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ILLUSORY TRANSFERS AND SECTION 18

PAUL POWERS †

The passage of more than a quarter of a century since the enactment of Section 18 of the Decedent Estate Law provides not only an opportunity to study its growth and decline in the countless cases which have set its boundaries and fixed its meaning, but, more important, it enables us to discuss its defects from a different background of public sentiment than that which attended its beginnings. Today, we accept without any misgiving the idea of a compulsory share for the surviving spouse, and many there are who remember a different rule only as history. Yet when the idea was first advanced in its legislative form, it proposed a restriction on a long enjoyed freedom of testamentary disposition, and was greeted with some reluctance, if not active opposition. We shall understand better the failure of the Commissioners to deal more resolutely with problems that were apparent from the very beginning if we remember the climate of public opinion in which they labored.

When we put the statute to the test of time and try to assess the impairment caused by the assaults of the unfriendly and the neglect of the indifferent, it is quite natural that we shall find that it has suffered its greatest damage at the point of its most glaring weakness, namely, the lack of adequate protection against disinheritance through gratuitous inter vivos transfers. The statute never made explicit reference to the effect of such transfers on the right of the surviving spouse. The courts contrived a somewhat limited defense which they developed under the title "Illusory Transfers." We shall take that title as the subject of this article. Perhaps we should avoid the use of terms so vulnerable to criticism, but in the present instance they have the

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advantage of widespread and long continued usage, and although few will pretend to be able to define an illusory transfer, all familiar with Section 18 will understand the scope of our discussion when it is so entitled.

As far back as 1928 the Commission to Investigate Defects in the Laws of Estates, more commonly known as the Decedent Estate Commission, was warned of the threat to the widow's share by gratuitous inter vivos transfers. An article on the proposed legislation adverting to the Commission's statement that "there is a glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death," had this comment to offer:

If this "glaring inconsistency" is to be eliminated then we must do as the French do, limit both the testamentary power and also the power to make gifts *inter vivos*, because a man desiring to leave his wife penniless can accomplish this end by living trusts just as well as by a will.

The Decedent Estate Commissioners were familiar with that article and its critical evaluation of their proposals, but there is no reference at all in any of the Commission reports to any consideration of the idea of placing a restriction or limitation on gratuitous transfers of property.

The Commission was, at that time, engaged in the attempt to minimize as far as possible the conflict between two discordant policies, namely, that of enlarging and protecting the widow's rights on the one hand, and that of assuring a freer alienability of property on the other. So intent was the legislature in the fulfillment of the one policy, that it explicitly declared in the statute itself that its aim and purpose was

... to increase the share of a surviving spouse in the estate of a deceased spouse, either in a case of intestacy or by an election against

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3 1928 Leg. Doc. No. 70, Combined Reports 171.
the terms of the will of the deceased spouse thus enlarging property
rights of such surviving spouse.\textsuperscript{4}

This unusually explicit declaration of legislative policy was
undoubtedly intended to fortify the statute in cases where
the words chosen to express that policy might prove too weak
for the burden entrusted to them. As to the other matter
of policy the Decedent Estate Commission plainly expressed
as one of its objectives "... 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."\textsuperscript{5} One of the principal
restraints on alienation which was in the process of being
changed was that flowing from the widow's inchoate right
of dower. With dower abolished,\textsuperscript{6} that restriction was re-
moved. Under the circumstances, it is not difficult to under-
stand the practical reasons behind the failure of the Com-
mmissioners to write into Section 18 a new restraint on the
power of one spouse freely to dispose of his real and personal
property during his lifetime. Of course, there may have been
other reasons for their failure. It may be that the Commis-
sioners considered the idea but felt no immediate necessity
for pursuing it, for the Pennsylvania enactment on which the
New York statute was based contained at that time no re-
strictions on inter vivos transfers.\textsuperscript{7} Perhaps the Commis-
sioners were content to take one step at a time; to state
the aim and purpose of the statute in bold and clear terms
in the expectation that the legislative policy would be en-
forced adequately through sympathetic judicial construc-
tion.\textsuperscript{8} Whatever the reason for their failure to take positive
action, we begin with a statute that lacks effective provision
for preserving the "increased benefits" which it explicitly
promises to the surviving spouse.

The history of Section 18 in the courts confirms the
fears uttered at the outset and makes it clear that there are

\textsuperscript{4} Laws of N.Y. 1929, c. 229, § 20.
\textsuperscript{5} 1928 LEG. Doc. No. 70, COMBINED REPORTS 12, 149.
\textsuperscript{6} Laws of N.Y. 1929, c. 229, § 12.
\textsuperscript{7} 1928 LEG. Doc. No. 70, COMBINED REPORTS 119, 157, 166.
\textsuperscript{8} See Matter of Byrnes, 141 Misc. 346, 350, 252 N.Y. Supp. 587, 591 (Sup.
Ct. 1931) (opinion of Surrogate Foley, Chairman of the Decedent Estate
Commission).
many ways of disinheriting a wife besides merely leaving her out of the will. It would be neither possible nor useful to trace that history through all of the reported decisions. The rise and fall of vitality in Section 18 will be clearly evident if we plot its course through a few of the important appellate court decisions. Nor would it be useful at this point in its history to attempt a critical evaluation of these decisions. Most of them have been discussed so widely that even mere citation of the law reviews would consume too much space. For our present purposes we must look at the decisions realistically, accepting them as definitive judicial interpretations of the statute. It will become obvious that what is now urgently needed is legislative action. However, we must not pass over the court decisions lightly. It is necessary to understand all that they imply, for the past always has its effect on the future and any legislative amendment to the present statute can itself be affected by the long shadows cast by early decisions. The leading decisions demand, therefore, a close examination.

