

OPINION NO. 85-065**Syllabus:**

R.C. Chapter 1785 does not prohibit the stock of a professional association from being held in trust, for the benefit of nonprofessionals, by an individual who is duly licensed or otherwise legally authorized to render the professional service for which the association was organized, and the fact that stock is so held provides no basis for cancellation of the articles of incorporation of that association by the Secretary of State. Since the trustee is a professional, however, he may not carry out any acts or exercise any

powers which conflict with the performance of his professional responsibilities or exceed the authority granted to him under applicable law. (1978 Op. Att'y Gen. No. 78-066, modified.)

To: Sherrod Brown, Secretary of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 29, 1985

I have before me your request for my opinion on the question whether the Secretary of State must cancel the articles of incorporation of a professional association if the statement filed by that association pursuant to R.C. 1785.06 indicates that some of the shares of stock of the association are held in trust for the benefit of nonprofessionals.

R.C. 1785.06 requires that a professional association file an annual statement with the Secretary of State, as follows:

A professional association shall, within thirty days after the thirtieth day of June in each year, furnish a statement to the secretary of state showing the names and post office addresses of all shareholders in such corporation and shall certify that all shareholders are duly licensed or otherwise legally authorized to render professional service in this state. This report shall be made on such form as shall be prescribed by the secretary of state, shall be signed by an officer of the corporation, and shall be filed in the office of the secretary of state.

If any professional association fails to file the annual report within the time required by this section, the secretary of state shall give notice of the failure by certified mail to the last known address of the corporation or its agent and, if the report is not filed within thirty days after the mailing of the notice, the secretary of state shall, upon the expiration of that period, cancel the articles of incorporation, give notice of the cancellation to the corporation by certified mail, and make a notation of the cancellation on his records. (Emphasis added.)

Pursuant to R.C. 1785.06, the professional association "shall certify that all shareholders are duly licensed or otherwise legally authorized to render professional service in this state." Such certification serves to carry out the stock ownership requirements appearing elsewhere in R.C. Chapter 1785. R.C. 1785.05 provides that "[a] professional association may issue its capital stock only to persons who are duly licensed or otherwise legally authorized to render the same professional service as that for which the association was organized," and R.C. 1785.07 permits a shareholder of a professional association to "sell or transfer his shares in such association only to another individual who is duly licensed or otherwise legally authorized to render the same professional service as that for which the corporation was organized."

You have asked, in essence, whether, if a professional association reports that some of its shares of stock are held in trust for the benefit of nonprofessionals, the association may be considered to be in compliance with the requirement of R.C. 1785.06 that it "certify that all shareholders are duly licensed or otherwise legally authorized to render professional service in this state." I am assuming, for purposes of this opinion, that you are concerned with a situation in which the legal title to particular shares of stock in a professional association has been transferred, by either a shareholder or the professional association itself, to a trustee who is duly licensed or otherwise legally authorized to render the professional service for which the association was organized, and that the trustee is to hold the stock in trust for the benefit of one or more persons who are not so licensed or authorized to render the professional service. Your question, then, is whether the fact that a qualified shareholder holds stock of a professional association in trust for the benefit of persons who could not themselves hold stock of the association results in a failure to satisfy the requirement that all shareholders be duly licensed or otherwise legally authorized to render the professional service for which the association was organized.

Your question arises in light of 1978 Op. Att'y Gen. No. 78-066, in which my predecessor concluded, in the syllabus, that "[l]egal title to stock of a professional association may be held by a trustee of a qualified pension or profit sharing plan, licensed to render the same professional service as that for which such association was organized, as long as equitable title to the stock is also held by such professionals." Op. No. 78-066 stated that, because "the ownership of property held in trust is split between the legal title of the trustee and the equitable title of the beneficiary," stock of a professional association may be held in trust only where both the trustee and the beneficiary are qualified to act as shareholders. Op. No. 78-066 at 2-162.

I agree with my predecessor that stock of a professional association may be held by a trustee of a qualified pension or profit sharing plan where both the trustee and the beneficiaries are qualified to act as shareholders. I believe, however, that the circumstances in which such stock may be held in trust are not as limited as that opinion implies.

