SB
515

SB515

GREATER FAIRBANKS BOARD OF REALTORS
711 Gaffney Road
Fairbanks, Alaska 99701
(907) 452-7743

March 20, 1990

Representative Dave Donley
District 11A
P. O. Box V
Juneau, Alaska 99811

Dear Representative Donley:

I am enclosing a copy of the Greater Fairbanks Board of REALTORS' resolution regarding Senate Bill 515, relating to interest-bearing trust accounts. Our membership of 125 REALTORS believes these trust accounts should continue under the management of the trustor in accordance with existing regulations and that the type of account should remain a choice between the trustor and trustee.

The Occupational Licensing Regulations and the Real Estate Commission Regulations as outlined under 12 AAC 02 and 12 AAC 64 seem to best serve the interests of the real estate industry and the public. We rely on your support to defeat Senate Bill 515.

Please contact me if you need further information or assistance in this matter.

Sincerely,

David B. Somers
President

DBS/nf

Enclosure

RESOLUTION OPPOSING SENATE BILL 515, RELATING TO INTEREST-BEARING TRUST ACCOUNTS

WHEREAS, it is the purpose of the Greater Fairbanks Board of REALTORS to foster and promote the real estate industry in the Fairbanks area, and

WHEREAS, the Greater Fairbanks Board of REALTORS membership includes 125 individuals who are also members of the Alaska Association of REALTORS, and

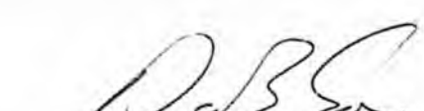
WHEREAS, all members of our organization use and are responsible for trust accounts which are subject to present Occupational Licensing Regulations and Real Estate Commission Regulations as outlined under 12 AAC 02 and 12 AAC 64, and

WHEREAS, current Regulations allow interest to be paid on trust accounts subject to disclosure to all parties including the trustor, and do allow that interest to go to the trustor,

NOW THEREFORE, BE IT RESOLVED by the Greater Fairbanks Board of REALTORS to encourage the Alaska State Legislature to continue to allow management of trust accounts pursuant to existing regulations and maintaining the freedom of choice by both the trustee and trustor on accounts as to whether such accounts would be interest-bearing, and, if so, how the trustor would choose to assign or donate interest earned.

PASSED and approved this 19th day of March, 1990.

GREATER FAIRBANKS BOARD OF REALTORS

By: 

David B. Somers, President

REALTOR®

ALASKA ASSOCIATION OF REALTORS, INC®
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-563-7133

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FYI

March 16, 1990

Dave Donley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811

Dear Representative Donley:

The Alaska Association of Realtors® is very interested in SB 515 introduced last week. The bill addresses interest on real estate trust accounts.

AAR respectfully requests the Alaska Legislature to delay action on SB 515 due to its ramifications for real estate brokers. We feel this proposed legislation should have thorough analysis for its cost and impact. AAR will study this bill prior to the next legislative session and make known the Realtors®' recommendations.

Sincerely,

Jim McCourt

Jim McCourt
President

Matt

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M February 28, 1990

SUBJECT: Real estate broker trust fund interest bill (Work Order No. 6-2296)

TO: Senator Jay Kerttula
Attn: Matt Fishel

intended for Budget & Audit Comm

FROM: John B. Gaguine JBG
Legislative Counsel

Enclosed you will find a bill requiring real estate brokers (who under AS 08.88.331 handle all funds in a real estate transaction) to set up interest-bearing accounts for certain funds that the broker is holding on behalf of a seller, requiring the banks administering the accounts to transmit the interest to the state, and requiring the commissioner of administration to account for the funds so derived so that the legislature can appropriate them to the Older Alaskans Commission for grants to older Alaskans service programs under AS 47.65. I did not specify capital programs, because the Older Alaskans Commission does not have the authority to make capital grants. I also made the funds subject to appropriation by the legislature, in order to avoid dedicated funds problems under Article IX, Section 7 of the Alaska constitution.

