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Robert C. Bensing

Western Reserve University

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Inter Vivos Trusts and the Election Rights of a Surviving Spouse

By ROBERT C. BENSING*

In other than community property states, legislation has been enacted in a majority of jurisdictions which gives to a surviving spouse the power to elect whether to accept any benefits conferred by a deceased spouse's will, or to renounce the will entirely and take a statutory share of the decedent's estate. Consequently, to the extent of this statutory share, the surviving spouse is given an interest in the estate of the deceased spouse which cannot be defeated by will.

However, except in jurisdictions which give a spouse an inchoate interest in any realty of which the consort was seised as an estate of inheritance at any time during the marriage, a spouse is generally not protected by any express statutory provision against disinheri
tance by a gratuitous inter vivos transfer. The election statutes do not expressly protect the survivor, because they provide for a designated share in the "estate" of the decedent, which includes only property which the decedent owned at the time of death.

Therefore, in regard to transfers of personalty, and also realty in states which have abolished inchoate interests, the question arises as to whether one may use the device of gratuitous inter vivos transfer to disinherit his spouse when the election statutes prevent him from doing so by will.

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* A.B., LL.B., University of Louisville; LL.M., J.S.D., Yale University; member of the Kentucky Bar; Associate Professor of Law, Western Reserve University.

1 For the share given a survivor in the various states, see II VERNIER, AMERICAN FAMILY LAWS secs. 189, 216 (1935).

2 A large number of states no longer give a spouse an inchoate interest in realty of which the other was seised at any time during coverture, but in lieu thereof give the survivor a designated share in property owned by the decedent at the time of death. See II VERNIER, AMERICAN FAMILY LAWS secs. 189, 216 (1935).

3 See, however: TENN. CODE secs. 8365, 8366 (Williams, 1934), (Inter vivos transfer made with intent to defeat spouse's statutory share voidable.); PA. STAT. ANN. tit. 20, sec. 301.11 (Purdon, 1950) (Conveyance of assets by person who retains a power of appointment by will, power of revocation, or consumption of principal, is testamentary so far as surviving spouse is concerned.)
The present discussion is primarily concerned with *inter vivos* transfers of property in trust because the problems presented by this method are more complex and occur more frequently than in other type transfers. On the whole, however, what is applicable to transfers in trust will also apply to other transfers, for the theories and policies involved are substantially the same.\(^4\)

I Majority Rule

In a majority of jurisdictions, the test of the validity of an *inter vivos* transfer when attacked by a surviving spouse is whether the transferor in good faith divested himself of the ownership of the property transferred.\(^5\) The good faith required does not refer to the transferor's intent or purpose to deprive his spouse of property which would otherwise pass to the latter because of the election statutes, but to the intent of the transferor to divest himself of the ownership of the property.\(^6\) Therefore, when the courts in applying this test speak of fraud, or fraudulent intent, they mean only that the spouse did not intend to divest himself of the ownership of the property involved. The courts also oftentimes refer to valid transfers as being "real" or "absolute," and invalid transfers as being "colorable," "illusory," or "testamentary." While these terms are not necessarily interchangeable in every sense in which they may be used,\(^7\) when each is used only to designate the fact of the validity or invalidity of an *inter vivos* transfer under this test, their meanings are identical and no further attempt at classification seems necessary.

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\(^4\) The reverse is also true. Consequently, where broad principles applicable to the question regardless of the type transfer actually made are involved, refer-\__ences will sometimes be made to non-trust cases.


\(^7\) The term "colorable" may be used to indicate a transfer which is absolute on its face but which is actually not a transfer at all because of some agreement between the parties to the effect that the transferor is to retain ownership. See 44 Mich. L. R. 151, 153 (1945).

"Illusory" may be used to indicate a transfer which on its face shows that the transferor has not divested himself of control. See Newman v. Dore, 275 N.Y. 371, 9 N.E. 2d 966 (1937); Bolles v. Toledo Trust Co., 144 Ohio St. 185, 58 N.E. 2d 381 (1944).

