St. John's Law Review

Volume 26
Number 1 *Volume 26, December 1951, Number 1*

Article 13

Decedent Estates--Valid Totten Trust Takes Precedence Over Wife's Right of Election (In Re Halpern's Estate, 303 N.Y. 33 (1951))

St. John's Law Review

permit a state to prohibit sales, even though only particular sales, in order to carry out its own local economic policies seems clearly contrary to the general line of authority. If such is the intent of Congress, and the Court has said that it is, it could far better be accomplished by divesting these direct sales of their interstate character as in the case of whiskey and oleomargarine, or by a declaration of national policy as in the case of insurance.

DECEDENT ESTATES—VALID TOTTEN TRUST TAKES PRECEDENCE OVER WIFE'S RIGHT OF ELECTION.—Fifteen months before his death, decedent, then living apart from plaintiff, established four "Totten trusts" in favor of his granddaughter. He made no withdrawals, and, testimony indicated, he had told people on several occasions that he wanted the child to have his bank books. Plaintiff, executrix and sole beneficiary of a will executed in 1939, sought to include these accounts in the estate, claiming them illusory since decedent retained full dominion over them. The Appellate Division modified a judgment for plaintiff. *Held,* affirmed. Real, not merely colorable or pretended, Totten trusts are completely valid transfers, with legally fixed effects even as against Section 18 of the Decedent Estate Law. In re *Halpern's Estate,* 303 N. Y. 33, 100 N. E. 2d 120 (1951).

Totten trusts, defined as deposits ". . . by one person of his own money, in his own name as trustee for another . . .", have been recognized as valid in New York since 1904.[1] These trusts are tentative in nature, and become absolute only in one of two ways: [2] upon some unequivocal act or declaration by the depositor during his lifetime; [3] or upon the depositor's death, before that of the beneficiary, without any prior act or declaration of disaffirmance.[4] Death without such disaffirmance gives rise to a rebuttable presumption of an absolute trust as to the balance remaining in the account at the depositor's death.[5] During the settlor's life there is no such presumption based

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[1] Matter of Totten, 179 N. Y. 112, 125, 71 N. E. 748, 752 (1904). See discussion of these trusts in 1 SCOTT, THE LAW OF TRUSTS 360 (1939).

[2] *Cf.* Tierney v. Fitzpatrick, 122 App. Div. 623, 625, 107 N. Y. Supp. 527, 528 (1st Dep't 1907), *rev'd on other grounds,* 195 N. Y. 433, 88 N. E. 750 (1909).

[3] *Accord,* Thomas v. Brevoort Savings Bank of Brooklyn, 275 App. Div. 724 (2d Dep't 1949).

[4] Matter of Clark, 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1933); *accord,* Matter of Rasmussen, 147 Misc. 564, 264 N. Y. Supp. 231 (Surr. Ct. 1933); *cf.* Garlick v. Garlick, 53 N. Y. S. 2d 321 (Sup. Ct. 1945); 20 FORD. L. REV. 105, 106 (1951).

[5] The presumption ". . . is in reality not a presumption at all, but merely a factual inference which is subject to rebuttal either by any competent evidence or by a stronger inference." Matter of Reich, 146 Misc. 616, 620, 262 N. Y. Supp. 623, 628 (Surr. Ct. 1933).

solely on the form of the deposit.[6] To separate real from illusory Totten trusts, courts examine the substance, not merely the form of the transfer,[7] and inquire whether the settlor actually intended to divest himself of his property.[8] Courts have felt that, except where there was fraud when the trusts were created,[9] or where there were creditors' claims against the estate in excess of the amount of the estate,[10] these trusts should be free and absolute on the settlor's death.[11] Totten trusts have been invaded for the payment of funeral expenses on the theory that the presumption favoring the validity of an absolute transfer of the balance remaining in the trust account at the depositor's death is rebutted by the presumption that the decedent intended to receive a proper burial.[12]

In 1930 the New York Legislature abolished dower and curtesy and created a new right intended to give the surviving spouse an enlarged property interest in the deceased's estate.[13] This statutory

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[6] ". . . nothing passes to the tentative beneficiary by the opening of such an account and the *jus disponendi* of the avails remains as completely in the depositor during his lifetime as if the account stood solely in his own name." Matter of Kelly, 151 Misc. 277, 281, 271 N. Y. Supp. 457, 463 (Surr. Ct. 1934); *cf.* Matter of Vaughan, 145 Misc. 332, 335, 260 N. Y. Supp. 197, 201 (Surr. Ct. 1932). But see 1 SCOTT, THE LAW OF TRUSTS 360 (1939) (The New York courts are said to hold the theory ". . . that a trust is created at the time of the deposit but that the trust is revocable in whole or in part by the depositor. . . .").

