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TRUSTS-ILLUSORY TRANSFER-RIGHTS OF SURVIVING SPOUSE

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TRUSTS—ILLUSORY TRANSFER—RIGHTS OF SURVIVING SPOUSE—In 1939 Henry Halpern drafted a will naming his wife executrix and sole beneficiary of his estate. In 1946, about the time he and his wife separated, Halpern opened four savings accounts in his own name in trust for his infant granddaughter.[1] While Halpern made subsequent deposits in two of them, he made no withdrawals; nor did he in any other manner revoke the trusts. Although evidence did not establish them as irrevocable trusts, it did show that Halpern on occasion indicated he meant the bank books to go to his granddaughter. Subsequently his wife, as executrix, instituted proceedings to have the purported trust accounts set aside and the funds brought into the estate.[2] The surrogate found that the trusts infringed the widow's rights under the Decedent Estate Law,[3] and they were set aside in entirety. The appellate division,[4] modifying, ruled that since the trusts were illusory only in so far as they deprived the widow of her statutory share, they should be sustained except for that amount.

[1] Savings bank trusts. See Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904); 1 SCOTT, TRUSTS §§58-58.6 (1939).

[2] 197 Misc. 502, 96 N.Y.S. (2d) 596 (1950).

[3] 13 N.Y. Consol. Laws (McKinney, 1949) Decedent Estate Law §§18, 83. Section 18 provides for election against a will by the surviving spouse; section 83 provides for the distribution of intestate estates. The right to elect against the will is conditional under the Decedent Estate Act. In the present case, it would seem that the widow had no right of election. Since the court upheld the trust, however, it was not required to determine whether the widow might invoke section 18 in order to set aside the trust, despite the fact she had no right of election.

[4] 277 App. Div. 525, 100 N.Y.S. (2d) 894 (1950). Noted in 20 FORDHAM L. REV. 105 (1951); 64 HARV. L. REV. 1367 (1951).

On appeal, *held,* reversed. A savings bank trust, otherwise valid, is not illusory as to the surviving spouse. The court of appeals also found that the appellate division had erred in decreeing the trusts in part illusory and in part good.[5] *In re Halpern's Estate,* 303 N.Y. 33, 100 N.E. (2d) 120.

A wife has no interest in her husband's personal property during his lifetime, and he may dispose of a part or all of it absolutely, without her consent.[6] However, a widow is generally entitled by statute to a share of the personal estate remaining at his death. Such statutes usually place it beyond the power of the husband to deprive his widow of the share by will if she elects to disregard the will.[7] Various devices have been conceived, consequently, whereby a husband seeks to enjoy his property during his life, while at the same time depriving his widow of any share of the final estate.[8] This has frequently forced the courts to determine whether these arrangements are also ineffectual

[5] Strictly, the point was not in issue, since no appeal had been taken in behalf of the beneficiary of the trusts. There had been some confusion in the New York courts as to what extent an illusory trust should be set aside. It appears that generally the entire fund was returned to the estate. Clavin v. Clavin, 41 N.Y.S. (2d) 377 (1943), affd 267 App. Div. 760 (1943). The appellate division here ruled that since the trusts were otherwise valid, only the widow's statutory share should be deducted. See Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S. (2d) 375 (1939), modified on other grounds, 260 App. Div. 174, 954, 21 N.Y.S. (2d) 232 (1940), where a similar result is reached under an interesting theory. On appeal the court of appeals took the opportunity to make it clear that under the Decedent Estate Act, as they construed it, a trust could not be in part illusory and in part good; there must be total validity or invalidity. At least one other state, however, has indicated it will permit a trust to be set aside in part. Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. (2d) 381 (1944); Harris v. Harris, 147 Ohio St. 437, 72 N.E. (2d) 378 (1947). There are also isolated cases in which gifts inter vivos and gifts causa mortis have been sustained except for the portion due the widow. Ibey v. Ibey, 93 N.H. 434, 43 A. (2d) 157 (1945); Baker v. Smith, 66 N.H. 422, 23 A. 82 (1890). The ruling in the instant case seems to be based on the idea that the property should not be treated as part of the estate unless it is made part of the estate. Since the application of the Decedent Estate Act is contingent upon the trust being brought into the estate, the full interest of the widow cannot be protected unless the funds involved are made part of the husband's estate for the purpose of computing the share. The answer made is that there is nothing in the statute to indicate that an otherwise valid trust must be set aside in entirety; and in a situation where a trust, generally lawful, has been challenged solely because a reserved control renders it illusory as against the surviving spouse, it would seem only equitable to maintain the intended beneficiary's interest while providing protection for the widow to the extent her statutory rights are prejudiced thereby. Such a trust is not void under the act; rather it is voidable only to the extent the protected interest has been injured. It is submitted that this result would be consonant with the purpose of the decedent estate laws, which were designed solely as a safeguard for the surviving spouse and not meant to thwart an otherwise effective transfer of property. Returning the property to the estate will often have the effect of directing the property to others than those it was intended for. Nevertheless, it must be conceded that those courts which set the property aside in entirety seem to be in substantial majority. Mushaw v. Mushaw, 183 Md. 511, 39 A. (2d) 465 (1944); Cochran's Administratrix v. Cochran, 273 Ky. 1, 115 S.W. (2d) 376 (1938).

