

Procedure: Who May Sue?

Normally, the evasion litigation is initiated by the surviving spouse. Having renunciation privileges not possessed by the other distributees,¹ it is up to her — not the personal representative — to complain about transfers in derogation of those privileges. In fact, she may prejudice her position if she permits the personal representative to bring suit on her behalf.² The *Halpern* case is illustrative. The majority opinion informed the widow (suing as executrix) that the transfers were valid; and Lewis, J. (concurring), sprinkled salt on her wounds, as follows: “Whatever personal rights the petitioner, as widow, may have in the estate of her husband, may

¹ Children or collaterals have no standing *per se* to attack inter vivos transfers of the decedent as being in “evasion” of their rights as distributees. *Hirschfield v. Ralston*, 66 N.Y.S.2d 59, 61 (Sup. Ct. 1946); *cf. Schenectady Trust Co. v. Seward*, 21 N.Y.S.2d 815, 817 (Sup. Ct. 1940). In some cases children or other distributees have joined the surviving spouse in bringing suit: *e.g.*, *Wooton v. Keaton*, 168 Ark. 981, 272 S.W. 869 (1925) (children); *Rudd v. Rudd*, 184 Ky. 400, 214 S.W. 791 (1919) (child; undue influence alleged); *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945) (child); *Hummel's Estate*, 161 Pa. 215, 28 Atl. 1113 (1894) (collateral heirs).

Two early Texas cases state that a child may set aside conveyances in fraud of his distributive share, if the parent retained either a life estate or the power to revoke: *Crain v. Crain*, 17 Tex. 80 (1856), *aff'd on second appeal*, 21 Tex. 790 (1858); *Epperson v. Mills*, 19 Tex. 66 (1857). In *Harrell v. Hickman*, 147 Tex. 396, 403, 15 S.W.2d 876, 880 (1949), the court questioned the statement in the *Crain* case that reservation of a life estate makes a deed testamentary. *Cf. Huie*, “Community Property Laws as Applied to Life Insurance,” 18 TEXAS L. REV. 121, 134 (1940).

² *Cf. Cochran's Adm'x v. Cochran*, 273 Ky. 1, 115 S.W.2d 376 (1938); *Farrell v. Puthoff*, 13 Okla. 159, 74 Pac. 96 (1903). *Contra: Mann v. Grinwald*, 203 Wis. 27, 32, 233 N.W. 582, 584 (1930) (under Wisconsin statute; dictum only); *cf. Grover v. Clover*, 69 Colo. 72, 169 Pac. 578 (1917) (suit by personal representative to set aside transfer in evasion of the widow's allowance, the latter being a *claim* against the estate); *Barroll v. Brice*, 115 Md. 498, 80 Atl. 1035 (1911) (surviving spouse dies; no inter vivos transfer in dispute).

not be enforced in a proceeding, such as the one before us, brought by her as executrix." ³ Certainly, the surviving spouse should bring suit in her own behalf in a jurisdiction committed to the "partial defeasance" notion.⁴ The amount recoverable in such a suit is earmarked for the spouse.

Nevertheless, although it may not be safe to relegate the action entirely to the personal representative, it may be prudent to join him as co-plaintiff. The court conceivably may declare that it has always followed or is now adhering to the "reality" test — in which event the personal representative should be the plaintiff.⁵ Furthermore, if there is any chance of the transfer being declared a sham — or colorable, or obtained by fraud, undue influence and the like — it may be to the advantage of the surviving spouse to have the transfer invalidated on that ground by the personal representative.⁶ In some circumstances she might take all, as the sole distributee. When she attacks the instrument as a fraud on her elective share, however, the court may restrict her to her elective share in the recaptured assets, even when it permits defeasance in toto.⁷

³ 303 N.Y. 33, 45, 100 N.E.2d 120, 126 (1951); *cf.* a well-written note in 25 N. Y. U. L. REV. 920, 923 (1950). As to the widow's right to bring a stockholder's derivative action with respect to her deceased husband's stock, pending probate, see *Steuer v. Hector's Tavern*, 1 M.2d 614, 148 N.Y.S.2d 402 (1955).

⁴ Sykes, "Inter Vivos Transfers in Violation of the Rights of Surviving Spouses," 10 MD. L. REV. 1, 9 (1949).

⁵ *E.g.*, In re Leiman's Estate, 116 N.Y.S.2d 658, (Surr. Ct. 1952), *aff'd without opinion*, 281 App. Div. 764, 118 N.Y.S.2d 750, (2d Dep't 1952), *leave to appeal denied*, 119 N.Y.S.2d 230, 112 N.E.2d 288 (2d Dep't 1953); *cf.* *Bodner v. Feit*, 247 App. Div. 119, 123, 286 N.Y. Supp. 814, 818 (1st Dep't 1936) (dissenting opinion). Frequently the surviving spouse sues individually and as personal representative, *e.g.*, *Poole v. Poole*, 96 Kan. 84, 150 Pac. 592 (1915). If it is not entirely clear which rationale is followed—as in New York at the present time with reference to transfers other than Totten trusts—presumably the widow should join the personal representative as co-plaintiff.

