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INTER VIVOS TRANSFERS IN VIOLATION OF THE RIGHTS OF SURVIVING SPOUSES

By MELVIN J. SYKES*

I. THE PROBLEM

The Maryland Code provides that surviving spouses may not be deprived by will of a minimum share of the "estate" of the decedent.¹ The Code provisions are the culmination of a long struggle of conflicting tendencies.² In Glanville's time, in the twelfth century, one-third of a husband's personal estate was the "wife's part" and one-third the "children's part", the husband's power of testation being limited to the remaining one-third when there were wife and children. The wife's rights were enforced by the writ *de rationabili parte bonorum*, which gradually fell

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¹ In general, Md. Code (1939) Art. 93, Secs. 313-330, and "... If the election be of dower in lands and the legal share of the personal estate, the said surviving husband or widow shall take dower in lands and one-third of the surplus personal estate (if the deceased spouse shall be survived by descendants) and dower in lands and one-half of the surplus personal estate (if the deceased spouse shall not be survived by descendants) and no more. If the election be of the legal share of both real and personal estate, the surviving husband or wife shall take one-third of the lands as an heir and one-third of the surplus personal estate (if the deceased spouse shall be survived by descendants) and one-half the lands as heir and one-half the surplus personal estate (if the deceased spouse shall not be survived by descendants but shall be survived by a father or mother); and Two Thousand Dollars, or its equivalent in property or any interest therein, at its appraised value, and one-half of the residue of the lands as an heir and one-half of the surplus personal estate remaining (if the deceased spouse shall not be survived by descendants or a father or mother) and no more," Md. Code Supp. (1947) Art. 93, Sec. 314.

Statutes frequently provide for one-third as the minimum share. See 1 PAGE ON WILLS (1941) 412.

² See Cahn, *Restraints on Disinheritance* (1936), 85 U. of Pa. L. Rev. 139. Election statutes now exist in almost every jurisdiction. See Comment, *The Present Status of "Illusory" Trusts — The Doctrine of Newman v. Dore Brought Down to Date* (1945), 44 Mich. L. Rev. 151; Notes, 64 A. L. R. 466 (1930), 112 A. L. R. 649 (1938).

into disuse and was completely abolished in 1837, when English law allowed a husband to bequeath all his personalty as he wished.³

About the first quarter of the nineteenth century, States began to pass election statutes to supplement dower rights, returning to the policy behind the ancient writ,⁴ since dower as an instrument of protection for the wife was becoming substantially "an illusion and deception".⁵ These statutes secure an economic interest in the marriage relation,⁶ often protecting husband as well as wife.⁷ They also tend to promote the social interest in the stability of the family, and widows especially appeal to the social interest in the protection of the economically dependent. On the other hand, some widows are in fact not economically dependent; the young second wife who claims her husband's fortune as against his grown children after only a few years of marriage arouses but little sympathy; and common law tradition has regarded with suspicion attempts to limit the *jus disponendi* of private property.⁸

The election statutes have not solved the problem they were designed to meet. Instead, the question of the extent to which the law should protect a surviving spouse against

³ 7 Wm. IV and 1 Vict. c. 26 (1837); PAGE, *supra*, n. 1, 408. An interesting and detailed summary of the protection of widows against disinheritation may be found in Cahn, *supra*, n. 2.

⁴ The New York statute, which is the most thorough modern legislation on the subject, was passed in 1929. On the New York statute generally, see BEECHLER, ELECTIONS AGAINST WILLS; SEC. 18, NEW YORK DECEDENT ESTATE LAW (1940). For early Maryland law concerning renunciation see Griffith v. Griffith, 4 H. & McH. 101 (Md. 1798); Coomes v. Clements, 4 H. & J. 480 (Md. 1819).

⁵ Report of Commission to Investigate Defects in the Laws of Estates (N. Y.) Leg. Doc. (1928) No. 70, 9; Leg. Doc. (1930) No. 69, 83. With personalty now the characteristic form of wealth and corporate ownership of realty common, it is true that in most estates of worldly men "dower in real estate does not exist". See O'Shea, *Surviving Spouses in New York* (1934), 8 St. John's L. Rev. 245.

⁶ In this respect they work toward the same social end as dower, curtesy, and husband's estate during coverture at common law, and the wife's right to maintenance and support today. The purpose of the election statutes was to correct the "glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death". Leg. Doc. (N. Y.) (1928) No. 70, 12; Leg. Doc. (1930) No. 69, 86. See also Pound, *Individual Interests in the Domestic Relations* (1916), 14 Mich. L. Rev. 177.

⁷ Md. Code (1939) Art. 93, Sec. 330; Harrison v. Prentice, 183 Md. 474, 38 A. 2d 101 (1944); Hayes v. Seavey, 69 N. H. 308, 46 A. 189 (1898).

⁸ Cf. Comment, *supra*, n. 2.

disinheritance is being fought out on a new battle ground, namely, the *inter vivos* transfer. The cases record numerous, often successful, attempts to accomplish by *inter vivos* transfer what the statutes forbid to be done by will. Insofar as these attempts are sanctioned by the law, the election statutes are merely a trap for the unsophisticated.⁹ Legislatures have not generally regulated *inter vivos* transfers by spouses,¹⁰ and the case law has been marked by that uncertainty which reflects the same delicately balanced, conflicting considerations of policy which underlay the vacillations of the law with regard to testamentary transfers prior to the passage of the election statutes. It is the purpose of this article to discuss how courts, especially the Maryland Court of Appeals, have treated *inter vivos* transfers challenged by a surviving spouse.

The problem, technically, is one of statutory interpretation. The election statutes provide for a legal share in the "estate" of the deceased spouse.¹¹ The question therefore is: Under what conditions will an *inter vivos* "transfer" be regarded as ineffectual to take the property transferred out of the "estate" of the decedent as against the claim of the surviving spouse under the election statutes?

II. THEORIES OF DECISION

The courts have refused to lay down rules broadly,¹² and have not been consistent with one another or with themselves.¹³ The cases generally purport to rest on one of the following theories:

⁹ Cf. (1943) 52 Yale L. J. 656; Kempton, *How a Surviving Spouse May Be Disinherited* (1940) N. Y. L. J. 294; Harris, *Can Section 18, Decedent Estate Law, Be Avoided?* (1939) N. Y. L. J. 1644, 1664.

¹⁰ See BEECHLER, *op. cit. supra*, n. 4, 541, n. 51 for a sampling of the few statutes there are.

¹¹ *E.g., supra*, n. 1.