"Testamentary" technically always indicates a disposition of property which is not intended to vest an interest in the donee until the death of the donor. See Black's Law Dictionary (4th ed. 1951). For a different use of the term, however, see Scott, Trusts secs. 57.5, p. 850 (1939).
Relationship of The Statute of Wills and General Property Law

When will a transferee of property be deemed to have divested himself of ownership so as to preclude his surviving spouse from setting the transfer aside? If he retains so much control over the property that the transfer is invalid under the Statute of Wills, the transfer is void and will everywhere be set aside in its entirety. It will be set aside not only at the suit of the survivor, but at that of the executor or any other party who will benefit if the property is a part of the transferor's estate.

In applying the Statute of Wills to trusts, the courts have been extremely liberal, and permit the settlor to retain a great many of the perogatives of ownership without requiring that the transaction be executed as a will. It is well settled that a donor may retain a life interest, or the power to revoke or modify the trust in whole or in part, or all of these, and that such reservations do not, in themselves, make the trust testamentary. Where, however, in addition to both the retention of a life interest and the power to revoke and modify the trust, the settlor also retains such power to control the trustee as to the details of the administration of the trust that the trustee is in substance nothing more than the agent of the settlor, the disposition insofar as it is intended to take effect after the settlor's death is invalid unless the requirements of the Wills Act are complied with.

A disposition not intended to go into effect until the death of the donor is void unless executed in accordance with the statutes regulating the making of wills. See Brown, Personal Property sec. 48 (1936); Scott, Trusts secs. 56, 56.1 et seq., 57.2 (1939); Bogert, Trusts and Trustees secs. 103, 104 (1935). Also see Restatement, Trusts secs. 56.57 (1935).

In a transfer not involving a trust, title in such instances does not pass from the donor, and the property therefore remains a part of the donor's estate. See Brown, Personal Property sec. 48 (1936).

In a transfer in trust, even though the donor vests title to the property in the trustee, the transaction is nevertheless invalid since no interest passes to the beneficiaries prior to the donor's death. See Scott, Trusts sec. 57.2 (1939).

Providing, of course, that such party is permitted by local procedure to bring suit.

Unless the settlor has retained power to effect a revocation of the trust, reservation of the power to control the trustee in the administration of the trust is immaterial. See Reinecke v. Northern Trust Co., 278 U.S. 339, 73 L. Ed. 410, 49 S. Ct. 123, 66 A.L.R. 397 (1929).


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Similarly, when the settlor declares himself to be trustee of the property and reserves not only a life interest but also a power to revoke and modify the trust, the trust is not testamentary merely because of the reservation of these powers. As in the case of a transfer to another as trustee, however, if in addition to the above powers the settlor reserves the power to deal with the property as he wishes for as long as he lives, the intended trust is invalid unless executed in conformity with the Statute of Wills.

The only instance in which the courts have really ignored this last qualification, and the furthest that they have gone in holding a transaction not to be in violation of the Statute of Wills, is where one deposits money in a savings account in his name as trustee for another. In this situation, in the absence of any evidence of the depositor's intention other than the form of the deposit, some courts follow the doctrine laid down in the New York case of Matter of Totten, and indulge in the presumption that the depositor intended to create a trust and to reserve a power not only to revoke the trust but to deal with the deposit during his lifetime in any way he should desire. This presumption render the trustee the agent of the settlor and that which will not is not clearly defined by the courts. Space and the limitation of the scope of this article prevent an exhaustive consideration of this difficult problem. For a detailed treatment, see: Scott, Trusts sec. 57.2 (1939); Bogert, Trusts and Trustees secs. 103 et seq. (1935).


