Missouri’s Totten Trust Doctrine

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I. INTRODUCTION

In recent years the Missouri legislature has taken significant steps toward adapting the requirements of probate to the needs of the modest estate while retaining certain essential protective provisions.1 In doing so, the legislature has reacted to a growing concern of the average citizen: how to pass one’s property at death in a quick, cost-efficient manner.

Missouri courts similarly have acknowledged the necessity of adapting the succession laws to the needs and desires of low- to middle-income persons. In the past decade, Missouri courts have been particularly active in the area of bank accounts as will substitutes. A significant step in this direction has been the judicial liberalization of requirements for survivorship rights in joint savings accounts.2 This has resulted in the recognition of the


2. See In re Estate of LaGarce, 487 S.W.2d 493, 500-01 (Mo. en banc 1972). The LaGarce court arrived at a new interpretation of Mo. Rev. Stat. § 369.150 (1978), which pertains to joint accounts in savings and loan associations. Prior to LaGarce, the section had been interpreted as raising a rebuttable presumption that the depositor intended to create a joint tenancy when he made a deposit in joint form. This could be rebutted with evidence that the depositor intended some other disposition, requiring the donee to produce evidence of delivery and donative in-

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joint savings account as a practical will substitute, enabling a person to pass funds outside of probate.3

This need for adapting the law of succession to the needs of the average citizen was also the catalyst for the development of the Totten trust doctrine. In the early 1900’s, New York courts recognized that the savings account trust was generally used to avoid the inconveniences of making a will and thus was simply a will substitute.4 The depositor intended to retain full control over the account until death, at which time the money would pass to a named beneficiary without the expense and delay of probate. Missouri courts, in attempting to streamline probate requirements and permit the use of savings accounts as will substitutes, have purported to adopt the Totten trust doctrine.5

This Comment will address the historical treatment of the Totten trust in Missouri and the recent Missouri decisions that purport to adopt it. The focus will be on whether the doctrine has actually been adopted and whether the courts have correctly applied it. Initially, however, a review of the Totten trust doctrine is in order.

II. THE DOCTRINE AND ITS BIRTH

A Totten trust is typically created by a deposit in a savings or banking institution account6 in the name of “A, in trust for B.”7 The depositor, A, is

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3. 39 Mo. L. Rev., supra note 2, at 275.
6. Although the Totten trust is most often found in the context of savings account deposits, it also has been held to be created by certificates of deposit purchased in trust for another. See, e.g., Nace v. Fulton Cty. Nat’l Bank, 79 Pa. D. & C. 325, 327-28 (C.P. 1951); Estes, supra note 4, at 22 n.1; cf. In re Estate of Blier, 75 Misc. 2d 436, 437, 347 N.Y.S.2d 895, 896-97 (Sur. Ct. 1973) (mutual fund certificate with designated beneficiary sufficiently analogous to Totten trust to make it available for payment of funeral and administration expenses of insolvent estate).
7. The title of the account may vary and no particular form is required so long as there is a basis for finding that the depositor intended to create a trust. See Estes, supra note 4, at 22 n.2; cf. In re Ellis’ Estate, 178 Misc. 491, 494, 34 N.Y.S.2d 884, 887 (Sur. Ct.) (Totten trust doctrine applied where account title did not contain words “in trust”), aff’d mem., 264 A.D. 846, 36 N.Y.S.2d 187 (1942); Nace v. Fulton Cty. Nat’l Bank, 79 Pa. D. & C. 325, 328-29 (C.P. 1951) (certificate of de-
both the settlor and the trustee. The deposit must be of his own money. In a Totten trust, the mere form of the deposit gives rise to the presumption that the depositor intended to create a revocable trust. As such, the trust may be revoked at any time during A’s life, and he retains full control and

8. If the depositor does not own the money or is not authorized by the owner to use the money in opening the account, a Totten trust is not created. See, e.g., In re Estate of Dillon, 441 Pa. 206, 209, 272 A.2d 161, 162 (1971); Brose Estate, 416 Pa. 386, 397, 206 A.2d 301, 307 (1965). At least one Missouri case has agreed with this position. See First Nat’l Bank of Mexico v. Munns, 602 S.W.2d 910, 913 (Mo. App., E.D. 1980).

9. See In re Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752 (1904); Restatement (Second) of Trusts § 58.1 comment a (1959); 1 A. Scott, supra note 7, § 58.1, at 520. It is generally recognized that when a deposit is made in the form “A in trust for B,” the depositor may have one of three possible intentions: (1) not to create a trust at all; (2) to create an irrevocable trust; or (3) to create a revocable trust. 1 A. Scott, supra note 7, § 58.1, at 519-20. If there is no evidence of the depositor’s actual intent, different jurisdictions will presume different intentions. For example, in Massachusetts, Ohio, and Texas, extrinsic evidence of intent is required; absent that proof, the presumption is that no trust was intended. See, e.g., Day Trust Co. v. Malden Sav. Bank, 328 Mass. 576, 578-79, 105 N.E.2d 363, 364-65 (1952); Hogarth-Swann v. Steele, 294 Mass. 396, 397, 2 N.E.2d 446, 447 (1936); Seliefstein v. Greenstein, 9 Mass. App. 344, —, 401 N.E.2d 379, 385-86 (1980); In re Estate of Hoffman, 175 Ohio St. 363, 367, 195 N.E.2d 106, 109-10 (1963); Fleck v. Baldwin, 141 Tex. 340, 346-47, 172 S.W.2d 975, 978 (1943); Citizens’ Nat’l Bank v. Allen, 575 S.W.2d 654, 657 (Tex. Civ. App. 1979). But see McLaughlin, Joint Accounts, Totten Trusts, and the Poor Man’s Will, 44 Tex. B.J. 871, 874 (1981) (stating that Totten trust doctrine has statutory recognition in Texas). In Maine, the presumption is that an irrevocable trust was intended. See, e.g., Rose v. Osborne, 133 Me. 497, 502, 180 A. 315, 318 (1935); Cazallis v. Ingraham, 119 Me. 240, 246, 110 A. 359, 361 (1920). In most states, however, the presumption is that a revocable trust was intended. See, e.g., Wilder v. Howard, 188 Ga. 426, 429, 4 S.E.2d 199, 201 (1939); Walso v. Latterner, 143 Minn. 364, 366, 173 N.W. 711, 712 (1919); In re Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752 (1904); Scanlon’s Estate, 313 Pa. 424, 428-29, 169 A. 106, 108 (1933). While it is unclear whether the form of deposit alone is sufficient in some states, those states will enforce the trust if there is evidence that the depositor intended a revocable trust. 1 A. Scott, supra note 7, § 58.3, at 528-29 (listing states in which Totten trust has been upheld).
use of the fund. The trust may be revoked by any manifestation of an intent to revoke by the depositor, including withdrawals from the account. A withdrawal by the depositor is a revocation only to the extent of that withdrawal. At the depositor's death, the trust becomes absolute. The named beneficiary is immediately entitled to the remaining balance in the account. If the beneficiary predeceases the depositor, the trust is terminated. This presumption of revocability may be rebutted by showing that the depositor did not intend to create a trust at all or that the trust was intended to be irrevocable.

The Totten trust doctrine was a "radical innovation" of the New York courts. In the mid-nineteenth century, when the popularity of the savings account was first recognized, a deposit in the form of "A, in trust for B" was construed as creating only an irrevocable trust. The New York decisions of that era also required that there be extrinsic evidence of the depositor's intent to create a trust.

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10. See In re Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752 (1904); 1 A. Scott, supra note 7, § 58.2, at 525.
11. See Restatement (Second) of Trusts § 58 comment c (1959); 1 A. Scott, supra note 7, § 58.4, at 535-36. Although the depositor theoretically may be shown to have revoked the trust by oral declaration, the burden of proving such a revocation is a very heavy one. It is rarely satisfied. See, e.g., Litsey v. First Fed. Sav. & Loan Ass'n of Tampa, 243 So. 2d 239, 244 (Fla. Dist. Ct. App. 1971); In re Deneff's Will, 44 Misc. 2d 947, 949-50, 255 N.Y.S.2d 347, 349-50 (Sur. Ct. 1964); Annot., 46 A.L.R.2d 487, 522-24 (1972); Annot., 38 A.L.R.2d 1243, 1259-60 (1954).
12. Restatement (Second) of Trusts § 58 comment c (1959).
13. In re Totten, 179 N.Y. 112, 126, 71 N.E. 748, 752 (1904); Restatement (Second) of Trusts § 58 (1959).
14. In re Bulwinkle, 107 A.D. 331, 333, 95 N.Y.S. 176, 177-78 (1905); Restatement (Second) of Trusts § 58 comment c (1959); see also 1 A. Scott, supra note 7, § 58.4, at 536-37 (beneficiary's estate is not entitled to the deposit).
15. Restatement (Second) of Trusts § 58 comment a (1959); 1 A. Scott, supra note 7, § 58.1, at 536-37. A deposit in the form "A in trust for B" is ambiguous since the testator can have three possible intentions. See note 9 supra. Because of this ambiguity, the parol evidence rule does not exclude extrinsic evidence of the testator's intent. See, e.g., Schuck Estate, 419 Pa. 466, 470, 214 A.2d 629, 631 (1965); Brose Estate, 416 Pa. 386, 395, 206 A.2d 301, 307 (1965).
16. Larremore, supra note 4, at 316.
17. See Estes, supra note 4, at 45 (arguing that Totten trust is judicial abrogation of common law and changes are responsibility of courts, not legislature).
19. See, e.g., Martin v. Funk, 75 N.Y. 134 (1878). Professor Scott interpreted Martin as follows:

[A] trust of a savings bank deposit can be created without delivery of the bank book to the beneficiary and without communication to him of the intention to create a trust, provided that there was evidence of the depositor's intention to create a trust other than the mere form of the deposit.
two possible intentions: (1) creation of an irrevocable trust, relinquishing title to and use of the money; or (2) creation of no trust at all. Since the savings account trust was construed as irrevocable, the named beneficiary could surcharge the estate for any amounts the depositor had withdrawn. This approach greatly diminished the desirability of savings account trusts as will substitutes.

