CHAPTER 13

Trusts

1. REVOCABLE INTER VIVOS TRANSFERS IN TRUST

Forty-two cases were noticed that appear to be directly in point. In a little more than one half of these cases (to wit, twenty-three) the decision favors the trust beneficiary over the surviving spouse.[1]

[1] *Favoring spouse.* Grover v. Clover, 69 Colo. 72, 169 Pac. 578 (1917); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Hays v. Henry, 1 Md. Ch. 337 (1848); Wanstrath v. Kappel, 354 Mo. 565, 190, S.W.2d 241 (1945), 356 Mo. 210, 201 S.W.2d 327 (1947), *aff'd,* 358 Mo. 1077, 218 S.W.2d 618 (1949); Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939); MacGregor v. Fox, 280 App. Div. 435, 114 N.Y.S.2d 286 (1st Dep't 1952), *aff'd without opinion,* 305 N.Y. 576, 111 N.E.2d 445 (1953); Burns v. Turnbull, 37 N.Y.S.2d 380 (Sup. Ct. 1942), *rev'd mem.,* 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep't 1943), *reargument granted,* 267 App. Div. 986, 48 N.Y.S.2d 453 (2d Dep't 1944), *aff'd on reargument mem.,* 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep't 1944), *motion to dismiss appeal denied,* 294 N.Y. 809, 62 N.E.2d 240 (1945); *aff'd without opinion,* 294 N.Y. 889, 62 N.E.2d 785 (1945); Schnakenberg v. Schnakenberg, 176 Misc. 312, 27 N.Y.S.2d 270 (Sup. Ct. 1941), 262 App. Div. 234, 28 N.Y.S.2d 841 (2d Dep't 1941); President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S.2d 375 (Sup. Ct. 1939), *modified on other grounds,* 260 App. Div. 174, 954, 21 N.Y.S.2d 232 (2d Dep't 1940); Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); Darrow v. Fifth Third Union Trust Co., 139 N.E.2d 112 (Ohio Com. Pl. 1954); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd,* 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); Estate of Brown, 384 Pa. 99, 119 A.2d 513 (1956) (unfunded life insurance trust); In re Pengelly's Estate, 374 Pa. 358, 97 A.2d 844 (1953); Vederman Estate, 78 D.&C. 207 (Pa. 1951); Bickers v. Shenandoah Valley Nat. Bank, 197 Va. 145, 88 S.E.2d 889 (1955), *reh. denied,* 197 Va. 732, 90 S.E.2d 865 (1956) (unfunded life insurance trust); *cf.* In re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122 (1st Dep't 1951), *aff'd without opinion,* 304 N.Y. 598, 107 N.E.2d 87 (1952) (nonevasive); Blush v. McQuade, 47 N.Y.S.2d 450 (Sup. Ct. 1944); O'Brien v. City Bank Farmers Trust Co., Sup. Ct., N. Y. L. J. (15 Dec. 1936), 1 P-H Unreported Trust Cases, ¶25,244.

Favoring trust beneficiary. Burnet v. First Nat'l Bank, 12 Ill. App. 2d 514, 140 N.E.2d 362 (1957); Stice v. Nevin, 344 Ill. App. 642, 101 N.E.2d

Detailed analysis of these revocable trust cases may be found under the general discussion of evasion rationales.[2] When the court adheres strictly to the "reality" rationale, as in the Massachusetts cases,[3] the trust beneficiary will prevail. Under the "illusory trust" rationale ("real," but vulnerable to the spouse's claim), the result is not entirely predictable. In theory, the spouse must demonstrate that the decedent retained excessive control; in actuality, the equities play a large part in the decision-making process. Under the "intent" rationale the equities are avowedly relevant, usually decisive. Under the proposed model statute,[4] revocable trusts are treated exactly as any other revocable transfer.

