"READING" THE POOR MAN'S WILL – A Guide To Interpreting Pay On Death Accounts Under Illinois Common Law and Statutes

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Introduction

Suppose two sisters (let's call them Faith and Hope) come into your office and relate the following story. Their sister, Charity, died recently after a prolonged illness. Charity was married, but had been estranged from her husband for some time. Faith and Hope tell you that their sister was very wealthy in her own right, as is her husband.

While going through Charity's papers after her death, Faith and Hope discovered several years' worth of monthly statements from an account that Charity maintained at a local bank. Faith and Hope did not know about the account before they found the statements. The statements list the title of the account as "Charity Smith Trustee for Faith Jones and Hope Johnson Beneficiary." At the time of Charity's death, the account contained over a quarter-million dollars.

With nothing more to go on, the sisters have a very simple question for you: Does the money belong to us?

Before you answer that question, you may decide to contact the bank to determine what information it has. The bank informs you that Charity must have appeared in person at the bank and signed a signature record when the account was opened. However, to your surprise, the bank cannot locate the signature record for the account.

The only additional information the bank can provide concerning the nature of the account is the computerized record used by tellers to check the account holder's signature.

Besides a scanned image of Charity's signature, the record shows Charity's name and notes that it is a "Trustee Account," but says nothing more that is relevant to your inquiry.

Without complete documentation from the bank, or any other source of information concerning Charity's intentions respecting the money, answering Faith's and Hope's question may be more difficult than you anticipated. Meanwhile, the situation has become even more complicated. Just as you finished your research with the bank, Faith and Hope tell you that Charity's husband is claiming that the account is part of Charity's estate. He has decided to renounce Charity's will (by which he would have received very little) and claim his statutory spousal share – including a portion of the "trustee" account.[i]

Even if you have drafted many estate plans, even if you have experience with estate litigation, and even if you believe that you know what you are dealing with, some further research may be in order. What you may not know is that you are standing at a legal "fork in the road." One way leads to the common law "Totten Trust;" in the other direction lies the statutory pay on death account.

Which path you choose will affect both the elements necessary to prove a claim to the funds and the evidence required to substantiate that claim. Choosing the right road at the earliest stage may mean the difference between recovering the entire amount of the account or nothing at all. You are facing the first step in the sometimes difficult and perplexing task interpreting a "poor man's will."

The "Poor Man's Will"

The so-called "poor man's will" is a simple – and, for that reason, fairly common – method of estate planning, used by rich and poor alike.[ii] Not actually a will at all, "poor man's

will" is a shorthand term that refers to arrangements under which a person may deposit money into a bank account so that funds remaining in the account pass by operation of law to one or more designated recipients at the depositor's death.[iii]

While a "poor man's will" may be used either in lieu of, or in addition to, a valid will,[iv] such accounts are characteristically established informally, without prior consultation with a lawyer or use of the explicit and detailed documentation that typically accompanies express trust declarations. Forms used to create the accounts are usually provided by the depository institution and may not accurately or completely express the depositor's intentions.

Despite its apparent simplicity, the "poor man's will" sometimes becomes complicated where parties raise adverse claims to funds in the account. It is then that the lawyer may first become involved.

The attorney facing such a situation should be aware that Illinois law has developed along separate common law and statutory branches, either of which may cover the sort of accounts commonly called a "poor man's will." The two types of accounts share many characteristics, but also differ in important ways. Understanding the differences is vital to determining how best to address conflicting claims.

This article provides a brief history of the common law and statutes. It then addresses the major practical distinctions between accounts that are governed by the common law versus those controlled by statute.

The Common Law Branch – Totten Trusts

The Illinois Supreme Court first approved the use of savings account trusts, more commonly known as Totten Trusts, in 1965.[v] The court explicitly adopted §58 of the Restatement (Second) of Trusts:

> 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 to 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.[vi]

Thus, opening a Totten Trust creates an immediate, albeit "highly destructible," equitable interest in the beneficiary, because the depositor retains complete power to revoke the trust and the beneficiary's enjoyment is postponed until the depositor's death.[vii] Upon the depositor's death, the beneficiary's interest becomes indefeasible.[viii]

Informality is a key feature of the common law Totten Trust, with no specific forms or agreements needed to create such an account.[ix] A Totten Trust is simply a savings account titled or otherwise designated in the name of the depositor as trustee for a named person or persons.[x]

