ASPECTS OF DISCLAIMERS UNDER THE UNIFORM DISCLAIMERS PROPERTY INTERESTS ACT

Estate Planning Council of Delaware
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1.0 In General.

Effective October 1, 2004, Maryland adopted the Uniform Disclaimer of Property Interests Act ("MUDOPIA"). It largely tracks the uniform act promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1999 as amended in 2002. The uniform act "was drafted to allow the full range of disclaimers recognized under the Code Section 2518." LaPiana, "Some Property Law Issues in the Land of Disclaimers," 38 Real Prop., Prob. & Trust J., 207, 209 (Summer 2002) (hereinafter "LaPiana").[1]

Although designed to take advantage of all of the possibilities under IRC § 2518, it purposefully "decoupled" the statute from the nine-month required of IRC § 2518 and, or course, prior Maryland law. See Est. & Trusts § 9-202 of the pre-October 1, 2004 statute. The decoupling was "designed to reduce confusion" by signaling that a tax qualified disclaimer had to qualify under the § 2518 rules which, in the case of disclaimers of future interests, had to be made within nine months of the creation of the interest. The earlier versions of the uniform acts (including Est. & Trusts § 9-202) authorized disclaimers within nine months of when the contingent interest was finally ascertained and the disclaimant's right to possession or enjoyment

[1] William P. LaPiana, an academic ACTEC fellow, is the Reporter for the uniform act.

became indefeasibly vested. "The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law." Comment, Prefatory Note, UDOPIA (2002).

Treasury issued final regulations under § 2518 in 1997 addressing the meaning of "transfer creating the interest" – the event triggering the nine-month period:

> "For purposes of the time limitation described in paragraph (c)(1)(i) of this section, the 9-month period for making a disclaimer generally is to be determined with reference to the transfer creating the interest in the disclaimant. With respect to inter vivos transfers, a transfer creating an interest occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as transfers creating an interest for this purpose. With respect to transfers made by a decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer. For example, a bequest of foreign-situs property by a nonresident alien decedent is regarded as a transfer creating an interest in property even if the transfer would not be subject to estate tax. If there is a transfer creating an interest in property during the transferor's lifetime and such interest is later included in the transferor's gross estate for estate tax purposes (or would have been included if such interest were subject to estate tax), the 9-month period for making the qualified disclaimer is determined with reference to the earlier transfer creating the interest. In the case of a general power of appointment, the holder of the power has a 9-month period after the transfer creating the power in which to disclaim. If a person to whom the exercise, release, or lapse of a general power desires to make a qualified disclaimer, the disclaimer must be made within a 9-month period after the exercise, release, or lapse regardless of whether the exercise, release, or lapse is subject to estate or gift tax. In the case of a nongeneral power of appointment, the holder of the power, permissible appointees, or takers in default of appointment must disclaim within a 9-month period after the original transfer that created or authorized the creation of the power. If the transfer is for the life of an income beneficiary with succeeding interests to other persons, both the life tenant and the other remaindermen, whether their interests are vested or contingent, must disclaim no later than 9 months after the original transfer creating an interest. In the case of a remainder interest in property which an executor elects to treat as qualified terminable interest property under section 2056(b)(7), the remainderman must disclaim within 9 months of the transfer creating the interest, rather than 9 months from the date such interest is subject to tax under section 2044 or 2519. A person who receives an interest in property as the result of a qualified disclaimer of the interest must disclaim the

> previously disclaimed interest no later than 9 months after the date of the transfer creating the interest in the preceding disclaimant. Thus, if A were to make a qualified disclaimer of a specific bequest and as a result of the qualified disclaimer the property passed as part of the residue, the beneficiary of the residue could make a qualified disclaimer no later than 9 months after the date of the testator's death. See paragraph (d)(3) of this section for the time limitation rule with reference to recipients who are under 21 years of age."

Regs. § 25.2518-2(c)(3)(i). These rules, however, are made applicable for transfers creating the interest sought to be disclaimed occurring on or after December 31, 1997. This means that one must wade through prior law although the new final regulations are supposedly "reflective of prior law." See Llewellyn, Levin & Lewis, "Disclaimers by a Surviving Spouse: The Trend of Increased Opportunities for Post Mortem Tax Planning Continues," 35 Real Prop. Prob. & Trust J. 1, 10 (Spring 2000) (hereinafter "Llewellyn").[2]

The final regulations explicitly permit the disclaimer of the survivorship interest in the entirety interest within nine months of death. In states that permit entireties in personal property, this rule means that the survivorship interest in such property (generally 1/2) is also subject to a disclaimer. Thus, stock held by the entireties will be subject to the survivorship rule.

The final regulations limit the amount that can be disclaimed with respect to bank accounts, brokerage accounts and mutual funds to the portion attributable to the deceased spouse:

> "Special rule for joint bank, brokerage, and other investment accounts (e.g., accounts held at mutual funds) established between spouses or between persons other than husband and wife … [I]f a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift … the surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant."

Thus, if stock acquired from funds solely provided by the surviving spouse is held by the entireties, a one-half interest may be disclaimed. If a brokerage account, on the other hand, is acquired solely from funds attributable to the surviving spouse, such a fund cannot be

[2] The "Levin" is, of course, Kenneth J. Levin, the co-panelist at this discussion.

disclaimed. This result is different, of course, if the fund is held by the entireties and not severable. This raises issues as to whether titling trumps the account agreement language of such account when such language permits unilateral severance. In Maryland, the entirety tenancy exists if the parties intended the joint account to be so held. Whether such an intention would trump the terms applicable to the account is uncertain. But see Llewellyn, supra, footnote 71, taking the position that the intent to hold a brokerage account by the entireties may trump the account terms providing for unilateral severance.[3]

The regulations continued the QTIP rule of counting from creation not death for inter vivos QTIP trusts.

As noted, MUDOPIA permits the full range of disclaimers recognized by IRC § 2518. It also goes further. Under Est. & Trusts § 9-204, the surviving spouse (or other surviving joint tenant) may disclaim the greater of the survivorship share or that portion attributable to the contribution by the deceased holder. "Therefore, under UDOPIA, a surviving citizen spouse could disclaim all of the family home if he or she did not contribute to its purchase, but could make a qualified disclaimer under Code § 2518 of only one-half of the property." LaPiana at 213.

