#D-300 4/21/80

Memorandum 80-43

Subject: Study D-300 - Enforcement of Judgments (Deposit Accounts in Trust Form)

TOTTEN TRUSTS

If a person creates a bank account in his or her name as trustee for another, that results in a tentative trust, revocable during the depositor's lifetime or by the depositor's will. Upon the depositor's death, a presumption arises that the depositor intended an absolute trust as to the balance on hand in the account, and the funds become the property of the named beneficiary. This is the so-called "Totten trust," first recognized in New York.

California has recognized and approved the Totten trust doctrine, although the cases are relatively few. See 7 B. Witkin, Summary of California Law Trusts §§ 17-19, at 5379-83 (8th ed. 1974). In the jurisdictions which have adopted the Totten trust doctrine, creditors of the depositor may reach the funds in the trust because the depositor has such extensive control over the funds during his or her lifetime that the depositor may fairly be treated as the unrestricted owner. See 1 A. Scott, The Law of Trusts § 58.5, at 543-44 (3d ed. 1967); Restatement (Second) of Trusts, Comment d (1959). Although no California case has decided the question, according to Witkin creditors of the depositor can reach the fund (citing Scott and the Restatement, supra). We can assume that if a California court were faced with the question, it would so hold.

Two states (New York and New Jersey) have codified the Totten trust doctrine and have included provisions protecting the rights of creditors. These statutes are attached to this memorandum as Exhibits 1 and 2, respectively. The New York statute provides that it "does not affect" the rights of creditors of the depositor or the depositor's estate. New York Est., Powers & Trusts Law § 7-5.5 (McKinney Supp. 1979-1980). The New Jersey statute provides that it does not "validate any trust created in fraud of creditors of the individual depositor." N.J. Stat. Ann. § 17:9A-216 (West 1963).

The staff recommends that the Commission propose legislation along the lines of the New York and New Jersey statutes to accomplish the following purposes:

(1) To codify the Totten trust doctrine in California.

(2) To make the Totten trust a more useful testamentary device for persons of modest means by making it more difficult for heirs of the depositor to attack the trust. This may be accomplished by eliminating the rule that the trust may be attacked by presenting circumstantial (and often flimsy) evidence that the depositor did not intend a trust and limiting the means of modification or revocation to (1) withdrawals from the account during the depositor's lifetime made or authorized by the depositor or (2) an express provision in the depositor's will.

(3) To make clear in California that creditors of the depositor may reach the funds in trust during the depositor's lifetime or after the depositor's death.

Attached to this memorandum is a staff draft of a Tentative Recommendation relating to Bank Accounts in Trust Form which is based primarily on the New York statute and would accomplish the above purposes. If the Commission approves the staff draft, we will send it to the State Bar and others for their review and comment with a view toward having a final recommendation ready for introduction at the 1981 session of the Legislature.

BANK ACCOUNTS WITH PAYABLE-ON-DEATH DESIGNATION

Although courts uphold Totten trusts and joint bank accounts with rights of survivorship, a deposit in the depositor's name payable on the depositor's death to another is generally held void as being a testamentary disposition which lacks the formalities required by will statutes. See 1 W. Bowe & D. Parker, Page on the Law of Wills § 6.18, at 270-71 (3d ed. 1960). This result has been criticized since these three types of accounts--two of which are upheld and one of which is not--are indistinguishable in their effect. See Dukeminier, Cleansing the Stables of Property: A River Found at Last, 65 Iowa L. Rev. 151, 170-71 (1979).

New Jersey has adopted legislation to validate bank accounts with payable on death designations:

> When a time or demand deposit account is maintained in a banking institution in the name of
>
> . . . .
>
> (c) an individual depositor, payable on the death of the individual depositor to a named person,
>
> and the individual depositor predeceases the named person, the right of the named person to be vested with sole and indefeasible title to the moneys to the credit of the account at the death of the individual depositor, shall not be denied, abridged or in anywise affected because such right has not been created by a writing executed in accordance with the law of this State prescribing the requirements to effect a valid testamentary disposition of property. [N.J. Stat. Ann. § 46:37-2 (West Supp. 19__). Accord, N.J. Stat. Ann. §§ 17:9A-216, 17:9A-217 (West 1963).]

If the Commission approves of the incorporation of this legislative policy into California law, the staff will prepare a separate tentative recommendation dealing with deposits by a person payable at death to another and will propose the incorporation of any final recommendation into the Totten trust bill.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

New York Estates, Powers and Trusts Law

PART 5. BANK ACCOUNTS IN TRUST FORM [NEW]

Sec.
7-5.1 Definitions.
7-5.2 Terms of a trust account.
7-5.3 Payment to beneficiary.
7-5.4 Effect of payment.
7-5.5 Rights not affected.
7-5.6 Joint depositors.
7-5.7 Application.

§ 7-5.1 Definitions

(a) A "beneficiary" is a person who is described by a depositor as a person for whom a trust account is established or maintained.

(b) A "depositor" is a person in whose name a trust account subject to this part is established or maintained.

(c) A "financial institution" is a bank, trust company, national banking association, savings bank, industrial bank, private banker, foreign banking corporation, federal savings and loan association, a savings institution chartered and supervised as a savings and loan or similar institution under federal law or the laws of a state, a federal credit union, or a credit union chartered and supervised under the laws of a state.

(d) A "trust account" includes a savings, share, certificate or deposit account in a financial institution established by a depositor describing himself as trustee for another, other than a depositor describing himself as acting under a will, trust instrument or other instrument, court order or decree.

Added L.1975, c. 499, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 499, § 3.

Practice Commentary

By Patrick J. Rohan

Sections 7-5.1 through 7-5.7 of the EPTL were enacted at the suggestion of the Law Revision Commission to clarify the rights of parties interested in a Totten Trust account, and form a new Part 5 of Article 7 of the Estates, Powers and Trusts Law. See 1975 Leg.Doc. No. 65(B). This part, effective September 1, 1975, supersedes Banking Law Sections 134(2); 171(2); 202(h)(2); 239(2); 349(5); 453 (16) and 629(2); which formerly controlled various aspects of trust accounts. Section 7-5.1 sets forth the definitions applicable to this part, and makes clear the fact that all forms of Totten Trust accounts fall within its purview, including accounts established with a bank, trust company, national banking association, savings bank, industrial bank, private banker, foreign banking corporation, federal savings and loan association, a savings institution chartered as a savings and loan (or similar institution) under federal law or the laws of a state, a federal credit union and credit unions chartered and supervised under the laws of a state. The legislative intendment appears to cover Totten Trust type accounts, irrespective of the type of institution in which they are found. Moreover, the definitions set forth in EPTL 7-5.1(a) appears broad enough to cover any type of Totten Trust account (with no particular language required to create such an account, as long as it appears that the depositor created a savings account, share, certificate or deposit account in a financial institution, and described himself as trustee for the named beneficiary).

