OHIO ADOPTS MASSACHUSETTS RULE FOR TENTATIVE TRUSTS

IN RE ESTATE OF HOFFMAN
175 Ohio St. 363, 195 N.E. 2d
106 (1963).

Seven savings account passbooks found among the belongings of the decedent were included in the inventory of his estate by the administratrix. Each passbook was in the name of the decedent as trustee for another. Of the seven separate accounts there were five intended beneficiaries, one to each account, with two beneficiaries being designated to two accounts. Three of the beneficiaries filed exceptions to the inventory. The Probate Court sustained the exceptions, finding that the savings accounts were trusts and not a proper part of the inventory. The Court of Appeals affirmed the decision while finding that the signature cards contained the signature of the decedent and the typewritten word "Trustee", that the decedent had retained complete control over the passbooks and accounts during his lifetime, and that the named beneficiaries had no knowledge of the accounts until the passbooks were found among the decedent's effects. The Supreme Court of Ohio reversed the decision, holding that there must be clear and convincing evidence of the present intent of the depositor to create a trust, that the mere word "trustee" on the passbooks was equivocal, and that, since there was nothing more to show the depositor's intent, no trust was created.[1]

In *In re Estate of Hoffman*[2], Ohio has followed the minority view of the few states that have considered the validity of savings deposit trusts on similar facts.[3] The majority view was pronounced by the Supreme Court of New York in 1904 in *In re Totten.*[4] These savings deposit trusts have since become known as "tentative" or "Totten" trusts.

The Totten trust is a testamentary device used as a substitute for a will, and is closely related in form to the familiar inter vivos revocable trust.[5] The features distinguishing the Totten trust and the inter vivos revocable trust are the degree of control that the settlor retains over the trust *res* during his lifetime and the manifestation of the settlor's intent when the trust is created.

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[1] *In re* Estate of Hoffman, 175 Ohio St. 363, 195 N.E.2d 106 (1963).

[2] *Ibid.*

[3] Only about one-fifth of the estates have considered the validity of the savings account trust. About eight states have sustained it under the New York rule. Comment, "Totten—An Anomaly in Trusts," 6 DePaul L. Rev. 117 (1956).

[4] 179 N.Y. 112, 71 N.E. 748 (1904).

[5] The inter vivos revocable trust is accepted in Ohio. Stevenson, "The Amazing Revocable Trust: A Study in Contradictions," 32 U. Cinc. L. Rev. 1 (1963); Goldman and De Camp, "When is a Trust not a Trust," 16 U. Cinc. L. Rev. 191 (1942).

Because the Totten trust purports to be an inter vivos revocable trust in form, the intent of the settlor as expressed in his self-declaration of trust becomes the controlling factor. It is generally accepted that the settlor's expression of intent must be clear and unequivocal to sustain a revocable trust. His intent to reserve the power of revocation and a life interest in the trust estate must be properly expressed by his words or conduct.[6] However, in the Totton trust, the only evidence of the depositor's intent is the form of the deposit, *i.e.*, "*A* in trust for *B*." Therefore, the immediate problem confronting a court passing on the validity of such a trust is determining the depositor's intention. Where there was no evidence of intent other than the form of the deposit, the courts before *In re Totten* held that the depositor had either created an irrevocable trust, or no trust at all.[7] The New York cases held that there was no trust unless there was other evidence of intent, in which case an irrevocable trust was created[8] *In re Totten* then added the third possibility, holding that in the absence of evidence showing that no trust at all or an irrevocable trust was intended, a revocable trust was created.[9] Thus the Totten trust differs in the first instance from the ordinary revocable trust in that the settlor's intent is presumed rather than expressly stated.

The second distinction between the ordinary revocable trust and the Totten trust is the degree of control retained by the settlor over the trust. Where the settlor declares himself trustee, reserves the power of revocation and retains a life estate in the beneficial interest, the trust is generally upheld where it can be shown that the settlor intended to create an immediate equitable interest in the beneficiary by the declaration of trust. The trust may be upheld even though the beneficiary has no knowledge of it until the settlor's death.[10] Such a disposition differs very little from that which is made when the settlor transfers the property to another as trustee and reserves these same rights and powers in himself. In both cases, the trust must be administered according to its terms.[11] In contrast, the settlor in a Totten trust exercises such complete control over the deposit that he retains absolute ownership. He is free to deal with it as his own, leaving the residue at his death to the beneficiary. Such a trust

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[6] Restatement (Second), Trusts § 330, comments *b* and *c* (1959); 1 Scott, Trusts, §§ 23, 24, 57.6 (1956).