¹² *E.g., Collins v. Collins*, 98 Md. 473, 484, 57 A. 597 (1904): "Nothing that we have said, however, is to be understood as going beyond the case before us or as laying down the rule more broadly than to protect the widow against a voluntary conveyance by the husband of *all* his estate, made on the eve of his marriage without her knowledge and with the intent of defeating her marital right."

¹³ The Maryland Court of Appeals has admitted that its own cases are not easy to fit into a consistent pattern, *Mushaw v. Mushaw*, 183 Md. 511, 517, 39 A. 2d 552 (1944). See also, the analysis of Vermont law in Cahn, *supra*, n. 2, 150.

A. "Illusory" or "colorable" transfers.¹⁴ Many cases hold a transfer ineffectual against a surviving spouse if it is "illusory" or "colorable".¹⁵ The test seems to be whether the transfer, practically speaking, changed the position of the donor as owner, *i.e.*, whether "from the technical point of view such a conveyance does not take back all that it gives, but practically it does".¹⁶ Under this view, a man's "estate" is what he in fact controlled during his lifetime.¹⁷ This is the view taken in cases which determine the extent of a decedent's estate for federal tax purposes.¹⁸ How far a court will be "realistic" in determining who is the owner of property, however, will depend on the firmness of the

¹⁴ See Comment, *supra*, n. 2, which traces the development of the doctrine subsequent to the leading case of *Newman v. Dore*, 275 N. Y. 371, 9 N. E. 2d 966 (1937). An "illusory" transfer is generally said to be one which on its face shows that the practical control of the donor is not disturbed; "colorable" transfers are complete on their face but do not in fact alter the *status quo*.

¹⁵ *Newman v. Dore*, *supra*, n. 14; *Leonard v. Leonard*, 181 Mass. 458, 63 N. E. 1068 (1902); *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N. E. 2d 75 (1944); *Krause v. Krause*, 285 N. Y. 27, 32 N. E. 2d 779 (1941) (applying the doctrine to savings bank, or "Totten" trusts); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N. E. 2d 381 (1944). The cases in this field, however, although purporting to go on one ground, are usually supportable on others. In *Newman v. Dore*, *supra*, n. 14, for instance, practically all the testator's assets were transferred and the transfer took place shortly before his death.

¹⁶ *Holmes, J.*, in *Leonard v. Leonard*, 181 Mass. 458, 461, 63 N. E. 1068, 1069 (1902).

¹⁷ The cases generally hold that the decedent must have had virtually all the prerogatives of ownership. Reservation of a life estate, if the gift of the remainder is irrevocable, would probably be effective against the surviving spouse. *Cf. Leonard v. Leonard*, *supra*, n. 15; *Haskell v. Art Institute of Chicago*, 304 Ill. App. 393, 26 N. E. 2d 736 (1940) (reservation for one year by 81 year old, ill testator, who died within a year); Note, 64 A. L. R. 466, 473 (1930). But *cf. Hays v. Henry*, 1 Md. Ch. 337 (1848). Reservation of a life estate plus an intent to defeat the wife's claim, however, have been held sufficient grounds for setting the transfer aside. *Grover v. Clover*, 69 Colo. 72, 169 Pac. 578 (1917).

The extreme form of this theory appears in *Bolles v. Toledo Trust Co.*, *supra*, n. 15, which extends a spouse's statutory share to the assets of any revocable trust. *Accord: Report of the Commission of Revision of the Laws of North Carolina Relating to Estates* (1936) 34-37, approved in Note, *Protection of Widow's Statutory Share by Restricting Inter Vivos Transfers of the Husband* (1936), 46 Yale L. J. 884. Most states, however, do not go so far, and in a recent Ohio case, *Harris v. Harris*, 147 Ohio St. 437, 72 N. E. 2d 378 (1947), while the court followed the *Bolles* case, three out of seven judges dissented.

¹⁸ See *e.g.*, *Porter v. Commissioner*, 288 U. S. 436, 444 (1933) (reserved power to alter or amend, corpus of trust held part of decedent's gross estate); *Helvering v. Hallock*, 309 U. S. 106, 117 (1940) (*inter vivos* trust which on some contingency might revert to settlor held taxable to settlor's estate even if the contingency does not occur).

policy underlying the particular statute with reference to which ownership is to be determined.¹⁹

Retention of control appears as the test in the early Maryland cases. In *Rabbitt v. Gaither*,²⁰ Judge Miller, summarizing the law of earlier decisions,²¹ said:

“ . . . if the transfer be colorable merely, that is to say if it be a mere device or contrivance by which the husband does not part with the absolute dominion over the property during his life, but seeks thereby to defeat the claims of his widow at his death, the law pronounces it a fraud upon her rights, *and this fraud may be proved and established by his retention of possession, during his life, by a reservation of an interest to himself on the face of the conveyance, or by any outside agreement or arrangement between him and his grantee or donee, to the effect that he shall receive the benefit of, or have control over, the property, during his life . . .*” (italics supplied).

¹⁹ Apart from the tax statutes, the Statute of Wills presents an analogy. Balanced against the salutary reasons for the formality of execution required by the statute is the consideration that the obvious intention of many testators may be defeated by what seems to be excessive technicality. Some instruments therefore, which strictly speaking would seem to require execution according to the Statute of Wills are nevertheless held valid although they do not comply with that statute. Thus, revocable, amendable trusts, in which income, possession and profits remain with the settlor are held non-testamentary. The trust most nearly testamentary in its effect which nevertheless has been held valid without the formalities of execution required by the Statute of Wills is the “Totten” or tentative trust in savings bank deposits. *Milholland v. Whalen*, 89 Md. 212, 43 A. 43 (1899). The New Jersey court, however, taking a strict position, has held that savings bank trusts are void. *Thatcher v. Trenton Trust Co.*, 119 N. J. Eq. 408, 182 A. 912 (1936).

Statutes providing that only a certain proportion of property can be bequeathed to charity, or that a charitable gift may not be made by a will executed less than a certain time prior to the death of the testator are held not violated if the prohibited transfer is made by revocable *inter vivos* trust. *Cleveland Trust Co. v. White*, 134 Ohio St. 1, 15 N. E. 2d 627 (1938).

Obviously, the policy protecting a spouse against disinheritance will be more vulnerable to judicial undermining than a tax statute, but perhaps less vulnerable than the Statute of Wills. See SCOTT, TRUSTS (1939) Secs. 57.5, 58.5, suggesting that though the Statute of Wills may not invalidate a transfer, the election statute may do so.

²⁰ 67 Md. 94, 105, 8 A. 744 (1887).

