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TRUSTS—DESCENT AND DISTRIBUTION—WIFE'S FORCED SHARE AND AN INTER VIVOS TRUST—Settlor had created an inter vivos trust, retaining income for life, right to revoke, and control over the investment. Upon settlor's death, plaintiff, settlor's wife, was to receive income for life, with gift over to settlor's children. Plaintiff elected to take against settlor's will in favor of a statutorily provided distributive share.¹ Upon application for declaratory judgment the trial court declared the trust to be valid, but granted relief to plaintiff as to her distributive share out of the trust assets, and the court of appeals affirmed.² On motion to certify, *held*, reversed. Since the trust is valid, title is in the trustee, and settlor has retained no interest upon which the wife can claim a distributive share. *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961).

Historically, the common-law concept of dower provided for wife's maintenance after her husband's death by giving her a life estate in one-third of the land that the husband had owned during the marriage.³ Today, however, with the bulk of actual wealth and assets in the form of personal

¹ OHIO REV. CODE § 2107.39 (Anderson 1953).

² *Smyth v. Cleveland Trust Co.*, 163 N.E.2d 702 (Ohio Ct. App. 1959).

³ See MACDONALD, FRAUD ON THE WIDOW'S SHARE 60-62 (1960); MOYNIHAN, THE LAW OF REAL PROPERTY 27-28 (1940).

property of various types it is often thought necessary to give the wife a share of such personalty to insure her continued security after her husband's death. Thus, most states now have forced-share statutes which allow the wife to elect against her husband's will, and take an absolute interest in one-third or one-half of the husband's total estate.⁴ Nevertheless, various means are still available for a husband to defeat his wife's expectancy, among these being an inter vivos gift of his property before death, and the placing of his property in a non-revocable inter vivos trust.⁵ However, self-interest generally prevents a person from stripping himself of all control over his wealth during his lifetime in order merely to spite his wife.⁶

The policy behind the forced-share statutes meets stern opposition when the husband seeks to maintain control over his property, and at the same time defeat his wife's expectancy by creating a revocable inter vivos trust. Most courts have allowed the husband effectively to defeat his wife's expectancy where he creates an inter vivos trust, while retaining income for life and the right to revoke.⁷ But when the husband retains not only income for life and the right to revoke, but also control over the trust investment, as in the principal case, courts have taken several rather divergent views. Some courts hold that although the trust is valid, it is illusory as to the wife,⁸ since the husband has retained so much control over the property that in reality he still has all the benefits of ownership, and should not be able to defeat his wife's forced-share election thereby. These courts include the trust assets in the husband's estate with respect to the determination of the wife's distributive share, with the wife getting one-third of the trust assets, and the remaining two-thirds passing under the terms of the trust. This might aptly be called the illusory-control doctrine. Other courts, including the present Ohio court, find the trust illusory only if it is a sham,⁹ holding that there is no trust at all if the husband has not actually transferred legal title to the trustee. Under this view the test is not the amount of control retained, but whether or not there is any actual intent to create

⁴ See SIMES, PUBLIC POLICY AND THE DEAD HAND 19 (1955).

⁵ See *Freed v. Judith Realty & Farm Prods. Corp.*, 201 Va. 791, 113 S.E.2d 850 (1960).

⁶ See SIMES, *op. cit. supra* note 4, at 25.

⁷ *E.g.*, *National Shawmut Bank v. Cummings*, 325 Mass. 457, 91 N.E.2d 337 (1950); *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945); *Beirne v. Continental-Equitable Trust Co.*, 307 Pa. 570, 161 Atl. 721 (1932); *Windolph v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914). *Contra*, *Harris v. Harris*, 147 Ohio St. 437, 72 N.E.2d 378 (1947) (overruled by principal case); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944) (overruled by principal case).

⁸ *E.g.*, *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944); *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937).

⁹ *E.g.*, *Ascher v. Cohen*, 333 Mass. 397, 131 N.E.2d 198 (1956) (settlor retained income for life, right to revoke, so much of the res as settlor might request, and settlor was co-trustee, but the court held against the spouse); *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951) (dictum that there is nothing illusory about a Totten trust as the source of the illusory-sham doctrine).

a true trust arrangement. If the trust is found to be valid, as in the principal case, then no part of the trust assets are included in the husband's estate for the purpose of determining the amount of the wife's distributive share. If the trust is found invalid, then the entire amount of the trust assets pass intestate to the husband's heirs, or pass under the husband's will, depending on the particular circumstances. This might appropriately be termed the illusory-sham doctrine. Still another view, accepted by a few courts, is that the trust is valid or invalid depending upon the settlor's motives.¹⁰ If he intends to leave his wife penniless, the trust is invalid as a fraud on the wife.¹¹ If he provides for the wife in the trust, as in the principal case, or if he gives the wife sufficient property before his death, or if his wife is independently wealthy, then the trust is held valid.¹²

The principal case accepts the illusory-sham doctrine: if the husband has parted with title to the property, the trust is valid and therefore the trust assets cannot be considered as part of his estate for the purpose of determining the amount of the wife's distributive share. And this holds true even though the husband, in creating the trust, has really parted with very little, retaining income for life, right to revoke, and control over the investment. Arguably, this view fails to consider the policy basis of forced-share statutory provisions which attempt to provide adequately for a wife's material needs, insofar as is possible, after her husband's death. If this policy can be defeated by every technically valid inter vivos trust, even though the husband has retained almost all of the incidents of ownership, then the statute is seemingly of rather restricted value, for only the "poor and the stupid"¹³ need conform. At least one state has recognized that the illusory-sham doctrine is incompatible with the policy of the forced-share statute, and by statute allows the wife to elect to treat a trust with right of revocation or power of appointment as testamentary for purposes of her distributive share.¹⁴ This legislation was prompted by unfavorable reaction to revocable trust cases which had resulted in effectively defeating the wife's share.¹⁵ Federal estate tax law has also recognized