I took the language of the statute from the Code of Professional Responsibility of the Alaska Bar Association; the IOLTA (Interest on Lawyers' Trust Accounts) program, which a majority of states have adopted, and which funnels trust fund interest to pro bono programs, is found in Disciplinary Rule 9-102(C). However, I did not include the part of DR 9-102 that allows lawyers (or here brokers) to opt out of the program. At least one other state has made its IOLTA program mandatory, with no opt-out option.

There may be a constitutional challenge to this bill, if it is passed, on the grounds that the state is taking property

(interest earned on the seller's funds) without compensation. However, courts have unanimously rejected such challenges to IOLTA programs. I am enclosing a copy of a recent federal court decision rejecting such a challenge. As long as the program is limited to small amounts or very short-term deposits, as the bill provides, it should be safe. I talked with Ron Johnson, and he assured me that most of the deposits he makes into his trust fund would fall into the short-term category.

If I may be of further assistance, please advise.

JBG:pl
WKP2/102

Enclosures

[10] The defendant further argues that Speed did not testify merely as a summary witness but qualified as an expert accountant. Since Fed.R.Evid. 703 [6] allows an expert to testify based on facts otherwise inadmissible in evidence, Scrima maintains that the trial court erred in refusing to allow Speed to refer to the hearsay statement of Charles Clayton as a basis for his opinion. Rule 703, however, is not an open door to all inadmissible evidence disguised as expert opinion. Although experts are sometimes allowed to refer to hearsay evidence as a basis for their testimony, such hearsay must be the type of evidence reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. *United States v. Cox*, 696 F.2d 1294 (11th Cir.), *cert. denied*, 464 U.S. 827, 104 S.Ct. 99, 78 L.Ed.2d 104 (1983). Scrima made no showing that qualified accountants customarily rely on statements to casual business acquaintances when calculating net worth.

[11] The district court afforded Speed wide latitude to criticize the net worth theory and to point out what he perceived to be inconsistencies in the government's case against the defendant. The expert's testimony was precluded only where he sought to rely on Clayton's stricken testimony or on his conclusions about the veracity of the government's witnesses to support his opinion. Since assessing the credibility of witnesses is exclusively within the province of the jury, opinion testimony was properly excluded. *Steinberg v. Indemnity Ins. Co. of North America*, 364 F.2d 266 (5th Cir. 1966); *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir.1985) (expert testimony properly excluded where expert could offer nothing beyond understanding and experience of average citizen). Due to the limited probative value of Speed's testimony, we find no error in the parameters placed upon his testimony by the trial court and no resulting prejudice to the defendant. *See Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 789 (11th Cir.1983); *Cunningham v. Rendevous, Inc.*, 699 F.2d 676, 678 (4th Cir.1983).

The defendant's convictions are

AFFIRMED.

Jean Ann CONE, as Personal Representative of the Estate of Evelyn M. Glaeser, deceased, and as representative of a class of all persons similarly situated, Plaintiff-Appellant,

v.

The STATE BAR OF FLORIDA, the Florida Bar Foundation, Inc., and Holland & Knight, Defendants-Appellees.

No. 85–3993.

United States Court of Appeals, Eleventh Circuit.

June 19, 1987.

Class action was brought to challenge constitutionality of Florida Bar's interest on trust accounts program, through which funds held in lawyers' trust accounts are placed in interest bearing accounts to produce income for legal aid programs and other public purposes, and parties filed cross motions for summary judgment. The United States District Court for the Middle District of Florida, No. 84–1345 Civ–T–13, Seybourn H. Lynne, J., upheld IOTA program and determined that client was not entitled to interest on account, and client appealed. The Court of Appeals, Hill, Circuit Judge, held that: (1) in order to demonstrate constitutionally cognizable property

6. Fed.R.Evid. 703 provides:

Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

interest, client must demonstrate that she had specific and legitimate claims of entitlement to the $2.25 generated on the $13.75 held for her in attorney's IOTA, and (2) client did not have claim of entitlement to interest due to economics of running interest producing demand account and restrictions that federal banking law places upon interest producing demand accounts.

Affirmed.

1. Constitutional Law ⇐277(1)

In order to demonstrate that she had constitutionally cognizable due process property interest to the $2.25 generated on the $13.75 held for her in attorney's IOTA, client must identify substantive law or mutually explicit understandings which gave her legitimate claim of entitlement to interest earned on attorney's IOTA. U.S.C.A. Const.Amends. 5, 14.