²¹ As Judge Offutt pointed out in *Jaworski v. Wisniewski*, 149 Md. 109, 131 A. 40 (1925), Judge Miller's statement of the law is not clearly that of the Court. Judge Miller thought that there was no participation by the donee in the donor's purpose to defeat the surviving spouse's interest, and would have held the gift good on that ground. The majority, not deciding whether such participation is necessary before the transfer is set aside, held that there was such participation; i.e., that the evidence showed an agreement by the donee to leave the ownership in the donor during his lifetime.

This is one of the few explicit statements in the cases as to just what a surviving spouse needs to prove in order to upset a decedent's *inter vivos* conveyance. Although Judge Miller spoke of "fraud",²² it is clear that if the law will "pronounce" fraud when the transfer is colorable or illusory, the basis of the decision is the colorable or illusory character of the transfer.²³

The language of the earlier cases cited in *Rabbitt v. Gaither* bears out Judge Miller's statement of the law. In *Hays v. Henry*²⁴ a husband, with a view to preventing any claim by his wife, conveyed his property to a mistress, who immediately reconveyed to the donor in trust for herself for life, remainder to his children by her. The reconveyance contained a covenant that the husband was not to be disturbed in his possession, control or enjoyment of the benefits of the property during his lifetime. The transfer was vacated, the Court remarking:²⁵

"If the disposition of the husband be bona fide²⁶ and no right is reserved to him, then, though made to defeat the claim of the wife, it will be good against her because an act cannot be denounced as fraudulent which the law authorizes to be done. But if it be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks, at his death, to deny his widow that share of his personal estate which the law assigns to her, then it will be ineffectual against her . . . Retention of possession is a badge of fraud."²⁷

²² See section B, *infra*.

²³ Of course, again the decision itself may be supported on other grounds than the rule announced by Judge Miller. The conveyance was made for the purpose of depriving the widow of her statutory share.

²⁴ *Supra*, n. 17.

²⁵ *Supra*, n. 17, 338.

²⁶ Although the Court speaks of "bona fide" disposition this refers only to the question of whether the prerogatives of ownership were reserved and not whether testator had an intention to cut down the share of his surviving spouse, since an absolute transfer, regardless of the purpose for which it is made, would be good under this language. In *Rabbitt v. Gaither*, *supra*, n. 20, 101, the Court said that this language plainly had "no reference to good faith on the part of the husband toward his wife but to the transaction itself as between the husband and his transferee or donee. . . . The transfer . . . must be absolutely unconditional".

²⁷ Under the obsolete doctrine of *Twyne's Case*, Star Chamber 1601, 3 Coke 80B, when a "badge" of fraud is proved, the fraud is proved. Thus fraud could be reduced to objective rules. It is curious that after a course of reasoning which proves that fraud is not the test, the court adheres to fiction and states its conclusion in terms of fraud.

*Dunnock v. Dunnock*²⁸ announces the same rule, denying relief because the conveyance was absolute on its face and the evidence did not show any collateral arrangement whereby the husband was to retain the fruits of ownership.

B. *Fraud on Marital Rights.* Fraud on marital rights is at least the nominal theory of the Maryland cases, even where it masks another theory, as in the line of cases through *Rabbitt v. Gaither*. It is also the theory of the Model Probate Code.²⁹ Fraud in this context has no definite meaning;³⁰ it is a statement of the result of the cases which invalidate the transfer rather than a reason for reaching it. And even as a verbal formula, the test of fraud may yield to other considerations.³¹

The leading case rejecting fraud as a test is the New York case, *Newman v. Dore*,³² which relies on the decision of Justice Holmes in *Leonard v. Leonard*,³³ recognizing the question-begging character of the formula. The danger of the theory is that since it begs the question it gives no inkling of what is really controlling in the cases and is likely to frustrate lawyers confronted with the practical question of presenting evidence which is likely to be persuasive.³⁴

²⁸ 3 Md. Ch. 140 (1852). Although the case came up on a bill for maintenance, the Court treated the complainant as on a par with a surviving spouse. Cf. *Levin v. Levin*, 166 Md. 451, 171 A. 77 (1934), involving a bill for divorce and alimony in which the Court said that the wife stands higher than a surviving spouse. But cf. *Feigley v. Feigley*, 7 Md. 537 (1855).

²⁹ Model Probate Code, in SIMES AND BAYE, PROBLEMS IN PROBATE LAW (1946), Sec. 33 (a): "Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will."

³⁰ Model Probate Code, Sec. 33 (a), Comment: "This section makes no attempt to define the expression 'in fraud of marital rights'. It is believed that only by judicial decision can that be done. [Other tests have been proposed] but it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. . . . It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse." For criticism of the Model Probate Code provision on this point see Niles, *Model Probate Code and Monographs in Probate Law: A Review* (1947), 45 Mich. L. Rev. 321, 330.

³¹ *Whitehill v. Thiess*, 161 Md. 657, 158 A. 347 (1932) (fraud not an "absolute and invariable" test).

³² *Supra*, n. 14.

³³ *Supra*, n. 15.

³⁴ See also, Comment, *supra*, n. 2.

C. *Completeness of the transfer under general property laws.* The Maryland cases contain language indicating that a surviving spouse may not upset a "complete" *inter vivos* transfer. Thus a gift which is "complete" in that it need not be executed with the formalities required for testamentary dispositions by the Statute of Wills is said to be "complete" insofar as a surviving spouse is concerned, since a gift is either complete or it is not.³⁵ The difficulty with this theory is that it fails to take into consideration the fact that the different statutes which in some particular limit the power of testation represent different measures of the validity of *inter vivos* transfers; the policy underlying one such statute may be stronger or weaker than the policy underlying another. The decisions, it is true, often do not

³⁵ In *Brown v. Fidelity Trust Co.*, 126 Md. 175, 94 A. 523 (1915), the Court holds that because an interest is "vested" in a trustee, although the settlor reserved a life estate and power of revocation it could not be sham or colorable. Curiously, the Court cites (at page 184), *Hays v. Henry*, *supra*, n. 17, which, if it stands for anything, stands for the opposite conclusion. *Poole v. Poole*, 129 Md. 387, 99 A. 551 (1916) holds that a deed on nominal consideration is a "complete transfer"; a complete transfer is "absolute", and an absolute transfer cannot be colorable as against a surviving spouse. *Sturgis v. Citizens' National Bank*, 152 Md. 654, 137 A. 378 (1927) reasons: retention of possession by the donor does not "invalidate" a gift by way of a savings bank trust (citing *Milholland v. Whalen*, *supra*, n. 19, which holds that savings bank trusts are not invalidated by the Statute of Wills); a complete gift is "by its nature" complete as to all persons (see page 659), and the test of completeness is the same whether the executor or the widow sues. There could therefore be no "fraud" if the only intention of the donor was to make a "legally effective gift". This theory would make it impossible for a wife to recover the assets of any savings bank trust, and is inconsistent with the result in *Mushaw v. Mushaw*, *supra*, n. 13, in which such a trust was set aside at the instance of the widow. *Bullen v. Safe Deposit & Trust Co.*, 177 Md. 271, 9 A. 2d 581 (1939) argues that the proper test for determining whether a widow may recover is whether the executor could sue to make the assets part of the "estate" (at page 277). There can be no intent to defraud, therefore, where the assets transferred are not part of the decedent's "estate".

