Appeal History:

aff'd, No. C89-0001 (N. D. Iowa May 11, 1989) (Hansen, J.)
aff'd, No. 89-2275 920 F.2d 521 (8th Circuit 1990)

In the United States Bankruptcy Court

for the Northern District of Iowa

SAMUEL HENRY THIELKE and
HELEN K. THIELKE
f/d/b/a Mr. Steak;
f/d/b/a B.F.T. Inc.;
f/d/b/a Four T Restaurants
Debtor(s).

Bankruptcy No. 87-00814SSC
(Arizona) Pending in the United States
Bankruptcy Court for the District of Arizona

Chapter 7

ROBERT THIELKE

Plaintiff

vs.

ACKLEY STATE BANK and
CLAUDE PITRAT Trustee
Defendant(s)

Adversary No. X87-0102C
Northern District of Iowa

MEMORANDUM OF DECISION AND ORDER

The matter before the court is an adversary proceeding filed by Robert Thielke to determine the bankruptcy estate's interest in certain bank accounts and certificates of deposit. A trial was held in Cedar Rapids, Iowa on April 11, 1988.

This adversary proceeding arose out of a bankruptcy filed in the United States Bankruptcy Court for the District of Arizona. The plaintiff's nephew, Samuel Thielke, a resident of Arizona, filed a Chapter 7 bankruptcy petition in that court on February 10, 1987.

During the trial on April 11, 1988, all parties waived any objection to venue. No party raised the issue of jurisdiction.

1 This proceeding was described in the initial pleading as a motion." However, it has been treated in all respects as an adversary proceeding. Trial proceeded and the matter was taken under advisement. Subsequently, the court concluded that the Arizona Bankruptcy Court had exclusive jurisdiction over the property in question. Therefore, the court held its decision in the above-captioned adversary in abeyance pending a proposed resolution of the jurisdiction issue. On October 10, 1988, the United

States Bankruptcy Court for the District of Arizona ordered that jurisdiction and venue of the adversary proceeding be transferred nunc pro tunc to the United States Bankruptcy Court for the Northern District of Iowa.

The parties have filed briefs in support of their positions. The court, having considered the evidence and the arguments of the parties, now issues the following findings of fact and conclusions of law pursuant to B.R. 7052.

This is a core proceeding under 23 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

1. The plaintiff's nephew, Samuel Henry Thielke, and Samuel's wife, Helen Kay Thielke, filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Arizona on February 10, 1987. The trustee in the bankruptcy case is Claude Pitrat.

2. Robert Thielke of Ackley, Iowa initiated this adversary proceeding in Iowa on March 27, 1987 by filing a "MOTION TO DETERMINE NON-EXISTENCE OF INTEREST IN PROPERTY."

3. AC the time of the bankruptcy filing, Robert Thielke possessed several depository accounts and certificates of deposit with the Ackley State Bank, an Iowa corporation (BANK). These accounts include (1) savings account no. 68-4005-2; (2) checking account no. 03-1564-8; (3) certificate of deposit no. 24241 dated 4-1-84; (4) certificate of deposit no. 25317 dated 1-31-85; (5) certificate of deposit no. 25570 dated 3-30-851 (6) certificate of deposit no. 25860 dated 6-23-85; (7) certificate of deposit no. 25245 dated 11-4-86; and (8) certificate of deposit no. 27239 dated 1-7-85.

4. The name of the debtor, Samuel Henry Thielke, had been placed on nearly all of the above-mentioned accounts and certificates. The savings account opened at the Bank on December 14, 1982 is designated as the account of "Robert W. Thielke or Samuel Henry Thielke." Each of the certificates of deposit show as depositor: "Robert W. Thielke or Samuel Henry Thielke." Only Robert W. Thielke's name appears on the checking account.

5. Robert Thielke has been retired since 1934. Since that time, he has continually conducted business with the Ackley State Bank and its predecessors and has had several different accounts at the bank through the years. Mr. Thielke had inherited a harness business, a farm and other assets from his parents and has reinvested this inheritance through the years.

6. Robert Thielke's nearest living relative is the debtor, Samuel Henry Thielke, a nephew. Robert Thielke's only other living relatives are Samuel's children, Julie Marie Thielke and Brent Thielke. Prior to the bankruptcy, Robert Thielke had intended that his entire estate pass to his nephew Samuel upon his death.

7. Robert Thielke's total deposits in the Bank at some point exceeded the Federal Deposit Insurance Corporation's (FDIC) protection limit of $100,000.00. In order to increase the insurance protection, Samuel Thielke's name was placed on the accounts by his Uncle Robert.

8. Robert Thielke intended to retain full control of the savings account and certificates of deposit until the time of his death; he did not intend to make a gift to Samuel Thielke at the time he placed his name on the accounts. Robert Thielke understood that he was the only person who could withdraw funds from these accounts or certificates and that Samuel Thielke had no present interest in them.

Robert Thielke said what he wanted full control of the deposits since he had no idea of how much money he would need for living expenses during the remainder of his life.

9. Robert Thielke believed that Samuel Thielke had no knowledge that his name had been put on the accounts or certificates, and that Samuel Thielke had no knowledge of his uncle's financial affairs.

10. Robert Thielke opened the savings account at the Bank by entering into a savings account agreement (plaintiff's exhibit 2). A bank officer typed in the information needed to open this account. Robert Thielke was present at the time the information was typed onto the form. The names "Robert W. Thielke or Samuel Henry Thielke" appear on the blank for name of account. The initial deposit was $53,488.63. The box for "Personal Account" is checked on this agreement. There is no check mark, however, preceding the phrases "NO SURVIVORSHIP INTENDED" or "JOINT ACCOUNT-WITH SURVIVORSHIP." The only signature which appears on this savings account agreement in that of Robert W. Thielke. Samuel Henry Thielke did not sign this agreement. The social security number which appears on this agreement is Robert Thielke's.