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873 (1951); Boyle v. John M. Smyth Co., 248 Ill. App. 57 (1928); Wheelock v. Wheelock, 97 Ind. App. 501, 187 N.E. 205 (1933); De Leuil's Ex'rs v. De Leuil, 255 Ky. 406, 74 S.W.2d 474 (1934); Brown v. Fidelity Trust Co., 126 Md. 175, 94 Atl. 523 (1915); Ascher v. Cohen, 333 Mass. 397, 131 N.E.2d 198 (1956); National Shawmut Bank of Boston v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945); Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904); Roche v. Brickley, 254 Mass. 584, 150 N.E. 866 (1926); Seaman v. Harmon, 192 Mass. 5, 78 N.E. 301 (1906); Stone v. Hackett, 12 Gray 227 (Mass. 1858); Potter v. Winter, 280 S.W.2d 27 (Mo. 1955); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891); Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S.2d 648 (3rd Dep't 1939), *motion for leave to appeal denied,* 256 App. Div. 1026, 11 N.Y.S.2d 547, *aff'd without opinion,* 281 N.Y. 760, 24 N.E.2d 20 (1939); Ballantyne Estate, 1 Fiduc. 445, 67 Montg. 314, 65 York 148 (Pa. 1951); McKean Estate, 71 D.&C. 429 (1950), *aff'd,* 336 Pa. 192, 77 A.2d 447 (1951); Mornes v. Lawrence Sav. & Trust Co., 8 LAWRENCE L. J. 163 (Pa. 1949); 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); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891); Dunnett v. Shields, 97 Vt. 419, 123 Atl. 626 (1924); In re Steck's Estate, 275 Wis. 290, 81 N.W.2d 729 (1957); *cf.* Exchange National Bank of Winter Haven v. Smith, 4 So.2d 675, 676 (Fla. 1941) (amendable insurance trust); Pond v. Sweetser, 85 Ind. 144, 150 (1882) (conflict of laws); Matter of Fields, 193 Misc. 777, 84 N.Y.S.2d 645 (1948), *modified,* 276 App. Div. 835, 1082, 93 N.Y.S.2d 267 (1949), *modified and aff'd,* 302 N.Y. 262, 97 N.E.2d 896 (1951); Hochster v. City Bank Farmers Trust Co., 260 App. Div. 712, 24 N.Y.S.2d 110 (1st Dep't 1940), *aff'd without opinion,* 288 N.Y. 588, 42 N.E.2d 600 (1942); Stefano v. First National Bank, 29 WESTMORELAND Co. L. J. 49, *exceptions overruled, id.,* 191 (Pa. Com. Pl. 1947) (50 year trust).

[2] See *supra,* Chap. 7:2.

[3] *Supra,* note 1.

[4] Suggested Model Decedent's Family Maintenance Statute, *infra,* p. 299.

2. Revocable Self-Declarations of Trust

Seemingly there has been very little litigation concerning spouses' rights in this type of transfer. Two cases were noticed, in both of which the beneficiary prevailed.[5]

Lack of litigation does not necessarily mean that malevolent husbands shun such a device. In "reality" jurisdictions,[6] for instance, it may or may not be in common use.[7] Technically impervious to the widow's claim, it has the added advantage of great control and secrecy. Where the jurisdiction concerned purports to follow the "control" or "intent" rationales, however, the revocable self-declaration of trust would be a risky transfer for the husband to employ. Probably most counsel would advise against it, particularly when the equities run in favor of the potential widow.

3. Irrevocable Inter Vivos Trusts

Most of the evasion cases involving this type of transfer favor the trust beneficiary, whether the decedent makes a self-declaration of trust or a transfer in trust. In cases where the trust is not clearly irrevocable the cases are fairly well balanced.[8] Where the trust is clearly irrevocable, however, the

[5] United Building & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W. D. Ark. 1946); Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1887). *But cf.* Application of Cerchia, 279 App. Div. 734, 108 N.Y.S.2d 753 (1st Dep't 1952) (*semble* surviving spouse not involved).

The spouse prevailed in Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep't 1936), but the dissenting judge pointed out (p. 123) that "The complaint does not allege that the trusts were revocable. . . ."

[6] Pennsylvania could be so classified, at least at the time of Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1887).

