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EPTL § 5-1.1(b)(1)(B): Totten Trust Established Prior ro August 31, 1966 and Transferred to Another Depository Subsequent to That Date Held To Be a Testamentary Substitute

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the statute a virtual nullity in a situation which it expressly was intended to govern.¹²⁰ It is hoped that the legislative purpose underlying section 151 will be implemented by the courts in future decisions.

ESTATES, POWERS AND TRUSTS LAW

EPTL § 5-1.1(b)(1)(B): Totten trust established prior to August 31, 1966 and transferred to another depository subsequent to that date held to be a testamentary substitute.

Designed to prevent the disinheritance of a surviving spouse by use of the Totten trust device,¹²¹ EPTL section 5-1.1(b)(1)(B) provides that money that has been deposited in a Totten trust by a decedent after August 31, 1966 and subsequent to his marriage to the surviving spouse is to be treated as a "testamentary substitute" and included in the net estate subject to the surviving spouse's right of election.¹²² Although seemingly unambiguous on its face, this statute fails to expressly treat the question whether funds placed in a Totten trust prior to August 31, 1966 and transferred to another

DEBT. & CRED. LAW § 151 (McKinney Supp. 1977), it would appear to be improper for the *South Shore* court to have considered adversely the bank's failure to react immediately.

¹²⁰ As was noted by the *South Shore* dissent, "the first effective notice of the issuance of an execution is by service of that execution upon the garnishee . . ." 55 App. Div. 2d at 146, 389 N.Y.S.2d at 853 (Lane, J., dissenting) (citation omitted). Thus, it is clear that the majority's position, in demanding action by the garnishee prior to service of execution, greatly encroaches upon the garnishee's right of setoff.

¹²¹ The term Totten trust is derived from the case *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904). The usual Totten trust is established when a person makes a deposit in a savings account in his own name in trust for another. The account is not an irrevocable trust; by making withdrawals the depositor can revoke, modify, or terminate the trust at any time during his lifetime. The beneficiary has no rights in the trust until the depositor dies, whereupon title to the funds automatically vests in the beneficiary. If the depositor survives the beneficiary, the trust is terminated. See EPTL § 7-5.2. See generally G. BOGERT & G. BOGERT, LAW OF TRUSTS § 20 (5th ed. 1973); 1 A. SCOTT, TRUSTS § 58 (3d ed. 1967).

¹²² EPTL § 5-1.1(b)(1)(B) provides that the following transaction is to be treated as a testamentary substitute subject to the surviving spouse's right of election:

Money deposited, after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in a savings account in the name of the decedent in trust for another person, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

The surviving spouse's elective share is one-third of the net estate when the decedent is survived by one or more issue, and one-half of the net estate in all other cases. EPTL § 5-1.1(a)(1)(A). The net estate is computed by deducting debts, administration expenses, and reasonable funeral expenditures from the probate estate. *Id.* See generally 9A P. ROHAN, NEW YORK CIVIL PRACTICE ¶ 5-1.1[1]-[4] (1977) [hereinafter cited as ROHAN]; A. SAINER, THE SUBSTANTIVE LAW OF NEW YORK §§ 22-49 (1976).

financial institution after that date constitute "money deposited after August 31, 1966."¹²³ In addition, section 5-1.1(b)(1)(B) does not specify the method of accounting used when withdrawals have been made from a Totten trust account either before or after August 31, 1966.¹²⁴ Recently, in *In re Agioritis*,¹²⁵ the Court of Appeals, presented with an opportunity to resolve these issues, held that a change in either the depository bank or the beneficiary of a pre-August 31, 1966 Totten trust is a new deposit within the contemplation of EPTL section 5-1.1(b)(1)(B) and subjects the account to the surviving spouse's right of election.¹²⁶ Concerning the proper method to account for withdrawals from the Totten trust, the *Agioritis* Court, applying the "first in - first out rule," held that withdrawals made "both prior and subsequent to August 31, 1966, should be deemed to have been made from money first deposited" in the account.¹²⁷