11. The second page of the savings account deposit agreement (exhibit 2) provides: "JOINT ACCOUNTS-WITH SURVIVORSHIP: If such an account is indicated, each of you intends and agrees that the account balance upon your death shall be the property of the survivor, and if more than one survives, you intend to remain as joint tenants with right of survivorship, unless and until this account is changed or closed."

12. The savings account deposit agreement also states:

> "SET OFF: Each of you acknowledges and agrees that we have the right to set-off against all or any part of the account balance any debt you may owe us to the extent of your right Co withdraw or transfer funds from this account (without regard to the frequency or minimum denomination limits). This right may be exercised at any time and without prior notice (except as limited by law). This right applies even if one or more of you having the right of withdrawal is not obligated to us on the debt. This right applies to any debt we now own or hereafter acquire, and however it arises, so long as we in good faith can reduce the obligation to a definite amount.
>
> This right does not apply Lo the separate debt of a person whose right to withdraw or transfer funds from this account is clearly and solely in a representative capacity, unless the person or entity represented is obligated on the debt. It also does not apply if, by the nature of this account and applicable law, the account must be exempt from the claims of all creditors (for example, if this account is an Individual Retirement Account)."

13. Robert Thielke testified that he aid not read the entire savings account deposit agreement.

14. Each of the certificates of deposit included the following language:

> "If more than one of you [depositors] are named above, you will own this certificate as joint tenants with right of survivorship (and not as tenants in common). (You may change this ownership by written instructions.) We [bank] will treat any one of you [depositors] as owner for purposes of endorsement, payment of principal and interest, presentation (demanding payment of amounts due), transfer and any notice to or from you."

The certificates of deposit make no statement as to a Bank right of set-off.

15. All contributions to the savings account and certificates of deposit were made by Robert Thielke.

16. Each of the certificates of deposit indicates that the depositor was "Robert W. Thielke or Samuel Henry Thielke." Each of the certificates of deposit indicates that the interest is to be paid monthly by check. Monthly checks are sent to Robert W. Thielke's address at 921 Third Avenue, Ackley, Iowa 50601. The only social security number which appears on the certificates of deposit is Robert Thielke's.

17. The interest checks for the certificates of deposit were made to the order of "Robert W. Thielke or Samuel M. Thielke, 921 Third Avenue, Ackley, Iowa." The interest checks were cashed by Robert Thielke. Samuel did not endorse any of the interest checks. The proceeds of the interest checks were used for Robert's personal expenses or were reinvested by him in other accounts.

18. Each of the certificates of deposit were typed by an officer of the Bank. The certificate of deposit is not signed by the depositor. Each of the originals of the certificates of deposit was given by the bank officer to Robert Thielke at the time of original deposit. Robert Thielke placed these originals in his safety deposit box and has not relinquished control of these documents to anyone.

19. All of the interest income from the accounts at the Bank was reported on the tax returns of Robert Thielke; he was the only person to pay tax on this interest income.

20. Delbert Harken, vice president and cashier of the Ackley State Bank, testified that he did discuss with Robert Thielke the limits and protections of the Federal Deposit Insurance Corporation. Mr. Harken testified that it is the Bank's policy to discuss FDIC protection whenever an account holder has more than $100,000.00 on deposit with the Bank. Mr. Harken said that it was Robert's decision alone to place Samuel Thielke's name on the account.

21. Samuel Thielke had borrowed money from the Ackley State Bank prior to his bankruptcy filing and had executed several notes.

22. Robert Thielke was unaware of his nephew's financial situation prior to the bankruptcy. Additionally, Robert Thielke had little contact with Samuel Thielke since Samuel had moved to Arizona.

23. The Ackley State Bank stated that it was directed by the trustee to "freeze all accounts of whatever nature located at the Bank in which the debtor Samuel Henry Thielke is listed as a joint tenant until further order of the court." The bank has not allowed Robert Thielke access to any accounts which include the name of Samuel Henry Thielke.

24. The trustee asserts that he holds an interest in the bank accounts pursuant to the provisions of the Bankruptcy Code and that the Code prohibits Robert Thielke, Samuel Thielke or Bank from disposing of these assets.

25. The Bank asserts that it has a right of set-off against all assets of the debtor located at the bank due to several overdue loans made to the debtor. The bank contends that it has a right of set-off to 100% of the deposits in the accounts which include the names "Robert W. Thielke or Samuel A. Thielke."

26. The Bank did not assert any right of set-off against these accounts prior to the filing of the bankruptcy petition. The bank did not separately notify Robert Thielke of the bank's right of set-off prior to the filing of the bankruptcy and had never discussed the possibility with him.

DISCUSSION

I.

The first determination to be made is whether the savings account, certificates of deposit (CDS), and checking account held by the Bank are property of the bankruptcy estate of Samuel Thielke.

Robert Thielke argues that Samuel Thielke has no present interest in the savings account, checking account and certificates of deposit. He contends that he intended to retain full control of the money during his lifetime and never intended to give Samuel any present interest in the property. Therefore, Robert Thielke argues that since Samuel Thielke has no present interest in the property, the bank accounts and CDS cannot be property of the debtor's bankruptcy estate.

The determination of what constitutes property of the estate under 11 U.S.C. § 541 is a matter of state law. Therefore, the court will look to Iowa law to determine if Samuel Thielke has a legal or equitable interest in the property.

Personal property in Iowa may be held under joint tenancy with right of survivorship or by tenancy in common. See In re Estate of Miller, 248 Iowa 19, 79 N.W.2d 315, 318 (1956).

A. Savings Account

Robert Thielke opened the savings account on December 14, 1982 with an initial deposit of $53,488.63. At the time of opening this account, he entered into a depository agreement with the Bank (Exhibit No. 2). The names "Robert W. Thielke or Samuel Henry Thielke" appear on the blank for name of account.