R.C. Chapter 1785 nowhere expressly states or clearly implies that all interests in the stock of a professional association must be held by persons who are qualified professionals. Rather, it provides that capital stock of a professional association may be issued, sold, or transferred only to such persons. R.C. 1785.05; R.C. 1785.07. I believe that such requirements are satisfied whenever the legal title to such stock is held by a person who is duly licensed or otherwise legally authorized to render the professional service for which the association was organized, whether that person holds that stock outright or in trust, and, if in trust, regardless of whether all beneficiaries of the trust are qualified professionals. See generally O'Neill v. United States, 410 F.2d 888, 898 (6th Cir. 1969) ("[t]he only limitation which [Ohio law] imposes is that the shareholders must be licensed to practice the profession" (citations omitted)). The language of R.C. 1785.06 certainly permits such a result, since a "shareholder" is commonly considered to be the person who holds the legal title to stock. See R.C. 1701.01(F) ("[s]hareholder" means a person whose name appears on the books of the corporation as the owner of shares of such corporation"); R.C. 1701.28(B)(2) (a corporation shall incur no liability if it treats the person in whose name securities stand of record on its books as absolute owner, with full competency, capacity, and authority to exercise all rights of ownership); R.C. 1785.08 (providing that, in general, provisions of R.C. Chapter 1701 apply to professional associations, to the extent that they do not conflict with the provisions of R.C. Chapter 1785); Lesch v. Chicago & Eastern Illinois Railroad Co., 226 F.2d 687, 690 (7th Cir. 1955) ("the word 'shareholder' . . . in its ordinary and usual sense . . . included only the registered owner of stock. . . . [T]he beneficial owner was without right to participate in a stockholders' meeting and vote upon [an] amendment"); Bache & Co. v. General Instrument Corp., 74 N.J. Super. 92, 98, 180 A.2d 535, 538, cert. denied, 38 N.J. 181, 183 A.2d 87 (1962) ("[i]n general, the legal owner, rather than the beneficial owner, is considered the 'stockholder' or 'shareholder'" (citation omitted)); Black's Law Dictionary 996, 1272 (5th ed. 1979) (defining "own" as "[t]o have a good legal title"; defining "stockholder" as "[a] person who owns shares of stock in a corporation or joint-stock company"). But see, e.g., HFG Co. v. Pioneer Pub. Co., 162 F.2d 536 (7th Cir. 1947) (concluding that the equitable and beneficial owner of stock was a shareholder for purposes of maintaining a shareholder's suit on behalf of the corporation under Fed. R. Civ. Proc. 23(b)).

A general definition of a trust was set forth by the Ohio Supreme Court in Ulmer v. Fulton, 129 Ohio St. 323, 339, 195 N.E. 557, 564 (1935), as follows: "Briefly, a trust is the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another." See also G. Bogert, The Law of Trusts and Trustees §1, at 1-2 (rev. 2d ed. 1984) ("[a] trust may be defined as fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another" (footnote omitted)); Restatement (Second) of Trusts §2 (1959) (defining a trust as a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person"). While my predecessor, in Op. No. 78-066, distinguished between the legal title to trust property, which is held by the trustee, and the equitable title to trust property, which is held by the beneficiary, see Schwan v. Meinert, 56 Ohio

App. 336, 10 N.E.2d 951 (Wood County 1937), I believe that it is helpful in considering your question to refer to the rights of the beneficiary more generally as an equitable "interest." See, e.g., First National Bank of Cincinnati v. Tenney, 165 Ohio St. 513, 518, 138 N.E.2d 15, 19 (1956) ("the radical idea of a trust is the coexistence of the legal title and the equitable interest. . . [P]erfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time"); 1985 Op. Att'y Gen. No. 85-022 at 2-86 ("a trust may exist only if the legal and equitable interests in property are separate"). See generally G. Bogert, The Law of Trusts and Trustees §183 (rev. 2d ed. 1979).

The beneficiary has, under a trust, whatever rights the trust instrument grants. See Ulmer v. Fulton; Berry v. McCourt, 1 Ohio App. 2d 172, 204 N.E.2d 235 (Franklin County 1965). See generally Martin v. Martin, 54 Ohio St. 2d 101, 374 N.E.2d 1384 (1978); Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961). The beneficiary's interest is equitable, as opposed to legal, and legal title to the trust property is generally held by the trustee.¹ Just how the beneficiary's interest should be characterized is the matter of scholarly debate. See, e.g., G. Bogert, The Law of Trusts and Trustees §183 (rev. 2d ed. 1979) (discussing whether the beneficiary of a trust is the owner of only a claim against the trustee to have the trust carried out, whether he is the equitable owner of the trust property, or whether he has both a right against the trustee and an ownership of the trust property). See generally Blair v. Commissioner of Internal Revenue, 300 U.S. 5 (1937).

