in *Zehr* failed to answer certain basic questions vital to a decision of the case. What kind of constructive delivery of a joint bank account *is* necessary when signature cards are not used in establishing the account? Is possession of the evidence of a joint bank account by *all* the joint tenants necessary when such evidence is incapable of possession by more than one joint tenant at a time? Is it necessary to prove donative intent when seeking to claim a survivorship joint bank account? Is a certificate of deposit a contract—written or oral—in Indiana? Does a contract satisfy the gift requirement of delivery? Does reservation of the interest during the donor's lifetime defeat a valid gift? Is possession by one joint tenant of the instrument memorializing the joint tenancy possession by all the joint tenants? Since the court did not address itself to these threshold questions, it is difficult to understand exactly what must be done to make a valid inter vivos gift of a certificate of deposit in Indiana at the present time.

Contract Theory

It has been noted that counsel for the appellant apparently proceeded only on the inter vivos gift theory.[94] The majority held that since there were no signature cards, deposit agreements or other writings signed by either party, the trial court was correct in

92. *Id.*
93. *Id.* at ____, 288 N.E.2d at 176.
94. *Id.*

relying on the inter vivos gift theory to resolve the issue.[95] The court implied that in a case concerning a joint bank account, signature cards are necessary for a binding contract.[96] The court ignored that Indiana has long recognized a certificate of deposit as a written contract.[97] The court, as a result, also ignored the issue of the donee's standing as a third party beneficiary.

It seems clear that in light of the decisions in Indiana concerning the rights of a third party beneficiary on a contract,[98] the donee in *Zehr* had an enforceable right. The donor-promisee clearly indicated an intent to benefit the donee,[99]and such an intent was manifested on the face of the certificate.[100] It was not necessary for the instrument memorializing the contract to be delivered to the donee,[101] nor was it necessary for the donee to have knowledge of the contract.[102] As the right arising in the donee was beneficial, his acceptance is presumed.[103]

While a contract may serve to fulfill the requirement for the delivery of a gift,[104] as the *Zehr* court noted,[105] it should be possible to rely on the contract theory alone in deciding a case concerning a joint bank account with right of survivorship. When the survivorship account is in the form of a certificate of deposit (rather than a passbook account for example) contract law provides a more appropriate theory. The *Zehr* court, by refusing to recognize the nature of a certificate of deposit as a contract, has opened the door to a great number of problems concerning an instrument widely used in commercial transactions as well as by the private investor.

Difficulty in Appplying the Relevant Statute: Reconciliation of Indiana Case Law

The court in *Zehr* never mentions the Indiana statute concerning joint tenancy in personal property with right of survivorship, nor

95. *Id.* at ___, 288 N.E.2d at 177.
96. *Id.*
97. *See* cases cited note 30 *supra*.
98. *See* cases cited note 34 *supra*.
99. Loper v. Standard Oil Co., 138 Ind. App. 84, 211 N.E.2d 797 (1965).
100. *Id.*
101. Copeland v. Summers, 138 Ind. 219, 35 N.E. 514 (1893).
102. Waterman v. Morgan, 114 Ind. 237, 8 N.E. 590 (1887).
103. *See* cases cited notes 40 and 41 *supra*.
104. Estate of Harvey v. Huffer, 125 Ind. App. 478, 126 N.E.2d 784 (1955).
105. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972).

the bank protection statute. Since a joint tenancy at the common law had attributes which are not enforced in cases involving joint bank accounts,[106] perhaps some of the confusion in *Zehr* concerning the nature of a joint tenancy bank account, or what constitutes a valid inter vivos gift of such an account, could be resolved if the wording of the statutes did not encourage the use of the term "joint tenants" on such an account.[107] As has been noted above, this confusion is magnified when only one person has contributed to the account.[108]

Although the court in *Zehr* does not discuss the theories of joint tenancy, either at common law or by statutory enactment, possibly the attributes of traditional joint tenancy were factors in the decision; this is manifested in confusing the lifetime rights of the donee and his survivorship interest,[109] illustrated by the majority's reliance on *Clausen v. Warner.*[110] *Clausen* dealt with an attempt at an inter vivos divestment of a joint tenant's interest in a joint bank account without the knowledge of the other joint tenant.

If a survivorship bank account were viewed in terms of the depositor's intention in making a contract or gift—for the transfer of personal property—to himself and another as joint depositors, it would be easier to assess the situation in a particular case. There would be no need then to consider the common law requisites of time, title, possession and interest. This appears to be the position taken by the dissenting judge in *Zehr.*[111] This area could properly be considered by the legislature, as well as by the courts.

CONCLUSION

An established practice on which people rely should not be held invalid by the courts in the absence of compelling reasons to do so. The way in which a certificate of deposit is created in Indiana is well established. It is a practice relied on by bankers and the public. Unless it is to be the considered policy of the Indiana courts to

106. *See* notes 11-19 *supra* and accompanying text.

107. *See generally* Kepner, *The Joint and Survivorship Bank Account.*

108. *See* case cited note 19 *supra* and accompanying text.

109. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972). The findings that prior to the time of purchase the corpus was the property of the donor and that the donor retained possession of the interest due indicate a concern with common law unities of time, possession and interest.

110. 118 Ind. App. 340, 78 N.E.2d 551 (1948).

111. Zehr v. Daykin, ___ Ind. App. ___, 288 N.E.2d 174 (1972).

disregard the intent of a person who chooses to transfer his property through this device, it is necessary for the courts to establish in what way the statute passed by the legislature authorizing such joint tenancy with right of survivorship shall be enforced. It is clear that at the present time there is no established rule to aid the trial courts in their decisions.