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THE DEATH OF THE
REVOCABLE LIVING TRUST—
JOHNSON V. LaGRANGE STATE BANK

Although Illinois laws protect the rights of a surviving spouse in the estate of a decedent, that protection may be diminished when a decedent spouse, by making lifetime transfers, reduces the amount of property that will pass to the survivors through the probate estate. Surviving spouses have challenged such lifetime transfers as being a fraud on their marital rights. In adjudicating these contests, courts have traditionally weighed two competing policy considerations: the freedom of the decedent spouse to alienate his or her property and the interest of the state in providing for the welfare of the surviving spouse and family.

1. ILL. REV. STAT. ch. 3, § 2-8(a) (1975) provides:
If a will is renounced by the testator's surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant or 1/4 of the entire estate if the testator leaves no descendant.

ILL. REV. STAT. ch. 3, § 2-1 (1975) provides:
The intestate real and personal estate of a resident decedent and the intestate real estate in his State of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:
(a) If there is a surviving spouse and also a descendant of the decedent: 1/4 of the entire estate to the decedent's descendant's per stirpes.
(c) If there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse.

2. Many different types of transfers have been challenged. For instance, surviving spouses have attacked a number of joint tenancy arrangements. See, e.g., Frey v. Wubbena, 26 Ill.2d 62, 185 N.E.2d 850 (1962); Holmes v. Mims, 1 Ill.2d 274, 115 N.E.2d 790 (1953); Hoefner v. Hoefner, 389 Ill. 253, 59 N.E.2d 684 (1945); Toman v. Svoboda, 39 Ill. App.3d 394, 349 N.E.2d 668 (1st Dist. 1976); Mis v. Mindykowski, 23 Ill. App.3d 916, 320 N.E.2d 450 (1st Dist. 1974). Also a surviving spouse has challenged a transfer in which the decedent spouse remained co-owner of savings bonds with his daughter. See Levites v. Levites, 27 Ill. App.2d 274, 169 N.E.2d 574 (1st Dist. 1960). Additionally, there has been litigation involving trusts. Trusts which have been challenged include trusts in which the settlor has not reserved any rights or powers, Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895); Padfield v. Padfield, 78 Ill. 16 (1875); Stoxen v. Stoxen, 6 Ill. App.3d 445, 285 N.E.2d 198 (2d Dist. 1972); trusts in which the settlor has reserved the right to income, Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912); irrevocable trusts, Rose v. St. Louis Union Trust Co., 43 Ill.2d 312, 253 N.E.2d 42 (1969); revocable trusts in which the settlors reserved the right to income and the right to control the administration of the corpus, Burnet v. First National Bank, 12 Ill. App.2d 514, 140 N.E.2d 362 (1st Dist. 1957); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1st Dist. 1944); and Totten trusts, Montgomery v. Michaels, 54 Ill.2d 532, 301 N.E.2d 465 (1973); Mertes v. Lincoln Park Fed. Sav. & Loan Assoc. of Chicago, 34 Ill. App.3d 557, 340 N.E.2d 25 (1st Dist. 1975).

In Johnson v. LaGrange State Bank, the most recent Illinois case involving a challenge to a lifetime transfer, the surviving husband attacked the validity of a revocable inter vivos trust created by his wife for the benefit of her relatives and various charities as being a fraud on his marital rights. In the agreement establishing the trust, the decedent designated herself as trustee and retained the right to receive income earned from the trust principal. In addition, she reserved the power to invade the principal at her sole discretion and retained the unilateral right to alter, amend, and modify the trust.

rationalized by reforming our present system of providing for the welfare of the surviving spouse through the use of the minimum statutory share (see note 1, supra). As an alternative, he suggests a system of maintenance payments made to the surviving spouse out of the decedent's estate. The amount of payment would be geared, inter alia, to the individual need of the survivor, the interests of the persons otherwise entitled to the surviving spouse's property, the conduct of the survivor in relation to the deceased and the deceased's reasons for his testamentary plan. See also, Comment, Trusts and Trustees—Totten Trusts—Right of a Surviving Spouse to have a Totten Trust Included in His Deceased Spouse's Estate for Purposes of Determining His Statutory Share, 1973 U. ILL. L. F. 775 [hereinafter cited as Comment].