Other jurisdictions reflect the same confusion. In *re Schurer's Estate*, 157 Misc. 573, 577, 284 N. Y. S. 28, 33 (1935), *aff'd* memo. 248 App. Div. 697, 289 N. Y. S. 818 (1936), the Court reasons: "The contention of the objectant that she does not claim that the (savings bank) trusts are void but merely claims that they are subject to her widow's interest, is obviously a compromise argument. Surely if they are not part of the estate, they are not part of the widow's interest. If they stand alone outside of the estate and bear no element of fraud, no actual or constructive revocation, and are subjected to no claims of creditors, the trusts are free and absolute." And *cf. Jones v. Somerville*, 78 Miss. 269, 28 So. 940 (1900); *Harris v. Harris*, 147 Ohio St. 437, 72 N. E. 2d 378 (1947) (dissenting opinion). Some cases have simply held certain types of transfers "testamentary" with respect to the surviving spouse. *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S. W. 2d 611 (1939) (gift in contemplation of death). The term "testamentary", however, like "fraud" seems merely a shorthand expression of the conclusion that the transfer violates the policy of the election statutes.

purport to rest on the "nature" of the transfer alone, but their language may be highly misleading nevertheless.³⁶

Whether the test of validity of transfers attacked by a surviving spouse under the election statutes is the same as the test of validity under general property law may be significant in determining who may have the transfer set aside and to what extent. If the transfer is "by its nature" invalid, the executor should be able to have it set aside completely. If only the spouse's rights are violated, may the executor sue, and how much of the gift is to be set aside?³⁷ If, except for the rights of a surviving spouse, a transfer would be valid, there would seem to be no reason to invalidate it beyond the point necessary to give the surviving spouse what she would have received had the *inter vivos* transfer not been made.³⁸ On the other hand, most of the *inter vivos* transfers attacked under the election statutes are of types which in effect are substantially like wills, and it has been only after considerable hesitation that the courts have held the requirements of the Statute

³⁶ See *supra*, n. 19. Cf. the language of *Mushaw v. Mushaw*, *supra*, n. 13, citing *Milholland v. Whalen*, *supra*, n. 19, as standing for the proposition that a tentative trust "may be used as an alternative to the delivery of the subject matter of the gift". If taken literally this would mean that no tentative trust could be set aside by a wife, a conclusion negated by the *Mushaw* case itself. And cf. *In re Clark's Estate*, 149 Misc. 374, 268 N. Y. S. 253 (1933) (property in savings bank trust taxable in full to settlor's estate because widow entitled to no part of it since gift is complete. It was not "complete" enough to escape the tax to the donor's estate, however).

³⁷ *Sturgis v. Citizens' National Bank*, *supra*, n. 35, states that whoever brings suit, recovery is primarily on behalf of the estate and the assets transferred should be brought into the estate, the widow obtaining her share in the normal course of distribution. In *Mushaw v. Mushaw*, *supra*, n. 35, the Court granted a decree as prayed to a widow who asked to have certain bank accounts declared to be part of her husband's estate. In *Jaworski v. Wisniewski*, *supra*, n. 21, a husband moved to set aside a deed which as against anyone other than a surviving spouse would ordinarily be held valid under the rule of *Brown v. Mercantile Trust Co.*, 87 Md. 377, 40 A. 256 (1898). However, since the donor retained every practical benefit of ownership, the Court set aside the deed and declared the property part of the husband's estate. Likewise in *Krause v. Krause*, 285 N. Y. 27, 32 N. E. (2d) 779 (1941). See also *Matter of Schurer*, *supra*, n. 35. But see *infra*, n. 38. If it is conceded that the election statutes and the Statute of Wills raise different questions of policy, then it would seem to follow that the Maryland cases, which without analysis fashion the remedy as if the policy underlying the two statutes were the same, are open to question.

³⁸ *Ibey v. Ibey*, 93 N. H. 434, 43 A. 2d 157 (1945); see also *President & Directors of Manhattan Club v. Janowitz*, 172 Misc. 290, 297, 14 N. Y. S. 2d 375, 384 (1939).

of Wills inapplicable to such transfers.³⁹ These "valid gifts", therefore, may perhaps be so vulnerable that when attacked by a surviving spouse, they may be upset completely.⁴⁰ The question has not been raised in the Maryland cases, but *query* whether in any case an executor would be able to sue after the donee paid the widow her full one-third share of the transferred assets in settlement of her claim.⁴¹

The dangerous extreme to which the theory that a transaction is essentially "valid" or "invalid" may be carried is illustrated in the Pennsylvania case, *Beirne v. Continental Equitable Title & Trust Co.*⁴² Testator in that case left his wife almost nothing in his will. During his lifetime he made defendant trustee of a substantial sum for himself for life, and on his death for certain named remaindermen. He received all the income and could revoke or amend the trust at will. The purpose of the trust was to deprive his wife of her thirds. The Court held the trust "valid", "formally effective", and that assets disposed of by valid *inter vivos* trust cannot be part of the settlor's "estate". The wife therefore recovered nothing. The decision in effect permits anyone who can afford a lawyer to nullify the election statutes.⁴³

³⁹ Such transfers include savings bank trusts and trusts with varying degrees of revocability and control by the settlor.

⁴⁰ The Model Probate Code apparently accepts this conclusion. Sec. 33 (a) provides that a transfer in fraud of the marital rights of surviving spouses should be treated as a "testamentary disposition".

⁴¹ The answer would seem to be that he could not. Where the transfer is valid under general property laws, only the surviving spouse has a claim strong enough to upset it. The executor merely rides the spouse's coat-tail. It is this fact which makes it difficult to understand why the transfer should be set aside to a greater extent than is necessary to put the spouse in the position in which she would have been if the transfer had not been made. Under the Maryland authorities, therefore, it might be desirable for decedent's donee to settle with the widow in a doubtful case and thus possibly save at least two-thirds of the gift.

