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LIABILITY OF SURVIVING JOINT TENANT FOR DEBTS OF DECEASED JOINT OWNER

A Review of Section 30-624 Nebraska Revised Statutes

I. INTRODUCTION

Problems arising under decedents' estates, joint tenancy, and creditor's rights were greatly increased by the 1955 enactment of Section 30-624 of the Nebraska Revised Statutes. This statute is peculiar to Nebraska¹ and for this reason judicial determinations from other states are of very little value in solving the problems arising under this act. The purpose of this article is to review these problems, in the light of Nebraska law and court decisions as an aid to their solution.

II. LEGISLATIVE HISTORY

L.B. 197² was sponsored by persons who thought that joint tenancy was being used to avoid the payment of debts. Although the sponsors did not want to eliminate joint tenancy, they thought that the property in joint tenancy should be liable for the payment of the debts of the deceased joint owner.³ As originally introduced, L.B. 197 made all jointly held real or personal property—specifically including joint bank and savings and loan accounts—liable for the debts of the deceased joint owner.⁴ The Standing Committee made minor amendments to the bill;⁵ however, these amendments were

¹ Kindler v. Kindler, 169 Neb. 153, 98 N.W.2d 881 (1959).

² L.B. 197 was the bill number for what is now NEB. REV. STAT. § 30-624 (Reissue 1956).

³ Ginsburg, *Review of Legislation Affecting Real Estate, Probate and Trusts Passed by the 1955 Nebraska Legislature* (Nebraska State Bar Association Proceedings, 1955), 35 NEB. L. REV. 297 (1956).

⁴ Neb. Leg. Jour., 67th Sess., 190 (1955).

⁵ *Id.* at 1008.

rejected and the bill was amended on the floor of the legislature to read essentially as it did for final reading.⁶

The title to the bill as amended stated:

A bill for an act relating to decedents' estates; to make the surviving joint owner or owners of jointly held real or personal property liable for the debts and obligations of the deceased joint owner or owners⁷

The act itself makes the surviving joint owner of "real or personal property in joint tenancy" personally liable to "a creditor or personal representative of the deceased joint owner" for the amount that the deceased joint owner "contributed to the jointly owned property" under certain circumstances. The action must be brought "in a court of competent jurisdiction" within three months after the death of the decedent but only when the assets of the deceased joint tenant are insufficient to pay his debts and obligations. The recovery, if any, is subject to all homestead and "legal exemptions" of the decedent in the property.⁸

It will be noted that the bill as enacted differs from the bill as originally introduced in two very important aspects. First, the liability is placed on the survivor personally rather than on the property, and second, those jointly held accounts covered by Sections 8-157 and 8-317⁹ are not specifically included as they were in the original bill.

After quoting the entire statute and title, the Nebraska Supreme Court gave some indication as to what the statute "attempts to provide" by stating in *Kindler v. Kindler*:¹⁰

It will be noted that the language in the title of section 30-624, R.R.S. 1943, as originally enacted, and the act itself as well, relates to "decedents' estates" and attempts to provide a conditional liability of the surviving joint tenant for debts and obligations of a deceased joint tenant as a lawfully existing asset of his estate with which to pay his creditors.¹¹

⁶ *Id.* at 1359.

⁷ *Id.* at 1503.

⁸ NEB. REV. STAT. § 30-624 (Reissue 1956).

⁹ NEB. REV. STAT. §§ 8-167, -317 (Reissue 1954).

¹⁰ 169 Neb. 153, 159, 98 N.W.2d 881, 885 (1959).

¹¹ Although this quote is dictum in the case, it constitutes the only statement of the Nebraska Supreme Court as to what is provided by the statute in question. In *DeForge v. Patrick*, 162 Neb. 568, 574, 76 N.W.2d 733, 737 (1956), the court did mention the statute but only to state that it did not abolish joint tenancy.

III. JURISDICTION AND CONSTITUTIONALITY

Although the question of constitutionality of Section 30-624 has not been litigated before the Nebraska Supreme Court, the question was recently presented in the case of *Buehler v. Kirby*,¹² an action instituted in the Lancaster District Court. In that case, District Judge Paul W. White held the statute to be "a direct and very catastrophic interference with the necessarily exclusive jurisdiction of the county court."¹³

As partial support for this holding,¹⁴ Judge White, following the reasoning of *Rehn v. Bingaman*,¹⁵ emphasized that the county court has original, exclusive jurisdiction over the settlement of claims against a deceased person.¹⁶ A claim includes every species of liability for which the estate can be called upon to provide payment.¹⁷ Therefore, an original action in the district court based upon a claim against a deceased joint tenant, an action apparently allowed by Section 30-624,¹⁸ would be an extension of the district court jurisdiction into the realm of the original, exclusive jurisdiction of the county court—an extension contrary to the Constitution and statutes of this state.¹⁹

¹² Memorandum Opinion, Doc. 198, p. 187, Dist. Ct. of Lancaster County, Nebr. (1959).