The existence of such an account raises a presumption that the decedent intended to create a tentative trust in favor of the named beneficiary or beneficiaries.[xi] By analogy to the rule under joint bank accounts, where such a presumption of donative intent has arisen, it may be

overcome only by clear and convincing evidence by the opposing party that a gift was not intended.[xii]

The depositor's intent is the guiding principle in the disposition of funds.[xiii] As one court put it:

> Wherever possible, and where not clearly contrary to established policy, statutes or laws, courts of review should carry into effect the intent of the parties, rather than frustrate the intent by erecting theoretical barriers not conceived by the party, to prevent such intent from being carried out.[xiv]

The account holder's intent has remained the constant guiding principle at the core of the reported decisions involving adverse claims.[xv]

After less then ten years of use, one court commented on the "general popularity and acceptance of Totten trusts in Illinois,"[xvi] mainly due to their straightforward nature. Now, after more than forty years' use, the Totten Trust is still a viable option in Illinois.[xvii] However, it exists alongside a statutory framework that addresses many of the same matters in ways that differ, sometimes substantially, from the common law.

The Statutory Branch – Trust and Pay on Death Accounts

From 1955 until 1985, the Illinois Savings and Loan Act ("S&L Act") provided for "payable on death" accounts at savings and loan institutions.[xviii] Under that statute, the depositor could designate that funds remaining in an account upon the depositor's death be paid to one or more designees. For many years there was no comparable provision for accounts established at banks.[xix]

In 1985, the S&L Act was substantially revised, with the former provision for payable on death accounts omitted. Effective in 1986, the Illinois legislature enacted the Illinois Trust and Payable on Death Account Act ("POD Act").[xx]

The POD Act applies to all types of depository institutions and provides that a depositor may create one of two types of account upon signing "an agreement with the institution": trust accounts (addressed in §3 of the POD Act[xxi]) and payable on death accounts, which are addressed in §4 of the POD Act.[xxii] The POD Act does not specify a particular form of agreement,[xxiii] but a case decided under the prior S&L Act holds that, for purposes of establishing a pay on death account, an agreement must be: in writing; signed by the account holder; and made by or at the direction of the account holder.[xxiv]

The POD Act provides default terms to govern accounts established under authority of the statute "unless otherwise agreed in writing between the person or persons opening or holding the account and the institution."[xxv] The default terms for the two types of accounts are essentially identical: (1) the depositor may change the named recipient at any time without the recipient's consent "by a written instrument accepted by the institution;"[xxvi] (2) the depositor may make additional deposits into the account and withdraw all or part of the funds at any time without the named recipient's consent;[xxvii] and (3) any funds remaining in the account become the property of the named recipient(s) at the depositor's death.[xxviii]

The POD Act is strictly construed because it provides for a will substitute.[xxix] Therefore, in contrast to the common law poor man's will, where the decedent's intent is the dispositive issue, the POD Act requires that the claimant establish the existence of a writing that satisfies the statute.[xxx]

Where such a writing is produced, a presumption arises that the account was created under the POD Act.[xxxi] However, that presumption of donative intent may be overcome by clear and convincing evidence to the contrary.[xxxii] On the other hand, where no such writing can be produced, the purported beneficiary must demonstrate – by clear and convincing evidence – that such a writing did exist and that the writing reflected the donor's intent.[xxxiii] Under the POD Act, even crystal clear evidence of intent is insufficient without evidence of a proper writing.

"Reading" the Will

Armed with that legal background, the attorney who encounters a "poor man's will" account must determine whether the account is legally effective to remove the funds in question from the decedent's estate in favor of the named beneficiaries. That is, whether the account may be categorized as a Totten Trust account or an account established pursuant to the POD Act.

There are substantial similarities between Totten Trust accounts and POD Act accounts, and a resulting tendency to ignore some distinctions that may prove dispositive of a claim to the funds. The Second District Appellate Court's decision in In re Estate of Weiland provides one example of blurring the distinctions. Although the opinion sets forth a very useful analysis of the POD Act, it unfortunately seems to conflate statutory pay on death accounts and Totten Trusts.[xxxiv] However, it appears that Weiland is the only reported Illinois opinion to disregard the important distinction between Totten Trusts and statutory POD Act accounts, while other opinions have scrupulously distinguished between the two.[xxxv]

If it is necessary to litigate a claim against the estate, the claimant should be prepared to allege in the alternative that the account(s) in question should be treated under either common law Totten Trust principles or according to the POD Act, depending upon whether the proofs show that the account(s) qualify under either category. Several key points govern which type of account is at issue in a given case, or whether any legally-recognized type of "poor man's will" account has been formed:

Signed agreement. Whether a signed agreement with the institution exists is a matter of great practical significance. A Totten Trust arises merely with the opening of an "account in the name of a depositor as trustee for another, nothing more."[xxxvi] By contrast, to create an account under the authority of the POD Act, the depositor must "sign an agreement with the institution."[xxxvii]

Thus, an account titled in the name of the depositor as trustee for another (without knowing more), may be either a common law Totten Trust account or a statutory trust account pursuant to 205 ILCS 625/3. If, upon further investigation, it can be definitively established that the depositor did not enter into any signed agreement with the institution relating to a trust intent, the account cannot be a POD Act account. Conversely, "when there are specific trust declarations which contain definite terms and provisions regarding the deposit and disposition of funds and the manner in which the trust may be modified or terminated," a Totten Trust is not a possibility.[xxxviii]

Some complications may arise. For example, the depositor may have entered into an agreement with the institution, but the agreement has been lost. The authors' experience suggests that such occurrences are not infrequent in major financial institutions. Where the signed account agreement (the only copy of which is typically held by the depository institution)

cannot be produced when needed, a claimant under the POD Act will be left to show – by clear and convincing evidence – that there was such an agreement and that it expressed the depositor's intent.[xxxix] The claimant must also show – still be clear and convincing evidence – what that intent was. As a practical matter, it may be impossible to reach that threshold and the depositor's intent may fail, unless the account can be construed as a Totten Trust, which does not require comparable documentation.

A different problem may arise if the written instrument can be located, but is insufficient to qualify as an "agreement" pursuant to the POD Act. As noted above, such a writing should at least make clear that it was made by or at the direction of the holder of the account and be signed by the account holder after such writing was added to the account documents.[xl]

A related problem may arise where the writing that is produced does not fully, accurately, or clearly express the decedent's intent. Because form documents are usually provided by the financial institution – often on the spur of the moment when the depositor appears to open an account – the resulting "agreement" may not be the product of a thorough consultation with the depositor and the depositor almost certainly will not have the benefit of legal advice before signing.

In such situations, a faulty instrument may thwart the depositor's intention. Nevertheless, because effectuating the depositor's intent is the key concern under common law, it may be possible to interpret the account under common law rules in a way that will accomplish the depositor's goals.

Form of account. Only a savings account can qualify as a Totten Trust account.[xli] On the other hand, the POD Act defines the term "account," as used throughout the act, much

more broadly to encompass "any account, deposit, certificate of deposit, withdrawable capital account or credit union share in any institution."[xlii]

Accordingly, if the account in question in a particular case is a savings account, it may qualify (pending further information) as either a Totten Trust or a POD Act account. However, anything other than a savings account will not qualify as a Totten Trust and a purported beneficiary must establish a right to the account within the scope of the POD Act, if at all.

Number of depositors. It has been suggested (although apparently not explicitly so held) that a Totten Trust may have only one depositor-trustee.[xliii] The POD Act is not so limited, and expressly authorizes accounts established or held by "one or more persons."[xliv]

Testamentary character. Although usually of limited practical effect, courts have drawn a distinction between statutory and common law accounts based upon the testamentary nature of the arrangement. Totten Trusts are not treated as testamentary dispositions for most purposes.[xlv] By contrast, statutory payable on death accounts are deemed testamentary.[xlvi]

A Word about Spouse's Share

For many years, the validity of "poor man's will" accounts to deprive a spouse of his or her statutory share pursuant to 755 ILCS 5/28 was a particularly fertile ground for litigation. Under that statute, the surviving spouse may renounce the decedent's will and receive a spousal award of one-third of the entire estate if the testator leaves a descendant or one-half of the estate if the testator leaves no descendant.[xlvii]

While the validity of poor man's will accounts for other purposes is well established, issues still commonly arise as to whether the funds in the account must be included when calculating the statutory spousal share. In other words, the key question is whether funds in

those accounts are included in, or excluded from, the decedent's estate. The exact nature and degree of proof necessary in connection with different types of accounts was defined and redefined by case law over several years. During the course of that development, the standards applicable to Totten Trust accounts sometimes differed from those applied to statutory accounts.

The matter was clarified in 1977 by the enactment of the Lifetime Transfer of Property Act[xlviii], which remains in effect and provides as follows:

> An otherwise valid transfer of property, in trust or otherwise, by a decedent during his or her lifetime, shall not, in the absence of an intent to defraud, be invalid, in whole or in part, on the ground that it is illusory because the decedent retained any power or right with respect to the property.