This depository agreement created a contract between Robert Thielke, as depositor, and the Bank. The bank and trustee both argue that Robert Thielke created a joint account with right of survivorship reachable by Samuel's creditors when he placed his nephew's name on the savings account agreement. Robert Thielke argues that he never intended to transfer a present interest in the savings account to his nephew, and therefore the bank and trustee are not entitled to receive any portion of the savings account.

The first issue before the court is whether the savings account is being held by Robert and Samuel Thielke as joint tenants or tenants in common.

Tenancy in common is a type of co-ownership of property in which each of the cotenants has a distinct and separate interest in the property other than the right to possession which is common to all of the cotenants. Appeal of Delashmutt, 235 Iowa 1255, 15 N.W.2d 619, 622 (1944). A bank account agreement in which two or more persons are named depositors is presumed to create a tenancy in common unless the parties express a contrary intent. In re Estate of Miller, 248 Iowa 19, 79 N.W.2d 315, 318 (1956).

The Iowa courts have concluded that the issue of ownership of a bank account is determined under contract law. See Petersen v. Carstensen, 249 N.W.2d 622, 624 (Iowa 1977); In re The Estate of Stamets, 260 Iowa 93, 97-98, 148 N.W.2d 468, 471 (1967); In re Estate of Martin, 261 Iowa 630, 155 N.W.2d 401, 404-06 (1968).

The bank argues that the wording of the contract determines the intent of the parties and that extrinsic evidence tending to change intention expressed in the contract is not competent. The names "Robert or Samuel Thielke" were set forth in the blank for name of account. No language on the document indicates whether the account was to be a joint account with right of survivorship or without.

> It is . . . of no importance that the words 'joint ownership' or 'joint account' are not used; the controlling question is whether the person opening the account intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship."

O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412, 418 (Iowa 1943). A depository agreement which includes the names of two persons separated by an "or" can establish a joint tenancy if joint tenancy was intended by the person who opened the account. See O'Brien v. Biegger, 11 N.W.2d at 418; In re Estate of Martin, 261 Iowa 630, 155 N.W.2d 401, 405 (1968).

"Whether a joint tenancy is created is a question of intent, and way be shown by parol evidence, at least as to interests in personal property." In re Louden's Estate, 249 Iowa 1393, 92 N.W.2d 409, 412 (1958).

Robert Thielke was present at the trial and testified that he had no intent to transfer a present interest in the bank accounts to his nephew Samuel. His purposes for opening the account included insurance and diversification. He was concerned that his account was not fully protected by the FDIC and therefore added Samuel Thielke's name to the account. Delbert Harken, vice-president and cashier at the Bank, testified that he discussed the limits and protections of FDIC with Robert Thielke and explained that insurance protection could be expanded by adding another person's name to the account. Additionally, Robert Thielke testified that he intended that all of his money would pass to Samuel Thielke upon his death.

This court believes that Robert Thielke never intended to transfer partial control of his money to Samuel Thielke and was unaware of the consequences that might arise. However, the evidence establishes that Robert Thielke intended to open a joint account with right of survivorship with the Bank. Robert and Samuel Thielke did not hold the account as tenants in common.

If Samuel was a joint tenant, what was his share? Some states have a statute which sets forth the rights and liabilities of joint tenants. For example, in Nebraska there is a statute which provides that "a joint account belongs, during a lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is a clear and convincing evidence of a different intent." Neb. Rev. Stat. § 30-2703(A) (reissue 1985). There is no statute in Iowa which defines ownership of a joint account between the parties during their lifetime.

Iowa Code § 524.806 provides:

> "When a deposit is made in any state bank in the names of two or more individuals, payable to any one or more of them, or payable to the survivor or survivors, the deposit, including interest, or any part thereof, may be paid to any one or more of the individuals whether the others be living or not, and the receipt or acquittance of the individuals so paid is a valid and sufficient relief and discharge to the state bank for any payment so made."

This statute was enacted in order to protect the depository bank from any liability if they make payment out of the joint account to a non-contributing account holder. The statute does not determine the depositor's legal rights between themselves and it does not establish ownership of the deposit. See Keokuk Savings Bank & Trust v. Desbaux, 259 Iowa 387, 143 N.W.2d 296, 300 (1966).

Although Iowa does not have a statute that specifically states that a joint depositor owns only that amount which he contributed, this court agrees with the reasoning of Anderson v. Iowa Department of Human Services, 368 N.W.2d 104 (Iowa 1985). The court in Anderson at 110 held that the Department of Human Services erred as a scatter of law when it failed to consider the intent of the parties in creating a joint tenancy account. The court stated that the establishment of a joint tenancy account does create a rebuttable presumption that all names on the account are the owners, but this presumption can be overcome by showing that the parties did not intend to give ownership of the account to certain of the persons whose names appear on the account. See also Frederick v. Shorman, 259 Iowa 1050, 147 N.W.2d 478, 482 (1966).

"Extrinsic evidence is admissible as an aid to ascertaining the intention of parties to a contract when it sheds lights on the situation of the parties, antecedent negotiations, and the objects they are striving to attain." Petersen v. Carstensen, 249 N.W.2d 622 (Iowa 1977) citing Egan v. Egan, 212 N.W.2d 461, 464-65 (Iowa 1973); Hamilton v. Wosepka, 261 Iowa 299, 306, 154 N.W.2d 164, 168 (1967).

While this court determines that Robert Thielke and Samuel Thielke were joint tenants of the savings account, it is permissible for this court to consider the contribution of each party to the account. Robert Thielke has provided sufficient evidence to overcome the presumption that he and Samuel Thielke owned equal shares in the joint account. Although Robert Thielke and Samuel Thielke were joint tenants of a bank account, the evidence establishes Samuel Thielke had no present monetary interest in this bank account. See Anderson v. Iowa Department of Human Services, 368 N.W.2d 104, 109 (Iowa 1985); Frederick v. Shorman, 259 Iowa 1050, 1058-59, 147 N.W.2d 478, 483-24 (1966).