After the turn of the century, however, the New York Court of Appeals decided that a new construction of the savings account trust was required. In In re Totten, the court announced the new rule:

A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

The Totten trust was born. Subsequent New York cases upheld the Totten trust against the claim that it was invalid as a testamentary disposition in violation of the applicable statute of wills. Because of its utility as a will substitute for the small estate and the unlikelihood of fraud, the Totten trust was eventually adopted in a majority of jurisdictions.

1 A. Scott, supra note 7, § 58.2, at 524.
20. See 1 A. Scott, supra note 7, § 58.2, at 524.
21. See Note, supra note 18, at 689.
22. 179 N.Y. 112, 71 N.E. 748 (1904).
23. Id. at 125-26, 71 N.E. at 752. The court reviewed its prior conflicting decisions involving savings account trusts and stated, "It is necessary for us to settle the conflict by laying down such a rule as will best promote the interests of all the people in the state." Id. at 125, 71 N.E. at 752.
25. See, e.g., Brucks v. Home Fed. Sav. & Loan Ass'n, 36 Cal. 2d 845, 849-50, 228 P.2d 545, 548 (1951); Seymour v. Seymour, 85 So. 2d 726, 727 (Fla. 1956); In re Estate of Petralia, 32 Ill. 2d 134, 138, 204 N.E.2d 1, 3 (1965); First Fed. Sav. & Loan v. Baugh, 160 Ind. App. 102, 107, 310 N.E.2d 101, 104 (1974); Bollack v. Bollack, 169 Md. 407, 415-16, 182 A. 317, 320-21 (1936). Additional cases are collected in 1 A. Scott, supra note 7, § 58.3, at 528 n.5. In many instances, however, it is unclear
III. MISSOURI'S REACTION TO TOTTEN: THE EVOLUTION FROM INTENT TO FORM

A. Legislative Reaction

Soon after the Totten decision, Missouri enacted legislation regarding savings account trusts. A 1909 provision enabled banks and trust companies to pay checks or orders signed by the depositor/trustee and drawn on a deposit made by him in trust for another.26 A 1915 law allowed banks and trust companies to pay the account to the named beneficiary on the death of the depositor/trustee.27 But it was unclear whether these statutes were a validation of the savings account trust with regard to the beneficiary's rights in the account or were merely protective provisions for savings institutions in the event payment was made to the wrong party.28

This uncertainty may have been eliminated by subsequent statutes pertaining to trust account deposits in savings and loan associations.29 In enacting these provisions, the legislature expressly stated that it did not intend to make a determination "of the rights of persons interested in such account as between themselves."30 By analogy, it may be safe to say that the legislature did not intend its prior provisions to determine the rights of beneficiaries to the accounts.31 The question whether the Totten trust is to be an effective will substitute has been left to the Missouri courts.32

Whether these courts are relying on the presumption of revocability or merely enforcing the depositor's apparent intent. Id. § 58.1, at 520 n.3; id. § 58.3, at 528-29.

Many jurisdictions have adopted statutes permitting the savings institution to pay the named beneficiary of a savings account trust at the depositor's death. See, e.g., Ark. Stat. Ann. § 67-1840 (1980); Iowa Code Ann. § 524.807 (West 1970); Ky. Rev. Stat. Ann. § 289.401 (Bobbs-Merrill 1981); Okla. Stat. Ann. tit. 6, § 902 (West 1966); Tenn. Code Ann. §§ 45-2-704, -3-511 (1980); see also 1 A. Scott, supra note 7, § 58.3, at 530 n.7 (collecting statutes from other jurisdictions). Professor Scott points out that such statutes usually have been construed as protective measures for the institution and not as determinations of the beneficiaries' rights. Id. § 58.3, at 530-31.


27. Mo. Rev. Stat. § 11779 (1919) (banks); id. § 11840 (trust companies).

28. See Bank Deposits as Will Substitutes in Missouri, 28 Mo. L. Rev. 482, 486 (1963).


30. Id. § 369.179.4(3).

31. The majority of Missouri cases involving trust deposits have not addressed the issue whether the statutes are merely protective provisions for the institution or are determinations of the beneficiaries' rights in the deposit. See 28 Mo. L. Rev., supra note 28, at 486.

32. In Blue Valley Fed. Sav. & Loan Ass'n v. Burris, 617 S.W.2d 111 (Mo. App., W.D. 1981), the court stated that the effect of Mo. Rev. Stat. § 369.179.4(3) (1978) is not to "conclusively vest title in the beneficiary," but simply to allow evidence to be introduced "to show that the trust has been revoked or disaffirmed."
B. Judicial Reaction

In examining the reaction of Missouri courts to the Totten trust, the cases may be better analyzed by dividing them into two categories: those rendered before 1980 and those rendered after 1980.33

1. The Pre-1980 Approach

Treatment of the Totten trust by Missouri courts during the years before 1980 is unclear.34 It can even be said, with good reason, that Missouri did not recognize the Totten trust at all.35 Since the crux of the Totten trust doctrine is that a presumption of a revocable trust is created by the mere form of the deposit,36 a review of early cases demonstrates that the presumption—and consequently the doctrine—was largely ignored.

Not long after the Totten decision, the Missouri Supreme Court decided Harris Banking Co. v. Miller.37 Although Miller involved an assignment of a certificate of deposit to take effect upon the depositor's death38 rather than a savings account trust, the assignee's right to the deposit was sustained on a trust theory.39 But the manner in which this trust was to be characterized is unclear. The court did not describe it as revocable; instead, it seemed to characterize it as an irrevocable trust subject to a reserved life estate in the

617 S.W.2d at 114. But the court in First Nat'l Bank of Mexico v. Munns, 602 S.W.2d 910 (Mo. App., E.D. 1980), used MO. REV. STAT. §§ 362.475, 362.480, 369.154, 369.179 (1978), as evidence that the Totten trust has been recognized in Missouri. 602 S.W.2d at 913.

33. The dividing point is the decision in First Nat'l Bank of Mexico v. Munns, 602 S.W.2d 910 (Mo. App., E.D. 1980), the first Missouri decision expressly purporting to adopt the Totten trust doctrine.

34. 39 MO. L. REV., supra note 2, at 272; cf. 28 MO. L. REV., supra note 28, at 485 (stating that Missouri courts would probably follow Totten).

35. This was the contention advanced, as late as 1981, by the depositor's executor in Blue Valley Fed. Sav. & Loan Ass'n v. Burrus, 617 S.W.2d 111, 113 (Mo. App., W.D. 1981).

36. 1 A. SCOTT, supra note 7, § 58.1, at 520.

37. 190 Mo. 640, 89 S.W. 629 (1905).

38. A deposit of $8,080 was originally made by the depositor in his own name and a certificate of deposit was issued directly to him. After asking employees of the bank how he could make his housekeeper, Helen Miller, the owner of the deposit at his death, he complied with their suggestion that he assign it to her. Id. at 653-54, 89 S.W. at 630-32. The depositor made the following endorsement: "For value received I hereby assign this certificate to Helen A. Miller and authorize her to draw the same. [Signed] Giles Burlingame." Id. at 660, 89 S.W. at 632. There was also evidence that the depositor notified the housekeeper of the assignment but told her that he was to have the use of the interest generated by the deposit. Id. at 656-58, 89 S.W. at 631-33.