¹⁰ E.g., *Potter v. Winter*, 280 S.W.2d 27 (Mo. 1955); *Dunnett v. Shields & Conant*, 97 Vt. 419, 123 Atl. 626 (1924); *Thayer v. Thayer*, 14 Vt. 107 (1842) (fraud even with no power to revoke); cf. *Whittington v. Whittington*, 205 Md. 1, 106 A.2d 72 (1954) (Totten trust); *Mushaw v. Mushaw*, 183 Md. 511, 39 A.2d 465 (1944) (Totten trust). See generally *Sykes, Inter Vivos Transfers in Violation of the Rights of Surviving Spouses*, 10 MD. L. REV. 1 (1949).

¹¹ See *Sykes, supra* note 10, at 11-15.

¹² *Ibid.*

¹³ *Cohn, Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 150 (1936): "If the statutes creating such valuable rights for widows (and children) are subject to easy evasion by transfers inter vivos, their utility is slight indeed. Only the poor and stupid need conform."

¹⁴ PA. STAT. ANN. tit. 20, § 301.11 (1947).

¹⁵ *Beirne v. Continental-Equitable Trust Co.*, 307 Pa. 570, 161 Atl. 721 (1932) (husband retained income and right to revoke and succeeded in his purpose of limiting his

analogous policy considerations by treating a trust with retained life estate,¹⁶ general power of appointment,¹⁷ or right to revoke,¹⁸ as part of the settlor's gross estate for taxation purposes.

The illusory-control doctrine, on the other hand, recognizes the policy conflict between the forced share statute and the inter vivos trust concept. However, the illusory-control doctrine arguably places too much emphasis on control over the investment and not enough emphasis on a more important incident of ownership, the right to revoke.¹⁹ Aside from the issue of the wife's forced share, control over investment has long been an important consideration in determining whether or not a valid inter vivos trust has been created. The old view was that if the settlor retained income for life, right to revoke, and control over the investment the trust was testamentary, and thus invalid,²⁰ but that if the settlor only retained income for life and the right to revoke, then the trust would be upheld as being validly created. The modern view is that a retained power of control over the investment, when added to the other powers, does not by itself necessarily result in a trust being found invalid.²¹ But this conflict over the validity of the creation of an inter vivos trust, with its emphasis on control over the investment, should seemingly not be determinative of the somewhat different question of whether a husband can thereby defeat his wife's forced share, for in this situation the added and important consideration of providing for the wife is presented.

Since a prime incident of ownership is the right to get the property back at any time by revoking the trust, retention of the right to revoke should arguably also make a trust illusory as to the wife. At least two prior Ohio cases had found a trust illusory where the husband had retained the right to revoke but no control over the investment.²² This view, overruled and rejected in Ohio by the holding in the principal case, has at least four distinct advantages. First, creation of a non-revocable trust is a sufficient loss of the benefits of ownership to the husband to deter the disinheritance of his

wife to \$40 per month after his death); *Windolph v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914).

¹⁶ INT. REV. CODE OF 1954, § 2036.

¹⁷ INT. REV. CODE OF 1954, § 2041.

¹⁸ INT. REV. CODE OF 1954, § 2038.

¹⁹ See MACDONALD, *op. cit. supra* note 3, at 90-92.

²⁰ RESTATEMENT, TRUSTS § 57 (1935): "Where the settlor . . . reserves . . . power to control the trustee as to the details of the administration of the trust . . . the disposition . . . is testamentary"

²¹ RESTATEMENT (SECOND), TRUSTS § 57 (1959): "[T]he disposition is not testamentary . . . merely because the settlor reserves . . . power to control the trustee as to the administration of the trust." See *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944).

²² *Harris v. Harris*, 147 Ohio St. 437, 72 N.E.2d 378 (1947); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944).

wife.²³ Second, it gives certainty to the estate planner. He now knows just how much power the settlor can retain without having an illusory trust, and need not worry about the husband's motive in creating the trust, or the amount of control retained by the husband so long as the trust is valid, and the right to revoke has not been retained. Third, if an illusory trust is created, the settlor's intent is not completely destroyed since the balance of the otherwise valid trust, after the wife's forced share is deducted, can go to the beneficiaries of the trust, and does not pass intestate or under the settlor's will.²⁴ A court does not have to stretch to find the trust testamentary to aid the spouse as is necessary under the illusory-sham doctrine.²⁵ Fourth, freedom of alienation is still allowed as long as the settlor provides the equivalent of a forced share for his spouse, a result which is consistent with the primary aims of forced-share legislation.

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²³ See SIMES, *op. cit. supra* note 4, at 25.

²⁴ See MACDONALD, *op. cit. supra* note 3, at 130-32.

²⁵ Compare MacGregor v. Fox, 280 App. Div. 435, 114 N.Y.S.2d 286 (1952), *aff'd per curiam*, 305 N.Y. 576, 111 N.E.2d 445 (1953) (testamentary), with Matter of Ford 279 App. Div. 152, 108 N.Y.S.2d 122 (1951), *aff'd per curiam*, 304 N.Y. 598, 107 N.E.2d 87 (1952) (not testamentary) and National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944) (not testamentary).