[7] *Cf.* Farkas v. Williams, 3 Ill. App.2d 248, 121 N.E.2d 344, (1954) *rev'd*, 5 Ill.2d 417, 125 N.E.2d 600 (1955) (no surviving spouse).

[8] (a) *Favoring spouse.* Kratli v. Booth, 99 Ind. App. 178, 191 N.E. 180 (1934) (*semble* irrevocable, but decided on basis of fraud in nondisclosure of all facts before securing wife's concurrence); Stone v. Stone, 18 Mo. 390 (1853); Thayer v. Thayer, 14 Vt. 107 (1842) (*semble* irrevocable).

(b) *Favoring beneficiary.* Wilson v. Lowrie, 77 Colo. 427, 236 Pac. 1004 (1925) (transfer in trust "causa mortis"; *semble* irrevocable); Stewart v. Stewart, 5 Conn. 317 (1824); Small v. Small, 56 Kan. 1, 42

spouse has prevailed in relatively few cases.[9]

We may presume that counsel for the transferor will be quick to advise use of the irrevocable trust, once it has received judicial sanction as an evasive device. It may be more than coincidence that the cases favoring the beneficiary tend to cluster in a few states, and that in two of those states —

Pac. 323 (1895); Estate of Sides, 119 Neb. 314, 228 N.W. 619 (1930); *cf.* Pond v. Sweetser, 85 Ind. 144 (1882).

[9] (a) *Favoring spouse.* City Bank Farmers Trust Co. v. Miller, 163 Misc. 459, 297 N.Y. Supp. 88 (Sup. Ct. 1937), *aff'd without opinion,* 253 App. Div. 707, 1 N.Y.S.2d 640 (1st Dep't 1937), *motion for leave to appeal granted,* 253 App. Div. 880, 2 N.Y.S.2d 798 (1st Dep't 1938), *rev'd,* 278 N.Y. 134, 15 N.E.2d 553 (1938) (with power of appointment); Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep't 1936) (apparently irrevocable: see dissent, *id.* at 123, 286 N.Y. Supp. at 818; *cf.* 46 YALE L. J. 884, note 1 (1937); 50 HARV. L. REV. 529 (1937)); Hill's Estate, 15 D.&C. 699 (Pa. 1931) (one day before death); *cf.* Peterson v. Anderson, 218 Minn. 383, 16 N.W.2d 185 (1944) (conveyance by trustee in fraud of dower of beneficiary's wife); McCammon v. Summons, 2 Disn. 596, 600 (Ohio 1859) (statement that immaterial whether revocable or irrevocable); Appeal of Miskey, 107 Pa. 611, 629 (1883) (undue influence, drunkenness; absence of a power of revocation "is a circumstance which throws the burden of proof upon the party taking the benefit, and in the absence of proof of a distinct intention to make the gift irrevocable, if the other circumstances of the case require it, the conveyance will be set aside"); Norris v. Barbour, 188 Va. 723, 51 S.E.2d 334 (1949).

(b) *Favoring beneficiary.* Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905); Ford v. Ford, 4 Ala. 142 (1842); Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956); Bee Branch Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949); Williams v. Collier, 120 Fla. 248, 162 So. 868 (1935); Patterson v. McClenathan, 296 Ill. 475, 129 N.E. 767 (1921); Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912) (informal irrevocable trust, *semble* income reserved for life, held not a gift causa mortis); Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895); Ginn's Adm'x v. Ginn's Adm'r, 236 Ky. 217, 32 S.W.2d 971 (1930) (imperfect gift enforced as a trust); Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914); Cameron v. Cameron, 10 Smedes & M. 394 (Miss. 1848); Morrison v. Morrison, 99 Ohio App. 203, 132 N.E.2d 233 (1955) (self-declaration of trust); Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909); Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850); Lightfoot's Ex'rs v. Colgin, 19 Va. (5 Munf.) 42 (1813); *cf.* West v. Miller, 78 F.2d 479 (7th Cir. 1935), *cert. denied,* 296 U.S. 633 (restricted power of revocation); Haulman v. Haulman, 164 Iowa 471, 145 N.W. 930 (1914) (antenuptial transfer); Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N.Y. Supp. 92 (1st Dep't 1905), *modified and aff'd,* 185 N.Y. 485, 78 N.E. 359 (1906) (amendable inter vivos trust held not to contravene New York statute prohibiting certain testamentary gifts to charity).