That provision applies to common law Totten Trust accounts as well as accounts established pursuant to the POD Act.[xlix]

The legislature has mandated that the relevant inquiry is whether the transfer was accompanied by an intent to defraud. Intent to defraud in this context does not involve the traditional meaning of fraud, but rather refers to a transaction that is illusory or colorable in the sense that it takes back all that it appears to give.[1] While distinguishing between true and illusory transfers remains an important issue in such cases, the proper standard is now the same for all "poor man's will" accounts and no longer requires drawing a distinction between common law and statutory accounts.

Conclusion

The intended simplicity of the "poor man's will" can quickly give way to complex estate litigation. Had Charity come into your office for estate planning counsel before her death, some basic advice might have clarified things tremendously. If she insisted upon using a "poor man's will" account instead of a more clearly defined express trust or other arrangement, she – and anyone using such an account – would be well advised to keep copies of all documents that were signed when the account was opened.

Although a lawyer is rarely consulted when such accounts are opened, the attorney who knows the history and operation of the "poor man's will" can be an invaluable resource to clients like Faith and Hope when it comes time for the account to be closed and the funds distributed. The continuing use of the "poor man's will" assures the reoccurrence of the sometimes difficult question: Does the money belong to us?

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Endnotes

i. The hypothetical situation is suggested by In re Estate of Venuso, No. 1-05-0060 (Ill. App. 1st Dist), in which the authors were co-counsel on appeal. The appellate court entered a Rule 23 Order on November 23, 2005, deciding the case primarily evidentiary grounds.

ii. In re Estate of Brach, 76 Ill.App.3d 1050, 1055, 395 N.E.2d 583, 587 (5th Dist. 1979). For ease of reference, the authors have opted to retain the terminology "poor **man's** will," as used in case law.

iii. *See* In re Estate of Waitkevich, 25 Ill.App.3d 513, 516, 323 N.E.2d 545, 548 (1st Dist. 1975). This article does not address accounts titled jointly in the name of two or more depositors, which share some characteristics of poor man's will accounts and can be used to accomplish similar purposes, but are governed by somewhat different legal rules.

iv. Brach, 76 Ill.App.3d at 1055, 395 N.E.2d at 587.

v. In re Estate of Petralia, 32 Ill.2d 134, 138, 204 N.E.2d 1, 3 (1965).

vi. Petralia, 32 Ill.2d at 138, 204 N.E.2d at 3, *quoting* Restatement (Second) of Trusts §58.

vii. In re Estate of Peterson, 103 Ill.App.3d 481, 484, 431 N.E.2d 748, 750 (2nd Dist. 1982).

viii. *Id.*

ix. *See* Johnson v. La Grange State Bank, 73 Ill.2d 342, 356, 383 N.E.2d 185, 191 (1978).

x. In re Estate of Anderson, 69 Ill.App.2d 352, 362, 217 N.E.2d 444, 449 (1st Dist. 1966), *citing* In re Totten, 179 N.Y. 112, 71 N.E.752 (1904). *See also* In re Estate of Weiland, 338 Ill.App.3d 585, 589, 788 N.E.2d 811, 815-16 (2nd Dist. 2003), *appeal denied*, 205 Ill.2d 583, 803 N.E.2d 482 (2003) (a "Totten trust is created when a deposit is made by a person (the holder) of his or her own money in his or her own name as trustee for another"); In re Estate of Chandler, 90 Ill.App.3d 674, 679, 413 N.E.2d 486, 491 (2nd Dist. 1980) (Totten Trust "is by definition a savings account opened in the name of a depositor as trustee for another with no formal terms, provisions or statement of intention").

xi. Petralia, 48 Ill.App.2d 122, 136, 198 N.E.2d 200, 207 (1964), *aff'd*, 32 Ill.2d 134, 204 N.E.2d 1 (1965).

xii. Weiland, 338 Ill.App.3d at 597, 788 N.E.2d at 822, *citing* Murgic v. Granite City Trust & Sav. Bank, 31 Ill.2d 587, 591, 202 N.E.2d 470, 472 (1964) (in which one party deposited funds in an account titled jointly in his name and that of his friend names and both parties signed a joint account agreement).

xiii. Weiland, 338 Ill.App.3d at 603, 788 N.E.2d at 826.

xiv. In re Estate of Wright, 17 Ill.App.3d 894, 897, 308 N.E.2d 319, 321 (3rd Dist. 1974).