[7] It appears that *In re* Totten is the first case holding that a revocable trust was created. In Cazallis v. Ingraham, 119 Me. 240, 110 Atl. (35)9 (1920), and in Rose v. Osborne, 133 Me. 497, 180 Atl. 315 (1935), irrevocable trusts were created. Hogarth-Swann v. Steele, 294 Mass. 396, 2 N.E.2d 446 (1936) and Mulloy v. Charlestown Five Cents Savings Bank, 285 Mass. 101, 108 N.E. 608 (1934) held that no trust at all was created.

[8] Beaver v. Beaver, 137 N.Y. 59, 32 N.E. 998 (1893); Martin v. Funk, 75 N.Y. 134, 31 Am. Rep. 446 (1878).

[9] *Supra* note 4.

[10] 1 Scott Trusts, § 57.6 (1956); Restatement (Second), Trusts § 36, comment *a* (1959).

[11] 1 Scott, *op. cit. supra* note 10, at 476; Goldman and De Camp, *supra* note 5, at 205.

would ordinarily be considered testamentary and held invalid unless the Statute of Wills were complied with, but the Totten trust is an exception to this general rule.[12] When confronted with the testamentary features of the trust, the New York courts upheld the trust by saying that an equitable interest in the deposit passed to the beneficiary when the deposit was made, but the trust thereby created was "tentative" as the gift of the deposit could have been revoked by the depositor or completed by him by some decisive act or declaration. The court concluded that because the depositor died without revoking or completing the gift, the presumption arose that an absolute trust of the balance remaining on deposit at the depositor's death was created.[13] Thus we have a bequest device invalid as a will but nevertheless upheld through the use of legal fiction in labeling the device a "trust" even though it goes beyond the most liberal requirements of the inter vivos trust.

Despite the legal shortcomings of the Totten trust, it has been accepted in the majority of the states which have considered it, because there appears to be little public policy against it. This device enables the depositor to distribute small amounts [14] of his estate conveniently, because it eliminates following the rigid formalities, expense, and delay inherent in the Statute of Wills and probate hearings. There is no infringement upon the rights of third parties, as the trust is generally subject to inheritance[15] and federal estate taxes,[16] the claims of creditors[17] and in some juridictions the claim of the surviving spouse.[18] Also the amount involved is easily identified and cannot be altered by forgery, nor can the named beneficiary be changed without the consent of the depositor because a duplicate record of the account is kept by the bank. Therefore, the danger

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[12] 1 Scott, Trusts § 58.3 (1956); Restatement (Second), Trusts § 58 (1959). *But see* Fleck v. Baldwin, 141 Tex. Civ. App. 340, 172 S.W.2d 975 (1943).

[13] *In re* Totten, *supra* note 4.

[14] Contra to the argument that in most cases the amount involved is small, the total amount of the seven deposits in *Hoffman* was $66,780.90.

[15] Scott, "The Effects of the Power to Revoke a Trust," 57 Harv. L. Rev. 362 (1944); 29 Ohio Jur. 2d *Inheritance and Estate Taxes* § 30 (1958); Ohio Rev. Code Ann. § 5731.02 (Page Supp. 1962).

[16] Wasserman v. Commissioner of Internal Revenue, 139 F.2d 778 (1st Cir. 1944).

[17] Most states have statutes protecting the claims of creditors by enabling them to reach the trust fund. See 1 Scott, Trusts, § 58.5 (1956). The language of Ohio Rev. Code Ann. § 1335.01 (Page Supp. 1963) validating the revocable trust was relied upon by the Court of Appeals in *Hoffman,* but the Supreme Court noted that the statute, a part of the chapter entitled "Statute of Frauds," deals with formal written trust deeds and is designed to protect creditors from fraudulent conveyances, and has no weight in determining the validity of a trust. *In re* Estate of Hoffman, *supra* note 1, at 366, 195 N.E.2d at 108.

[18] 1 Scott, Trusts, § 58.5 (1956). *But cf.* Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961). The testator created an inter vivos trust with the Trust Company. The court held that the widow, electing to take under the statute of descent and distribution, could not claim the property held in trust. Query, whether the Ohio courts would apply this rule to the savings deposit trust?

of fraudulent claims, protected against by the Statute of Wills, is absent.[19] Finally, it is argued that the majority of such depositors really intend to make a gift, and the law should not be so strict as to require the layman to be aware of and follow the technical requirements of making an effective testamentary transfer. Instead, the law should be lenient in this regard and uphold the layman's presumed intent in the absence of fraud or abuse.

