

## 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.<sup>145</sup>

*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.<sup>146</sup> 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).

<sup>145</sup> 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).

<sup>146</sup> EPTL § 5-1.1 (1981 & Supp. 1982-1983). The concept of a "forced share" for a surviving spouse was introduced in New York in 1929 with the enactment of section 18 of the Decedent Estate Law (DEL), ch. 229, § 18, [1929] N.Y. Laws 500 (current version at EPTL § 5-1.1 (1981)) [hereinafter cited as DEL]. Until that time, a survivor was provided for through the common-law doctrines of dower and curtesy. See Cox, *The Right of Election*, 32 ST. JOHN'S L. REV. 164, 164-67 (1958). See generally Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 42-55 (1948) (historical overview). In New York under the Statute of Dower, the "widow shall be endowed of the third part of all the lands whereof her

a decedent from frustrating the survivor's elective right by stripping the estate of assets during his lifetime,<sup>147</sup> subsection (b) pro-

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husband was . . . seized of an estate of inheritance, at any time during the marriage." N.Y. REAL PROP. LAW § 190 (McKinney 1968); see Wilson, *The Impact of Divorce and Separation on Section 18 of the Decedent Estate Law*, 32 ST. JOHN'S L. REV. 183, 185 (1958). This endowment right became less effective as estates consisting primarily of personal property, in which no right to dower existed, became more common. Cox, *supra*, at 165; Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand*, 26 U. CIN. L. REV. 1, 6 (1957). Moreover, the common-law forms of conveyance could be manipulated in order to prevent dower from attaching. Note, *Preventing Dower from Accruing when Acquiring an Estate*, 25 COLUM. L. REV. 938, 944 (1925); see also COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES, COMBINED REPORTS, 1928 N.Y. LEG. DOC. NO. 70, at 9-10 [hereinafter cited as COMBINED REPORTS].

The need to reform the antiquated dower right led to the legislature's formation of the Commission to Investigate Defects in the Law of Estates (the Foley Commission). Ch. 519, [1927] N.Y. LAWS 1235. Among the changes in the law of inheritance initiated by the Foley Commission was the abolition of the rights of dower and curtesy in favor of a statutory right of a survivor to a "forced share" in the deceased spouse's estate. Ch. 229, § 18, [1929] N.Y. LAWS 500 (current version at EPTL § 5-1.1 (1981 & Supp. 1982-1983)); see 9A P. ROHAN, *NEW YORK CIVIL PRACTICE—EPTL* ¶ 5-1.1[2], at 5-20 (1983); Prashker, *Preface to Symposium on the Right of Election of a Surviving Spouse Under Section 18 of the Decedent Estate Law*, 32 ST. JOHN'S L. REV. 161, 161 (1958). DEL § 18 permitted the surviving spouse to elect to receive the share of the estate that he or she would have received had the decedent died intestate, up to a maximum of one-half of the net estate. 9A P. ROHAN, *supra*, ¶ 5-1.1[3], at 5-25 to -26.

<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> Recently, in *In re Estate of Riefberg*,<sup>150</sup> the New York Court of Appeals held that a stock buy-and-sell agreement falls within this statutory definition of a testamentary substitute.<sup>151</sup>

In *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.<sup>152</sup> 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.<sup>153</sup> In his will, the decedent

<sup>148</sup> 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.

*Id.* § 5-1.1(b)(1)(A)-(E).

<sup>149</sup> *Id.* § 5-1.1(b)(1)(E); see *supra* note 148.

<sup>150</sup> 58 N.Y.2d 134, 446 N.E.2d 424, 459 N.Y.S.2d 739 (1983).

<sup>151</sup> *Id.* at 142, 446 N.E.2d at 428, 459 N.Y.S.2d at 743.

<sup>152</sup> *Id.* The decedent and his brother each owned 50% of the stock of Eastern Warehouse Service, Inc. *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. *Id.*

<sup>153</sup> 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.<sup>154</sup> Maria exercised her elective right and sought to have the shareholder agreement included in the estate for the purpose of computing her elective share.<sup>155</sup> The Surrogate's Court, Nassau County, held that the shareholder agreement must be included in the estate because the agreement constituted a testamentary substitute.<sup>156</sup> The Appellate Division, Second Department, unanimously affirmed without opinion.<sup>157</sup>

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

made in specified percentages to Henrietta, her four adult children, and a friend. 107 Misc. 2d at 6, 433 N.Y.S.2d at 375. The amendment was executed while the decedent was hospitalized for the treatment of terminal cancer. *Id.*

<sup>154</sup> 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. *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.