_Bodner v. Feit_⁹ was not the first decision to put the strong arm of the court behind the legislative policy,¹⁰ but it was one of the first to evoke extended comment.¹¹ In that case, the court read Section 18 with an eye to the declared legislative intent to enlarge rather than restrict the rights of the surviving spouse, and it expressed the view that these enlarged rights of the spouse

... may not be destroyed by transfers under which the grantor retains the control and benefit of his property during life but which upon death pass the property to others than those entitled to receive it under the statute. Under the statute, husbands and wives have the utmost freedom of control over their respective properties and may transfer them as they will in normal course during their lives. They may not, however, strip themselves of their property for the

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¹¹ See 37 Colum. L. Rev. 317 (1937); 50 Harv. L. Rev. 529 (1937); 14 N.Y.U.L.Q. Rev. 101 (1936); 46 Yale L.J. 884 (1937).
sole purpose of depriving those that the statute intended to protect of their right to inherit.\textsuperscript{12}

That decision never received the approval of the highest court, and refinements that were subsequently made in the rule to be applied in such cases somewhat limit its general authority.

The leading case in New York is \textit{Newman v. Dore}.\textsuperscript{13} Here, too, the New York Court of Appeals dealt sympathetically with Section 18 and sought to give vitality to the declared legislative policy. Like \textit{Bodner v. Feit},\textsuperscript{14} it held that rights are given to the surviving spouse under Section 18, and such rights cannot be destroyed by transfers under which the grantor reserves dominion, control and enjoyment of property during his lifetime and attempts to pass it on at his death in defiance of the statute. However, in \textit{Newman v. Dore} the court did not go as far as did the court in the earlier case. It obviously decided to tread carefully in the new field, to go no further than the necessities of the case before it, and to permit the governing rules to develop as circumstances demanded. In that case the decedent's will complied with Section 18 in form, and it professed to set aside for the widow's benefit the minimum portion required by that statute. However, three days before his death the decedent executed trust agreements by which he conveyed all of his real and personal property to named trustees. The trust deeds reserved to him the enjoyment of the entire income of the properties as long as he should live and the right to revoke the trusts at his will. Powers conferred upon the trustees were in terms made subject to the settlor's control during his life, and such powers could be exercised only in such manner as the settlor should from time to time direct in writing. As the court remarked, the settlor had thus reserved substantially the same rights to enjoy and control the disposition of the property as he enjoyed prior to the making of the trust deeds.

\textsuperscript{13} 275 N.Y. 371, 9 N.E.2d 966 (1937).
\textsuperscript{14} \textit{Bodner v. Feit}, note 12 supra.
\textsuperscript{15} 275 N.Y. 371, 9 N.E.2d 966 (1937).
The New York Court of Appeals rejected motive and intent of the donor as a decisive factor in determining the validity of the challenged conveyance. An intent to evade or circumvent Section 18 was declared to be insufficient in and of itself to strike down the transfer as invalid. Since Section 18 does not prohibit gratuitous inter vivos transfers, the only sound test of the lawfulness of the transfer, said the court, "... is whether it is real or illusory ... whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer." 16 The good faith required of a donor or settlor was held to refer not to his purpose in respect of the expectant rights of his spouse, but rather to his intent to divest himself of ownership of the property. Turning to the facts in the case before it, the court said:

Judged by the substance, not by the form, the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed. We do not attempt now to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than illusory. Question of whether reservation of income or of a power of revocation, or both, might even without reservation of the power of control be sufficient to show that the transfer was not intended in good faith to divest the settlor of his property must await decision until such question arises. In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near.17

This decision reveals a sympathetic consideration of the rights given by Section 18 to the surviving spouse and an effort to protect and preserve those rights against what was palpably a scheme to frustrate them. It tells us that it did not intend to formulate a general rule applicable to all cases, but necessarily, it had to make some choice among the tests by which such transactions are to be judged. It might have measured such donations of property with an eye to the statute, to the policy which it declared and to the mischief it meant to cure, and fitted the standard to those specifications.

16 Id. at 379, 9 N.E.2d at 969.
17 Id. at 381, 9 N.E.2d at 969-70.
It chose instead the so-called real-or-illusory test. Time and events have not blessed that choice.

