

**OPINION NO. 85-022****Syllabus:**

For purposes of 12 U.S.C. §1832(a)(2), the "entire beneficial interest" of an interest-bearing trust account established by an attorney, a law firm, or a legal professional association pursuant to R.C. 4705.09 is held by those legal aid societies which meet the qualifications set forth in R.C. 120.51-.55.

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**To: Randall M. Dana, State Public Defender, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, May 22, 1985**

I have before me your opinion request in which you ask who holds the "entire beneficial interest" in the trust accounts of lawyers opened pursuant to the Interest On Lawyers Trust Accounts (IOLTA) program established under newly enacted Am. Sub. S.B. 219. You have informed me that the IOLTA program, recently established by Am. Sub. S.B. 219, 115th Gen. A. (1984) (eff., in part, Jan. 8, 1985), is similar to programs which have been adopted in some thirty-five other states. The Ohio IOLTA program requires lawyers to place nominal and short-term deposits of their clients into interest-bearing trust accounts. R.C. 4705.09(A). It provides that the interest on such accounts is to be periodically forwarded by the institutions holding the deposits to the Treasurer of State, for deposit in the legal aid special account established under R.C. 120.52. R.C. 4705.09(B); R.C. 4705.10. Pursuant to R.C. 120.52, the legal aid special account, within the state special revenue fund, is "for the charitable public purpose of providing financial assistance to legal aid

societies that provide civil legal services to indigents." The Ohio Public Defender is given the responsibility of administering the program for providing financial assistance to legal aid societies pursuant to R.C. 120.51-.55. R.C. 120.04(A)(11). Funds from the legal aid special account are to be apportioned, allocated, and paid periodically to qualified legal aid societies for purposes authorized by statute. R.C. 120.51-.55.

You have indicated that your question has arisen "because these new [IOLTA] trust accounts must be either NOW [negotiable order of withdrawal] Accounts or Super NOW Accounts so that withdrawal of the principal can be made 'on demand' by an attorney" on behalf of his client. Cf. R.C. 4705.10(A)(1) ("[a]ll funds in [an interest-bearing trust account established under authority of R.C. 4705.09] shall be subject to withdrawal upon request and without delay, or as soon as is permitted by federal law"). See generally 12 C.F.R. §526.1(i); 12 C.F.R. §563.6. Under 12 U.S.C. §1832(a)(2), NOW or Super NOW accounts are available:

only with respect to deposits or accounts which consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit, and with respect to deposits of public funds by an officer, employee, or agent of the United States, any State, county, municipality, or political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, any territory or possession of the United States, or any political subdivision thereof. (Emphasis added.)

It is clear that the funds deposited in IOLTA accounts will not necessarily be public funds. See R.C. 4705.09. Thus, the IOLTA program may be implemented through the use of NOW or Super NOW accounts only if the entire beneficial interest in such accounts is held by "one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit." You have asked whether, under Ohio law, this is the case.

In order to determine who holds the "entire beneficial interest" of the IOLTA accounts, it is necessary to define what is meant by the term "beneficial interest." The general definition appears in Black's Law Dictionary 142 (5th ed. 1979), as follows: "[p]rofit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control." Similarly, the person for whose benefit a trust is created is commonly referred to as the beneficiary. See Scott on Trusts §3.2 (3d ed. 1967). See also Restatement (Second) of Trusts §3(4) (1959). It is clear that a trust may exist only if the legal and equitable interests in property are separate. See Hill v. Irons, 160 Ohio St. 21, 113 N.E.2d 243 (1953); In re Estate of Bicknell, 108 Ohio App. 51, 160 N.E.2d 550 (Hancock County 1958). See generally Restatement (Second) of Trusts §113 (1959). While I am aware of no Ohio case which specifically defines the term "beneficial interest," it is clear that, under Ohio law, the "beneficial interest" of a fund is held by one who has the right to the benefits which accrue to, or the profits which are derived from, the fund. See generally Hill v. Irons; Morgan v. First National Bank of Cincinnati, 84 Ohio App. 345, 84 N.E.2d 612 (Hamilton County 1948). Under this definition, the one who holds the beneficial interest of a NOW or Super NOW account is the one who has the right to the interest earned upon the account. See generally Morgan v. First National Bank of Cincinnati.