The depository agreement does not state that Robert Thielke and Samuel Thielke were equal contributors to this account. Samuel Thielke had no knowledge of the joint account prior to the bankruptcy filing. Samuel Thielke made no contribution to this account. All interest checks were sent to and cashed by Robert Thielke. If Samuel Thielke had contribute to these accounts, he would likely have wanted a share of the interest income.

As to taxes on the income from the account, all income was reported by Robert Thielke and all taxes were paid by him.

B. Certificates of Deposit

At the time of the bankruptcy filing, Robert Thielke was in possession of six certificates of deposit (CDS) issued by the Bank. Each of the CDS indicates that the depositor was "Robert W. Thielke or Samuel Henry Thielke." There is printed language on each certificate which provides that if one or more depositor is named on the certificate, the certificates will be held in joint tenancy with right of survivorship.

The Iowa courts have also applied a contract theory to determine if certificates of deposit are held in joint tenancy. See Petersen v. Carstensen, 249 N.W.2d 622, 624 (Iowa 1977). The language which appears on the face of each CD establishes that the depositors intended to hold the CDS as joint tenants rather than tenants in common.

Although Robert Thielke was unaware of the consequences that might arise, the evidence establishes that he intended to have the certificates of deposit held in joint tenancy with Samuel. Robert Thielke testified that he intended to place Samuel's name on the CDS for the purposes of "insurance protection and diversification." Robert Thielke also testified that he intended the CDS to pass to Samuel upon his death, which is an essential element of the "right of survivorship."

Each joint tenant is presumed to own an equal share in joint certificates of deposit. Anderson v, Iowa Department of Human Services, 368 N.W.2d 104, 109 (Iowa 1985). However, this presumption is rebuttable. Frederick v. Shorman, 259 Iowa 1050, 147 N.W.2d 478, 482 (1966).

There is clear and convincing evidence in this case to establish that Robert and Samuel Thielke did not own equal shares in the six CDS. Samuel Thielke contributed nothing to those CDS. The money used to purchase the CDS was provided entirely by Robert Thielke. Samuel Thielke had no knowledge of the CDS prior to his bankruptcy filing, which clearly establishes he could not have contributed any financial resources to the purchase of the CDS. Cashier's checks, normally issued monthly for payment of interest on the CDS, were sent to the residence of Robert Thielke. Robert Thielke cashed these checks and used the money to either pay bills or for new investments. None of the interest payments were given to Samuel Thielke. Samuel Thielke does not have a present monetary interest in the six CDS.

C. Checking Account"L

The checking account hold by Robert Thielke at the Ackley State Bank was not a joint account. Samuel Thielke's name does not appear on this account.

The trustee and Bank agree that the checking account is not a joint account. However, they argue that some of the proceeds, such as interest from the joint accounts, were deposited into the checking account. Therefore, they contend this is joint property and should be able to trace these proceeds.

The Bank and trustee have not established that any of the proceeds of the joint account were deposited in the checking account.

The court also holds that the Bank and trustee cannot obtain any proceeds of the checking account since Samuel Thielke made no contributions to the joint savings account or certificates of deposit.

II.

The final issue before the court is whether the bank has a right of set-off against these accounts. The bank relies on statutory language as well as the provision in the depository agreement. The bank contends that it has a right to set-off the entire amount of the savings account and certificates of deposit, not just a fractional or one-half share.

The savings account deposit agreement (Exhibit 2) provides:

> "SET-OFF: Each of you acknowledges and agrees that we have the right to set-off against all or any part of the account balance any debt you may owe us to the extent of your right to withdraw or transfer funds from this account (without regard to the frequency or minimum denomination limits). This right may be exercised at any time and without prior notice (except as limited by law). This right applies even if one or more of you having the right of withdrawal is not obligated to us on the debt. This right applies to

> any debt we now own or hereafter acquire, and however it arises, so long as we in good faith can reduce the obligation to a definite amount.
>
> This right does not apply to the separate debt of a person whose right to withdraw or transfer funds from this account is clearly and solely in a representative capacity, unless the person or entity represented is obligated on the debt. It also does not apply if, by the nature of this account and applicable law, the account must be exempt from the claims of all creditors (for example, if this account is an Individual Retirement Account)."

The certificates of deposit do not contain any language regarding the bank's right of set-off.

In addition to the language in the depository agreement, the bank relies on Iowa Code § 524.806 in contending that it has a right of set-off. Section 524.806, which was referred to earlier, provides that a bank may pay the entire joint account to either joint owner without liability to the other. As previously indicated, this statute was enacted in order to protect banks from liability, not to establish ownership between the joint tenants. See Keokuk Savings Bank & Trust v. Desbaux, 259 Iowa 387, 143 N.W.2d 296, 300 (1966).

This court has determined that Samuel Thielke has contributed nothing to the accounts. Therefore, he has no present ownership interest in the deposited funds. Iowa Code § 524.806 does not provide the bank with a statutory basis to set-off the subject accounts against the debt owed by Samuel Thielke as that section does not establish ownership.

It is well settled under Iowa law that a bank has the right to set off funds deposited with it against a debt owed it by the depositor. Jensen v. State Bank of Allison, 518 F.2d 1, 5 (8th Cir. 1975); Olsen v. Harlan National Bank, 162 N.W.2d 755, 759 (Iowa 1960).

The court in Olsen v. Harlan National Bank at 759 stated that the right to set-off depends on the facts of each case. "A bank does not have the right to offset its claim against a deposit in every case where the depositor owes the bank money." Id.

As a basis for set-off of the savings account, the bank relies on the terms of the depository agreement. The agreement created a contract between the bank and depositors. However, the agreement provides that the bank is entitled to set-off any account balance against the debt only to the extent of the debtor's right to withdraw or transfer funds from the account.