39. Id. at 672, 89 S.W. at 638. The trial court's finding that an inter vivos gift had been effected by the assignment was disapproved because there had been no delivery. Id. at 663, 89 S.W. at 635.
depositor as to the interest generated by the account. 40

The irrevocable characterization of the trust by the Miller court is reinforced by Citizen's National Bank v. McKenna. 41 In McKenna, the depositor's nephew asserted that a trust had been created by a savings account deposit, the certificate to which stated that it was payable to the depositor or the nephew. 42 The court rejected the contention that a trust had been created, pointing out that the depositor had never relinquished ownership and control over the deposit. 43 The court distinguished Miller on the ground that

40. See id. at 670-72, 89 S.W. at 637-38. The court stated that while a trust will not be imposed on an imperfect gift, a trust may still be found when the donor intended to make a complete disposition of the property subject to a retained life estate in the income. Id. at 667, 89 S.W. at 637 (citing In re Soulard's Estate, 141 Mo. 642, 659, 43 S.W. 617, 621 (1897)). Further consideration of how the Miller trust should be characterized illustrates the pitfalls encountered in using the savings account as a will substitute. These pitfalls are the result of courts drawing distinctions without differences. If the depositor in Miller intended that no interest in the deposit should pass to the assignee until his death, he created, in effect, a payable on death (POD) account. See 28 Mo. L. REV., supra note 28, at 486-87. Most states, including Missouri, hold POD accounts invalid as testamentary dispositions. See, e.g., Webster v. St. Petersburg Fed. Sav. & Loan Ass'n, 155 Fla. 412, 20 So. 2d 400 (1945); Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247 (1949); Bank of Perryville v. Kutz, 276 S.W.2d 593 (Mo. App., St. L. 1955); In re Schultz's Estate, 152 N.Y.S.2d 959 (Sur. Ct. 1956); Kyle v. Groce, 50 N.C. App. 204, 272 S.E.2d 609 (1980); In re Brown's Estate, 343 Pa. 230, 22 A.2d 821 (1941). Ironically, many of these states will presume and uphold a revocable savings account trust when the deposit is in the form "A in trust for B." See, e.g., Wilder v. Howard, 188 Ga. 426, 4 S.E.2d 199 (1939); Walso v. Latterner, 143 Minn. 364, 173 N.W. 711 (1919); In re Totten, 179 N.Y. 112, 71 N.E. 748 (1904); Scanlon's Estate, 313 Pa. 424, 169 A. 106 (1933). The intended effect of both the POD account and the revocable savings account trust is the same: the depositor retains the use of the deposit for life and any remaining balance is to pass to a designated donee. Whether the transaction is valid depends on the "magic" words used. See Morgan v. McLaughlin, 260 So. 2d 890, 892 (Fla. Dist. Ct. App. 1972) (Mann, J., dissenting) (such distinctions are "balderdash"). Although the Totten trust has been sustained as nontestamentary on the theory that a present but defeasible interest passes to the beneficiary, see 1 A. SCOTT, supra note 7, § 58.3, at 527, this theoretical difference hardly justifies treatment different from a POD account.


42. Id. at 255, 153 S.W. at 522. There was evidence that the depositor had stated to the institution's cashier that he wanted the deposit to be "put in a certificate to bear interest, payable to my nephew, William McKenna, in the event I die, or anything happens to me." Id. at 256, 153 S.W. at 522. Cf. 1 A. SCOTT, supra note 7, § 58.6, at 549 (joint account deposits can present situation analogous to deposit "in trust" for another).

43. 168 Mo. App. at 257, 153 S.W. at 523. The court concluded that the form of the certificate and the statements of the depositor indicated that "a testamentary disposition was intended—a disposition only to become consummated at his death.
the earlier case had involved a final disposition of the fund. The McKenna court apparently interpreted Miller as authorizing only irrevocable savings account trusts.

These two decisions make it clear that Missouri courts were not viewing the savings account trust in the same light as the Totten court. In Missouri, a revocable trust would not be presumed from the mere form of the deposit. Although neither Miller nor McKenna dealt with Totten-type deposits, it is clear that the possibility of a revocable savings account trust was not recognized in either decision. Miller indicated an approach similar to the pre-Totten approach in New York: if the depositor intended to create a trust, it would be enforceable only as an irrevocable trust. The implications of McKenna—that a savings account over which the depositor retains control during his lifetime is an invalid testamentary disposition, not a trust—is wholly repugnant to the principles of the Totten trust.

From this foundation, the Missouri approach to the Totten trust became confusing. Over the next sixty-seven years, courts repeatedly engaged in a case-by-case search for extrinsic evidence of the depositor's intent and a basis for distinguishing prior cases. In each of these numerous cases, the courts placed little importance on the form of the deposit; they looked mainly at the depositor's intent as evidenced by his acts and statements.

without other direction, a condition incompatible with a trust. Id. at 258, 153 S.W. at 523.

44. Id. at 258-59, 153 S.W. at 523. In other words, the McKenna court saw the transaction in Miller as one in which the depositor had given up all beneficial interest in the principal of the deposit, retaining only a right to use the interest generated by the deposit. Consequently, if the depositor in Miller withdrew any of the principal, the assignee/beneficiary could surcharge his estate. See Note, supra note 18, at 689. On the other hand, the transaction in McKenna was viewed as one in which the depositor intended to retain all beneficial interest until his death.

45. See Martin v. Funk, 75 N.Y. 134, 141-42 (1878); 1 A. Scott, supra note 7, § 58.2, at 524. This approach also seems to be the prevailing view in Maine. See Rose v. Osborne, 133 Me. 497, 502, 180 A. 315, 318 (1935). The Miller court relied heavily on Hallowell Sav. Inst. v. Titcomb, 96 Me. 62, 51 A. 249 (1901), which held that a valid trust may be created by a savings account deposit even though the depositor retains a life estate in the interest generated by the deposit. Id. at 69-70, 51 A. at 251-52.

46. The Totten trust doctrine contemplates that the depositor will retain full use and control of the account, and that control does not make the trust an invalid testamentary disposition. See In re Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752 (1904); 1 A. Scott, supra note 7, § 58.2, at 525.

47. See 28 Mo. L. Rev., supra note 28, at 486 (cases are impossible to reconcile; courts rely on depositor's intent, not form of deposit).

48. A sampling of these cases is illustrative. In Frank v. Heimann, 302 Mo. 334, 347-48, 258 S.W. 1000, 1003-04 (en banc 1924), the court held that a checking account deposit in the name of "Morris A. Heimann, trustee for Melba Heimann" did not create a revocable trust. The court distinguished the reasoning in Miller on the ground that the depositor intended to create a trust of funds to be accumulated
Dispositions in the nature of Totten trusts were given effect in a few appellate cases of this period. 49 In each of them, emphasis was placed on the depositor's statements that he intended, in effect, to create a revocable savings account trust. 50 The results in these cases may be attributed to the

in the future and not in any existing fund. In Clabbey v. First Nat'l Bank, 320 S.W.2d 738, 741 (Mo. App., K.C. 1959), a checking account in the name of the depositor "or Thos. R. Clabbey" was held not to be a trust where the evidence showed that the account was opened only for the purpose of allowing another to draw funds for the benefit of the disabled depositor. The court stated that "no trust results from the mere fact the account is established in the name of two or more persons." Id. at 741. In Bank of Perryville v. Kutz, 276 S.W.2d 593, 595 (Mo. App., St. L. 1955), the court found no trust when the deposit was made in the depositor's name, payable on death to another, since the failure to relinquish control over the funds indicated that there was no intent to create a trust. In Butler State Bank v. Duncan, 319 S.W.2d 913, 916-17 (Mo. App., K.C. 1959), a savings account in the depositor's name, payable on death to the depositor's daughter, was held to be a revocable trust where the testimony showed that the depositor intended to retain the use of the account and to allow the daughter full use of it. The court distinguished Kutz on the grounds of the depositor's intent. Id. at 916. In In re Geel's Estate, 143 S.W.2d 327, 330-31 (Mo. App., St. L. 1940), the court found that a new trial was warranted on the issue whether a revocable trust was created by a deposit in a joint savings account where the testimony showed that the depositor intended to reserve the use of the deposit for life and that while he withdrew part of the principal, he quickly replaced it. And in Masterson v. Plummer, 343 S.W.2d 352 (Mo. App., Spr. 1961), the court found a trust was created under two certificates of deposit, one payable to the order of the depositor "or Henry Masterson, Beneficiary" and the other payable to the order of the depositor "if living; if not living to Henry Masterson, Beneficiary." The language of the certificates and the fact that the principal remained intact indicated intent to create a trust. Id. at 355-56. See also Eschen v. Steers, 10 F.2d 739, 742 (8th Cir. 1926) (no trust under Missouri law when depositor intended to retain pass book and thus control of savings account in daughter's name). It is not the intent of this Comment to evaluate the correctness of these decisions or to imply that an inquiry into the depositor's intent is improper. On the contrary, it is a fundamental part of the Totten trust doctrine that the presumption of revocability created by the form of the deposit is rebuttable by evidence of the depositor's contrary intent. RESTATEMENT (SECOND) OF TRUSTS § 58 comment a (1959); 1 A. SCOTT, supra note 7, § 58.1, at 520-23. But these cases do show that Missouri courts have not engaged in any initial presumption of revocability.


