

## Can The Widow Be Treated As A Creditor?

Property conveyed by voluntary transfer in fraud of creditors is vulnerable to the creditor's claim to the same extent as if it were still in the hand of the debtor.<sup>1</sup> If the transferee participated in the fraud the creditor's remedy is available even when the transfer was for consideration.<sup>2</sup> In addition to instances in which she actually *is* a creditor, the spouse may also attain that status in divorce and maintenance matters.<sup>3</sup> Why not, then, treat the surviving spouse as a creditor for purposes of attacking inter vivos "evasions"?

The suggestion is not without merit. We saw earlier<sup>4</sup> that vital community values are involved in financial protection to widows. And precedents are not lacking for preferring family needs to creditors' claims: homestead and family allowances have priority; inchoate dower is preferred in most

<sup>1</sup> Glenn, 1 FRAUDULENT CONVEYANCES AND PREFERENCES, §§58-62b (1940). As to trusts, *cf.* RESTATEMENT, TRUSTS, §156(c) (1935); RESTATEMENT, PROPERTY, §328 (1948 Supp.); Scott, "The Effect of a Power to Revoke a Trust," 57 HARV. L. REV. 362, 372, 374 (1944).

<sup>2</sup> Conveyances in fraud of creditors will not be set aside if the grantee is a purchaser for value without notice of the fraud. 27 C.J. *Fraudulent Conveyances*, §§474, 526-36 (1922). On the necessity for proof of participation by the donee in transfers in fraud of creditors, see Annot. 17 A.L.R. 728 (1922); also see, *supra*, Chap. 10, text at note 41.

<sup>3</sup> For example, the divorce statutes in some states permit her to set aside any conveyance made by her husband to prevent her from obtaining alimony. Glenn, *op. cit. supra*, note 1, §93C. Aside from such statutes the wife may act as a creditor in reaching conveyances of her husband that are in fraud of her right to accrued alimony. Most cases extend her the protection of the fraudulent conveyance statute; there is also authority to the effect that she is assisted by the general equity powers. *Id.*, §377. The remedy is available even before the divorce suit is instituted, and she may enjoin threatened transfers. Similar protection is afforded a wife who secures a judgment on accrued installments under a maintenance agreement.

<sup>4</sup> *Supra*, Chap. 2.

instances, the statutory share<sup>5</sup> in some instances. But the shoe is on the other foot when we consider protection against evasion. The three last-named devices are of uncertain value in the present state of the evasion case-law. As some courts have pointed out, the widow receives less actual protection than does the prospective bride (antenuptial transfer doctrine), the wife during coverture (common-law duty of support), and the divorced wife (alimony). Consider, for example, the plight of the married woman when her husband has deserted her prior to making the objectionable inter vivos transfer. Assuming that a divorce is either not feasible or not desired, it is of course possible that she can enforce the common-law duty of support. But there is no guarantee as to support after the husband's death; and the probabilities are that the average widow needs more support than does the average wife.<sup>6</sup>

On the other hand, the community values involved in the widow's claim differ from those involved in payment of creditors' claims. Different social goals should be enforced by different machinery. It seems clear that no fraudulent conveyance should be permitted to thwart collection of a legitimate creditor's claim; but not all inter vivos "evasions" should be amenable to the widow's claim. Her power to invade should depend on her need. Unnecessary encroachment on security of titles would also ensue if the widow, suing as a creditor, would be permitted to upset "collusive" transfers for consideration.

The judicial pronouncements on the point do not favor the widow. It is true that the custom of London cases<sup>7</sup> regard the widow as at least a quasi-creditor. It will be remembered however that the cases under the custom were much more liberal to the wife than are the more modern cases. This liberality may have been in compensation for the limited

<sup>5</sup> *E.g.*, Fla. Stat. §731.34 (1957).

<sup>6</sup> See discussion, *supra*, Chap. 2:3.

<sup>7</sup> See *supra*, Chap. 5:3.

property rights of married women during the long period of the custom.<sup>8</sup> Statements that the widow is a creditor may also be found in the cases involving antenuptial transfers. These cases involve the element of actual deception. Possibly the courts in the antenuptial transfer cases are more sympathetic to the plaintiff's claim than are the courts in the post-nuptial evasion cases. It is arguable, of course, that the wife should receive the same legal protection regardless of whether the transfer induced or followed the wedding.

Many cases contain statements that the widow is a creditor,<sup>9</sup> or a quasi-creditor,<sup>10</sup> or even that she should be put in a more favored position than creditors.<sup>11</sup> These cases, however, by and large are either antenuptial transfer cases,<sup>12</sup> alimony or maintenance cases,<sup>13</sup> or cases under the custom of Lon-

<sup>8</sup> An early fraudulent conveyance decision in England had this to say: ". . . I must decree for the plaintiff, the creditors against the wife and children; for though I have always a great compassion for wife and children; yet, on the other side, it is possible, if creditors should not have their debts, their wives and children would be reduced to want." Taylor v. Jones, 2 Atk. 600, 603, 26 Eng. Rep. 758, 760 (Ch. 1743).