The flexibility afforded by decoupling somewhat from IRC § 2518 permits non-qualified disclaimers for a variety of reasons. The non-tax reasons for disclaimers in general may include:[4]

- Accelerating an interest or eliminating a trust. Est. & Trusts § 9-302(e) provides that: "Upon the disclaimer of a preceding interest, a future interest held by a

[3] See Llewellyn also for a discussion of the opportunities (but complexities) for qualified disclaimers in the marital planning environment. Particularly noteworthy is the discussion of income tax planning through basis adjustments. See Llewellyn at 30-36.
[4] These examples of non-tax reasons for disclaimers are taken from Thompson, "When It Is Better To Disclaim Than Receive," 39 Inst. Est. Plan. 13-39 through 13-50 (2005).

person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment." Thompson cites several cases (in Florida, New York, South Carolina, and Oregon) confirming that a disclaimer by the life tenant accelerated the interests of the remaindermen and that the class was not held open for unborns.

- To avoid environmentally troubled property.
- Creditor avoidance. There is great potential for this non-tax purpose in Maryland (see discussions below).
- To avoid a conditional bequest. Thompson cites a case where a remaiderman was permitted to disclaim within nine months of the death of the life tenant (which would have had to been disclaimed within nine months of the creditor of the interest under IRC § 2518). In that case, the remainderman's acceptance would have necessitated payments to his sisters in excess of the then value of the property.

Thus, MUDOPIA recognizes uses for disclaimers beyond qualifying for non-gift tax treatment under IRC § 2518, on the one hand, yet permits all of the various disclaimers permitted under the tax act.

2.0 Drye: The Federal Tax Lien Trumps State-Law Rights.

In 1999, the U.S. Supreme Court held that the federal tax lien against an heir attached to an inheritance regardless of a disclaimer filed by the heir. Drye v. U.S., 528 U.S. 49 (1999). The disclaimer was qualified under state law (Arkansas) and under IRC § 2518. In an unanimous decision, the Court held that: "We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state – delineated rights qualify as "property" or "rights to property" within the compass of the federal tax lien legislation." Drye at 58.

Justice Ginsburg described the "division of competence" between state and federal law as looking to state law to determine whether the taxpayer has a legally protected right to property, then federal law determines whether the lien can attach. Interestingly, she uses two examples dealing with insurance to make her point. In the first situation, the taxpayer's right to the cash surrender value was exposed to the federal tax lien because the taxpayer (but not his ordinary creditors) could compel his insurance to pay the cash surrender value. That right to the cash surrender value was "property" or "right to property" created under state law. For federal tax lien purposes, the taxpayer's right to receive that value meant the tax lien attached regardless of the state law that shielded the cash surrender value from creditors' liens. Drye at 58 referring to U.S. v. Bess, 357 U.S. 51 at 56-57 (1958). In the other situation (the death benefit), the tax lien did not attach because the taxpayer did not have access to those funds: "By contrast, we also concluded, again as a matter of federal law, that no federal tax lien could attached to policy proceeds unavailable to the insured in his lifetime." Drye at 59 referring to Bess at 55-56.

Thus, in the disclaimer context, the heir had a right to the inheritance but for the disclaimer. It was a right to property that he gave up. This right to property is an attachable interest under IRC § 6321. The state law "relation back" which produces the creditor protection does not inhibit the federal taxing authority:

> "In sum, in determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' '[t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property.' Morgan, 309 U.S., at 83. Drye had the unqualified right to receive the entire value of his mother's estate (less administrative expenses), see National Bank of Commerce, 472 U.S., at 725 (confirming that unqualified 'right to receive property is itself a

> property right' subject to the tax collector's levy), or to channel that value to his daughter. The control rein he held under state law, we hold, rendered the inheritance 'property' or 'rights to property' belonging to him within the meaning of § 6321, and hence subject to the federal tax liens that sparked this controversy."

It is this control over effective enjoyment that was pivotal:

> "The disclaiming heir or devisee, in contrast, (to someone merely declining an offered inter vivos gift), does not restore the status quo, for the decedent cannot be revived. Thus the heir inevitably exercises dominion over the property. He determines who will receive the property – himself if he does not disclaim, a known other if he does. See Hirsch, "The Problem of the Insolvent Heir," 74 Cornell L. Rev. 587, 607-608 (1989). This power to channel the estate's assets warrants the conclusion that Drye held 'property' as a 'right to property' subject to the Government's liens."[5]

3.0 Disclaimers and Creditor Protection.

Other than for federal tax liens, a disclaimer is not a transfer for fraudulent conveyance purposes in most jurisdictions. Essen v. Gilmore, 607 N.W.2d 829, 835 (Neb. 2000) ("A review of the jurisprudence of other states shows that it is the majority view that a renunciation under the applicable state probate code is not treated as a fraudulent transfer of assets under the Uniform Fraudulent Transfer Act ("UFTA"), and creditors of the person making the renunciation cannot claim any rights to the renounced property in the absence of an express statutory provision to the contrary."). Also see, Pauw v. Agee, 2000 U.S. Dist. LEXIS 22323 (U.S. Dist. Ct. for S.C. 2000), which permitted a debtor to disclaim his inheritance then rent the property back from his brother who received the property due to the operation of the disclaimer: "This view (that a disclaimer will defeat the judgment against the debtor/disclaimant) corresponds with the majority view that a creditor cannot prevent a debtor from disclaiming an inheritance." [at 19]. It appears that New York follows the majority rule. In Est. of Oot, 95 Misc.2d 702, 707,

[5] Two ACTEC Academic Fellows are cited in Drye: Adam Hirsch and Jeffrey Pennell. See footnote 3 wherein Jeffrey Pennell is mentioned as pointing out that IRC § 2518 is limited by its terms to gift tax provisions not the Code in general.

408 N.Y.S.2d 303 (1978), the court upheld the renunciation of a legacy regardless of the disclaimant's creditors' claims: "It is with no small degree of reluctance that the court arrives at this decision. However, until the legislature in its wisdom provides some statutory vehicle for protecting creditors against frustration of their claims, unfortunate results may again occur." In Pennsylvania, however, a disclaimer may be a fraudulent transfer. Est. of Centrella, 20 Pa. D.&C.2d 486 (1960) ("While a solvent legatee may freely renounce and refuse a gift or legacy, an insolvent legatee may not do so since his renunciation would constitute a fraudulent conveyance, void as to creditors under § 4 of the Uniform Fraudulent Conveyance Act of May 21, 1921." [at 487.]

