EPTL § 5-1.1: Buy-and-Sell Agreement Directing Payment to Third Party Upon Death of Testator Held a Testamentary Substitute

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with a greater limitation on the available number of peremptory challenges, would not only eliminate abuse of challenges by the litigants, but also would serve to convert voir dire in New York from an adversarial contest to an impartial seating of a defendant’s peers.\footnote{Richard C. Cavo}

### Estates, Powers & Trusts Law

**EPTL § 5-1.1: Buy-and-sell agreement directing payment to third party upon death of testator held a testamentary substitute**

Section 5-1.1 of the Estates, Powers and Trusts Law (EPTL) permits a surviving spouse to elect to take a specified share of the decedent’s estate despite the existence of a valid will.\footnote{To prevent Since the adoption of judicially controlled voir dire by the federal courts, state courts have looked for ways to curb the abusive tendencies of the present counsel-based system. See Okun, Investigation of Jurors by Counsel: Its Impact on the Decisional Process, 56 Geo. L.J. 839, 847 (1968). Counsel-controlled voir dire has engendered cumbersome delays in an already overtaxed judicial system. See Recent Developments, Civil and Criminal Procedure—Voir Dire Examinations—New Jersey Supreme Court Places Primary Responsibility for Conducting Voir Dire Examinations on Trial Court Judges, 15 VILL. L. Rev. 214, 217 (1969). Voir dire conducted by counsel allows a litigant to attempt to influence prospective jurors toward his client’s position under the facade of unearthing juror bias. Id. at 218. It is suggested that judicial control of voir dire will not only curtail the delays and adversarial abuse present in counsel-controlled voir dire, but will allow the court discretion to review potentially prejudicial practices as well. Note, Selection of Jurors by Voir Dire Examination and Challenge, 58 Yale L.J. 638, 644 (1949).}

The State of Illinois has adopted the federal court method of judicially controlling voir dire. See, e.g., Ill. Ann. Stat. ch. 110A, § 234 (Smith-Hurd Supp. 1982); see People v. Lexow, 23 Ill. 2d 541, 179 N.E.2d 683, 684 (1962). New Jersey, recognizing the inherent benefits of the federal system, also has instituted the operative elements of that system in its courts. N.J. Court Rules 1:8-3(a) (1983). The New Jersey statute grants the trial judge broad discretion to control the line of questioning by advancing only those questions he deems to be probative of a venireman’s ability to be impartial. Id. See State v. Manley, 54 N.J. 259, 269, 255 A.2d 193, 199 (1969).

\footnote{See generally Bermant & Shapard, supra note 109, at 77, 85-91 (discussing present format of voir dire and questioning its place in an adversarial advocacy system).}

a decedent from frustrating the survivor's elective right by stripping the estate of assets during his lifetime,\(^{147}\) subsection (b) pro-

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\(^{147}\) See EPTL § 5-1.1, commentary at 16 (1981); Third Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, 1964 Leg. Doc. No. 19, 189 [hereinafter cited as Third Report, Commission on Estates]; 9A P. Rohan, supra note 146, ¶ 5-1.1[1], at 5-19. See generally Arenson, 1965 Legislation Affecting Law of Trusts and Estates, 12 N.Y.L.F. 1, 4-8 (1966) (brief review of cases utilizing “illusory” transfers to prevent stripping of assets); Powers, Illusory Transfers and Section 18, 32 St. John's L. Rev. 193, 196-217 (1958). DEL § 18 made no mention of inter vivos dispositions of a testamentary nature. See DEL § 18; Powers, supra, at 193. This omission was often criticized because it enabled individuals to circumvent the statute through inter vivos transfers of property. See, e.g., In re Estate of Filfiley, 69 Misc. 2d 372, 373, 329 N.Y.S.2d 632, 634 (Sur. Ct. Kings County 1972), aff’d mem., 43 App. Div. 2d 981, 353 N.Y.S.2d 400 (2d Dep’t 1974); In re Estate of Kleinerman, 66 Misc. 2d 563, 569, 319 N.Y.S.2d 898, 905 (Sur. Ct. Kings County 1971); Arenson, supra, at 3; Cox, supra note 146, at 169 n.42. In order to prevent the frustration of the legislature’s purpose, the judiciary developed the “illusory transfer” doctrine, under which certain inter vivos transfers by the decedent would be deemed ineffective. See generally infra note 170 and accompanying text. This doctrine, in turn, was criticized as confusing and unpredictable. Powers, supra, at 193-94. Consequently, the legislature directed the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates (the “Bennett Commission”) to formulate, inter alia, legislation that would remedy the “flux” in the “illusory transfer” doctrine. See In re Estate of Agioritis, 40 N.Y.2d 646, 649, 357 N.E.2d 979, 981, 389 N.Y.S.2d 323, 325 (1976). Pursuant to the Bennett Commission’s recommendations, section 18 of the DEL was amended, effective September 1, 1966, to include testamentary substitutes. Ch. 665, [1965] N.Y. Laws 1670; see Arenson, supra, at 10-14. This section subsequently was incorporated into the EPTL, effective September 1, 1967. See EPTL § 5-1.1, commentary at 16 (1981).
vides that certain inter vivos transactions, termed "testamentary substitutes," are to be included in the estate for the purpose of computing the widow's elective share.\textsuperscript{148} Testamentary substitutes include transfers of property "in trust or otherwise" which, through the instrument of disposition, reserve to the testator a substantial degree of control over the corpus.\textsuperscript{149} Recently, in \textit{In re Estate of Riefberg},\textsuperscript{150} the New York Court of Appeals held that a stock buy-and-sell agreement falls within this statutory definition of a testamentary substitute.\textsuperscript{151}