50. A closer reading of Masterson and Duncan, however, reveals that neither indicates that a Totten trust was deemed a nontestamentary disposition during this period. In both cases, the courts emphasized that the depositor had not exercised complete control over the deposit up to the moment of his death, thus indicating that the beneficiary had been given a present equitable interest in the account. See Masterson, 343 S.W.2d at 356 (that trust funds remained intact used as evidence of intent); Duncan, 319 S.W.2d at 916 (depositor relinquished control of pass book

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confusing dictum of the Missouri Supreme Court in *Frank v. Heimann*. The precise issue in *Heimann* was whether an irrevocable trust was created by numerous deposits in an account entitled “Morris A. Heimann, trustee for Melba Heimann.” The court correctly found that the depositor never intended to divest himself of all rights in the deposits and that without such intent an irrevocable trust could not have been created. The court concluded its opinion, however, with dictum to the effect that the depositor’s declaration that the account was to be his daughter’s nest egg referred to a fund “in the mere process of accumulation.” Since the intended subject matter of the trust had not yet been acquired, the trust was wholly executory and revocable.

If this dictum is a recognition of the Totten trust, two points arise. First, it is a fundamental requirement of every trust that there be some

51. 302 Mo. 334, 258 S.W. 1000 (En banc 1924).

52. The beneficial was the daughter of the depositor. Evidence was presented that the account was initially intended as a nest egg for the daughter, but after her marriage hostlity arose between father and daughter. Subsequently, the father made a series of withdrawals from the account, leaving a balance of $1.44. The daughter sued the father, contending that an irrevocable trust had been established and that the father had converted the funds to his own use. She sought a lien on the real estate purchased with those funds. *Id.* at 338-39, 258 S.W. at 1000.

53. *Id.* at 344-45, 258 S.W. at 1003. This finding was largely based on the depositor’s own testimony that if he had intended to give up all title to the account, his remaining assets would have afforded him just the bare necessities of life. *Id.* at 345, 258 S.W. at 1003.

54. *Id.* at 347-48, 258 S.W. at 1004.

55. *Id.* The court further indicated that the depositor’s personal use of the funds operated as a revocation, but it did not state whether the beneficiary would be entitled to the remaining $1.44 on deposit. *See* note 52 supra.
definite or ascertainable trust property. In a Totten trust, that rule is satisfied by viewing the account's balance as ascertainable trust property. The Heimann court, however, apparently did not accept this view, since it found that there was no existing trust res. Consequently, it is confusing to say that Heimann recognized the Totten trust since the court indicated that such a trust would lack any ascertainable subject matter.

Second, confusion arises from the court's implication that where the depositor/trustee intends to augment the trust by future deposits, the trust is executory. An executory trust is one that requires some further act before it is created. But the court did not indicate what further act must be accomplished in order for the trust to be created. It is unclear whether the court contemplated that this further act must be something by which the depositor/trustee would relinquish all control over the account.

Both of these points lead to the further issue of when the trust actually arises: at the time of deposit or at the depositor's death? The Heimann court's view that the trust is executory when further deposits are intended may be interpreted as meaning that the trust arises only at the depositor's death. This conflicts, however, with the New York view that the trust arises at the moment of deposit, subject to revocation. In light of this, Heimann

57. See Edgar v. Fitzpatrick, 377 S.W.2d 314, 317 (Mo. en banc 1964); 1 A. Scott, supra note 7, § 76, at 684.
58. This also comports with the view that the trust arises at the moment of deposit rather than at the moment of the depositor's death. 1 A. Scott, supra note 7, §§ 58.3, 4. See note 62 infra.
59. 302 Mo. at 346, 258 S.W. at 1003.
60. The Heimann court did not discuss the Totten trust doctrine. If the court's decision was based on that doctrine, it apparently did not perceive the doctrine as the anomaly that it is. For example, the court not only indicated that there was no ascertainable subject matter but also began its analysis with the proposition that a completely executed voluntary trust is irrevocable unless the power of revocation is expressly reserved. Id. at 345, 258 S.W. at 1003. This traditional trust concept conflicts with the Totten trust doctrine and nullifies the savings account trust as a valid will substitute. See Note, supra note 18, at 691; Note, Bank Account Trusts, 49 Va. L. Rev. 1189, 1191 (1963).
62. 1 A. Scott, supra note 7, § 58.3, at 527; id. § 58.4A, at 541. But see Note, supra note 18, at 690-93 (New York courts see the trust as arising at depositor's death). The question whether the trust arises at the depositor's death or at the time of the deposit is usually discussed in the context of justifying use of the Totten trust as a testamentary disposition in violation of the applicable statute of wills. Professor Scott recognized that the New York view of the trust—as arising at the time of the deposit—was a fiction but felt that the utility of the Totten trust justified it. 1 A. Scott, supra note 7, § 58.3, at 527. He further argued that if the trust is going to be upheld, it normally makes no difference which theory is applied except where (1) the depositor becomes insane and the courts permit his guardian to revoke the trust by withdrawals to the extent necessary for the depositor's support (trust arises at deposit); (2) the savings institution is not permitted a right of set-off against the
is questionable authority for the proposition that the Totten trust is valid in Missouri.

Unfortunately, Heimann’s confusing dictum was not resolved by later decisions that relied on it. To the contrary, recent decisions have relied on this dictum, without clarification, as authority for the proposition that the Totten trust is recognized in Missouri.

2. The Post-1980 Approach

The 1970’s were largely years of inactivity for Missouri courts in the area of the revocable savings account trust. More attention was given to the joint account as a valid will substitute. But beginning in 1980, with First National Bank of Mexico v. Munns, Missouri appellate courts made an abrupt change in their approach to the Totten trust. Instead of continuing their pursuit of ever-evasive evidence of the depositor’s intent, the courts focused largely on the form of the deposit. Not only was the title of the account considered, but emphasis was placed on any agreements executed in connection with the deposit. These agreements were usually set forth on the signature card used in both the joint and trust savings accounts.

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trust account to satisfy debts owed to it by the depositor (trust arises at deposit); and (3) where the expenses of the depositor’s funeral and administration expenses are given priority over the beneficiary (trust arises at death). Id. § 58.4A, at 541.

63. See, e.g., In re Geel’s Estate, 143 S.W.2d 327, 331 (Mo. App., St. L. 1940) (interpreting Heimann as recognizing revocable savings account trusts, although under facts of Heimann trust not established for want of proof of definite fund).

64. See, e.g., First Nat’l Bank of Mexico v. Munns, 602 S.W.2d 910, 913 (Mo. App., E.D. 1980). One commentator has argued that In re Geel’s Estate, 143 S.W.2d 327 (Mo. App., St. L. 1940), was the first Missouri case to recognize tentative trusts; Heimann held that the depositor’s frequent deposits and withdrawals prevented any implication of trust intent. Note, Trusts—Tentative Trusts—Joint Bank Account Payable to Either or Survivor, 26 WASH. U.L.Q. 286, 287 (1941).

65. See note 2 supra.

66. 602 S.W.2d 910 (Mo. App., E.D. 1980).

67. Of particular importance to this Comment is the following agreement used by many Missouri savings and loan associations in connection with the opening of a savings account trust:

DISCRETIONARY REVOCABLE TRUST AGREEMENT

Trust Agreement No._____

The funds in the account indicated on the reverse side of this instrument, together with earnings thereon, and any future additions thereto are conveyed to the trustee as indicated for the benefit of the beneficiary as indicated. The conditions of said trust are: (1) The trustee is authorized to hold, manage, pledge, invest and reinvest said funds in his sole discretion; (2) The undersigned grantor reserves the right to revoke said trust in part or in full at any time and any partial or complete withdrawal by the original trustee if he is the grantor shall be a revocation by the grantor to the extent of such withdrawal, but no other revocation shall be valid unless written notice is given to the institution named on the reverse side of
In *Munns*, a woman opened a joint savings account at a savings and loan association by a deposit in the names of herself, her daughter, and her son, as "joint tenants with right of survivorship and not as tenants in common." She deposited the proceeds from the sale of her home. Evidence was presented that she had intended to reserve the right to use this fund during her life; at her death it was to be divided equally between the surviving joint tenants. An agreement, provided by the institution, was executed by all of the joint tenants at the time the deposit was made, authorizing each to make withdrawals or pledge the account. The son, without his mother's knowledge, then withdrew the entire balance of the account and placed it in a trust account in the same institution, naming himself as trustee for his mother and sister. He pledged the trust account as security for a loan from another institution. On the son's default, the lender brought an action on his promissory notes, seeking to enforce its security interest. The beneficiaries intervened. The trial court granted summary judgment for the lender and ordered the account to be delivered to it.

In affirming the trial court's decision, the court of appeals rejected several contentions raised by the beneficiaries. The most important of these,

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**Boone Nat'l Sav. & Loan Ass'n, Columbia, Mo., Discretionary Revocable Trust Agreement.**

68. 602 S.W.2d at 912.

69. *Id.* In opening this savings account trust, the son as grantor executed a discretionary revocable trust agreement substantially similar to that set forth in note 67 *supra.* *Id.* at 912 n.1.

70. *Id.* at 912.