Florida and Virginia[10] — most of the evasion litigation is concerned with irrevocable trusts.

There is some justification for protecting the beneficiary of an irrevocable trust. When a transfer has been made beyond hope of recall, it can truly be said to have an "absolute" quality, an air of finality; the beneficiary's reliance interest is greater than if the power to revoke had been retained.

But the irrevocable trust is not sacrosanct: it is a creature of equity. An unreasonably large transfer should not attain automatic immunity simply because it is irrevocable. The emphasis should be on the *relative size* of the transfer, not on its form. For example, an unreasonably large transfer made shortly before death flouts the forced share whether it be revocable or irrevocable. When death looms, of what avail is the power of revocation? What cared the settlor in *Newman* v. *Dore*[11] that he had this power, having made a definitive transfer in his last mortal days? Would not any Ohio lawyer, for example, under similar circumstances, guard against insertion of a revocation clause? The control rationale, which is unrealistic regardless of the time of the transfer,[12] becomes mere pedantry when applied to transfers made close to death.

Moreover, the trappings of irrevocability may cloak a secret arrangement that the trust be revocable at will,[13] or revocable — or even automatically terminated — in the event the wife predeceases the husband. We must remember that the "trustee" may well be one of the inter vivos donees, not a corporate fiduciary; and the acquiesence of the beneficiaries may be secured by money, or the glimmer thereof. These arrangements lie in the borderland between revocable trusts and "colorable" transfers; and, if the facts can be proven as stated, the widow should prevail.[14] But how to get the proof?

[10] See cases cited, *supra,* note 2.

[11] 275 N.Y. 371, 381, 9 N.E.2d 966, 970 (1937) discussed, *supra,* pp. 74–76.

[12] See Chap. 7:3, *supra.*

[13] As to the revocability of an "irrevocable" power of attorney, see MacGregor v. Gardner, 14 Iowa 326 (1862).

[14] Irrevocable trusts made in close proximity to death of course invite a charge of undue influence; e.g., Burton v. Burton, 100 Colo. 567, 69

The widowed stepmother may face a wall of conspiracy. Human nature is not always pretty: some of the evasion cases show degrees of Legree. Difficulties of this sort point to the advisability of putting irrevocable trusts under our statutory formula.[15]

4. Bank Account Trusts

The best known type of bank account trust is the Totten trust.[16] This device received its baptism, if not its birth,[17] in the celebrated dictum in *Matter of Totten:* [18]

> "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of dis-

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P.2d 307 (1937) (irrevocable transfer seventeen days before death, while "seriously ill," sustained; marriage late in life; nature of transfer not clear); see Appeal of Miskey, 107 Pa. 611 (1883); *cf.* Hill's Estate, 15 D.&C. 699 (Pa. 1931).

[15] Revocability is relevant, however, under the "cut-off" provisions in § 8, Chap. 22, *infra.*

[16] Variations of the Totten trust, involving no presumption arising from the mere form of the deposit, are described in Clark, "Totten Trusts in Connecticut," 29 Conn. B. J. 1 (1955).

[17] For the early history of the Totten trust see Scott, Trusts §58.2 (2d ed. 1956); 87 U. Pa. L. Rev. 847 (1939). In general, see Larremore, "Judicial Legislation in New York," 14 Yale L. J. 312 (1905); Moynihan, "Trusts of Savings Deposits in Massachusetts," 22 B. U. L. Rev. 271, 286 (1942); Oleck, "Bank Account Trusts: Should They Be Presumed to be Fraudulent?" 91 Trusts and Estates 39 (1952); Slusser, "Recent Developments in the Tentative Trust Doctrine; Influence of Civil Code s.2280 on the California Law," 28 Calif. L. Rev. 202 (1940); J. Vaughan, "Developments in Totten Trusts," 130 N. Y. L. J. 160, 166; Williams, "Totten Trusts and the Test of the Validity of a Challenged Transfer," 126 N. Y. L. J. 374 (6 Sept. 1951). On Totten trusts in the Chicago area, see Hayes, "Illinois Dower and the 'Illusory' Trust," 2 DePaul L. Rev. 1, 23 (1952).