The debtor, Samuel Thielke, had no right to withdraw any funds from the savings account or CDS, as he had contributed nothing to the accounts. Samuel Thielke has never signed the depository agreements and had no knowledge of the existence of the joint accounts. Delbert Harken, Vice President and Cashier of the Bank, testified that Samuel Thielke could not have withdrawn any funds from the savings account, as he had never signed the depository agreement. Since Samuel Thielke had no right to withdraw any funds, the set-off provision contained in the agreement does not provide the Bank with a right of set-off.

The court also believes that it would be inequitable to allow the bank to set-off its debt with Samuel Thielke against the savings account and CDS. The Bank was fully aware that Robert Thielke was the sole depositor of the subject accounts. There is no indication that the bank made any loans to Samuel Thielke on the premise that it would be able to set-off the joint account if he was unable to pay the loans. The Bank did not attempt to exercise its right of set-off prior to the filing of the bankruptcy,

even though Samuel was past due on his notes with Bank. Bank never discussed the right of set-off with Robert Thielke prior to the bankruptcy.

Finally, an important factor militating against set-off is the role the bank played in Robert Thielke's adding his nephew's name to the account and CDS. Delbert Harken, vice-president and cashier at the Bank, testified that he discussed the limits and protections of FDIC and explained how Robert Thielke could increase his protection, which included adding another person's name to the accounts. The bank was aware that Samuel Thielke was Robert's nearest living relative. At the time Samuel's name was placed on the account and CDS, Samuel owed a substantial amount of money to the bank.

A number of courts in other states have held that a bank cannot offset a joint account against the debt of a joint tenant who contributed nothing to the account. See Peoples Bank of Clinton v. Turner, 169 Md. 430, 182 A. 314 (1936) cited in 68 A.L.R.3d 192; City National Bank v. American Surety Co., 52 S.W.2d 259 (Tex. 1932), cited in 103 A.L.R. 493; Nelson v. First National Bank & Trust Co. (In re Nelson), 6 B.R. 248, 250-51 (Bankr. D. Kan. 1980); Craig v. Hastings State Bank, 380 N.W.2d 613, 625 (Neb. 1986).

The court stated in Hanby v. First Savings Bank of Spring Hill, 197 Iowa 150, 197 N.W. 51, 52 ('1924):

> "When a person has money which in equity and good conscience belongs to another and it can be traced into the hands of such person who has neither paid a valuable consideration therefor nor changed his relation to the person from whom the fund was received so as to give rights to any equitable defense against the claims of the true owner of such fund, the latter should recover, when it is shown that he who claims it against the true owner has notice of the trust character of the fund so received or appropriated."

The court held that the bank could not set-off against a deposit when it had knowledge of a special or trust relationship.

Although the parties have stipulated that the accounts and CDS were not held in trust, this court believes that the reasoning of Hanby is applicable in those situations where the bank is fully aware that the money which was deposited to the account belongs to another person.

The Bankruptcy Court is a court of equity which applies equitable principles. 11 U.S.C. § 105. See In re Briggs Transp. Co., 780 F.2d 1339, 1343 (8th Cir. 1985); In re Stevenson Associates, 777 F.2d 415, 419 (8th Cir. 1985). "Equity jurisdiction allows a court the necessary flexibility to determine the equities between the parties." Farmers Savings Bank, Joice v. Gearhart, 372 N.W.2d 238, 245 (Iowa 1985) citing Skubal v. Meeker, 279 N.W.2d 23, 27 (Iowa 1979).

A fundamental maxim of equity is that equity courts look to the substance of a transaction rather than form. Rath v. Rath Packing Company, 257 Iowa 1277, 136 N.W.2d 410, 415 (1965).

This court must look beyond the form of the transactions between Robert Thielke and the Bank. Although the depository agreement and CDS indicate that Robert Thielke opened joint accounts at the Ackley State Bank, the substance of the transaction clearly shows that Robert had no intention of transferring a present interest in the joint accounts to Samuel. Robert Thielke was the sole depositor. Equitable principles require the court to conclude that the bank has no right to set-off the funds held in the Bank. It would be unconscionable to allow the Bank to obtain a large amount of Robert Thielke's

lifetime savings, especially in light of the role the bank played in adding Samuel Thielke's name to the account.

Since Samuel Thielke has no present monetary interest in the savings account or certificates of deposit at the Ackley State Bank, the bank is not entitled to set-off any amount in this account against any debts of Samuel Thielke.

ORDER

IT IS ORDERED that the money held in the joint accounts and certificates of deposit of Robert Thielke and Samuel Thielke in the Ackley State Bank is the sole property of Robert Thielke.

IT IS FURTHER ORDERED that the Ackley State Bank has no right of set-off against the joint accounts or certificates of deposit of Robert and Samuel Thielke held at the Ackley State Bank.

IT IS FURTHER ORDERED that the joint accounts and certificates of deposit of Robert Thielke and Samuel Thielke held at the Ackley State Bank are rot property of Samuel Thielke's bankruptcy estate, and therefore the trustee is not entitled to recover any of this property.

SO ORDERED ON THIS 23rd DAY OF NOVEMBER, 1988.

William L. Edmonds
Chief Bankruptcy Judge

In the United States District Court

for the Northern District of Iowa

ACKLEY STATE BANK and
CLAUDE PITRAT, Trustee
Appellants

vs.

ROBERT THIELKE
Appellee

This matter is before the court on the Ackley State Bank and Claude Pitrat's appeal of an order entered November 23, 1988, by the Honorable William L. Edmonds, United States Bankruptcy Judge for the Northern District of Iowa. The parties have filed briefs in support of their respective positions on appeal. The court, having read the well-written briefs filed by the parties and the order from which this appeal is taken, and having found that oral argument is not necessary in this case, enters the following order.

Findings of Fact

The parties do not dispute the findings of fact made by the bankruptcy court. Because findings of fact are not to be set aside unless they are clearly erroneous, the court finds that the bankruptcy court's findings of fact should be adopted in their entirety. Bankruptcy Rule 8013. The court incorporates those findings by reference to the bankruptcy court's order, which is attached hereto.

