Jurisdiction of Surrogate's Court Over Inter Vivos Trusts Relating to the Affairs of a Decedent

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attributed to conduct which is actually an integral part of another
offense, it was necessary that kidnapping in the second degree be
merged with rape and robbery.

It is submitted, however, that the merger doctrine need be ex-
tended no further to accomplish its objectives. Thus, the two lesser
related offenses created by the revision of the kidnapping statute,
unlawful imprisonment in the first and second degrees,\textsuperscript{159} should not
be merged with robbery and rape. Because these two crimes are less
serious than rape and robbery, their existence does not create the
difficulty that led to the formulation of the merger doctrine:\textsuperscript{160} they
cannot be used to elevate the charges against a person who has in
fact committed a lesser crime. Perhaps in recognition of this fact,
several lower court decisions have refused to merge unlawful impris-
onment with rape and robbery.\textsuperscript{161} Unfortunately, the Cassidy Court
was not presented with this issue. It is hoped that in the near future
the Court of Appeals will have an opportunity to confront the prob-
lem.

\textbf{SURROGATE'S COURT PROCEDURE ACT}

\textit{Jurisdiction of surrogate's court over inter vivos trusts relating to
the affairs of a decedent.}

Both the New York State Constitution\textsuperscript{162} and the Surrogate's
Court Procedure Act\textsuperscript{163} bestow upon the surrogate's court jurisdic-
tion over all actions, proceedings, and matters "relating to the af-

\begin{footnotesize}
\begin{enumerate}
\item N.Y. Penal Law §§ 135.05-.10 (McKinney 1975).
\item See note 142 and accompanying text supra.
\item See People v. Webster, 54 App. Div. 2d 703, 387 N.Y.S.2d 443 (2d Dep't 1976) (mem.)
(unlawful imprisonment in the first degree does not merge with rape and robbery); People v.
Ennis, 50 App. Div. 2d 935, 377 N.Y.S.2d 600 (2d Dep't 1975) (mem.) (unlawful imprisonment
in the first degree does not merge with attempted rape).
\item N.Y. Const. art. 6, § 12(d) provides:
The surrogate's court shall have jurisdiction over all actions and proceedings relating
to the affairs of decedents, probate of wills, administration of estates and ac-
tions and proceedings arising thereunder or pertaining thereto, guardianship of the
property of minors, and such other actions and proceedings, not within the exclu-
sive jurisdiction of the supreme court, as may be provided by law.
\item N.Y. Surra. Cr. Proc. Acr § 201(3) (McKinney 1967) provides:
The court shall continue to exercise full and complete general jurisdiction in law
and in equity to administer justice in all matters relating to the affairs of decedents,
and upon the return of any process to try and determine all questions, legal or
equitable, arising between any or all of the parties to any action or proceeding, or
between any party and any other person having any claim or interest therein, over
whom jurisdiction has been obtained as to any and all matters necessary to be
determined in order to make a full, equitable and complete disposition of the
matter by such order or decree as justice requires.
\end{enumerate}
\end{footnotesize}
fairs of decedents.’’ This language reflects the dramatic expansion of the jurisdiction of the surrogate’s court in New York since its inception in the eighteenth century. 164 Predictably, however, there has been much speculation as to the limits of this grant of power. A particularly difficult problem is presented when a surrogate is requested to assert jurisdiction over inter vivos trusts which are in some manner connected to the administration of an estate. 165 The Surrogate’s Court, Nassau County, addressed this issue in In re Estate of Fornason 166 and held that it had the authority to settle an inter vivos trust that related ‘‘to the affairs of a decedent.’’ 167

In Fornason, petitioner Chemical Bank filed for a voluntary judicial settlement of its accounts as both executor under decedent’s will and trustee of an inter vivos trust which had poured over into the decedent’s estate. Noting that there exists a severe conflict of authority concerning the jurisdiction of a surrogate’s court over an inter vivos trust, 168 Surrogate Bennett thoroughly reviewed the juris-

164 For a historical overview of the development of the surrogate’s court in New York, see TEMPORARY STATE COMM’N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, FIFTH REPORT, N.Y. LEG. DOC. No. 19, app. M-1, at 492 (1966) [hereinafter cited as COMM’N REPORT].