I am not aware of any case or statutory provision of Ohio law which clearly establishes the nature of the interest of a trust beneficiary in trust property, and I do not believe that, for purposes of answering your question, it is necessary for me to make a determination on that issue. See generally Martin v. Martin; Cleveland Trust Co. v. Eaton, 21 Ohio St. 2d 129, 256 N.E.2d 198 (1970); First National Bank of Cincinnati v. Tenney; Lawton v. Lawton, 5 Ohio N.P. 441 (Super. Ct. Cincinnati 1898) (discussing the nature of the interests of beneficiaries of a trust in real property held by the trustee). I find, instead, that, regardless of the precise nature of the interest of a trust beneficiary, that interest is not sufficient to negate the conclusion that the holder of the legal title to shares of stock in a professional association is the shareholder for purposes of R.C. Chapter 1785 and, in particular, R.C. 1785.06. Regardless of how the rights of beneficiaries of a trust holding stock in a professional association are characterized, I do not believe that they will interfere with the operations of the association where the trustee is a qualified professional. In such a situation, the trustee will have legal title to the stock and the corresponding power to take such actions with respect to the stock as he, as a qualified professional, determines to be appropriate.² See Cliffs Corp. v. United States, 103 F.2d 77 (6th Cir.), cert. denied, 308 U.S. 575 (1939); Finkbeiner v. Finkbeiner, 111 Ohio App. 64, 165 N.E.2d 825 (Hamilton County 1959); Lloyd v. McDiarmid, 60 Ohio App. 7, 13, 19 N.E.2d 292, 295 (Hamilton County 1937) ("a trustee of an active trust. . . has the power but not the right to sell except in conformity to the terms of the trust"); Hopkins v. Guardian Trust Co., 15 Ohio L. Abs. 121 (App. Cuyahoga County 1933); Restatement (Second) of Trusts §186 (1959). The beneficiaries may, of course, enforce whatever rights they have. See, e.g., Cleveland Trust Co. v. Eaton. The interests held by the beneficiaries will,

¹ It is possible for a grantor to place in trust an interest which is less than legal title, but that is not the situation which you have presented. See G. Bogert, The Law of Trusts and Trustees §1, at 5 (rev. 2d ed. 1984) (a trustee usually has legal title, but if the grantor has only an equitable interest in certain property, he may convey that interest to the trustee to be held in trust).

² I am not considering whether statutes or ethical provisions governing members of particular professions might operate to make particular trust arrangements impermissible in certain circumstances. See generally, e.g., In re Trusteeship of Stone, 138 Ohio St. 293, 302, 34 N.E.2d 755, 760 (1941) ("[s]ince a trustee is a fiduciary of the highest order and is charged with the

however, have been granted by either a qualified professional or the professional association itself, and will remain subject to the limitation that neither the trustee nor any other professional may be required to act in a manner that conflicts with, or exceeds the authority permitted under, applicable law. See generally O'Neill v. United States, 410 F.2d at 898 ("[t]he professional relationship and the principles governing it exist independent of...the kind of entity through which the professional man renders his services"); Restatement (Second) of Trusts §166 (1959).

It might be argued that permitting the stock of a professional association to be held in trust for the benefit of nonprofessionals would run counter to the general philosophy behind the adoption of R.C. Chapter 1785, in that it would permit nonprofessionals to have an interest in the operations of a professional association. It is commonly stated that the ownership restrictions on stock of professional corporations were designed to permit the preservation of the professional's ethical standards, to preserve the personal relationship between the professional and his client or patient, and to protect that personal relationship from interference by nonprofessionals interested solely in maximizing the return on their investment. See O'Neill v. United States, 410 F.2d at 899 ("the State of Ohio saw fit expressly to preserve [the professional] relationship and to authorize only such centralization of management as is compatible with it"); South High Development, Ltd. v. Weiner, Lippe & Cromley Co., L.P.A., 4 Ohio St. 3d 1, 3, 445 N.E.2d 1106, 1108 (1983) ("[a] professional corporation is organized in order to carry out or practice a profession. . .[A] private corporation's sole purpose is to accumulate capital so that the owners, those contributing capital, may get a return on their capital"). See generally Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934). I do not, however, believe that the fact that stock of a professional association is held in trust for nonprofessionals will interfere with the proper practice of a profession in light of the fact, discussed above, that the trustee, as holder of legal title to the stock, will have both the power and the obligation to carry out professional responsibilities.