5. "A trust is a fiduciary relationship in which one person is the holder of the title to the property subject to an equitable obligation to keep or use the property for the benefit of another." C. Bogert, LAW OF TRUSTS 1 (4th ed. 1963). Bogert explains that the trust is conceived as being the relationship between property and persons incidental to which are certain rights and duties. The totality of property, persons, rights, and duties makes up the trust.

Trusts created by the settlor during his lifetime are called inter vivos trusts. In contrast, trusts created by will are called "testamentary" trusts. J. Ritchie, N. Alford Jr., R. Effland, DECEDENTS' ESTATES AND TRUSTS 374 (5th ed. 1976) [hereinafter cited as DECEDENTS' ESTATES AND TRUSTS].

6. Beneficiaries under the trust were decedent's mother, sister, niece, and various charities. Upon the happening of certain contingencies, the unborn descendents of decedent's niece were also beneficiaries of the trust. A provision in the trust directed the successor trustee to pay so much income and principal of the trust estate as was necessary to meet any emergency situation for the reasonable support, medical and burial expense of the surviving husband. 50 Ill. App.3d at 833-34; 365 N.E.2d at 1058.

7. As trustee, decedent retained broad powers to invest, reinvest, divide, and distribute the trust assets. Upon her death, Mrs. Johnson designated LaGrange State Bank as successor trustee. Id., 365 N.E.2d at 1059.

8. On the same day Mrs. Johnson created the trust, she also executed a will. Among other bequests, decedent bequeathed her personal effects and real estate to her husband, id. at 833-34, 365 N.E.2d at 1058-59. Prior to her death, however, the decedent sold her home, the only real property she owned. The proceeds ($75,000) were placed in a bank account owned in joint tenancy with her husband. Brief for Appellee, at 15. Johnson v. LaGrange State Bank, 50 Ill. App.3d 830, 365 N.E.2d 1056 (1st Dist. 1977).

The corpus of the trust consisted of money and securities valued at $200,000 given to Mrs. Johnson by her husband. The surviving husband's net worth at time of trial was $2.25 million. Evidence in the record showed that the surviving spouse had some knowledge of decedent's contract with her attorney for the purpose of preparing a trust instrument and will. He chose not to involve himself in that contract. The trial court found that there was no estrangement of feeling during the Johnsons' marriage of 35 years and that there was deep love and affection between husband and wife. Id. at 14-17.
The Circuit Court of Cook County upheld the trust and rejected the allegations that the decedent had committed fraud upon the plaintiff. On appeal, the appellate court reversed the trial court and distinguished the tests for determining what constitutes a fraud on the marital rights of a surviving spouse and for ascertaining common law fraud. The appellate court then examined the trust agreement to determine if the settlor relinquished any incidents of ownership in establishing the trust. In so doing, the court relied on a “retention of control” test developed in prior Illinois decisions. The court found that in light of the numerous powers retained by the settlor, the decedent had effectively retained ultimate control over the trust assets during her lifetime. Accordingly, the court held that the trust could not be permitted to defeat the marital rights of the

9. Plaintiff’s complaint included three counts. Count I alleged the trust to be an illusory and colorable transfer of the trust property and a fraud upon his marital rights. Count II alleged that the decedent established the trust with the intention of defeating plaintiff’s marital interest in the settlor’s personal estate. Count III averred the decedent acted in an intentional, deliberate and fraudulent manner for the purpose of denying plaintiff his statutory share of the decedent’s estate. The court dismissed counts I and II of the amended complaint but allowed count III to stand. 50 Ill. App.3d at 832, 365 N.E.2d at 1057-58.