⁴² 307 Pa. 570, 161 A. 721 (1932).

⁴³ The Court said that "actual fraud" would vitiate even a "valid trust" but set aside a finding by the lower court that intent to deprive the widow of her distributive share constituted such fraud. Thus, no matter how flimsy the transfer or what the purpose of the donor in making it may be, under this holding, if the transfer is good under the Statute of Wills it can never be attacked by a surviving spouse. *Kerwin v. Donaghy*, 317 Mass. 559, 59 N. E. 2d 299 (1945) goes to the same length. In that case, reservation of equitable life estate, power to revoke, and intent to deprive widow were held not to violate the widow's rights.

III. CONTROLLING CONSIDERATIONS

It is apparent that the legal "tests" lead only to confusion. In the Maryland cases, as has been seen, there are echoes of several legal theories. Courts, however, weigh more factors than the legal "tests" would seem to indicate. To debate the merits of an ultimate legal test of the validity of *inter vivos* transfers is to obscure the practical problem of what considerations actually influence courts in reaching their decision. It would be helpful if instead of speaking of "fraud", the courts would speak of "violation of marital rights", and indicate in factual terms rather than by words of art the factors they deem relevant and the approximate weight they are disposed to give to each. Judicial discretion is best exercised if the factors to be considered are made clear. Among such factors are the following:

A. *Purpose to defeat the claim of the surviving spouse.* In some jurisdictions, it has been held that any *inter vivos* gift, even where the donor retains no interest at all, may be set aside by a surviving spouse if made with the express purpose of defeating her statutory claim.⁴⁴ In Maryland, however, as in most states, the law is otherwise. If willing to cut off his nose, the donor is allowed to spite his face.⁴⁵ It is where the donor retains the fruits of ownership that his purpose is significant as one of the elements entering into "fraud".⁴⁶ No clear clue, however, is given as to what

⁴⁴ *E.g.*, *Ibey v. Ibey*, *supra*, n. 38.

⁴⁵ *Hays v. Henry*, *supra*, n. 17; *Poole v. Poole*, *supra*, n. 35. The conclusion is put on the ground of the protection of trade and commerce. It would be burdensome to require careful scrutiny of all transfers by the husband for something so elusive as motive. The Court fails to consider the intermediate position that only gratuitous transferees of the donee need be subject to the surviving spouse's claim. *Cf.* Model Probate Code, Sec. 33 (a); *Kernan v. Carter*, 132 Md. 577, 583, 140 A. 530 (1918); *Sturgis v. Citizens' National Bank*, *supra*, n. 35; *Rabbitt v. Gaither*, *supra*, n. 20; *Brown v. Fidelity Trust Co.*, *supra*, n. 35; *Dunnoch v. Dunnoch*, *supra*, n. 28. Niles, *Model Probate Code and Monographs in Probate Law: A Review*, *supra*, n. 30, suggests that if motive is made the test, improvement of land might be discouraged since donees would not take a chance on the outcome of judicial scrutiny. This rationale, of course, would not apply to gifts of personalty.

⁴⁶ *Sturgis v. Citizens' National Bank*, *supra*, n. 35, citing *Rabbitt v. Gaither*, *supra*, n. 20, which really stands for the proposition that retention is *all* that is necessary to be proved in order to set a transfer aside. See *Feigley v. Feigley*, *supra*, n. 28. This was an action for alimony (*cf. supra*, n. 28), which the Court treated as controlled by the principles governing the claims of surviving spouses. The true test whether a transfer may be set

is necessary to prove a purpose to defeat the surviving spouse's claim,⁴⁷ and although such purpose be proved, it will not necessarily be conclusive in setting aside the transfer even where the donor retains the prerogatives of ownership.⁴⁸

B. *Retention of control by donor.* Retention of control in the Maryland cases is evidence of the donor's purpose to defeat his spouse's claim.⁴⁹ It seems to be a necessary but not a sufficient condition for setting aside *inter vivos* transfers.⁵⁰ A distinction has been suggested based on the degree of control retained.⁵¹ The more fully the preroga-

aside was said to be whether it was made with the purpose of depriving her of the assets transferred. The case is cited interchangeably with those involving surviving spouses. See, e.g., *Sanborn v. Lang*, 41 Md. 107, 114 (1874). *Kerwin v. Donaghy*, *supra*, n. 43, refuses, when dealing with a claim based on the election statutes, to follow the analogy of transfers attacked while the donor is still alive. *Cf.* also *Bullen v. Safe Deposit & Trust Co.*, *supra*, n. 35 ("intent" is the test); *Jaworski v. Wisniewski*, *supra*, n. 21, (combination of intent to deprive and substantial control by donor); *Sanborn v. Lang*, *supra*, (combination of intent and control, flagrant facts); *Mushaw v. Mushaw*, *supra*, n. 13 ("explicit or implicit purpose of defrauding the widow"—the Court found a purpose to defeat the claim of the widow from the fact that the transfer could not possibly have had any other effect, and the testator must have intended the natural results of his acts).

⁴⁷ In *Nichols v. Nichols*, 61 Vt. 426, 431, 18 A. 153, 154 (1889), it was held that intent to defeat a spouse's rights will be presumed from the knowledge that those rights will in fact be defeated. *Cf.* *Mushaw v. Mushaw*, *supra*, n. 46. Thus acting "knowing that" would equal acting "for the purpose of". This is not law in Vermont today. *Patch v. Squires*, 105 Vt. 405, 409, 165 A. 919, 920 (1933). Many cases, such as *Patch v. Squires*, *supra*, require "clear and convincing proof" of such intent. See, e.g., *Sturgis v. Citizens' National Bank*, *supra*, n. 35. Inadequacy of consideration has been held a basis for inference of such an intent in *Thayer v. Thayer*, 14 Vt. 107 (1842), but in *Feigley v. Feigley*, *supra*, n. 28, a conveyance to a sister of property worth about \$700 for a consideration of \$200 was held not fraudulent *per se* as against a wife. Of course, direct testimony of decedent's contemporary statement of his purpose is sufficient. *Sanborn v. Lang*, *supra*, n. 46. Anything short of that, however, seems most uncertain.

⁴⁸ Purpose to defeat claim of spouse shown, but relief not granted in *Whitehill v. Thiess*, *supra*, n. 31; *Sturgis v. Citizens' National Bank*, *supra*, n. 35.

⁴⁹ *Sturgis v. Citizens' National Bank*, *supra*, n. 35; *Mushaw v. Mushaw*, *supra*, n. 13 (retention of possession evidence of fraud).