14 Dickerson's Appeal, 115 Pa. 193, 8 Atl. 64 (1887); De Leuil's Ex'trs v. De Leuil, 235 Ky. 406, 74 S.W. 2d 474 (1934); O'Hara v. O'Hara 281 Mass. 75, 195 N.E. 909 (1935); Smith v. Deshaw, 116 Vt. 441, 78 A. 2d 479 (1951). Also see Scott, Trusts sec. 57.6 (1939); Restatement, Trusts sec. 57 (1935).

15 Noble v. Learned, 153 Cal. 245, 94 Pac. 1047 (1908); Tunnell's Estate, 325 Pa. 554, 190 Atl. 906 (1937). Also see Scott, Trusts sec. 57.6 (1939); Restatement, Trusts sec. 57 subd. (3) (1935).

16 See Scott, Trusts secs. 58.1, 58.2, 58.3 (1939), and the cases collected therein. Also see Atkinson, Wills 173-177 (2d ed. 1958). This is the position adopted in the Restatement of Trusts, sec. 58. In some states, however, the fact that the depositor intends to reserve control over the deposit is held to render the transaction testamentary. See Scott, Trusts sec. 58.3, where these cases are collected.
tion is, of course, rebuttable. Therefore, if it is shown that the depositor intended to vest an interest in the beneficiary only upon the depositor's death, the deposit is testamentary and invalid under the Statute of Wills. Also it may be possible to show that the depositor did not intend to create a trust at all, but rather to use the account as a "dummy" for some special purpose of his own. In the latter instance, the Statute of Wills is not involved; no trust arises simply because none was intended.

The Basis of The Surviving Spouse's Rights

Since a surviving spouse is not defeated by a "dummy" transaction, or by one which is invalid under the Statute of Wills, the next question that arises is whether a disposition which is valid under the Statute of Wills and is not a "dummy" is safe from attack by a surviving spouse? That is, is the test insofar as the rights of a survivor are concerned simply whether the disposition is valid or invalid under the Statute of Wills and general property law?

(a) The Statute of Wills and General Property Law

One line of cases clearly appears to answer this question in the affirmative. Typical of these is Kerwin v. Donaghy, in which the court stated:

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For a discussion of various reasons why depositors may make such deposits, see Scott, Trusts sec. 58.1 (1939); Bogert, Trusts 47 (Hornbook Series, 3d ed. 1952); Temple L. Q. 87 (1933).


Also see the following savings account cases: In Matter of Clark, 149 Misc. 374, 265 N.Y. Supp. 253 (Surr. Ct. 1933); Matter of McCann, 155 Misc. 763, 281 N.Y. Supp. 445 (Surr. Ct. 1935); In re Schurer's Estate, 157 Misc. 573, 284 N.Y. Supp. 28 (Surr. Ct. 1933) aff'd memo. 248 App. Div. 697, 289 N.Y. Supp. 818 (1st Dep't 1936); In re Halpern's Estate, 303 N.Y. 33, 100 N.E. 2d 120 (1951). (Technically dictum, but important because it changes the prior New York law. The Halpern rule has been adopted in the following Savings account cases: In re Freistadt's Will, 279 App. Div. 603, 107 N.Y.S. 2d 866 (2d Dep't 1951); In re
The limitation ... upon the right of a husband to disinherit his wife by a conveyance or gift of personal property inter vivos, that the conveyance or gift must not be "colorable" ... means merely that the conveyance or gift must be one legally binding on the settlor or donor, accomplished in his lifetime, and not testamentary in its effect.  

The nature of the survivor's rights in these cases, therefore, is merely the same as that of any other person entitled to a share of the decedent's estate.

(b) The Election Statutes

Another line of cases, however, following the decision of the Court of Appeals of New York as stated in Newman v. Dore, answers the question in the negative. In Newman v. Dore, the court declared:

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This is the Restatement's position in ordinary trust cases. See RESTATEMENT, TRUSTS sec. 57, comment c. (1935). In savings account cases, however, the position is taken that the survivor can reach the deposit. RESTATEMENT, TRUSTS sec. 58, comment c. (1948 Supp.).