Moreover, in formulating that test, it is particularly unfortunate that the court chose the word *illusory*. The term is not so narrow in its scope as to carry the same meaning to all. 18 *Newman v. Dore* cited as authority for the real-or-illusory test the case of *Leonard v. Leonard* 19 decided by Justice Holmes, then Chief Justice of the Supreme Judicial Court of Massachusetts. The cited case involved at least three separate transfers, but the term *illusory* was not employed in respect to the one which engaged most of the attention of the Court of Appeals and which evoked the rulings which it quoted with approval. 20 A purported transfer of a bank account occasioned little comment, and it was in respect to that transaction that Mr. Justice Holmes observed that the evidence may have established "... that this transfer was only illusory and was not understood to be effectual between the parties." 21 Both decisions used the same word to convey the idea of an outward appearance which failed to give the true character of what was perceived. But one was referring to an apparent transfer which was never intended between the parties to be any transfer at all; the other was characterizing a conveyance which was seriously intended by the parties to take effect in strict accord with its terms, but was not meant to destroy the donor's enjoyment of, or control over, the property. The very terms of the transfer—not a secret agreement—preserved that control. The pretended transfer which is pure sham and the device which is intended to circumvent the statute by a transfer which is very seriously intended, have much in common, but they have

19 181 Mass. 458, 63 N.E. 1068 (1902).
20 That part of the opinion in *Leonard v. Leonard*, 181 Mass. 458, 63 N.E. 1068 (1902), which was quoted with approval in *Newman v. Dore*, explained the earlier decision of the Massachusetts court in *Brownell v. Briggs*, 173 Mass. 529, 54 N.E. 251 (1899). The *Brownell* case itself was later overruled in *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945), wherein it was said that the limitation in some of the cases that a gift must not be "colorable" means only that the conveyance or gift "... must be one legally binding on the settlor or donor, accomplishes in his lifetime, and not testamentary in its effect." Id. at 571-72, 59 N.E.2d at 307.
very distinct differences. Regrettably, the common label, which their similarities permit both to use, has obscured the differences and destroyed any usefulness the test may have had in the beginning.  

The Court of Appeals assumed in *Newman v. Dore* that except for the provisions of Section 18, the instrument of transfer would be valid and would operate according to its terms. The New York decisions fully and completely support that assumption. The Court of Appeals had said:

... [F]ew things are better settled than that the reservation of [a power of revocation] is entirely consistent with the trust, and does not work its destruction where the rights of creditors are not involved.

The reservation of certain administrative control in a trust does not invalidate the trust. Nor does the reservation of income to the donor cause the trust to fail. None of these cases, of course, involved the rights of a surviving spouse. In each case, the question was whether the transaction resulted in a valid trust or no trust at all. Neither singly nor in the aggregate do these factors infect with invalidity a transfer in trust.

Nothing but confusion is added to the discussion when we attempt to judge an invasion of the spouse’s rights under Section 18 by tailoring general principles of trust law to fit the demands of justice in the circumstances. The line between a good trust and a mere agency may sometimes be difficult to trace clearly. However, when all the elements of a valid trust are present and the real question is whether it would violate some established policy of the State, we cannot judge the violation of the public policy when we use only principles that were made for a wholly different use. The

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only issue in such a situation is whether a trust instrument is invalid for failure to comply with the public policy declared by the Statute of Wills, or that explicitly written in Section 1826 or that defined in some other statute. The solution of the issue must depend upon the particular statute involved, its purpose, the policy behind it, and the results which it is designed to prevent. To say that a trust instrument would be valid except for Section 18 means that its validity must be tested by that section and not by some convenient principles somewhat altered for the new use to which they are put.

One further note must be made of the effect of the decision in *Newman v. Dore*. If the transfer is assumed to be perfectly good and effective except for Section 18, one might expect the courts to uphold it except to the extent that it constitutes an unlawful invasion of the rights conferred by that statute. However, when it was found in *Newman v. Dore* that the conveyance took back almost all that it gave, the Court of Appeals struck down the entire instrument. The decree declared that the trust deeds were void and of no effect, directed the trustees to transfer all of the assets held by them to the personal representatives of the settlor, and extinguished all right, title and interest of the plaintiff and others in and to the proceeds of the trust fund.27 The Court of Appeals deemed itself compelled to view the single conveyance as entirely real or wholly illusory, for it was reluctant to call a single conveyance real as to some distributees and an illusory transfer as to others. No such considerations would have affected the decretal provisions had the court framed the rule of law with reference to the statute which alone stood in the way of the instrument’s complete validity. It might then have said that the conveyance was void only to the extent that it infringed upon the rights conferred by the statute.