Several states have statutes that prohibit disclaimers by insolvent heirs. Disclaimers are prohibited in Florida, for example, when "the disclaimant is insolvent when the disclaimer becomes irrevocable." Fla. Stat. 739.402(2)(d). Also see Minn. Stat. § 525.532(6).

In Maryland, under both the current statute and the pre-2004 version, disclaimers were barred if before the disclaimer becomes effective the disclaimant "voluntarily assigns, conveys, encumbers, pledges or transfers" the interest sought to be disclaimed. MUDOPIA § 9-210(b)(2). Compare prior § 9-205(a)(1).

One court used the "encumbers"[6] provision to trump the "relation back" provision to permit a creditor's lien to operate to bar the disclaimer. That decision, Pennington v. Bigham, 512 So.2d 1344 (Ala. 1987), turned on the direct interest an heir has in estate property.

As in Maryland for decedents dying before January 1, 1970, real estate in Alabama directly passes to intestate heirs: "When John Thomas Bigham died intestate on June 25, 1986, the legal title to a one-half interest in his real property vested eo instanti in Bobby Bigham (the disclaimant); however, it vested subject to the statutory power of the administratrix to take

[6] This was based on a prior version of the uniform act before the "voluntary" element was added to the act.

possession of it and obtain an order to have it sold for payment of the debts of his father's estate." Pennington at 1345-46. In Pennington, a judgment creditor had perfected her lien against all of the disclaimant's property before the disclaimant's father died. Thus, the lien acted as an encumbrance of the disclaimant's share. The Supreme Court of Alabama held that a disclaimer after the lien attached under the circumstances of that case constituted a fraudulent conveyance. In re Kalt's Estate, 16 Cal.2d 807, 108 P.2d 401 (Cal. 1940), the California Supreme Court found a disclaimer to violate the fraudulent conveyance act. That case also discussed (although it is unclear whether it formed a part in the decision) the fact that under California law, at that time, an heir immediately becomes vested in the property. Kalt's Estate is important because it served as the basis of other decisions constituting the minority view. California subsequently legislatively reversed Kalt's Estate:

> "The few states which appear to follow the minority view that a disclaimer can constitute a fraudulent conveyance base the holding on the California case of In re Kalt's Estate (citations omitted). See Stein v. Brown, 480 N.E.2d 1121 (Ohio 1985). The holding in Kalt's Estate, however, was overruled by the California legislature when it enacted a statute providing specifically that a disclaimer is not a fraudulent conveyance. See Cal. Prob. Code § 283."

Pauw v. Agee, supra.

ACTEC Fellow Adam Hirsch has criticized UDOPIA for failing to tackle head-on the relationship of the insolvent disclaimant and his/her creditors:

> "Whether creditors should have it in their power to prevent an insolvent beneficiary from disclaiming, the thereby thwarting levies of execution by her creditors, is the single greatest controversy – and most underdeveloped subdivision – within modern disclaimer law. Common law cases have divided on the question, and so have those disclaimer statutes that speak explicitly to the issue – many of which are poor drafted, saddling local law with numerous uncertainties. But the legal landscape is even bleaker elsewhere: In nearly half the states, neither an enactment nor a single published opinion has ever addressed disclaimer by an insolvent beneficiary. This is a vacuum which the Commissioners ought to abhor. UDPIA, however, fails to speak to the matter. Instead of proposing a rule to govern these cases, UDPIA expressly relegates

> the issue of insolvent disclaimer to local law. Despite adopting this agnostic stance, UDPIA still represents an improvement over the Uniform Probate Code. Remarkably, the Code failed event to clarify whether it was intended to cover creditors' rights, and hence left everything to be desired. UDPIA at lease removes the issue unambiguously from its purview. Yet, the Commissioners' reluctance to tackle the problem of insolvent disclaimer is disappointing, if only because it is so central. There exist, after all, just two significant reasons to disclaim property – either to disclaim avoid estate and gift taxes or to avoid creditors' claims. A beneficiary who is prompted to disclaim by virtually any other motive can achieve the same result by accepting and then assigning away inherited property. As the estate tax dwindles in significance, creditors' claims grow correspondingly more salient. Troublingly, the Commissioners here shrank from their own ambition "to deal with all the difference situations the [disclaimer] statues have not addressed before." If UDPIA represents "the most comprehensive disclaimer statute ever written," it remains less comprehensive than it could be."

Hirsch, "Revisions In Need of Revising: the Uniform Disclaimer of Property Interests Act," 29 Fla. St. U.L. Rev. 109, 154-157 (Fall 2001).

There is no decision in Maryland (other than for Medicaid purposes, discussed below) that addresses the operation of the "relation back" provision under prior law, or the "not a transfer, assignment, or release" provisions under the current act. MUDOPIA § 9-203(f)(1); prior act § 9-205; Comment, Section 5, UDOPIA: "Subsection (f) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional 'relation back' doctrine of prior Acts."

Like in Pennington, Maryland has a provision barring disclaimers if the property to be disclaimed is encumbered.[7] Unlike Pennington, Maryland Est. & Trusts § 1-301(a) reversed the common law rule passing real property directly to the heirs by providing that: "All property of a decedent shall be subject to the estates of decedent's law, and upon the person's death shall pass directly to the personal representative, who shall hold legal title for administration and

[7] As noted, however, the newer uniform act added voluntarily to the bar.

distribution, without any distinction, preference, or priority between real and personal property." This is the Maryland rule for all decedents dying on or after January 1, 1970. An existing lien operating against the disclaimant of a Maryland estate would therefore not attach to the disclaimed property unless the property was actually distributed to him/her.

Perhaps more telling, however, is the language of the Maryland statute under the current act and its predecessor. Section 9-202(f)(2) of the MUDOPIA states: "Creditors of the disclaimant have no interest in the property disclaimed." This comports with the prior statute: "Creditors of the disclaimant have no interest in the property or interest disclaimed, whether their claims are based on contract, tort, tax obligations, or otherwise."