2. Attorney and Client ⇐120

Where funds are held for specific client, and expected holding period makes it obvious that money could earn interest that would exceed lawyer's administrative costs and bank charges, lawyers should consult client about depositing funds in such a way as to generate interest; attorney is normally required to place trust funds in interest bearing account if client so requests.

3. Attorney and Client ⇐120

Client did not have property interest in $2.25 interest which was generated on $13.75 deposit held for her in attorney's IOTA, and thus, was not entitled to recover such interest from attorney, where deposit of client's funds alone would not have produced sufficient income to offset administrative charges, federal banking laws would not permit client's nominal deposit to be placed in pooled NOW account maintained in firm's name nor could deposit be placed in pool's NOW account maintained by firm as trustee for clients, in that account would be partially composed of deposits of corporate clients in violation of federal banking laws. 12 U.S.C.A. § 1832(a)(1).

Herbert P. Schlanger, Atlanta, Ga., for plaintiff-appellant.

Thomas C. MacDonald, Jr., Craig B. Glidden, Shackleford, Farrior, Stallings & Evans, Tampa, Fla., for The Florida Bar Foundation, Inc.

F. Wallace Pope, Jr., Clearwater, Fla., for Holland & Knight.

Michael Nachwalter, Brian F. Spector, William J. Blechman, Miami, Fla., and Paul F. Hill, Gen. Counsel, Tallahassee, Fla., for The Florida Bar.

Randall C. Berg, Jr., Peter M. Siegel, National IOLTA Clearinghouse, Florida Justice Institute, Inc., Miami, Fla., L. David Shear, National IOLTA Clearinghouse, Tampa, Fla., for amicus curiae Florida Legal Services, Inc., et al.

Arthur J. England, Jr., National IOLTA Clearinghouse, Miami, Fla., for amicus curiae National IOLTA Clearinghouse, et al.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL and JOHNSON, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

HILL, Circuit Judge:

This case challenges the constitutionality of the Florida Bar's Interest On Trust Accounts (IOTA) program, through which certain funds held in lawyers' trust accounts are placed in interest bearing accounts to produce income for legal aid programs and other public purposes. The parties filed cross-motions for summary judgment, supported by stipulated facts.

In February, 1969, Ms. Evelyn Glaeser retained the law firm of Holland & Knight to probate the estate of her deceased husband. Ms. Glaeser paid a cost deposit of $100 to Holland & Knight, which was placed in a noninterest-bearing trust ac-

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

count. When the firm's representation of Ms. Glaeser concluded in 1970, $13.75 of the original cost deposit remained in the trust account. Holland & Knight inadvertently failed to refund this amount to Ms. Glaeser, and it remained in the firm's non-interest-bearing account until December 1, 1981.

During this period, the Supreme Court of Florida approved the IOTA program. The IOTA plan authorized, but did not require, lawyers and law firms to place nominal or short term funds into pooled interest-bearing accounts, the interest proceeds of which to be remitted by the financial institution directly to the Florida Bar Foundation. The Foundation would then allot the funds to legal aid organizations, law student scholarships, and other charitable purposes. Only deposits which could otherwise not earn interest net of expenses (because they were nominal in amount or were to be held for a short period of time) could be used to generate interest under the IOTA program.

On December 1, 1981, Holland & Knight transferred all of its nominal or short term trust account funds, including Ms. Glaeser's $13.75, to an interest bearing IOTA account, where Ms. Glaeser's deposit remained for almost three years. After discovering its error, Holland and Knight returned the principal amount to Ms. Glaeser by check on September 26, 1984. During the time that the money was in the interest-bearing account it generated $2.25 of interest, which was given, pursuant to the IOTA, to the Florida Bar Foundation.

Ms. Glaeser, claiming to represent all persons similarly situated, sued Holland & Knight, the Florida Bar, and the Florida Bar Foundation, to recoup this interest. She claimed that the appropriation of the interest earned on her money constituted an uncompensated taking of private property in violation of the Fifth Amendment (as applied to the states via the Fourteenth Amendment), and deprivation of her property without due process, as well as a breach of fiduciary duty under state law. Her[1] argument was simple: any interest earned on her portion of the Holland & Knight IOTA account belonged to her.

