

Michigan Law Review

Volume 46 | Issue 1

1947

TRUSTS-ILLUSORY TRANSFER-RIGHTS OF SURVIVING WIDOW

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Recommended Citation

John E. Grosholl S.Ed., *TRUSTS-ILLUSORY TRANSFER-RIGHTS OF SURVIVING WIDOW*, 46 MICH. L. REV. 118 (1947).

Available at: <https://repository.law.umich.edu/mlr/vol46/iss1/21>

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TRUSTS—ILLUSORY TRANSFER—RIGHTS OF SURVIVING WIDOW—On May 12, 1939, the testator created an inter vivos trust, the corpus consisting of 100 shares of stock in a closed corporation, of which the testator was president and a director. He reserved the life income and the right to revoke or modify the trust agreement. The agreement gave no express authority to the trustee to sell or invest the trust property. It did, however, authorize the trustee to vote the stock, but further authorized him to enter into a trust agreement with the remaining four stockholders, which was done on May 15, 1939. This had the effect of nullifying the authority originally given to the trustee to vote the stock. The testator died on October 11, 1942; his surviving widow elected to take against the will and brought this action to have the trust declared void so that the property could be administered as part of her husband's estate. *Held*, the trust was ineffective to deprive the surviving widow of her statutory share of the estate. *Harris v. Harris*, (Ohio 1947) 72 N.E. (2d) 378.

In determining the validity of an inter vivos trust at the instance of the surviving widow, the first question is whether the trust is testamentary.¹ If it is, the wife may elect to take a statutory share of the trust estate. If it is non-testa-

¹ 1 SCOTT, TRUSTS, §§56, 57 (1939), and cases cited.

mentary, she still may be permitted to take such distributive share, due to a statutory policy favoring surviving widows in this respect.² Two tests have commonly been used by the courts in determining whether such statutory policy has been vitiated. One is based on whether the husband in making the conveyance had a primary intent to defeat the marital rights of his wife.³ The other, which is receiving increased favor among the courts, is the so-called illusory transfer doctrine highlighted by *Newman v. Dore*.⁴ An illusory transfer, meaning illusory only as to the wife, is said to be one which on its face shows such a large retention of interest in the subject matter conveyed that it takes back practically all it gives; it is based not on an intent to defeat the marital rights of the widow but rather on an intent to retain full control of the property.⁵ In the principal case, the majority clearly followed the illusory transfer doctrine in striking down the trust, as it did also in the recent case of *Bolles v. Toledo Trust Co.*,⁶ which the court cites with approval. Certainly the court did not hold this trust to be testamentary, nor was its holding based on the husband's intent to defeat his wife's marital rights, although the court does make slight mention of such intent apparently as a makeweight.⁷ The first dissenting opinion attempted to distinguish the *Bolles* case on the ground that the trusts there were held to be testamentary. The language of the *Bolles* case, however, seems to indicate clearly that the court held the trusts invalid purely on the basis of their being illusory transfers; it was expressly stated in the opinion that the trusts there involved were valid except as to the surviving widow.⁸ The second dissenting opinion made no distinction between the instant case and the *Bolles* case but disagreed with the principles set out in both since the respective trusts involved were not testamentary.⁹ Thus, at the present time it appears that four justices on the Ohio

² 1 SCOTT, TRUSTS, §57.5 (1939), and cases cited.

³ *Payne v. Tatem*, 236 Ky. 306, 335 S. E. (2d) 2 (1930); *Patch v. Squires*, 105 Vt. 405, 165 A. 919 (1933); *Harrison v. Harrison*, 198 Ark. 64, 127 S. W. (2d) 270 (1939); *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S. W. (2d) 611 (1939); *Ibey v. Ibey*, 93 N. H. 434, 43 A. (2d) 157 (1945).

⁴ 275 N. Y. 371, 9 N. E. (2d) 966 (1937). Followed in *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N. E. (2d) 25 (1944); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N. E. (2d) 381 (1944); 157 A. L. R. 1164 at 1184 (1945). See Amendments to TRUSTS RESTATEMENT, Proposed Final Draft No. 2, § 57 (1947).

⁵ See 44 MICH. L. REV. 151 (1945), a comment on "The Present Status of Illusory Trusts."

⁶ 144 Ohio St. 195, 58 N. E. (2d) 381 (1944).

⁷ Principal case at 380.

⁸ ". . . We have been unable to find any evidence in the record which would justify a holding in the face of the provisions of Section 8617 . . . that trust No. 331 constituted a mere agency or was otherwise invalid except that it was voidable by the widow to the extent of her distributive share of her husband's property . . ." *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195 at 224, 58 N. E. (2d) 381 (1944); and at 226 the court says: "We are unable to conclude from the evidence in this case that either the trust settlement or the procedure thereunder constituted or resulted in a mere agency arrangement. On the other hand we think that the trust is valid, save as to the rights of Mrs. Bolles."

⁹ The principal cases relied on by both the dissenting opinions were *Union Trust Co. v. Hawkins*, 121 Ohio St. 159, 167 N.E. 389 (1929), and *Cleveland Trust Co.*

court feel there is a statutory policy favoring widows as against certain types of inter vivos transfers that would otherwise be valid, and that the test to be used in determining whether such policy has been vitiated is the illusory transfer test.¹⁰ The remaining three justices apparently feel there is no such statutory policy; that is, if an inter vivos trust is valid according to ordinary standards it is also valid as to the surviving widow.¹¹

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v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938). In the former case the administrator was suing to have the trust declared void; in the latter the trustee brought an action to construe certain provisions of the trust agreement. In neither case was it claimed that the trust in question operated to defeat the surviving spouse's statutory share of the decedent's estate. Also relied on by the dissenting opinions, and with some justification, it would seem, was the Ohio statute which provides that a revocable and amendable living trust "shall be valid as to all persons" except creditors. Ohio Gen. Code (Page, 1938) §8617.

¹⁰ Precisely how much control must be reserved by the settlor before the transfer will be held illusory as to his surviving widow is not settled. It is generally agreed that the mere reservation of life income does not label the transfer as illusory, nor does the mere power of revocation. But when the settlor reserves both life income and the power of revocation and amendment there appears to be some conflict. Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N. E. (2d) 381 (1944), indicated such a retention was sufficient to make the transfer illusory; the majority in the principal case apparently reaffirmed that view although there were a few additional elements of control involved. In Newman v. Doré, 275 N. Y. 371, 9 N. E. (2d) 966 (1937), the court specifically refused to decide this question. 1 TRUSTS RESTATEMENT, §57(1)c (1935), indicates that mere retention of life income plus the power to revoke or modify would not make the trust illusory as to the surviving widow. Cf. Marine Midland Trust Co. of Binghamton v. Stanford, 256 App. Div. 26, 9 N. Y. S. (2d) 648 (1939); Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N. Y. S. (2d) 841 (1941); Mitchell v. Mitchell, 265 App. Div. 27, 37 N. Y. S. (2d) 612 (1942). See also Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N. W. (2d) 458 (1942), which apparently does not follow the illusory transfer doctrine.

¹¹ "The decision of the instant case, therefore, must turn on whether the agreement created an agency. If it constituted a trust, it is valid and the res is not a part of the net estate; if an agency, the res did become a part of the net estate." First dissenting opinion of the principal case at 382.

"It seems incongruous indeed that a trust may be valid giving the trustee title to and a vested interest in the trust property and yet the settlor's widow, upon electing not to take under his will, may be accorded the right by judicial fiat to claim a 'distributive share' of the trust property under the statutes of descent and distribution." Second dissenting opinion, principal case at 383.