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# Trusts

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## TRUSTS

### WIDOW'S RIGHTS AGAINST REVOCABLE INTER VIVOS TRUST

In *Smyth v. Cleveland Trust Company*<sup>1</sup> the husband established an inter vivos trust, reserving the income therefrom to himself and retaining the power to amend or revoke the trust. In one of the conveyances to the trust he was joined by his wife. At the death of the settlor, the trust remaining unrevoked, the widow attempted to include the corpus of the trust in the net estate of her husband in order to claim her statutory share thereof under the law of descent and distribution. Apparently not questioning the validity of the trust<sup>2</sup> under Ohio Revised Code section 1335.01, the claimant relied on the rule stated in *Bolles v. Toledo Trust Company*,<sup>3</sup> decided in 1944, and followed in *Harris v. Harris*,<sup>4</sup> in 1947. Both of these cases held that inter vivos trusts of the type involved did not preclude the widow from claiming a statutory share of the trust corpus.

The supreme court, noting that Ohio Revised Code section 1335.01 expressly states that trusts of the type under discussion are valid and makes no exception concerning a wife, overruled the *Bolles* and *Harris* cases and denied the widow the right to claim a statutory share in the corpus of the revocable inter vivos trust.

The supreme court also noted that the position previously taken by it in the *Bolles* and *Harris* cases was extreme and not in accord with general trust law.<sup>5</sup> The present decision sustains the position of Judge Zimmerman in his dissent in the *Harris* case. His concluding statement was, perhaps, prophetic.

Within the provisions of present Section 8617, General Code, [now Revised Code section 1335.01] it is plain that an individual during his lifetime may create a valid revocable trust, with the reservations stipulated, which will operate to exclude any claim of the surviving spouse to a "distribution share" of the property in the trust upon the settlor's death. If the existence of a situation of this kind is undesirable in Ohio, the General Assembly is the agency to adopt corrective legislation.<sup>6</sup>

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1. 172 Ohio St. 489, 179 N.E.2d 60 (1961).

2. In *Adams v. Fleck*, 171 Ohio St. 451, 172 N.E.2d 126 (1961), the validity of a purported inter vivos trust was successfully attacked. See discussion in *Recent Decision*, p. 608 *infra*.

3. 144 Ohio St. 195, 58 N.E.2d 381 (1944); Annot., 157 A.L.R. 1164 (1945).

4. 147 Ohio St. 437, 72 N.E.2d 378 (1947).

5. 172 Ohio St. 489, 503, 179 N.E.2d 60, 70 (1961).

6. 147 Ohio St. 437, 449, 72 N.E.2d 378, 383-84 (1947). For a recent proposal for legislative action, see Merrick, *Comments on Smyth v. Cleveland Trust Company*, 1962 Clev. B.A.J. 112, 126.

## STATUTORY CHANGES

*Insurance Trusts*

Ohio Revised Code section 1335.01 was amended, effective October 5, 1961, by the addition of a clause validating trusts consisting of the primary or contingent right to receive the proceeds of life insurance contracts, endowment contracts, or other contractual interests payable at death or by reason of death.

Although there have been no Ohio cases directly in point,<sup>7</sup> litigation in other states has arisen concerning whether the creation of such a trust is a testamentary disposition and invalid if not in compliance with the requirements of the statute of wills. The disposition is clearly not testamentary where the insured has not reserved the power to change beneficiaries or to revoke the trust.<sup>8</sup> Even when the insured has the power to change the beneficiary of the policy and of the trust, courts have had no difficulty in upholding insurance trusts though not executed with the formality requisite for a will.<sup>9</sup>

If in the absence of statute the contention has not been previously raised in Ohio, it is doubtful that the validity of an insurance trust expressly approved by the legislature will be challenged.

*Payable on Death Deposits*

Ohio Revised Code section 2131.10, effective July 25, 1961, provides that any natural person may make deposits in savings institutions which are payable on the death of the owner to another person. The owner retains the right to withdraw the funds, and to change the beneficiary, whose interest vests upon the owner's death, by executing a form prescribed by the savings institution.

Such a statutory P.O.D. account is similar to a Totten trust. Although there are no reported cases approving the Totten trust doctrine in Ohio,<sup>10</sup> the General Assembly has provided protection to banks making payments to a beneficiary under a Totten trust agreement,<sup>11</sup> and the banks' duties and liabilities seem to be the same under either type of

7. In *Finney v. Hinkle*, 106 Ohio App. 89, 153 N.E.2d 699 (1958), the court impressed a trust upon the proceeds of a life insurance policy which the beneficiary had contracted to pay to another.

It seems clear that the owner of war risk insurance can declare a valid trust of the proceeds. *Dorland v. Whitmer*, 43 Ohio App. 285, 182 N.E. 686 (1932).

In *Stone v. Guardian Trust Co.*, 4 Ohio Supp. 4 (33 N.E.2d) (Cleveland Munic. Ct. 1934), the court apparently assumed that an insurance trust was valid.

8. 1 SCOTT, TRUSTS § 57.3 (2d ed. 1956).

9. *Ibid.*

10. 40 O. JUR. TRUSTS § 42 (1935). *But see* In the Matter of Estate of Atkinson, 175 N.E.2d 548 (Ohio P. Ct. 1961); 37 NOTRE DAME LAW, 461 (1962).

11. OHIO REV. CODE § 1105.10.

account.<sup>12</sup> However, the courts may make a distinction between the two where other groups, such as creditors, the surviving widow, and charitable organizations, are concerned.

There is some authority that creditors can attack the corpus of a Totten trust while the settlor is alive, and, under certain conditions, after his death.<sup>13</sup> Whether the surviving widow can include the Totten trust corpus within the property of the estate if she elects to take against the will is not settled.<sup>14</sup> Scott has criticized<sup>15</sup> the New York dictum that a widow cannot invade a Totten trust,<sup>16</sup> as being contrary to the public policy of protecting the widow's share. Scott has also suggested that Totten trusts might be used to evade the Mortmain statutes<sup>17</sup> as a gift to a charity made in the form of a trust is valid even though made within the proscribed period of time.<sup>18</sup>

Whether the courts will apply Totten trust principles to the P.O.D. account is a matter for conjecture, but not infrequently the courts have used trust language in discussing other types of savings deposits.<sup>19</sup>

### *Transfer to Grantee as "Trustee"*

Ohio Revised Code section 2103.021, effective October 17, 1961, provides that a bona fide purchaser of land from a person who had been deeded the land "as trustee" is protected from the dower claims of the grantor's spouse unless an affidavit showing such dower interest has been recorded. It seems obvious that where an instrument is of record showing such a claim to a particular parcel of land there could not be a bona fide purchaser for value who did not have at least constructive notice.

### *Pour-Over Trusts*

Ohio Revised Code section 2107.63, effective October 5, 1961, provides statutory recognition of the doctrine of independent legal significance in pour-over trusts. Prior to the enactment of this section a provision in a will that the residue of the estate pour over into a pre-existing inter vivos trust was valid if the trust was incorporated by reference

12. Section 2131.11 of the Ohio Revised Code provides, similarly to section 1105.10, that receipt by the person paid on the owner's death is sufficient release and discharge of the savings institution.

13. 1 SCOTT, TRUSTS § 58.5 (2d ed. 1956).

14. *Ibid.*

15. *Ibid.*

16. Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951).

17. 1 SCOTT, TRUSTS § 58.5 (2d ed. 1956).

18. *Ibid.*

19. 1 SCOTT, TRUSTS § 58.6 (2d ed. 1956).