Conclusions of Law

1. The court has jurisdiction over this appeal and subject matter jurisdiction over the parties hereto. 28 U.S.C. 5 158(a). 2. The bankruptcy court concluded that Robert Thielke created a joint tenancy with Samuel Thielke in the savings account and the certificates of deposit when he added Samuel's name to those items. The parties do not dispute this conclusion which the court finds to be correct.

3. The bankruptcy court concluded that the money held in the joint account and the certificates of deposit was the sole property of Robert Thielke, and that Samuel Thielke had no present interest in those accounts. The bank argues that the court erred in reaching those conclusions.

The bank argues that since the language of the depository documents is unambiguous, the bankruptcy court should have ignored the evidence upon which its opinion is grounded: that only Robert Thielke's social security number was listed on the accounts; that Robert received the interest checks; that Robert was in possession of all of the documents pertaining to the savings account and certificates of deposit; that Robert contributed all of the money to the account and the certificates of deposit; that Robert paid all of the taxes on the income from the account and certificates of deposit; and that Samuel did not know of the existence of the joint account and certificates of deposit. Appellant's brief, filed February 16, 1989, at 5.

Under the bank's analysis, the court's determination of Samuel's precise share of the joint account and the certificates of deposit would begin and end with a reading of the bank documents which create the bank-depositor relationship. The certificates of deposit read, in part,

If more than one of you [depositors] are named above, you will own this certificate as joint tenants with right of survivorship (and not as tenants in common). (You may change this ownership by written instructions.) We [bank] will treat any one of you [depositors] as owner for purposes of endorsement, payment of principal and internist, presentation (demanding payment of amounts due), transfer and any notice to or from you."

Exhibit 5, p. 1 (emphasis added). In addition, the savings account deposit agreement states:

SET OFF: Each of you acknowledges and agrees that we have the right to set-off against all or any part of the account balance any debt you may owe us to the extent of your right to withdraw or transfer funds from this account (without regard to the frequency or minimum denomination limits). This right may be exercised at any time and without prior notice (except as limited by law). This right applies even if one or more of you having the right of withdrawal is not obligated to us on the debt. This right applies to any debt we now own or hereafter acquire, and however it arises, so long as we in good faith can reduce the obligation to a definite amount.

This right does not apply to the separate debt of a person whose right to withdraw or transfer funds from this account is clearly and solely in a representative capacity, unless the person or entity represented is obligated on the debt. It also does not apply if, by the nature of this account and applicable law, the account must be exempt from the claims of all creditors (for example, if this account is an Individual Retirement Account).

Exhibit 2, p. 2. The bank argues that the contracts between the bank and its depositors give the bank the right to treat the funds as though they were entirely the property of either Samuel or Robert Thielke. Under the bank's theory, the bank documents establish conclusively that Samuel and Robert Thielke have equivalent rights to the funds.

The bankruptcy court relied extensively on Anderson v. Iowa Dept. of Human Serv., 368 N.W.2d 104 (Iowa 1985), in determining the relative rights of Samuel and Robert Thielke to the funds. Anderson teaches that a joint tenancy is accompanied by a rebuttable presumption that the joint tenants hold in equal shares. Id. at 109. The presumption may be rebutted by clear and convincing evidence. Id. (citing Frederick v. Shorman, 147 N.W.2d 478, 483-84 (Iowa 1966)). The court's discussion of joint tenancy in Anderson is, by its own terms, "limited to the time before the death of a co-owner and does not include consideration of survivorship rights." Id. at 109. Because this case concerns incidents which occurred before the death of either joint tenant, Anderson applies to this case. "The rights of the individual joint tenants must be determined from their agreement . . .. Generally, the respective rights of the parties to a joint bank account are determined by the rules of contract law, and the intent of the parties with respect to the joint . . . account is controlling." Id. (citations omitted). Because it is the intent of the parties to the joint account which determines the extent of their individual shares in the account, the bank's documents are of little help in the determination. While those documents clearly demonstrate Robert's intent to create a joint tenancy in the savings account and the certificates of deposit, they do not reveal the precise shares of the funds held by Robert and Samuel respectively.

The bankruptcy court concluded that Samuel Thielke had no present monetary interest in the bank account or the certificates of deposit. Based on the findings of fact made by the bankruptcy court, this court affirms those conclusions. The unchallenged findings that Robert Thielke placed Samuel's name on the account and the certificates of deposit in order to increase his insurance protection (Robert's total deposits exceeded the FDIC's $100,000 protection limit); that Robert intended to retain full control of the savings account and certificates of deposit until the time of his death; that Robert did not intend to make a gift to Samuel at the time he placed Samuel's name on the accounts; that Robert understood that he was the only person who could withdraw funds from the account or certificates, and that Samuel had no present interest in them; that Robert intended to retain full control of the deposits because he did not know how much money he would need for living expenses for the remainder of his life; that Robert believed Samuel had no knowledge that his name had been added to the accounts or certificates; and that Samuel had no knowledge of Robert's financial affairs rebut in a clear and convincing manner the presumption that Samuel and Robert held the funds in equal shares.

The bank's reliance on In re Estate of Martin, 155 N.W.2d 401 (Iowa 1968), is misplaced because Martin involved a determination whether a certificate of deposit payable to "W.F. Martin or Isal Barber" served to vest in Isal Barber a right to the funds. The case arose as a challenge to his executor's final report after W.F. Martin had died. The court determined that a joint tenancy with rights of survivorship had been created, and that the survivor, Isal Barber, was entitled to the certificate of deposit. In contrast to the factual setting of Martin, this court is asked to determine the relative rights of joint tenants, both of whom are living. Anderson, 368 N.W.2d at 109, is controlling here because, as noted above, the Anderson court specifically states, "This discussion of the rights of the joint tenants is limited to the time before the death of a co-owner and does not include consideration of survivorship rights." Id. On that basis, the court affirms the bankruptcy court's finding that Samuel Thielke had no present monetary interest in the bank account or the certificate of deposit.