⁶ The personal representative is the proper party to bring suits to set aside transfers of this sort, but a distributee may sue in the event that the personal representative unreasonably refuses to sue, or when none has yet been appointed. In *Merz v. Tower Grove Bank and Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611 (1939) the personal representative, joined as co-defendant, was permitted defeasance in toto, by crossbill.

⁷ See discussion, *supra*, Chap. 9:2.

But it should not be assumed that the evasion question arises only on the initiative of the widow. In some cases the personal representative started the ball rolling, e.g., in seeking instructions,⁸ or in requesting settlement of his account.⁹ And suit may be brought by the donee;¹⁰ or by a trustee, whether in seeking instructions,¹¹ in settlement of accounts,¹² or in attempting to remove a cloud on title.¹³ Usually the issue will arise in a court having equitable jurisdiction,¹⁴ but it has also arisen in a court of law.¹⁵ Interpleader cases may be found;¹⁶ and in several instances the surviving spouse sued for damages incurred from a "conspiracy" to defraud her of her marital rights.¹⁷ In several cases the widow brought a declaratory judgment action.¹⁸ The issue may arise in the

⁸ *E.g.*, *Kelley v. Snow*, 185 Mass. 288, 70 N.E. 89 (1904); *cf.* *Malone v. Walsh*, 315 Mass. 484, 53 N.E.2d 126 (1944).

⁹ *E.g.*, *In re Kalina's Will*, 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945), *appeal dismissed by default*, 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946).

¹⁰ *E.g.*, *In re Rynier's Estate*, 48 Lanc. Rev. 475, *aff'd*, 347 Pa. 471, 32 A.2d 736 (1943) (presentment of claim).

¹¹ *E.g.*, *Norris v. Barbour*, 188 Va. 723, 51 S.E.2d 334 (1949).

¹² *E.g.*, *Marine Midland Trust Co. v. Stanford*, 256 App. Div. 26, 9 N.Y.S.2d 648, (3rd Dep't 1939), *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).

¹³ *E.g.*, *National Shawmut Bank v. Cumming*, 325 Mass. 457, 91 N.E.2d 337 (1950). In this case the cloud was occasioned by the widow's claim that the trust was invalid.

¹⁴ *E.g.*, *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891).

¹⁵ *E.g.*, *Wright v. Holmes*, 100 Me. 508, 62 Atl. 507 (1905) (administrator brings trover; widower at that time in Maine had no "forced share").

¹⁶ *United Building & Loan Ass'n v. Garrett*, 64 F. Supp. 460 (W.D. Ark. 1946); *Weisman v. Metropolitan Life Ins. Co.*, 7 N.Y.S.2d 565 (Sup. Ct. 1938), *aff'd without opinion*, 256 App. Div. 914, 10 N.Y.S.2d 414 (1st Dep't 1939).

¹⁷ *E.g.*, *Maruska v. Equitable Life Assur. Soc. of United States*, 21 F. Supp. 841 (D. Minn. 1938); *cf.* *Samson, Adm'x v. Samson*, 67 Iowa 253, 25 N.W. 233 (1885).

¹⁸ *Morrison v. Morrison*, 99 Ohio App. 203, 132 N.E.2d 233 (1955); *Estate of Brown*, 384 Pa. 99, 119 A.2d 513 (1956).

lifetime of the offending spouse,¹⁹ or after the death,²⁰ or remarriage²¹ of the surviving spouse, or while she is a minor²² or mentally incompetent.²³

Parenthetically, a spot check of one hundred and fifty evasion cases reveals that in the great majority of the cases the widow is surviving spouse.²⁴ One hundred and twenty-six of these cases (eighty-four per cent) involve widows; twenty-four cases (sixteen per cent) involve widowers. These figures prove little, other than that most "evasions" are perpetrated by husbands. And this in turn is to be expected in view of the economic superiority of husbands,²⁵ the fact that women live longer than men, and the fact that in some states, e.g., Florida, the widower does not have a forced share.

¹⁹ Bee Branch Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949) (suit by wife, individually and as curator for her mentally incompetent husband, to set aside husband's transfers); De Noble v. De Noble, 331 Pa. 273, 200 Atl. 77 (1938); cf. Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884) (dower); Buzick v. Buzick, 44 Iowa 259 (1876) (dower); Delaney v. Delaney, 133 N.E.2d 915 (Ohio C.A. 1956); Mann v. Grinwald, 203 Wis. 27, 31, 233 N.W. 582, 584 (1930). *But cf.* Galewitz v. Walter Peek Paper Corp., 145 N.Y.S.2d 402, 405 (Sup. Ct. 1955).

²⁰ Hastings v. Hudson, 359 Mo. 912, 224 S.W.2d 945 (1949) (widower dies after the trial, action revived in name of his administrator and heirs).

²¹ *E.g.*, Smith v. Hines, 10 Fla. 258 (1863-4); see discussion of this factor, *supra*, p. 167.

²² *E.g.*, Potter Title & Trust Co. v. Braum, 294 Pa. 482, 144 Atl. 401 (1928) (widow aged eighteen).

²³ *E.g.*, Hastings v. Hudson, 359 Mo. 912, 224 S.W.2d 945 (1949); York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922).

²⁴ As to equities, if any, based on the sex of the claimant, see p. 173, *supra*.

²⁵ See discussion, *supra*, Chap. 2:3.