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# Trusts - Totten Trust - Initial Illinois Recognition

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plaintiff predicate liability on the theory of breach of warranty in order to impose strict liability on the manufacturer. Thus, the assault upon the citadel continues, and one can anticipate that other jurisdictions will follow the precedent set out by *Greenman* and *Suvada*. Strict tort liability is a revolutionary concept and surely is "the law of the immediate future."<sup>30</sup>

*Robert Breakstone*

<sup>30</sup> Putnam v. Erie City Manufacturing Co., *supra* note 29.

## TRUSTS—TOTTEN TRUST—INITIAL ILLINOIS RECOGNITION

For a number of years, the decedent, Antonio Petralia, was the sole owner of a savings account in his own name at the First National Bank of Chicago. On November 8, 1948, he closed this account and transferred all funds therein to an account in his own name as Trustee for his daughter, Dominica DiMaggio.<sup>1</sup> From the time the account was opened to the date of his death, Antonio Petralia had, and exercised, the power to make deposits and withdrawals from the account. At the death of Antonio Petralia, the beneficiary of the trust instituted a citation proceeding against the administrator of the estate, claiming title to the account. The probate court entered a decree in favor of the beneficiary, and it was affirmed by the appellate court. The Illinois Supreme Court upheld the decree on the grounds that a valid and enforceable inter vivos trust was created since the beneficiary had acquired a present interest during the lifetime of the decedent. *In re Petralia*, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

This decision marks the first judicial recognition of the tentative, or "Totten" Trust, in Illinois. A tentative trust was first defined in New York<sup>2</sup> and is now incorporated in the *Restatement of Trusts*.<sup>3</sup> This note

<sup>1</sup> Signature card showed the words "Tony Petralia, Trustee" on the front, and on the reverse side the following language: "All the deposits in this account are made for the benefit of Domenica DiMaggio 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."

<sup>2</sup> *In re Totten*, 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904): "A savings bank trust is a deposit by one person of his in his own name as trustee for another. Such a deposit, 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 in 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."

<sup>3</sup> RESTATEMENT, TRUSTS, § 58 (2d ed. 1958).

will consider the judicial reasoning behind the court's decision to adopt the Totten Trust and will explore some of the case law of other states recognizing such trusts.

Two problems were faced by the court in adopting the Totten Trust in this situation. First, there was no evidence that the settlor intended to create a trust, other than the language on the bank's signature card, which the decedent executed. The court held that this was sufficient evidence to show such an intent, and pointed out that the wording of the card followed the language of an Illinois statute which states that the funds on deposit in a savings bank trust account shall be paid to the beneficiary on the depositor's death.<sup>4</sup> It should be noted that savings bank trust agreements of a similar or identical wording had been held to create valid trusts in previous Illinois cases,<sup>5</sup> but the trusts were deemed irrevocable on the basis of extrinsic evidence showing such intent.<sup>6</sup>

The second problem, the source of difficulty for many courts and the subject of considerable comment by legal writers,<sup>7</sup> is whether the trust exists from the time of the original deposit, subject to *pro tanto* revocation by later withdrawals, or has the settlor reserved so much control that a valid trust exists only from the time of his death. Unless the cestui acquires a beneficial or equitable interest during the life of the settlor, and a valid inter vivos trust is created, the Totten Trust should be void as an attempted testamentary disposition which fails to conform to the Statute of Wills.

New York has decided, in two cases specifically treating this second problem, that no trust arises until the death of the depositor. In the case of *In re U.S. Trust Co.*,<sup>8</sup> a father opened two savings accounts in trust for his son. The father retained the pass books and no deposits or with-

<sup>4</sup> ILL. REV. STAT. ch. 16½, § 145 (1963). Such statutes exist in almost all states, but solely for the protection of banks, and have never been interpreted by the courts as legislative recognition of this type of trust. See 1 SCOTT, LAW OF TRUSTS § 58.3 at 487, n. 7 (2d ed. 1956, amended by pocket part 1965).

<sup>5</sup> "There must be hundreds of individual trust accounts in Chicago banks which have used this or similar forms. Countless depositors, who have the right to make withdrawals at will and to close out their accounts, have designated themselves as trustees in the belief that the beneficiary named by them will receive whatever balance remains in their accounts at their death. That so few cases involving these accounts have reached our reviewing courts is surprising and is evidence of their general acceptance." *In re Joseph's Estate*, 30 Ill. App. 2d 492, 493, 175 N.E.2d 265, 265 (1961).

<sup>6</sup> *Estate of Helfrich*, 1 T.C. 590, *aff'd*, 143 F.2d 43 (7th Cir. 1944); *Albert v. Albert*, 334 Ill. App. 440, 80 N.E.2d 69 (1948); *In re Joseph's Estate*, *supra* note 5; *In re Hauser's Estate*, 40 Ill. App. 2d 150, 189 N.E.2d 370 (1963).