The conflict between the legal and policy considerations of the Totten trust has led to different treatments of the device among the jurisdictions that have passed on its validity. A Texas court, for example, found that the mere form of a man's savings deposit was not sufficient evidence of intent to create a trust, and in any event the disposition was testamentary in character, and therefore invalid.[20] A Connecticut statute required banks to supply a detailed signature card to all depositors.[21] The Connecticut court, in *Fasano v. Meliso*,[22] held that this signature card was sufficient evidence of intent, but that the trust was invalid because it lacked the essential elements of an ordinary trust, *i.e.*, a present, unequivocal disposition of some interest in the trust to a beneficiary so that legal and equitable title is in two different persons, not the same person. However, *Fasano* was overcome in 1962 when the statute involved was amended. Connecticut now follows the Totten trust by statute.[23] The Totten trust has also led to much confusion in New Jersey. Early cases followed the Texas rule and held that the trusts were testamentary and therefore invalid.[24] But a 1954 statute[25] created an irrebuttable presumption that any such deposit, regardless of other evidence of contrary intent, created a gift for the named beneficiary. This statute was held unconstitutional in *Howard Savings Institution v. Quatra*,[26] but a recent decision[27] questioned the soundness of the *Quatra* case, and held the statute constitutional while upholding a Totten-type trust. The Machachusetts rule requires something more than the form of the deposit to show an intent to create a valid trust. This rule, as stated in *O'Hara v. O'Hara*[28] has been followed by the 1963 decision of *Reagan v. Phillips*.[29] Other Massachusetts cases upheld the savings deposit trust where there was other evidence that the depositor intended to create a trust.[30] In the instant case, the court, in citing *O'Hara*, indicated that Ohio will follow the Massachusetts rule.

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19 34 Conn. Bar. J. 67, 73 (1960); *But see*, Comment, "Trusts which Substitute for Wills," 51 Nw. U. L. Rev. 113 (1956).

20 Fleck v. Baldwin, *supra* note 12.

21 Conn. Gen. Stat. Ann. § 36-110 (1960).

22 146 Conn. Supp. 496, 152 A.2d 512 (1959).

23 Conn. Gen. Stat. Ann. § 36-110 (Supp. 1962).

24 Nicklas v. Parker, 71 N.J. Eq. 777, 71 Atl. 1135 (1907).

25 N.J. Stat. Ann. § 17: 9A-216 (1963).

26 38 N.J. Super. 174, 118 A.2d 121 (1955).

27 Howard Savings Institution v. Kielb, 38 N.J. 186, 183 A.2d 401 (1962).

28 291 Mass. 75, 195 N.E. 909 (1935).

29 345 Mass. 387, 187 N.E.2d 801 (1963).

30 Cohen v. Newton Savings Bank, 320 Mass. 23, 67 N.E.2d 748 (1946); Greely v. Flynn, 310 Mass. 23, 36 N.E.2d 394 (1941).

The court apparently felt that the other possible reasons for establishing an account in a trust form, such as to conceal one's financial position, to avoid a legal limit on the size of savings accounts, or possibly to avoid the claims of third persons, rendered speculative the notion that the depositor's intent was to create an inter vivos trust. In requiring clear and convincing evidence of intent, the court followed the rule applied to the inter vivos revocable trust in Ohio,[31] thus implying that where the depositor's intent is clear the savings deposit trust will be upheld as an inter vivos revocable trust despite the extreme degree of control of the deposit retained by the depositor-trustee. Past Ohio savings deposit cases upholding a trust where the depositor's intent was unequivocal, support this contention.[32] Thus it appears that Ohio has adopted the Massachusetts rule.