In *Agioritis*, the decedent, Peter Agioritis, died intestate in 1973, leaving a gross estate of approximately \$800,000. More than \$650,000 of the estate consisted of Totten trusts, the beneficiaries of which were various collateral relatives living in Greece.¹²⁸ A number of the Totten trust accounts had been opened prior to August 31, 1966. All of these accounts had been transferred to another depository after that date, and the beneficiaries of some of them were changed at the time of transfer. After receiving letters of administration, the petitioner-wife filed notice of intention to take her elective share against those Totten trusts containing pre-August 31, 1966 deposits which later had been transferred to another bank. The surrogate's court ruled that the accounts which had been transferred without a change in beneficiary had been altered only in form and were therefore exempt from the wife's right of election.¹²⁹ The accounts in which there had been a change in beneficiary, however, were changed not merely in form but in substance, the surrogate

¹²³ EPTL § 5-1.1(b)(1)(B).

¹²⁴ The choice of a particular method of accounting is determinative of the proportion of exempt funds in the Totten trust account. See note 140 *infra*.

¹²⁵ 40 N.Y.2d 646, 357 N.E.2d 979, 389 N.Y.S.2d 323, *aff'g* 52 App. Div. 2d 128, 383 N.Y.S.2d 304 (1st Dep't 1976), *modifying* 84 Misc. 2d 83, 378 N.Y.S.2d 208 (Sur. Ct. N.Y. County 1975).

¹²⁶ 40 N.Y.2d at 651, 357 N.E.2d at 982, 389 N.Y.S.2d at 326.

¹²⁷ *Id.*, 357 N.E.2d at 982, 389 N.Y.S.2d at 327.

¹²⁸ *Id.* at 647, 357 N.E.2d at 979, 389 N.Y.S.2d at 323. The petitioner-wife had married the decedent in 1950. *Id.* Since all of the accounts had been opened subsequent to this date, see 84 Misc. 2d at 89-94, 378 N.Y.S.2d at 216-21, the requirement that the money be deposited after the date of marriage to the surviving spouse was satisfied.

¹²⁹ 84 Misc. 2d at 87, 378 N.Y.S.2d at 214.

reasoned, and thus were subject to the wife's right of election.¹³⁰ On the issue of the proper manner in which to treat withdrawals from the Totten trusts, the lower court determined that withdrawals made both before and after August 31, 1966, were to be charged against the funds first deposited.¹³¹ Holding that the Totten trusts which had no change of beneficiary were not exempt from EPTL section 5-1.1(b)(1)(B), the Appellate Division, First Department, modified the judgment of the surrogate's court.¹³² The First Department affirmed, however, the lower court's treatment of the withdrawals from the bank accounts.¹³³

The Court of Appeals unanimously affirmed the decision of the appellate division, declaring that "a change of either beneficiary or depository bank constitutes a new deposit of money within the meaning of the statute."¹³⁴ In so ruling, the Court determined that the legislative intent underlying the enactment of section 5-1.1(b)(1)(B) dictated a literal construction of that statute, and thus rejected the substance-form analysis utilized by the surrogate's court.¹³⁵ Finding that the legislature intended the surviving spouse to have a right of election against all monies deposited into Totten trust accounts by the decedent during his marriage and after August 31, 1966, the *Agioritis* Court reasoned that the mere fact that the money was derived from a source that was not a testamentary sub-

¹³⁰ *Id.*

In *In re Kleinerman*, 66 Misc. 2d 563, 319 N.Y.S.2d 898 (Sur. Ct. Kings County 1971), Surrogate Sobel, apparently for the first time, applied a form-substance analysis in determining whether a Totten trust was subject to the surviving spouse's right of election. In that case the decedent died intestate in 1970, leaving a widow and two children from an earlier marriage. In 1960 the decedent had opened two Totten trusts for his daughter which he transferred to another bank in 1968 without changing either the beneficiary or amount of the account. The decedent's wife contended that these formerly exempt transactions became testamentary substitutes as a consequence of the transfer to the second bank. Surrogate Sobel rejected this argument, holding that such transfers retained "their character as exempt *inter vivos* transactions" and suggested that even a change in beneficiary would not have caused the account to lose its exempt status. *Id.* at 571-72, 319 N.Y.S.2d at 907. In the present case, Surrogate DiFalco disagreed with the *Kleinerman* court's analysis, stating that a change in beneficiary was "more than a 'mere formal' change." 84 Misc. 2d at 87, 378 N.Y.S.2d at 214. Surrogate DiFalco did concur, however, with the idea that a transfer of an account to another depository without a change in beneficiary does not affect the account's exempt status. *Id.* For further discussion of this problem, see 171 N.Y.L.J. 1, May 9, 1974, at 4, cols. 3-5; EPTL § 5-1.1, commentary at 102-03 (McKinney Supp. 1977); Pasley, *Trusts & Administration*, 23 SYRACUSE L. REV. 239, 263 (1972).