10. The Johnson court further explains that the expression “fraud on the marital rights” should be viewed as words of art. The court adds that “fraud on the marital rights” is an unfortunate phrase since the word “fraud” adds rampant connotations. Id. at 836, 365 N.E.2d at 1060, citing, Stoxen v. Stoxen, 6 Ill. App. 3d 445, 447, 285 N.E.2d 198, 199 (2d Dist. 1972). In Stoxen, decedent intentionally placed title to real estate in a land trust in order to deprive his wife of her minimum statutory share in his estate. Defendants moved to dismiss for failure to state a cause of action since plaintiff did not allege the elements of common law fraud in her complaint. The court found that the kind of fraud alleged by the plaintiff was not the type of fraud founded upon misrepresentation, but one based upon the statutory right under the forced share statute (ILL. REV. STAT. ch. 3, § 2-8 (a) (1976)). See note 1 supra. See also, Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908). The court in Blankenship interpreted the Frauds and Perjuries Act (ILL. REV. STAT. ch. 59, § 4 (1905)). The act provides:

[E]very gift, grant, conveyance ... made with the intent to disturb, delay, hinder or defraud creditors or other persons ... shall be void, as against such creditors, purchasers and other persons.

The court held that the phrase “creditors and other persons” does not include the wife of the grantor with reference to her right under specific circumstances to take a one-half interest in his real estate in lieu of dower. Id. at 125-30, 84 N.E.2d at 195-97.

11. A settlor is the person creating the trust. DECEDEIENTS’ ESTATES AND TRUSTS, supra note 5 at 374.

12. 50 Ill. App.3d at 841-42, 365 N.E.2d at 1063-64.

13. The Johnson court refers to this test as the “retention of ownership” test. Id. at 837, 365 N.E.2d at 1061. However, this test is commonly referred to as the retention of control test by legal writers. See, e.g., W. MACDONALD, FRAUD ON THE WIDOW’S SHARE, 67-87 (1960) (hereinafter cited as MACDONALD). Therefore, this test will be referred to as the “retention of control test” throughout this article.

surviving spouse. Because the court employed a test which looks solely to the structure of the trust agreement, the decision makes the revocable trust more susceptible to attack by a surviving spouse. As a result, the effectiveness of the inter vivos trust as an estate planning tool is weakened. This decision has been appealed to the Illinois Supreme Court.

The purpose of this Note is to review the developing case law in the area of inter vivos transfers by a decedent spouse with respect to the rights of a surviving spouse. Specifically, the Note will examine and evaluate the appellate court's decision in Johnson. It also will analyze the Johnson opinion in light of Public Act 80-737, a subsequently enacted statute which may be interpreted in certain circumstances to uphold the validity of inter vivos transfers despite the settlor's retention of control over the property. Finally, the potential ruling of the Illinois Supreme Court will be discussed.

WHAT CONSTITUTES FRAUD ON MARITAL RIGHTS

In its opinion, the appellate court discussed two approaches.