[18] Matter of Totten, 179 N.Y. 112, 125–26, 71 N.E. 748, 752, 70 L.R.A. 711 (1904).

> affirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." [19]

This device is more often found in savings bank accounts than in commercial bank accounts and is also known as a "savings bank trust," a "bank account trust," or a "tentative trust." It is a judicial compromise. The poor man can dispose of his modest account without hiring a lawyer; and his estate will not incur liability for withdrawals made after the "trust" is established. There is a rebuttable presumption of intention to establish a revocable "trust" for the designated beneficiary, arising from the mere form of the deposit.[20] If the donee can prove intent to create an irrevocable trust, he will be entitled to recover withdrawals before death.[21] Otherwise, he is entitled to the balance at the depositor's death, provided the trust was not revoked.

The bank account trust is said to have originated in some states because of limitations on the size of accounts.[22] This stimulated the opening of further accounts in the same bank in "trust" for another party. Other motives are to conceal assets, to avoid rules restricting interest rates, to attempt to avoid taxation, or to make an avowedly testamentary disposition. The figures indicate that it is a popular substitute for the expense, delay, and publicity of testamentary transmission.[23] As Surrogate Wingate remarked in the *Reich* [24]

[19] On how the beneficiary establishes his case, see Oleck, *supra,* note 17, at 39. On revocation, see Annot. 38 A.L.R.2d 1244 (1954).

[20] Scott, p. 478; Restatement, Trusts §58, comment a (1935). On the necessity for notice see Day Trust Co. v. Malden Sav. Bank, 328 Mass. 576, 105 N.E.2d 363 (1952); Brucks v. Home Fed. Sav. & Loan Ass'n, 36 Cal.2d 845, 228 P.2d 545 (1951); 50 MICH. L. REV. 1124 (1952).

[21] Scott, p. 483. *Semble* notice to the beneficiary of the mere existence of the trust will not make it irrevocable; Moran v. Ferchland, 113 Misc. 1, 184 N.Y. Supp. 428 (1920); In re Ingels Estate, 372 Pa. 171, 92 A.2d 881 (1952), noted in 26 TEMP. L. Q. 468–70 (1953), 14 U. PITT. L. REV. 627–29 (1953); *cf.* Restatement, Trusts, §58, comment a (1935). Delivery of the passbook may make the trust irrevocable, unless explained otherwise: Matter of Totten, *supra,* note 18, at 126, 71 N.E. at 752; Matter of Smith, 177 Misc. 601, 31 N.Y.S.2d 603 (Surr. Ct. 1941).

[22] Note, 39 DICK. L. REV. 37–42 (1934).

[23] It is also said to be popular with women, *ibid.*

[24] Matter of Reich, 146 Misc. 616, 618, 262 N.Y. Supp. 623, 626 (1933).

case, "its enunciation is but another evidence of the attempt of the courts to conform the law to the customs of the community." [25] The great practical advantages of the device indicate a social and business utility that ensures its continued use. Savings accounts are becoming of increasing importance in the estate of the average person, perhaps secondary only to the family home and insurance.