¹³ *Ibid.* Judge White declared the statute unconstitutional and therefore the plaintiff's cause of action based upon the statute was dismissed.

¹⁴ Several of the remaining reasons for Judge White's holding are discussed throughout this article. See also 39 NEB. L. REV. 339 (1960).

¹⁵ 151 Neb. 196, 204, 36 N.W.2d 856, 861 (1949).

¹⁶ NEB. CONST. art. V, § 16 states: "County courts . . . shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons. . . ." NEB. REV. STAT. § 24-503 (Reissue 1956) makes this original jurisdiction exclusive. NEB. REV. STAT. § 24-504 states: "The county court shall have power to hear and determine claims . . . in the matter of estates of deceased persons. . . ."

¹⁷ *In re Edwards*, 138 Neb. 671, 675, 294 N.W. 422, 425 (1940).

¹⁸ "The statute by its very terms, and implicit in it, contemplates that there is jurisdiction within the county court to accomplish the same purpose for the creditor that is embodied in the statute, but provides that if a certain time element passes and if there is proof of insolvency that then an independent action may be taken up in the district court." *Buehler v. Kirby*, Memorandum Opinion, Doc. 198, p. 187, Dist. Ct. of Lancaster County, Nebr. (1959).

¹⁹ "Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act." *Hendreshke v. Harvard High School Dis-*

IV. EFFECT ON JOINT TENANCY

Although the title of the bill related the act to decedents' estates,²⁰ the act itself has a major effect upon joint tenancy although this effect may be considered indirect.²¹

A. EFFECT ON THE LAND

Since the statute creates a personal liability on the surviving joint owner rather than impressing a lien upon the property, it does not abrogate the strict interpretation of the common law rule that the survivor takes *title* free and clear of the debts of the deceased joint owner. Therefore, one of the major objections to the bill as first introduced is eliminated—it does not put a restraint on alienation.²² However, because of the limit of liability and the provision of personal liability to the creditors, the act places a great burden on the surviving joint tenant personally.

B. EFFECT ON THE SURVIVOR

The survivor is liable for only that amount which the deceased contributed to the jointly owned property. Therefore, if the property has increased in value over the original investment, the survivor gets the full benefit of the increase. But, if the property has decreased in value, the survivor must stand the full loss. Should the value of the deceased's contribution be less than the unsatisfied claims, the statute would seem to require a race by the creditors to get judgment against the survivor and thereby satisfy their claims.²³

As pointed out by Judge White in *Buehler v. Kirby*,²⁴ the act

trict, 35 Neb. 400, 401, 53 N.W. 204, 205 (1892). See also *Stewart v. Herten*, 125 Neb. 210, 249 N.W. 552 (1933). It seems apparent that such a "special tribunal," the county court, has been provided to deal with claims against the deceased. See note 16 *supra*.

²⁰ Neb. Leg. Jour., 67th Sess., 1503. See also *Kindler v. Kindler*, 169 Neb. 153, 159, 98 N.W.2d 881, 885 (1959).

²¹ "This [L.B. 197, later NEB. REV. STAT. § 30-624 (Reissue 1956)] also purports to be, by its title, an act relating to decedents' estates. However, it does not affect decedents' estates but affects the law of joint tenancy." Ginsburg, *Review of Legislation Affecting Real Estate, Probate and Trusts Passed by the 1955 Nebraska Legislature* (Nebraska State Bar Association Proceedings, (1955) 35 NEB. L. REV. 297, 307 (1956).

²² See *Ibid.*

²³ *Buehler v. Kirby*, Memorandum Opinion, Doc. 198, p. 187, Dist. Ct. of Lancaster County, Nebr. (1959).