165 Testamentary trusts are undeniably within the jurisdiction of the surrogate’s court as matters relating to the affairs of a decedent. See 25 CARMODY-WArr 2d § 149.75, at 67 (1968). Inter vivos trusts, however, have been consistently held to be outside the jurisdiction of the surrogate’s court. See, e.g., In re Estate of Lyon, 266 N.Y. 219, 194 N.E. 682 (1935); In re Estate of Lachlan, 8 App. Div. 2d 635, 186 N.Y.S.2d 167 (2d Dep’t 1959) (mem.); In re Estate of Green, 271 App. Div. 171, 63 N.Y.S.2d 371 (3d Dep’t 1946); In re Estate of Springett, 25 Misc. 2d 68, 206 N.Y.S.2d 48 (Sur. Ct. N.Y. County 1960).


167 Id. at 740, 389 N.Y.S.2d at 1005.

168 Id. at 738-39, 389 N.Y.S.2d at 1004. The uncertainty concerning the status of the surrogate’s court’s jurisdiction over inter vivos trusts which are involved in a decedent’s affairs can be illustrated by conflicting decisions recently rendered by the Queens County and New York County surrogate’s courts. In re Griffith, 176 N.Y.L.J. 11, July 16, 1976, at 9, col. 2 (Sur. Ct. Queens County), involved a request for settlement of the accounts of an inter vivos trust by trustees who were also the executors of the settlor’s estate. The court refused to assert jurisdiction, noting that the cases petitioner relied on were of little authority because none were appealed. Id., discussing In re Estate of Lurje, 64 Misc. 2d 569, 315 N.Y.S.2d 476 (Sur. Ct. N.Y. County 1970); In re Estate of Martin, 58 Misc. 2d 740, 296 N.Y.S.2d 498 (Sur. Ct. Westchester County 1968) (mem.); In re McCoy’s Will, 157 Misc. 281, 283 N.Y.S. 597 (Sur. Ct. Bronx County 1935). In those cases the respective surrogates decided that it was within their jurisdiction to determine issues concerning inter vivos trusts which were significantly related to the affairs of the decedent.

In contrast to Griffith is In re Estate of Frohlich, 87 Misc. 2d 518, 385 N.Y.S.2d 922 (Sur. Ct. N.Y. County 1976), a case involving a similar fact situation, wherein Surrogate Midonick found no barrier to jurisdiction. The surrogate cited with approval an unpublished decision, In re Estate of Healy, No. 151102 (Sur. Ct. Nassau County, June 26, 1976), in which Surrogate Bennett, who subsequently decided Fornason, asserted jurisdiction over an inter vivos trust which poured over into the estate his court was administering.
The court first acknowledged that in 1963 the legislature failed to implement a proposal by the Temporary State Commission on the Law of Estates recommending that the surrogate’s court be granted concurrent jurisdiction over all trusts. Nevertheless, declaring that settlement of both accounts in one proceeding would serve the interests of judicial economy and save money for all concerned parties, the Fornason court found authority for such a course of action in the relevant constitutional and statutory provisions. Article 6, section 12(d) of the state constitution provides the surrogate’s court with “jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates, . . . and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.” No exclusive jurisdiction over inter vivos trusts has been granted to the supreme court. Moreover, Surrogate Bennett noted, section 201(3) of the Surrogate’s Court Procedure Act provides “full and complete general jurisdiction . . . in all matters relating to the affairs of decedents . . . in order to make a full, equitable and complete disposition of the matter . . . .” Finding that “the inter vivos trust agreement made by the decedent . . . ‘relates’ to his ‘affairs’ as much as the will itself,” the court held that it had “full and complete jurisdiction” of the matter and could settle both accounts accordingly.