The district court correctly perceived that the appellant's constitutional claims turned on one question, that being, whether the interest earned on nominal or short term funds held in an IOTA account was the property of the client for the purposes of the Fifth and Fourteenth Amendments. Appellant relied on the traditional property doctrine that interest follows principal. However, as the district court noted, "when Justice Johnson observed in *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319, 3 L.Ed. 111 (1809), that 'interest goes with the principle, as the fruit with the tree,' his illustration necessarily assumed the existence of a fruit-bearing tree." The district court found that in the absence of the IOTA program, Ms. Glaeser's money would not have borne any fruit, for her benefit or for anyone else's. Due to the regulations governing interest-bearing accounts, and the economic realities of attempting to produce income with such nominal or short-term deposits, the court determined that appellant's individual deposit could not have earned any interest net of expenses without the IOTA. Thus, it could not be said that she had a legitimate claim of entitlement to the interest which she claimed was taken from her without due process or just compensation. The court therefore dismissed her case, and we now affirm.[2]

[1] To demonstrate a constitutionally cognizable property interest appellant must show that she has a specific and legitimate "claim of entitlement" to the $2.25 generated on the $13.75 held for her in Holland & Knight's IOTA account. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). A legitimate claim of entitlement can be based on positive rules of substantive law or mutually explicit understandings. *Perry v. Sinder-*

1. Ms. Glaeser passed away during the pendency of this suit and was replaced by Jean Ann Cone, the personal representative of her estate.

2. After dismissing the federal claims the district court declined to exercise pendent jurisdiction over the state claims. This decision is not challenged on appeal.

man, 408 U.S. 593, 601–02, 92 S.Ct. 2694, 2699–2700, 33 L.Ed.2d 570 (1972). These principles are designed to protect the claimant's reasonable, often investment-backed expectations, rather than inchoate unilateral expectations. *Penn Central Transportation Co. v. The City of New York*, 438 U.S. 104, 124–25, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). Thus, appellant must identify substantive law or mutually explicit understandings which give her a legitimate claim of entitlement to a share of the interest earned on Holland & Knight's IOTA account. The district court determined that appellant could not satisfy this requirement because of three factors: (1) ethical requirements placed upon the legal profession in dealing with any kind of trust account; (2) the economics of running an interest-producing demand account; and (3) the restrictions that federal banking law places upon interest-producing demand accounts. An examination of the history behind the IOTA account program supports this conclusion.

[2] Frequently, attorneys and law firms have the need to hold client funds, including advances for costs and expenses. The Florida Bar Code of Professional Responsibility, like the rules governing the conduct of attorneys in most states, requires that such funds be kept separate from the attorneys' own monies. Moreover, attorneys and law firms must often use available-on-demand accounts to facilitate the prompt delivery of such trust funds to the client upon request. Integration rule of Florida Bar, Rule 11.02(4); Dr. 9–102(B)(4), Fla.Bar Code of Prof.Resp. Historically, this meant that attorneys had to use noninterest-bearing accounts for such client deposits because federal law forbade the payment of interest on available-on-demand accounts in most states. *See* Banking Act of 1933, Ch. 89, § 11(b), Pub.L. No. 66, 48 Stat. 181 (1933). For these reasons, client trust deposits were normally pooled and maintained in a single noninterest-bearing demand account, separate from the attorney's own funds. *See* ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 348, 68 ABA Journal 1502 (1982).[3]

Before the initiation of the IOTA, the only beneficiaries of the old regime were the banks, who were treated to "free" use of trust account deposits. The IOTA plan was designed to put these dormant funds to good use. Because of the various restrictions described above, the original plan for Florida's IOTA program provided that client trust funds could be deposited into a pooled savings account. This would earn interest for the Florida Bar Foundation. Funds could be immediately transferred (at the client's request) to a noninterest-bearing checking account, to facilitate the quick return of such funds to the client. *In re Interest on Trust Accounts*, 356 So.2d 799, 804 (Fla.1978). While still somewhat cumbersome, this scheme would have allowed some interest to be earned on the funds. However, this version of the program was never implemented; instead, the IOTA program was able to capitalize on the arrival of interest-bearing checking accounts, which vastly enhanced the program's feasibility.