In \textit{Riefberg}, the decedent, Sid Riefberg, and his brother, sole shareholders of a close corporation, had executed a buy-sell agreement which provided that upon the death of either shareholder, the corporation would purchase the decedent's corporate interest from his estate.\textsuperscript{152} One day before Sid Riefberg's death, he and his brother amended the agreement to provide that the proceeds from the sale of the stock would be paid to Sid Riefberg's first wife, Henrietta, rather than to the estate.\textsuperscript{153} In his will, the decedent

\textsuperscript{148} EPTL § 5-1.1(b)(1) (1981). The five enumerated testamentary substitutes provided in the EPTL are as follows:

(A) Gifts causa mortis.

(B) Money deposited ... in a savings account in the name of the decedent in trust for another person ... and remaining on deposit at the date of the decedent's death.

(C) Money deposited ... in the name of the decedent and another person and payable on death, pursuant to the terms of the deposit or by operation of law, to the survivor, ... and remaining on deposit at the date of the decedent's death.

(D) Any disposition of property made by the decedent ... whereby property is held, at the date of his death, by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety.

(E) Any disposition of property made by the decedent ... in trust or otherwise, to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof.

\textit{Id.} § 5-1.1(b)(1)(A)-(E).

\textsuperscript{149} Id. § 5-1.1(b)(1)(E); see supra note 148.


\textsuperscript{151} Id. at 142, 446 N.E.2d at 428, 459 N.Y.S.2d at 743.

\textsuperscript{152} Id. The decedent and his brother each owned 50% of the stock of Eastern Warehouse Service, Inc. \textit{In re Estate of Riefberg}, 107 Misc. 2d 5, 6, 433 N.Y.S.2d 374, 375 (Sur. Ct. Nassau County 1980), aff'd mem., 86 App. Div. 2d 782, 449 N.Y.S.2d 371 (2d Dep't 1982), aff'd, 58 N.Y.2d 134, 446 N.E.2d 424, 459 N.Y.S.2d 739 (1983). The buy-sell agreement obligated the corporation to purchase the shares of a deceased shareholder from ""the decedent's personal representatives."" 107 Misc. 2d at 6, 433 N.Y.S.2d at 375. The proceeds, therefore, would become part of the estate. \textit{Id.}

\textsuperscript{153} 58 N.Y.2d at 137, 446 N.E.2d at 426, 459 N.Y.S.2d at 741. The handwritten " Amendment of Stockholders' Agreement" provided that payment for the shares was to be
bequeathed the bulk of his estate to Henrietta and her children, but made no provision for his current wife, Maria.\textsuperscript{154} Maria exercised her elective right and sought to have the shareholder agreement included in the estate for the purpose of computing her elective share.\textsuperscript{155} The Surrogate’s Court, Nassau County, held that the shareholder agreement must be included in the estate because the agreement constituted a testamentary substitute.\textsuperscript{156} The Appellate Division, Second Department, unanimously affirmed without opinion.\textsuperscript{157}

On appeal, the Court of Appeals also affirmed.\textsuperscript{158} Writing for a unanimous Court, Judge Fuchsberg surveyed the historical development of the rights of surviving spouses.\textsuperscript{159} The reports of the Bennett Commission,\textsuperscript{160} Judge Fuchsberg observed, indicated an intent to include stock purchase agreements in the initial draft of EPTL § 5-1.1.\textsuperscript{161} Thus, the Court reasoned, the failure to include