The question left unanswered by the *Hoffman* case is what constitutes clear and convincing evidence? The court in *Adams v. Fleck,* referring to an inter vivos revocable trust, implied that a formal trust document is required.[33] The *Hoffman* case, referring to *Adams* as authority for the "clear and convincing" evidence rule, used this same language. But the syllabi in both cases do not mention formal documents, but only clear and convincing evidence. Perhaps the courts in both cases felt that because of the testamentary nature of the trusts involved, the declarations of trust *should* be in writing.[34] In a large percentage of revocable trusts in Ohio, the trustee is a professional trust company, and the trust agreement is invariably expressed in a formal written instrument. Such an instrument is obviously the most practical means of expressing the settlor's intent and setting forth the rights and powers of the settlor and trust company. It is perhaps this written instrument, used when the trust property is transferred to professional trustee, that the Ohio cases have reference to when they imply that clear and convincing evidence means a formal written document. However, in refusing formally to require a written document, the Ohio court has left open the possibility of creating a revocable trust by parol in other situations. That a revocable trust can be created orally in many situations has long been the Ohio law.[35] Perhaps then the bank account trust is one of those situations where a revocable trust can be created without a formal written document, as this trust does not involve a transfer of property to an individual fiduciary or trust company. This contention finds support in the prior Ohio bank account trust cases,[36], the

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31 Adams v. Fleck, 171 Ohio St. 451, 172 N.E.2d 126 (1961).

32 Thomas v. Dye, 70 Ohio L. Abs. 118, 127 N.E.2d 228 (Ct. App. 1954); Jones v. Luplow, 13 Ohio App. 428 (1920); Herrmann v. Brighton German Bank, 16 Ohio N.P. (n.s.) 47 (Super. Ct. of Cinc. 1914) (irrevocable trust).

33 Adams v. Fleck, *supra* note 31, "(T)his court has gone far in recognizing inter vivos trusts as valid . . . only in those cases where there has been a formal trust instrument that definitely eliminated any question as to the donor's intent."

34 See Stevenson, *supra* note 5, at 6.

35 *Ibid.*

36 Cases cited note 32, *supra.* These cases made no mention of formal trust instruments.

Massachusetts cases[37], and the court's language in the instant case.[38] Until the court decides otherwise, it appears that any evidence showing an unequivocal intent to create a bank account trust will constitute clear and convincing evidence under the Ohio rule.

The few Ohio cases involving the savings deposit trust indicate that this device has been of little use to donors in Ohio. This is perhaps due to the wide acceptance of the joint and survivorship bank account as a means of testamentary disposition.[39] The joint and survivorship account is closely analogous to the savings deposit trust. Just as in the savings deposit trust, the depositor in a joint bank account who wishes to make a valid gift of the deposit at death can retain possession of the passbook, the power to revoke, and can generally treat the account as his own during his lifetime.[40] Generally the beneficiary of a joint depositor has knowledge of the deposit and signs the signature card along with the depositor; however, in *Rhorbacker v. Citizens Building Ass'n*[41] a joint account gift was held valid where the depositor retained possession of the passbook, and the beneficiary neither signed the signature card nor knew of the deposit until the depositor's death.

Through the use of the joint and survivorship bank account, the revocable trust, and the savings deposit trust, the Ohio law provides great flexibility for those wishing to make testamentary dispositions of cash while avoiding the requirements of the Statute of Wills. It seems that the requirement of clear and convincing evidence of intent, particularly in the savings deposit trust, will add to this flexibility the needed protection against fraud and abuse while affording greater assurance to the donor that his intention will be given effect.

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[37] Cohen v. Newton Savings Bank, *supra* note 30 (the depositor's intent was indicated by clear language on the signature card); Greely v. Flynn, *supra* note 30 (the depositor gave the passbook to the beneficiary, thus making his intent clear).

[38] *Supra* note 1, at 367, 368; 195 N.E.2d at 109, 110:

> Where there is a formal trust instrument, the settlor's intention is clearly shown. Without a formal trust instrument, the intention and terms of the trust must be *implied* . . . . Where a trust is claimed in savings bank deposit . . . there being no formal trust instrument, no relinquishing of any control and no knowledge of the purported beneficiaries, a trust is not created.

While the court says that a formal trust instrument is sufficient to show intent to create the trust, the court also implies that other extrinsic evidence will suffice.

[39] Close, "Joint Bank Accounts in Ohio," 11 W. Res. L. Rev. 511 (1960).

[40] Goldman and De Camp, *supra* note 5.

[41] 138 Ohio St. 273, 34 N.E.2d 751 (1941). The joint and survivorship bank account is predicated on the contract theory. The court here held that the contract ran between the depositor and the bank, with the named beneficiary of the account as a third party beneficiary to this contract. This precedent has been followed by the case of *In re* Estate of Di Santo, 142 Ohio St. 223, 51 N.E.2d 639 (1943).