

OPINION NO. 2011-001

Syllabus:

2011-001

1. For purposes of 12 U.S.C.S. § 1832(a)(2), the entire beneficial interest in an interest-bearing trust account opened pursuant to R.C. 3953.231 is held by those organizations that are eligible to receive financial assistance from the legal aid fund pursuant to R.C. 120.51-.55.
2. For purposes of 12 U.S.C.S. § 1832(a)(2), the Ohio Legal Assistance Foundation is among those organizations that hold a beneficial interest in interest-bearing trust accounts opened pursuant to R.C. 4705.09 and R.C. 3953.231.

To: Timothy Young, State Public Defender, Columbus, Ohio

By: Richard Cordray, Ohio Attorney General, January 6, 2011

In 1985, the State Public Defender requested an opinion of the Attorney General regarding the Ohio Interest on Lawyers' Trust Accounts (IOLTA) program, R.C. 4705.09-.10. 1985 Op. Att'y Gen. No. 85-022. You now request that we revisit 1985 Op. Att'y Gen. No. 85-022 based on more recent developments in Ohio law. Specifically, you ask us to determine:

1. Who holds the entire beneficial interest in the interest-bearing trust accounts opened pursuant to the Ohio Interest on Trust Accounts (IOTA) program, R.C. 3953.231?
2. Does the Ohio Legal Assistance Foundation (OLAF), as an organization eligible to receive financial assistance from the legal aid fund, hold a beneficial interest in the income generated by the Ohio IOLTA and IOTA programs?

Background

Statutory Framework: The IOLTA and IOTA Programs

The Ohio IOLTA program requires lawyers to deposit funds of clients that are nominal in amount or are to be held for a short period of time in interest-bearing trust accounts. R.C. 4705.09(A). IOLTA accounts are considered “demand accounts” because the funds must be available for withdrawal on demand. R.C. 4705.10(A)(1) (funds must be available for “withdrawal upon request and without delay, or as soon as is permitted by federal law”); *see also Carroll v. State Bar of Cal.*, 166 Cal. App. 3d 1193, 1199, 213 Cal. Rptr. 305, 308 (Ct. App. 1985) (demand accounts are “those permitting withdrawals on demand”).

Historically, nominal and short-term client funds were placed in noninterest-

bearing accounts because federal banking law prohibited banks from offering customers interest-bearing checking accounts. See *Cone v. State Bar of Florida*, 819 F.2d 1002, 1005 (11th Cir. 1987). In 1980, however, the United States Congress enacted legislation that authorized the use of interest-bearing checking accounts. The Consumer Checking Equity Act of 1980, title III of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 303, 94 Stat. 132, 146 (1980), codified at 12 U.S.C.S. § 1832(a) (1982); see also *Carroll*, 166 Cal. App. 3d at 1199; *In re. N.H. Bar Assoc.*, 122 N.H. 971, 972-73, 453 A.2d 1258, 1259 (1982). Interest-bearing checking accounts commonly were known as “NOW” (negotiable order of withdrawal) or “Super NOW” accounts. See *Cone*, 819 F.2d at 1005; *Carroll*, 166 Cal. App. 3d at 1199. Although NOW and Super NOW accounts still exist, the phrase “NOW account” is a generic term used to refer to interest-bearing checking accounts, which may now have different names. Additionally, new types of interest-bearing accounts have emerged over time that may be used in the IOLTA program. See The Resource, *IOLTA Revenue Enhancement: The Time is Now*, http://www.greatprograms.org/newsletter/fall__2003/revenue__enhancement.htm (last visited Dec. 29, 2010) (discussing use of interest-bearing checking accounts in IOLTA programs and emergence of sweep accounts).

Federal law restricts the use of interest-bearing checking accounts. 12 U.S.C.S. § 1832(a)(2). Generally, “[o]nly funds owned by individuals, certain charitable non-profit organizations, or public entities are allowed to receive interest on their checking accounts.” *Cone*, 819 F.2d at 1005, citing 12 U.S.C.S. § 1832(a)(2). Specifically, interest-bearing demand accounts are available only where “the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit, and with respect to deposits of public funds by [certain public entities].” 12 U.S.C.S. § 1832(a)(2).

This restriction is significant for purposes of Ohio’s IOLTA program. The interest earned on IOLTA accounts is not held by individuals nor are the funds in IOLTA accounts public funds deposited by public entities. Therefore, accounts opened pursuant to the Ohio IOLTA program only qualify for the use of interest-bearing demand accounts if the “entire beneficial interest” belongs to “an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit.” 12 U.S.C.S. § 1832(a)(2). Accordingly, in 1985 the State Public Defender asked the Attorney General to determine who holds the entire beneficial interest in accounts opened pursuant to Ohio’s IOLTA program for purposes of federal banking law, *i.e.*, 12 U.S.C.S. § 1832(a)(2). See 1985 Op. Att’y Gen. No. 85-022, at 2-85 to 2-86.