The bankruptcy court went on to find that the bank had no right to set-off Samuel's debt against these accounts. The certificates of deposit do not contain any language concerning the bank's right to set-off. The savings account deposit agreement provides:

SET OFF: Each of you acknowledges and agrees that we have the right to set-off against all or any part of the account balance any debt you may owe us to the extent of your right to withdraw or transfer funds from this account (without regard to the frequency or minimum denomination limits). This right may be exercised at any time and without prior notice (except as limited by law). This right applies even if one or more of you having the right of withdrawal is not obligated to us on the debt. This right applies to any debt we now own or hereafter acquire, and however it arises, so long as we in good faith can reduce the obligation to a definite amount.

This right does not apply to the separate debt of a person whose right to withdraw or transfer funds from this account is clearly and solely in a representative capacity, unless the person or entity represented is obligated on the debt. It also does not apply if, by the nature of this account and applicable law, the account must be exempt from the claims of all creditors (for example, if this account is an Individual Retirement Account).

Exhibit 2, p. 2 (emphasis added). The bank argues that because Samuel had the right as a joint tenant to withdraw the funds, the bank has the right to set-off Samuel's debt against the account. The bankruptcy court held that the bank had no right of set-off because Samuel had no ownership interest in the account. For the reasons stated in the bankruptcy court's opinion on this issue, the court agrees that the bank has no right to set-off against the joint savings account.1

ORDER

Accordingly, it is ordered:

The decision of the bankruptcy court entered November 23, 1988, is hereby affirmed.

Done and Ordered this 11th day of May, 1989.

David R. Hansen, Jr.
United States District Court

(fn.1) The court has reviewed the remaining issues raised in appellants' statement of issues which were not discussed in the parties' briefs. The court finds that the bankruptcy court's order should be affirmed on those remaining issues.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

ACKLEY STATE BANK No. 89-2275
Appellant
Claude Pitrat

Trustee

vs.

ROBERT THIELKE
Appellee

Appeal from the United States District Court for the Northern District of Iowa

- Submitted: March 16, 1990
- Filed: December 3, 1990

McMILLIAN, Circuit Judge.

Ackley State Bank (the Bank) appeals from a final order entered in the United States District Court (fn.1) for the Northern District of Iowa, affirming the Bankruptcy Court's(fn.2) determination that Samuel Thielke (Samuel) did not have a present vested interest in certain joint bank accounts (accounts), with his uncle,

*The Honorable Earl 11. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

1 The Honorable David R. Hansen, United States District Judge for the Northern District of Iowa.

2 The Honorable William L. Edmonds, United States Bankruptcy Judge for the Northern District of Iowa.

Robert Thielke (Robert), and consequently the bank could not set off Samuel's defaulted loans with the Bank against the accounts. For reversal, the Bank argues that the district court erred in (1) holding that Samuel had no present vested interest in the accounts, (2) allowing the introduction of parol evidence to vary the terms of the written agreement between the Bank and Robert, and (3) holding that the Bank was not entitled to set off the unpaid debts against the joint accounts. For the reasons discussed below, we affirm the order of the district court.

FACTS

From December 14, 1982, to November 4, 1986, Robert, with his own funds, opened a savings account, six certificates of deposit, and a checking account with the Bank. The savings account and the certificates of deposit exceeded the Federal Deposit Insurance Corporation (FDIC) protection limit of $100,000.00.

Based on a discussion about the FDIC limit of protection on savings accounts with Delbert Harken, the Bank's vice-president and cashier, Robert added Samuel's name to his savings and certificate of deposit accounts. The sole name on the checking account was that of Robert. Samuel, however, was not aware that his name had been placed on the accounts, nor was his signature on any of the signature cards pertaining to said accounts. Robert maintained sole control of the savings passbook as well as the certificates of deposit. All contributions to the accounts were made by Robert, and the interest payments were sent directly to Robert's home in Ackley, Iowa. Robert reported the interest income for tax purposes.

On February 10, 1987, Samuel filed a bankruptcy petition in the United States Bankruptcy Court for the District of Arizona. On October 10, 1987, the bankruptcy court in Arizona transferred the case to the United States Bankruptcy Court for the Northern District of Iowa. Samuel had borrowed money from the Bank and had executed several notes prior to filing for bankruptcy. The bankruptcy trustee, claiming that the accounts were part of the bankruptcy estate, directed the Bank to freeze all accounts in which Samuel was listed as a joint tenant. The Bank sought to set off the notes it was holding from Samuel against the funds in Robert's accounts.

On March 27, 1987, Robert initiated an adversary proceeding to obtain a declaration that Samuel owned no present vested interest in either the certificates of deposit or the savings account. After **a** full trial the bankruptcy court held that, although Robert and Samuel were joint tenants in the accounts, Samuel had no present vested interested in the funds, and the accounts were not part of the bankruptcy estate. The bankruptcy court went on to hold that the Bank had no right to set of f Samuel's notes against Robert's accounts. Applying Iowa law, the bankruptcy court held that each joint tenant is presumed to own an equal share in joint accounts, but the presumption could be rebutted by clear and convincing evidence to the contrary. The bankruptcy court held that there was clear and convincing evidence that Robert and Samuel did not own equal shares of the accounts.

The Bank appealed; the bankruptcy trustee did not appeal. The District Court for the Northern District of Iowa affirmed the bankruptcy court. This appeal followed.

PRESENT VESTED INTEREST IN THE ACCOUNTS

The Bank argues that the district court erred in holding that Samuel had no present vested interest in Robert's accounts. The Bank contends that the district court correctly found that the accounts were "joint accounts," but failed to correctly define the rights of the parties in joint accounts. Specifically, the Bank argues that the Iowa Supreme Court has, after a long struggle with gift, trust, joint tenancy and contract theory, adopted the contract theory to define the rights of the parties holding joint accounts.