The scope of this legislation is limited, however, insofar as it does not extend to situations in which the depositor describes himself as acting under a will, trust or instrument, court order or decree. It would also appear that, as an unstated premise, the depositor would have to be depositing his own funds in such a trust account. Where, for example, an attorney, fiduciary or agent deposited funds of a third party in such an account, this section would not govern, even if the attorney, fiduciary or agent neglected to state the true nature of the transaction on the bank account cards. In this connection, it should be noted that EPTL 7-5.5 specifically states that this legislation does not impair the rights of any creditor of the depositor or of his estate. The statute would also have no application to trust accounts established in other jurisdictions by New York domiciliaries, since such accounts would be controlled by the law of the state in which the financial institutions were located.

It should be noted that both the statute and the Law Revision Commission studies are silent on the situation where the depositor is acting under undue influence. Thus for example, where a recently hired nurse or relative pressures an infirm person to open a joint account or Totten Trust, it may be shown after the depositor's death that the depositor never intended the statutory results to flow from the opening of the account, but rather was acting under undue influence. See, *e. g.*, Matter of Creekmore, 1956, 1 N.Y.2d 284, 152 N.Y. S.2d 449, 135 N.E.2d 193.

EPTL Section 7-5.2 establishes the substantive rules which will govern the revocation of trust accounts, on or after September 1, 1975. Unlike EPTL Section 5-1.1, which has been construed as applying only to deposits made in Totten Trusts on or after September 1, 1956, this section will apply to all pre-existing accounts, as well as subsequent deposits. This section is designed to establish objective criteria for determining whether a gift has been made of a trust account and whether such an account has been revoked by the depositor through actions taken while alive (or through his last will and testament). This section works a major change in prior law by stipulating that a change in the legal status of the account cannot be made by delivering the bank book to a donee. Accordingly, whether the donee in question is the beneficiary named on the account or a third party, delivery of the bank book (coupled with an expression of donative intent), will no longer effectuate a gift. By virtue

of EPTL 7-5.2, the whole transaction would be rendered nugatory. Henceforth, the only way a gift can be made of funds on deposit in a trust account would be for the depositor or his authorized representative, to make the necessary withdrawal and hand the cash to the donee. Presumably, the depositor could give the donee the passbook and a written power of attorney authorizing the donee to make the withdrawal. The gift would be effective if the withdrawal was actually made in the depositor's lifetime, assuming no fraud or overreaching were present. It should be noted that the requirement that a withdrawal be made to effect a legal change in the account has no application to non-donative transfers. Since EPTL 7-5.5 stipulates that this part shall not impair the rights of creditors of the depositor, it would appear that a pledge or assignment of a trust account by the depositor, coupled with written notice thereof to the institution in question, would suffice to protect the creditor's rights. In this connection it should be noted that the whole thrust of the new legislation is to clarify the intentions of the depositor toward his beneficiaries, and not to affect commercial transactions.

The statute codifies earlier case law to the effect that the death of the beneficiary before the death of the depositor terminates the role of the beneficiary and the account remains the sole property of the depositor. Neither the statute nor the supporting Law Revision study specify the disposition to be made of the account where the depositor and beneficiary die under such circumstances that it is not possible to determine the order of their deaths. The Uniform Simultaneous Death Act specifically covers this situation, and mandates that the beneficiary loses all interest in the trust account in the case of simultaneous death of the depositor and beneficiary. This would appear to be the correct result, since, in theory, the beneficiary did not outlive the depositor.

Where the trust account is not terminated according to the terms of EPTL 7-5.2(2), the beneficiary will succeed to the amount on deposit, unless the depositor's will revokes or modifies the account pursuant to the provisions of EPTL 7-5.2(3). In order to work such a revocation, the language continued in the testator's will must identify the account as being in a specific institution and as being in trust for the named beneficiary. The explicit sentence revoking the account (or perhaps bequeathing it to another) need not mention the specific account number on the passbook. Moreover, a revocation mentioning a specific institution will work a revocation of all accounts on deposit in trust for the named beneficiary in that institution, unless the revocation is expressly limited "to one or more accounts specifically identified by account number". This constitutes a major change from prior law; henceforth no trust account can be revoked by implication by means of a general clause relating to assets or bank accounts of the testator. Any such attempted revocation will fail, unless the specific requirements of EPTL 7-5.2(2) are met. The statute specifically authorizes a partial revocation, provided the specific requirements of EPTL 7-5.2(2) are satisfied.

Section 7-5.3 of the EPTL is designed to correlate the payment of funds from a trust account with other provisions of the Estates, Powers and Trusts Law governing payment of funds to persons of the age of eighteen. Where the beneficiary of the trust account is eighteen or over *at the time a demand for payment is made*, payment may be made directly to such beneficiary. If, however, the beneficiary is under the age of eighteen at that time, the fund may be paid to his parent or a guardian of his property, if the amount is one thousand dollars or less. If the amount exceeds one thousand dollars, it can only be paid to a duly appointed guardian of his property. Where the beneficiary is a non-domiciliary, it is probable that payment can be made, on behalf of a beneficiary under the age of eighteen, in accordance with the law of his domicile.

EPTL 7-5.4 protects a financial institution which, prior to service upon it of a restraining order or other appropriate process from a court of competent jurisdiction prohibiting payment, makes payment

to a beneficiary of other person in accordance with the terms of part 5 of Article 7 of the Estates, Powers and Trusts Law, and obtains a receipt from such person. Accordingly, where a dispute exists as to such trust account, or creditors seek to lay claim to it, or the surviving spouse claims it is a "testamentary substitute" as far as the surviving spouse's right of election is concerned, an appropriate court order should be sought to enjoin payment of the funds on deposit to the beneficiary, pending a final resolution of the matter. The same would apply where it is claimed that passing of the funds to the beneficiary would contravene contractual joint or mutual wills, or would violate an earlier separation or divorce settlement. Pending the issuance of process from the appropriate court, the lending institution should be notified by registered or certified mail.

EPTL 7-5.5 specifically mandates that part five of Article Seven of the Estates, Powers and Trusts Law does not affect (1) rights of creditors of the depositor or of his estate; (2) rights of fiduciaries of the estate of the depositor, or (3) rights of the surviving spouse of the depositor. Accordingly, it is clear that the provisions of the recently enacted trust account legislation are designed solely to regulate and control the rights of the depositor and beneficiary. Accordingly, an assignment of the account to a creditor or pledge of the account in a commercial transaction would be efficacious, even if the funds were not withdrawn from the account. Similarly, as under prior law, funds held in a trust account remain subject to the claims of creditors of the depositor and are includible in his estate. By the same token, the funds in a trust account are reachable as "testamentary substitutes" under the surviving spouse's right of election. Where the depositor entered into a separation or divorce settlement and bound himself to dispose of his assets in a specific way, or executed joint or mutual wills pursuant to contract, the funds in the trust account could be subject to the terms of the agreement.

If the funds are subject to the claims of creditors, the surviving spouse or required by the legal representative of the depositor for the administration of the estate, the fact that the funds have already been paid by the financial institution to the beneficiary will protect the lending institution. However, the claimant can follow the funds into the hands of the beneficiary.