⁵⁰ See *supra*, n. 46. Yet query when retention of control becomes so flagrant that purpose will be presumed from retention. *Cf.* *Harris, Can Section 18, Decedent Estate Law, Be Avoided?* *supra*, n. 9: "It is difficult to conceive of a situation in which a spouse could divest himself of all his property, retaining the right to the income, without harboring the intent to defeat the surviving spouse's rights."

⁵¹ *Cf. supra*, n. 17. See Comment, *supra*, n. 2. *Sturgis v. Citizens' National Bank*, *supra*, n. 35 suggests a distinction between ordinary control and control as a trustee, holding that a trustee has no such control as will vitiate a gift. This distinction seems without merit if the trustee is also the sole beneficiary during his lifetime and especially if he can revoke the "trust"

tives of ownership are retained, the stronger the case of the surviving spouse. No Maryland cases, however, seem to have turned on this distinction.

C. *Other provisions made for the surviving spouse.* A Michigan decision, *Rose v. Rose*,⁵² is the leading case holding that a transfer could not be set aside by a surviving spouse who was reasonably provided for by the decedent. This consideration seldom appears explicitly in other jurisdictions,⁵³ but was stressed in *Mushaw v. Mushaw*,⁵⁴ which took cognizance of the confused state of the Maryland law and offered this theory to reconcile the conflicting Maryland decisions.⁵⁵ Provision for the surviving spouse may be reasonable despite disparity between the amount of decedent's gross estate and the amount given to the survivor; the test is reasonableness under all the circumstances.⁵⁶

at will. It is based on the confusion of the election statutes with the law of gifts. But *cf.* in re Clark's Estate, *supra*, n. 36, which argues that the only right given by the election statutes is to property left by will, and degree of control, provided the property be "given" *inter vivos*, is immaterial.

⁵² 300 Mich. 73, 1 N. W. 2d 458 (1942).

⁵³ See Comment, *supra*, n. 2, n. 47. The New York statute takes into consideration the extent of the provision made for the surviving spouse. New York Decedent Estate Law, Sec. 18, provides as to the analogous question of when a wife may renounce a will: "Where the will contains an absolute legacy or devise whether general or specific, to the surviving spouse, of or in excess of the sum of twenty-five hundred dollars and also a provision for a trust for his or her benefit for life of a principal equal to or more than the excess between said legacy or devise and his or her intestate share, no right of election whatever shall exist in the surviving spouse. . . . Where the intestate share is over twenty-five hundred dollars and where the testator has devised or bequeathed in trust an amount greater than the intestate share, with income thereof payable to the surviving spouse for life, the surviving spouse shall have the limited right to take the sum of twenty-five hundred dollars absolutely, which shall be deducted from the principal of such trust fund and the terms of the will shall otherwise remain effective." Provisions with regard to a trust include legal life estates, annuities, or any other form of income for life created by will for the benefit of the surviving spouse.

⁵⁴ *Supra*, n. 13.

⁵⁵ Reasonable provisions made and transfer sustained in *Brown v. Fidelity Trust Co.*, *supra*, n. 35; *Sturgis v. Citizens' National Bank*, *supra*, n. 35; *Bullen v. Safe Deposit & Trust Co.*, *supra*, n. 35. Reasonable provisions not made and transfers set aside in *Mushaw v. Mushaw*, *supra*, n. 13, *Jaworski v. Wisniewski*, *supra*, n. 21; *Collins v. Collins*, *supra*, n. 12; *Sanborn v. Lang*, *supra*, n. 46.

⁵⁶ *Kernan v. Carter*, *supra*, n. 45. Disparity between the gross estate of the decedent and the amount of the bequest to the surviving spouse is a factor in considering reasonableness, however. In the *Kernan* case, where the widow was incompetent, a bequest to her of a relatively small amount sufficient, however, to take care of her needs was held to preclude an action by her to set aside an *inter vivos* transfer (alternative holding). When a number of small *inter vivos* transfers have the cumulative effect of diminishing the portion of the surviving spouse beyond the point of reason-

D. *Time between transfer and death of donor.* The Model Probate Code, Section 33 (b) provides: "Any gift made by a married person within two years before the time of his death is deemed to be in fraud of the marital rights of his surviving spouse unless shown to the contrary."⁵⁷ While the cases place less emphasis on the time element than the Model Probate Code, they do take into consideration the short interval between the transfer and the donor's death.⁵⁸

E. *Moral Claim of Surviving Spouse and Others.* The relative equities of the complainant and the other interested parties frequently enter into the decisions.⁵⁹ In this respect the following factors seem to be significant:

(1) Claimant's treatment of decedent.⁶⁰

(2) Abandonment of decedent by claimant.⁶¹

ableness, the most recent transfer might be set aside, or all might be made to contribute proportionately until the spouse is reasonably provided for; or the spouse might conceivably have all the transfers set aside once she establishes that she is not reasonably provided for. Apparently the problem has been seldom discussed.

⁵⁷ The emphasis on the time element in the Model Probate Code is perhaps due to the fact that a transfer made shortly before death involves something of the flavor of contemplation of death; such a transfer is so nearly "testamentary" that the property falls within the "estate" of the donor more easily than property transferred when death was not imminent. But just what would the executor, on whom the burden of proof rests (Model Probate Code, Sec. 33 (b), Comment) have to show under this section?

⁵⁸ See *Thayer v. Thayer*, *supra*, n. 47. There is some tendency to hold gifts made shortly before death as "gifts causa mortis" against a wife, whatever this means. See Note, 64 A. L. R. 466, 485 (1930). In *Newman v. Dore*, *supra*, n. 14, the Court pointed out that the transfer took place only three days before the death of the donor. The related question of the health of the donor was adverted to in *Re Wrono's Estate*, 177 Misc. 541, 31 N. Y. S. 2d 191 (1941). In *Mushaw v. Mushaw*, *supra*, n. 13, the Court stressed the fact that decedent was 75 years old and in ill health, and that the transfer took place less than a week before his death.

⁵⁹ See, e.g., *Sanborn v. Lang*, *supra*, n. 46, 119: "No moral justification or excuse for (decedent's) extraordinary conduct."

⁶⁰ *Sanborn v. Lang*, *supra*, n. 46, 118, remarks on the faithful performance by the widow of her wifely duties. Pleadings often allege that marital duties were faithfully performed.

