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Illinois Totten Trust: The Rights of Legal Representatives of a Beneficiary Who Predeceases the Trustee

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ILLINOIS TOTTEN TRUST: THE RIGHTS OF LEGAL REPRESENTATIVES OF A BENEFICIARY WHO PREDECEASES THE TRUSTEE

I. INTRODUCTION

The savings account trust has provided the depositor in Illinois banks with a convenient and economical method through which he, upon his death, can pass the balance in his savings account to a named beneficiary. Because of the popularity and the extensive use of these accounts, the banks have found it necessary to print special signature cards bearing an appropriate agreement. The following example, which appears on the reverse side of the signature card used by The First National Bank of Chicago, is typical of the form of agreement used throughout the state:

> All deposits in this account are made for the benefit of:
>
> _____ _____
> Name of Beneficiary Residence
>
> _____ _____ _____
> Relationship Date of Birth Birthplace
>
> to whom or to whose legal representative said deposits or any part thereof, together with the interest thereon may be paid in the event of the death of the undersigned trustee.
>
> _____[1]
> Trustee

It is of particular interest that the agreement provides, upon the trustee's death, that the bank may pay the beneficiary or his "legal representative." It is well settled in Illinois that the term legal representative always includes executor or administrator.[2] This language also covers the administrator or executor of a beneficiary who has died after the trustee but before collecting the funds in the saving account. However, does it reasonably follow that the bank should pay the legal representative if the beneficiary predeceases the trustee? Or, is the trust automatically revoked upon the death of the beneficiary?

[1] The language which the banks have chosen to use in connection with the trust accounts corresponds to Ill. Rev. Stat. ch. 16½, § 145 (1969), which is the only legislation in Illinois dealing with Totten Trust savings accounts:

> If a deposit is made with a bank by one person in trust for another, the name and residence of the person for whom it is made shall be disclosed, and it shall be credited to the depositor as trustee for such person; and if no other notice of the existence of and terms of a trust has been given in writing to the bank, the deposit, or any part thereof, together with the interest thereon, may in the event of the death of the trustee, be paid to the person for whom said deposit was made, or to his legal representative. No bank so paying shall thereby be liable for any estate, inheritance or succession taxes or penalties due this State.

[2] Delainey v. Burnett, 9 Ill. 454 (1847); Phelps v. Smith, 15 Ill. 572 (1854); Morehouse v. Phelps, 18 Ill. 472 (1857); Murray v. Strang, 28 Ill. App. 608 (1889); Hamilton v. Darley, 188 Ill. App. 229 (1915); Hamilton v. Darley, 266 Ill. 542, 107 N.E. 798 (1915).

II. Present Illinois Law

The controlling case in Illinois determining the validity of the savings account trust on the strength of the type of agreement used by the First National Bank was *In re Petralia's Estate.*[3] The court in *Petralia* held that the deposit itself, absent evidence to the contrary, is sufficient to show an intention to create a revocable trust. Subsequent withdrawals constitute a *pro tanto* revocation of the trust and, upon the trustee's death, the trust becomes absolute for the named beneficiary in the amount of the balance in the account.

In reaching its decision the court cited the case of *Farkas v. Williams,*[4] to show that a trust, not a testamentary disposition, was created. Had the court determined that this was a testamentary disposition, Totten Trusts would be void as a violation of the Statute of Wills.[5] *Farkas,* although not dealing with a savings account trust, held that a valid trust is created even if the settlor (who on Totten Trust accounts is also the trustee) reserves power to revoke and reserves a life interest in the trust property. In holding Totten Trusts valid in Illinois, the appellate court in the *Petralia* case held that the interest retained by the trustee is not great enough to defeat an intention to create a valid inter vivos trust and therefore:

> [T]he beneficiary acquired an equitable interest in the deposits at the time the account was opened, subject to the divesting of that interest partially or wholly upon the happening of conditions subsequent, namely, withdrawals by the trustee of parts or of the whole of the deposits.[6]

The equitable interest acquired by the beneficiary is of special significance because it could effect the status of the legal representative of the beneficiary. The decision of the appellate court was upheld by the Illinois Supreme Court when it reviewed the case,[7] but the Supreme Court did not discuss the "equitable interest" obtained by the beneficiary.