R.C. 4705.09(B), as enacted by Am. Sub. S.B. 219, directly addresses the question of who holds the beneficial interest in interest generated by an IOLTA account, as follows:

All interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section shall be transmitted to the treasurer of state for deposit in the legal aid special account established under section 120.52 of the Revised Code. Moneys deposited in the account may be invested by the treasurer of state in accordance with section 120.52 of the Revised

Code and shall be used only to provide financial assistance to legal aid societies in accordance with the provisions of sections 120.51 to 120.55 of the Revised Code. No part of the interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section 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 accordance with this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code. (Emphasis added.)

This language specifically delineates persons who do not have a beneficial interest in interest earned by an IOLTA account (namely, 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) and specifies that no other person has any such interest except as provided in R.C. 4705.09, R.C. 4705.10, and R.C. 120.51 through R.C. 120.55.

Pursuant to R.C. 4705.09, interest earned on an IOLTA account is to be transmitted to the Treasurer of State for deposit in the legal aid special account. R.C. 120.52 specifies that the legal aid special account "shall be for the charitable public purpose of providing financial assistance to legal aid societies that provide civil legal services to indigents." It authorizes the Treasurer of State to invest moneys contained in the account and provides: "All income earned as a result of any such investment shall be deposited by the treasurer of state into the legal aid special account for use in providing financial assistance to legal aid societies."

R.C. 120.51 defines "[l]egal aid society," for purposes of R.C. 120.51-.55, as follows:

"Legal aid society" means a nonprofit corporation, incorporated and operated exclusively in this state, the primary purpose and function of which is to provide civil legal services, without charge, to indigents, and which, in addition to providing such services, may provide legal training or legal technical assistance, without charge, to other legal aid societies in this state.

R.C. 120.53 provides a procedure by which legal aid societies may apply for financial assistance from the legal aid special account. Pursuant to R.C. 120.53(C), the Ohio Public Defender determines whether such applicants are eligible. R.C. 120.53(D) states, in part: "The state public defender shall allocate moneys contained in the legal aid special account twice each year for distribution to applicants that filed their applications in the previous calendar year and were determined to be eligible applicants." Moneys so allocated are paid to the legal aid societies twice annually. R.C. 120.53(F).

R.C. 120.54 limits the purposes for which a legal aid society may use amounts received from the legal aid special account, as follows:

(A) A legal aid society that receives financial assistance under section 120.53 of the Revised Code shall use the financial assistance for only the following purposes:

(1) To defray the costs of providing legal services to indigents;  
 (2) To provide legal training and legal technical assistance to other eligible legal aid societies; and

(3) If the legal aid society has entered into an agreement with a local bar association, any private attorney, or any group of private attorneys pursuant to division (H) of section 120.53 of the Revised Code and in accordance with the description and list of conditions set forth in its application pursuant to division (B)(9) of that section, to provide funds for the services, programs, training, and legal technical assistance provided by the local bar association, private attorney, or group of private attorneys.

(B) No financial assistance received by a legal aid society

pursuant to section 120.53 of the Revised Code shall be used for the provision of legal services in relation to any criminal case or proceeding or in relation to the provision of legal assistance in any fee generating case.

It is clear that, under the statutory scheme discussed above, interest earned on IOLTA accounts is, ultimately, to be distributed to qualifying legal aid societies for the specified purposes, which center around the provision of legal services to indigent persons in civil matters. It appears, then that the beneficial interest in IOLTA accounts is held by qualifying legal aid societies. Those societies are, by definition, nonprofit, see R.C. 120.51(A), and their purposes are primarily "religious, philanthropic, charitable, educational, or other similar purposes." 12 U.S.C. §1832(a)(2). See generally 12 C.F.R. §526.1(l)(1). Thus, these organizations are among those which may, under 12 U.S.C. §1832(a)(2), hold the beneficial interest of NOW and Super NOW accounts.