EPTL 7-5.6 is designed to cover the situation where a trust account is established in the names of more than one depositor, with the funds to be paid to the survivor of them, in trust for another. Such accounts, like the ordinary trust account are subject to the terms of Part 5 of Article 7 of the Estates, Powers and Trusts Law, with the sole exception that the title to the funds on deposit, *as between the depositors themselves*, is governed by Article XIII-C of the Banking Law.

EPTL 7-5.7 stipulates that Part 5 of Article 7 of the Estates, Powers and Trusts Law applies to all funds on deposit in trust accounts on the effective date of the Act (September 1, 1975), except that the provisions shall not impair or defeat any rights which have accrued prior to that date. Accordingly, a transfer by way of gift of a trust account effectuated by delivery of the passbook to the donee prior to September 1, 1975, would be sustained, even though such a transfer would be invalid if made on or after that date. It should be noted, however, that nothing contained in EPTL 7-5.7 prevents the application of the statute to pre-existing wills, where the testator dies on or after September 1, 1975. Accordingly, it may be necessary to execute a codicil to such a will in order to revoke a trust account in accordance with the requirements of EPTL 7-5.2. Where this is not done, an attempted revocation that does not comply with EPTL 7-5.2 will be ineffective even though the will was executed prior to September 1, 1975.

Supplementary Practice Commentaries

By Patrick J. Rohan

1979

Where a transfer of funds to a donee was completed more than one year prior to an application for medical assistance and disability arose

suddenly long after transfer was made, the transfer could not be set aside on the ground that it was entered into in order to qualify the transferor for medical assistance. *Dorren v. Department of Social Services*, 1978, 63 A.D.2d 821, 406 N.Y.S.2d 177. In *Matter of Marone*, 1979, — A.D.2d —, 415 N.Y.S.2d 892, the Appellate Division, Second Department ruled that where a Totten Trust account was opened in the name of both spouses (in trust for their son), each spouse was entitled to half of the balance on deposit when the parties were divorced.

1978

Matter of Reich, 1978, 94 Misc.2d 319, 404 N.Y.S.2d 781 concerned the final judicial settlement of a conservator's account. Questions arose with respect to his computation of commissions and to the disposition of sums held by the conservatee in bank accounts prior to the conservatee's death. The funds on deposit in a Totten Trust bank account were never invaded by the conservator for the benefit of the conservatee even though the passbook was in the possession of the conservator and the original Totten Trust account was cancelled and the funds deposited in the name of the conservator in his official capacity. The court concluded that such funds were never received by the conservator and not subject to the allowance of commissions. The original title of the account was to be reinstated for the benefit of the Totten Trust beneficiary. The passbook for a joint account in the names of conservatee and another was delivered to the conservator without waiver or prejudice to the rights of the other named depositor. Although the funds were withdrawn from this account and placed in the name of the conservator in his official capacity, the court found that the statutory presumption under Section 675 of the Banking Law was not rebutted and the balance of the funds remaining from the original joint account were to be restored to the original joint form thus allowing the other depositor the funds through survivorship. Commissions were allowed on one-half of the funds originally on deposit as properly received by the conservator.

In Matter of Chaikowsky, 1978, 94 Misc.2d 70, 404 N.Y.S.2d 510, the public administrator succeeded in having two Totten Trusts set aside as fraudulent conveyances, pursuant to EPTL 13-3.6, where the estate was insolvent. See also Matter of Jacobs, 1978, 92 Misc.2d 1027, 401 N.Y.S.2d 986; Matter of White, N.Y.L.J., Dec. 23, 1977, p. 11, col. 1; Matter of Stitch, N.Y.L.J., Nov. 3, 1977, p. 10, col. 3.

Practice Commentary Cited

Estate of Miller, 1975, 84 Misc.2d 807, 377 N.Y.S.2d 944.

Law Review Commentaries

Totten trusts in New York. 28 Brooklyn Bar. 7 (1976).

Library References

Banks and Banking ⇐130(2)

C.J.S. Banks and Banking § 276 et seq.

§ 7-5.2 Terms of a trust account

The funds in a trust account, which shall include any dividends or interest thereon, shall be trust funds subject to the following terms:

(1) The trust can be revoked, terminated or modified by the depositor during his lifetime only by means of, and to the extent of, withdrawals from or charges against the trust account made or authorized by the depositor.

(2) A trust can be revoked, terminated or modified by the depositor's will only by means of, and to the extent of, an express direction concern-

ing such trust account, which must be described in the will as being in trust for a named beneficiary in a named financial institution. Where the depositor has more than one trust account for a particular beneficiary in a particular financial institution, such a direction will affect all such accounts, unless the direction is limited to one or more accounts specifically identified by account number in addition to the foregoing requirements. A testamentary revocation, termination or modification under this paragraph can be effected by express words of revocation, termination or modification, or by a specific bequest of the trust account, or any part of it, to someone other than the beneficiary. A bequest or part of a trust account shall operate as a pro tanto revocation to the extent of the bequest.

(3) If the depositor survives the beneficiary, the trust shall terminate and title to the funds shall continue in the depositor free and clear of the trust.

(4) If the beneficiary survives the depositor, and the depositor's will contains no provision revoking, terminating or modifying the trust account under paragraph (2), the trust shall terminate and title to the funds shall vest in the beneficiary free and clear of the trust.

(5) If the beneficiary survives the depositor and the depositor's will contains language sufficient under paragraph two of this section, to revoke, terminate or modify the trust, in whole or in part, that part of the trust which is affected shall terminate and title to the funds shall be subject to disposition by the depositor's will, free and clear of the trust.

Added L.1975, c. 499, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 499, § 3.

Practice Commentary

By Patrick J. Rohan

In Estate of Motta, N.Y.L.J., Oct. 17, 1977, p. 15, col. 2, the court stated that the provisions of EPTL 7-5.2 dealing with revocation of Totten Trusts apply to all such accounts in existence on September 1, 1975, but only to revocations made on or after such date.

Library References

Banks and Banking ⇐130(1)

C.J.S. Banks and Banking § 276 et seq.

Notes of Decisions

1. Irrevocable trust

Expressed intention of depositor to make gift, accompanied by unconditional delivery of savings passbooks to his grandchildren, constituted irrevocable trust, and fact that beneficiaries transferred passbooks to their father who, on termination of three-year term, directed that deposits be continued under same titles did not impugn irrevocability of the trust. Dorren v. State Dept. of Social Services, 1978, 63 A.D.2d 821, 406 N.Y.S.2d 177.

§ 7-5.3 Payment to beneficiary

(a) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-5.2, the funds shall be paid to the beneficiary upon his order, if, at the time of his demand for payment of all or part of the funds, he is eighteen or more years of age.

(b) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-5.2, and if the beneficiary is under eighteen years of age at the time demand for payment of any part or all of the funds is made, the funds may be paid to the order of

the parent or parents of the beneficiary to be held for the use and benefit of such infant beneficiary or to the order of the duly appointed guardian of the property of the beneficiary, if the funds are equal to or are less than one thousand dollars; but if the funds are more than one thousand dollars, the funds may be paid only to the order of the duly appointed guardian of the property of the beneficiary.