In Indiana it is provided by statute that: "In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the will, the court shall consider only such property as would have passed under the laws of descent and distribution." 3 INDIANA STATUTES ANN. (Burns, 1953 Replacement) sec. 301.

In Kerevin v. Donaghy, 317 Mass. 559, 59 N.E. 2d 299 (1945), where the court stated that the right of a wife was no higher than the similar right of a child of the decedent.

We need not now determine whether such a trust is, for any purpose, a valid present trust. . . . We do not now consider . . . whether in this case the reserved power of control is so great that the trustee is in fact "the agent of the settlor." We assume, without deciding, that except for the provisions of section 18 of the Decedent Estate Law the trust would be valid.26

Even though the court did not decide whether the trust was testamentary, it did assume that except for the surviving spouse's rights under the election statute the trust would be valid. Consequently, it would seem that the court recognized that a transaction in which a settlor retains certain measures of control may be invalid as against a surviving spouse even though the degree of control retained is not enough to render the transfer invalid under the Statute of Wills or under general property and trust law.

An especially clear proof of the application of this theory is found in the New York savings account cases decided after the Newman doctrine was announced; for while the New York courts have consistently held that savings bank deposits of the so-called "Totten" variety do not violate the Statute of Wills and are otherwise effective trusts upon the death of the depositor,27 after the Newman decision and up until 1951,28 these trusts were just as consistently held to be "illusory," or invalid, as to the surviving spouse of the depositor.29

The clearest example outside of the State of New York of the recognition of this special right of the survivor is found in two decisions of the Supreme Court of Ohio,30 where the trusts in-
volved, while held invalid as to the surviving spouses and set aside pro tanto to the extent of the share to which they were entitled by law, were held otherwise valid and effective.

It may seem upon first impression that the concept that a transaction may be at one and the same time both valid and invalid is a logical impossibility. When, however, the basis upon which this concept rests is understood, it seems quite logical. That basis is simply a recognition of the fact that the policy underlying the election statutes is stronger in regard to the degree of divestment of control necessary for the validity of an inter vivos transfer than is the policy underlying the Statute of Wills. This position appears sound, for it is a surviving spouse alone who cannot be deprived by will of a share in the estate of a decedent.

(1) Control Sufficient to Render a Trust Invalid Under the Newman v. Dore Concept

Since the Newman v. Dore concept creates a different standard of control than the Statute of Wills, the question arises as to just what degree of reserved control will be sufficient to render the trust invalid.

Ordinary Trusts: In Newman v. Dore, the settlor reserved the income for life, the power to revoke the trust at will, and the powers granted the trustees were, in general, made “subject to the settlor’s control during his life,” and could be exercised “in such manner only as the settlor shall from time to time direct in writing.” The court expressly refused, however, to state whether the reservation of either the income for life, or the power to revoke the trust, or both, might, without the power to control the trustee in the administration of the trust, be sufficient in themselves to render the trust invalid.

81 See 23 CORN. L. Q. 457, 458 (1938), where this opinion is expressed.
82 See 10 MARYLAND L. REV. 1, 8 (1949).
83 See Scott, TRUSTS secs. 57.5, 58.5 (1939). In sec. 58.5 (1953 Supplement), Professor Scott states: “It might well be held that the policy in favor of the surviving spouse is stronger than the policy requiring that a testamentary disposition shall be executed with certain formalities; the question is whether the testator can accomplish a purpose through the creation of such a trust which he could not accomplish by executing a will.”
84 That a transfer may be valid as to others, yet invalid as to a surviving spouse.
This practice of not laying down precise rules in regard to the degree of control sufficient to render a trust invalid as to the survivor, but rather to decide each case upon its merits, prevails in almost every case in which this special concept of the spouse's rights has been adopted. Consequently, if any general rule exists, it can be found only by examining the terms of the trusts in which this issue has arisen.