[7] The transfer will be illusory if it is ". . . intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed." Newman v. Dore, 275 N. Y. 371, 381, 9 N. E. 2d 966, 969 (1937); *accord,* Marano v. LoCarro, 62 N. Y. S. 2d 121 (Sup. Ct.), *aff'd mem.,* 270 App. Div. 999, 63 N. Y. S. 2d 829 (1st Dep't 1946).

[8] Newman v. Dore, *supra* note 7; Burns v. Turnbull, 294 N. Y. 889, 62 N. E. 2d 785 (1945), *affirming* 266 App. Div. 779, 41 N. Y. S. 2d 448 (2d Dep't 1943); Reiss v. Reiss, 166 Misc. 274, 2 N. Y. S. 2d 358 (Sup. Ct. 1937).

[9] *Cf.* Matter of Weinberg, 162 Misc. 867, 875, 296 N. Y. Supp. 7, 18 (Surr. Ct. 1937); Matter of Timko, 150 Misc. 701, 705, 270 N. Y. Supp. 323, 328 (Surr. Ct. 1934).

[10] Matter of Reich, 146 Misc. 616, 262 N. Y. Supp. 623 (Surr. Ct. 1933); Beakes Dairy Co. v. Berns, 128 App. Div. 137, 112 N. Y. Supp. 529 (2d Dep't 1908); *accord,* Matter of Clark, 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1933).

[11] *See* Matter of Schurer, 157 Misc. 573, 577, 284 N. Y. Supp. 28, 33 (Surr. Ct. 1935), *aff'd mem.,* 248 App. Div. 697, 289 N. Y. Supp. 818 (1st Dep't 1936).

[12] Matter of Reich, 146 Misc. 616, 262 N. Y. Supp. 623 (Surr. Ct. 1933) (beneficiary held entitled to proceeds of Totten trust less amount necessary to pay creditors and reasonable funeral and administrative expenses where intestate's estate is insufficient).

[13] N. Y. DEC. EST. LAW § 18. This statute was ". . . enacted pursuant to the intention of the legislature to increase the share of a surviving spouse in the estate of a deceased spouse . . . thus enlarging property rights of such surviving spouse. . . ." Laws of N. Y. 1929, c. 229, § 20. See discussion of this interest in Bodner v. Feit, 247 App. Div. 119, 123-129, 286 N. Y. Supp. 814, 819-825 (1st Dep't 1936) (dissenting opinion by Untermyer, J.); Note, 25 ST. JOHN'S L. REV. 67 (1950).

right [14] is not a present property interest, but a right *in posse;* [15] it is ". . . only an expectant interest . . ." [16] which vests ". . . as of the date of decedent's death." [17] Hence it does not properly apply to transfers made other than by will during decedent's life, or ". . . effective . . . at the instant of death. . . ." [18]

Insofar as the right created by Section 18 of the Decedent Estate Law affects trusts, *Newman v. Dore* [19] established a general test to determine whether a transfer is illusory as a fraud on the other spouse's marital rights.[20] Though a prime factor indicating an illusory trust is a decedent's intent to deprive his survivor of her rights under Section 18,[21] the mere intent so to defeat the other spouse is not sufficient to render the transfer ineffective.[22] Generally there are circumstances relating to the transfer which mark it a sham; [23] some courts have, however, intimated that trusts, otherwise valid, would be wholly illusory if they served to defeat the survivor's rights under Section 18.[24]

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[14] "Where a testator dies . . . and leaves a will . . . and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy. . . ." N. Y. DEC. EST. LAW § 18.

[15] "The act grants no property right in esse but only a property right in posse. which springs into existence only if the statutory right is exercised under conditions which create the right only as of the time of the exercise of the election." Matter of Herter, 193 Misc. 602, 607, 83 N. Y. S. 2d 36, 41 (Surr. Ct.), *aff'd mem.,* 274 App. Div. 979, 84 N. Y. S. 2d 913 (1st Dep't 1948), *aff'd mem.,* 300 N. Y. 532, 89 N. E. 2d 252 (1949).

[16] Newman v. Dore, 275 N. Y. 371, 376, 9 N. E. 2d 966, 967 (1937); *see* Herrmann v. Jorgenson, 263 N. Y. 348, 356, 189 N. E. 449, 452 (1934).

[17] Matter of Matthews, 255 App. Div. 80, 82, 5 N. Y. S. 2d 707, 710 (2d Dep't 1938), *aff'd mem.,* 279 N. Y. 732, 18 N. E. 2d 683 (1939).