²⁴ *Ibid.*

permits the survivor to be plagued with a multiplicity of suits. Assuming that the amount contributed by the decedent would satisfy the claims of several creditors, each could bring an action to satisfy his claim. The other creditors and the personal representative would apparently not be "necessary parties"²⁵ nor would the survivor meet the requirements for interpleader.²⁶ Intervention²⁷ may or may not aid the situation depending on whether it is allowed and whether the other creditors or the personal representative elect to come into the action brought by another creditor.²⁸

A judicial determination of the amount contributed by the decedent to the jointly owned property probably would not be a bar to a determination of this same fact in a subsequent action brought by another creditor.²⁹ However, if the first action was brought by the personal representative who determined and collected the amount contributed by the deceased joint owner, a subsequent action would be highly improbable, if not impossible.³⁰

²⁵ NEB. REV. STAT. § 25-323 (Reissue 1956). "By statute the court is only required to order new parties to an action when a determination of the controversy cannot be had without the presence of the other parties." *Dent v. City of North Platte*, 148 Neb. 718, 721, 28 N.W.2d 562, 564 (1947). See also *Cunningham v. Brewer*, 144 Neb. 218, 16 N.W.2d 533 (1944). It would seem that the other creditors and the personal representative would not be necessary to determine the controversy between the instant creditor and the survivor.

²⁶ NEB. REV. STAT. § 25-325 (Reissue 1956). In *Farming Corporation v. Bridgeport Bank*, 113 Neb. 323, 327, 202 N.W. 911, 913 (1925), the court stated that the essential conditions to bringing interpleader are: "(1) The same thing, debt or duty, must be claimed by both or all of the parties against whom the relief is demanded. (2) All their adverse titles or claims must be dependent, or be derived from a common source. (3) The person asking the relief . . . must not have nor claim any interest in the subject matter. (4) He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder."

²⁷ NEB. REV. STAT. § 25-328 (Reissue 1956).

²⁸ The party seeking to intervene must have a "direct and immediate interest" so that he "will either lose or gain by the direct operation and legal effect of the judgment." *Cornhusker Electric Co. v. City of Fairbury*, 131 Neb. 888, 270 N.W. 482 (1936). See also *City of Omaha v. Douglas County*, 125 Neb. 640, 251 N.W. 262 (1933). It would seem that the creditors and the personal representative would meet this test as a determination of the amount contributed would be of direct interest to them and they could stand to lose by operation of the judgment.

²⁹ See RESTATEMENT, JUDGMENTS § 93 (1942) and illustrations thereunder.

³⁰ See RESTATEMENT, JUDGMENTS §§ 80, 85 (1942). It is possible that the personal representative would be considered as acting in a fiduciary

V. BANK AND SAVINGS & LOAN ACCOUNTS

Joint bank and savings and loan accounts, specifically included in the bill as originally introduced, were not included in Section 30-624 as enacted.³¹ It may be argued that this factor is indicative of the intention of the legislature to exclude such accounts from the effect of the statute. This argument is further supplemented by the fact that the statute used the words "property in joint tenancy" and the accounts given the right to survivorship by Sections 8-167 and 8-317³² are not, or at least do not have to be, held in joint tenancy.³³

The argument for the inclusion of such accounts within the scope of Section 30-624 is aided by the title of the bill. The title, from the time of the bill's introduction until its enactment, referred to "jointly held" property rather than "property in joint tenancy."³⁴ In addition, the legislature has granted the right of survivorship to such jointly held accounts thereby disregarding previous judicial pronouncements concerning technical aspects of joint tenancy when dealing with bank and savings and loan accounts.³⁵ To achieve the purpose of the sponsors of the bill,³⁶ it would seem that the legis-

capacity towards the general creditors to collect an asset out of which the creditors could be paid. If this were the case, the creditors would be bound by the action brought by the personal representative. This possibility, combined with the difficulty of proving a larger contribution and with the three month time limit, would probably make a subsequent action by a creditor impractical. It should also be noted that if two actions were instituted, within the three month period, in the same county, they would probably be consolidated. However, if these actions were instituted in different counties, the consolidation would not be possible.

³¹ Compare Neb. Leg. Jour., 67th Sess., 190 (1955), with NEB. REV. STAT. § 30-624 (Reissue 1956).

³² NEB. REV. STAT. §§ 8-167, -317 (Reissue 1954).

³³ See *First Trust Co. of Lincoln, Nebr. v. Hammond*, 140 Neb. 330, 299 N.W. 496 (1941), *opinion supplemented* 140 Neb. 339, 300 N.W. 808 (1941), *opinion supplemented* 141 Neb. 756, 4 N.W.2d 756 (1942); *Tobias v. Mutual Building & Loan Ass'n*, 147 Neb. 676, 24 N.W.2d 870 (1946); *Whiteside v. Whiteside*, 159 Neb. 362, 67 N.W.2d 141 (1954). See also Ginsberg, *Effect of Owner's Execution of Land Contract or Mortgage Upon a Joint Tenancy* (Nebraska State Bar Association Proceedings, 1954) 34 NEB. L. REV. 280, 282 (1955).

³⁴ See Neb. Leg. Jour., 67th Sess., 190, 1008 and 1503 (1955).