Under Ohio’s IOLTA program, “[n]o part of the interest earned on funds deposited in an interest-bearing trust account established under [R.C. 4705.09(A)(1) or (2)] shall be paid to, or inure to the benefit of, the attorney, the attorney’s law firm or legal professional association, the client or other person who owns or has a beneficial ownership of the funds deposited, or any other person other than in accor-

dance with this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code.” R.C. 4705.09(B). When 1985 Op. Att’y Gen. No. 85-022 was issued, all interest earned on IOLTA accounts, less service or other related charges, had to be periodically forwarded to the Treasurer of State for deposit into the legal aid special account within the state special revenue fund under former R.C. 120.52, former R.C. 4705.09(B), and former R.C. 4705.10(A)(3)(a).

In 1985, R.C. 120.52 stated that the legal aid special account was “for the charitable public purpose of providing financial assistance to legal aid societies that provide civil legal services to indigents.” Legal aid societies in Ohio could apply for financial assistance from the legal aid special account. R.C. 120.53 (since amended). R.C. 120.52 and R.C. 120.53 made the State Public Defender responsible for administering the payment of legal aid special account moneys to legal aid societies pursuant to former R.C. 120.51-.55.

While the basic provisions of Ohio’s IOLTA program remain the same today, there have been some changes to the way the funds are collected and distributed as discussed in more detail below. In addition, since the issuance of 1985 Op. Att’y Gen. No. 85-022, the General Assembly has enacted legislation for title insurance agents known as the Ohio Interest on Trust Account (IOTA) program. 1995-1996 Ohio Laws, Part I, 898, 1402-1404 (Am. Sub. H.B. 117, eff. January 1, 1996). The Ohio IOTA program is nearly identical to the Ohio IOLTA program. As IOLTA does for attorneys, IOTA requires title insurance agents and title insurance companies to place clients’ nominal and short-term deposits into interest-bearing trust accounts, and those funds must be available for “withdrawal or transfer upon request and without delay, or as soon as is permitted by law.” R.C. 3953.231(A). And under IOTA, as with the IOLTA program, “[n]o part of the interest earned shall be paid to the title insurance agent or company.” R.C. 3953.231(C)(3).

All interest earned on IOLTA and IOTA accounts, less service or other related charges, must be forwarded periodically to the Treasurer of State for deposit into the legal aid fund, previously known as the legal aid special account, established pursuant to R.C. 120.52. R.C. 4705.09(B); R.C. 4705.10(A)(3)(a); R.C. 3953.231(C)(3); R.C. 3953.231(D)(1). The purpose of the fund, however, remains unchanged—“for the charitable public purpose of providing financial assistance to legal aid societies that provide civil legal services to indigents.” R.C. 120.52. In addition to receiving interest from the IOLTA and IOTA programs, the legal aid fund also receives moneys attributed to filing fee surcharges collected by clerks of courts. R.C. 120.52.

The legal aid fund is now administered by the Ohio Legal Assistance Foundation (OLAF) rather than being directly administered by the State Public Defender. R.C. 120.52. OLAF is a charitable, tax exempt foundation. R.C. 120.521(A). OLAF is responsible for establishing rules governing the administration of the legal aid fund. R.C. 120.52. Administration of the fund includes reviewing applications for funding from legal aid societies to determine their eligibility for financial assistance, allocating money in the legal aid fund for distribution, and reporting on the fund as required by statute. R.C. 120.53(C)-(D); R.C. 120.53(G)(2).

In addition to administering the legal aid fund, OLAF also explores other funding sources, including private fundraising initiatives and working with financial institutions to improve revenues from the IOLTA and IOTA programs. And like legal aid societies, OLAF works to improve the availability and quality of civil legal services available for the poor, including conducting educational programs and improving pro bono legal services. *See* R.C. 120.521(A).

Moneys in the legal aid fund primarily are distributed to legal aid societies. *See* R.C. 120.52; R.C. 120.53. Legal aid societies in Ohio, which are nonprofit organizations by definition, may apply for financial assistance from the fund. R.C. 120.51(A); R.C. 120.53(A). Their primary purpose is to provide civil legal services to the poor, but they also may provide legal training or legal assistance to other legal aid societies in Ohio. R.C. 120.51. A legal aid society that receives financial assistance from the legal aid fund may only use that money to defray the costs of providing legal services to indigents, to provide legal training and assistance to other eligible legal aid societies, and to provide funds pursuant to an agreement entered into under R.C. 120.53(H). R.C. 120.54.