4.0 Disclaimers and Medicaid.

In a pre-2004 case, the Court of Special Appeals looked at the propriety of a Medicaid recipient disclaiming an intestate share of an estate. In Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), cert. denied, 347 Md. 255, 700 A.2d 1215 (1997), the Court first looked at whether excepting benefits after receiving Medicaid benefits constituted "an assignment, conveyance, voluntary encumbrance … " under the statute. The Court held that a disclaimer was not barred by that Section due to the disclaimant receiving Medicaid payments. The Court held that the disclaimer of benefits, however, would disqualify the disclaimant for Medicaid payments because those assets, in effect, constituted an available resource:

> "What this Court is more broadly faced with is the propriety of the disclaimer in light of societal interest and overall policy considerations. What is ludicrous, if not repugnant, to public policy is that one who is able to regain the ability to be financially self-sufficient, albeit for a temporary or even brief period of time, may voluntarily relinquish his windfall.
>
> While we are mindful that social agencies are 'skewered through and through with office pens, and bound hand and foot with red tape,' this acknowledgment does not vitiate legal obligation to report a recipient's change in financial status. Lettich had a legal obligation to 'pay his own way' (by means of the

inheritance) until such time as his resources were exhausted. Had the disclaimed funds actually been acquired and exhausted, Lettich most certainly would have been eligible to resume his receipt of Medicaid benefits.

In Molloy v. Bank, 214 A.D.2d 171, 631 N.Y.S.2d 910 (1995), the Supreme Court of New York, Appellate Division, confronted the same issue now before this Court. Molloy, a resident of a nursing home, was a recipient of medical assistance. Upon the death of her daughter, Molloy, pursuant to intestacy law, was entitled to her statutory share of the estate. Prior to disposition of the estate, Molloy renounced her interest in it. Acknowledging that the right to renounce a intestate is irreconcilable with the principle that public aid is of a limited nature and should only be afforded to those who demonstrate legitimate need, 631 N.Y.S.2d at 911, the court found that '[Molloy]'s renunciation of a potentially available asset was the functional equivalent of a transfer of an asset since by refusing to accept it herself, she effectively funneled it to other familial distributes.' Id. At 913.

Applying this analysis to the case sub judice, we adopt the reasoning of the New York court. The result of such a transfer prior to application for benefits is that the transferee enjoys a 'windfall' for which the applicant/transferor is penalized against the inception of his eligibility. So too should this penalty result in a circumstance in which a Medicaid recipient disclaims or otherwise transfers an inheritance that if accepted would result in a loss of eligibility."

Unfortunately, the Court then went on to "suggest" that the State had a potential cause of action for a constructive trust to seek reimbursement for the payments it made to the disclaimant improperly. [This was a "suggestion" because, as the case stated, the personal representative of the estate had acquiesced to reimbursing the State for any Medicaid benefits erroneously paid for the benefit of the disclaimant.]

Presumably, to the extent it is still good law under the new statute, <u>Troy v. Hart</u> carves out a narrow exception to the provision that creditors have no interest in the property disclaimed. Generally, the Medicaid override is a policy trumping of the statute. Comment to UDPIA (at Section 13):

"A number of States refuse to recognize a disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These decisions often rely on the definition of 'transfer' in the federal Medical Assistance Handbook which includes a 'waiver' of the right to receive an inheritance (see 42

> U.S.C.A. § 1396p(e)(1)). See Hinschberger v. Griggs County Social Services, 499 N.W.2d 876 (N.D. 1993); Department of Income Maintenance v. Watts, 211 Conn. 323 (1989), Matter of Keuning, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and Matter of Molloy, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), Tannler v. Wisconsin Dept. of Health & Social Services, 211 Wis.2d 179, 564 N.W.2d 735 (1997); but see, Estate of Kirk, 591 N.W.2d 630 (Iowa, 1999) (valid disclaimer by executor of surviving spouse who as Medicaid beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies will begin to address the question of disclaimers of real property on which an environmental hazard is located in order to avoid saddling the State, as title holder of last resort, with the resulting liability, although the need for fiduciaries to disclaim property subject to environmental liability has probably been diminished by the 1996 amendments to CERCLA by the asset Conservation Act of 1996 (PL 104-208). These larger policy issues are not addressed in this Act and must, therefore, continue to be addressed by the States. On the federal level, the United States Supreme Court has held that a valid disclaimer does not defeat a federal tax lien levied under IRC § 6321, Drye, Jr. v. United States, 528 U.S. 49, 120 S. Ct. 474 (1999)."

5.0 Bankruptcy Considerations of Disclaimers.

Whether a disclaimer is respected in bankruptcy depends on the timing of the disclaimer: pre-petition disclaimers are generally respected while post-petition disclaimers are generally not respected.

Pre-petition transfers are governed by § 548 of the Bankruptcy Code (11 U.S.C. § 548). This permits the trustee to avoid any transfer made within two years of filing the petition. Although "transfer" is broadly defined for bankruptcy purposes (11 U.S.C. § 101), ultimately that definition relies on state law as to what constitutes an interest in property to be the subject of the transfer:

> "Property interests are created an defined by state laws. Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"

Butner v. U.S., 440 U.S. 48, 55 (1979) (deciding that state laws governs whether the mortgagor retains the right to rents after default). The Butner court was concerned that forum shopping within a state would be triggered if the state law definition of rights to property did not govern. Forum shopping among the various state jurisdictions for bankruptcy purposes, of course, was "cured" by the new bankruptcy act.[8]

Before Drye, pre-petition disclaimers were not transfers under § 548 for bankruptcy purposes because of the relation back doctrine and because the state law determination of what constituted a transfer of a right to property. Drye, of course, determined that the disclaimant's interest in the disclaimed property constituted a property interest for federal tax lien purposes.

At least one bankruptcy court has extended Drye beyond the tax lien generally to the bankruptcy setting: In re Kloubec, 247 B.R. 246 (Bankr. N.D. Iowa 2000), aff'd, 268 B.R. 173 (N.D. Iowa 2001). Kloubec has met criticism and rejection: "The reasoning of Kloubec was simply mistaken, and reliance on Drye and the rationale of the Kloubec court have been widely rejected." Young, "The Intersection of Bankruptcy and Probate," 49 S. Tex. L. Rev. 351, 385 (Winter 2007). In Gaughan v. Edward Ditloff Revocable Trust (In re Costas), 346 B.R. 198, 203 (Bankr. 9th Cir. Arizona 2006), the Bankruptcy Appellate Panel for the circuit rejected Kloubec and distinguished Drye:

> "The Nistler court is correct in observing that the Drye decision rests on tax statutes and law that ignore state law exemptions, while the Bankruptcy Code in general observes and respects state law exemptions. In essence, the Drye decision is based largely on Congressional mandates that the federal government be able to exercise its extensive abilities to impose liens in order to collect delinquent taxes; the Supreme Court set forth a litany of examples of where the IRS primes other creditors. In contrast, the Supreme Court and Congress have traditionally referred to state laws in determining what is property of the estate for the purposes of the Bankruptcy Code."