If any inter vivos device appears to be testamentary, it is the Totten trust. Its everyday utility absolves it from the requirements of the Wills Act, but it is subservient to the claim of the undertaker,[26] the creditor,[27] the personal representative.[28] As far as the surviving spouse is concerned, until the *Halpern* case came along, it was popularly and not unreasonably understood that a Totten trust was illusory *per se*.[29] This thinking was reflected in the addition of a comment to the Restatement of Trusts in 1948, permitting the surviving spouse to "reach" a Totten trust.[30] In view of the recent New York Court of Appeals decision in the *Halpern* case,[31] however, it is not at all clear that the Restatement view represents prevailing judicial opinion. Under the *Halpern* test we are concerned merely with the "reality" of the Totten

[25] For figures on the use of the device in Massachusetts, see Moynihan, "Trusts of Savings Deposits in Massachusetts," 22 B. U. L. REV. 271, 272 (1942); Seymour v. Seymour, 85 So.2d 726 (Fla. 1956).

[26] Matter of Reich, *supra,* note 24.

[27] Scott, §58.5; Oleck, "Bank Account Trusts: Should They be Presumed to be Fraudulent?" 91 TRUSTS AND ESTATES 39 (1952); see "Matter of Workmen's Compensation Board of State of New York" (Furman), 126 N. Y. L. J. 8 (2 July 1951).

[28] Scott, §58.5, In re Aybar's Estate, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952).

[29] *E.g.,* Krause v. Krause, 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 32 N.E.2d 779 (1941). Also see text, *supra,* Chap. 9:1.

[30] Restatement, Trusts, §58, comment cc (1935); *cf.* Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L. J. 1, 36–37 (1941).

[31] Discussed, *supra,* Chap. 9:1.

trust, i.e., whether it was intended to be legally operative.[32] The widow is relegated to the status of a mere legatee.[33]

Looking at the entire group [34] of bank-account trust eva-

[32] In re Leiman, 116 N.Y.S.2d 658, 660 (Surr. Ct. 1952), *aff'd without opinion,* 118 N.Y.S.2d 750, 281 App. Div. 764 (2d Dep't 1952), *leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (1952); also see Gulliver and Tilson, *supra,* note 30, at 38.

[33] *Cf.* In re Zern's Estate, 138 N.Y.S.2d 894 (1954). In matter of Nelson's Will, 200 Misc. 3, 106 N.Y.S.2d 427 (1951) a husband and wife, pursuant to " contract or agreement," executed joint and mutual wills which gave the survivor a life estate, and which also provided that after the death of both the balance would go to designated legatees. It was held that Totten trusts made by the surviving husband, after his wife's death, would be set aside in favor of the designated legatees under the joint and mutual wills. The court stated that the survivor had become a "trustee" for the beneficiaries: but surely the case for the legatees sounded in contract, not in trust? On contracts to make a will, see Appendix D, *infra.*