The results of an examination show that in practically every instance in which the trust was held invalid, the settlor reserved not only the income for life, and the power to modify and/or revoke the trust, but in addition expressly reserved some power of control over the trustee in the administration of the trust.\(^{27}\) While this summation is admittedly too general to be of any definite value as a standard by which to judge the validity of a transfer, because of the reluctance of these courts to lay down precise rules, no clearer rule can be formulated.

The Supreme Court of Ohio, however, has shown no such reluctance, and on two occasions has laid down the broad rule that a trust wherein the settlor reserves the income during his lifetime together with the right to amend or revoke the trust, though otherwise valid, is nevertheless invalid as against a surviving spouse.\(^{38}\)

\(^{27}\) Burns v. Turnbull, 266 App. Div. 779, 41 N.Y.S. 2d 448 (2d Dep’t 1943) (settlor designated as one of two trustees; retained right to appoint and remove trustees without limitations; retained exclusive control over management of the trust funds, including right to substitute and replace investments, plus right to amend or revoke); President & Directors of M. Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S. 2d 375 (Sup. Ct. 1939) (Life income; revocation and modification; right to withdraw securities and make substitutions in settlor’s own discretion; and, in the words of the Court: “... reserved a substantial measure of control over the management of the trust by the trustee.”); Smith v. Northern Trust Co., 323 Ill. App. 168, 54 N.E. 2d 75 (1944) (Income to settlor for life; right to alter, amend or revoke; right to veto the sale, disposition or investment of trust assets by the trustee; in event of illness or changed business conditions, to request of trustee enough of principal to support him in manner to which he is accustomed.).

But see Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y. S. 2d 841 (2d Dep’t 1941), where, while the reserved powers (life income; revocation; alter, amend or modify; withdraw moneys or property therefrom) were substantial, settlor did not expressly retain the right to control the trustee in the administration of the trust as in the cases cited above.

\(^{38}\) In Boiles v. Toledo Trust Co., 144 Ohio St. 195, 53 N.E. 2d 331 (1944), paragraph 3 of the syllabus states: “The transfer of property to a trustee under an agreement whereby the settlor reserves to himself the income during his life with the right to amend or revoke, is valid by virtue of Section 8617, General Code, but under such a trust agreement settlor does not part absolutely with the dominion of such property and his widow electing to take under the statute of descent and distribution may assert her right to a distributive share of the property in such trust at settlor’s death.”
No other court has gone as far as the Ohio Supreme Court. Whether the Ohio Court, or any other, will go even further in the future and hold invalid a trust in which only the power to revoke and/or modify is reserved, is a matter for speculation. It is hoped that they will! If it is conceded to be against the policy of the election statutes to permit a deceased spouse to retain the ownership of property for all practical purposes during his lifetime and yet to deprive his spouse of her statutory share, this result should follow. Where a settlor retains the power to revoke the trust, or to amend or modify it, either unrestrictedly or to the extent that he can name himself the sole beneficiary, or where he reserves the power to withdraw principal therefrom, it is submitted that to the extent of any of these reserved powers his ownership and control over the property are in ultimate effect substantially the same as before the transfer in trust. And this is true even though he does not retain the right to receive the income from the trust for the remainder of his life.

While the argument has been made that the adoption of a rule which allows a survivor to reach property placed in a revocable trust will result in a flight of revocable trust capital from a state adopting the rule into one that does not, as far as is known, there has been no mass migration of such capital from the State of Ohio as a result of the decisions in the Bolles and Harris cases.

In Harris v. Harris, 147 Ohio St. 437, 72 N.E. 2d 378 (1947), the complete syllabus in the case reads: "Under the provisions of Section 8617, General Code, the transfer of property to a trustee is valid under an agreement whereby the settlor reserves to himself the income during his life with the right to amend or revoke; but when such settlor does not part with dominion or control over the trust property, his widow may elect to take under the statute of descent and distribution and may assert her right to a distributive share of such property after his death (paragraph three of the syllabus in the case of Bolles v. Toledo Trust Co., Ex'r . . . approved and followed.)"