[18] Matter of Clark, 149 Misc. 374, 376, 268 N. Y. Supp. 253, 255 (Surr. Ct. 1933). Totten trusts are not of such testamentary nature as to be classified as wills within the meaning of Section 18. See Note, 157 A. L. R. 1184, 1193 (1945).

[19] 275 N. Y. 371, 9 N. E. 2d 966 (1937).

[20] See note 7 *supra.* An apparent transfer which is really a device whereby the husband can use and enjoy his property during his life, and also deprive his wife of her property rights in it at his death ". . . is a fraud on the wife's rights and consequently void." See Note, 112 A. L. R. 649, 650 (1938).

[21] *See* Schnakenberg v. Schnakenberg, 262 App. Div. 234, 236, 28 N. Y. S. 2d 841, 843 (2d Dep't 1941).

[22] "While it is true that the intent on the part of a husband to actually divest himself of his property is not wrongful, yet if his intent is to use an illusory transfer as a means to retain the property but to divest his wife of a share in it, then such intent becomes part of a wrongful fraud." Clavin v. Clavin, 41 N. Y. S. 2d 377, 379 (Sup. Ct.), *aff'd,* 267 App. Div. 760, 45 N. Y. S. 2d 937 (1st Dep't 1943).

[23] Newman v. Dore, 275 N. Y. 371, 9 N. E. 2d 966 (1937); Burns v. Turnbull, 294 N. Y. 889, 62 N. E. 2d 785 (1945), *affirming* 266 App. Div. 779, 41 N. Y. S. 2d 448 (2d Dep't 1943); Marano v. LoCarro, 62 N. Y. S. 2d 121 (Sup. Ct.), *aff'd mem.,* 270 App. Div. 999, 63 N. Y. S. 2d 829 (1st Dep't 1946); *accord,* Krause v. Krause, 285 N. Y. 27, 32 N. E. 2d 779 (1941) (after observing that the beneficiary had never lived in the United States, that settlor made no deposits or withdrawals, and that deceased had omitted plaintiff entirely when making his will, the court concluded that there was no foundation for finding decedent intended a gift inter vivos).

[24] "We assume . . . that except for the provisions of section 18 of the

Inasmuch as the legislature intended to protect only the surviving spouse,[25] it appears incorrect to declare an otherwise valid trust totally illusory as against Section 18, since to do so would enable other relatives to take unintended advantage of the statute.[26] Some courts have therefore declared that otherwise valid trusts may be illusory as against the survivor's rights under Section 18, while at the same time preserving their validity as to other persons.[27]

But Section 18 should not apply to Totten trusts,[28] as they are not part of the deceased's estate;[29] furthermore, these trusts are not considered of such testamentary character to be classified as "wills" within the meaning of Section 18.[30] The fact that the settlor retains complete control of the trust should not negate the validity of the transfer, since this is the very nature of Totten trusts.[31]

Where the trust is in fact illusory, based on other evidence than the mere form of the deposit, the surviving spouse should be able to

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Decedent Estate Law the trust would be valid. . . ." Newman v. Dore, 275 N. Y. 371, 380, 9 N. E. 2d 966, 969 (1937); *accord,* Matter of Halpern, 197 Misc. 502, 96 N. Y. S. 2d 596 (Surr. Ct. 1950) (Surrogate's decision in instant case); *cf.* Krause v. Krause, 285 N. Y. 27, 33, 32 N. E. 2d 779, 781 (1941); Murray v. Brooklyn Savings Bank, 258 App. Div. 132, 135, 15 N. Y. S. 2d 915, 918 (1st Dep't 1939).

[25] See note 9 *supra.*

[26] See Note, 25 ST. JOHN'S L. REV. 67, 72 (1950).

[27] Application of Halpern, 277 App. Div. 525, 100 N. Y. S. 2d 894 (2d Dep't 1950) (appellate decision in instant case); Steixner v. Bowery Savings Bank, 86 N. Y. Supp. 747 (Sup. Ct. 1949); Getz v. Getz, 101 N. Y. S. 2d 757 (Surr. Ct. 1950) (citing *Application of Halpern, supra,* as controlling); *cf.* President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 297, 14 N. Y. S. 2d 375, 384 (Sup. Ct. 1939), *modified,* 260 App. Div. 174, 21 N. Y. S. 2d 232 (2d Dep't 1940).

[28] "The Decedent Estate Law . . . did not directly or by implication affect this method of disposition of property. . . ." Matter of Yarme, 148 Misc. 457, 459, 266 N. Y. Supp. 93, 95 (Surr. Ct. 1933), *aff'd mem.,* 242 App. Div. 693, 273 N. Y. S. 2d 403 (2d Dep't 1934).