There remains the question whether any person or entity other than the qualified legal aid societies may be deemed to hold any part of the beneficial interest of the IOLTA accounts. Pursuant to R.C. 4705.09(A)(2), IOLTA accounts are to contain only: (1) "client funds that are nominal in amount or are to be held by the attorney for a short period of time"; (2) funds of the attorney, law firm, or legal professional association "sufficient to pay depository institution service charges in excess of earnings on the account"; and (3) "other funds belonging to the attorney, firm, or association. . . as authorized by the Code of Professional Responsibility adopted by the supreme court." See Code Prof. Respons., DR 9-102. Clearly, the attorney has a duty to "[p]romptly pay or deliver to the client as requested by a client the funds. . . which the client is entitled to receive." Code Prof. Respons., DR 9-102(B)(4). An IOLTA account is not, however, created to benefit either the lawyer or his clients. Rather, an IOLTA account is created so that interest may be earned upon funds which would not otherwise bear interest, and the interest is, by statute, directed toward qualified legal aid societies. It is, therefore, my judgment that, for purposes of 12 U.S.C. §1832(a)(2), neither a lawyer nor any of his clients may be considered to hold any part of the beneficial interest of an IOLTA account created pursuant to R.C. 4705.09 and R.C. 4705.10. See generally Restatement (Second) of Trusts §128 (1959) (the extent of a beneficiary's interest is determined by the intention manifested by the creator of a trust).

I am aware that there are provisions which authorize the payment of certain charges or expenses from interest earned on IOLTA accounts. See R.C. 120.52 (the legal aid special account "shall be assessed the reasonable costs of administering" R.C. 120.51-.55; the "remainder of the moneys in the account shall be distributed" pursuant to R.C. 120.53); R.C. 120.53(D) ("[a]ll moneys contained in the [legal aid special] account. . . shall, after deduction of the costs of administering [R.C. 120.51-.55], be allocated to" those legal aid societies whose applications are approved); R.C. 120.53(D)(2) ("[a]fter deduction of administrative costs, . . . the moneys in the [legal aid special] account that were generated pursuant to [R.C. 4705.09 and 4705.10] and all income derived from the investment of such moneys" shall be apportioned as provided); R.C. 4705.10(A)(3)(a) (permitting the depository institution which holds fund in an IOLTA account to deduct "reasonable service charges" before remitting interest or dividends on the account to the Treasurer of State). See generally R.C. 4705.09(A)(3) (providing for an attorney, firm, or legal professional association to deposit "funds sufficient to pay depository institution service charges in excess of earnings" in an IOLTA account). It is, however, my judgment that these provisions do not operate to grant any person other than qualifying legal aid societies a beneficial interest in the IOLTA accounts. It 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. See III Scott on Trusts §§188, 233, 244 (3d ed. 1967). See generally Holmes v. Hrobon, 158 Ohio St. 508, 110 N.E.2d 574 (1953). The 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. See Taylor v. Huber's Executors, 13 Ohio St. 288 (1862); Restatement (Second) of Trusts §126 at 269 (1959) ("[a] person is not a beneficiary of a trust if the settlor does not manifest an intention to give him a

beneficial interest, although he may incidentally benefit from the performance of the trust").

It is, therefore, my opinion, and you are hereby advised, that, for purposes of 12 U.S.C. §1832(a)(2), the "entire beneficial interest" of an interest-bearing trust account established by an attorney, a law firm, or a legal professional association pursuant to R.C. 4705.09 is held by those legal aid societies which meet the qualifications set forth in R.C. 120.51-55.