<sup>7</sup> See, e.g., Comment, 6 DE PAUL L. REV. 117 (1956); 14 N.Y.U. INTRA. L. REV. 63 (1958); 42 N.C.L. REV. 214 (1963).

<sup>8</sup> 117 App. Div. 178, 102 N.Y.S. 271 (1907), *aff'd mem.* 189 N.Y. 500, 81 N.E. 1177 (1907).

drawals were made. Under New York law, perfect tentative trusts were established. However, the beneficiary predeceased the settlor, and the court held that "until the depositor's death the funds on deposit are impressed with no trust in the sense that any title thereto, actual and beneficial, vests in the proposed beneficiary unless the depositor shall have completed the gift. . . ."<sup>9</sup> This principle was affirmed recently in the case of *In re City Savings and Loan Association*,<sup>10</sup> wherein the court held that the settlor of the trust was entitled to vote the shares in the trust as "the accounts are . . . his both legally and equitably."<sup>11</sup> Courts in a few other states have come to the same conclusion as New York in holding Totten Trusts invalid.<sup>12</sup> In *Fleck v. Baldwin*,<sup>13</sup> a woman died intestate, leaving an estate of nearly \$400,000, most of which was in savings bank trust accounts for her sisters and brothers. The court, although expressing sympathy for the petitioners, refused to recognize the accounts as trusts, saying there had been no gift of any interest to the supposed beneficiaries, and that "no trust is created, for an imperfect gift will not be enforced as a trust merely because of its imperfection."<sup>14</sup>

The Illinois decision is in accord with the viewpoint of the majority of states which have recognized the Totten Trust.<sup>15</sup> These states hold that a present interest is created in the beneficiary during the lifetime of the settlor. This is consistent with a line of cases in Illinois which has ruled that inter vivos revocable trusts, created by formal instruments, are valid despite a reservation of powers of a very broad scope in the settlor.<sup>16</sup> In the recent case of *Farkas v. Williams*,<sup>17</sup> which the Illinois Supreme Court cites as support of its decision in the instant case, it was held that an

<sup>9</sup> *Id.* at 179, 102 N.Y.S. at 272.

<sup>10</sup> 123 N.Y.S.2d 852 (1953).

<sup>11</sup> *Id.* at 858.

<sup>12</sup> *Springvale National Bank v. Ward*, 122 Me. 227, 119 Atl. 529 (1923); *Bartlett v. Remington*, 59 N.H. 364 (1879); *Nicklas v. Parker*, 69 N.J. Eq. 743, 61 Atl. 267 (1905); *Travers v. Reid*, 119 N.J. Eq. 416, 182 Atl. 908 (1936); *In re Estate of Hoffman*, 175 Ohio St. 363, 195 N.E.2d 106 (1963); *Fleck v. Baldwin*, 141 Tex. 340, 172 S.W.2d 975 (1943).

<sup>13</sup> 141 Tex. 340, 172 S.W.2d 975 (1943).

<sup>14</sup> *Id.* at 978.

<sup>15</sup> *Wilder v. Howard*, 188 Ga. 426, 4 S.E.2d 199 (1939); *Coughlin v. Farmers & Mechanics Savings Bank*, 199 Minn. 102, 272 N.W. 166 (1937); *In re Shapley's Deed of Trust*, 353 Pa. 499, 46 A.2d 227 (1946); *In re Madsen's Estate*, 48 Wash. 2d 575, 296 P.2d 518 (1956); *Delaware Trust Co. v. Fitzmaurice*, 27 Del. Ch. 101, 31 A.2d 383 (1943). For other cases recognizing Totten Trusts, but saying nothing on this specific point, see *Hale v. Hale*, 313 Ky. 344, 231 S.W.2d 2 (1950); *Bollock v. Bollock*, 169 Md. 407, 182 Atl. 317 (1935); *Kuck v. Raferty*, 117 Cal. App. 755, 4 P.2d 552 (1931).

<sup>16</sup> *Kelly v. Parker*, 181 Ill. 47, 54 N.E. 615 (1899); *Bear v. Milliken Trust Co.*, 336 Ill. 366, 168 N.E. 349 (1929); *Gurnett v. Mutual Life Insurance Co.*, 356 Ill. 612, 191 N.E. 250 (1934); *Farkas v. Williams*, 5 Ill. 2d 417, 125 N.E.2d 600 (1955).

<sup>17</sup> *Supra* note 16.

enforceable corporate stock trust was created even though the written agreement reserved to the settlor the right to receive all cash dividends, to change the beneficiary, and to revoke any part of the trust by selling any part of the stock in trust and retaining the proceeds. In addition, the agreements stated that if the beneficiary predeceased the settlor, the trust was automatically revoked. Because of this liberal attitude, the court had an ample basis for recognizing Totten Trusts as valid.