Added L.1975, c. 499, § 1; amended L.1976, c. 127, § 1.

1976 Amendment. Subd. (b). L. 1976, c. 127, § 1, eff. Apr. 13, 1976, inserted "to be held for the use and benefit of such infant beneficiary."

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 499, § 3.

Library References

Banks and Banking ⇐133.

C.J.S. Banks and Banking § 290 et seq.

Supplementary Practice Commentary

By Patrick J. Rohan

1976

After the passage of EPTL 7-5.3, it was pointed out that no express provision was contained in the section to indicate that the parents hold the funds for the use and benefit of the infant beneficiary. As a result, Chapter 127 of the Law of 1976 was passed, specifically providing that should the funds be delivered to the parents under the terms of this section, the funds are to be held for the use and benefit of the beneficiary. This correlates the provisions of this section with statutory language of other EPTL and SCPA sections governing payments to third parties on behalf of infants. This clarifying amendment was enacted at the suggestion of the Law Revision Commission. See 1976 Leg.Doc. No. 65(B).

§ 7-5.4 Effect of payment

A financial institution which, upon the death of a depositor and prior to service upon it of a restraining order, injunction or other appropriate process from a court of competent jurisdiction prohibiting payment, makes payment to a beneficiary or if the beneficiary is under eighteen years of age, to the guardian of the property or to the parent or parents of the infant beneficiary pursuant to section 7-5.3, shall, to the extent of such payment, be released from liability to any person claiming a right to the funds and the receipt or acquittance of the person to whom payment is made shall be a valid and sufficient release and discharge of the financial institution.

Added L.1975, c. 499, § 1; amended L.1976, c. 126, § 1.

1976 Amendment. L.1976, c. 126, § 1, eff. Apr. 13, 1976, inserted "upon the death of a depositor and" and substituted "a beneficiary or if the beneficiary is under eighteen years of age, to the guardian of the property or to the parent or parents of the infant beneficiary pursuant to section 7-5.3" for "any person designated by this part as a proper person to whom funds may be paid."

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 499, § 3.

Library References

Banks and Banking ⇐133.

C.J.S. Banks and Banking § 290 et seq.

Supplementary Practice Commentary

By Patrick J. Rohan

1976

As originally enacted the EPTL 7-5.4 provided that the payment by the lending institution could be made to "any person designated by this part." Concern was expressed over the possible effect upon financial

institutions of a literal reading of this language. If, pursuant to this section, the bank paid the funds to the trust account beneficiary (unaware that the depositor's will revoked the account), the legatee would only have recourse against the trust beneficiary, and not against the institution. But a literal reading of the original language of this section could have provided the legatee with a cause of action against the bank, as he was the only person entitled to receive the funds, the trust having been revoked by the will. This was not the intention of the legislature. Thus, the statute was amended by Chapter 126 of the Laws of 1976, to refer specifically to payment by a bank to a beneficiary, his parents or guardian upon the death of the trust account depositor. The result is that the exculpatory effect of the section is now made clear. This amendment was made at the suggestion of the Law Revision Commission. See 1976 Leg.Doc. No. 65(B). For a discussion of a related clarification of EPTL 7-5.3, see the Supplementary Practice Commentary to that section.

§ 7-5.5 Rights not affected

This part does not affect:
(1) The rights of creditors of the depositor or his estate,
(2) The rights of fiduciaries of the estate of the depositor, or
(3) The rights of the surviving spouse of the depositor.

Added L.1975, c. 499, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 499, § 3.

Library References
Banks and Banking ⇐130(2)
C.J.S. Banks and Banking § 276 et seq.

§ 7-5.6 Joint depositors

If a trust account is established in the names of more than one depositor, in form to be paid or delivered to any, or the survivor of them, in trust for another, such account shall be subject to the terms of this part, except that the title to the funds on deposit, as between the depositors, shall be governed by article XIII-C of the banking law.

Added L.1975, c. 499, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 499, § 3.

Library References
Banks and Banking ⇐130(2).
C.J.S. Banks and Banking § 276 et seq.

§ 7-5.7 Application

This part shall apply to all funds in trust accounts, as defined in paragraph (d) of section 7-5.1, which are in existence on its effective date, except that its provisions shall not impair or defeat any rights which have accrued prior to such date.

Added L.1975, c. 499, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 499, § 3.

Library References
Banks and Banking ⇐130(2).
C.J.S. Banks and Banking § 276 et seq.

EXHIBIT 2

New Jersey Statutes Annotated

17:9A–216. Deposits by one person in trust for another

A. When a time or demand deposit account is maintained in a banking institution in the name of an individual depositor in trust for a named person, or in the name of an individual depositor as trustee for a named person, the banking institution shall pay any moneys to the credit of the account from time to time to, or pursuant to the order of the individual depositor during his lifetime. When the individual depositor makes a deposit or deposits, or causes a deposit or deposits to be made in such account, the individual depositor shall conclusively be presumed to intend to declare and create a trust of the moneys at any time to the credit of such account, for the named person, with the depositor as trustee, upon the following terms:

(1) the trust shall be revocable at will by the individual depositor, but only to the extent of withdrawals of, or charges against the moneys to the credit of the trust, made or authorized by the individual depositor, during the individual depositor's life;

(2) if the individual depositor survives the named person the named person's death shall terminate the trust and title to the moneys to the credit of the trust shall vest in the individual depositor, free and clear of the trust;

(3) if the named person survives the individual depositor, the individual depositor's death shall terminate the trust and any moneys to the credit of the trust, less all proper set-offs and charges, shall vest solely and indefeasibly in the named person, notwithstanding any action by the individual depositor, or any evidence, contrary to or negativing the individual depositor's conclusively presumed intention in declaring, creating and maintaining the trust;

(4) if the named person survives the individual depositor and is 18 years of age or over at the death of the individual depositor, the banking institution shall pay the moneys to the credit of the trust, less all proper set-offs and charges, to the named person or upon his order, as hereinafter provided, and such payment by the banking institution shall be valid, notwithstanding any lack of legal age of the named person;

(5) if the named person survives the individual depositor and is under 18 years of age at the individual depositor's death the banking institution shall pay the moneys to the credit of the trust, less all proper set-offs and charges,

(a) to the named person or upon his order when or after he becomes 18 years of age, or

(b) to the legal guardian of the named person, wherever appointed, or

(c) if a certificate of appointment of a legal guardian is not filed with the banking institution, to a person authorized to receive such moneys pursuant to sections 3A:6–31 and 3A:6–32 of the New Jersey Statutes.

B. A banking institution which makes any payment pursuant to subsection A of this section prior to service upon the banking institution of an order of court restraining such payment shall, to the extent of each payment so made, be released from all claims of the individual depositor, the named person, their legal representatives, and all others claiming under or through them.

C. Nothing in subsection A of this section shall validate any trust created in fraud of creditors of the individual depositor.

D. Subsection A of this section shall not apply to moneys deposited by a trustee acting under a will, other fiduciary instrument, court order or decree.

