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Trusts - Totten Trusts in Colorado - Estate of Hall v. Father Flanagan's Boys' Home

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COMMENT

TRUSTS — TOTTEN TRUSTS IN COLORADO — *Estate of Hall v. Father Flanagan's Boys' Home*, 491 P.2d 614 (Colo. Ct. App. 1971).

IN *Estate of Hall v. Father Flanagan's Boys' Home*,[1] Colorado joined the growing list of jurisdictions which recognizes the validity of revocable or tentative savings account trusts, commonly known as "Totten" trusts.[2] Such trusts have two important attributes. First, the settlor retains an unlimited power of control over the subject matter.[3] Second, it represents an effective form of testamentary disposition for which compliance with the Statute of Wills is not necessary. As a result of these benefits, a majority of the states presently concede the enforceability of either private[4] or charitable[5] Totten trusts.

Totten trusts were first upheld in the case of *In re Totten*,[6] wherein the New York Court of Appeals ruled that a person who deposits a sum in his own name in trust for another can intend to create: (1) an irrevocable trust, (2) no trust at all, or (3) a revocable trust. The court then established a set of rules which still govern revocable Totten trusts:

> 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 in his lifetime by some unequivocal act or declaration, such as delivery of the passbook 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.[7]

In the instant case the Colorado Court of Appeals chose an unusual fact situation in which to validate Totten trusts in Colorado. Mrs. Hall, the creator of the trust, opened a savings account in 1965 naming herself as the trustee and Father Flanagan's Boys' Home as the beneficiary.[8] The signature card bore

[1] 491 P.2d 614 (Colo. Ct. App. 1971).

[2] *See generally* 3 P-H 1967 EST. PLAN. ¶ 3604 *et seq.*

[3] 1 A. SCOTT, LAW OF TRUSTS § 57.6 (3d ed. 1967).

[4] *Id.* § 58.

[5] *Id.* § 361.

[6] 179 N.Y. 112, 71 N.E. 748 (1904).

[7] *Id.* at 125-26, 71 N.E. at 752.

[8] One of appellant's contentions rejected by the court of appeals was that the district court erred in granting summary judgment for appellee where the "Discretionary Revocable Trust Agreement" stated

the printed caption "Discretionary Revocable Trust Agreement" and set forth the terms of the trust agreement on the reverse side. Following Mrs. Hall's death, her executor filed a petition in district court to have the trust declared invalid. The trial court granted summary judgment in favor of Father Flanagan's Boys' Home, and Mrs. Hall's executor appealed.

In its decision, the court of appeals relied directly on the Totten trust theory. It seems possible, as urged by the appellee, that the trust in *Estate of Hall* could have been upheld as a valid inter vivos trust without resorting to the *Totten* theory.[9] Nevertheless, when the appellants challenged the validity of the trust on the grounds that the creator had too much control over the corpus, the court responded by stating: "Although we find no Colorado cases directly on point, the great weight of modern authority has upheld the validity of savings account trusts (often referred to as 'Totten Trusts') as against these objections."[10] There can, therefore, be no question as to the court's acceptance of the Totten trust theory as the basis for its decision.

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the account was in trust for "Boys Town (A Nebraska Non-profit Organization)," the bankbook bore the legend "Boys Town of Nebraska," and it was agreed that no entity existed in Nebraska under either of these names. Three other Nebraska organizations with the words "Boys Town" appearing in their names disclaimed in favor of appellee, and the court held no issue of material fact was raised by the pleadings, affidavits, and admissions. 491 P.2d at 616-17.

[9] Both parties agreed it was unnecessary for the court to rule on the validity of a Totten trust in Colorado in the case. Appellant urged reversal on the grounds that the attempt to create the trust failed. Appellee urged the ruling of the district court be affirmed on the grounds that a valid discretionary, revocable trust had been created. Brief for Appellant at 25-26, Brief for Appellee at 8, Estate of Hall v. Father Flanagan's Boys' Home, 491 P.2d 614 (Colo. Ct. App. 1971). A second rationale upon which the trust could possibly have been upheld was not argued. COLO. REV. STAT. ANN. § 122-3-15(2) (1963) provides:

> Every [savings and loan] association shall have power to issue stock or shares to any person on a revocable trust for another person, who is either named in writing as beneficiary thereof or who is unnamed. At any time during the lifetime of the trustee, the stock or shares together with dividends, if any, shall be withdrawn only by the trustee. On the death of the trustee . . . the stock or shares together with dividends, if any, shall be paid to the person for whom the stock or shares were issued as designated beneficiary even though he or she not be of full legal capacity . . . .

Whether or not one who deposits money in an account has "stock or shares" in the association within the meaning of the words of the statute is not certain, but at least one decision has held that a person who deposited money in a savings and loan association, and was issued certificates of deposit in return, was a shareholder in the association and not entitled to the priority of a creditor over other members of the association, even though no actual shares were issued. Exchange Nat'l Bank v. Receivers of the City Sav., Bldg. & Loan Ass'n, 95 Colo. 498, 37 P.2d 394 (1934).

[10] 491 P.2d at 616.

This type of trust is of special significance because it permits unlimited control to be retained by the depositor.[11] The Colorado Supreme Court confronted the issue of control in *Denver National Bank v. Von Brecht*[12] and held that "a settlor may reserve a life income for himself, together with the right to revoke the trust, and he may reserve additional powers *if he does not go too far.*"[13] Although a limit to this control has yet to be precisely defined, it is now accurate to say that the degree of control allowed by a Totten trust does not exceed the *Von Brecht* definition.

Of equal significance is the fact that the Totten trust permits the inter vivos distribution of property outside of one's estate.[14] This planning device is not violative of public policy since the supreme court held in *Von Brecht* that:

> [I]f an owner of property can dispose of it inter vivos and thereby render a will unnecessary for accomplishment of his practical purposes, he has a right to do so. The motive in making such a transfer may be to obtain the practical advantages of a will without the necessity of making one, but the motive is immaterial.[15]

The decision in *Estate of Hall* is, therefore, significant for two reasons. First, Colorado has joined the majority of jurisdictions in upholding the validity of Totten trusts. Second, although the subject of the trust was a savings account, it appears that the court of appeals has gone one step further than the supreme court did in *Von Brecht*[16] by permitting the settlor to retain even more control over the corpus.[17]

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[11] Where a person makes a deposit in a savings account in a bank or other savings organization in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust. RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).

[12] 137 Colo. 88, 322 P.2d 667 (1958).

[13] *Id.* at 102, 322 P.2d at 674 (emphasis added). However, where the motive for creating the trust or the effect of its creation is to impair or defeat the spouse's right to elect against the will, the outcome of an attack on the validity of any revocable, inter vivos trust in Colorado in uncertain. *See* Huff, *An Aspect of Estate Planning in Colorado: The Revocable Inter Vivos Trust,* 43 DENVER L.J. 296 (1966).

[14] 1 A. SCOTT, *supra* note 3, § 58.3.

[15] 137 COLO. 88, 99, 322 P.2d 667, 672.

[16] *Id.* at 88, 322 P.2d at 667.

[17] For a general history of revocable trusts in Colorado see Huff, *supra* note 13. The Colorado position concerning retention of control is treated at pages 305-09.