At least one commentator has concluded that the concerns about maintaining the independence of professionals should not bar them from holding stock in their corporations in trust:

[M]ust the professional own his stock in an individual capacity? Consider, for example, the attorney who decides to take his own advice by placing his properties in a revocable trust, of which he is the sole trustee. What are the legal and tax consequences? If one accepts as applicable the American Bar Association's rationale for requiring stock ownership by professionals (namely, to prevent interference with the attorney's professional independence), then, as a policy matter, the ownership of the professional's stock by himself, as sole trustee, would appear permissible.

Gibbs, "Getting Out of a Professional Corporation: Preparing for the Forthcoming Problems," 34 J. Tax. 134, 134 (1971). Further, the State of New York has, by statute, expressly authorized the practice of transferring stock in a professional corporation to a trustee who is a professional. See N.Y. Bus. Corp. Law §1511 (McKinney) ("[n]o shareholder of a professional service corporation may sell or transfer his shares in such corporation except to another individual who is eligible to have shares issued to him by such corporation or except in trust to another

utmost fidelity to his trust, he must refrain from creating situations where his own interests are brought into conflict with those of the trust, and from doing those things which would tend to interfere with the exercise of a wholly disinterested and independent judgment"); Code Prof. Respons. EC 3-8; Code Prof. Respons. DR 3-102; Code Prof. Respons. DR 5-107(C) ("[a] lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) A non-lawyer is a corporate director or officer thereof; or (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer").

individual who would be eligible to receive shares if he were employed by the corporation"). See also 1977-1978 Mich. Att'y Gen. No. 5190, p. 130 (concluding that, under Michigan law, a professional who owns stock in a professional corporation may transfer his shares to a revocable living trust of which he is sole trustee and sole beneficiary during his lifetime; other beneficiaries have a future interest in the trust which becomes irrevocable upon the grantor's death, and a successor trustee is named). These authorities support the proposition that construing R.C. Chapter 1785 so as to permit qualified shareholders to hold stock of a professional association in trust for the benefit of nonprofessionals will not, in itself, threaten the traditional standards governing the practice of a profession. See generally Smith, "Professional Corporations in Ohio: The Time for Statutory Revision," 30 Ohio St. L. J. 439, 451, 456 (1969) (concluding that, under Ohio professional association statutes, "[a] shareholder may not transfer his stock. . .to a trustee of a trust," but stating also that "[w]hile the voting trust device is not mentioned in the Ohio statute, it appears that the restriction placed on the identity of the transferee of shares [by R.C. 1785.07] has the effect of preventing the use of a voting trust except when the trustee is a qualified transferee" (emphasis added; footnotes omitted)).

I conclude, therefore, that the stock of a professional association may be held in trust, for the benefit of nonprofessionals, by an individual who is duly licensed or otherwise legally authorized to render the professional service for which the association was organized. It follows that, if the Secretary of State receives a statement under R.C. 1785.06 which indicates that some of the shares of stock of a particular professional association are so held, he need take no action with respect to cancellation of the articles of incorporation of that association on the basis of the fact that some shares of stock are held in trust.

It is, therefore, my opinion, and you are hereby advised, that R.C. Chapter 1785 does not prohibit the stock of a professional association from being held in trust, for the benefit of nonprofessionals, by an individual who is duly licensed or otherwise legally authorized to render the professional service for which the association was organized, and the fact that stock is so held provides no basis for cancellation of the articles of incorporation of that association by the Secretary of State. Since the trustee is a professional, however, he may not carry out any acts or exercise any powers which conflict with the performance of his professional responsibilities or exceed the authority granted to him under applicable law. (1978 Op. Att'y Gen. No. 78-066, modified.)