[8] Under the new Bankruptcy Act § 522(b)(3), if a debtor moves domicile within two years of filing a petition the old state laws govern the exemptions permitted.

See also Garrett v. Bank of Okla. (In re Faulk), 281 B.R. 15, 20 (Bankr. W.D. Okla. 2002); Michael A. Grassmueck, Inc. v. Nistler, 259 B.R. 723, 725-27 (Bankr. D. Ore. 2001).

The story for postpetition disclaiming is very different. Section 541 of the Bankruptcy Code creates the rule for inheritances not disclaimed before the bankruptcy petition is filed. That section defines the scope of the bankruptcy estate as all property wherever located and by whomever held if the interest has been an interest of the debtor on the date of the filing. Post-petition disclaimers will not be respected:

> "As of the filing of the petition, the debtor had not executed a disclaimer. The debtor filed her schedules and statement of affairs with the petition. The debtor, by rights, should have listed her interest in her mother's estate as an interest in property because, as of the date of filing, that interest belonged to the debtor as a matter of law … [T]his debtor, who undisputably (sic) had a legal or equitable interest in the property as of the commencement of the case, to wit her testamentary interest under her mother's will, would, by executing a disclaimer post-petition, 'inevitably exercise dominion over the property' – in this case, property of a bankruptcy estate. Only the trustee in bankruptcy is free to exercise such dominion and control over estate property, and any attempt to exercise that power in derogation of the trustee's exclusive right is either void ab initio or at lease voidable as an impermissible transfer …"

Lowe v. Sanflippo (In re Schmidt), 362 B.R. 318, 323-325 (Bankr. W.D. Tex. 2007).

Also, § 541 of the Bankruptcy Code brings in any inheritance to which the debtor is entitled if the interest accrues within 180 days after filing the petition. Matter of Chenoweth, 3 F.3d 111 (7th Cir. 1993). Inheritances vesting after the six-month period are not part of the bankruptcy estate but part of the "fresh start."

Appendix
Estate Planning Council of Delaware[*]

Asset Protection Variations Among Certain
Jurisdictions Recognizing Tenancy by the Entirety

Delaware	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: Not subject to attachment.
	Type of Property: Real & Personal property. Rigby v. Rigby, 88 A.2d 126 (Del. Ch. 1952) (Cattle); Widder v. Leeds, 317 A.2d 32 (Del. Ch. 1974) (partnership interest) ("It has likewise been held that, in the absence of proof to the contrary, a joint bank account opened in the conjunctive form in the name of a husband an wife may create a tenancy by the entireties, and this status is not altered by the fact that either may withdraw the funds therefrom.")
	Comment: The law has been stated at various times in Delaware that a judgment against one spouse does not create a lien on entireties property: "It is settled in Delaware that a creditor of one spouse, such as Ms. Johnson, may not place a lien on real property held as tenants by the entireties. See Steigler v. Ins. Co. of N. Am., Del. Supr., 384 A.2d 398 (1978) ('interest of neither [husband nor wife] can be sold, attached or liened 'except by [their] joint act'); Citizens Savings Bank, Inc. for the use of Govatos v. Astrin, Del. Supr., 61 A.2d 419 (1948); Hurd v. Hughes, De. Ch. 109 A 418 (1920) … so the creditors of one spouse cannot reach the interest the debtor holds in the estate." Johnson v. Smith, 1994 W.L. 643131, Del. Ch. 1994 (not reported). In Mitchell v. Wilmington Trust Co., 449 A.2d 1055 (Del. Ch. 1982), aff'd 461 A.2d 696 (Del. Super. Ct. 1983), a husband obtained a mortgage from a bank by fraudulently bringing a woman to execute loan settlement documents that, in fact, was not his wife. The court held that the forgery failed to operate to bind the tenant by entirety property. Before the wife received notice of the forgery, the husband transferred the title to the wife as a marital settlement. The transfer was held not as a fraudulent transfer because the wife lacked knowledge of the fraudulent transfer (being then unaware of the purported lien) and paid valid consideration (the release of her husband's marital obligations). The court held that the bank acquired an inchoate lien in the property which became extinguished upon his transfer of the property to his wife without knowledge and for valid consideration. Given that no lien attaches in any event, there should be no reason for the court to reach the fraudulent conveyance aspect of the case. Curiously, a recent unreported Delaware case seems to contradict otherwise settled law. In Wilmington Savings Fund Soc.,

Delaware continued	FSB v. Kaczmarczyk, 2007 WL 704937 (3/1/07), the Chancery Court found that a post-judgment transfer by the debtor husband to his non-debtor wife violated the fraudulent conveyance act. As opposed to Mitchell, the Kaczmarczyk court held that the transfer, while purportedly made pursuant to the divorce discussions, was not fair consideration because the parties reconciled. Arguably, neither case should have involved an examination of the fraudulent conveyance statute. These cases, however, necessarily raise a cautionary note as to whether a lien attaches.
Maryland	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and Personal property. Bruce v. Dyer, 524 A.2d 777 (Md. 1987)) (Entireties favored by the law.) Diamond v. Diamond, 467 A.2d 510 (Md. 1983) ("It is well established that this Court recognizes that a tenancy by the entireties may be created in personal property.)
	Comment: Watterson v. Edgerly, 388 A.2d 934 (Md. App. 1978) held that a creditor "has no standing to complain" when the debtor husband transferred all of his interest in a residence to his wife because it was held tenants by the entirety. In that case, the wife then provided that the residence go by Will to a spendthrift trust for husband's benefit. The wife died 61 days after the transfer of the real estate to her. The intent to create entireties property, coupled with the four unities, causes the tenancy to be created. Cruickshank-Wallace v. Co. Banking & Trust Co., 885 A.2d 403 (Md. App. 2005). See, however, In re Pernia, 165 B.R. 581 (Bankr D. Md. 1994) where the account designation trumped intent. In that case, proceeds from the sale of entireties property was used to acquire U.S. Treasury EE Bonds. The bonds were titled as held husband "or" wife. Treasury regulations stated that with such holding made the bonds subject to the order of either spouse. The court held that the EE Bonds were not entirety property: "Both husband and wife are essential parties to an effective transfer of property held as tenants by the entirety." The federal regulations governing the account holdings were found to preempt "all laws and court decisions" because of federal preemption. Pernia is wrong to the extent it claims to make a general pronouncement of Maryland law. Indeed, in In re Breslin, 283 B.R. 834 (Bankr. D. Md. 2002), the court stated that the Pernia result was "only because" the federal regulations determined ownership and referred to Brewer v. Bowersox, 48 A. 1060 (1901) for the proposition that when an account is held disjunctively but only payable to the two spouses, but subject to the order of either, an entireties account is created. Entireties exists if the couple so intends and the unities coincide regardless of the nature of the account. Cruickshank-Wallace, supra, Diamond, supra; M. Lit. Inc. v. Berger, 170 A.2d 303 (Md. 1961). There is also a presumption that property purchased from the proceeds of entireties property retains its character. Tait v. Safe Deposit & Trust Co. of B'more, 70 F.2d 79 (4th Cir. 1934) (Md.).
New Jersey	Type of Bar: Modified.