[34] *Transfer Valid: Maryland:* Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954) (to A in trust for A and B, subject to withdrawal by either, survivor to take all); Mushaw v. Mushaw, 183 Md. 511, 39 A.2d 465 (1944). *New York:* In re Zern's Estate, 138 N.Y.S.2d 894 (Surr. Ct. 1954); In re Friesing's Estate, 123 N.Y.S.2d 207, (Surr. Ct. 1953); In re Phipps' Will, 125 N.Y.S.2d 606 (Surr. Ct. 1953); In re Aybar's Estate, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952); Matter of Leiman, 116 N.Y.S.2d 658 (Surr. Ct. 1952), *aff'd without opinion,* 281 App. Div. 764 (2d Dep't 1952), *leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (2d Dep't 1953); In re Freistadt's Will, 104 N.Y.S.2d 510 (Surr. Ct. 1951), *aff'd,* 278 App. Div. 962, 105 N.Y.S.2d 995 (2d Dep't 1951), *rev'd,* 279 App. Div. 603, 107 N.Y.S.2d 466 (2d Dep't 1951) (reversal of earlier stand, in view of the Halpern case; case sent back to the surrogate for further evidence); In re Halpern's Estate, 197 Misc. 502, 96 N.Y.S.2d 596 (Surr. Ct. 1950), 277 App. Div. 525, 100 N.Y.S.2d 894 (1st Dep't 1950), *aff'd,* 303 N.Y. 33, 100 N.E.2d 120 (1951); In re Naydan's Estate, 107 N.Y.S.2d 701 (Surr. Ct. 1951); In re Prokaskey's Will, 109 N.Y.S.2d 888 (Surr. Ct. 1951); Matter of Ward, 279 App. Div. 616 (2d Dep't 1951); Murray v. Brooklyn Savings Bank, 169 Misc. 1014, 9 N.Y.S.2d 227 (Sup. Ct. 1939); *rev'd,* 15 N.Y.S.2d 915 (1st Dep't 1939); In re Schurer's Estate, 157 Misc. 573, 284 N.Y. 28 (Surr. Ct. 1935), *aff'd without opinion,* 248 App. Div. 697, 289 N.Y. 818 (1st Dep't 1936); In re Yarme's Estate, 148 Misc. 457, 266 N.Y. Supp. 93 (Surr. Ct. 1933), *aff'd without opinion,* 242 App. Div. 693, 273 N.Y. Supp. 403 (2d Dep't 1943); *cf.* In re Shortle's Estate, 206 Misc. 35, 130 N.Y.S.2d 233 (1954); In re Purcell's Will, 200 Misc. 643, 107 N.Y.S.2d 955 (Surr. Ct. 1951); In re Cohen's Will, 90 N.Y.S.2d 776, 779 (Surr. Ct. 1949) (money in account earned by beneficiary; dictum that a Totten trust as such is illusory and that any revocable transfer is illusory); Matter of Schacter, 1 P-H Unreported Trust Cases, ¶25,451, N. Y. L. J., 13 Jan. 1944 (Surr. Ct. 1944); In re McCann's Estate, 155 Misc. 763, 281 N.Y. Supp. 445 (Surr. Ct. 1935); In re Clark's Estate, 149 Misc. 374, 268 N.Y. Supp. 253 (Surr. Ct. 1933)

sion cases, we find that most decisions are from New York. This is to be expected in view of the popularity of the Totten trust in that important jurisdiction, as well as the doctrinal confusion in its courts. Until *Newman* v. *Dore* was decided, in 1937, the New York courts sustained the Totten trust against the claim of the surviving spouse.[35] In fact, the opinion of Surrogate Henderson in *Matter of Schurer* (in 1935) [36] reads not unlike the majority opinion in the Court of Appeals in the *Halpern* case. The *Halpern* case appears to have killed any chance of a Totten trust in New York being "illusory" in the *Newman* v. *Dore* sense. Although technically dictum, the *Halpern* case has been followed consistently in subsequent lower-court decisions involving Totten trusts.[37]

Under the *Halpern* doctrine the burden is on the personal representative to "make a factual showing of unreality." [38] A recent lower court decision calls attention to the fact that the court in the *Halpern* case mentioned "proof that the transfers were intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed." [39] This ambiguous phrase, however, was bor-

(tax case). *Transfer Invalid: New York:* Pichurko v. Richardson, 107 N.Y.S.2d 365 (1951) (before Court of Appeals decision in the Halpern case); Getz v. Getz, 101 N.Y.S.2d 757 (Surr. Ct. 1950); Steixner v. Bowery Savings Bank, 86 N.Y.S.2d 747 (Sup. Ct. 1949); Application of Barasch, 267 App. Div. 830, 45 N.Y.S.2d 790 (2d Dep't 1944), *reargument denied,* 267 App. Div. 905, 47 N.Y.S.2d 486 (2d Dep't 1944); Krause v. Krause, 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 32 N.E.2d 779 (1941); Hellstern v. Gillett, 1 P-H Unreported Trust Cases, ¶25,233, N. Y. L. J. 7 April 1937 (Sup. Ct. 1937); *cf.* Matter of Nelson, *supra,* note 33; Matter of Barthold, 171 Misc. 625, 13 N.Y.S.2d 346 (Surr. Ct. 1939). *Pennsylvania:* In re Krasney's Estate, 7 Fiduc. 403 (Pa. Orph. 1957); Del Conte v. Luca, 2 D.&C. 2d 130 (Pa. 1954); In re Graham's Estate, 42 Del. Co. 9, 4 Fiduc. 467, 3 D.&C. 2d 218 (Pa. 1954); Estate of Black, 64 York 166, 73 D.&C. 86 (Pa. 1950); *cf.* In re Iafolla's Estate, 380 Pa. 391, 110 A.2d 380 (1955).