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for present purposes, were that (1) a Totten trust was not created by the son since he did not use his own money to open the trust account, and (2) if a Totten trust existed, the pledging of the trust account did not constitute a revocation of it.71

In addressing the first contention, the court recognized the well-settled Totten trust principle that the son, as depositor, must have used his own funds when creating the trust.72 But the court, relying on In re Estate of LaGarce,73 concluded that the son had been a present joint owner of the original account74 and could withdraw all of the funds in the account under Missouri Revised Statutes sections 369.154 and 369.174.75 LaGarce held that a joint account in the form prescribed by section 369.15076 resulted in the account becoming the property of all of the named joint tenants, rather than giving rise to a rebuttable presumption of such ownership.77 The original joint depositor in Munns thus invested her son with title to the account by the mere fact that it was in joint form. Her intent to retain the sole use of the fund until death was of no consequence. The conclusion, then, is that Munns, in conjunction with LaGarce, is inconsistent with, and probably

71. Id. at 913-14. The beneficiaries also argued that the joint account depositor’s delivery of the certificate of deposit to her son was a bailment, giving the son as bailee no authority to assign it. The court rejected this argument as not raised at trial. Id. at 913. The beneficiaries next asserted that, under Mo. Rev. Stat. § 400.3-304 (1978), the pledgee had a duty to inquire of the beneficiaries as to the trustee’s authority to pledge the account and that absent such an inquiry the pledgee took the pledge subject to the trust. The court held this section inapplicable because the trust certificate of deposit was not a negotiable instrument and because prior case law regarding a creditor’s actual or constructive notice of a breach of trust had been abrogated by Mo. Rev. Stat. § 369.154(2) (1978), which only required notice of the pledging of a savings and loan trust account to the association, not the beneficiaries. 602 S.W.2d at 914-15. Finally, the beneficiaries argued that the pledging of the trust account by the trustee was a breach of trust, so the pledgee’s rights in the account should be subordinate to those of the beneficiaries. The court rejected this contention on the ground that Mo. Rev. Stat. § 369.154(2) (1978) authorizes the pledging of a savings and loan trust account and, if notice is given to the association, the pledgee is protected. 602 S.W.2d at 915-16. For a thorough criticism of the court’s analysis, see Joint Savings Accounts: Rights of Nondepositors While Original Joint Tenants Still Alive, 46 Mo. L. Rev. 666 (1981).

72. 602 S.W.2d at 913. See note 8 and accompanying text supra.

73. 487 S.W.2d 493, 500 (Mo. en banc 1972). The case is discussed in note 2 supra.

74. 602 S.W.2d at 914.

75. (1978).

76. Mo. Rev. Stat. § 369.150 (1969). This section was repealed in 1971 and has been replaced by id. §§ 369.150, 174 (1978). The Munns court recognized this fact but also noted that the LaGarce ruling had been reaffirmed in later cases involving joint accounts within the provisions of these new sections. 602 S.W.2d at 914 n.4.

77. 487 S.W.2d at 500.
overrules, prior cases in which a similar intention on the part of the joint account depositor was the basis for finding that a trust had been created.\textsuperscript{78} Unfortunately for Mrs. Munns, the form of the deposit, not her intent, controlled.

The form of the deposit was also emphasized when the court addressed the issue whether the trust account had been revoked by pledge. Although the court recognized that such a pledge would constitute a "decisive act" under traditional Totten principles,\textsuperscript{79} it also relied on the discretionary revocable trust agreement used in opening the account. The court noted that without notice to the institution, the depositor/trustee could revoke the trust only by withdrawal, since those were the terms of the agreement.\textsuperscript{80} Written notice of revocation by a pledge was sufficient, however, even though given by the pledgee rather than the depositor, because the agreement did not specify who must give notice.\textsuperscript{81} The natural implication is that if no written notice of revocation, other than by withdrawal, had been given to the institution, the revocation would be invalid regardless of the depositor/trustee's actual intent. Again the form of the deposit would prevail over the depositor's intent.

Although neither party in the case contended otherwise, the implicit assumption running throughout Munns is that the Totten trust had been accepted in Missouri. As authority for this assumption, the court relied on Frank v. Heimann\textsuperscript{82} and those statutes pertaining to savings account trusts in banks and savings and loan associations.\textsuperscript{83} As noted earlier, it is doubtful whether either Heimann or the statutes offer any support for the validity of the Totten trust in Missouri.

Soon after the decision in Munns, the Missouri Court of Appeals for the Western District, in Blue Valley Federal Savings and Loan Association v. Burrus,\textsuperscript{84} squarely addressed the issue assumed in Munns: is the Totten trust recognized in Missouri? In Burrus, like Munns, the depositor opened a savings account trust in a savings and loan association with a deposit in her name as trustee for another. At the same time the depositor executed a discretionary revocable trust agreement provided by the institution.\textsuperscript{85} In rejecting a

\textsuperscript{78} See, e.g., In re Geel's Estate, 143 S.W.2d 327, 330-31 (Mo. App., St. L. 1940).
\textsuperscript{79} In re Totten, 179 N.Y. 112, 126, 71 N.E. 748, 752 (1904).
\textsuperscript{80} Those terms are typical of discretionary revocable trust agreements used in Missouri. For a standard form, see note 67 supra. The Munns court also referred to the requirement of written notice to the savings and loan associations in Mo. Rev. Stat. § 369.154(2) (1978) but noted only that it gave protection to the pledgee against claims by third parties. 602 S.W.2d at 916.
\textsuperscript{81} 602 S.W.2d at 916.
\textsuperscript{82} 302 Mo. 334, 258 S.W. 1000 (en banc 1924).
\textsuperscript{83} Mo. Rev. Stat. §§ 362.475, .480 (1978) (banks and trust companies); id. §§ 369.154, .179 (savings and loan associations).
\textsuperscript{84} 617 S.W.2d 111 (Mo. App., W.D. 1981).
\textsuperscript{85} Id. at 112. The agreement was substantially similar to that set forth in note 67 supra.
claim to the balance of the account by the depositor's executor, the court held that a valid Totten trust had been created. The named beneficiary was entitled to the remaining balance of the account at the depositor's death.\textsuperscript{86}

More important, the court stated that by virtue of the \textit{Munns} decision, the Totten trust was recognized in Missouri.\textsuperscript{87} The \textit{Burrus} court engaged in no greater analysis than had the \textit{Munns} court in reaching this conclusion. Again, no attention was given to those prior cases that made the effect of the Totten trust in Missouri unclear.\textsuperscript{88} The court relied solely on its interpretation of \textit{Munns} as holding that, so far as savings and loan institutions were concerned, the Totten trust had been adopted by Missouri Revised Statutes section 369.179.\textsuperscript{89} The \textit{Burrus} court was undaunted by that section's express provision that it was not enacted as a determination of the beneficiary's rights in the account.\textsuperscript{90} The court simply interpreted that language as "not conclusively vest[ing] title in the beneficiary," thus allowing evidence that the trust had been revoked.\textsuperscript{91}

The \textit{Burrus} court's whole-hearted acceptance of \textit{Munns} seems to include the new emphasis on the form of deposit over the depositor's actual intent. Although the question of intent was not an express point of contention in \textit{Burrus}, it was inherent in the claim that the Totten trust was invalid as a testamentary disposition.\textsuperscript{92} The court resolved this issue by referring to the majority rule that the Totten trust is not subject to attack as an invalid testamentary disposition, either because a present interest in the account passes to the beneficiary at the time of deposit or because of the social utility of this device and the unlikelihood of fraud.\textsuperscript{93} Conspicuously absent

\textsuperscript{86} 617 S.W.2d at 113-14.
\textsuperscript{87} \textit{Id}.
\textsuperscript{88} \textit{See} Part II.B.1 supra.
\textsuperscript{89} (1978). \textit{See} 617 S.W.2d at 113.
\textsuperscript{90} The provision states that it does not attempt to make a determination "of the rights of persons interested in such account as between themselves." MO. REV. STAT. § 369.179.4(3) (1978).
\textsuperscript{91} 617 S.W.2d at 114. By its interpretation of § 369.179, the \textit{Burrus} court derived a positive inference of validity of the Totten trust from the statute's indifference to the beneficiary's rights in the account. But the court did not justify this inference, which is questionable in light of prior Missouri cases. The analysis seems to be that \textit{Munns} held that the Totten trust doctrine was adopted in Missouri by § 369.179, and while § 369.179 does not determine any person's rights in the trust account, this does not affect the \textit{Munns} holding. This analysis seems weak, especially since no attempt was made to reconcile or even address prior case law. The court noted that Florida courts had reached a similar conclusion in Seymour v. Seymour, 85 So. 2d 726, 727 (Fla. 1956). But Seymour was the first Florida case to address the Totten trust question, so there was no need to comment on the confused state of prior cases.
\textsuperscript{92} 617 S.W.2d at 114.
\textsuperscript{93} \textit{Id.} \textit{See also} RESTATEMENT (SECOND) OF TRUSTS § 58 comment b (1959)
from the court’s analysis is any discussion of the testator’s intent as evidenced by his acts and statements.\textsuperscript{94} If there was any question about that intent, the court apparently deemed a recitation of the form of the deposit, including the accompanying trust agreement, dispositive of that issue.