New Jersey continued	Effect of Judgment Creditor of One Spouse: Execution on judgment permitted subject to Equity determination.
	Type of Property: Real and Personal property by statute but cases call personalty into questions. N.J. Stat. Ann. 46:3-17.2 (2008) states that entireties exists in real and personal property. Fort Lee Sav. And Loan Ass'n v. LiButti, 254 A.2d 804 (N.J. Super. A.D. 1969) however suggests that entireties only exists in real property: "The estate by the entirety has been described as a "remnant of other times" which rests upon 'fiction of oneness of husband and wife …' But whatever social purpose this tenancy was designed to serve is the interest of married parties and for whatever reasons for its continued existence in the State, there is no justifiable basis for extending it to the personal property which replaces it (sale proceeds). To indulge in the further fiction necessary to achieve such a result serves no useful purpose and acts to frustrate justice. Furthermore, it runs counter to the policy of this State against recognizing the existence of tenancies by the entirety in personalty." (Dissent by Carton which was adopted when case was reversed at 264 A.2d 33 (1970). The Fort Lee position was reaffirmed in High v. Balun, 943 F.2d 323 (1991).
	Comment: The execution by the judgment creditor of one spouse acquires the survivorship interest of the debtor spouse and a tenant in common life interest without the automatic right of partition. Newman v. Chase, 359 A.2d 474 (1976). In Newman, the court weighed the creditor's interest against the "cost of dispossessing the family of its home." The court granted the creditor one-half the imputed net rental value of the house. Ultimately, the issue of partition is one within the equity court's determination. "In the usual case involving residential property, the purchaser at the sale may cause neither a physical partition of the property or a partition by sale of the life estate. The creditor may, however, collect from the non-debtor spouse one-half of the imputed rental value of the property, but must give credit to the non-debtor spouse for his share of certain charges against the property such as mortgage payments, taxes, insurance, and repairs." In re Jordan, 5 B.R. 59, 62 (Bankr. N.J. 1980).
Pennsylvania	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and Personal property. Madden v. Gosztonyi Savings & Trust Co., 200 A. 624, 630-631 (Pa. 1938) (joint bank account): "The authorities thus cited would seem to show that either spouse presumptively has the power to act for both, as long as the marriage subsists, in matters of entireties, without specific authorization, provided that fruits or proceeds of such action inures to the benefit of both and the estate is not terminated. But neither may be such action destroy the true purpose of the estate by attempting to convert it or a part of it, in bad faith, into one in severalty."

Pennsylvania continued	Comment: In Sterrett v. Sterrett, 166 A.2d 1 (Pa. 1960) (Musmanno), the Supreme Court likened tenant by the entirety property to a living tree "whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade and fruit as much as the other." It is not subject to the creditors of one spouse. In C.I.T. Corp. v. Flint, 5 A.2d 126 (1939) a transfer by the debtor husband and non-debtor wife to a spendthrift trust for their benefit was found not to be a fraudulent conveyance because the creditor had no attachable interest in the property. The court, however, pointed out that it only decided the issue of the fraudulent conveyance and not whether a creditor could reach the debtor's interests in the self-settled spendthrift trust.

C
United States Court of Appeals, Third Circuit.
Joseph M. HIGH
v.
Thomas M. BALUN, et al.; Alvin Miller; Karl D. Saulpaw, Jr., Defendants-Third Party-Plaintiffs,
v.
Frank I. KOVACS, Third-party Defendant,
Alvin Miller and Pauline Miller, Appellants.
No. 91-5071.

Argued July 10, 1991.
Decided Sept. 4, 1991.

Judgment creditor registered judgment obtained in another United States district court and then obtained attachment of certificate of deposit held by one of judgment debtors and his wife. On petition by judgment creditor to compel bank to turn over portion of proceeds and judgment debtor's objection, the United States District Court for the District of New Jersey, Garrett E. Brown, Jr., J., found that judgment debtor's and wife's entire interest in CD was available to satisfy judgment based on presumption of New Jersey law that entire amount of joint account belongs to debtor. Judgment debtor and his wife appealed. The Court of Appeals, Stapleton, Circuit Judge, held that: (1) under either Pennsylvania or New Jersey law, New Jersey Multiple Party Deposit Account Act governed ownership of CD, given provision on face of CD stating that it was subject to Act, and (2) under Act, judgment debtor and his wife each had independent ownership of one half of CD, given their equal "net contributions" to CD.

Affirmed in part; reversed in part; remanded.

West Headnotes

[1] Husband and Wife 205 ⚷14.2(1)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(1) k. Nature and Incidents. Most Cited Cases
Under New Jersey law, married couples may not own personal property by entireties.

[2] Husband and Wife 205 ⚷14.2(1)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(1) k. Nature and Incidents. Most Cited Cases

Husband and Wife 205 ⚷14.2(4)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(4) k. Evidence. Most Cited Cases
Under Pennsylvania law, couples may own personal property by entireties and law will presume that joint bank accounts are so held in absence of contrary evidence.