¹³¹ 52 App. Div. 2d at 137, 383 N.Y.S.2d at 310.

¹³² *Id.* at 138, 383 N.Y.S.2d at 311.

¹³³ *Id.* at 137, 383 N.Y.S.2d at 310.

¹³⁴ 40 N.Y.2d at 651, 357 N.E.2d at 982, 389 N.Y.S.2d at 326.

¹³⁵ *Id.*

stitute should not be permitted to override this intent.¹³⁶ Similarly, in holding that withdrawals from the accounts should be charged against the funds first deposited, the Court of Appeals felt that it was promoting the "Legislature's intention to increase the assets subject to elective rights."¹³⁷

It is submitted that the *Agoritis* Court's interpretation of the applicable legislative history is correct. Prior to the enactment of EPTL section 5-1.1(b)(1)(B), the Totten trust frequently was used to reduce the amount of assets that would be subject to the surviving spouse's right of election.¹³⁸ By enacting section 5-1.1(b)(1)(B), the legislature intended to prevent this practice and thereby enlarge the portion of a decedent's property that is subject to election.¹³⁹

¹³⁶ *Id.* at 650-51, 357 N.E.2d at 982, 389 N.Y.S.2d at 326. The Court indicated that its decision was based on the rationale employed in *In re Greenberg*, 261 N.Y. 474, 185 N.E. 704 (1933). In *Greenberg*, the decedent-husband had executed a will dated December 21, 1927. Thereafter, two codicils, dated October 30, 1930 and January 3, 1931, were executed. At the time, § 18 of the Decedent Estate Law, ch. 229, § 4, [1929] N.Y. Laws 500 (repealed 1966), provided that a surviving spouse could elect only against wills and codicils executed after August 31, 1930. In permitting the wife to take her elective share against all of the decedent's estate, the Court of Appeals held that the effect of a codicil is to re-date the will from the date of the execution of the will to the date of execution of the codicil. The *Greenberg* Court reasoned that any other result "would . . . [do] violence, not only to the meaning of plain language, but also to the legislative intent." 261 N.Y. at 479, 185 N.E. at 705.

¹³⁷ 40 N.Y.2d at 651-52, 357 N.E.2d at 982, 389 N.Y.S.2d at 327. See notes 139-40 and accompanying text *infra*.

¹³⁸ In 1929 the legislature prospectively abolished curtesy and dower, and enacted § 18 of the Decedent Estate Law, ch. 229, § 44, [1929] N.Y. Laws 500 (repealed 1966). This section permitted the surviving spouse to elect to take a specific share in the assets passing under the decedent's will. *Id.* It had a conspicuous weakness, however, in that a spouse still could successfully be disinherited through a gratuitous inter vivos transfer. See Powers, *Illusory Transfers and Section 18*, 32 ST. JOHN'S L. REV. 193 (1958); 15 ALB. L. REV. 254 (1951); 20 FORDHAM L. REV. 105 (1951).

