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## A closer look at the 'Totten trust' and third party benefits

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Before his untimely death, Brian owned a savings account at his local bank. The account was titled in trust for his beautiful wife, Katie. This type of account is known in the trade as a "Totten trust" and "is a tentative trust merely, revocable at will, until . . . the depositor dies before the beneficiary without revocation" leaving "the balance on hand at the death of the depositor" to the beneficiary. *In re Totten*, 179 NY 112, 125-26 (1904).

There are several reasons to set up a "Totten trust." One reason to use this type of trust is to effect the transfer of, and allow access to, the funds immediately upon the depositor's death, without having to resort to probate or other legal processes. Another reason is to permit the trust creator (depositor) to retain control over the account during his lifetime.

Brian perished in a tragic foosball-related accident occasioned by the unfortunate height of the table and the unorthodox rules by which his family plays. Brian's painful, albeit hilarious, demise resulted in an absolute vesting of the title to the Totten trust savings account in Katie.

Unfortunately for Katie, her sister-in-law, whose full name is also Kathleen, had already cleaned out Brian's account and refused to give the money to Katie (instead offering her a thin turkey sandwich).

The bank, in turn, refused to speak to Katie claiming that its contract was with the depositor and, therefore, its only duty was to its depositor. Naturally, Katie demanded the bank pay her the amount that had been in Brian's savings account. Katie's reaction to her sister-in-law will have to be the subject of a different essay (and probably a different journal).

There is hope for Katie. Normally, only a party to a contract may sue to recover for its breach. However, the law occasionally permits the intended third party beneficiary of a contract to sue for its breach.

"A third party may recover as a third-party beneficiary by establishing '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [the third party's] benefit and (3) that the benefit to [the third party] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the third party] if the benefit is lost. A beneficiary will be considered an intended beneficiary, rather than merely an incidental beneficiary, when the circumstances indicate that the promisee intends to give the beneficiary the benefit of the

promised performance,'" *DeLine v. CitiCapital Commercial Corp.*, 24 AD3d 1309, 1311 (Fourth Dep't 2005) (citations omitted).

"Thus, whether the bank acted negligently or deliberately, there was a breach of contract with the depositor, and the [intended third party beneficiary] may recover for the loss of the benefit [the depositor] sought to bestow upon [such third party beneficiary]," *Long Island Sav. Bank v. Savage*, 145 Misc2d 731, 735 (Sup. Ct. 1988).

Katie can recover from the bank.

"It is well settled that a third-party beneficiary may recover upon establishing the existence of a valid and binding contract between the other parties which was intended for his or her benefit," *Id.*; *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314, 336 (1983) (Third party may be the beneficiary of a contract if "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.").

Conversely, when the benefit to a third party is incidental rather than intended, no recovery will be permitted, see *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 NY2d 38 (1985). The Court of Appeals has explained the difference between incidental and intended third party beneficiaries.

"An incidental beneficiary is one who is not an intended beneficiary (Restatement [Second] of Contracts § 302 [2]). Essential to status as an intended beneficiary under subdivision 1 of that section is either that 'performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary' or that 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.' Among the circumstances to be considered is whether manifestation of the intention of the promisor and promisee is 'sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable,'" *Id.* at 44 (footnote omitted).

In the case of a Totten trust, the law seeks to protect the intended beneficiaries who by definition cannot have any interest in the contract between the bank and the depositor until the triggering event of the depositor's death. Of course, in other contractual relationships and where possible, the prudent practitioner will expressly name as a party and/or signatory those who hope to rely on a contract.

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