Nevertheless, a tentative trust is far different from a revocable trust created under a formal agreement. Withdrawal of any of the funds in the account is held to be a *pro tanto* revocation of the trust,<sup>18</sup> and if the beneficiary should predecease the settlor, no rights pass to his estate.<sup>19</sup> The Totten Trust can be successfully attacked both before<sup>20</sup> and after<sup>21</sup> the death of the settlor on the theory of an implied fraud on the creditors, although, presumably at least, all other available assets of the estate would first have to be subjected to the creditor's claims. The trust is also presumed to be revoked to the extent necessary to pay the burial expenses and costs of administration.<sup>22</sup> The effectiveness of the trust, theoretically rendered absolute on the settlor's death, is also subject, to some extent, to the terms of his will. The trust is considered revoked not only where the depositor expressly disposes of the deposit in his will in favor of some other person than the beneficiary,<sup>23</sup> but also where the dispositions made in his will would be ineffective if the trust were not revoked.<sup>24</sup> The trust is not affected, however, by a bequest of the residue of the depositor's estate.<sup>25</sup> Since the trust takes effect in possession and enjoyment only on the death of the depositor, it is included in the depositor's estate for the purpose of both federal<sup>26</sup> and state<sup>27</sup> taxation.

<sup>18</sup> *Vierling v. Ellwood City Fed. Savings & Loan Ass'n*, 356 Pa. 350, 52 A.2d 224 (1947); *In re Ingel's Estate*, 372 Pa. 171, 92 A.2d 881 (1952).

<sup>19</sup> *Hyman v. Tarplee*, 64 Cal. App.2d 805, 149 P.2d 453 (1944). See also, *In re Reich*, 146 Misc. 616, 262 N.Y.S. 623 (1933).

<sup>20</sup> *Workmen's Comp. Bd. v. Furman*, 106 N.Y.S.2d 404 (1951); *Banca D'Italia & Trust Co. v. Giordano*, 154 Pa. Super 452, 36 A.2d 242 (1944).

<sup>21</sup> *Beakes Dairy Co. v. Berns*, 128 App. Div. 137, 112 N.Y.S. 529 (1908); *In re Reich*, 146 Misc. 616, 262 N.Y.S. 623 (1933).

<sup>22</sup> *In re Greniewich*, 243 App. Div. 811, 278 N.Y.S. 279 (1935); *In re Aybar*, 203 Misc. 372, 116 N.Y.S.2d 720 (1952).

<sup>23</sup> *Scanlon's Estate*, 313 Pa. 424, 169 Atl. 106 (1933).

<sup>24</sup> *Walsh v. Emigrant Industrial Savings Bank*, 106 Misc. 628, 176 N.Y.S. 418 (1919), *aff'd* 192 App. Div. 908, 182 N.Y.S. 956 (1920), *aff'd* 233 N.Y. 512, 135 N.E. 897 (1922); *In re Beagan*, 112 Misc. 292, 183 N.Y.S. 941 (1920).

<sup>25</sup> *In re Pozzuto's Estate*, 124 Pa. Super. 93, 188 Atl. 209 (1936).

<sup>26</sup> INT. REV. CODE OF 1954, §§ 20.2036, 20.2038.

<sup>27</sup> ILL. REV. STAT. ch. 120, § 375 (1963).

The law is clear and consistently followed in most jurisdictions on these points, but the important question of what evidence is sufficient to show that the decedent intended an irrevocable trust,<sup>28</sup> or intended no trust at all,<sup>29</sup> is a matter of pleading and proof in the individual case. So also is the question of whether the surviving spouse may include the trust in determining her distributive share of the estate.<sup>30</sup> These are problems which could result in considerable future litigation for the courts. Nevertheless, as a means of bringing many uncomplicated estates within the "small estates" law,<sup>31</sup> at a savings of considerable time and money,<sup>32</sup> the value of the Totten Trust cannot be doubted.

*James Sheridan*

<sup>28</sup> See, e.g., *Farrell v. Cohalan*, 398 N.Y. 129, 81 N.E.2d 51 (1948) (delivery of the pass book); *Sleprow v. McSoley*, 54 R.I. 210, 172 Atl. 328 (1934) (informing beneficiary of the trust).

<sup>29</sup> See, e.g., *Rush v. South Brooklyn Savings Institution*, 65 Misc. 66, 119 N.Y.S. 726 (1909) (attempted withdrawal of funds, though prevented by bank rule requiring 60-day notice); *Boyle v. Kempkin*, 243 Wis. 86, 9 N.W.2d 589 (1943) (marked copies of the trust agreement "destroyed").

<sup>30</sup> *In re Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951) (requiring proof that the trust was illusory). See generally, 53 ILL. BAR. J. 918 (1965).

<sup>31</sup> ILL. REV. STAT. ch. 3, § 324 (1963). Limited to estates of less than \$5000, it provides a quick informal distribution of the estate, even where the decedent died intestate.

<sup>32</sup> ILL. REV. STAT. ch. 3, § 90 (1963). If an estate is opened, a minimum of 9 months is required before closing.