15. 50 Ill. App.3d at 841-42, 365 N.E.2d at 1063-64.
16. On January 26, 1978, Havey v. Patton, 52 Ill. App.3d 897, 368 N.E.2d 728 (4th Dist. 1977) was consolidated with Johnson for hearing before the supreme court. In Havey, the executor of the decedent husband's estate sought to have certain accounts which the decedent wife conveyed in joint tenancy to her sister-in-law included in the wife's probate estate. Also, the executor sought to include in the wife's probate estate a conveyance of the wife's undivided one-half interest in the family home in which she reserved a life estate. The deed was recorded but not delivered. The appellate court held that there was sufficient donative intent to sustain the gift of the accounts placed in joint tenancy. In so holding, the court stated that fraud arises not out of intent to defeat or minimize the marital rights of the surviving spouse, but from the absence of donative intent. Id. at 900, 368 N.E.2d 730. The court also upheld the conveyance of the one-half interest in the family home stating that delivery was completed after the deed was recorded and it was returned to the office of the wife's attorney. Id. at 901, 368 N.E.2d 731.
17. See note 68 and accompanying text infra.
19. See notes 68-85 and accompanying text infra [hereinafter called the Illusory Transfer Act].
20. For a state by state discussion of decisions involving the use of trusts to impair surviving spouses' rights, see Annot. 39 A.L.R.3d 14 (1971). See also Schuyler, Revocable Trusts — Spouses, Creditors and Other Predators 8 INST. EST. PLAN. §§ 74.1300-74.1301 (1974) [hereinafter cited as Schuyler]. Schuyler explains that American jurisdictions base the claim of the surviving spouse on one of three legal theories. The first theory is that the transfer was testamentary in character and invalid because it was not executed in a manner specified for the execution of wills. According to Schuyler, the "testamentary" approach is less likely to succeed because at least 43 states have passed statutes to insulate revocable trusts from attack based on the testamentary nature of the trust instrument. The second theory is that the transfers constituted a fraud on the spouse's marital rights. Schuyler explains that in this approach "fraud" is shown
which have been considered by prior Illinois courts in determining whether an inter vivos transfer defrauds a surviving spouse of his or her marital rights. According to this first view, fraud is determined by examining the manifestations of intent ("equities") of the decedent. In actuality, these "equities" are used to determine the reasonableness of the transfer. These equitable factors include the decedent's intent to defraud his spouse, the proximity in time between the transfer and the transferor's death, the proportion of the settlor's property transferred to the trust, the absence of consideration received from the transferee, and the fairness to the surviving spouse if the trust is operative. Although this approach was considered by the appellate court, it has been employed in only one Illinois case: Rose v. St. Louis Union Trust Co. In Rose, the Illinois Supreme Court construed a Missouri statute which governed inter vivos transfers made in fraud of the marital rights of a surviving spouse.

either by establishing the fraudulent intent of the settlor or by carefully balancing the "equities" in the case. The third theory is that the transfer was "illusory" in that the settlor did not sufficiently divest himself of ownership of the trust property. Id. § 74.1301.

21. 50 Ill. App.3d at 836, 365 N.E.2d at 1060-61.
22. MacDonald, supra note 13 at 103-16.
23. Rose v. St. Louis Union Trust Co., 43 Ill.2d 312, 316, 253 N.E.2d 417, 419 (1969). See also MacDonald supra note 13 at 145-74. MacDonald attempted to categorize the "equities" based on several hundred American cases on the subject. He categorizes these factors into major equities and minor equities. Major equities are given the greatest amount of consideration by the courts. They are the proportion of decedent's property included in the transfer, the proximity of the transfer to the date of death, any provision made by the decedent for the surviving spouse, the relationship of the donee, and the participation by the donee. The minor equities are those given a lesser amount of consideration by the courts. They are the source of decedent's property, the nature of the marriage and the claimant's financial position.

Compare with Annot., 39 A.L.R.3d 14, 19 (1971). The authors state that some courts recognize that the settlor's purpose of depriving his (or her) spouse of his (or her) marital rights is not sufficient to establish whether the settlor acted with fraudulent intent in creating the trust. Thus, the authors state that in determining fraudulent intent, such courts have looked to and weighed all of the facts and circumstances of each case including: the terms of the trust and the settlor's reserved powers of ownership and control; the voluntary nature of the settlor's conveyance of the property; the time interval between the conveyance and the settlor's death; the value of the property conveyed in comparison to the settlor's total estate and to the value of the property passing to the surviving spouse outside the trust; and the relationship existing between the settlor and his (or her) spouse.

25. Mo. Rev. Stat. § 474.150 (1975) provides:

Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of the surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him with adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

Although the trust in Rose was executed by a resident of Illinois, the supreme court held that Missouri law controlled the validity of the trust. The court considered the following factors: the
In the second approach, “fraud” is determined by examining the degree of control retained by the decedent over the transferred assets. The rationale underlying this view is that the more control exercised over the assets, the more apparent it is that the decedent in reality owned the property. Therefore, the surviving spouse’s minimum statutory share should not be defeated. In its opinion, the appellate court cited *Smith v. Northern Trust Co.*, the first Illinois case to adopt this approach. It is necessary to review the *Smith* decision in order to understand the development of the “retention of control” test in Illinois case law.