As a result of \textit{Munns} and its progeny, it is clear that some sort of revocable savings account trust is effective in Missouri as a will substitute.\textsuperscript{95} It is unclear, however, whether Missouri has truly adopted the Totten trust doctrine as originally pronounced by the New York courts or whether it has developed a “radical innovation” of its own.

\section*{IV. The State of the Law after \textit{Munns}: An Aberration of Totten?}

Uncertainty whether the Totten trust has been adopted in Missouri is due largely to the widespread use in the state of the Discretionary Revocable Trust Agreement (DRTA).\textsuperscript{96} The recent Missouri cases that purport to recognize the Totten trust have usually involved the execution of this type of agreement when the account is opened.\textsuperscript{97} The problem is that the

\begin{itemize}
  \item (courts uphold trust as valid because it is a convenient method of disposing of money); G. \textsc{Bogert} \& G. \textsc{Bogert}, \textit{The Law of Trusts & Trustees} § 47, at 343 (2d ed. 1965) (courts nearly unanimous in holding that beneficiary has present defeasible interest in account); 1 \textsc{A. Scott}, \textit{ supra} note 7, § 58.3, at 527 (theory of present defeasible interest is tenuous, but social utility and unlikelihood of fraud warrant upholding trust). The \textit{Burris} court concluded its discussion of the testamentary disposition issue by stating that the beneficiary had acquired a defeasible interest in the account at the moment of creation. 617 S.W.2d at 114. Although this position coincides with the traditional New York view as articulated by Professor Scott, it is irreconcilable with the implica- tion of \textit{Frank v. Heimann}, 302 Mo. 334, 348, 258 S.W. 1000, 1004 (en banc 1924), that no trust arises until the depositor’s death. \textit{See} note 62 and accompanying text \textit{supra}; \textit{cf.} \textit{Silk v. Silk}, 162 Misc. 773, 774, 295 N.Y.S. 517, 519-20 (Sup. Ct. 1937) (beneficiary has sufficient interest in account to bring action for injury to property based on fraud or duress while settlor still alive). \textit{But see} Spain v. Madam Laura, 621 S.W.2d 518, 519 (Mo. App., E.D. 1981) (beneficiary had no standing to sue divine healer for money had and received when depositor/trustee withdrew trust account funds to pay for “treatments”).

94. If such evidence was available, the court made a distinct change in approach from prior cases by not addressing it. \textit{See} notes 48-50 and accompanying text \textit{supra}.


96. A typical, standardized DRTA, widely used in Missouri, is reproduced in note 67 \textit{supra}.

97. Spain v. Madam Laura, 621 S.W.2d 518 (Mo. App., E.D. 1981); \textit{Blue Valley Fed. Sav. & Loan Ass’n v. Burris}, 617 S.W.2d 111 (Mo. App., W.D. 1981); \textit{First Nat’l Bank of Mexico v. Munns}, 602 S.W.2d 910 (Mo. App., E.D. 1980). There has been one exception. The decision in \textit{Willman v. Phelps}, 631 S.W.2d 63 (Mo. App., E.D. 1982), does not indicate that any trust agreement was executed; the court re-
DRTA varies somewhat from traditional Totten principles. For example, the DRTA typically allows the depositor/trustee to provide that the trust be continued even after his death. This is accomplished by two provisions in the DRTA. One states that the trust shall continue after the depositor’s death until the beneficiary has reached a specified age; the other provides for the appointment of a successor trustee who will have the same powers as the depositor/trustee. While these provisions allow the depositor greater flexibility in using the savings account trust as a will substitute, they seem to conflict with the traditional Totten concept that the beneficiary is entitled to the balance of the account at the depositor’s death.

A more direct conflict is found in the DRTA provision that in the event a beneficiary dies before reaching a specified age, the institution may deliver the proceeds of the account to the beneficiary’s heirs or to the trustee on their behalf. The Totten trust, on the other hand, provides that if the beneficiary predeceases the depositor, the trust is terminated and the proceeds are included in the depositor’s estate. Finally, the DRTA declares that unless the savings institution is given notice of any revocation other than by withdrawal, the revocation will be invalid, while a Totten trust can be revoked by any “decisive act or declaration of disaffirmance.”

With these variations in mind, an interpretation of Missouri’s current

lied on simple Totten principles. The case is discussed in notes 108-10 and accompanying text infra.

98. The DRTA set forth in note 67 supra provides: “This trust shall continue for the life of the grantor and thereafter until the beneficiary is — years of age . . . .” Cf. Blue Valley Fed. Sav. & Loan Ass’n v. Burrus, 617 S.W.2d 111, 112 (Mo. App., W.D. 1981) (DRTA provided that trust would continue until beneficiary was 66, but beneficiary was 66 when account was opened).

99. This provision, also included in the DRTA set forth in note 67 supra, reserves a power of appointment of successor trustees in the depositor and further provides that the savings institution may appoint a successor trustee in the event that no successor trustee was named by the depositor or that the appointment fails because of the successor’s death, resignation, removal, incompetence, or failure to act.

100. See In re Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752 (1904); Restatement (Second) of Trusts § 58 (1959); 1 A. Scott, supra note 7, § 58.3, at 527.

101. The DRTA set forth in note 67 supra provides that “the proceeds may be delivered by the association to the beneficiary or his heirs, or to the trustee on his or their behalf.”

102. Restatement (Second) of Trusts § 58 comment c (1959); 1 A. Scott, supra note 7, § 58.4, at 536-37.

103. The DRTA set forth in note 67 supra provides that “any partial or complete withdrawal by the original trustee if he is the grantor shall be a revocation by the grantor to the extent of such withdrawal, but no other revocation shall be valid unless written notice is given to the institution.”

104. See In re Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752 (1904); Restatement (Second) of Trusts § 58 comment c (1959); 1 A. Scott, supra note 7, § 58.4, at 535-36.
approach to the Totten trust requires an attempt to ascertain the role the DRTA has played in recent decisions. In light of current case law, this attempt admittedly is speculative.\textsuperscript{105} Any definitive answer must await a decision where the variations of the DRTA are reconciled with traditional Totten concepts.\textsuperscript{106} Still, a few observations may safely be made.

First, the DRTA has had at least some influence in the recent Missouri decisions purporting to adopt the Totten trust doctrine. This is indicated by various references in \textit{Munns} to the DRTA involved in that case.\textsuperscript{107} Second, it may be unjustified to say that the validity of the Totten trust in Missouri depends on the use of the DRTA. Third, the use of the DRTA seems to be viewed by the courts as part of the form of the deposit, adding strength to the presumption that a revocable trust was intended.

These last two observations are based on the logical consequences of the recent case of \textit{Willman v. Phelps.}\textsuperscript{108} The depositor in \textit{Phelps} was a Florida resident who had opened several savings account trusts in Florida institutions. These deposits were made in the traditional form—\textit{A} in trust for \textit{B}—without a DRTA or any other trust instrument. A Missouri resident was the named beneficiary.\textsuperscript{109} In resolving the beneficiary’s claim to the accounts, the Missouri Court of Appeals for the Eastern District noted that a possible conflicts of law issue existed. The court found that issue moot, however, by stating that Missouri and Florida laws on Totten trusts are the same.\textsuperscript{110}

\textsuperscript{105} The recent Missouri cases explicitly or implicitly purporting to adopt the Totten trust doctrine have not stated expressly the manner in which they view the DRTA. See \textit{Spain v. Madam Laura}, 621 S.W.2d 518 (Mo. App., E.D. 1981); \textit{Blue Valley Fed. Sav. & Loan Ass’n v. Burrus}, 617 S.W.2d 111 (Mo. App., W.D. 1981); \textit{First Nat’l Bank of Mexico v. Munns}, 602 S.W.2d 910 (Mo. App., E.D. 1980).

\textsuperscript{106} The problem would arise where the depositor attempts to revoke the trust by will without notifying the saving institution. An Illinois court has already decided such a case. In \textit{In re Estate of Anderson}, 69 Ill. App. 2d 352, 217 N.E.2d 444 (1966), the court held that no Totten trust is created when additional terms are expressed by a DRTA and that the revocation was ineffective without notice to the institution. \textit{Id.} at 364-65, 217 N.E.2d at 451.

\textsuperscript{107} See notes 79-81 and accompanying text supra.

\textsuperscript{108} See notes 79-81 and accompanying text supra.

\textsuperscript{109} Id. at 64-65.