The Illinois courts at the appellate and the supreme court levels did not determine the meaning to be given to the phrase "legal representatives" because no question concerning it arose in the case. The appellate decision mentioned in passing, however, that the specific terms of the agreement were apparently used to comply with chapter 16½, *Ill. Rev. Stat.* § 145 (1969), for the purpose of protecting the bank from liability when it transfers the balance after the trustee's death.[8]

Although at least one writer[9] feels that a Totten Trust in Illinois is revoked

[3] 48 Ill. App. 2d 122, 198 N.E.2d 200 (1964).
[4] 5 Ill. 2d 417, 125 N.E.2d 600 (1955).
[5] *In re Petralia's Estate,* 48 Ill. App. 2d 122, 126, 198 N.E.2d 200, 202 (1964).
[6] *Id.* at 128, 198 N.E. at 203.
[7] *In re Petralia's Estate,* 32 Ill. 2d 134, 204 N.E.2d 1 (1965).
[8] *In re Petralia's Estate,* 48 Ill. App. 2d 122, 136, 198 N.E. 200, 207 (1964).
[9] Mann, *Totten Trusts Approved in Illinois,* 53 Ill. Bar. J. 724 (1965).

by the death of the beneficiary before that of the trustee, the beneficiary's equitable interest in the account and the absence of a ruling on the meaning of the term legal representative raise some doubt as to the validity of the conclusion drawn by the above mentioned writer. The *Petralia* case gives a trustee the right to revoke the trust after the beneficiary's death. However, in cases which might arise between the legal representatives of the beneficiary and those of the trustee, in which there is no evidence of the trustee's intent other than the signature card, the Illinois courts faced with a problem of first impression, would certainly have to consider decisions in other jurisdictions before deciding the question.

III. Other Relevant Decisions

A. *The New York Rule*

The first case in New York, as well as in the United States, to uphold the validity of a savings account trust in favor of the beneficiary of a deceased trustee was *Matter of Totten.*[10] The court stated the New York rule to be as follows:

> [A] deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift within his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor . . .[11]

In *In re Bulwinkle,*[12] the New York courts were for the first time presented with the problem of a beneficiary who had predeceased his trustee. The evidence with respect to the savings account was that the books of the bank held the deposit in the name of "Mary Ann Dugard, in Trust for Lillie M. Lahey." The trustee had given no notice to the beneficiary of the existence of the trust account. She made no acts or declarations to anyone of the intention to create an irrevocable trust, and the words "in Trust for Lillie M. Lahey" in the pass book had been obliterated by pencil marks. From these facts the court decided that although a tentative trust had initially been created, no unequivocal act as required by the *Totten* decision had occurred to make it irrevocable. Only if the trust were shown to be irrevocable would the beneficiary's estate be entitled to the account. This case, therefore, established the rule in New York that the death of a beneficiary before that of the trustee revoked the trust. This rule was subsequently followed in two other New York cases, *In re Duffy*[13] and *In re Vaughan's Estate.*[14]

[10] 179 N.Y. 112, 71 N.E. 748 (1904).
[11] *Id.* at 125, 71 N.E. at 750.
[12] 107 App. Div. 331, 95 N.Y.S. 129 (1905).
[13] 127 App. Div. 74, 111 N.Y.S. 77 (1908).
[14] 145 Misc. 332, 260 N.Y.S. 197 (Sur. Ct. 1932).