In *Smith*, the appellate court invalidated a revocable trust in which the decedent spouse retained the right to control the trust corpus and the right to income as against the surviving spouse. In its decision, the court stated that an absolute inter vivos gift of personality by a decedent spouse is not a fraud on the marital rights of the surviving spouse even though made with the purpose of depriving the surviving spouse of the right to share in such property, provided that the transfer is not “colorable.” The court held that although the transfer in *Smith* was absolute in form, it was merely “colorable” and “illusory” in substance because of the degree of control that the decedent spouse maintained over the trust corpus.

In reaching its decision, the *Smith* court discussed *Newman v. Dore*, a New York case which had also established a “retention of trust” was negotiated and executed in Missouri, the trust was administered by a Missouri corporation with its principal place of business in Missouri, the trust corpus was kept in Missouri, the trust agreement used Missouri law to determine rights to the corpus should the grantor die without his wife or children surviving him. 43 Ill.2d at 313, 253 N.E.2d at 418.


27. The supreme court remanded the case to the trial court with instructions that Missouri law required that the “equities” be considered in determining whether an irrevocable trust created by a decedent husband was a fraud on the marital rights of his wife. 43 Ill.2d at 315, 253 N.E.2d at 419.

28. MACDONALD, supra note 13 at 68.


30. Id. at 176, 54 N.E. 2d at 78.

31. A colorable transfer is one in which the transferor did not “in good faith divest himself of ownership of his property or has made an illusory transfer.” Id. at 174, 54 N.E.2d at 77, quoting, Newman v. Dore, 275 N.Y. 371, 379, 9 N.E.2d 966, 969 (1937). See also note 80 and accompanying text infra.

32. 322 Ill. App. at 176, 54 N.E.2d at 78.

33. 275 N.Y. 371, 9 N.E.2d 966 (1937). In *Newman*, the decedent spouse created a testamentary trust under which his widow was given a life estate in one-third of all his property. The terms of a New York statute prevented the widow from electing against the will. Three days before his death and with the intent to defraud his wife’s statutory rights, decedent created an inter vivos trust of all his property. He retained the right to receive income from the trust and the power to revoke the trust. He also made the power of the trustees to act under trust
control” test and expressly rejected any consideration of the decedent’s intent to defraud the surviving spouse. In Smith, however, the Illinois Appellate Court did not accept the Newman decision totally. The Illinois court merely adopted the retention of control approach of Newman without reference to Newman’s expressed refusal to consider intent. Furthermore, the court indirectly evaluated the decedent’s intent to defraud his spouse by considering the equitable factors traditionally associated with the intent approach. Specifically, the court emphasized that the trust corpus constituted all of the decedent’s property except his pension. Also, in its presentation of the facts, the court acknowledged that the decedent amended the trust to exclude his surviving spouse while the couple was temporarily estranged. Consequently, although Illinois courts purportedly have adopted only the “retention of control” test, they have continued to evaluate equitable factors. This inconsistency has given rise to repeated attempts by attorneys to persuade Illinois courts to formally recognize equitable factors in determining the validity of inter vivos trusts as against surviving spouses.

conditional upon their receipt of his written instructions. The court found that the trust was illusory in that the decedent did not in good faith divest himself of the property. Id. at 381, 9 N.E.2d at 969-70.


Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory. . . . The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer.

35. 322 Ill. App. at 175-76, 54 N.E.2d at 78.

36. Id. at 171, 54 N.E.2d at 76. Also, the court noted that prior to this time, the decedent had suffered a stroke, had been diagnosed as having senile arteriosclerotic dementia and had been institutionalized. Id.

It is interesting to note that notwithstanding the Newman court’s express rejection of the “intent” test, the New York court also seemed to consider equitable factors. In the final paragraph of the decision, the court justified its decision by noting the husband’s intent to defraud his wife. 275 N.Y. at 381, 9 N.E.2d at 969-70.