\textsuperscript{110} Id. at 65 n.2. An argument can be made, however, that Florida’s approach to the Totten trust is not the same as Missouri’s. First, \textit{FLA. STAT. ANN. § 689.075} (West Supp. 1983) provides that a trust shall not be deemed invalid as a testamentary disposition because the settlor reserved such powers as the right to withdraw or add to the principal, the right of revocation, or the right to appoint a successor trustee—i.e., many of the powers found in the DRTA. The section further provides that a savings account trust is excluded from the requirement that all trusts be executed in the same manner as a will. Missouri has no comparable statute. Second, Florida courts already had held that a deposit in the form of \textit{"A in trust for B"} alone would give rise to a presumption that a revocable trust was intended. See \textit{Seymour v. Seymour}, 85 So. 2d 726, 727 (Fla. 1956). But Missouri courts, in the
Assuming the correctness of this statement, Florida case law should prove instructive. Florida originally adopted the Totten trust doctrine in its traditional form. Later, however, it was held that a Totten trust can also be created by the execution of a DRTA when an account is opened. The DRTA, or any other written declaration by the depositor, removes any ambiguity about the depositor’s intent. The presumption in favor of a revocable trust is strengthened. The person challenging the trust cannot prove by parol evidence that no trust was intended; he must show that the depositor did not read or understand the declarations.

absence of a DRTA, did not engage in any presumption of revocability when presented with a deposit in this form. See, e.g., Frank v. Heimann, 302 Mo. 334, 258 S.W. 1000 (en banc 1924). Third, if the Phelps ruling is based on First Nat’l Bank of Mexico v. Munns, 602 S.W.2d 910 (Mo. App., E.D. 1980), it may be further argued that Missouri had not adopted the Totten trust doctrine because Munns did not involve a Totten trust.

111. If the Phelps court was wrong on this point, the case still may be read as correctly decided under Florida law. Generally, when a depositor creates a savings account trust in the state in which he is then domiciled, and he subsequently dies in another state, the validity of the trust is governed by the law of the state in which the deposit was made. See United States v. Williams, 160 F. Supp. 761, 763 (D.N.J. 1958); cf. Rozyczke v. Sroka, 3 Ill. App. 3d 741, 744, 279 N.E.2d 155, 157 (1972) (law of situs of joint deposit applied, but identical to forum law); In re Estate of Bonness, 13 Wash. App. 299, 312, 535 P.2d 823, 831 (1975) (suggesting that law of situs of deposit should be applied, but finding it identical to forum law). But see Annot., 25 A.L.R.2d 1240, 1243 (1952) (impossible to derive uniform choice of law rule from cases).

112. See Seymour v. Seymour, 85 So. 2d 726, 727 (Fla. 1956).


114. In Litsey v. First Fed. Sav. & Loan Ass’n of Tampa, 243 So. 2d 239 (Fla. Dist. Ct. App. 1971), the court did not state that a DRTA was involved but did indicate that the depositor had signed a declaration when opening the account “to the effect that upon the death of the trustee the account and other rights would be paid to said beneficiary.” Id. at 240.

115. See note 15 and accompanying text supra. The court in Litsey v. First Fed. Sav. & Loan Ass’n of Tampa, 243 So. 2d 239 (Fla. Dist. Ct. App. 1971), indicated this when it addressed the burden of proof issue as to the depositor’s intent. The depositor’s executor had presented testimony that the depositor had only created the trust accounts in order to take advantage of insurance limits on account balances. On appeal, the executor contended that the trial court erred by imposing a higher burden of proof as to the depositor’s actual intent when a written declaration is involved than when an account is standing alone. This contention was rejected. Id. at 243. The court relied on Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E.2d 748 (1946), in which the court had held the usual Massachusetts rule—that notice to the beneficiary was required for the creation of a valid trust—inapplicable because the depositor had signed a card when opening a savings account trust that clearly set out his intent and the terms of the trust. Id. at 92-93, 67 N.E.2d at 750.

116. See Litsey v. First Fed. Sav. & Loan Ass’n of Tampa, 243 So. 2d 239, 242-44
On the basis of these observations, a case may be made that two types of revocable savings account trusts are recognized in Missouri. First, there is the trust involving a DRTA, which for the sake of clarity will be referred to as a Munns trust. Although its validity is sustained by reference to Totten, 117 the Munns trust has several distinctive characteristics. Because the Munns trust has unambiguous written terms so far as the depositor’s intent is concerned, 118 any oral statements made by the depositor prior to or at the time of execution of the agreement that would contradict those terms would be inadmissible under the parol evidence rule. 119 In other words, the Munns trust severely limits the traditional Totten trust rule that any extrinsic evidence concerning the depositor’s intent is admissible. The Munns trust also entails the previously mentioned variations provided by the DRTA, e.g., postponement of the beneficiaries’ rights in the account, prevention of termination by the death of the beneficiary, and limited revocation without notice to the institution.

The second type is the traditional Totten trust. Its validity in Missouri hinges on the correctness of the Phelps court’s assertion that Missouri law is identical with that of Florida. Since the limited terms “A in trust for B” are ambiguous, parol evidence as to the depositor’s intent is admissible. 120 Although this extrinsic evidence will be admitted, however, courts in other jurisdictions have given little weight to unsupported oral statements of the depositor’s intent. 121


118. The provisions of the DRTA set forth in note 67 supra indicate that the depositor who uses it intends to create a revocable savings account trust. Situations may arise, however, in which the depositor’s intent as to other matters may not clearly be shown by the DRTA, such as who the intended beneficiary is. See Estate of Hall v. Father Flanagan’s Boys’ Home, 30 Colo. App. 296, —, 491 P.2d 614, 615-17 (1971) (DRTA named “Boys Town of Nebraska” as beneficiary, but no entity existed under that name; parol evidence admissible to show intent).

119. See 1 A. SCOTT, supra note 7, § 38, at 301-02.

120. See note 15 and accompanying text supra.

121. Some courts seem to have developed a rule that little weight will be given to proof of oral revocation of a Totten trust. Courts worry that basing a finding of revocation on such proof “would permit frail oral memory years later to overcome the clear terms of the Totten Trusts.” In re Deneff’s Will, 44 Misc. 2d 947, 949-50, 255 N.Y.S.2d 347, 349-50 (Sur. Ct. 1964). See also Annot., 46 A.L.R.3d 487, 522-24 (1972); Annot., 38 A.L.R.2d 1243, 1259-60 (1954). Although the rule was developed in the context of whether a Totten trust had been revoked, it has been applied to proof by oral statements that the depositor did not intend to create a trust. See Litsey v. First Fed. Sav. & Loan Ass’n of Tampa, 243 So. 2d 239, 244 (Fla. Dist. Ct. App. 1971).
V. Arguments Against the Validity of the Munns Trust

If the Munns trust is to be an effective will substitute in Missouri, some difficult arguments against its validity must eventually be reconciled—arguments in addition to the trust’s tenuous foundation of questionable precedent.

The first argument is that there is a conflict between the DRTA and traditional Totten principles. The statements in Munns and Burrus to the effect that the Totten trust has been adopted in Missouri are purely dicta. Neither case involved a Totten trust. The trust in Totten was a deposit in trust for another “standing alone.” In both Munns and Burrus the deposit was not standing alone but was accompanied by the DRTA. Several jurisdictions have enforced the Totten language literally, holding that the use of the DRTA actually prevents any finding of a Totten trust. Ignoring the Totten principles, these courts treat the DRTA in the same manner as any other express inter vivos trust. Problems center particularly on the issues of revocation and the trust’s illusory or testamentary nature.


123. In re Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752 (1904).


125. The depositor’s intent to revoke may be frustrated where the revocation is attempted by will without notice to the institution, for such revocation is invalid under the DRTA but valid under the Totten trust doctrine if the bequest is sufficiently specific. See In re Estate of Anderson, 69 Ill. App. 2d 352, 361-65, 217 N.E.2d 444, 448-50 (1965).

126. Attacks on a trust as “illusory” are usually made by a settlor’s spouse who has been deprived of the property even though the depositor kept control of it during his life. See 1 A. SCOTT, supra note 7, § 58.5, at 544. There is some authority for the proposition that Totten trusts are immune from this attack. See, e.g., In re Halpern, 303 N.Y. 33, 37-39, 100 N.E.2d 120, 121-22 (1951). Thus, if the DRTA is not a Totten trust but an express inter vivos trust, it theoretically would be vulnerable to a surviving spouse’s claim that it is illusory. But Professor Scott has criticized the Halpern case, see 1 A. SCOTT, supra note 7, § 58.5, at 547, and the theory does not hold up well in practice. In Illinois, for example, the Totten trust is per se invalid as to the surviving spouse’s rights while an inter vivos trust such as the DRTA is considered illusory only after the surrounding facts and circumstances are considered. See Johnson v. La Grange State Bank, 73 Ill. 2d 342, 356-57, 383 N.E.2d 185, 191 (1978); In re Estate of Pruisis, 105 Ill. App. 3d 494, 499-501, 434 N.E.2d 443, 446 (1982); In re Estate of Chandler, 90 Ill. App. 3d 674, 679-80, 413 N.E.2d 486, 491 (1980).
ture, as a result, the intended effect of the trust is often frustrated. Other jurisdictions, however, have ignored the "standing alone" requirement. Like Munns and Burus, these cases hold that a DRTA creates a Totten trust.

This argument is the most difficult to reconcile, especially if it arises in a case in which the terms of the DRTA conflict with traditional Totten trust principles. In that instance, the courts will have to decide which takes precedence. Another alternative is available, however. The "standing alone" requirement could be recognized for Totten trusts, accompanied by an interpretation of Munns and Burus as involving express inter vivos trusts. Consequently, the whole issue whether the Totten trust is recognized in Missouri could be decided anew.