[3] Husband and Wife 205 ⚷14.2(3)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.2 Tenancy by Entirety in General
205k14.2(3) k. Personal Property; Bank Deposits. Most Cited Cases

Husband and Wife 205 ⚷14.3

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.3 k. Joint Tenancy. Most Cited Cases

Under Pennsylvania law, married couples may hold Pennsylvania bank account in joint tenancy, rather than tenancy by entireties, merely by expressing intent to do so.

[4] Husband and Wife 205 ⚿2

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k2 k. What Law Governs. Most Cited Cases

Under either New Jersey or Pennsylvania law, Pennsylvania married couple's ownership interest in certificate of deposit at New Jersey bank was to be determined under New Jersey Multiple Party Deposit Account Act where CD stated on its face that it was subject to Act, rather than by couple's alleged subjective intent. N.J.S.A. 17:16I-3, 17:16I-4.

[5] Husband and Wife 205 ⚿14.1

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k14 Conveyances to Husband and Wife
205k14.1 k. In General. Most Cited Cases

Pennsylvania residents had independent ownership each of one half of certificate of deposit they purchased from New Jersey bank under provisions of New Jersey Multiple Party Deposit Account Act where they made equal "contributions" by purchasing CD with funds taken from Pennsylvania account that was held as tenants by the entireties and made joint "withdrawals" from CD, for purposes of line of credit for which CD was security, where both signed application for line of credit and their testimony established that they were equal participants in business for which line of credit was used. N.J.S.A. 17:16I-3, 17:16I-4.

***323** Thomas M. Barron (argued), Lisa M. Willitts, Ferg, Barron, Muchinski & Gillespie, Moorestown, N.J. for appellants.
James G. O'Donohue (argued), Hill Wallack, Princeton, N.J. for appellee.

***324** BEFORE STAPLETON, HUTCHINSON and HIGGINBOTHAM, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:
Joseph High sought to execute on a judgment against Alvin Miller by attaching a certificate of deposit "jointly" owned by Alvin Miller and his wife, Pauline Miller. This appeal requires us to determine each spouse's ownership interest in the certificate. In order to do that, we must predict both how the New Jersey Supreme Court would apply New Jersey choice of law rules and how it would interpret that state's Multiple Party Deposit Account Act. We conclude that the New Jersey Supreme Court would honor the provision in the certificate of deposit that the certificate's ownership is governed by the New Jersey Multiple Party Deposit Account Act and that it would hold that, under that statute, each spouse owns a separate half interest in the certificate of deposit. Accordingly, we will affirm the district court's holding that New Jersey law governs the case, but reverse its conclusion that the Millers' entire interest in the certificate of deposit was available to satisfy High's judgment.

I.

The parties have not disputed the relevant facts. Pennsylvania residents Alvin and Pauline Miller purchased a certificate of deposit ("the CD") in the face amount of $300,000 from First Fidelity Bank, North Jersey ("the bank"). The CD was purchased by both Millers with funds from a Pennsylvania bank account that they owned as tenants by the entireties. The Millers had sought a line of credit with the bank, which required the CD as security for the loan. The bank presently has a $125,000 secured lien against the CD. One of the provisions on the face of the CD stated that "[t]his certificate is subject to the provisions of the Multiple Party Deposit Account Act N.J.S.A. 17-16I et seq.: I acknowledge receipt of the Act's provisions."

Thereafter, a $112,423.95 judgment was entered in the United States District Court for the Eastern District of Tennessee in favor of Joseph High against Alvin Miller and Thomas Balun, jointly and severally ("the judgment"). High registered the judgment with the United States District Court for the District of New Jersey ("the district court"), and then obtained an attachment of the CD. High petitioned the district court for an order compelling the bank to turn over enough of the unencumbered portion of the CD to satisfy the judgment with interest. Alvin Miller objected to the turnover, primarily on the grounds that he owned the CD as a tenant by the entireties with his wife and therefore it was not available to satisfy his individual obligations.

The case was referred to a magistrate judge for a recommendation and report. The magistrate rejected Alvin Miller's claim that Pauline Miller was a necessary party to the proceeding. He concluded that New Jersey would apply the Restatement (Second), Conflicts of Laws, § 118, the provision governing contracts, and that New Jersey law governed the Millers' ownership under that test. The magistrate then found that under New Jersey law, Mr. Miller had a separate half interest in the CD available to satisfy the judgment. Both parties filed objections to the magistrate's report. The district court entered an order affirming in part and reversing in part. It held that New Jersey law applied and that at least half of the unencumbered balance of the CD was available to satisfy the judgment, but reversed the conclusion that Pauline Miller was not a necessary party. The district court therefore remanded the case to the magistrate with instructions that High be allowed to amend the petition to include Pauline Miller and that a hearing be held to determine what portion of the remaining one-half of the CD was "attributable" to each spouse.

After conducting a hearing, the magistrate issued a second recommendation and report. Upon reconsideration, the magistrate decided that this case was a property dispute rather than a contract dispute and therefore his earlier choice of law analysis was mistaken. He then applied the Restatement***325** (Second) provisions governing marital property in movables (§ 258) and exemptions from execution (§ 132) and concluded that Pennsylvania law governed the dispute. Under Pennsylvania law, he found that the Millers owned the CD as tenants by the entireties, but that Pauline Miller was jointly liable for the judgment as (1) a partner by estoppel, (2) a real party in interest, or (3) a privy.

Again, both parties filed objections to the magistrate's report. The district court accepted the magistrate's recommendations in part and reversed them in part. It held that its earlier affirmance of the conclusion that New Jersey law governed was binding and that the magistrate should not have revisited the issue. The court then rejected the magistrate's various theories for Pauline Miller's liability on the judgment, but found the Millers' entire interest in the CD available to satisfy the judgment based on a presumption in New Jersey law that the entire amount of a joint account belongs to the debtor. Therefore, the final judgment ordered Alvin Miller to turnover enough of the unencumbered balance of the CD to satisfy the judgment. The Millers filed a timely appeal from that judgment.

The district court had jurisdiction pursuant to 28 U.S.C. § 1963,[FN1] and we have jurisdiction pursuant to 28 U.S.C. § 1291. Our review of the district court's interpretation of state law-the only issue in this case-is plenary. *Salve Regina College v. Russell,* 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

FN1. Section 1963 provides in relevant part,

> A judgment in an action ... in any district court ... may be registered by filing a certified copy of such judgment in another district.... A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

II.