³⁵ *Tobias v. Mutual Building & Loan Ass'n*, 147 Neb. 676, 680, 24 N.W.2d 870, 873 (1946).

³⁶ Ginsburg, *Review of Legislation Affecting Real Estate, Probate and Trusts Passed by the 1955 Nebraska Legislature* (Nebraska State Bar Association Proceedings, 1955), 35 NEB. L. REV. 297 (1956).

lature again intended to include in "joint tenancy" those accounts not technically includable in the term.

The inclusion or exclusion of jointly owned bank and savings and loan accounts within the scope of Section 30-624 is a matter that needs judicial or legislative clarification.

VI. EFFECT ON DECEDENTS' ESTATES

Presumably, a recovery under Section 30-624 by the "personal representative of the deceased joint owner" would become an asset of the estate and be distributed in the normal course of the probate proceedings.³⁷ However, if the creditor institutes the action, the effects under the statute would be "squarely within the vices which in the determination of estates the Constitution sought to prevent."³⁸

The first of these "vices" is the opportunity of the estate to contest the merits of the creditors' claim. Would the claimant bear the burden of proving the exact amount contributed by the deceased joint tenant?³⁹ Would the surviving joint owner be required to challenge the merits of a claim against the deceased? Judge White has stated:

The primary determination in the lawsuit would be only the amount that [the deceased] owned in the joint property, and yet this statute contemplates a necessary adjudication as to the validity and the amount of the claim for a determination of the matter which is merged in a final judgment and would naturally be conclusive between the parties. Obviously, the deceased is protected in this matter in the county court. . . .⁴⁰

³⁷ *Kindler v. Kindler*, 169 Neb. 153, 159, 98 N.W.2d 881, 885 (1959). For a general review of Nebraska probate procedure in regard to claims against the estate of a decedent, see 39 NEB. L. REV. 323 (1960).

³⁸ *Buehler v. Kirby*, Memorandum Opinion, Doc. 198, p. 187, Dist. Ct. of Lancaster County, Nebr. (1959).

³⁹ It seems reasonable to assume that the claimant would have to prove that the deceased contributed at least enough to the joint ownership of the property to permit the claimant to recover his claim or a portion thereof. However, should the amount contributed be more than the amount of the claim, would the claimant have to prove the exact amount contributed? This would seem unnecessary. Also, the facts as to the amount contributed by the deceased joint owner would be peculiarly within the knowledge of the surviving joint owner and, applying the general rule in such instances, could be alleged with less certainty than would otherwise be necessary. See the general rule set out in *Graham v. Graham*, 135 Neb. 761, 770, 284 N.W. 280, 285 (1939). The necessity of the survivor alleging in particular terms may shift the burden of proof over to him if the rule that "he who pleads must also prove" is applied.

⁴⁰ *Buehler v. Kirby*, Memorandum Opinion, Doc. 198, p. 187, Dist. Ct. of Lancaster County, Nebr. (1959).

Another of these "vices" is the detrimental effect which a creditor's suit would have on the priority provisions of the probate code.⁴¹ Under the statute being considered, a creditor with a tort claim, another with a claim for funeral expenses, and the personal representative trying to collect for a widow's allowance are all on equal footing as to recovery from the survivor. Again, an action allowed by the personal representative alone to recover this "asset" and distribute it in the probate proceedings would alleviate the problems.

VII. CONCLUSION

The policy of Section 30-624, making the survivor liable for the debts of the deceased joint owner under the circumstances provided by the statute, is not questioned. However, the procedure provided for by the statute, through which the sponsors of the bill attempted to attain their purpose,⁴² is seriously challenged. The author believes the problems discussed in this article are sufficient to merit an amendment to Section 30-624 and makes the following recommendations to alleviate these problems:⁴³

1. When the assets of the estate are insufficient to satisfy the claims of creditors, the personal representative of the deceased joint owner may bring an action against the surviving joint owner to collect the amount contributed by the deceased to the jointly owned property.

2. Upon application by the creditors, the same paying part of the costs of the litigation, the personal representative becomes bound to bring this action.

3. The recovery by the personal representative then becomes an asset of the estate to be appropriated in the same manner as other funds in the hands of the personal representative.

4. Jointly held property regulated by Sections 8-167 and 8-317 should either be expressly included or excluded from coverage by the statute.

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⁴¹ See NEB. REV. STAT. §§ 30-103, -615 (Reissue 1956).

⁴² See note 36 *supra*.

⁴³ It will be noted that the recommendations follow closely the procedure set out in those sections of the statutes dealing with fraudulent conveyances by the decedent. See NEB. REV. STAT. §§ 30-415 to -17 (Reissue 1956).