<sup>155</sup> 58 N.Y.2d at 137, 446 N.E.2d at 425-26, 459 N.Y.S.2d at 740-41.

<sup>156</sup> 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, *id.*

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. *Id.* The court also noted other powers of disposition reserved by the agreement. *See 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." *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. *Id.*

<sup>157</sup> 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).

<sup>158</sup> 58 N.Y.2d at 142, 446 N.E.2d at 428, 459 N.Y.S.2d at 743.

<sup>159</sup> *Id.* at 138-39, 446 N.E.2d at 426-27, 459 N.Y.S.2d at 741-42.

<sup>160</sup> *See supra* note 147.

<sup>161</sup> 58 N.Y.2d at 140, 446 N.E.2d at 427, 459 N.Y.S.2d at 742. The Court noted that the Bennett Commission had analogized stock purchase agreements to trusts in which the dece-

stock purchase agreements in the list of exceptions to the defined testamentary substitutes was significant.<sup>162</sup> 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.<sup>163</sup> 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.<sup>164</sup> 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).<sup>165</sup>

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,<sup>166</sup> and the removal of restraints on the free alien-

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dent retains a life interest. *Id.* Thus, the Court stated, the Commission determined that such agreements should be considered testamentary substitutes. *Id.*

<sup>162</sup> *Id.* at 140-41, 446 N.E.2d at 427, 459 N.Y.S.2d at 742. EPTL § 5-1.1, as enacted, specifically exempts certain payments, such as pension plans, insurance proceeds, profit-sharing plans, stock options, stock bonuses, and deferred compensation plans from inclusion as testamentary substitutes. EPTL § 5-1.1(b)(2) (1981). The Court found it notable that shareholders' agreements are not included in this list of exceptions. 58 N.Y.2d at 140-41, 446 N.E.2d at 427, 459 N.Y.S.2d at 742.

<sup>163</sup> 58 N.Y.2d at 141, 446 N.E.2d at 428, 459 N.Y.S.2d at 743. The executrix urged the Court to utilize the *ejusdem generis* rule of construction, whereby "a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series." *Id.* (citing *People v. Illardo*, 48 N.Y.2d 408, 416, 399 N.E.2d 59, 63, 423 N.Y.S.2d 470, 474 (1979)). She contended that the statute's application to the disposition of property "in trust or otherwise" applies only to transactions that are "trust-like" in nature. 58 N.Y.2d at 141, 446 N.E.2d at 428, 459 N.Y.S.2d at 743. The Court rejected this application of the rule, noting that a single, specific word rarely is a reliable indicator of the "intent behind [the] general one." *Id.* The Court interpreted the term "otherwise" in accordance with its literal definition, "different from." *Id.* This definition, the Court found, "dovetail[ed] with the Legislature's 'evident purpose.'" *Id.*

<sup>164</sup> 58 N.Y.2d at 141-42, 446 N.E.2d at 428, 459 N.Y.S.2d at 743.

<sup>165</sup> *Id.*

<sup>166</sup> See, e.g., *In re Estate of Agioritis*, 40 N.Y.2d 646, 650, 357 N.E.2d 979, 982, 389 N.Y.S.2d 323, 326 (1976); *In re Estate of Byrnes*, 141 Misc. 346, 349-50, 252 N.Y.S. 587, 591 (Sur. Ct. N.Y. County 1931), *aff'd mem.*, 235 App. Div. 782, 257 N.Y.S. 884 (1st Dep't 1932), *aff'd*, 260 N.Y. 465, 184 N.E. 56 (1933). The policy of protecting a surviving spouse has been in existence for centuries. See *Cox, supra* note 146, at 164-65; *Haskins, supra* note 146, at 42. The policy was manifested in the inchoate right of dower, which the courts generally interpreted in a fashion protective of the widow's rights. See *Cox, supra* note 146, at 164. For example, a transfer of real property during an engagement to marry would be declared void to the extent that the widow would have received the dower right. See *Youngs v. Carter*, 10 Hun 194, 199 (1st Dep't 1877). 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.<sup>167</sup> Often, these goals are conflicting.<sup>168</sup> In *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.<sup>169</sup> To remedy the often inequitable consequences