37. In Burnet v. First National Bank, 12 Ill. App.2d 514, 140 N.E.2d 362 (1st Dist. 1957), the executrix of the surviving spouse challenged the validity of a revocable trust where the decedent spouse had reserved the right to income and the right to control the administration of the trust. The court found that the settlor’s absolute control over the trust did not invalidate the trust per se and that the determination of the validity of the trust depended on the facts and circumstances of each case. The trust provided for payment of income therefrom to the wife during her life. The wife with full knowledge of her right of power of appointment given to her
The appellate court in Johnson relied primarily on Montgomery v. Michaels in reaching its decision. In Montgomery, the decedent spouse established a savings account or Totten trust for the benefit

by trust agreement, renounced the same in her will and accepted the trust income. The court held that the wife was estopped from claiming any interest in trust assets which was allegedly traceable to the wife's separate property. The court also held that her executrix stood in her shoes and was also estopped. Id. at 529, 140 N.E.2d at 369.

In Dennis v. Dennis, 132 Ill. App.2d 952, 271 N.E.2d 55 (3d Dist. 1971), the decedent created a revocable trust where he reserved the right to income as well as the right to amend and control the trust. The court held the trust to be valid because the settlor made the trust irrevocable prior to his death. In so holding, the court was looking to the facts and circumstances of the case. Id. at 958-59, 271 N.E.2d at 60.

In Stice v. Nevin, 344 Ill. App. 642, 101 N.E.2d 573 (1st Dist. 1951), the court dismissed a complaint of a surviving spouse who contested an amendment to a trust. The amendment excluded the spouse as the beneficiary under the trust. The court held that where the trust agreement included a right to amend and the wife had signed the agreement before a notary public, the wife's administrator could not upset an amendment to the trust as a fraud on her marital rights. In its opinion, the court acknowledged that the wife was left some property in her husband's will. Furthermore, it was noted that the complaint contained no allegation that the wife could not read or that there was any concealment or misrepresentation as to the terms of the trust.

In each of the above cases, it is clear that the courts did not look solely at the amount of control exercised by the decedent over the trust corpus. In Burnet and Stice, the settlor had as much control over the trust assets as did the settlor in Smith and Johnson. Yet in each of the latter cases, court upheld the trust due to the knowledge of the surviving spouse and to a provision made for the surviving spouse by the decedent by will. In Dennis, it can be argued that the settlor retain ultimate control over the trust because it was made irrevocable only a short time prior to the decedent's death. Also, in Dennis, the decedent provided for his wife by will. See also Comment, supra note 3, at 787.

38. 54 Ill.2d 532, 301 N.E.2d 465 (1973).

39. A Totten trust is established by an individual making a deposit in a savings account in his own name as trustee for another. The depositor reserves a power to withdraw the whole or any part of the deposit at any time or to otherwise revoke the trust. The trust is then enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit. In Estate of Petralia, 32 Ill.2d 34, 38, 204 N.E.2d 1, 3 (1965). The validity of a Totten trust has been upheld in Illinois despite the contention that the trust is invalid as an attempted testamentary disposition without compliance to the Statute of Wills. Id. at 137-38, 204 N.E.2d at 3. See also Restatement (Second) of Trusts § 58 (1959).

Banks and Savings and Loan Associations furnish signature cards whereby the depositor can create a Totten trust by declaring himself trustee for the benefit of a named beneficiary. Statutes protect these institutions from liability when they make payments on these accounts. See Ill. Rev. Stat. ch. 16 1/2 § 145 (1971) (applicable to banks); Id. ch. 32, §§770(c)-(e) (applicable to savings and loan associations). These statutes, however, do not establish the validity of savings account trusts. Mann, Totten Trusts Approved in Illinois, 53 Ill. B.J. 724, 725 (1965). See generally, Comment supra note 3. The author lists several policy considerations justifying the general acceptance of the Totten trust even though the trust is essentially testamentary in nature. These considerations include that the Totten trust satisfies both the ritual and fraud aspects of the Statute of Frauds, and the very reasons for the existence of the Statute would not be furthered by applying it to the Totten trust; that the Totten trust permits the settlor, as trustee, to manage his (or her) own affairs and make corrections in the disposition of his (or her) property; that the Totten trust allows persons who are unable to afford the services of an attor-
of her two children by a prior marriage. After discussing the difficulty of attempting to ascertain the decedent's intent, the Illinois Supreme Court specifically rejected the "intent" test.\textsuperscript{40} Rather, the court held that because of the "absolute unqualified control" of the settlor over the account, the trust was "illusory"\textsuperscript{41} as to the surviving spouse.\textsuperscript{42} Accordingly, the court did not consider any equitable factors as previous Illinois courts had done indirectly.\textsuperscript{43} As a result, the Supreme Court made the Totten trust, by its inherent nature, invalid \textit{per se} against a surviving spouse.\textsuperscript{44}