E. Nothing in this section shall affect any law of this State governing transfer inheritance or estate taxes.

F. When a time or demand deposit account is maintained in a form described in this section, the right of the named person to be vested with sole and indefeasible title to the moneys to the credit of the account on the death of the individual depositor, shall not be denied, abridged, or in anywise affected because such right has not been created by a writing executed in accordance with the law of this State prescribing the requirements to effect a valid testamentary disposition of property. L.1948, c. 67, p. 350, § 216; L.1949, c. 286, p. 880, § 1; L.1953, c. 17, p. 174, § 34; L.1954, c. 209, p. 770, § 1.

#D-300

Staff Draft

TENTATIVE RECOMMENDATION

relating to

DEPOSIT ACCOUNTS IN TRUST FORM

May 1980

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

May 16, 1980

LETTER OF TRANSMITTAL

This tentative recommendation relates to Totten trusts. A Totten trust is a tentative trust created when a depositor opens an account in a financial institution as trustee for another but reserves the power to withdraw funds during the depositor's lifetime. The Totten trust is a useful device that permits a person of modest means to avoid the expense and delay that results when other methods are used to dispose of property upon death.

The Commission recommends legislation designed to eliminate existing uncertainties that hamper the use of a Totten trust. The recommended legislation provides rules governing when a Totten trust exists and the methods by which such a trust may be modified or revoked. It also makes clear that the establishment of the trust does not affect the rights of the surviving spouse or creditors of the depositor.

This study was made pursuant to Resolution Chapter 45 of the Statutes of 1974 and Resolution Chapter __ of the Statutes of 1980.

#D-300 5/16/80

TENTATIVE RECOMMENDATION

relating to

DEPOSIT ACCOUNTS IN TRUST FORM

BACKGROUND

A Totten trust is a tentative trust created when a depositor merely opens an account in a financial institution in his or her own name in trust for another, intending to reserve the power to withdraw funds from the account during the depositor's lifetime.[1] The tentative trust is revocable during the depositor's lifetime or by the depositor's will.[2] Whenever the depositor withdraws money from the account, a partial revocation takes place to the extent of the withdrawal.[3] Upon death of the depositor, a presumption arises that an absolute trust was created as to the balance on hand in the account.[4]

The Totten trust is a useful device that permits a person of modest means to avoid the expense and delay that results when other methods are used to dispose of property upon death.[5] However, its usefulness is

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1. The Totten trust concept is drawn from In re Totten, 179 N.Y. 112, 71 N.E. 748 (1904). The concept has been recognized in California and a growing number of states. See, e.g., Kosloskye v. Cis, 70 Cal. App.2d 174, 160 P.2d 565 (1945); Estes, In Search of a Less Tentative Totten, 5 Pepperdine L. Rev. 21, 26 n.21 (1977) ("[a]t latest count, it appears that eighteen jurisdictions have accepted the common law savings bank trust concept, some in slightly differing forms"). See generally 7 B. Witkin, Summary of California Law Trusts §§ 17-19, at 5379-83 (8th ed. 1974). The Totten trust concept does not apply where there is a true trust, such as, for example, one created when the depositor deposits funds belonging to the beneficiary or where the depositor acts under a will, trust instrument or other instrument, or under a court order or decree. See 7 B. Witkin, supra § 19, at 5382-83; Miller v. Miller, 217 Cal. App.2d 538, 31 Cal. Rptr. 618 (1963).

2. 7 B. Witkin, Summary of California Law Trusts § 17, at 5379 (8th ed. 1974).

3. Id.

4. In re Totten, 179 N.Y. 112, 126, 71 N.E. 748, 752 (1904). If the beneficiary of the tentative trust predeceases the depositor, the tentative trust is terminated. 7 B. Witkin, Summary of California Law Trusts § 17, at 5379 (8th ed. 1974); Hyman v. Tarplee, 64 Cal. App.2d 805, 149 P.2d 453 (1944).

5. Estes, In Search of a Less Tentative Totten, 5 Pepperdine L. Rev. 21, 25 (1977).

limited by the existing rules of law which result in uncertainty concerning whether a Totten trust has been created in a particular case,[6] whether there has been a revocation or modification by inter vivos acts or declarations of the depositor,[7] and whether particular will provisions have the effect of revoking or modifying the trust.[8] A number of commentators have called for legislation to bring certainty and predictability to this area of the law and to make the Totten trust a more useful tool.[9]

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6. See 7 B. Witkin, Summary of California Law Trusts § 18, at 5381-82 (8th ed. 1974). Under existing law, a deposit in the name of the depositor in trust for another creates a presumption of an intent to create a Totten trust, but the presumption may be rebutted by circumstantial evidence of a contrary intention. Thus, the existence of the trust is left largely to the uncontrolled discretion of the trial judge and may turn entirely upon circumstantial evidence. For example, in Kosloskye v. Cis, 70 Cal. App.2d 174, 160 P.2d 565 (1945), the court found against a trust intent where the decedent had created bank accounts with himself as trustee for his nephews, because the decedent and his widow had lived together until his death, without the money she would be left penniless, the decedent had lived for some time on the charity of the wife's relatives, and the decedent had quarreled with the parents of the nephews. Thus, the court ignored the form of the deposit and reached its decision based on the court's view of what the decedent, in good conscience, ought to have intended. See 7 B. Witkin, supra at 5381.

7. The depositor may revoke or modify the trust during his or her lifetime not only by withdrawals from the account but also by acts or declarations which may not unambiguously reveal the depositor's intent. See G. Bogert, The Law of Trusts and Trustees § 47, at 354 n.74 (2d ed. 1965). "No particular formalities are necessary to manifest . . . an intention [to revoke a Totten trust]." Restatement (Second) of Trusts § 58, Comment c (1959).

8. The depositor may revoke or modify the trust upon death not only by an express direction in a will, but also by making dispositions in the will from which the revocation of the trust can be implied. 1 A. Scott, The Law of Trusts § 58.4, at 537-38 (3d ed. 1967). Under the Uniform Probate Code, however, a Totten trust may not be revoked by will. Uniform Probate Code § 6-104; see Annot., 46 A.L.R.3d 487, 497 (1972).

9. See, e.g., 39 Calif. L. Rev. 314, 316-17 (1951); Estes, In Search of a Less Tentative Totten, 5 Pepperdine L. Rev. 21, 43 n.106 (1977) (citing many articles). The existing uncertainty has produced much litigation. See, e.g., G. Bogert, The Law of Trusts and Trustees § 47, at 335, 354 (2d ed. 1965); Estes, supra at 36, 39.