[35] See cases, note 34, *supra.*

[36] Note 34, *supra.*

[37] *Ibid.*

[38] In re Zern's Estate, 138 N.Y.S.2d 894 (Surr. Ct. 1954).

[39] *Id.,* at 895; In re Shortle's Estate, 206 Misc. 35, 130 N.Y.S.2d 233, 234 (Surr. Ct. 1954).

rowed from *Newman* v. *Dore,*[40] and probably stems from the second passage of the *Kerr* test.[41] Certainly the court in the *Halpern* case had no thought of espousing the intent rationale. What it had in mind was shams. As far as intent (motive) is concerned, the very intent to defeat the widow's inheritance is now exalted: the more vindictive the husband's conduct the greater the likelihood that the husband intended to benefit the donee, i.e., that the transfer was "real." [42] Nor would the secrecy of the transaction appear to be relevant: a bank account trust may quite naturally be a matter solely between the depositor and the bank.[43]

It is difficult to envisage the equities playing any part in a case decided on the *Halpern* test. To be sure, the court in *Naydan's Estate* [44] referred to the reasonableness of the provisions made for the widow, as bearing on the decedent's intent "to make [the] transfer completely effective." But it would be rash to assume that the *unreasonableness* of the provisions for the widow would dictate a finding of lack of factual reality.[45]

The possibility of hardship [46] to the surviving spouse may be sensed from two recent lower-court decisions. In *In re Leiman's Estate* [47] the beneficiaries of several Totten trusts

[40] Matter of Halpern, 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951).

[41] See *supra,* Chap. 8, text at notes 3 and 4.

[42] Vindictiveness toward the wife could also, of course, stimulate a "colorable" arrangement between the decedent and the donee. In other words, the "minus" from the widow does not always result in a "plus" to the donee. The transfer is not real if there is no "plus" to the donee.

[43] The fact that the intended beneficiary was not notified of the existence of the account would be relevant in determining the existence of the *animus donandi,* as in the case of any gift or trust, but would certainly not be decisive. Geographical remoteness of the "faraway" beneficiary, alluded to by Desmond, J., in the Halpern case, seems of questionable relevance.

[44] 107 N.Y.S.2d 701, 703 (Surr. Ct. 1951).

[45] *But cf.* Note, 37 CORNELL L. Q. 258, 267 (1951).

[46] *But cf.* Scott, p. 360, note 3.

[47] In re Leiman's Estate, 116 N.Y.S.2d 658 (Surr. Ct. 1952), *aff'd without opinion,* 118 N.Y.S.2d 750, 281 App. Div. 764 (2d Dep't 1952), *leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (2d Dep't 1953).

were the husband's mother, his sister, and the woman with whom he had been living for some fifteen years before his death. The Surrogate commented that "In every Totten trust the depositor has indicated his intent that the beneficiary have the fund at his death by the very act of making the designation." The result in the instant case, he continued, "is unfortunate because the surviving spouse is thereby deprived of her statutory share in over $8,000 which the decedent had an absolute right to use for his own benefit throughout his lifetime, and the estate subject to administration is virtually nil." [48] In *In re Aybar's Estate* [49] two Totten trusts were upheld against the surviving husband, a disabled war veteran who had been declared incompetent. To be sure, in each of these cases the equities were not entirely with the claimant; [50] but under the *Halpern* dogma the surviving spouse is rebuffed, though she may be an indigent saint.

[48] 116 N.Y.S.2d 658, 660 (1952).

[49] In re Aybar's Estate, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952).

[50] In the Leiman case, a separation fifteen years before death; fault not stated. In the Aybar case the incompetent surviving spouse had an estate of $7000, and a government pension "which adequately provides for his needs."