xv. *See, e.g.*, Weiland, 338 Ill.App.3d at 603, 788 N.E.2d at 827 ("it is well established that it is the intent of the account holder, not the form of the written agreement, that governs whether the holder intended to establish a POD account"); Gates v. State Loan & Sav. Ass'n of Granite City, 131 Ill.App.3d 625, 633, 475 N.E.2d 1369, 1375 (5th Dist. 1985) (the key issue was "whether [the account holder] intended her to be the beneficiary of this and the other accounts"); Waitkevich, 25 Ill.App.3d at 518, 323 N.E.2d at 549 ("the evidence must reflect the account holder's intent").

xvi. Mertes v. Lincoln Park Fed. Sav. & Loan Ass'n of Chicago, 34 Ill.App.3d 557, 561, 340 N.E.2d 25, 28 (1st Dist. 1975).

xvii. *See, e.g.*, In re Johnson, 232 B.R. 735, 739 (C. D. Ill. 1999).

xviii. Wright 17 Ill.App.3d at 896, 308 N.E.2d at 321, *citing* Ill.Rev.Stat. ch. 32, §770(c) (1971).

xix. *Id*.

xx. 205 ILCS 625/1, *et seq*.

xxi. 205 ILCS 625/3.

xxii. 205 ILCS 625/4.

xxiii. Weiland, 338 Ill.App.3d at 603, 788 N.E.2d at 826.

xxiv. Waitkevich, 25 Ill.App.3d at 516, 323 N.E.2d at 548.

xxv. 205 ILCS 625/3 and 625/4.

xxvi. 205 ILCS 625/3(b) and 625/4(a).

xxvii. 205 ILCS 625/3(c) and 625/4(b).

xxviii. 205 ILCS 625/3(d) and 625/4(c).

xxix. Waitkevich, 25 Ill.App.3d at 518, 323 N.E.2d at 549.

xxx. Weiland, 338 Ill.App.3d at 603, 788 N.E.2d at 827.

xxxi. *Id.* at 598, 788 N.E.2d at 822.

xxxii. *Id.*

xxxiii. *Id.* at 603, 788 N.E.2d 836-27.

xxxiv. *See, e.g.*, *Id.* at 589, 788 N.E.2d at 815 (mentioning "POD accounts, also known as Totten trusts").

xxxv. *See, e.g.*, In re Estate of Capocy, 102 Ill.App.3d 609, 612, 430 N.E.2d 1131, 1133 (1st Dist. 1981); In re Estate of LaPierre, 20 Ill.App.3d 429, 432, 314 N.E.2d 309, 311 (1st Dist. 1974); Wright, 17 Ill.App.3d at 898-99, 308 N.E.2d at 322-23; Anderson, 69 Ill.App.2d at 363, 217 N.E.2d at 449.

xxxvi. Anderson, 69 Ill.App.2d at 363, 217 N.E.2d at 449.

xxxvii. 205 ILCS 625/3 and 625/4.

xxxviii. Hillyer v. Hillyer, 148 Ill.App.3d 399, 402, 499 N.E.2d 569, 571 (1st Dist. 1986), *appeal denied*, 113 Ill.2d 574, 505 N.E.2d 353 (1987).

xxxix. Weiland, 338 Ill.App.3d at 599, 788 N.E.2d at 823.

xl. *See* Waitkevich, 25 Ill.App.3d at 516, 323 N.E.2d at 548.

xli. In re Estate of Davis, 225 Ill.App.3d 998, 1005, 589 N.E.2d 154, 161 (2nd Dist. 1992), *appeal denied*, 145 Ill.2d 634, 596 N.E.2d 629 (1992).

xlii. 205 ILCS 625/2(b).

xliii. *See* Hillyer, 148 Ill.App.3d at 402, 499 N.E.2d at 571, *citing*, Helfrich's Estate v. Commissioner of Internal Rev., 143 F.2d 43, 46 (7th Cir. 1944).

xliv. 205 ILCS 625/3 and 625/4.

xlv. *See* Petralia, 32 Ill.2d at 137, 204 N.E.2d at 3.

xlvi. In re Estate of Gubala, 81 Ill.App.2d 378, 382, 225 N.E.2d 646, 649 (1st Dist. 1967).

xlvii. 755 ILCS 5/28.

xlviii. 755 ILCS 25/1, *et seq.*

xlix. 755 ILCS 25/2.

l. In re Estate of Defilippis, 289 Ill.App.3d 695, 700-01, 683 N.E.2d 453, 458 (1st Dist. 1997), *appeal denied*, 174 Ill.2d 562, 686 N.E.2d 1162 (1997).