New York and New Jersey have enacted statutes to codify the Totten trust concept and to restrict the power of revocation.[10] Both statutes provide that if a depositor establishes an account in his or her own name in trust for another, that will create a trust subject to statutory rules regarding disposition by will and revocation and modification.[11]

Under the New Jersey statute, a Totten trust is revoked only by withdrawals from or charges against the trust account made or authorized by the depositor or by the beneficiary predeceasing the depositor.[12] Under the New York statute, the trust may be revoked by these two methods or by an express provision in the depositor's will which describes the account as being in trust for a named beneficiary in a named financial institution.[13]

RECOMMENDATIONS

The Commission has considered the views of commentators who have urged legislative reform in this area of the law and has reviewed the New Jersey and New York statutes. The Commission recommends the enactment of legislation--drawn primarily from the recently enacted New York statute--to provide the following rules:

(1) When a depositor establishes a bank or similar account in his or her own name in trust for another, the depositor is conclusively presumed to have intended to create a Totten trust subject to the limited revocability rules set forth below.[14] This conclusive presumption would eliminate the uncertainty caused by the present rule permitting circumstantial (and sometimes flimsy) evidence as to what the depositor really intended.

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10. See N.J. Stat. Ann. § 17:9A-216 (West 1963); N.Y. Est., Powers & Trusts Law §§ 7-5.1 to 7-5.7 (McKinney Supp. 1979-1980).

11. N.J. Stat. Ann. § 17:9A-216 (West 1963); N.Y. Est., Powers & Trusts Law §§ 7-5.1, 7-5.2 (McKinney Supp. 1979-1980).

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

13. N.Y. Est., Powers & Trusts Law § 7-5.2 (McKinney Supp. 1979-1980).

14. This assumes that the funds deposited are funds of the depositor. This recommendation would not, for example, affect funds held by the depositor subject to a preexisting express trust.

(2) A Totten trust may be revoked only by withdrawals from or charges against the account during the depositor's lifetime or by an express provision in the depositor's will which describes the account as being in trust for the specific beneficiary in the specific financial institution. This restriction of the power of revocation will eliminate the uncertainty that results from the existing rule that revocation of a Totten trust may be implied from ambiguous conduct of the depositor, from oral declarations, or by means of a general will clause relating to assets or bank accounts of the testator.

(3) The creation of a Totten trust has no effect on the rights of a surviving spouse of the depositor or on the rights of creditors of the depositor or of the depositor's estate. This codifies what probably is existing law.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Chapter 4 (commencing with Section 2291.05) to Title 8 of Part 4 of Division 3 of the Civil Code, relating to trusts.

The people of the State of California do enact as follows:

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CHAPTER 4. DEPOSIT ACCOUNTS IN TRUST FORM

Article 1. Definitions

§ 2291.05. Application of definitions

2291.05. Unless the context otherwise requires, the words and phrases defined in this article govern the construction of this chapter.

Comment. The definitions in this article are drawn from Section 7-5.1 of the New York Estates, Powers and Trusts Law.

§ 2291.10. Beneficiary

2291.10. "Beneficiary" means a person who is described by a depositor as a person for whom a trust account is established or maintained.

Comment. Section 2291.10 is the same as paragraph (a) of Section 7-5.1 of the New York Estates, Powers and Trusts Law. See also Sections 2291.15 ("depositor" defined), 2291.30 ("trust account" defined).

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§ 2291.15. Depositor

2291.15. "Depositor" means a natural person in whose name a trust account subject to this chapter is established or maintained.

Comment. Section 2291.15 is the same as paragraph (b) of Section 7-5.1 of the New York Estates, Powers and Trusts Law except that it is made clear that a depositor is a natural person. See also Section 2291.30 ("trust account" defined).

[Note. The provision in Section 2291.15 that a depositor is a "natural" person is consistent with the purpose and apparent meaning of this chapter. Under Section 14 of the Civil Code, the word "person" includes a corporation as well as a natural person, but the application of this chapter to corporate depositors would be anomalous. Also, New Jersey law makes clear that the Totten trust legislation applies to an "individual" depositor.]

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§ 2291.20. Financial institution

2291.20. "Financial institution" means a bank, including a savings bank, commercial bank, and trust company, as defined in Chapter 1 (commencing with Section 99) of Division 1 of the Financial Code, a savings and loan association as defined in Section 5057 of the Financial Code, a federal savings and loan association, and a credit union as defined in Section 14000 of the Financial Code.

Comment. Section 2291.20 is drawn from paragraph (c) of Section 7-5.1 of the New York Estates, Powers and Trusts Law and is conformed to definitions found in the California Financial Code. See Fin. Code §§ 102-105, 107, 109, 5057, 14000.

§ 2291.25. Trust

2291.25. "Trust" means the trust to which funds in a trust account are subject, including any dividends or interest thereon.

Comment. Section 2291.25 is new and avoids the need to repeat cumbersome language where the defined term is used in this chapter. The reference to dividends or interest is drawn from the introductory paragraph of Section 7-5.2 of the New York Estates, Powers and Trusts Law. See also Section 2291.30 ("trust account" defined).

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§ 2291.30. Trust account

2291.30. "Trust account" means a savings account, share account, certificate account, deposit account, or similar account in a financial institution established by a depositor describing himself or herself as trustee for another, other than a depositor describing himself or herself as acting under a will, trust instrument or other instrument, or under a court order or decree.

Comment. Section 2291.30 is the same in substance as paragraph (d) of Section 7-5.1 of the New York Estates, Powers and Trusts Law. Section 2291.30 requires no particular language to create a trust account as long as the depositor describes himself or herself as trustee for a named beneficiary. See also Section 2292.15 (joint depositors).

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Article 2. General Provisions

§ 2292.05. Conclusive presumption of depositor's intent when deposit made in trust account

2292.05. When a depositor makes or causes to be made a deposit into a trust account as defined in Section 2291.30, the depositor is conclusively presumed to have intended to create a trust subject to this chapter.

Comment. Section 2292.05 is the same in substance as a portion of the second sentence of paragraph (A) of Section 17:9A-216 of the New Jersey Revised Statutes (Banking Act of 1948) and has the same effect as the introductory portion of Section 7-5.2 of the New York Estates, Powers and Trusts Law.

If a depositor creates a bank or similar account describing himself or herself as trustee for another (see Section 2291.30, defining "trust account"), the depositor is conclusively presumed to have intended to create a tentative trust, revocable to the extent of withdrawals during the depositor's lifetime and, to the extent not revoked by the depositor's will, ripening into an absolute trust on the depositor's death. See Sections 2293.10-2293.15, 2293.25. This changes prior law under which a deposit into such an account created merely an inference or a rebuttable presumption of an intent to create a trust. See Kosloskye v. Cis, 70 Cal. App.2d 174, 180, 160 P.2d 565, 568 (1945).

Under Section 2292.05, the conclusive presumption relates only to the intent of the depositor. Thus, when the depositor deposits his or her own funds into a trust account, the funds are subject to the rules set forth in this chapter. However, the deposit into a trust account as defined in Section 2291.30 of funds already subject to an irrevocable trust does not vary the terms of that trust. See Section 2292.10 and the Comment to that section. Likewise, if an attorney, fiduciary, or agent deposits funds that belong to the beneficiary into a trust account as defined in Section 2291.30, this chapter does not apply to that account, even if the attorney, fiduciary, or agent neglects to state the true nature of the transaction on the bank account cards. This is because the presumed intent under Section 2292.05 does not give the depositor a power of disposition that the depositor does not have. See also Section 2292.10 (rights of creditors not affected).