In relying on \textit{Montgomery}, the appellate court found the factual situation before it "directly parallel" to that presented to the supreme court in \textit{Montgomery}.\textsuperscript{45} The court observed that in each case the decedent enjoyed complete and unfettered control over the trust property during the lifetime.\textsuperscript{46} Furthermore, the court noted that the trust operated to exclude the surviving spouse from a sizable statutory share to which the spouse otherwise would have been entitled had the trust property passed under the will.\textsuperscript{47}

The court also found \textit{Montgomery} applicable not only to Totten trusts, but to other revocable inter vivos trusts.\textsuperscript{48} In support of this

\begin{itemize}
\item \textsuperscript{40} Id. at 779-80.
\item \textsuperscript{41} As opposed to real. See quotation from Newman v. Dore, note 34 supra.
\item \textsuperscript{42} Id. at 779-80.
\item \textsuperscript{43} See notes 36-37 and accompanying text supra. See also Comment, supra note 3, at 775, 787 n.48.
\item \textsuperscript{44} In a Totten trust, the settlor will always have ultimate control of the assets in trust since the trust is established in such a form as to allow the depositor to withdraw funds from the account at his discretion. Therefore, the Totten trust will always be invalid as to the surviving spouse. See, Nortell, \textit{Illinois Tottering Totten Trusts}, 63 ILL. B.J. 306 (1975). Nortell explains that the supreme court in \textit{Montgomery} avoided establishing a rule which would require that a factual determination be made on a case by case basis and provided a legal rule that there is always fraud if a Totten trust is established to the deprivation of the surviving spouse. He further states that since there is not always actual fraud in such situations, the supreme court created a category of legal or statutory fraud. Regardless of the actual facts, a surviving spouse in such circumstances will now be considered to be defrauded of his (or her) marital rights as a matter of law. \textit{Id.} at 310.
\item \textsuperscript{45} 50 I11. App. 838, 365 N.E.2d at 1062.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Contra}, \textit{In re Estate of Elliott}, 33 I11. App.3d 1046, 1049, 339 N.E.2d 378, 380 (1st Dist. 1975). The \textit{Elliott} court held a land trust valid against a surviving spouse when the surviving spouse failed to renounce decedent's will from which the surviving spouse received a substantial inheritance. Moreover, the court found that the holding in \textit{Montgomery} related only to Totten trusts, and not to other types of inter vivos trusts. \textit{Id.} at 1049, 339 N.E.2d at 380.
\end{itemize}
finding, the court reasoned that although the issue in *Montgomery* was phrased only to include Totten trusts, the decision itself was based on prior case law that involved other types of revocable trusts.\(^4^9\) Additionally, the appellate court observed that the *Montgomery* court acknowledged that a savings account trust is no different in substance from other revocable trusts.\(^5^0\) Hence, the appellate court rationalized its extension of *Montgomery* to include revocable trusts in which the settlor retained ultimate control of the trust property. In so doing, the *Johnson* court specifically rejected the need to look to the intent of the decedent spouse and held that:

> a trust may not be permitted to defeat the marital rights of a settlor's surviving spouse where the settlor effectively retained ultimate control of the trusts assets. To do so would defeat the purposes of the statute and frustrate the fundamental public policy which it embodies. The disinheritance of a surviving spouse could be accomplished by merely changing the document controlling the devolution of property on death from a will to a trust. This would permit a decedent to do by *indirect* means that which cannot be done *directly*. This court will not so exalt *form* over *substance*.\(^5^1\)

By adopting a "retention of control" test with no consideration of the "equities," the appellate court made revocable trusts in which the decedent reserved the right of ultimate control\(^5^2\) over the trust property, like Totten trusts, *per se* invalid against surviving spouses.\(^5^3\)

