

§8.15.59 *The Tontine*

[Excerpted from *Loring and Rounds: A Trustee's Handbook* (2012), at pages 1084-1085]

The concept of the tontine surely predates its namesake, Neapolitan banker Lorenzo de Tonti (c.1602–c.1684).⁷⁷⁵ In its crassest form, investors pay into a pool with the understanding that the principal will pass to the last survivor, a form of “death gamble” that one U.S. court suggested as recently as 1981 “ought not to be encouraged or expanded beyond limits of tontine insurance which has hitherto been recognized by law.”⁷⁷⁶ The court, of course, was alluding to the age-old societal concern that the tontine might tempt its investors to kill one another off. In the tontine’s traditional and more benign form, the investors receive an ever-increasing share of the pool’s income stream as their numbers die off, with the principal ultimately passing to the state or to the scheme sponsor, perhaps the developer of a building or a block of houses. (One court has referred to a frozen underfunded pension plan under which older participants receive full benefits and younger participants receive reduced benefits as a “reverse tontine.”⁷⁷⁷)

Today, the spirit of the tontine lives on, and not just in the works of Robert Louis Stevenson⁷⁷⁸ and P. G. Wodehouse.⁷⁷⁹ There are insurance products with tontine features. A premium-payer’s property interest, however, is not in a segregated pool but in the form of contractual rights against the insurance company.⁷⁸⁰ A joint bank account with right of survivorship, to be sure, is a poor man’s will; but it is also a poor man’s tontine. As we write, there are personal trusts being administered with tontine-like features, *e.g.*, income in equal shares to a class of individuals, with the principal passing outright and free of trust to those members of the class alive at the expiration of the trust’s term. One court, in upholding such a provision in a testamentary trust, addressed the public policy considerations:

A court may not distribute the testator’s estate according to the court’s sense of equity and justice rather than the testator’s intention as expressed in the will. After all, except as limited by statute or contract, a testator has the right to distribute his property as he wishes. He can only do this through the words he employs in his will. Accordingly he must be able to rely on the fact that the court cannot and will not distort the clear language to achieve a result it prefers to the result the testator desired. It may be true, as appellants contend, that the quasi-tontine arrangement in the will is not equitable but it is not illegal. Being legal and not contrary

⁷⁷⁵It is said that Lorenzo de Tonti proposed to Louis XIV that a national tontine income scheme would be a way of financing his military campaigns without levying new taxes, with the principal passing to the state upon the death of the last investor.

⁷⁷⁶*Quinn v. Stuart Lakes Club, Inc.*, 80 A.D.2d 350, 354, 439 N.Y.S.2d 30, 33 (1981).

⁷⁷⁷*Aon Trust Corp. v. KPMG (a firm) and others*, [2005] EWCA Civ. 1004 (England).

⁷⁷⁸*The Wrong Box* (1889).

⁷⁷⁹*Something Fishy (The Butler Did It in the United States)* (1957).

⁷⁸⁰*Pierce v. Equitable Life Assurance Soc’y*, 145 Mass. 56, 12 N.E. 858 (1887); *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421, 17 N.E. 363 (1888).

to public policy, it must be given effect.⁷⁸¹

⁷⁸¹Continental Ill. Nat'l Bank & Trust Co. of Chicago v. Bailey, 104 Ill. App. 3d 1131, 1139, 433 N.E.2d 1098, 1103 (1982).