Nothing in this chapter validates any trust which would be invalid under other rules of law when the trust is created as a result of fraud, duress, or undue influence.

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§ 2292.10. Rights not affected

2292.10. Nothing in this chapter affects:

(a) The rights of creditors of the depositor or the depositor's estate.

(b) The rights of a beneficiary under an irrevocable trust or a trust created by a will, trust instrument or other instrument, or pursuant to a court order or decree.

Comment. Subdivision (a) of Section 2292.10 is the same in substance as paragraph (1) of Section 7-5.5 of the New York Estates, Powers and Trusts Law. The rule that creditors of the depositor may reach the funds in a tentative trust is consistent with United States law generally. See 1 A. Scott, The Law of Trusts § 58.5, at 543-44 (3d ed. 1967). This is because the depositor has such extensive powers over the funds while living that the depositor may fairly be treated as the unrestricted owner. Restatement (Second) of Trusts § 58, Comment d (1959). Similarly, on the death of the depositor, the depositor's

creditors can reach the funds if they are needed for the payment of the depositor's debts. Id. As to the rights of the surviving spouse of the depositor, see Section 2293.25(b). See also Section 2293.30 (revocation or modification where depositor has conservator of the estate).

Subdivision (b) is new and makes clear that the deposit into a trust account as defined in Section 2291.30 of funds already subject to a trust does not vary the terms of such a trust. In this respect, this chapter does not change the rule of Miller v. Miller, 217 Cal. App.2d 538, 31 Cal. Rptr. 618 (1963) (creation of bank account trust using funds previously subject to oral express trust held not to convert the express trust into a tentative trust). Similarly, for example, if funds in a trust account as defined in Section 2291.30 are subject to a separate written trust instrument creating an express trust, the written instrument governs with respect to the rights of the beneficiary. This is true whether the separate written trust instrument is made before, at the time of, or after the deposit of the funds in a trust account as defined in Section 2291.30. Nevertheless, the financial institution holding the account may rely on the ostensible tentative form of the trust without being subjected to liability. See Section 2292.20.

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§ 2292.15. Joint depositors

2292.15. If a trust account is established in the names of more than one depositor, in form to be paid or delivered to any or to the survivor of them, in trust for another:

(a) Such account is subject to this chapter, except that title to the funds on deposit as between the depositors is governed by Section 852 of the Financial Code.

(b) Notwithstanding Section 2293.25, the death of one depositor does not terminate the trust and the trust continues to be subject to this chapter.

Comment. Subdivision (a) of Section 2292.15 is the same in substance as Section 7-5.6 of the New York Estates, Powers and Trusts Law except that the reference to Section 852 of the Financial Code has been substituted for the New York reference. See also Section 2291.30 ("trust account" defined). Subdivision (b) is new.

§ 2292.20. Release from liability of financial institution

2292.20. (a) Except as provided in subdivision (b) of Section 2292.15, a financial institution which upon the death of a depositor makes payment in the manner provided in Section 2293.25 is, to the extent of such payment, released from liability to any person claiming a right to the funds.

(b) If the financial institution makes such payment to an adult beneficiary, to the conservator of the estate of an adult beneficiary, or to the guardian of the estate of a minor beneficiary, the written receipt or acquittance of the person to whom payment is made is a valid and sufficient release and discharge of the financial institution. If the financial institution makes payment to the parent of a minor beneficiary, the financial institution may be released as provided in Section 3402 of the Probate Code.

(c) This section does not apply if the financial institution makes payment after it has been served with, or has actual notice of, a restraining order, injunction, or other appropriate process from a court of competent jurisdiction prohibiting such payment.

Comment. Section 2292.20 is drawn from Section 7-5.4 of the New York Estates, Powers and Trusts Law and from paragraph B of Section 17:9A-216 of the New Jersey Revised Statutes (Banking Act of 1948). The second sentence of subdivision (b) takes into account the California provisions relating to release upon payment to the parent of a minor beneficiary.

Subdivision (c) is an exception to the exculpatory provisions of this section. After the death of the depositor, there may be a dispute concerning entitlement to the proceeds of a trust account subject to this chapter. A person other than the beneficiary (such as the surviving spouse of the depositor or a creditor of the depositor) may claim the right to the funds and may obtain a court order enjoining the financial institution from making payment to the beneficiary pending resolution of the dispute. If the conditions of subdivision (c) concerning service on or notice to the financial institution of a restraining order or injunction are not satisfied, the financial institution will be released from liability if it makes payment as provided in Section 2293.25. In such case, the claimant can follow the funds into the hands of the payee.

§ 2292.25. Application of chapter

2292.25. (a) Subject to subdivision (b), this chapter applies to:

(1) All funds in trust accounts as defined in Section 2291.30 which are in existence on or after January 1, 1982.

(2) Revocations, terminations, and modifications of the trust which occur on or after January 1, 1982.

(b) Nothing in this chapter shall impair or defeat any rights which have vested prior to January 1, 1982.

Comment. Section 2292.25 is the same in substance as Section 7-5.7 of the New York Estates, Powers and Trusts Law except that paragraph (2) of subdivision (a) has been added for clarity, and in subdivision (b) the word "vested" has been substituted for "accrued." This is because this chapter changes prior law to impair the expectancy interest of heirs of the depositor by making it more difficult to attack a trust created pursuant to this chapter. See the Comment to Section 2292.05.

Where a depositor dies after the operative date of this act leaving a will executed prior to the operative date containing a general clause disposing of assets or bank accounts of the depositor, the general clause will be ineffective to revoke the trust. See the Comment to Section 2293.15. The rights of those who would have taken under the will under prior law are not vested (53 Cal. Jur.2d Wills § 23, at 249 (1960)), and, since a will does not take effect until the death of the testator (7 B. Witkin, Summary of California Law Wills and Probate § 85, at 5605 (8th ed. 1974)), the purported revocation by a general clause is subject to this chapter and therefore ineffective. To make an effective revocation, it is necessary for the testator to draw a new will provision which satisfies the requirements of Section 2293.15.

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Article 3. Revocation, Termination, or Modification of Trust

§ 2293.05. Revocation, termination, or modification only as provided in this article

2293.05. A trust subject to this chapter may be revoked, terminated, or modified only as provided in this article.

Comment. Section 2293.05 is the same in substance as a portion of the second sentence of paragraph A of Section 17:9A-216 of the New Jersey Revised Statutes (Banking Act of 1948) and the introductory portion of Section 7-5.2 of the New York Estates, Powers and Trusts Law. This article limits the rule of prior law under which an intent to

revoke the trust could be shown by any act or declaration of the depositor from which such an intent could be inferred. See Brucks v. Home Fed. Sav. & Loan Ass'n, 36 Cal.2d 845, 851, 228 P.2d 545, 548-49 (1951).

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§ 2293.10. Revocation, termination, or modification during depositor's lifetime

2293.10. The trust may be revoked, terminated, or modified by the depositor during the depositor's lifetime only by means of, and to the extent of, withdrawals from or charges against the trust account made or authorized by the depositor.