The syllabus of a decision of the Ohio Supreme Court is written by the court and states the law of Ohio. It will, however, in case of conflict, be interpreted with reference to the fact upon which it is predicated and the questions presented to and considered by the court. Maryland Casualty Co. v. Frederick, 142 Ohio St., 605, 53 N.E. 2d 795 (1944); Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 (1934).

* And thereby bring about the termination of the trust. See Scott, Trusts sec. 331.2 (1939).
* Where the settlor has power to draw from the trust estate, he has power to terminate the trust, Scott, Trusts sec. 331.2 (1939).

This argument was made in a brief filed by the Ohio Fiduciaries Research Association as amicus curiae in the case of Harris v. Harris, 147 Ohio St. 437, 72 N.E. 2d 378 (1947).

See note 38 supra, for quotations from the syllabi of these cases.
Savings Account or "Totten" Trusts: No application problem in regard to the degree of reserved control exists from case to case in savings account trusts of the so-called "Totten" variety because the inferred reservation of powers is the same in every case in which the only evidence of the depositor's intention is the deposit slip in the standard form of "A in trust for B."

In jurisdictions which adopt the "Totten" trust doctrine, therefore, the only question is that of the standard to be adopted in judging the validity of these transactions. If the Statute of Wills is the standard adopted, the survivor will, of course, be completely defeated, since under the "Totten" doctrine these accounts are recognized as valid inter vivos trusts. If, however, a concept is adopted which recognizes that a lesser degree of reserved control than that which is necessary under the Statute of Wills may invalidate a transfer, the surviving spouse should always prevail, for only in the case of a testamentary transfer is the reserved power of control as great as it is in a savings account trust of this type.

(C) Equities Between the Spouses Considered

In at least two other cases, the courts have considered not only the degree of control retained by the settlor over the trust but also whether the surviving spouse was adequately provided for outside of the trust.

Rights of the Survivor Where Decedent Dies Intestate: Regardless of the standard used to judge the validity of a transfer, if the transfer is testamentary, or is otherwise completely invalid because of some rule of general property law, the fact that the decedent died intestate presents no problem as far as the survivor is concerned. In such case, the property forms a part of the deceased spouse's estate and the survivor receives the same

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43 This standard has been applied in the New York cases since the decision in In re Halpern's Estate, 303 N.Y. 33, 100 N.E. 2d 120 (1951). See note 20 supra.
44 This concept was applied in the New York cases prior to 1951. See note 25 supra.
45 See Mushaw v. Mushaw, 183 Md. 511, 39 A. 2d 465 (1944), which attempts to reconcile the Maryland cases on this ground. For a detailed discussion of the Maryland cases, see 10 MARYLAND L. REV. 1 (1949).
interest in it that he would receive in any other instance in which the decedent died wholly intestate.

If, however, the *Newman v. Dore* concept is used, since it is founded upon the policy underlying the election statutes, which, strictly construed, apply only when there is a will in existence, the question arises as to whether the survivor may obtain relief against a non-testamentary transfer when the deceased spouse dies intestate and there is no will to elect against. According to the weight of authority an action may be maintained. This seems sound, for a transfer which is otherwise invalid as to the survivor under this theory would appear to be as much a violation of the policy underlying the election statutes when the decedent dies intestate as when he dies testate. To deny relief to the survivor because of the absence of a will would sanction the violation of this policy on the basis of a technicality, a result which seems indefensible.

**Extent to Which Invalid Transfer Set Aside:** If a transfer is invalid as to all persons and for all purposes, either because it violates the Statute of Wills, is a "dummy" transaction, or fails because of some other rule of general property law, it will, of course, be set aside in toto.