26 1 Scott, Trusts 451, 470-71 (2d ed. 1956); Restatement, Trusts § 57 (1935).
Burns v. Turnbull involved a deed of trust which reserved such a degree of control over the property that the judgment setting it aside and declaring it illusory did not call for any written opinion by the Court of Appeals and only a brief memorandum by the Appellate Division. The significance of this case is in what appears to be its recognition of the rights of the surviving spouse where the decedent left no will at all. The wife died intestate, and the husband brought the action both individually and as administrator of her estate. The judgment required the respondents to deliver to the plaintiff all of the property included in the alleged trust. Enforcement of the legislative policy clearly requires protection of the spouse’s minimum share in cases of intestacy. In so many of the cases, the will mocks the widow by a bequest which in words gives her more than her minimum share, but which relates to an estate that has already been plucked bare of its fruit. Here the court recognized the necessity of protecting the spouse’s intestate share, and it lent its aid to the enforcement of the declared legislative policy.

In Marine Midland Trust Co. v. Standford, the husband created a trust with plaintiff as trustee. He retained the power to amend, modify, alter or revoke the trust in whole or in part. The instrument gave him the right to request payments out of corpus up to a specified amount and a veto over any sale or disposition of the investments held in the trust. Upon his death, the principal was payable to his children, subject to a small legacy to a church. A most significant fact is that within a year or two prior to executing the trust deed, the husband had made a settlement with his wife as a result of which she received more than half of his entire property. The opinion makes it clear that the court was influenced by the fact that an equitable settlement had been made with the wife and that the transfer in trust far from depriving her of her fair share of his estate, repre-

represented rather an attempt to make an equitable adjustment of the just claims of both wife and children on his bounty.

Thus, the motive and intent of the husband became in truth an important factor, although *Newman v. Dore* had explicitly rejected it as a touchstone. In such circumstances, the court could not predicate its decision wholly upon a finding of the good faith and high motives of the husband. It turned to the real-or-illusory test and it phrased that test in this way:

The determining factor as to the validity of the trust is the intent with which the settlor transferred his property to the trustee. If illusory, there is no transfer; if made with intent to transfer the actual title, it is effective.\(^{30}\)

The result reached was patently a just one. The means at hand for reaching that particular result were not very well adapted. In struggling to fit the decision within the mould, the strain was too great. As a consequence, the shape of the mould was somewhat altered. The *intent to transfer the actual title*—an intent never lacking in any of these attempts to defeat the surviving spouse—emerges now as the test. The word *illusory* begins to change its shade of meaning again.

The somewhat changed standard was accepted and applied in *Matter of Ford*,\(^{31}\) where the wife was the principal beneficiary under the deed of trust, and the attack upon its validity came from collateral relatives. Section 18 of the Decedent Estate Law was in no way involved in that litigation. Indeed the majority opinion pointed out the lack of any intention of "defeating the expectant interest of anyone."\(^{32}\) The real question in this case would seem to be whether the failure to comply with the Statute of Wills rendered the instrument invalid or ineffective. That question is very different and distinct from the question whether a trust instrument violates the word and the spirit of Section 18. In this case, however, the court ignored any such distinction and treated the matters as if they were one and

\(^{30}\) *Id.* at 28, 9 N.Y.S.2d at 651 (emphasis added).


\(^{32}\) *Id.* at 157, 108 N.Y.S.2d at 127.
the same. It called once again on the real-or-illusory test. The court decided that the "... trust created was not colorable or illusory—it was a real, present and actual transfer of ownership of all of the settlor's property to the trustee, and was valid in all respects." 33

The degree of control reserved by the grantor in this case is worthy of note. The trust embraced virtually all of the settlor's property, and the settlor himself and a bank were co-trustees. He reserved the income for his life and the power to revoke the trust. It appears to have been the practice of the bank, when acting as co-trustee, to make no investment changes unless approved by the individual co-trustee. As the minority opinion so clearly pointed out, the fact that no action could be taken without the concurrence of the settlor, in combination with his reserved power to amend and to revoke the trust, gave him a practical control of the entire trust administration. If this case had been one under Section 18 where the widow had been deprived of her expectant rights by a transfer such as this, the result may well have been different. However, the basis for distinguishing this case from one which directly involves Section 18 has been somewhat weakened by the later decision in MacGregor v. Fox. 34 The latter case did involve Section 18 and it revealed a very real invasion of the surviving husband's expectant interest. The court explained its refusal to strike down the transfer in the Ford case by pointing out that in the earlier case "... there was no attempt to defeat the right of the surviving spouse, nor did the settlor have such control over the trust corpus as to make the trustee bank a mere agent." 35 Thus, the court again failed to draw the line between a violation of the Statute of Wills and a violation of Section 18, and it confirmed the application of the same rule in both cases even though the legislative purpose in one was far different from its objective in the other. More important, it reiterated the opinion that a reservation of control such as existed in the Ford case—a very effective method of control—

33 Id. at 157, 108 N.Y.S.2d at 126.
35 Id. at 437, 114 N.Y.S.2d at 287.
will not endanger a transfer that is challenged under Section 18.