The distinction between the problem presented in Illinois and that decided in the New York courts is discussed in a recent article[15] which reviews *In re U.S. Trust Co.*,[16] another New York case holding that the beneficiary's death revokes the trust. The *U.S. Trust Co.* case held that a tentative trust is an incomplete, unconsummated trust, in which the beneficiary can have no interest until the death of the trustee. If the beneficiary predeceases the trustee he can never gain an interest.. In Illinois, however, the beneficiary apparently acquires an equitable interest at the time of the deposit in accordance with the appellate court decision in *Petralia.*

It is also noteworthy that none of the accounts with which the New York courts have dealt contain the agreement used in Illinois. No New York court has had to resolve the problem presented when an agreement has been signed to pay to the beneficiary or his legal representatives.

B. *The New Jersey Rule*

Two cases dealing with a beneficiary who predeceased his trustee have arisen in New Jersey. In the first of these, *Abruzzese v. Oestrich*,[17] a mother opened a Totten Trust savings account and named her two daughters as beneficiaries. One daughter predeceased the mother. The court held that the interests of the two daughters would be as tenants in common as to the balance in the account upon the mother's death. Consequently, the surviving daughter was awarded one half of the balance. The daughter who predeceased the mother had named the mother as sole legatee under her will. The court reasoned that, if the daughter's death revoked the savings account trust as to her half, the mother's estate would be entitled to the funds. Similarly, if the trust remained valid and the daughter's legal representatives were entitled to her half, the funds would still pass to the mother's estate by way of the daughter's will. Since the result would be identical whichever way the court decided the question, it simply chose to leave the question unresolved, and awarded one half of the account to the mother's estate. The opinion mentions the New York rule but says that the New Jersey statute,[18] which gave validity to Totten Trusts and also provided for payment of the account to the beneficiary's legal representatives, may have indicated a contrary rule.

In *United States v. Williams*,[19] the federal district court decided the respective rights of the legal representatives of the trustee and those of the beneficiary according to the New Jersey statute. The statute made it clear that the bank was to pay to the beneficiary or to his legal representative the specified funds and

[15] Sheridan, *Trusts—Totten Trust—Initial Illinois Recognition*, 15 De Paul L. Rev. 240 (1965).
[16] 117 App. Div. 178, 102 N.Y.S. 271 (1907).
[17] 138 N.J. Eq. 33, 47 A.2d 883 (1946).
[18] R.S. 17:9-4, N.J.S.A. (Repealed 1948).
[19] 160 F. Supp. 761 (D.N.J. 1958).

was interpreted as being merely protective of the bank and not determinative of the ultimate ownership. The court held that no equitable title vested in the beneficiary at the time the account was opened and, therefore, the legal representatives of a beneficiary who predeceasd his trustee are not entitled to the balance in the savings account.

Subsequent to the occurrence of the determinative facts in the *Williams* case and prior to the decision of the court, the New Jersey legislature passed additional legislation[20] which specifically provided that if the depositor survived the beneficiary, the beneficiary's death terminated the trust. However, *Williams*, like the New York cases, was decided on the basis of the beneficiary having no interest in the savings account before the trustee's death. This is again contrary to the Illinois appellate court theory validating Totten Trusts in which the beneficiary has an equitable interest.

C. *Additional Authority*

A California case holding that the beneficiary's legal representatives are not entitled to the balance in the account upon the death of the surviving trustee is *Hyman v. Tarplee*.[21] Again, the decision rests on the theory that the beneficiary acquires no interest in the account until the death of the trustee.

Scott's treatise on trusts,[22] which was followed extensively in *In re Petralia*,[23] states that when a beneficiary predeceases a depositor, the personal representatives of the beneficiary are not entitled to the deposit.[24] This opinion, however, is based upon the cases previously cited from the jurisdictions which have dealt with the issue.