[6] Potter Title and Trust Co. v. Braum, 294 Pa. 482, 144 A. 401 (1928).

[7] Decedent Estate Law, supra note 3.

[8] These devices take several forms. They may be gifts inter vivos, causa mortis, or transfers in trust. The scope of this note is limited to transfers in trust.

under the distribution laws.[9] In some jurisdictions the courts have set aside a conveyance if the grantor intended thereby to deny his widow any interest in his property, while still others spoke in terms of colorable transfers or actual fraud.[10] Rejecting the idea that an effective transfer made with intent to defeat a widow's rights rendered a trust invalid, the New York court in *Newman v. Dore*[11] adopted as its criterion the test of "whether the husband had in good faith divested himself of ownership of his property or [had] made an illusory transfer." Under the application of the rule, if the supposed grantor has an effective control over the property, the purported transfer being a mere mask, courts have generally treated the property as part of the estate. However, a spouse has not been required to dispose of his entire interest in the trust to avoid its being rendered illusory. Although the courts have declined to formulate a general test of how far the trustor must divest himself of interest to render the trust effective, they have sustained trusts generally, where a life interest has been retained, and, on occasion, where a power to revoke or amend has been reserved.[12] Prior to the present case, the courts have been unwilling to recognize any greater reservation of control than this. Savings bank trusts are, by their very nature, revocable at will and subject to the right of the depositor to deal with the fund as he chooses.[13] Due to this extraordinary control reserved in the depositor, it had been thought the New York court would not sustain a savings bank trust against a widow's rights in her spouse's estate.[14] However, in the instant case the court upheld such a trust. The earlier decision was distinguished on the grounds that the trust there lacked reality and was never intended to have any real effect, but that in the present case there was no evidence to show that these transfers were meant merely as a mask "'. . . for the effective retention by the settlor of the property, which in form he had conveyed.'"[15] Here, apparently, the court sought to determine whether in reality

[9] Cases are annotated in 157 A.L.R. 1184 (1945), 112 A.L.R. 649 (1938), 64 A.L.R. 466 (1929).

[10] The various tests are commented on in 44 MICH. L. REV. 151 (1945).

[11] 275 N.Y. 371, 9 N.E. (2d) 966 (1937).

[12] TRUSTS RESTATEMENT §57(1)C (1935); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E. (2d) 299 (1945), where a trust which renounced all interests except life estate and power to revoke and amend was upheld; Marine Midland Trust Co. of Binghamton v. Margaret Edith Stanford, 256 App. Div. 26, 9 N.Y.S. (2d) 648 (1939), affd. 281 N.Y. 760, 24 N.E. (2d) 20 (1939). But see: Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944), trust reserving income for life and power of revocation held illusory; Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. (2d) 381 (1944); Schnakenberg v. Schnakenburg, 262 App. Div. 234, 28 N.Y.S. (2d) 841 (1941).

[13] Note 1 supra.

[14] Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941); see also Mushaw v. Mushaw, supra note 5.

[15] Principal case at page 122.

the settlor intended the trust to have effect.[16] There seemed to be no particular concern over whether there had been a substantial divesting of ownership. The court's language indicates a willingness to place greater emphasis on the intent and motives of the trustor in determining the validity of such a trust. If so, the meaning of the word "illusory" has undergone a transformation. Perhaps the court was merely taking judicial notice of the exceptional nature of the savings bank trust and recognizing a degree of control greater than it had heretofore recognized in inter vivos trusts. The court clearly did not purport to overrule *Newman v. Dore*. Yet the instant case is, in a sense, contrary to the spirit of the earlier decision. Under the present ruling an individual may reduce his fortune to cash, place it in a savings trust over which he may retain an effective control, and deny his widow any portion of his estate on his death. Actually, it is extremely doubtful whether the decision opens an avenue whereby it is possible to avoid the Decedent Estate Act, since the court indicates it will closely scrutinize the motives of the depositor in establishing a savings bank trust.

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[16] In Marine Midland Trust Co. of Binghampton v. Margaret Edith Stanford, supra note 12, the court stated the rule similarly: "The determining factor as to the validity of the trust is the intent with which the settlor transferred his property to the trustee. If illusory, there is no transfer; if made with intent to transfer actual title it is effective."