Viewed in terms of practicality and judicial economy, the decision in Fornason is difficult to criticize. The weight of authority,

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169 88 Misc. 2d at 738-39, 389 N.Y.S.2d at 1004.
170 Id. See COMM’N REPORT, supra note 164, at 512.
171 88 Misc. 2d at 739, 747, 389 N.Y.S.2d at 1004, 1010. The legislature’s failure to act on the Commission’s proposal did not prevent petitioners from asking surrogate’s courts to make determinations concerning inter vivos trusts which were inextricably intertwined with the administration of estates. Most surrogates dismissed such applications without prejudice to institution of an action in the supreme court, which could subsequently be removed to the surrogate’s court. Id. at 738-39, 389 N.Y.S.2d at 1004.
172 Id. at 739-47, 389 N.Y.S.2d at 1005-09.
173 N.Y. CONST. art. 6, § 12(d).
174 N.Y. CONST. art. 6, § 7(a) provides the supreme court with exclusive jurisdiction only over crimes prosecuted by indictment.
175 N.Y. SURR. CT. PROC. ACT § 201(3) (McKinney 1967). But see note 184 and accompanying text infra.
176 88 Misc. 2d at 747, 389 N.Y.S.2d at 1010.
177 Id. The court noted that it had already probated the will of decedent and that the petitioner in its roles as trustee and executor was accounting to the same parties. This was suggested as a justification for accepting jurisdiction over the trust. Id.
178 For a discussion of the practical desirability of granting jurisdiction over all inter vivos trusts to the surrogate’s court, see COMM’N REPORT, supra note 164, at 510-11.
however, seems to hold that surrogates have no jurisdiction whatever over inter vivos trusts. The only Court of Appeals decision squarely facing this issue, In re Estate of Lyon,\(^{179}\) held that the former Surrogate Court Act, which expressly granted the surrogate's court jurisdiction over testamentary trusts while remaining silent as to inter vivos trusts,\(^{180}\) clearly evinced a legislative intent to exclude the latter from the surrogate's court's jurisdiction.\(^{181}\) In apparent disregard of Lyon, many commentators on the Surrogate's Court Procedure Act suggest that the court can exercise jurisdiction over inter vivos trusts which are sufficiently involved with the affairs of decedents.\(^{182}\) It appears, however, as was suggested in a recent opinion by the Supreme Court, New York County, that this "issue must be regarded, at the very least, as a seriously debatable one."\(^{183}\)

The assertion of jurisdiction by a surrogate over an inter vivos

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\(^{179}\) 266 N.Y. 219, 194 N.E. 682 (1935). Numerous decisions made by lower courts before and after Lyon support the proposition that the surrogate's court does not have jurisdiction over inter vivos trusts. See note 165 supra; Comm'n Report, supra note 164, at 489 & n.1.

\(^{180}\) It should be noted that the Lyon decision was based not on the Surrogate's Court Procedure Act, but rather on an earlier statute, the Surrogate Court Act, ch. 928, 4 [1920] N.Y. Laws 523. That law granted jurisdiction over matters relating to the affairs of decedents similar to that provided by the present statutory scheme. Also in effect at the time, however, was the 1925 version of the New York Constitution, under which the Surrogate Court Act was construed. N.Y. Const. art. 6, § 13 (1925, repealed 1961) provided in pertinent part that "Surrogates' Courts shall have the jurisdiction, legal and equitable, and powers now established by law until otherwise provided by the legislature." In contrast, today's surrogates, operating under article 6, § 12 of the 1962 constitution and the Surrogate's Court Procedure Act, are granted somewhat more flexible jurisdiction restricted to that already established by law. See notes 162-64 and accompanying text supra.