⁶¹ New York Decedent Estate Law, Sec. 18, Pars. 4, 5, provides that no husband who has refused or neglected to provide for his wife or has abandoned her and no wife who has abandoned her husband shall have the right to elect the statutory share. It is questionable whether an invariable rule should be laid down. In *Whitehill v. Thiess*, *supra*, n. 31, the husband, who had deserted his wife, did not succeed in setting aside the transfer although (a) the deed was made for the purpose of defeating his rights, (b) virtually the whole estate was conveyed, and (c) the wife retained practical ownership during her lifetime. In *Mushaw v. Mushaw*, *supra*, n. 13, the court remarked that there was no evidence of estrangement, and the parties continued to share the same bedroom till the husband's death. In *Sturgis v. Citizens' National Bank*, *supra*, n. 35, where the claimant was

- (3) Duration of marriage; whether the marriage is a first or subsequent marriage.⁶²
- (4) Disparity of age between surviving spouse and decedent.⁶³
- (5) Whether claimant is husband or wife.⁶⁴
- (6) Whether claimant has separate funds.⁶⁵
- (7) Superiority of moral claim of donee.⁶⁶

F. *Participation by donee in the "fraud"*. A dictum in *Rabbitt v. Gaither* suggests that transfers should be set aside where the donee participates in the "fraud". This test, which is drawn from an entirely different context in the law of fraudulent conveyances, seems not to have been mentioned in any other case.

It would seem that if the transaction as far as the donor is concerned would be sufficient to deprive his spouse of her statutory share, it should not become illegal merely because someone other than the donor knew about it. The

unsuccessful, the parties had been estranged for ten years before resuming cohabitation five years before decedent died. But *cf. Jaworski v. Wisniewski*, *supra*, n. 21, where husband and wife lived together for ten years after the alteration leading to the conveyance; *Thayer v. Thayer*, *supra*, n. 47, where claimant who abandoned decedent still had the transfers set aside.

⁶² In *Mushaw v. Mushaw*, *supra*, n. 13, the husband and wife had been married for seven years, and the claimant was successful. Explicit reference in the cases to duration of marriage is infrequent.

⁶³ In *Duttera v. Babylon*, 83 Md. 536, 35 A. 64 (1896), the question was whether the conveyance to a wife was obtained by undue influence. *Held*, mere disparity in age is not conclusive of undue influence. It might, however, be a factor to be considered in the present connection, although seldom stressed in the cases.

⁶⁴ The Maryland statute, *supra*, n. 1, places husband and wife on a par. It is hardly possible to tell whether as a matter of judicial psychology, a wife is nevertheless in a superior position. *Harrison v. Prentice*, *supra*, n. 7, seems to apply the statute without regard to whether claimant is husband or wife.

⁶⁵ Some states have attempted to measure the share of a surviving spouse according to actual need. See *Cahn*, *supra*, n. 2. No Maryland cases have been found discussing this point.

⁶⁶ The consideration of the strength of the moral claim of the surviving spouse as against other claimants underlies the Maryland statute itself, *supra*, n. 1. The widow's share is less if there are close surviving next of kin than if the next of kin are distant. In *Hays v. Henry*, *supra*, n. 17, the donee was the mistress of the donor and the transfer was set aside. In *Poole v. Poole*, *supra*, n. 35, the Court stressed that decedent's child would be hurt if the challenged deed were cancelled. *Whitehill v. Thiess*, *supra*, n. 31, held that where money for the purchase of the property was given to a mother by her children, and she took a life estate with powers, remainder to the children, the children had a strong moral claim although strictly speaking the money belonged to the mother after the gift. The Court argued that "really" the children gave the property to their mother in the first place, and a stranger may give property subject to whatever restraints and with whatever purpose he wishes, without giving cause to the donee's spouse to complain. *Mason v. Johnson*, 47 Md. 347 (1877).

protection of the wife is a matter of policy independent of the "punishment" of the donee.⁶⁷

G. *Testate or intestate decedent.* This distinction has caused confusion in the law of New York and other jurisdictions, but so far has not found its way into the Maryland cases.⁶⁸ The argument in this regard is that in intestacy, the Statute of Descent and Distribution governs. A spouse inheriting by dint of that statute is on a par with every other person who so succeeds to property. If an *inter vivos* transfer, therefore, is valid as against other next of kin, it is valid as against a surviving spouse in intestacy. Only the election statutes give spouses any special protection, and those statutes do not apply unless the decedent has left a will. The argument has been rejected in *Schnakenberg v. Schnakenberg*.⁶⁹ It is submitted that the *Schnakenberg* case is sound.⁷⁰

H. *Consent of spouse during lifetime.* Mere failure to protest during the decedent's lifetime will not bar the survivor from later asserting a claim against *inter vivos* transfers.⁷¹ If the survivor actually consents to the trans-

⁶⁷ Query what would be the result, even assuming there is force in this test, where the purpose of the transfer is to defeat the widow's claim but there is no agreement between the parties reserving any rights in the property to the donor? Would it be sufficient if the donor merely trusted the donee? Would it make any difference if the donee broke the "trust"? In any event, this test would seem to be inapplicable to an "illusory" transfer like a savings bank trust, where donees seldom even know of their rights to the account and could not obtain it during the decedent's lifetime if they did.

⁶⁸ *Murray v. Brooklyn Savings Bank*, 258 App. Div. 132, 15 N. Y. S. 2d 915 (1939).

⁶⁹ 262 App. Div. 234, 28 N. Y. S. 2d 841 (1941).

⁷⁰ It would be difficult to explain to a layman that a husband may cut his wife off with nothing by putting his estate into the form of tentative trusts and leaving no will, but that she would get her thirds if, after setting up the trusts he bequeathed her a substantial part of his "estate". This anomaly in the New York law is underscored by the case of *Newman v. Dore*, *supra*, n. 14, where the will was so drawn that renunciation was precluded by the terms of Sec. 18 of the Decedent Estate Law, since the wife received a life estate in a trust of one-third of the real and personal estate of the decedent. While the *inter vivos* gifts were set aside in that case as illusory, the wife's relief was not based on her right to renounce and claim through the election statutes.