Thus far we have confined our examination of the decisions to those involving deeds of trust. There are other areas, however, where the statute has proved to be even more vulnerable to attack. One such area is that of the joint savings bank account. In *Inda v. Inda*, the widow sued, individually and as administratrix, to recover, on behalf of the estate, two savings bank accounts that had been in the name of the decedent and another, payable to either or to the survivor. One account was in the name of a son of the decedent, who was one of his ten children, and the other was in the name of that son's wife. The widow challenged the deposits as illusory transfers which were ineffective to deprive her of her expectant estate as widow and distributee. The trial court found that the decedent never intended to divest himself of the ownership of these deposits during his lifetime, and that they were illusory transfers, without substance or reality. It held, however, that because of the terms of Section 239 of the Banking Law plaintiff could not recover. The court did allow recovery against a commercial bank, and that part of the judgment was not appealed. Subdivision three of Section 239 of the Banking Law governs the repayment by savings banks of deposits "... made by any person in the names of such depositor and another person and in form to be paid to either or the survivor of them." Such a deposit becomes the property of such persons as joint tenants, and may be paid to either during the lifetime of both or to the survivor, and the release of one to whom such payment is made is a valid discharge of the bank. The statute declares that:

The making of the deposit in such form shall, in the absence of fraud or undue influence, *be conclusive evidence* in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor.

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37 N.Y. BANKING LAW § 239(3) (emphasis added).
Subdivision three of Section 134 of the Banking Law, relating to repayment of joint deposits in commercial banks and trust companies, does not contain this conclusive presumption.

The Court of Appeals, in affirming the judgment, gave careful consideration to the provisions of the Banking Law. The Decedent Estate Law received but scant attention. Indeed the court raised some doubt as to whether a surviving spouse possessed rights in intestacy comparable to those given by Section 18. Solely for the purpose of the controversy then before it, it assumed that she did have such rights. The court viewed the Banking Law as expressly preserving this form of deposit as a lawful and convenient method for the transmission of property. It made no effort to balance that legislative policy against the one which gave birth to Section 18. The finding of the trial judge that the decedent intended in fact to make an illusory transfer was not disturbed; it was held to be immaterial. The court said:

The legal effect of a full compliance with the terms of [Section 239(3) of the Banking Law] is the creation of joint tenancy. Therefore, as pointed out in Newman v. Dore ..., the actual intent of the intestate makes no difference since all that the law requires by way of the creation of a joint tenancy has taken place.38

No line was drawn between transfers of substance and transfers of form; no effort was made to measure the transaction by the real-or-illusory test; no attempt was made to harmonize the different legislative policies. The Court of Appeals apparently did not intend to depart from the holding in Newman v. Dore. It would seem, however, that the decision really finds more support in Marine Midland Trust Co. v. Stanford, where the intent to transfer actual title was held to be a factor which made the transfer unassailable even under Section 18.39 To create a joint tenancy, full compliance with the provisions of the Banking Law is all that is required.

A distinction had been drawn by the trial court between a joint account in a savings bank and one in a commercial

39 See text at note 30 supra.
bank. The only difference between the two is that in the former the presumption arising from the form of the account is conclusive; in the latter it is rebuttable. The Court of Appeals noted the entry of the judgment in respect of the commercial account and the lack of any appeal, but it gave no hint of its own views on that question. The reasoning of the decision, however, would seem to make it clear that if the depositors had intended to create a joint tenancy as permitted by statute, their intent to defeat the rights of the spouse would not impair the transfer. It would, therefore, make little practical difference to the surviving spouse whether the presumption created by the form of the account was conclusive or rebuttable. Her path would be just as difficult in either event. To overcome the presumption arising out of the form of the account, she must establish that her spouse did not in fact intend to create a joint tenancy, but inasmuch as the husband had to leave the property to someone on his death, his very intent to defraud his wife tends to strengthen the presumption. Thus, the joint bank account seems to provide a safe and certain way of cutting off the expectant interests of the surviving spouse.

It has come to pass, however, that an even easier and safer method of accomplishing the same result is at hand, namely, the so-called Totten Trust. The joint bank account gives to the other depositor rights that may be exercised during the lifetime of the original owner. The Totten Trust enables the depositor to preserve a dominion, control and use of the account to an extent that would brand it illusory in any other transaction.

At first, it seemed that the courts would not countenance that kind of invasion of the spouse's expectancy. *Debold v. Kinscher* 40 was an action by the surviving husband to set aside transfers of bank accounts to the individual defendants upon the ground that the transfers were illusory and violative of his rights under Section 18. One of the bank accounts had originally stood in the name of the wife in trust for the husband. The wife changed the account to substitute one

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of the defendants as beneficiary instead of her husband. Some five years later she opened a new account in her name in trust for another defendant, and a few days later she made a will explicitly disinheriting her husband. The trial court determined that the husband had no right to the accounts. The Appellate Division affirmed all the findings of fact, but it reversed the judgment. Its opinion was as brief as the facts demanded. "The testimony on behalf of the alleged donees failed to establish a gift inter vivos. Plaintiff is entitled to judgment." 41 It cited *Newman v. Dore* and *Bodner v. Feit* as authority for the reversal. The Court of Appeals affirmed without opinion. Curiously enough, the memorandum of the State Reporter prefacing the Court of Appeals decision, elaborated on the Appellate Division opinion to the extent of quoting as follows from *Bodner v. Feit* in respect of the rights given by Section 18 to the surviving spouse:

They may not be destroyed by transfers under which the grantor retains the control and benefit of his property during life but which upon death pass the property to others than those entitled to receive it under the statute.42

These appellate decisions and the Reporter's memorandum all seem eminently correct and in accordance with binding authority.