In response to this apparent legislative oversight, the courts developed doctrines to defeat several of these inter vivos transfers. See, e.g., *Bodner v. Feit*, 247 App. Div. 119, 286 N.Y.S. 814 (1st Dep't 1936), which suggested that inter vivos transfers would not be recognized when decedent retains full benefit and control over the property during his lifetime, or when the sole motive for the transfer was to deprive the spouse of her right of election. One of these doctrines was the "illusory doctrine" enunciated in *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937). Under this approach the courts, instead of looking at the decedent's motives for making the inter vivos transfer, would determine whether the challenged transfer was real or illusory. See, e.g., *id.* at 379, 9 N.E.2d at 969; *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941); *Debold v. Kinscher*, 268 App. Div. 786, 48 N.Y.S.2d 900 (2d Dep't 1944) (mem.), *aff'd per curiam*, 294 N.Y. 668, 60 N.E.2d 758 (1945). The "illusory doctrine" afforded the surviving spouse little protection, because in *In re Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951), the Court of Appeals held that "[t]here is nothing illusory about a Totten trust as such." *Id.* at 38, 100 N.E.2d at 122. This decision recognized the inherent weakness of § 18 in respect to inter vivos transfers and, in effect, announced to the legislature that it, and not the courts, would have to treat the problem. See *id.* at 39, 100 N.E.2d at 122-23.

¹³⁹ In 1964 the Temporary State Commission on Estates was authorized to study the problem created by inter vivos transactions, and draft new legislation. See TEMPORARY STATE

Clearly, the *Agoritis* decision is in accord with this legislative purpose. The determination that a post-August 31, 1966 change in depository or beneficiary converts the account into a testamentary substitute, as well as the application of the first in - first out rule to withdrawals, serves to reduce the amount of property exempt from the right of election.¹⁴⁰ Thus, by basing its decision on a literal construction of the statute rather than an analysis of whether the change in the Totten trust was one of form or substance, the *Agoritis* Court was faithful to the legislatively declared policy underlying the statute.

PENAL LAW

Penal Law § 135.20: Court of Appeals reaffirms merger doctrine in second degree kidnapping prosecutions.

Formulated by the judiciary to mitigate the unjust consequences of the overly broad definition of kidnapping contained in the former New York Penal Code,¹⁴¹ the merger doctrine mandates

COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, THIRD REPORT, N.Y. LEG. DOC. NO. 19, at 117-18 (1964) [hereinafter cited as COMM'N ON ESTATES]. See generally 9A ROHAN, *supra* note 122, ¶ 5-1.1[4]; Amend, *The Surviving Spouse and the Estates, Powers and Trust Law*, 33 BROOKLYN L. REV. 530 (1967); Arenson, *Surviving Spouse's Right of Election*, 25 N.Y. COUNTY L. B. BULL. 53 (1967-1968). Admitting that criticism of § 18's failure to protect a surviving spouse's right of election was well-founded, the Commission stated that "if any inter vivos device appears to be testamentary, it is the Totten trust . . . [U]ntil the *Halpern* case came along, it was popularly and not unreasonably understood that a Totten trust was illusory *per se*." COMM'N ON ESTATES, *supra* at 124. The Commission concluded that a surviving spouse could not be protected until the *Halpern* decision was overcome. *Id.* These statements by the Commission demonstrate that in adopting the recommended § 5-1.1(b) the legislature intended to protect the surviving spouse from disinheritance through the mechanism of a Totten trust.

¹⁴⁰ With respect to the first in - first out rule, Professor Patrick J. Rohan has observed: If a "last in - first out" rule is applied, this will tend to perpetuate the exemption accorded funds deposited prior to the effective date of the statute. If a "first in - first out rule" is applied, this rule will serve to wither away the exemption of previously deposited funds, and thereby implement the beneficial ends sought to be achieved by EPTL 5-1.1(b)

9A ROHAN, *supra* note 122, ¶ 5-1.1[5] at 5-51. Under the first in - first out method withdrawals made both prior and subsequent to August 31, 1966 will be regarded as having been made from funds deposited first, thereby decreasing the proportion of exempt funds in the balance of the account. This method of accounting also is utilized in the area of bank deposits and collections. See N.Y.U.C.C. § 4-208(2) (McKinney 1964).

¹⁴¹ Ch. 321, § 3, [1965] N.Y. Laws 1022-23 (repealed by ch. 1030, § 500, [1965] N.Y. Laws 2482 (effective 1967)). The statute provided that:

A person who wilfully: 1. Seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained, against his will