In addition to providing financial assistance to eligible legal aid societies, the legal aid fund—like the legal aid special account before it—pays for the costs associated with its administration. When 1985 Op. Att’y Gen. No. 85-022 was issued, the legal aid special account was assessed “the reasonable costs” of administering sections 120.51 to 120.55. Former R.C. 120.52. Today, four and one-half percent of the moneys in the legal aid fund automatically are reserved for OLAF. R.C. 120.52; R.C. 120.53(D)(1). That money is for the “actual, reasonable costs” of administering Revised Code sections 120.51 to 120.55 (governing the legal aid fund and financial assistance to legal aid societies), sections 1901.26, 1907.24, and 2303.201 (governing filing fees collected by clerks of court and deposited into legal aid fund), and sections 3953.231 (IOTA) and 4705.09 to 4705.10 (IOLTA). R.C. 120.52.

1985 Op. Att’y Gen. No. 85-022

The opinion requested by the State Public Defender in 1985 addressed who holds the entire beneficial interest in an IOLTA account. As previously mentioned, this question was significant for purposes of determining whether the IOLTA program could use interest-bearing checking accounts under federal banking law. *See* 1985 Op. Att’y Gen. No. 85-022, at 2-85 to 2-86.

The Attorney General concluded that the entire beneficial interest in Ohio IOLTA accounts is held by “legal aid societies which meet the qualifications set forth in R.C. 120.51-.55.” 1985 Op. Att’y Gen. No. 85-022, at 2-89. The opinion also concluded that the legal aid societies are, by definition, nonprofit and that their primary purposes are “religious, philanthropic, charitable, educational, or other similar purposes.” *Id.* at 2-88. Accordingly, the opinion concluded that legal aid societies “are among those which may, under 12 U.S.C.S. § 1832(a)(2), hold the beneficial interest of NOW and Super NOW accounts.” *Id.*

Beneficial Interest in IOTA Accounts

In light of the General Assembly’s establishment of the Ohio IOTA program

and the role now played by OLAF in the administration of and receipt of money from the legal aid fund, you first ask us to determine who holds the entire beneficial interest in the interest-bearing trust accounts opened pursuant to the Ohio IOTA program, R.C. 3953.231. This question once again is significant because of the federal banking law restrictions on who may hold an interest-bearing checking account. 12 U.S.C.S. § 1832(a)(2). Both IOTA and IOLTA require use of interest-bearing checking accounts. R.C. 3953.231; R.C. 4705.09. As with an IOLTA account, the interest earned on IOTA accounts is not held by individuals nor are the funds in IOTA accounts deposited by public entities. *See* R.C. 3953.231. Therefore, in order to use interest-bearing checking accounts under federal banking law, the entire beneficial interest of an IOTA account must belong to “an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit.” 12 U.S.C.S. § 1832(a)(2).

Accordingly, you ask us to determine who holds the entire beneficial interest in accounts opened pursuant to IOTA. The analysis and conclusions of 1985 Op. Att’y Gen. No. 85-022, in which we addressed who holds the entire beneficial interest in IOLTA accounts, remain valid. Because the IOLTA and IOTA programs are identical in all material respects, the analysis in the Attorney General’s 1985 opinion is applicable in answering your current question. For the following reasons, I conclude that the entire beneficial interest in IOTA accounts is held by those organizations that are eligible to receive financial assistance from the legal aid fund pursuant to R.C. 120.51-.55.

The beneficial interest in an interest-bearing checking account is held by the person or entity that has a right to the interest earned upon the account. 1985 Op. Att’y Gen. No. 85-022, at 2-86. As was the case with the IOLTA program addressed in the 1985 opinion, the Revised Code identifies the beneficiaries of the IOTA program and of the legal aid fund. Taken together, R.C. 3953.231 and R.C. 120.52 establish which party has the right to interest earned on IOTA accounts. R.C. 3953.231(C)(3) thus declares:

All interest earned on the account, net of service charges and other related charges, shall be transmitted to the treasurer of state for deposit in the legal aid fund established under section 120.52 of the Revised Code. No part of the interest earned shall be paid to the title insurance agent or company.

This language specifically states that title insurance agents or companies will not be paid any of the interest earned on an IOTA account. Rather, pursuant to R.C. 3953.231, all interest earned on an IOTA account must be transmitted to the Treasurer of State for deposit in the legal aid fund. R.C. 3953.231(C)(3). Money from the legal aid fund is then distributed exclusively to OLAF and to eligible legal aid societies. R.C. 120.52-.53.

As previously explained, legal aid societies may apply for and receive financial assistance from the legal aid fund. R.C. 120.53. Moneys received from the legal aid fund must be used by the legal aid societies for specific purposes, all of

which pertain to the provision of legal services to indigent persons. R.C. 120.54. Additionally, four and one-half percent of the moneys in the legal aid fund are reserved for OLAF to pay for the “actual, reasonable costs” of administering the legal aid fund. R.C. 120.52. These include the costs of administering R.C. 120.51-.55, R.C. 1901.26, R.C. 1907.24, R.C. 2303.201, R.C. 3953.231, and R.C. 4705.09-.10. R.C. 120.52. Accordingly, I am of the opinion that OLAF and the legal aid societies that are eligible to receive financial assistance from the legal aid fund pursuant to R.C. 120.51-.55 hold a beneficial interest in IOTA accounts.