The Court of Appeals also reached the same result in *Krause v. Krause*. 43 The action was by the surviving spouse to set aside three transfers made by the decedent to his children by an earlier marriage. Two of the transfers involved parcels of realty. In each case, the decedent conveyed a parcel by warranty deed which reserved to the grantor the rents and profits of the property during his life. The third item was a bank account in the name of the decedent in trust for his daughter. The trial court decided in favor of the plaintiff on all the transfers, but the Appellate Division reversed and dismissed the complaint. The Court of Appeals agreed with the Appellate Division as to the realty. It said:

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42 Id. at 669, 60 N.E.2d at 758.
43 285 N.Y. 27, 32 N.E.2d 779 (1941).
The transaction evidenced by either of these deeds was a real transaction in that thereby [the husband] divested himself of a major legal estate or interest in real property in accordance with the essential forms of law... We cannot find in section 18 of the Decedent Estate Law any suggestion that such a conveyance by a husband or wife was ever to be defeated by the other spouse merely on the score of its having been voluntary.  

As to the Totten Trust, however, the Court of Appeals found that

the sole evidence of the aim of the account is the form of the deposit. In these circumstances, we are to draw the inference "that the depositor intended to create a trust but intended to reserve power during his lifetime to deal with the deposit in any way he should choose."  

The court observed that there was no basis in the record for a finding that a gift inter vivos had been consummated. Without any further discussion it held that "... the trial court was right on this branch of the case and that its finding should be reinstated," citing Newman v. Dore.

Whatever principle these decisions might appear to have stood for, in and of themselves, was completely negated in Matter of Halpern. In that case the surviving spouse was the executrix under the will and its only beneficiary. Her benefit under the will was more apparent than real because the estate had been largely denuded by the establishment of four Totten Trust accounts, each in the name of the decedent in trust for his infant grandchild. The decedent had actually turned over one of the bank books to the mother of the infant but he retained possession of the other three. The Court of Appeals did not, however, draw any distinction between the one where delivery had been made and the ones where full control was retained. The court was united in the result reached but divided in the reasons for the decision.

In the majority opinion, there is again evident the changed color of the words real and illusory. We have noted that in Newman v. Dore the transfer was branded as illusory.

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45 Id. at 33, 32 N.E.2d at 781.
46 Ibid.
47 303 N.Y. 33, 100 N.E.2d 120 (1951).
even though the donor had actually intended the instrument to take full effect in accordance with its terms. It was illusory because what the instrument reserved was too much to permit its defeat of rights granted by Sections 18 and 83. In Matter of Halpern, the question discussed in the majority opinion is merely whether the donor intended the instrument of transfer to take effect in accordance with its terms. In the Newman case, the intent to transfer title was admitted but the issue was whether, in view of what was reserved, the transfer was more form than substance. In the Halpern case, what was reserved was held immaterial as long as the intent to transfer title was present. Thus the majority ruled in Matter of Halpern that "Totten Trusts, if real and not merely colorable or pretended, are valid transfers with legally fixed effects." 48 But by the word "colorable" it meant a mere sham that was intended to be no transfer at all. Despite the statement in Krause v. Krause that "the sole evidence of the aim of the account is the form of the deposit," 49 the Court of Appeals distinguished the ruling therein made on the ground that:

... [O]n the unusual facts there established, the weight of evidence favored the holding of the trial court that decedent Krause had never intended that his Totten trust, made in favor of his daughter who lived in a foreign country and from whom he had not heard in years, should have any real effect, or that the money should ever go to the faraway daughter. 50

As one reads the opinion, a question so strongly suggests itself that the opinion both recognized and gave expression to it. Said the court: "Perhaps it may seem that we are putting the legislative policy of section 18 to rout by use of the court made (but legislatively recognized, see Banking Law, § 239, subd. 2) rule of the Totten case." 51 Its answer to its own inquiry was not categorical. The plain implication was that the court left it to the legislature

48 Id. at 37, 100 N.E.2d at 122.
50 Matter of Halpern, 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951).
51 Id. at 39, 100 N.E.2d at 122.
If the reasoning of Matter of Htalpern is to be applied to an ordinary deed of trust, the decision in Newman v. Dore must be confined to its own facts, as was the decision in Krause v. Krause. The question in that event must be: Has everything required by law for the creation of a trust been accomplished? If so, the settled legal result must follow as a matter of course. All that will defeat the trust is the existence of an actual intent to have no trust at all, an intent to pretend a transfer which is never to take effect at all.