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  \item[(154)] 58 N.Y.2d at 137, 446 N.E.2d at 425, 459 N.Y.S.2d at 740. The decedent's former wife and her four children were left the entire estate except for a $500 bequest to the decedent's daughter by his second wife. \textit{Id.} The estate itself was valued at less than $8,000, but the interest in the corporation was valued at $250,000. 107 Misc. 2d at 6, 433 N.Y.S.2d at 375.
  \item[(155)] 58 N.Y.2d at 137, 446 N.E.2d at 425-26, 459 N.Y.S.2d at 740-41.
  \item[(156)] 107 Misc. 2d at 10, 433 N.Y.S.2d at 377. The executrix challenged the spousal election on the grounds that Maria had constructively abandoned the decedent. 58 N.Y.2d at 136, 446 N.E.2d at 425, 459 N.Y.S.2d at 740. The Surrogate's court acknowledged that the "marriage was apparently rather stormy and both parties sought its dissolution," 107 Misc. 2d at 5-6, 433 N.Y.S.2d at 375, but nevertheless concluded that the evidence did not establish constructive abandonment, \textit{id.}
  \item[(157)] The Surrogate held that the "in trust or otherwise" language of EPTL § 5-1.1(b)(1)(E), see supra note 148, encompassed the stock purchase agreement and, thus, the agreement qualified as a testamentary substitute. 107 Misc. 2d at 8-9, 433 N.Y.S.2d at 377. The court found that the decedent had retained power over the disposition of the principal since the power to terminate the agreement was essentially the same as the power to revoke a trust. \textit{Id.} The court also noted other powers of disposition reserved by the agreement. See \textit{id.} at 9, 433 N.Y.S.2d at 377. Surrogate Delin concluded that "[t]he amendment . . . [was a] stark confirmation of the continued control the shareholders could and did exercise over the Eastern stock." \textit{Id.} at 10, 433 N.Y.S.2d at 377. Thus, the court held that the estate must include the value of the corporate interest in the computation of the widow's elective share. \textit{Id.}
  \item[(159)] 58 N.Y.2d at 142, 446 N.E.2d at 428, 459 N.Y.S.2d at 743.
  \item[(160)] \textit{Id.} at 138-39, 446 N.E.2d at 426-27, 459 N.Y.S.2d at 741-42.
  \item[(161)] See supra note 147.

\end{enumerate}
\end{footnotesize}
stock purchase agreements in the list of exceptions to the defined testamentary substitutes was significant.\textsuperscript{162} Adopting a broad interpretation of the phrase “in trust or otherwise,” the Court rejected the argument that the legislature intended to include only dispositions that are “trust-like” in nature.\textsuperscript{163} The Court distinguished the shareholder agreement from an ordinary contract by pointing out that the agreement allowed the decedent the beneficial enjoyment of the property while stripping the estate of assets at death.\textsuperscript{164} The Court concluded, therefore, that because the agreement provided for the power of disposition over the principal, it was within the purview of EPTL 5-1.1(b)(1)(E).\textsuperscript{165}

The courts and the Legislature historically have been guided by two major policy considerations in defining the rights of a survivor upon the death of a spouse: the promotion of the rights of a surviving spouse,\textsuperscript{166} and the removal of restraints on the free alienation of property.\textsuperscript{167} The replacement of dower with the statutory right of election clearly was designed to enlarge marital property rights. Rubin v. Myrub Realty
ability of property.\footnote{167} Often, these goals are conflicting.\footnote{168} In \textit{Riefberg}, the Court of Appeals resolved this dichotomy in favor of the widow's rights. It is submitted, however, that in so doing, the Court may have unduly jeopardized the legal certainty necessary for the free transfer of contract and property rights.