⁷¹ *Levy v. Sherman*, 185 Md. 63, 43 A. 2d 25 (1945) (antenuptial agreement). The conclusion is based on the policy of the law in favor of domestic harmony. A stronger reason where the claim is based on the election statutes would seem to be that there is nothing which a wife may do to annul a transfer during her husband's lifetime, since her statutory right arises only at the husband's death. Where it would be useless for

fer, a different question is raised. The cases dealing with the related question of the release of a surviving spouse's share under the election statutes would probably be persuasive. *Barroll v. Brice*⁷² holds that a spouse may release his distributive share, but such waiver must be with full knowledge of his rights and the facts. The Court requires strong evidence of waiver, but the precise formalities necessary to make it effective are not stated.⁷³ Likewise, *Jaworski v. Wisniewski*⁷⁴ recognizes that a spouse may renounce his distributive share, but the case holds that while a sale by a husband to a wife of his share of property held by them as tenants by the entireties does make the property part of the wife's separate estate, it does not necessarily release the husband's legal right based on the election statute. Consent to *inter vivos* transfers which would, in the absence of such consent, violate the marital rights of the surviving spouse, might thus be effective, but it would be subject to careful scrutiny and considerable legal formality would probably be required.⁷⁵

I. *Type of assets transferred.* Gifts of the proceeds of life insurance policies on the life of the decedent spouse have been held effective against a surviving spouse notwithstanding that the insured reserved the right to change the beneficiary.⁷⁶ *Bullen v. Safe Deposit & Trust Co.*,⁷⁷

her to protest, failure to protest should not prejudice her rights. Antenuptial transfers have been set aside during the donor's lifetime, on the ground that the conveyance was "fraudulent". *LeStrange v. LeStrange*, 242 App. Div. 74, 273 N. Y. S. 21 (1934).

⁷² 115 Md. 498, 80 A. 1035 (1911).

⁷³ Apparently, consideration is not necessary, since lack of consideration, if fatal to waiver, would have disposed of the case. Prudence would require at least a writing under seal. The New York statute, Sec. 18 (9) prescribes subscription and acknowledgment. Though it is silent concerning consideration, the New York cases have subjected waivers to close scrutiny for fraud or duress in the absence of consideration. They have, however, refused to apply the general principles of estoppel against a surviving spouse, holding that waiver, to be effective, must comply with the requirements of form imposed by the statute. See BEECHLER, *op. cit. supra*, n. 4, 472-562.

⁷⁴ *Supra*, n. 21.

⁷⁵ It has been held that consent in writing or of record will bar a surviving spouse of his distributive share. *Bacus v. Burns*, 48 Okla. 285, 149 Pac. 1115 (1915).

⁷⁶ *Mitchell v. Mitchell*, 265 App. Div. 27, 37 N. Y. S. 2d 612 (1942).

⁷⁷ *Supra*, n. 35, 278: "The proceeds of life insurance policies have never been regarded as part of the personal estate of the deceased unless payable to the estate." But see Internal Revenue Code, Sec. 811 (g).

holding that a surviving spouse may not share in proceeds of an insurance policy payable to a beneficiary other than the decedent's estate, has been supported on the ground that it deals with a life insurance trust.⁷⁸ Joint tenancies in savings accounts are likewise put on a special footing, even though the deceased had full control during his lifetime.⁷⁹ If the law is to work out a consistent policy for the protection of surviving spouses, the form of the assets should not be controlling.

J. *Transfer before or after marriage.* Antenuptial transfers are treated differently from postnuptial. There is an element of fraud (in its meaningful sense of misrepresentation inducing reliance) in concealing the transfer. While the apparent ownership of property is not, conventionally, the reason why ladies marry their husbands, the law properly regards it as a consideration.⁸⁰ However, the leading Maryland case involving premarital transfers, *Collins v. Collins*,⁸¹ reasons from post-nuptial transfers, relying on the line of cases beginning with *Hays v. Henry*.⁸²

IV. CONCLUSION

The problem presented by these cases calls for the discriminating exercise of judicial discretion. While discretion necessarily involves uncertainties,⁸³ which are perhaps even

⁷⁸ See Comment, *supra*, n. 2, 158.

⁷⁹ *Malone v. Walsh*, 315 Mass. 484, 53 N. E. 2d 126 (1944); *Inda v. Inda*, 288 N. Y. 315, 43 N. E. 2d 59 (1942); Note, (1943) 52 Yale L. J. 656. If the *Inda* case is to remain law in New York, then a form of deposit creating a joint tenancy under the New York Banking Law, even though the "joint tenant" beneficiary knows nothing about the "gift" is a foolproof method for defeating the claims of a surviving spouse and undermines the result of *Newman v. Dore*, *supra*, n. 14. *Mushaw v. Mushaw*, *supra*, n. 13, states that savings bank trusts should not be treated any differently from any other *inter vivos* transfers in determining the rights of a surviving spouse.

⁸⁰ *Kavanaugh v. Kavanaugh*, 279 Mass. 238, 181 N. E. 181 (1932).

⁸¹ *Supra*, n. 12. The case involved an antenuptial transfer without consideration, without knowledge of the bride-to-be, but no "actual misrepresentation" was made. The transfer was made with the purpose of depriving the wife of her marital rights and a great deal of benefit and control was reserved by the husband. Concealment of the transfer was held fraud *per se*. In any event, it would seem that misrepresentation by conduct is as "actual" as misrepresentation by words.

⁸² *Supra*, n. 17.

⁸³ The uncertainty of aims and lack of fundamental pattern of the law with regard to *ante-mortem* transfers is highlighted by comparison with the law of powers. In the absence of statute, creditors may not reach

desirable where considerations of policy are delicately balanced, the confusion in the cases seems unnecessarily increased by a hazy delineation of the precise problem to be solved, by the tendency of the cases to try to fit facts into one precedent or another without fundamental analysis of the *ratio decidendi*, by the use of question-begging formulas such as "fraud", and by the citation of cases inconsistent with the proposition for which they are cited. As the law now stands, therefore, the lawyer seeking some measure of practical guidance from the cases is confronted with confusion worse confounded than should be necessary.⁶⁴

assets of a donor merely because the donor has reserved a power of revocation, but may reach the assets only to the extent that the power is actually exercised. See SCOTT, CASES ON TRUSTS (3d ed. 1940) 213, n.; Note, 92 A. L. R. 282 (1934); cf. *Mercantile Trust Co. v. Bergdorf Trust Co.* 167 Md. 158, 173 A. 31 (1934). If this is so of creditors, it might be argued, then how can a surviving spouse, who is a volunteer, reach the assets when the power is not exercised? The argument would emasculate the election statutes, but it serves to underscore the lack of integration in the law as it stands.

⁶⁴ Niles, *supra*, n. 30, argues that the proper solution is an explicit statute setting forth just what facts a surviving spouse need establish in order to be able to have an *inter vivos* transfer set aside. There seem, however, to be too many variables to make such a statute practical. And there is always the difficulty that astute lawyers may circumvent the policy of such a statute and yet keep within the letter. On the other hand, almost every case now invites litigation, and there is perhaps something to be said for the position that the elegance of expensive tailor-made decisions does not outweigh the practical advantages of a standard pattern of statutory regulation.