As stated in the beginning, we are not engaged in a critical review of the decisions but a realistic acceptance of them. New York began with an effort on the part of the courts to give strength and support to the legislative policy and the spirit of the statute. The effort became more feeble as time moved on. Today we must admit that the legislative policy has been put to almost complete rout. A husband who wishes to maintain complete use of, and dominion and control over, his money during his lifetime and to transmit it at death to others than his wife, may use a joint bank account or Totten Trust. He can broadcast far and wide his intent and his purpose to defeat his wife’s rights under Section 18. Nothing will foil his plans unless he also intends to cheat the named beneficiaries as well. The creation of a living trust may pose some troublesome questions to his attorney. His counsel may be in doubt as to whether the Court of Appeals took back in Matter of Htalpern all that it gave to Section 18 in Newman v. Dore. He may wonder, too, whether the kind of trust held to be real in Matter of Ford would stand up in a lawsuit in which Section 18 was actually involved. If it can be taken at its face value and on the faith of the later decision which explained it, there is then available to him the deed of trust which reserves income to the donor, gives him the power to modify or revoke and appoints the donor and a corporate fiduciary as co-trustees, thus enabling the donor to keep his property and give it away at the same time. Even if his counsel lacks confidence that such a

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52 Id. at 39, 100 N.E.2d at 123.
scheme will ultimately stand up, he will have no doubt at all of the effectiveness of a trust deed that will retain all the fruits of the property as well as the power to modify and revoke the instrument. Efforts to retain administrative control of the trust fund must be confined to control in a practical sense and not in any legal sense, for the latter attempt could very well prove fatal, as it did once before. The ingenuity of draftsmen will discover paths to a satisfactory practical control of the fund.

It thus stands clearly revealed that the rule formulated by the courts has proved hopelessly unsatisfactory and may be said to be now almost completely ineffective. Professor Atkinson aptly sums up the New York decisions as follows: "There is a single bright possibility—New York may be leading of necessity to an early complete legislative readjustment of the property rights of the surviving spouses." 53 It is patent that there must either be a legislative re-examination of the statute or the inaction of the legislature will be interpreted as approval of the continued whittling down of the rights promised to the surviving spouse.

In other jurisdictions steps have been taken to remedy the defect which has been revealed in the election statutes. Pennsylvania, whose statute was the source of our own Section 18, has amended its law to provide that a conveyance by one who retains a testamentary power of appointment or a power of revocation or a power of consumption over the principal shall, at the election of the surviving spouse, be treated as a testamentary disposition to the extent to which the power has been reserved and in so far as the surviving spouse is concerned. The rights of the spouse are made expressly subject to the rights of any income beneficiary whose interests in income become vested in enjoyment prior to the death of the conveyor. 54 In this remedy to the problem, it is the disposition at the moment of death that is made subject to attack. Rights which theretofore were vested in enjoyment are immune from challenge. A gift of property with

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no strings attached—no powers reserved—is likewise unassailable even though it takes effect in enjoyment at the moment of death and even though the donor had enjoyed the income up to that moment.

The Model Probate Code approaches the problem from the standpoint of fraud as to the rights of the survivor. Any gift made by a person

... whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.\textsuperscript{55}

A gift made by a married person within two years of his death is deemed to be fraudulent unless shown to the contrary.\textsuperscript{56} The proposed statute does not attempt to define the expression “in fraud of the marital rights,” and that failure is deliberate. The comment to the text expresses the belief that only by judicial decision can the definition be worked out. The comment quite correctly views the “fraud of marital rights” approach as more satisfactory than the “illusory transfer” test.\textsuperscript{57} One other advantage of the Code proposal is that it purports to subject to the spouse's attack a greater area than does the Pennsylvania statute. Trusts that would be unassailable under the latter rule would be subject to the spouse's claim under the Code rule.

That method of solving the problem, however, has its disadvantages as well.\textsuperscript{58} Too much is left to the courts in the development of the definition of fraud, and on past history in New York, the courts may very well pass that burden back to the legislature. In giving the spouse the right to recover from purchasers who take from the donee “without adequate consideration,”\textsuperscript{59} some fear has been expressed lest it bring back all the disadvantages of inchoate dower, broadened now to embrace personal as well as real property.

\textsuperscript{55} \textit{Model Probate Code} § 33(a) (1946).
\textsuperscript{56} Id. § 33(b).
\textsuperscript{57} Id. § 33, comment.
\textsuperscript{59} \textit{Model Probate Code} § 33(a) (1946) (emphasis added).
It is true that the charge of too great a restraint on alienation could not be levelled against a right of recovery from the donee directly or from the trustee who holds for his benefit so long as only gratuitous transfers are involved. But the word "gift" or "gratuitous transfer" must be defined in the statute because, if the mere presence of some consideration will take the transaction beyond the statutory protection, the surviving spouse will be at a serious disadvantage. It has been well said that "... it would be a rare case where some consideration could not be worked into the arrangement" by skillful counsel.