Interest-bearing checking accounts were authorized by the Consumer Checking Account Equity Act, 12 U.S.C. § 1832(a)(1) (1982). The Act allows for interest to be paid on certain types of available-on-demand accounts, specifically, Negotiable Order of Withdrawal accounts, commonly known as "NOW" accounts. However, the statute restricts the use of NOW accounts; only funds owned by individuals, certain charitable non-profit organizations, or public entities are allowed to receive interest on their checking accounts.[4] *See* 12 U.S.C.

3. Where funds are held for a specific client, and the expected holding period makes it obvious that the money could earn interest that would exceed the lawyer's administrative costs and the bank charges, the lawyer should consult the client about depositing the funds in such a way as to generate interest. *See* ABA Formal Op. 348, 688 ABA Journal 1503 (1982). An attorney is normally required to place trust funds in an interest bearing account if the client so requests. *Id.*

4. The Florida IOTA program was able to utilize NOW accounts as early as 1981 via a special ruling from the Federal Reserve Board. 68 A.B.A.J. 1504 at n. 7.

§ 1832(a)(2) (1982); 12 C.F.R. §§ 217.157, 329.103, 526.1(1) (1986) (discussing eligible depositors for NOW accounts).

The IOTA program, as implemented, circumvents these restrictions. Making an eligible nonprofit charitable organization (the Foundation) the sole recipient of the interest produced by the trust funds enables the IOTA to use NOW accounts without violating 12 C.F.R. § 217.157. Making one entity the recipient of the fund also enables interest to aggregate such that it exceeds bank charges, because the bank does not need to sub-account the fund. The money produced by the IOTA may thus be used to provide legal services for the poor, and other charitable pursuits. At last count, 41 states and the District of Columbia had adopted IOTA programs.[5]

[3] In this case, the district court found that appellant's nominal deposit could not have been placed in a separate NOW account because $13.75 fell short of the minimum balance requirements for such an account. Even assuming that the money could be deposited in an interest bearing account, the administrative costs incurred by Holland & Knight, along with the bank service charges, would have devoured the estimated $.06 per month in gross interest produced by appellant's $13.75 deposit. The district court concluded that as an individual account maintained by Holland & Knight for the benefit of Ms. Glaeser, appellant could not have realized any interest net of expenses on her $13.75 deposit.

Moreover, the federal banking laws discussed above mean that appellant's nominal deposit could not be placed in a pooled NOW account maintained in Holland & Knight's name, because partnerships cannot maintain NOW accounts under federal banking regulations. 12 C.F.R. § 217.157. Nor could appellant's nominal deposit be placed in a pooled NOW account maintained by Holland & Knight as trustee for its clients, because the account would be partially composed of deposits of corporate clients in violation of federal banking laws. *Id.* Even assuming that Holland & Knight could maintain separate trust accounts for their corporate clients and their private, individual clients, the total cost of subaccounting would exceed the interest earned on the aggregate fund.[6] The district court concluded, and we agree, that:

> The end result of these economic and practical impediments to individual investment of IOTA funds is to negate any reasonable unilateral expectation, much less a mutually explicit understanding, that a client such as Mr. Glaeser should receive interest generated by the IOTA program.

The sole authority cited by appellant in support of her contention that she has a substantive right to IOTA proceeds is *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). In *Webb's*, the Supreme Court struck down a Florida law