[29] Matter of Schurer, 157 Misc. 573, 284 N. Y. Supp. 28 (Surr. Ct. 1935), *aff'd mem.,* 248 App. Div. 697, 289 N. Y. Supp. 818 (1st Dep't 1936); *cf.* Matter of Clark, 149 Misc. 374, 376, 268 N. Y. Supp. 253, 255 (Surr. Ct. 1933).

[30] *Cf.* Matter of Hammer, 102 Misc. 193, 169 N. Y. Supp. 684 (Surr. Ct. 1918); see Note, 157 A. L. R. 1184, 1193 (1945). "We do not believe it to have been the purpose of the statute in such cases to invalidate a form of trust which for generations has been recognized as a lawful and convenient method for the transmission of property." Murray v. Brooklyn Savings Bank, 258 App. Div. 132, 135, 15 N. Y. S. 2d 915, 918 (1st Dep't 1939). Although ". . . a similar trust of property other than savings bank deposits would be invalid," Scott states that the New York theory supporting these trusts is that the public policy of that state to invalidate these transfers as testamentary devises is not as strong as that to preserve this convenient form of bequeathing relatively small sums of money. 1 SCOTT, THE LAW OF TRUSTS 360 (1939).

[31] "By the very nature of the savings account in trust, no present rights are conferred upon the beneficiary, in the absence of a consummated gift by delivery of the bank book, and the depositor retains all of the rights and incidents of ownership in his lifetime. . . ." Matter of Kalina, 184 Misc. 367, 375, 53 N. Y. S. 2d 775, 782 (Surr. Ct. 1945), *appeal dismissed,* 270 App. Div. 761, 59 N. Y. S. 2d 525 (2d Dep't 1946).

attack it even without recourse to the statutory election.[32] It is submitted that the inference—based on sound public policy and good morality—that the decedent intended to provide for the support of the surviving spouse should have been given at least equal weight with the claims of the creditors in overcoming the presumption of a valid trust on the settlor's death. Some courts, in effect, have adopted this view,[33] but in the instant case the Court of Appeals intimated that if the legislature intended Totten trusts to be vulnerable under Section 18, it should have so provided by appropriate enactments, and that, in the interim, Totten trusts were to be effective as against this statute.

The progress of the instant case through the courts best emphasizes the legal import of the opinion of the Court of Appeals. In the Surrogate Court the Totten trusts were declared entirely void, although there was no evidence to indicate an illusory transfer. However, the Appellate Division, in attempting to reconcile the validity of these trusts, as established by *Matter of Totten*[34] with the interpretation of Section 18 in *Krause v. Krause*,[35] held that the trusts were invalid only to the extent necessary to provide the surviving spouse with a sum equal to the amount she would have taken in intestacy if the trust were never formed. In its holding, the Court of Appeals stamped the Surrogate's opinion as incorrect law. Unable to overrule the Appellate Division because of the trust beneficiary's failure to appeal, the court nevertheless deplored its reasoning and decision, and declared the legal principles to be applied henceforth in cases involving Totten trusts.

The statements regarding Totten trusts are partially dicta, but in this very fact lies their importance. Many cases involving Totten trusts do not reach the Court of Appeals, since the sums involved are negligible, and the estate would be consumed if an appeal were prosecuted. But there was great need for an authoritative statement on the matter, and the court leaped to respond. With befitting sagacity, it spoke forth against the inconsistencies of the lower courts, and laid down the rule, in clarion terms, that a real Totten trust, not one colored by fraud, is a valid transfer with legally fixed effects, that such a trust is not subject to being split-up, but is either wholly effective or totally illusory, Section 18 notwithstanding.

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[32] "A widow may have no right to elect pursuant to the Decedent Estate Law and yet may rely upon it in support of her action to set aside a revocable trust as illusory where the very purpose of the decedent in so conveying was to avoid its application." Schnakenberg v. Schnakenberg, 262 App. Div. 234, 236, 28 N. Y. S. 2d 841, 843 (2d Dep't 1941); *cf.* Marano v. LoCarro, 62 N. Y. S. 2d 121, 126 (Sup. Ct.), *aff'd mem.*, 270 App. Div. 999, 63 N. Y. S. 2d 829 (1st Dep't 1946); see Note, 112 A. L. R. 649, 650 (1938).

[33] See note 27 *supra*.

[34] 179 N. Y. 112, 71 N. E. 748 (1904).

[35] 285 N. Y. 27, 32 N. E. 2d 779 (1941).