\(^{181}\) 266 N.Y. at 224, 194 N.E. at 684. The Fornason court did not mention Lyon.


This question has been discussed in Midonick, Do Surrogates Have Jurisdiction in Cases Involving Living Trusts?, 173 N.Y.L.J. 115, June 16, 1975, at 19, col. 1. Surrogate Midonick suggests that the surrogate's court presently has concurrent jurisdiction over inter vivos trusts if the corpus of the trust is materially enhanced because of the death of the settlor or the dispositive provisions of the trust "become operative or undergo a substantial shift in emphasis as a result of the death of the settlor." Id., at 25, col. 2. He states that surrogates have such jurisdiction on the basis of the opening lines of article 6, § 12(d) of the state constitution.

\(^{183}\) In re Clemente, 177 N.Y.L.J. 17, Jan. 25, 1977, at 5, col. 3 (Sup. Ct. N.Y. County).
trust would seem to contradict not only Lyon, but also the apparent intent underlying New York's legislative scheme. This issue was expressly called to the legislature's attention in 1963 by the Temporary State Commission on the Law of Estates, which recommended that the surrogate's court be granted jurisdiction over all trusts. This proposal was disregarded. Moreover, the Surrogate's Court Procedure Act itself provides, in the section dealing with powers incidental to the jurisdiction of the surrogate, that "[n]othing herein provided shall be construed to confer jurisdiction on the court over inter vivos trusts." Though such language is subject to more than one interpretation, it can readily be seen as an indication of legislative intent to deny the surrogate such jurisdiction in all situations.

It appears, therefore, that however practical and prudent the Fornason decision may be, it does not fully comport with the command of precedent. Hopefully, the Court of Appeals at its earliest opportunity will reevaluate Lyon in light of subsequent constitutional and statutory developments. Ultimately, however, this question can best be resolved by the legislature. It is only through clarification of the statutory provisions concerning the jurisdiction of the surrogate's court with respect to living trusts that the legislative purpose can be accurately divined and faithfully executed.

DEVELOPMENTS IN NEW YORK PRACTICE

Residence requirements in a matrimonial action held not to relate to subject matter jurisdiction.

184 COMM'N REPORT, supra note 164, at 512.

185 N.Y. Surr. Ct. Proc. Act § 209(4) (McKinney 1967). It has been suggested that the caveat contained in § 209(4) was the legislature's reaction to the Temporary Commission's suggestion that the surrogate's court be given jurisdiction over all trusts. See In re Griffith, 176 N.Y.L.J. 11, July 16, 1976, at 9, col. 3 (Sur. Ct. Queens County). The Reviser's Notes to the section state simply that subdivision 4, which grants the surrogate power to determine the decedent's interest in certain property, "is not intended to confer power on the court to settle the account of the trustee of an inter vivos trust." N.Y. Surr. Ct. Proc. Act § 209, Reviser's Notes at 214-15 (McKinney 1967).

186 In In re Estate of Lurje, 64 Misc. 2d 569, 315 N.Y.S.2d 476 (Sur. Ct. N.Y. County 1970), the court stated that the last sentence of § 209(4) meant simply that nothing in that subdivision conferred jurisdiction, and that § 201(3) did provide general jurisdiction over decedents' affairs. See also Midonick, Do Surrogates Have Jurisdiction in Cases Involving Living Trusts?, 173 N.Y.L.J. 115, June 16, 1975, at 19, col. 1. Professor Siegel, however, suggests that any argument concluding that the Act's general grants of subject matter jurisdiction could be construed to include inter vivos trusts is negated by § 209(4). N.Y. Surr. Ct. Proc. Act § 201, commentary at 46 (McKinney 1967). In Fornason, the court interpreted § 209(4) "as not prohibiting jurisdiction in a case . . . where the inter vivos trust has terminated and the 'affairs of a decedent' are involved." 88 Misc. 2d at 746, 389 N.Y.S.2d at 1009.

187 See note 180 supra.