An approach that held something in common with both the Model Code and the Pennsylvania Act was proposed in North Carolina. Any gratuitous transfer of property would be deemed to be in fraud of a wife unless she assented thereto, if either the husband retained the power of revocation or the transfer was made in contemplation of death and took place within a year prior to his death. A gratuitous transfer was presumed to be in contemplation of death if made within the preceding year, but that presumption would be a rebuttable one. Thus the reservation of the power of revocation in and of itself would subject the transfer to the widow's claim. However, the definition of fraud would be otherwise limited to a gift made in contemplation of death and made within the last year of the testator's life. Although the failure to define fraud may open too broad a field of litigation, the limitation of the term in this proposal would seem to narrow it too severely.

A bill introduced in the New York Legislature in 1957 attempted to recover much that has been lost to the statute since Newman v. Dore. Unfortunately, the bill sought to perpetuate the use of the terms illusory transfer and real transfer, unmindful that in them lay the germ of much of

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60 Note, Family Relations—Inter Vivos Transfers—Protection of Spouse's Statutory Share, 5 U. Chi. L. Rev. 504 (1938).
63 A. Int. No. 3221, Pr. No. 3356 (Introduced by Mr. Kappelman February 19, 1957) (failed to be reported out of the Judiciary Committee).
the confusion and difficulty. The proposed new Section 83-a of the Decedent Estate Law would declare that the rights granted to a spouse by Sections 18 or 83

... shall not be impaired or defeated by a transfer or conveyance of property made by the decedent in his lifetime to a person other than his surviving spouse, which transfer was made without full consideration in money or money's worth and was not intended to take effect in possession or enjoyment until his death . . . .

It would specify as transfers which shall not defeat the rights of the spouse, deposits made in banks under subdivisions two or three of Section 134 or under the parallel subdivisions of Section 239 of the Banking Law (which cover joint accounts and Totten Trusts in commercial banks and in savings banks), or investments in United States savings bonds or defense bonds payable upon the death of the purchaser to another than his spouse. The reservation by the decedent “... of any interest in or right of control or possession of the property transferred or conveyed, or of the income thereof, or of any such deposit or bond not terminable until the death of the decedent” shall be presumptive evidence that the transaction was not intended to take effect until death and that it was intended to defeat or impair the rights granted by statute to the surviving spouse, “... and any such transfer or conveyance, deposit or purchase shall be deemed an illusory and not an absolute transfer.”

The surviving spouse may show the court that the transfer was illusory and was made with intent to defeat or impair the rights granted by Section 18 or Section 83 to the surviving spouse, and if that be established to the satisfaction of the court, it shall determine that the property belongs to the estate and shall direct that it be paid to the legal representative.

One grave danger in setting forth a list of proscribed transfers is that the failure to include other similar transactions may be deemed to validate them. Hence deposits in

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64 Ibid.
65 Ibid.
66 Ibid.
industrial banks, in savings and loan associations, or in credit unions are not covered by the proposed act, and may be regarded as still open to those seeking to evade the statute.

The adoption of the illusory transfer doctrine may logically require that the transaction be treated as entirely valid or entirely void. If the illusory transfer idea were dropped completely, that method of dealing with the property would have nothing to recommend it. The transfer or conveyance could be suspended only insofar as it violated the spouse's rights; otherwise it would be allowed to stand.

All of these different attempts to furnish protection to the rights of the surviving spouse have their merits and their weaknesses. Considerations of time and space forbid us to explore these proposals adequately or to discuss in detail the advantages and disadvantages in the different methods of approach. They deserve more attention than we have been able to give to them, and they provide a field worthy of legislative attention and exploration.

We have thus far spoken of the rights of the surviving spouse and the failure of the statute adequately to protect them. We must look, too, at the rights of the other estate beneficiaries. The New York statute does not define the elective share, although it does place a limitation upon it. The result is to give to the surviving spouse, within the specified limitations, the amount that he or she would have taken if the other spouse had died intestate. In an intestate estate, inter vivos gifts to the surviving spouse are not taken into account at all. The same is true in determining the right to elect and the elective share under Section 18. A widow who is the beneficiary of a number of large life insurance policies may still elect to take her share in a relatively small estate. A spouse who is the beneficiary of a very substantial living trust ought not be permitted to challenge a relatively small transfer to her in-laws. If fraud of her rights be the basis of her complaint, she could hardly succeed in defeating such a transfer. But under different statutory plans, it would

67 N.Y. Banking Law § 310(5)(6).
68 Id. § 394(1)(5).
69 Id. § 453-a.
70 In re Rosenfield's Estate, 76 N.Y.S.2d 177, 180 (Surr. Ct. 1944).
be possible for the surviving spouse to acquire more than justice should permit.

It is clear, therefore, that mere piecemeal amendment of Section 18 is not the solution. The entire statute should be taken under legislative study. Only then can there be reasonable assurance that the correction of one defect will not create others equally serious. To repair the weaknesses in the statute may be a task that is long and difficult. The beginning of it can hardly be postponed any longer. What the statute professed to give must be somehow strengthened or there will be nothing left but the shell.