Statutory provisions specifically authorize the payment of certain fees and expenses from the interest earned on IOTA accounts that is deposited in the legal aid fund, just as IOLTA authorized the payment of certain fees and expenses when 1985 Op. Att’y Gen. No. 85-022 was issued. R.C. 120.51-.55 (costs of administering legal aid fund and distributions to legal aid societies); R.C. 1901.26, R.C. 1907.24, R.C. 2303.201 (filing fees collected by clerks of courts); R.C. 3953.231 (administrative expenses of IOTA); R.C. 4705.09-.10 (administrative expenses of IOLTA). These provisions authorizing the payment of fees and expenses, however, do not grant any persons other than the legal aid societies and OLAF a beneficial interest in the IOTA accounts. As the Attorney General reasoned in the 1985 opinion, “[t]he fact that administration expenses or other charges may be deducted from a fund before final disposition is made of the fund does not entitle persons who will receive such expenses or charges to any part of the beneficial interest in the fund.” 1985 Op. Att’y Gen. No. 85-022, at 2-88 (citations omitted). Rather, “[i]t is a general rule that expenses which are necessary or appropriate for the carrying out of the purposes of a trust should be borne by the trust estate.” *Id.* (citations omitted). I therefore conclude that the “entire beneficial interest” is held by those organizations that are entitled to financial assistance pursuant to R.C. 120.51-.55.

Next, I find that the purposes of the legal aid societies and OLAF are primarily “religious, philanthropic, charitable, educational, political, or other similar purposes.” 12 U.S.C.S. § 1832(a)(2). The purpose of legal aid societies, as previously discussed, is to provide civil legal services to the indigent and to provide legal assistance or training to other legal aid societies. OLAF’s purpose is to administer the legal aid fund; OLAF also finds additional funding and works to improve civil legal services to the poor. Further, legal aid societies and OLAF are nonprofit organizations by definition. R.C. 120.51(A); R.C. 120.521. Thus, as charitable, nonprofit organizations, they are among those organizations that are permitted to hold the beneficial interest in an interest-bearing checking account for purposes of federal banking law. 12 U.S.C.S. § 1832(a)(2).

OLAF’s Beneficial Interest in IOLTA and IOTA Accounts

Your second question relates to OLAF, which did not receive funds from the legal aid special account and was not statutorily responsible for administration of that account when 1985 Op. Att’y Gen. No. 85-022 was issued. You now ask whether OLAF, as an organization eligible to receive financial assistance from the legal aid fund, holds a beneficial interest in the income generated by the IOLTA and IOTA programs. As discussed in response to your first question, OLAF is an orga-

nization that is eligible to receive financial assistance from the legal aid fund. In fact, it is the only organization that is statutorily entitled to money from the fund and, therefore, has a right to the interest earned on IOTA and IOLTA accounts. R.C. 120.52; R.C. 120.53(D)(1). Accordingly, OLAF is among the organizations that hold a beneficial interest in IOLTA and IOTA accounts.

1985 Op. Att’y Gen. No. 85-022 advised that the entire beneficial interest in an IOLTA account was held by “those legal aid societies” that met the qualifications set forth in R.C. 120.51-.55. 1985 Op. Att’y Gen. No. 85-022 (syllabus). OLAF was not considered in that opinion because it was not yet part of the statutory scheme. *See* 1985 Op. Att’y Gen. No. 85-022. The conclusion in 1985 Op. Att’y Gen. No. 85-022 was based on the finding that the beneficial interest is held by those organizations that have the right to the interest earned upon an account. 1985 Op. Att’y Gen. No. 85-022, at 2-86. Because OLAF also is entitled to that interest under the current provisions of R.C. 120.51-.55, the conclusion that OLAF is among those organizations that hold a beneficial interest in IOLTA accounts is consistent with the analysis and conclusions of 1985 Op. Att’y Gen. No. 85-022.

Conclusion

In sum, it is my opinion, and you are hereby advised as follows:

1. For purposes of 12 U.S.C.S. § 1832(a)(2), the entire beneficial interest in an interest-bearing trust account opened pursuant to R.C. 3953.231 is held by those organizations that are eligible to receive financial assistance from the legal aid fund pursuant to R.C. 120.51-.55.
2. For purposes of 12 U.S.C.S. § 1832(a)(2), the Ohio Legal Assistance Foundation is among those organizations that hold a beneficial interest in interest-bearing trust accounts opened pursuant to R.C. 4705.09 and R.C. 3953.231.