Co., 244 App. Div. 541, 544, 279 N.Y.S. 867, 870 (1st Dep't 1935); *In re Erstein*, 205 Misc. 924, 930-31, 129 N.Y.S.2d 316, 322 (Sur. Ct. N.Y. County 1954). Indeed, the legislature specifically stated that one purpose for enacting section 18 of the DEL was to expand the property rights of a surviving spouse. Ch. 229, § 20, [1929] N.Y. Laws 519. With this purpose in mind, the "illusory transfer" doctrine was formulated. See, e.g., *Newman v. Dore*, 275 N.Y. 371, 379, 9 N.E.2d 966, 969 (1937); *Bodner v. Feit*, 247 App. Div. 119, 121-22, 286 N.Y.S. 814, 817 (1st Dep't 1936).

EPTL § 5-1.1, the current statute, was an attempt to further expand the rights of a surviving spouse. *In re Estate of Agioritis*, 52 App. Div. 2d 128, 134, 383 N.Y.S.2d 304, 309 (1st Dep't), *aff'd*, 40 N.Y.2d 646, 357 N.E.2d 979, 389 N.Y.S.2d 323 (1976); see EPTL § 5-1.1, commentary at 16 (1981); 9A P. ROHAN, *supra* note 146, ¶ 5-1.1[1], at 5-18. For example, certain enumerated testamentary substitutes, such as Totten Trust accounts, were not deemed estate assets under the illusory test. *In re Halpern*, 303 N.Y. 33, 38-39, 100 N.E.2d 120, 122 (1951); 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).

The New York courts have stated clearly the policy that elective rights are remedial, and are to be construed in favor of the survivor to guarantee "the broadest possible protection." E.g., *In re Estate of Bartley*, 83 Misc. 2d 672, 679, 370 N.Y.S.2d 990, 998 (Sur. Ct. Cattaraugus County 1975). The judiciary views with "suspicion and disfavor" anything that "tends to prevent marriage, or to disturb the marriage state." *Mofsky v. Goldman*, 3 App. Div. 2d 311, 316, 160 N.Y.S.2d 581, 585 (4th Dep't 1957) (quoting *Owens v. McNally*, 113 Cal. 444, 453, 45 P. 710, 713 (1896)).

<sup>167</sup> See Cummins, *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 realty, 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. 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, *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 THIRD REPORT, COMMISSION ON ESTATES, *supra* note 147, at 153-58.

<sup>168</sup> See Powers, *supra* note 147, at 194-95; see also Cox, *supra* note 146, at 172.

<sup>169</sup> *In re Erstein*, 205 Misc. 924, 930-31, 129 N.Y.S.2d 316, 322-23 (Sur. Ct. N.Y. County 1954); Arenson, *Surviving Spouse's Right of Election and its Application to Testamentary Substitutes*, 20 N.Y.L.F. 1, 4 (1974). The Pennsylvania statute, which served as a model for the New York statute, did not contain any provision regarding inter vivos transfers. PA. STAT. ANN. tit. 20, § 6111 (Purdon 1975) (repealed 1978); COMBINED REPORTS, *supra* note 146, at 13; see 9A P. ROHAN, *supra* note 146, ¶ 5-1.1[6], at 5-80. Placing a new restraint on

of this omission, the judiciary formulated the "illusory transfer" doctrine whereby certain dispositions of property were invalidated if deemed "illusory" by the court.<sup>170</sup> The illusory test, however, was unpredictable.<sup>171</sup> Indeed, the Bennett Commission rejected a codification of the illusory test precisely because its uncertainty placed a cloud on all inter vivos transfers.<sup>172</sup> 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, *any* contract can be terminated or amended by the mutual consent of the parties.<sup>173</sup> In addition, to

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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, ¶ 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.

<sup>170</sup> 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, ¶ 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 *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 (1953); *Bodner v. Feit*, 247 App. Div. 119, 121-22, 286 N.Y.S. 814, 817 (1st Dep't 1936). *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 *Inda v. 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. *But see Debold v. Kinscher*, 268 App. Div. 786, 786, 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).

<sup>171</sup> 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, *Trusts and Administration*, 28 N.Y.U. L. REV. 633, 634-35 (1953); Powers, *supra* note 147, at 199.