<sup>9</sup> Hamilton v. First State Bank, 254 Ill. App. 55 (1929) (misconstruing earlier Illinois cases); cf. Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894); also see the arguments of counsel in Feighley v. Feighley, 7 Md. 537, 547-60 (1855).

<sup>10</sup> McCammon v. Summons, 2 Disn. 596, 598 (Ohio 1859); Crain v. Crain, 17 Tex. 80, 98 (1856) (forced heirs).

<sup>11</sup> E.g., Bolles v. Toledo Trust Co., 144 Ohio St. 195, 215, 58 N.E.2d 381, 391 (1944) (discussed, *supra*, Chap. 7, note 69); Thayer v. Thayer, 14 Vt. 107, 117-8 (1842) (citing custom of London cases); cf. Grover v. Clover, 69 Colo. 72, 169 Pac. 578 (1917); Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135 (1891) (nonevasive); also see cases cited in argument of counsel in Hastings v. Hudson, 359 Mo. 912, 913, 224 S.W.2d 945 (1949). Some cases, without explicitly stating that the widow is a creditor, argue that she should be entitled to like protection, e.g., Smith v. Smith, 22 Colo. 480, 489, 46 Pac. 128, 131 (1896) (disapproved in Moedy v. Moedy, *infra*, note 17).

<sup>12</sup> Dorrough v. Grove, 257 Ala. 609, 60 So.2d 342 (Ala. 1952).

<sup>13</sup> Alimony: Blankenship v. Hall, 233 Ill. 116, 125, 84 N.E. 192, 195 (1908); Oles Envelope Corp. v. Oles, 193 Md. 79, 65 A.2d 899 (1949); Fischer v. Fischer, 24 N.J. Super. 180, 93 A.2d 788 (1952) (wife cannot invade policemen's pension fund for alimony since she is a general creditor); Caldwell v. Caldwell, 259 App. Div. 845, 19 N.Y.S.2d 392 (2d Dep't 1940), *motion to dismiss appeal denied*, 285 N.Y. 517, 32 N.E.2d 819 (1941), *aff'd*, 285 N.Y. 655, 33 N.E.2d 866 (1941); cf. Deke v. Huenkemeier, 260 Ill. 131, 102 N.E. 1059, 48 L.R.A. (N.S.) 512

don.<sup>14</sup> And, of the purely evasion cases,<sup>15</sup> the authority cited is almost invariably from the above-mentioned group of cases.<sup>16</sup> Indeed, there seems to be no recent evasion case holding squarely that the widow is a creditor.<sup>17</sup> Nor is the widow's

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(1913), *related hearing*, 289 Ill. 148, 124 N.E. 381 (1919); *Small v. Small*, 56 Kan. 1, 14, 42 Pac. 323, 327 (1895); *Wright v. Holmes*, 100 Me. 508, 514, 62 Atl. 507, 507-08 (1905); *Armstrong v. Connelly*, 299 Pa. 51, 149 Atl. 87 (1930) (maintenance).

<sup>14</sup> The fact that the forced share takes priority over creditor's claims is of course relevant: see *e.g.*, *Smith v. Hines*, 10 Fla. 258, 293 (1863-4). This case sustained the widow's claim, not on the ground that she was a creditor, or superior to a creditor, but because the husband had retained too much "dominion" over the res. The present Florida statutory share also takes precedence over creditors' claims: see note 5, *supra*.

<sup>15</sup> The language is often ambiguous; thus *Ibey v. Ibey*, 93 N.H. 434, 436, 43 A.2d 157, 158 (1945), *exceptions overruled*, 94 N.H. 425, 55 A.2d 872 (1947): "Just as future creditors are protected by statute from conveyances made with actual intent to defraud, similarly it is held by judicial reasoning that wives should be protected with respect to their distributive shares in the estates of their deceased husbands." Also see *Rose v. Union Guardian Trust Co.*, 300 Mich. 73, 79, 1 N.W.2d 458, 460 (1942).