IV. A Comparison of Decisions

Although all existing authority leads to the conclusion that the legal representatives of the beneficiary who predeceases the trustee of a savings account have no claim to the balance therein, an examination of the individual cases reflects differences which can be distinguished from the *Petralia* case. None of the cases cited deal directly with terms similar to the agreement executed by the trustee (depositor) in Illinois banks; none of the cases recognize a present equitable interest in the beneficiary.

It is a distinct possibility that an Illinois court could dismiss these outside authorities because they do not recognize the beneficiary's present equitable interest in the Totten Trust account. A view, favoring the representatives of the beneficiary, could be established under the reasoning of the dissent in *In re U.S.*

[20] N.J.S. 17:9A-216 subd. A(2), N.J.S.A. (1963).
[21] 64 Cal. App. 2d 805, 149 P.2d 453 (1944).
[22] 1 Scott, Trusts § 58.4 (3d ed. 1967).
[23] 48 Ill. App. 2d 122, 198 N.E.2d 200 (1964), *aff'd* 32 Ill. 2d 134, 204 N.E.2d 1 (1965).
[24] Accord, 38 A.L.R.2d 1243, 1247 (1954); Restatement (Second) of Trusts § 58c (1957).

Trust Co.[25] Judge Ingraham there stated that, because a trustee has the right to revoke a Totten Trust at any time, his failure to do so after the death of a beneficiary could indicate an intention to make the trust irrevocable.

The Totten Trust account is used by the public as a testamentary disposition. The people to whom it is of most importance are usually those whose total estate consists of a savings account and those who are financially unable to afford the services of an attorney to draft a will. It offers these people a convenient means of passing their estate to the person of their choice. This avoids not only the confusion of the Illinois intestate inheritance laws but also saves possible attorney expenses. It is the most economical means by which a poor person can pass his estate to a non-relative.

Because of the ease and informality surrounding the opening of a Totten Trust account, the trustee neither considers nor receives council on the possible repercussions of naming a beneficiary on his savings account. Consequently, his only concern is that after he dies the funds in the account pass to his beneficiary. Two motivating factors probably contribute to the establishment of the bulk of the Totten Trust accounts; first, that the beneficiary receive personal enjoyment of funds on the trustee's death; and second, that the beneficiary receive the funds (estate) and distribute them in accordance with a plan arranged by the trustee, in effect acting as an executor, but without the cost of a will or probate.[26] In neither of these situations does the trustee express a specific intention of benefiting the estate of the beneficiary, should the beneficiary predecease him. Because of the possibility of this occurrence after the trustee establishes the account, it is more reasonable to allow the trustee's estate to pass according to intestate laws if it cannot go to the named beneficiary.

The court in the *Petralia* case recognized the public need to uphold the validity of the Totten Trust account.[27] For this reason it seemed willing to grasp at any existing law in the state with which it could hold in favor of the account. The theory of the beneficiary acquiring an equitable interest served this purpose by allowing the court to circumvent the Statute of Wills. Unfortunately the using of the words "equitable interest" in describing the Totten Trust account raises the possibility that the trustee's intent could be frustrated if he fails to remove the name of a beneficiary who predeceases him.

V. Conclusion

It is recommended that the legislature enact a proper statute covering the Totten Trust account. Because of the public good that would result, Totten Trusts

[25] 117 App. Div. 178, 102 N.Y.S. 271, 273 (1907).

[26] For example, a trustee may name one of his three sons as beneficiary with instructions that the first son retain two thirds of the account, give one third to the second son, and nothing to the third son. Such a division would not result under the Illinois laws of intestate succession.

[27] *In re Petralia's Estate*, 48 Ill. App. 2d 122, 198 N.E.2d 200 (1964), *aff'd* 32 Ill. 2d 134, 203 N.E.2d 1 (1965).

should retain their validity. Because a trustee may be unaware of the beneficiary's death or unable physically or mentally to remove the name of the beneciary from his account, and due to the fact that the beneficiary apparently possesses an equitable interest, the statute should provide that, if the beneficiary predeceases the trustee, the trust is revoked.

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