<sup>172</sup> THIRD REPORT, COMMISSION ON ESTATES, *supra* note 147, at 153-58.

<sup>173</sup> EPTL § 5-1.1, commentary at 42 (1981); RESTATEMENT OF CONTRACTS § 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.<sup>174</sup> 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.<sup>175</sup>

The legislature sought to remove the restraints on alienability of property by increasing the certainty with which a transaction could be categorized.<sup>176</sup> It is submitted that this objectivity can be achieved only through a literal interpretation of the statute.<sup>177</sup> It is

ment a (1932); see J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 21-2, at 757 (1977). The *Riefberg* Court emphasized that the agreement, "by expressly providing for the manner of its termination, fell squarely within the express statutory definition of the category of testamentary substitute" in EPTL § 5-1.1(b)(1)(E). 58 N.Y.2d at 142, 446 N.E.2d at 428, 459 N.Y.S.2d at 743. Yet, there is no question that the parties would have been able to abrogate the contract by mutual agreement regardless of any express provision. See J. CALAMARI & J. PERILLO, *supra*, § 21-2, at 757.

<sup>174</sup> EPTL § 5-1.1, commentary at 42 (1981).

<sup>175</sup> 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.

<sup>176</sup> 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.

<sup>177</sup> 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*, 1965 N.Y. LEG. 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.

*Lisa Schreibersdorf*

### 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<sup>178</sup> operates in derogation of the common-law rule that innkeepers are absolutely liable

ment, stock bonus, profit sharing, and insurance arrangements as well as inter vivos gifts, irrevocable trusts, deeds of real property and gifts of U.S. Savings Bonds. *Kleinerman*, 66 Misc. 2d at 570, 319 N.Y.S.2d at 906. The Surrogate found significant the fact that the legislature set the effective date of the statute 14 months from the date of enactment, presumably to allow testators an opportunity to arrange their affairs so as to avoid the statute's operation. *Id.* at 571, 319 N.Y.S.2d at 906. The court also emphasized that the act of disinheriting one's spouse is indicative of a deteriorated marital relationship. *Id.* at 570, 219 N.Y.S.2d at 906. Hence, the court concluded that accounts created before August 31, 1966, retain their character as exempt gifts unless the amount and/or beneficiary changed. *Id.* at 571, 319 N.Y.S.2d at 906-07.

<sup>178</sup> N.Y. GEN. BUS. LAW § 200 (McKinney 1968). Section 200 of the General Business Law provides, in pertinent part:

Whenever the proprietor or manager of any hotel . . . shall provide a safe in the office of such hotel, . . . or other convenient place for the safe keeping of any money, jewels, ornaments, bank notes, bonds, negotiable securities or precious stones, belonging to the guests . . . and shall notify the guests or travelers thereof by posting a notice stating the fact that such safe is provided, . . . in a public and conspicuous place and manner in the office and public rooms . . . of such hotel, . . . if such guest or traveler shall neglect to deliver such property, to the person in charge of such office for deposit in such safe, the proprietor . . . shall not be liable for any loss . . . and if such guest or traveler shall deliver such property, to the person in charge of such office for deposit in such safe, said proprietor, . . . shall not be liable for any loss thereof, sustained . . . by theft or otherwise, in any sum exceeding the sum of five hundred dollars unless by special agreement in writing . . . .

*Id.* Section 200 is designed to protect the innkeeper from "undisclosed excessive liability." *Millhisser v. Beau Site Co.*, 251 N.Y. 290, 294, 167 N.E. 447, 448 (1929); see *infra* note 205 and accompanying text. It should be noted, however, that the statute does not establish new innkeeper liability, but rather assumes the existence of absolute common-law liability. *Navagh, A New Look at the Liability of Inn Keepers for Guest Property Under New York Law*, 25 FORDHAM L. REV. 62, 64 (1956). Thus, where strict compliance with the statutory requirement has not been observed, the common-law rule will control. *Davidson v. Madison Corp.*, 231 App. Div. 421, 426, 247 N.Y.S. 789, 796 (1st Dep't), *aff'd*, 257 N.Y. 120, 177 N.E. 393 (1931); *Shaine v. Jacobson, Inc.*, 121 Misc. 590, 591, 201 N.Y.S. 781, 781 (Sup. Ct. Spec. T. N.Y. County 1923).