Under the *Newman v. Dore* concept, however, where it is recognized that a transfer may be valid as to all other persons, but invalid, or "illusory," as to the surviving spouse, it would seem to follow logically that such transfer should be set aside.
only pro tanto to the extent necessary to satisfy the share given the survivor by the election statutes. And a number of cases have so decided. Similar holdings have been made in cases in which the minority "intent to defraud" test has been applied, and also in cases involving ante-nuptial transfers found to have been made with the intent to defeat the expectant spouse's rights.

II Minority View

A minority of courts have held that a spouse's rights may not be defeated by any transfer made during life with intent to deprive the spouse of property which, because of the election statutes, would otherwise pass to such spouse. A transfer made with such intent is regarded as a fraud upon the other spouse's marital rights and will be set aside. Conversely, a transfer made

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50 Rubin v. Myrub Realty Co., 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep't 1935); Deke v. Huenemeyer, 260 Ill. 131, 102 N.E. 1059 (1913); Martin v. Martin, 222 Ky. 411, 138 S.W. 2d 509 (1940). But see Vordick v. Kirsch, 216 S.W. 219 (Mo. 1919), where the transfer was set aside in toto.

51 Payne v. Tatum, 236 Ky. 306, 33 S.W. 2d 2 (1930); Benge v. Barnett, 309 Ky. 354, 217 S.W. 2d 782 (1949); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1890) (Intent theory applied, but court also found that gift had not been perfected.); Evans v. Evans, 78 N.H. 352, 100 Atl. 671 (1917); Ivey v. Ivey, 93 N.H. 434, 43 A. 2d 157 (1945); Thayer v. Thayer, 14 Vt. 107 (1842); Nichols v. Nichols, 61 Vt. 492, 6 Atl. 153 (1889). Also see cases collected in 64 A.L.R. 466 (1929); 112 A.L.R. 49 (1938); 157 A.L.R. 184 (1945).

52 Missouri qualifies the rule by requiring that the transfer also have been made in contemplation of death. Dyer v. Smith, 62 Mo. App. 606 (1895); Mertz v. Tower Grove Bank & Trust Co., 944 Mo. 1150, 130 S.W. 2d 611 (1939) (Trust also found to be testamentary); Wanstrath v. Kappell, 356 Mo. 210, 201 S.W. 2d 327 (1947).

53 See Note 5 supra.
with an intent other than to cut off the transferor's spouse is valid, since intent is the controlling factor.63

While the test applied by the courts is the same, the protection afforded the survivor varies according to the rules and presumptions which the courts have adopted to aid them in administering the test. For example, in Vermont, the rule has been adopted that:

... the law in no case presumes fraud. One who seeks to set aside a conveyance on the ground that it is fraudulent must establish that fact so clearly and conclusively as to put it beyond a reasonable doubt.64

In New Hampshire, while fraud is also not presumed, the survivor is required only to establish by a preponderance of the evidence that the transfer was made with fraudulent intent.65 And in Kentucky a survivor is aided by a presumption of fraud in instances in which the decedent transferred all or a greater portion of his property during his lifetime.66

The courts in setting these transfers aside have not set them aside in toto, but only pro tanto to the extent of the survivor's statutory share.67 They have also set transfers aside in several instances in which the transferors died intestate, although no case has been found which expressly litigated this question.68 As dis-