When the right of election initially appeared in New York, there was no provision regarding inter vivos transfers of a testamentary nature.\footnote{169} To remedy the often inequitable consequences

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\footnote{167}{See Cummins, \textit{Recent Reforms in the Inheritance Laws of New York}, 16 A.B.A. J. 785, 786 (1930) (primary criticism of the right to dower was its disruptive effect on free alienation of property). In fact, the Foley Commission stated that “the removal of the restraints on the conveyance of real estate with a view of giving严密, as nearly as possible, the liquidity and ease of disposition now characteristic of personal property” would be the goal of any legislation replacing the right of dower. \textit{Combined Reports}, supra note 146, at 6. The failure of DEL § 18 to provide for inter vivos transactions was often attributed to this policy goal. See, e.g., Powers, supra note 147, at 195; see Derby, \textit{Disinheritance in New York}, 6 N.Y.U. L.Q. 247, 254 (1929). In formulating the current statute, the Bennett Commission also hoped to avoid the possible cloud on transfers made by a decedent that could arise under the illusory transfer test or a strict inter vivos approach. See \textit{Third Report, Commission on Estates}, supra note 147, at 153-58.}

\footnote{168}{See Powers, supra note 147, at 194-95; see also Cox, supra note 146, at 172.}

of this omission, the judiciary formulated the "illusory transfer" doctrine whereby certain dispositions of property were invalidated if deemed "illusory" by the court.\textsuperscript{170} The illusory test, however, was unpredictable.\textsuperscript{171} Indeed, the Bennett Commission rejected a codification of the illusory test precisely because its uncertainty placed a cloud on all inter vivos transfers.\textsuperscript{172} Although Riefberg's intent to circumvent the statute was apparent, it is suggested that this decision casts doubt on a greater spectrum of contracts. As Dean Rohan has pointed out, \textit{any} contract can be terminated or amended by the mutual consent of the parties.\textsuperscript{173} In addition, to

alienation, by restricting inter vivos transfers was not favored because one of the primary purposes of the elimination of the inchoate right of dower was to encourage freedom in such transfers. Powers, supra note 147, at 195; see P. ROHAN, supra note 146, \S\ S 5-1.1(6), at 5-80. The result was, as one commentator noted, "a statute that lack[ed] effective provision for preserving the 'increased benefits' which it explicitly promise[d] to the surviving spouse." Powers, supra note 147, at 195; accord Arenson, supra, at 4.

\textsuperscript{170} See generally Simes, supra note 146, at 8-9. The courts developed the "illusory transfer" doctrine to serve as a limitation on the decedent's power to denude his estate. 9A P. ROHAN, supra note 146, \S\ S 5-1.1(1), at 5-19; see Wilson, supra note 146, at 193. In the leading case regarding "illusory" transfers, Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937), the Court of Appeals held that the right of election cannot be destroyed by inter vivos transfers where the grantor reserves dominion, control and enjoyment of the property during his life. See id. at 380-81, 9 N.E.2d at 970. The Court held that the donor's motive and intent for making the conveyance was not to be considered in determining the validity of a transfer. Id. at 379, 9 N.E.2d at 969. Thus, an intent to circumvent section 18 was irrelevant. Rather, the transfer's validity was determined by "whether the husband has in good faith divested himself of ownership of his property." Id.

Various types of trusts in which the grantor retained a great deal of control were invalidated as "illusory" after the \textit{Newman} decision. See, e.g., MacGregor v. Fox, 280 App. Div. 435, 437, 114 N.Y.S.2d 286, 288 (1st Dep't 1952), aff'd mem., 305 N.Y. 576, 111 N.E.2d 445 (1955); Bodner v. Feit, 247 App. Div. 119, 121-22, 286 N.Y.S. 814, 817 (1st Dep't 1936), \textit{but cf.} Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 29, 9 N.Y.S.2d 648, 650 (3d Dep't) (grantor's retention of power to revoke or amend trust was upheld against wife's claim since husband had made an equitable settlement with the wife prior to the deed of trust), aff'd mem., 281 N.Y. 760, 24 N.E.2d 20 (1939). However, joint bank accounts became a method of easily avoiding the widow's elective right after \textit{Inda} v. \textit{Inda}, 288 N.Y. 315, 43 N.E.2d 59 (1942), wherein the Court held that joint accounts were not "illusory" transfers. Id. at 318, 43 N.E.2d at 61; see Powers, supra note 147, at 207. \textit{But see} Debold v. Kinscher, 268 App. Div. 786, 788, 48 N.Y.S.2d 900, 901 (2d Dep't 1944) (held illusory transfer since "donees" failed to establish inter vivos gift), aff'd mem., 294 N.Y. 668, 60 N.E.2d 758 (1945).

\textsuperscript{171} See supra note 147. The difficulty of predicting whether a particular transaction would be held illusory contradicted the state goal of certainty in the succession laws. See, e.g., Cox, supra note 146, at 172 "[o]missions in the section itself as well as some judicial decisions construing it call for continuous appraisal". Indeed, the Court's somewhat inconsistent utilization of the "real-or-illusory" test, and even its use of the term "illusory," were criticized as confusing. See Niles, \textit{Trusts and Administration}, 28 N.Y.U. L. Rev. 633, 634-35 (1953); Powers, supra note 147, at 199.