5. *See* National IOLTA Clearinghouse, 3 IOLTA Update (Spring 1986). The Supreme Courts of at least 30 of these states have agreed with the Florida Supreme Court that no property is taken via the establishment of an IOTA program because such programs create income which would never, under any set of circumstances, accrue to the benefit of the client. *See e.g., Matter of Interest on Trust Accounts*, 402 So.2d 389, 395 (Fla.1981); *Petition of Minnesota State Bar Association*, 332 N.W.2d 151 (Minn.1982); *Petition of New Hampshire Bar Association*, 122 N.H. 971, 453 A.2d 1258 (1982); *Matter of Interest on Lawyers Trust Accounts*, 672 P.2d 406 (Utah 1983); *In the Matter of Interest On Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984), *reversing*, 279 Ark. 84, 648 S.W.2d 480 (1983); *Petition of Massachusetts Bar Assoc.*, 395 Mass. 1, 478 N.E.2d 715 (1985); *Carroll v. State Bar of California*, 166 Cal.App.3d 1193, 213 Cal.Rptr. 305 (4 Dist.1984), *cert. denied sub nom. Chapman v. State Bar of California*, — U.S. —, 106 S.Ct. 142, 88 L.Ed.2d 118 (1985).

6. The affidavit of Holland & Knight's comptroller, John F. Dwiggins, attached to Holland & Knight's motion for summary judgment, indicated that the cost of subaccounting a pooled fund would have far exceeded the interest earned by appellant. This was supported by the affidavit of Herbert C.M. Hoover, Senior Vice President of the NCNB National Bank of Florida, who indicated that the charge for subaccounting was $2.00 per month for each subaccount in a pooled account, plus $.25 per transaction. This fee would be 30 times larger than the gross interest per month produced on appellant's nominal deposit of $13.75. Appellant did not offer any contradictory evidence on this point.

which declared interest accrued on interpleader funds deposited with the registry of a county court to be the property of the court clerk. The Supreme Court found that the Florida statute allowed the county to, "exact two tolls," because under the statute the county was allowed to charge a processing fee, and, additionally, keep all the interest accruing from money deposited with the court. Florida Stat. § 676.106(4) (1977).

The Supreme Court did base its decision in *Webb's* upon the "usual and general rule [that] any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." 449 U.S. at 162, 101 S.Ct. at 451. The court noted that a recharacterization of this interest as public money was not a sufficient justification for the taking. While the court "express[ed] no view as to the constitutionality of a statute that prescrib[ed] a county's retention of interest earned, where the interest would be the only return to the county for the service it renders" in setting up the interpleader fund, it found that the double toll imposed by the Florida statute was an unconstitutional taking.

Despite the superficial similarity, the *Webb's* decision is distinguishable from this case in that the interest earned on the interpleader funds deposited pursuant to the Florida statute did give rise to a legitimate claim of entitlement. The funds were sufficient in amount, and held for a sufficient period of time, to generate $90,000 in interest over a year and a half. *Id.*, 449 U.S. at 158, 101 S.Ct. at 449. The district court in this case correctly concluded that, "the crucial distinction is not the amount of interest earned, but that the circumstances led to a legitimate expectation of interest exclusive of administrative costs and expenses." The district court pointed out that the Supreme Court in *Webb's* found that the challenged statute had "the practical effect of appropriating for the county the value of the use of the fund for the period in which it [was] held in the registry." *Id.*, 449 U.S. at 164, 101 S.Ct. at 452. Here, the district court concluded as a matter of law that the use of Ms. Glaeser's money had no net value, therefore there could be no property interest for the state to appropriate. We agree.[7]

In affirming the district court, we emphasize that we are not establishing a de minimis standard for Fifth Amendment takings, or due process violations. We do not wish to imply that the state may constitutionally appropriate property so long as the property is very small property. Here, there was no taking of any property of the plaintiff.[8] Standing alone, her deposit in the IOTA account could not earn anything. By combining all such deposits, interest income has been created which was not within the legitimate expectations of the owner of any one of the principal amounts.[9]

7. Where an attorney wrongfully withholds money from a client, by law that client may or may not be entitled to interest on the wrongfully withheld funds. In such a situation the interest is in the nature of a penalty. Our affirmance of the district court is not intended to cover interest awarded in such a situation.

8. Appellant also argues that the existence of her property interest is proven by the fact that the IRS made clear it would treat IOTA income as income to the attorney's client if the client had a say in whether or how to invest the money. To avoid this result, the IOTA program was amended in 1981 to eliminate client control over the investment of the funds. We agree with the Florida Supreme Court that the IRS' opinion was based on traditional notions of assignment of income under revocable trust funds; its decision did not account for the unique circumstances of this case. *See In re Matter of Interest on Trust Accounts*, 402 So.2d 389 (Fla.1981). Moreover, the "assignment of income" doctrine is not designed to determine who is the legal owner of specific property; rather, the purpose of the doctrine is to assure that income is taxed to he who earns it. *See McLucas v. Earl*, 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731 (1930).