63 Cooke v. Fidelity Trust & S.V. Co., 104 Ky. 473, 47 S.W. 325 (1898); Dunnett v. Shields & Conant, 97 Vt. 419, 123 Atl. 626 (1924); Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933).
64 Dunnett v. Shields, 97 Vt. 419, 123 Atl. 626 (1924). Also see Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933). Prior to the Dunnett case the Vermont court had declared in Nichols v. Nichols, 67 Vt. 426, 18 Atl. 153 (1889), that: "The intent to defeat the marital rights of the oratrix by both grantor and grantees ... is necessarily presumed from their knowledge that such rights would be defeated by the conveyance. Both are presumed to have intended the natural results of their acts."
65 Murray v. Murray, 90 Ky. 1, 13 S.W. 244 (1890); Manikku v. Beard, 85 Ky. 20, 2 S.W. 545 (1887); Payne v. Tatum, 236 Ky. 306, 33 S.W. 2d 2 (1930).
This does not mean that a presumption may not arise to aid the challenging spouse in any case in which less than the bulk of the other spouse's property was transferred. See Benge v. Barnett, 309 Ky. 354, 217 S.W. 2d 782 (1949).
discussed in connection with the test applied by the majority of jurisdictions, both of the above positions seem completely sound.

A fundamental objection to the intent to deprive, or fraud test is that it fails to strike the balance between the spouse's rights as appear to be required by the policy underlying the election statutes. That policy would seem to recognize the right of the one spouse to freely alienate his property during his lifetime. Yet at the same time, it would also appear to recognize the right of the other spouse to be protected from disinheri- tance by means of a device which will accomplish a result which the election statutes prevent the decedent from accomplishing by will. The only type transfer which falls within this prohibition is one in which the decedent retains for all practical purposes the ownership of the property until his death. It would not appear to affect absolute transfers in which the spouse retained none of the prerogatives of ownership, regardless of the motive or intent of the transfer. The fraud test, however, denies free alienation in this latter instance if the intent to deprive the other spouse of the property is present. No protection, however, is afforded the survivor against a transfer in which the spouse retained most of the prerogatives of ownership—although not enough to violate the statute of wills, but made the transfer in good faith. Another criticism of the fraud test is that doubt is cast upon all gratuitous transfers made by a spouse during marriage.

Conclusion

I. The minority intent to defraud test is unsatisfactory. It not only makes every transfer potentially suspect, but protects the surviving spouse only when fraud is involved. As a result, the survivor is afforded no protection against transfers in which the transferor retained most of the prerogatives of ownership but made the transfer in good faith.

II. Also objectionable is the position taken by other courts that any gratuitous inter vivos transfer is effective to cut off the

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See pages 626 et seq. supra.

See Newman v. Dore, 275 N.Y. 371, 9 N.E. 2d 966 (1937). In Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W. 2d 611 (1939), the court answered this criticism by stating that excessive litigation has not resulted from the application of the test. Quaere: Does this fact make any or all transfers less suspect?

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survivor as long as it does not violate the Statute of Wills or general property and trust law. This position ignores the fact that the election statutes indicate a policy on the part of the legislature to protect a surviving spouse to a greater extent than an heir or distributee.

III. The *Newman v. Dore* concept that a transfer although valid as to all other persons may nevertheless be invalid as against a surviving spouse is sound, for it recognizes the policy underlying the election statutes.

However, the courts should abandon the practice of refusing to lay down precise rules in regard to the reserved powers sufficient to invalidate a transfer, for it has resulted only in uncertainty and confusion.

IV. It is submitted that the most satisfactory solution to this problem lies in the adoption of a rule which declares invalid as against a surviving spouse all gratuitous *inter vivos* transfers in trust to the extent to which a deceased spouse retains either a power of revocation, or amendment, or consumption of the principal of the trust, or any combination of these powers.

The rule should be applied whether the deceased spouse died intestate or testate. The trust, if otherwise valid, however, should not be set aside *in toto*, but only to the extent required to satisfy the survivor's forced share.

This solution permits the one spouse to freely alienate his property during his lifetime and at the same time protects the survivor from disinheritance by means of a device which will accomplish a result which the election statutes prevent the decedent from accomplishing by will.

If the courts are unwilling to afford adequate protection to the survivor, it is believed that the problem is important enough for this protection to be supplied by legislation.61

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61 This has been done in Pennsylvania. See *Pa. Stat. Ann.* (Purdon) tit. 20 sec. 301.11 (1950).