\textsuperscript{172} \textit{Third Report, Commission on Estates, supra} note 147, at 153-58.

\textsuperscript{173} \textit{EPTL} \S\ 5-1.1, commentary at 42 (1981); \textit{Restatement of Contracts} \S\ 406 com-
the extent that contract rights can be assigned or transferred, the testator always retains the power of disposition over the fruits of the contract. \(^{174}\) Thus, it is unclear the extent to which the decision will subject other contractual arrangements to attack under EPTL 5-1.1(b)(1)(E). This uncertainty is reminiscent of the unpredictability that led to the abandonment of the illusory test. \(^{175}\)

The legislature sought to remove the restraints on alienability of property by increasing the certainty with which a transaction could be categorized. \(^{176}\) It is submitted that this objectivity can be achieved only through a literal interpretation of the statute. \(^{177}\) It is

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\(^{174}\) EPTL § 5-1.1, commentary at 42 (1981).

\(^{175}\) It is clear that the inconsistencies and uncertainty of the “illusory transfer” doctrine were important considerations in the promulgation of EPTL § 5-1.1. Arenson, supra note 169, at 2. To quell this uncertainty and to avoid evidentiary problems, the Bennett Commission rejected any consideration of the transferor’s motive as an indicator of “illusory” status. See Third Report, Commission on Estates, supra note 147, at 153-58.

\(^{176}\) 9A P. Rohan, supra note 146, ¶ 5-1.1[5], at 5-53; see Third Report, Commission on Estates, supra note 147, at 153-58.

\(^{177}\) See In re Estate of Zeigher, 95 Misc. 2d 230, 231, 406 N.Y.S.2d 977, 978 (Sur. Ct. Nassau County 1978); 9A P. Rohan, supra note 146, ¶ 5-1.1[5], at 5-68. In Zeigher, the court stated that “the entire approach of the Commission on Estates indicates that the statutory enumeration of transfers . . . which qualify for testamentary substitute treatment is exhaustive, and not meant to be expanded by judicial decisions so as to reach unspecified (though parallel or analogous) situations.” 95 Misc. 2d at 231, 406 N.Y.S.2d at 978 (quoting 9A P. Rohan, supra note 146, ¶ 5-1.1[5], at 5-68). Thus, the court concluded, the correct inquiry in determining whether a transaction is to be deemed a testamentary substitute is whether it is included in the list of testamentary substitutes in § 5-1.1(b), not whether it is excluded from the list of exemptions. 95 Misc. 2d at 231, 406 N.Y.S.2d at 978. Indeed, the Bennett Commission left no doubt that the EPTL is intended to provide a comprehensive statement as to the rights of a surviving spouse with respect to inter vivos transactions made by the decedent . . . .” Fourth Report, Commission on Estates, 1985 N.Y. Lec. Doc. No. 19, at 145.

Much of the ambiguity surrounding the illusory transfer doctrine was a result of the varying priorities given the competing policy goals of DEL § 18. See In re Erstein, 205 Misc. 924, 930, 129 N.Y.S.2d 316, 322 (Sur. Ct. N.Y. County 1954). Indeed, it must be remembered that enlarging the share of the surviving spouse was not the sole concern of the legislature. See In re Estate of Kleinerman, 66 Misc. 2d 563, 566-71, 319 N.Y.S.2d 898, 902-06 (Sur. Ct. Kings County 1971). In Kleinerman, the court examined the various factors relating to the policy with respect to testamentary substitutes. Id. at 570, 319 N.Y.S.2d at 906. On the one hand, EPTL § 5-1.1 was intended to expand greatly the rights of a surviving spouse. EPTL § 5-1.1, commentary at 16 (1981). On the other hand, the court observed, the legislature specifically rejected the inclusion of certain benefits, such as thrift, savings, pension, retire-
hoped, therefore, that the Riefberg decision will not frustrate the legislature’s intention to clarify this area of the law.

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GENERAL BUSINESS LAW

Gen. Bus. Law § 200: Court of Appeals held that whether an innkeeper has complied with the safe requirement of section 200 is a question of fact for the jury

Section 200 of the General Business Law\(^{178}\) operates in derogation of the common-law rule that innkeepers are absolutely liable...