A second argument is that at least one court has found that certain provisions of the DRTA violate the statute of uses. In Ward v. Saranac Federal Savings and Loan Association a New York court stated that a DRTA, similar to that involved in Munns, created a passive trust. More specifically, the court objected to the fact that the DRTA permitted the savings institution to appoint a successor trustee at the depositor/trustee's death. The successor's only duty would be to hold the trust property until the beneficiary attained a specific age. These provisions, combined with the fact that the successor practically would be given legal title to the account by a provision giving him all the powers of the original trustee, conferred no active duty on the successor. But the Ward court did not explain why it

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130. The difference between the two is largely in the description of the powers reserved by the depositor/settler and those granted to the depositor/trustee. In Ward, the DRTA simply stated that the account was given to the trustee for the following purposes:

To withdraw and transfer the same in whole or in part and to exercise full control over the participation value thereof as though the account were held absolutely free and discharged of any trust, and without obligation on the part of the Association to look to the application of the fund.

Id. at 338, 369 N.Y.S.2d at 541. This language can be compared with conditions (1) and (2) of the standard DRTA set forth in note 67 supra, which are more specific as to the trustee's duties.

131. 48 A.D.2d at 339, 369 N.Y.S.2d at 542.

132. Id.
objected only to the DRTA's provision for appointment of a successor trustee. All Totten trusts arguably are passive. Where the trustee is the original depositor, however, this argument may be countered by the assertion that the Totten trust's utility requires the suspension of traditional trust principles.\textsuperscript{133} The \textit{Ward} court apparently determined that this social utility argument did not justify deferment of the beneficiary's interest by a successor trustee for no apparent reason.\textsuperscript{134}

A similar problem exists under Missouri law. Although the Missouri statute of uses excludes personal property,\textsuperscript{135} Missouri courts have stated that "[o]n the analogy of the Statutes of Uses, and on separate principles of equity, a passive trust of personalty also is deemed executed."\textsuperscript{136} Even though the DRTA involved in \textit{Munns} and \textit{Burrus} recited that various powers were conferred on the trustee, the fact remains that any successor trustee would merely hold the trust property for the beneficiary; it is hard to define any active duty on the part of the successor trustee.\textsuperscript{137}

The response to this passive trust argument is that at least one Missouri court has already recognized that the utility of this type of trust requires the suspension of traditional trust concepts.\textsuperscript{138} Moreover, if the depositor's creditors are able to reach the account\textsuperscript{139} and the depositor is not escaping tax liability by using the trust,\textsuperscript{140} the fact that the trust is passive seems to cause little harm.\textsuperscript{141}

Finally, there is an argument that the Munns trust permits the deposi-

\textsuperscript{133} This is the argument advanced by Professor Scott. \textit{See} 1 A. SCOTT, supra note 7, § 58.3, at 527.
\textsuperscript{134} 48 A.D.2d at 339-40, 369 N.Y.S.2d at 542-43.
\textsuperscript{135} \textit{See} MO. REV. STAT. § 456.020 (1978).
\textsuperscript{136} Penney v. White, 594 S.W.2d 632, 640-41 (Mo. App., W.D. 1980).
\textsuperscript{137} The problem in defining any active duties of the successor trustee arises from the fact that the DRTA is deemed to be a Totten trust. \textit{See} Blue Valley Fed. Sav. & Loan Ass'n v. Burrus, 617 S.W.2d 111, 113 (Mo. App., W.D. 1981). If the successor trustee actually is given active duties by virtue of condition (1) of the DRTA set forth in note 67 supra, his exercise of any of these duties would work a revocation of the trust under Totten principles.
\textsuperscript{138} \textit{See} Blue Valley Fed. Sav. & Loan Ass'n v. Burrus, 617 S.W.2d 111, 113 (Mo. App., W.D. 1981) (Totten trust doctrine created so popular trust account would not be forced into traditional trust mold).
\textsuperscript{139} \textit{See} 1 A. SCOTT, supra note 7, § 58.5, at 543.
\textsuperscript{140} \textit{See} Note, supra note 18, at 695 (Totten trust is incomplete transfer for federal tax purposes).
\textsuperscript{141} There may be some prejudice to the beneficiary's creditors, however, depending on when the trust is executed and legal title to the account is vested in the beneficiary. If the trust is not executed when the successor trustee takes over, the beneficiary's creditors would be placed in a worse position than if the depositor had disposed of the funds by will or intestacy. On the other hand, if the trust is executed as passive while the depositor/trustee is alive, the resulting access of the beneficiary's creditors to a fund that might not otherwise be available is arguably a windfall.
tor to dispose of his funds in a manner that could not be effected by will. Essentially, the depositor is conveying an absolute interest in the funds, similar to that of a fee simple in land, to the trustee. This interest is limited, however, by a gift over to the beneficiary of any remaining funds at the trustee’s death. A majority of courts take the position that “[i]f a fee simple in land or a like interest in personalty is given, coupled with an absolute power of disposal by deed or will, . . . a gift over in the same instrument of what remains undisposed of is void.”142 Thus, if the depositor should choose to dispose of his funds in a similar manner by will rather than by revocable savings account trust, the beneficiary would receive nothing since the gift over would be void.143 Missouri has followed the majority rule, at least so far as land is concerned.144

The response to this argument is that the reason for the rule is not present in the Munns trust situation. One reason traditionally given for the rule where personalty is involved is that the gift over is too indefinite.145 But in the Munns trust situation the gift over, i.e., the remaining balance in the account at the trustee’s death, is readily ascertainable, so the gift over arguably should not be void.146

VI. Conclusion

In light of the foregoing discussion, it is open to debate whether the Totten trust has been adopted in Missouri. The most tenable position at the present time is that Missouri is applying the Totten doctrine with its own innovations. Since the Missouri Supreme Court has failed to squarely address the issue, and in the absence of any legislation regarding the rights of beneficiaries, the Totten trust is not recommended as a will substitute in Missouri. This is especially true since a similar effect can be achieved with a joint savings account so long as the depositor retains control over the bank book.147

143. In Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950), the testatrix bequeathed all of her money on deposit at the savings institution to her husband with a gift over to her niece of any remaining funds in the account at the husband’s death. The court held that the husband took absolute ownership and that the gift over was void. Id. at 13, 76 A.2d at 877.
144. See, e.g., Vaughan v. Compton, 361 Mo. 467, 473, 235 S.W.2d 328, 331 (1950). See also Eckhardt, Work of the Missouri Supreme Court for 1950—Property, 16 Mo. L. Rev. 372, 388 (1951); Executory Limitations Following Power of Disposal, 17 Mo. L. Rev. 177, 177-78 (1952).
145. 3 L. Simes & A. Smith, supra note 142, § 1485, at 369.
146. See id. at 370 (arguing that indefiniteness presents issue of proof, not reason for invalidating gift over which can be ascertained).
147. The depositor, however, may dispose of his money sooner than intended if the joint tenant is given access to the account. The depositor discovered this, to her
Because the Totten trust more readily comports with the needs of a depositor desiring a will substitute, the doctrine's utility demands that the law in Missouri be clarified in its favor. Since the Totten trust is a creature of judicial decision, the responsibility for clarification lies primarily with the courts. Prior cases that seem to impeach the doctrine's validity should be expressly discredited. A definite choice should be made whether the DRTA is to be treated as an inter vivos trust or incorporated into the Totten trust doctrine.

Missouri courts probably will not have an opportunity to clarify their position on the Totten trust before legislation resolves the confusion. Article VI of the Uniform Probate Code, 148 pertaining to multiple party accounts, is currently under consideration by the legislature. 149 Enactment of this legislation will mean a complete recognition of the Totten trust in Missouri, 150 an improvement over current statutes that do not determine rights under savings account trusts. Enactment of Article VI will also resolve the...

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148. **Unif. Probate Code §§ 6-101 to 6-201 (1975).**


150. There are two key provisions of Article VI for purposes of recognizing the Totten trust. The first addresses the effect of the trust account while the depositor and beneficiary are still alive:

Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime . . . . If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

**Unif. Probate Code § 6-103(c) (1975).** If there are two or more named trustees, then the account belongs beneficially to both in proportion to their net contributions to the account. See id. § 6-103(a), (c). The second provision addresses the effect of the trust account when the depositor/trustee predeceases the beneficiary:

If the account is a trust account . . . [o]n death of the sole trustee or the survivor of 2 or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear evidence of a contrary intent; if 2 or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.
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irony that the payable on death account is invalid in Missouri even though its effect is virtually identical to that of a Totten trust.\textsuperscript{151} Such a clearing of the clouds surrounding the use of the savings account as a will substitute in Missouri will carry forward the current trend of freeing the modest estate from the confines of probate.

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\textsuperscript{151} Article VI provides that the payable on death (POD) account is to have the same effect as the trust account. The POD account belongs to the depositor during his lifetime. \textit{Id.} § 6-103(b). Any sums remaining in the account at the depositor's death belong to the POD payee if he survives the depositor. \textit{Id.} § 6-104(b). Finally, the POD account is not invalid as a testamentary disposition. \textit{Id.} § 6-106.