9. Appellant also argues that, as in *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), the fact that the government makes use of private property in a way that the owner could not use it does not mean that there is no taking. This argument misses the point. In *Causby*, the court found a "taking" in the government's use of air space above the claimant's land because this destroyed his ability to use his land as a chicken farm. It was undisputed that the chicken farmer in *Causby* had a *property interest*. The question was whether or not a "taking" occurred. The farmer was eco-

6-2296A
Gaguine
2/28/90

BY THE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE BUDGET AND AUDIT COMMITTEE

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to interest on trust accounts of real estate brokers."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 08.88.071(a)(3) is amended by adding a new subparagraph to read:

(I) if a real estate broker, fails to turn over to the Department of Revenue interest derived from an account established under AS 08.88.356;

* Sec. 2. AS 08.88 is amended by adding a new section to read:

Sec. 08.88.356. INTEREST EARNED ON CERTAIN TRUST FUND DEPOSITS. (a) A real estate broker licensed under this chapter shall establish and maintain an interest bearing insured depository account into which the broker shall deposit funds received by the broker on behalf of the seller of real estate when the funds either are nominal in amount or are expected to be held for a short period of time. A broker may not deposit into this account funds that reasonably may be expected to generate $100 or more in interest before they are paid to the seller.

(b) Earnings from this account may not be made available to the broker, and the broker does not have a right or claim to the earnings.

(c) A broker establishing an account under this section shall direct the depository institution to

(1) remit the earnings from the account, less service charges or fees computed according to the institution's standard accounting practices, to the Department of Revenue at least four times

a year; and

(2) transmit with each remittance of earnings a statement showing the name of the broker on whose account the remittance is sent and the rate of interest applied, with a copy of the statement to the broker.

(d) The broker shall review the records of the account established under this section at reasonable intervals to determine if changed circumstances require further action with respect to funds in the account.

(e) The commissioner of administration shall separately account for funds deposited into the general fund by the Department of Revenue under this section. The annual estimated balance in the account may be used by the legislature to make appropriations to the Older Alaskans Commission for grants under AS 47.65.

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6-2296A
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2/28/90

BY THE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE BUDGET AND AUDIT COMMITTEE

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to interest earned on trust accounts of real estate brokers and salesmen."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 08.88.071(a)(3) is amended by adding a new subparagraph to read:

(I) if a real estate broker, fails to turn over to the Department of Revenue interest derived from an account established under AS 08.88.356; does not happen (see)

* Sec. 2. AS 08.88 is amended by adding a new section to read:

Sec. 08.88.356. INTEREST EARNED ON CERTAIN TRUST FUND DEPOSITS. (a) A real estate broker licensed under this chapter shall establish and maintain an interest bearing insured depository account into which the broker shall deposit funds received by the broker on behalf of the sellers or buyers of real estate when the funds either are nominal in amount or are expected to be held for a short period of time. (A broker may not deposit into this account funds that reasonably may be expected to generate $100 or more in interest before they are paid to the seller.)

(b) Earnings from this account may not be made available to the broker, and the broker does not have a right or claim to the earnings.

(c) A broker establishing an account under this section shall direct the depository institution to

(1) remit the earnings from the account, less service charges or fees computed according to the institution's standard accounting practices, to the Department of Revenue at least four times

a year; and

(2) transmit with each remittance of earnings a statement showing the name of the broker on whose account the remittance is sent and the rate of interest applied, with a copy of the statement to the broker. OK

(d) The broker shall review the records of the account established under this section at reasonable intervals to determine if changed circumstances require further action with respect to funds in the account.

(e) The commissioner of administration shall separately account for funds deposited into the general fund by the Department of Revenue under this section. The annual estimated balance in the account (may SHALL) be used by the legislature to make appropriations to the Older Alaskans Commission for grants under AS 47.65.