<sup>16</sup> *E.g.*, in *Walker v. Walker*, 66 N.H. 390, 394, 31 Atl. 14, 16 (1891) the court stated that "she stands in the equity, if not in the attitude, of a creditor . . . [M]arriage is equivalent to a pecuniary consideration." But none of the cases cited in the *Walker* case is squarely in point: *Tyler v. Tyler*, 126 Ill. 525, 21 N.E. 616 (1888) (maintenance and support); *Johnson v. Johnson*, 75 Ky. 485 (1877) (cited as 12 Ky. 485) (divorce suit jurisdictional problems); *Jiggitts v. Jiggitts*, 40 Miss. 718 (1866) (post marital transfer, but not authority for the point it is cited for); *Bouslough v. Bouslough*, 68 Pa. 495, 499 (1871) (stands for the opposite of what it is cited for); *Killinger v. Reidenhauer*, 6 S. & R. 531, 535 (Pa. 1821) (fraudulent mortgage by husband will not prevail against the widow *and* creditors); *Reynolds v. Vance*, 48 Tenn. 294 (1870) (decided under statute concerning transfers in fraud of dower); *Boils v. Boils*, 41 Tenn. 192 (1860) (alimony); *Brewer v. Connell*, 30 Tenn. 343 (1851) (decided under statute concerning transfers in fraud of dower); *Green v. Adams*, 59 Vt. 602 (1887) (alimony).

<sup>17</sup> Many cases state explicitly or by inference that the widow is not a creditor, as far as the evasion cases are concerned; in other words, she cannot have her husband's inter vivos transfers set aside under the statutes dealing with transfers in fraud of creditors. *Maruska v. Equitable Life of U.S.*, 21 F. Supp. 841 (D. Minn. 1938); *Moedy v. Moedy*, 130 Colo. 464, 469-70, 276 P.2d 563, 566 (1954) (expressly disapproving *Smith v. Smith*, *supra*, note 11); *Stewart v. Stewart*, 5 Conn. 317 (1824); *Cook v. Lee*, 72 N.H. 569, 58 Atl. 511 (1904); *Krause v. Krause*, 285 N.Y. 27, 32, 32 N.E.2d 779, 780 (1941); *In re Schurer's Estate*, 157 Misc. 573, 576-77, 284 N.Y. Supp. 28, 32 (Surr. Ct. 1935), *aff'd*, 248 App. Div. 697, 289 N.Y. Supp. 818 (1st Dep't 1936) ("Objectant's contention that a widow should stand in as good a position as the creditor is chivalrous,

position improved if her husband had agreed by antenuptial contract to leave his "estate" to her, unless a definite sum was agreed upon.<sup>18</sup>

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though legally untenable"); *Garrison v. Spencer*, 58 Okla. 442, 160 Pac. 493 (1916); *Farrell v. Puthoff*, 13 Okla. 159, 74 Pac. 96 (1903); *Richards v. Richards*, 30 Tenn. 294 (1850); *Gentry v. Bailey*, 47 Va. (6 Gratt.) 594 (1850); *Lightfoot's Ex'ors v. Colgin*, 19 Va. (5 Munf.) 42, 72 (1813) (custom of London cases distinguished); *cf. Haskell v. Art Institute*, 304 Ill. App. 393, 26 N.E.2d 736 (1940); *Boyle v. Smyth*, 248 Ill. App. 57 (1928); *McLaughlin v. McLaughlin's Adm'r*, 16 Mo. 242 (1852); *Sanborn v. Goodhue*, 28 N.H. 48 (1853); *In re Lorch's Estate*, 33 N.Y.S.2d 157 (Surr. Ct. 1941); *In re Wrone's Estate*, 177 Misc. 541, 31 N.Y.S.2d 191 (1941); *Bodner v. Feit*, 247 App. Div. 119, 125, 286 N.Y. Supp. 814, 820 (1st Dep't 1936) (dissent); *Robb v. Washington and 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) (charities); *Del Conte v. Luca*, 2 D.&C.2d 130 (Pa. 1954); *Dunnett v. Shields*, 97 Vt. 419, 123 Atl. 626 (1924); *In re Peterson's Estate*, 12 Wash. 2d 686, 123 P.2d 733 (1942); *Mann v. Grinwald*, 203 Wis. 27, 31-32, 233 N.W. 582, 584 (1930).

<sup>18</sup> *In Mornes v. Lawrence Savings & Trust Co.*, 8 Lawrence L. J. 163 (Pa. 1949) a prospective husband agreed by antenuptial contract to leave his wife all of his estate in excess of \$6000. The court held that the wife thereby became a creditor of the estate, but since no fixed sum had been agreed upon she was not a creditor for purposes of setting aside inter vivos transfers. Also see *Eaton v. Eaton*, 233 Mass. 351, 124 N.E. 37, 5 A.L.R. 1426 (1919); *Mornes Estate*, 79 D.&C. 356 (Pa. 1951); and citations in *Jacobs and Goebel, CASES ON DOMESTIC RELATIONS*, 661 (1952); *cf. Pickell case*, Appendix C, note 19, *infra*.