Comment. Section 2293.10 is the same as paragraph (1) of Section 7-5.2 of the New York Estates, Powers and Trusts Law and has the same effect as paragraph A(1) of Section 17:9A-216 of the New Jersey Revised Statutes (Banking Act of 1948). Section 2293.10 limits prior law with respect to the manner of revocation. See the Comment to Section 2293.05.

Section 2293.10 recognizes that the depositor, for example, may make an assignment of all or part of the account to a creditor, may pledge the account as part of a commercial transaction, or may by marital settlement agreement commit the funds to being divided, without actually withdrawing funds from the account. Any of these actions constitutes a partial revocation to the extent that the action results in a withdrawal or a charge against the funds in favor of a person other than the beneficiary. See Section 2292.10 (rights of creditors of the depositor not affected).

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§ 2293.15. Revocation, termination, or modification of trust by depositor's will

2293.15. (a) The trust may be revoked, terminated, or modified by the depositor's will only by an express direction in the will which describes the funds as being in trust for a named beneficiary and in a named financial institution, and contains either of the following:

(1) Express words of revocation, termination, or modification.

(2) A specific bequest of all or any part of the funds to someone other than the beneficiary.

(b) A specific bequest of part of the funds operates as a pro tanto revocation of the trust to the extent of the bequest.

(c) If the depositor has more than one trust account for a particular beneficiary in a particular financial institution, a direction in the will which satisfies the requirements of subdivision (a) affects all such accounts unless the direction is limited to one or more accounts specifically identified by account number.

Comment. Section 2293.15 is the same in substance as paragraph (2) of Section 7-5.2 of the New York Estates, Powers and Trusts Law. Section 2293.15 changes the prior rule that a will which contains a testamentary plan "wholly inconsistent" with disposition pursuant to the terms of a bank account in trust form operates to revoke the trust. See Brucks v. Home Fed. Sav. & Loan Ass'n, 36 Cal.2d 845, 852-53, 228 P.2d 545, 549-50 (1951). Under Section 2293.15, a trust account may no longer be revoked by implication by a general will clause relating to assets or bank accounts of the testator; under the section revocation by will may occur only by an express provision. It is not necessary, however, that the express will provision mention the account number of the trust account.

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§ 2293.20. Termination of trust on death of beneficiary

2293.20. If the depositor survives the beneficiary, the trust terminates on the death of the beneficiary and title to the funds continues in the depositor free and clear of the trust.

Comment. Section 2293.20 is the same in substance as paragraph (3) of Section 7-5.2 of the New York Estates, Powers and Trusts Law and paragraph A(2) of Section 17:9A-216 of the New Jersey Revised Statutes (Banking Act of 1948).

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§ 2293.25. Termination of trust on death of depositor

2293.25. (a) Except as provided in subdivision (b) of Section 2292.15, if the beneficiary survives the depositor, the trust terminates on the death of the depositor and, except as provided in subdivisions (b) and (c), the funds vest in the beneficiary free and clear of the trust. If the beneficiary is an adult, the funds shall be paid to the beneficiary upon the beneficiary's order or, if the beneficiary has a conservator of the estate, to the conservator of the estate. If the beneficiary is a minor, the funds shall be paid as follows:

(1) In the manner provided in Chapter 2 (commencing with Section 3400) of Part 8 of Division 4 of the Probate Code.

(2) In the case of a bank as defined in Section 102 of the Financial Code, in the manner provided in paragraph (1) or in Section 853 of the Financial Code.

(b) If the beneficiary survives the depositor and all or any portion of the funds in trust are community or quasi-community property, upon the depositor's death the rights of the surviving spouse in such property are the same as they would be if the depositor had disposed of the property by will.

(c) Subject to Chapter 1 (commencing with Section 201) of Division 2 of the Probate Code, if the beneficiary survives the depositor and the depositor's will contains language sufficient under Section 2293.15 to revoke, terminate, or modify the trust in whole or in part, the funds are to that extent subject to disposition by the depositor's will free and clear of the trust.

Comment. Subdivisions (a) and (c) of Section 2293.25 are drawn from paragraphs (4) and (5) of Section 7-5.2 and from Section 7-5.3 of the New York Estates, Powers and Trusts Law, and from paragraphs A(3)-(5) of Section 17:9A-216 of the New Jersey Revised Statutes (Banking Act of 1948). Subdivision (a) of Section 2293.25 has been conformed to existing California law concerning the manner of payment to a minor beneficiary. If the trust account is established in the names of more than one depositor, the trust does not terminate on the death of one depositor, but continues to be subject to this chapter. Section 2292.15.

Subdivision (b) is drawn from paragraph (3) of Section 7-5.5 of the New York Estates, Powers and Trusts Law (rights of surviving spouse of depositor not affected) but is made more explicit and is adapted to the California community property system. If a deceased spouse purports to dispose of community or quasi-community property by will, the surviving spouse has the right to elect against the will to the extent of one-half of the property, absent a waiver. See Prob. Code §§ 201, 201.5; 7 B. Witkin, Summary of California Law Wills and Probate §§ 20-23, at 5541-45 (8th ed. 1974). See generally Brawerman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting §§ 8.1-8.14, 8.37-8.42, at 225-33, 249-51 (Cal. Cont. Ed. Bar 1965). Accordingly, under subdivision (b) the surviving spouse may elect to take a statutory one-half share of the community and quasi-community property in a trust account subject to this chapter upon the death of the depositor, assuming no waiver. With respect to the remaining half of the community or quasi-community property, the funds in a trust account subject to this chapter are governed by subdivisions (a) and (c). If the surviving spouse does not elect to take the statutory share, the entire account is

governed by subdivisions (a) and (c). See generally 7 B. Witkin, Summary of California Law Community Property §§ 58-66, at 5148-56 (8th ed. 1974).

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§ 2293.30. Revocation, termination, or modification where depositor has conservator of the estate

2293.30. (a) If the depositor has a conservator of the estate, the court in which the conservatorship proceeding is pending may order that the trust be revoked, terminated, or modified.

(b) An order under this section revoking, modifying, or terminating a trust may be obtained:

(1) In the manner provided in Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4 of the Probate Code for the purposes set forth in that article.

(2) Upon petition by the conservator of the estate or by the depositor when the funds in trust are necessary for the support, maintenance, or education of the depositor or of those legally entitled to support, maintenance, or education from the depositor. Notice of the hearing on the petition under this paragraph shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 of the Probate Code.

(c) In addition to the persons entitled to notice of the hearing on a petition filed pursuant to paragraph (1) or (2) of subdivision (b), notice shall be given to the beneficiary or beneficiaries of the trust.

Comment. Section 2293.30 is drawn from paragraph (2) of Section 7-5.5 of the New York Estates, Powers and Trusts Law (rights of fiduciaries of the estate of the depositor not affected). Paragraph (2) of subdivision (b) continues California case law. See Guardianship of Cuen, 142 Cal. App.2d 258, 298 P.2d 545 (1956); Katz v. Greeninger, 96 Cal. App.2d 245, 215 P.2d 121 (1950). Accord, Restatement (Second) of Trusts § 58, Comment c (1959).