The Bank claims that, under the contract theory, the joint tenants in the account possess two different rights: the first and most essential right is the one that arises at the creation of the account, namely the "right to withdraw" the entire or any part of the funds in the accounts; the second right is the "right of survivorship" in the account. According to the Bank, the joint tenants' rights of survivorship are dependent upon the existence of rights during their lifetime. The Bank contends that, under the contract theory, there is no right of survivorship where there has not also been created a vested present interest in the account during the lifetime of the joint tenants. Hence, the Bank argues that the district court erred in holding that it is possible to have joint accounts where there is a right to survivorship, but no present vested interest.

Robert argues that the district court's decision was correct because Iowa law does not hold that equal lifetime interests by the joint tenants are essential to joint tenancy ownership. Robert contends that there is only a rebuttable presumption that the joint tenants own equal shares during their lifetime. Frederick v. Shorman, 259 Iowa 1050, 147 N.W.2d 478, 482 (1966).

Robert argues that under Iowa law a joint tenancy bank account may exist without both tenants having equal withdrawal rights. In support of his position, Robert cites Keokuk Savings Bank & Trust Co. v. Desvaux, 259 Iowa 397, 143 N.W.2d 296 (1966), where the court held that, as between themselves, parties to a joint tenancy bank account are restricted by the terms of the deposit agreement with

respect to withdrawal rights. For example, if the deposit agreement requires presentation of a passbook, and one of the joint tenants retains sole possession of the passbook, the other joint tenant has no right of withdrawal. Id. at 298-302. Thus, Robert argues that Samuel had no present right under the depository agreements to make withdrawals, because Samuel did not have possession of the certificates or of the passbook, nor did he sign the signature cards for the savings accounts. Robert also maintains that, in Anderson v. Iowa Dep't of Human Services, 368 N.W.2d 104 (Iowa 1985) (Anderson) , the court addressed the question whether joint tenants could establish that one of the joint tenants was not intended to have a lifetime interest. The court held that, during their lifetimes, the true interest of the joint tenants in a bank account can be ascertained and that joint tenants are entitled to establish their true intent as to whether a joint tenant had any lifetime ownership interest. Id. at 109-10.

We give substantial weight to district judges and bankruptcy judges in interpreting state law. E.g., Grenz Super Valu v. Fix, 566 F.2d 614, 615 (8th Cir. 1977). While we are not bound by the interpretation, our role is not to reach our own construction of state law, but rather to review that court's determination. Parkerson v. Carrouth, 782 F.2d 1449, 1451-52 (8th Cir. 1986). Such interpretations will not be reversed in the absence of clear error or an abuse of discretion. Perkins v. Clark Equipment Co., 823 F.2d 207, 209 (Sth Cir. 1987), guoting Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc., 767 F.2d 464, 469 (8th Cir. 1985).

We hold that the district court did not err in holding that Samuel had no present vested interest in the accounts. The Bank's contention is that, under Iowa's contract theory of joint tenancy bank accounts, it is impossible to create a joint tenancy bank account with a right of survivorship without also giving each joint tenant an equal lifetime interest in the funds. The Bank',-reliance on the contract theory is misplaced. When survivorship rights are at issue, Iowa has followed the contract theory in holding that survivorship rights cannot be rebutted by extrinsic evidence absent fraud, duress, mistake, or a confidential relationship. See, e.g., In re Estate of Roechlke, 231 N.W.2d 26, 28 (Iowa 1975). However, the contract theory as adopted in Iowa allows extrinsic evidence to be used to establish the rights of joint tenants during their lifetime as opposed to survivorship rights. Anderson, 368 N.W.2d at 109.

INTRODUCTION OF PAROL EVIDENCE

Next, the Bank argues the district court improperly allowed the introduction of parol evidence to vary the terms of the written deposit agreements between the Bank and Robert. The Bank contends that the district court misapplied the Anderson case and failed to recognize that whenever a joint bank account is created there are two separate relationships involved, one relationship between the bank and its depositors, and another relationship between the depositors themselves. The Bank distinguishes the Anderson case on the grounds that in that case the relationship between the bank and the depositors was not in issue.

The Bank argues that, while joint bank accounts are analogous to joint tenancy, they do not have all the incidents of joint tenancy. The Bank argues the presumptions are not the same in joint bank accounts as they are in joint tenancy in real property. The Bank maintains that, unlike a joint tenancy in real property in which a joint owner has no right to convey any more than his or her own actual interest in the joint property, in a bank account a joint owner has the right to immediately withdraw the entire account.

We hold the district court did not err in looking to extrinsic evidence to ascertain the respective lifetime interests of the joint tenants in the bank accounts. A tenant is presumed to own equal shares in the joint bank account; however, this presumption is rebuttable" See Anderson, 368 N.W.2d at 109.

Because the deposit agreements did not address the respective life interests in the accounts, it was proper to examine extrinsic evidence to ascertain Robert's intent at the time he added Samuel's name to the accounts. See In re Estate of Miller, 248 Iowa 19, 79 N.W.2d 315, 319 (1956).

SUFFICIENCY OF THE EVIDENCE OF INTENT

The Bank concedes that a]presumption that property is held in joint tenancy may be overcome by evidence showing a different intention or tending to prove that the character of the property was other than joint property. Assuming extrinsic evidence of intent is admissible, the Bank argues that the evidence against joint ownership was not clear and convincing.
We also hold that the district court did not err in holding that Robert's intent not to confer a present ownership interest in the accounts to Samuel was established by clear and convincing evidence. The record shows that Samuel was not aware of the existence of the accounts; he did not execute the signature cards, nor did he possess the passbook or certificates of deposit. Samuel did not make any contribution of funds to the accounts and he did not receive any of the interest payments or report the interest income in his tax returns.

SET OFF RIGHTS AGAINST THE JOINT ACCOUNTS

Because we agree with the district court that Samuel did not possess a present vested interest in the accounts, we need not reach this issue.
Accordingly, the order of the district court is affirmed.

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