New Jersey law controls this case, not because New Jersey has a greater interest in the dispute than Pennsylvania, but because both states would enforce the Millers' agreement to hold the CD "subject to the provisions of the Multiple Party Deposit Account Act N.J.S.A. 17:16I*et seq.*" The first step in any New Jersey choice of law analysis is to determine whether an actual conflict exists. *Veazey v. Doremus,* 103 N.J. 244, 510 A.2d 1187, 1189 (1986). Where the application of either state's law would yield the same result, no conflict exists to be resolved.

[1][2][3] New Jersey law does not permit married couples to own personal property by the entireties. *Fort Lee Sav. & Loan Assoc. v. LiButti,* 106 N.J.Super. 211, 254 A.2d 804, 807 (N.J.Super.Ct.App.Div.1969) (Carton, J., dissenting), *unanimously adopted as majority opinion,* 55 N.J. 532, 264 A.2d 33 (1970). Pennsylvania law does permit couples to own personal property by the entireties and will assume, in the absence of contrary evidence, that joint bank accounts are so held. *In re Cribbs,* 411 Pa. 242, 191 A.2d 379, 382-83 (1963). But Pennsylvania does not *require* couples to hold property by the entireties; "intention is the cardinal and controlling element and if it is the intention of the parties to create an estate other than by entireties, such intention will be given effect." *Brenner v. Sukenik,* 410 Pa. 324, 189 A.2d 246, 249 (1963). In other words, a Pennsylvania couple may hold a Pennsylvania bank account in joint tenancy merely by expressing an intent to do so.

[4] There is no dispute that the Millers jointly purchased the CD or that the CD states on its face that it is subject to the Act. Section 3 of the Act states:

The provisions of section 4 to 6 [of the Act] concerning beneficial ownership as between parties ... are relevant ... to controversies between these persons and their creditors and other successors....

Section 4 provides:
Unless a contrary intent is manifested by the terms of the contract, or the deposit agreement, or there is other clear and convincing evidence of a different intent at the time the account is created:

(a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by ***326** each to the sums on deposit. In the absence of proof of net contributions, the account belongs in equal shares to all parties having present right of withdrawal.

N.J.S.A. 17:16I-3 and 17:16I-4.

When the Millers opened the account, they agreed to own the account "subject" to the Act, and the Act itself states that its designation of ownership is "relevant" to disputes with creditors. Therefore, when the Millers signed the CD and agreed to own it under the Act, their election governed not just their ownership of the CD vis-a-vis the bank, but also their rights against each other and third-parties.

Although the Millers consistently claim that their subjective intent was to continue to hold the funds by the entireties, that testimony is insufficient to overcome the clear provision of the CD. In determining the intent of parties to a contract, both Pennsylvania and New Jersey law will honor clear, contemporaneous, written expressions rather than testimony after the fact about the parties' subjective intent. *Steuart v. McChesney,* 498 Pa. 45, 444 A.2d 659, 661 (1982) ("when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement."); *Zapanta v. Isoldi,* 212 N.J.Super. 678, 515 A.2d 1298, 1303 (1986) ("Motivations or mental reservations cannot affect a written agreement."), *disapproved on other grounds, Levison v. Weintraub,* 215 N.J.Super. 273, 521 A.2d 909*cert. denied,* 107 N.J. 650, 527 A.2d 470 (1987). We conclude that both Pennsylvania and New Jersey would enforce the CD provision, as a clear contemporary expression of the Millers' intent, rather than the Millers' alleged subjective intent. Therefore, the courts of both states would look to the Act to determine ownership of the certificate of deposit.

III.

[5] Finding that the Act governs the Millers' ownership of the CD does not settle the question of what is available to Alvin Miller's creditors; we must still determine what portion of the CD belongs to each spouse. Although the language of the Act, by speaking of proportion, rules out the possibility of joint ownership of the whole, it allows for any division between the parties-from complete ownership by the husband, at one end of the spectrum, to complete ownership by the wife, at the other. Because the district court's conclusion that Alvin Miller owned the entire CD was based on general New Jersey law, rather than on the Act, it bears reconsideration.

Because there was no contrary expression of intent, the Act states that the Millers' account "belongs ... to the parties in proportion to the net contributions of each to the sums on deposit. In the absence of proof of net contributions, the account belongs in equal shares to all parties having present right of withdrawal." N.J.S.A. 17:16I-4. There appear to be no New Jersey cases interpreting "net contribution." The Act defines the phrase as "the sum of all deposits ... made by or for him, less all withdrawals made by or for him ... plus a pro rata share of any interest or dividends included in the current balance."

Thus, we must determine the net contributions of the Millers to the CD. It is undisputed that the funds to purchase the CD came from the Millers' joint account in Pennsylvania which they held in tenancy by the entireties; therefore, the Millers made equal contributions when the CD was established. By drawing upon the secured line of credit without making repayments, the Millers effectively made "withdrawals" from the CD.[FN2] Those "withdrawals" were equal joint "withdrawals" because both Millers signed the application for the line of credit and their testimony established that they were equal participants in the horse business for which the line of credit was used. Therefore, the Millers made equal "net contributions" to the CD because all deposits and withdrawals were joint and *327 equal. Ownership under the Act "in proportion to the net contributions of each" results in each of the Millers having independent ownership of half the CD.

> FN2. Because the line of credit was technically a separate obligation, it might be said that withdrawals were made by the bank *for* the Millers to repay that obligation. The result under the statute was the same.

The comment to § 6-103 to the Uniform Probate Code, on which section 4 of the Act is based, reinforces this conclusion. The comment states:

This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership.

The comment indicates that the language was intended to allow one party to deposit funds in a joint account without creating a presumption that the deposit, without more, made a gift to the other party. Thus, if the wife owned funds before depositing them in a couple's joint account, the deposit will not be interpreted as a gift of a half-interest to her husband. The provision was intended to prevent the mere establishment or use of a joint account from automatically changing the parties' ownership interests in the deposited funds. It is consistent with that intent to find that the Millers' equal interests in the funds that purchased the CD continued so that they had equal interests in the CD.

IV.

For these reasons, we will affirm the district court's holding that New Jersey law applies, but will reverse its conclusion that under New Jersey law the entire unencumbered portion of the CD is available to satisfy a judgment against Alvin Miller. We will remand for entry of an order consistent with this opinion.

C.A.3 (N.J.),1991.
High v. Balun
943 F.2d 323

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