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The *Johnson* court distinguishes *Elliott* as dicta and states:

> We find that every point of distinction between *Montgomery* and *Elliott* fails between *Montgomery* and the case at bar. In *Elliott*, decedent had appointed a third party as trustee as compared to *Montgomery* where the decedent appointed herself as trustee. In the instant case decedent declared herself trustee. In *Elliott*, the decedent parted with an interest during life because he entered into a joint tenancy with the respondent where a vested beneficial interest passed immediately. In *Montgomery* and in the instant case, the decedent parted with nothing during her lifetime. Finally, in *Elliott*, the decedent amply provided for his wife by will which she did not renounce, while in *Montgomery* and in the instant case, the decedent provided virtually nothing for her surviving spouse. 50 Ill. App.3d at 839, 365 N.E.2d at 1062.

49. As examples, the *Johnson* court cited Farkas v. Williams, 5 Ill.2d 417, 125 N.E.2d 600 (1955) and Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937). For a discussion of Farkas, see note 74 infra. For a discussion of Newman, see notes 33-37 and accompanying text supra.

50. 50 Ill. App.3d at 839 N.E.2d at 1062, citing *In re Estate of Petralia*, 32 Ill.2d 134, 204 N.E.2d 1 (1965). For a discussion of *In re Estate of Petralia*, see note 39 supra.

51. 50 Ill. App.3d at 841, 365 N.E.2d at 1063-64.

52. There is uncertainty as to the amount of retained control necessary to render a trust illusory, although a trust in which a power of revocation or modification is reserved subject to attack by the surviving spouse. See *Decedents' Estates and Trusts*, supra note 5, at 502. Examples of the various degrees of control which can be reserved by the settlor in the administration of a trust include the power to initiate or veto investments or sales; to act as co-trustee; to vote stock; to use, occupy, manage, control, improve, or lease land which is the corpus of the trust; and to make the trustee's powers of control subject to the settlor's written instructions.
In reaching its decision, the appellate court in Johnson also distinguished Rose and other prior Illinois cases in which the courts had questioned the intent of the decedent. The appellate court's decision noted that Illinois courts had inquired into donative intent of the settlor only in cases in which the settlor had parted during lifetime with an immediate interest in the transferred property. For example, in Rose the trust under attack was irrevocable; and therefore, the settlor was precluded from regaining ownership of the trust property. In such cases, the trust will be valid if the settlor had an intent other than to defeat the marital rights of the surviving spouse. In Montgomery and Johnson, however, the settlors did not relinquish any incidents of ownership in the transferred property during lifetime. Because the trust property in reality belonged to the settlor, the Johnson court found that the intent of the decedent making the transfer was irrelevant. Therefore, the Johnson court held that "without the mitigating factor of parting with incidents of ownership, the statutory policy against complete disinheritance of the spouse prevails."

In categorizing Rose with other Illinois cases, the Johnson court failed to distinguish the difference between Missouri and Illinois case law on the meaning of "intent". In Rose, the Illinois court was applying a Missouri statute which makes all inter vivos transfers subject to the same test as transfers during lifetime. In Smith, Newman, and Johnson, the settlor retained the right to income and to revoke the trust as well as the right to exercise extensive control over the trust corpus. It is uncertain if the trust would be illusory if each of these powers were standing alone or if two out of the three powers were combined. A. Scott, The Law of Trusts, § 57.5 at 511-12 (3d ed. 1967).

53. The trust will always be invalid even if the equities are in favor of upholding. For examples of such fact situations, see note 84 and accompanying text, infra. For a discussion of the per se invalidation of Totten trusts, see note 44 and accompanying text supra.


In Holmes, decedent entered into a joint tenancy arrangement with respect to a savings account with his second wife. Subsequently, his first wife set aside a divorce decree and challenged the validity of the transfer. In Hoefner, the decedent, a mortgagee, purchased property on foreclosure and had the certificate of sale and master's deed made to himself and his daughter in joint tenancy. In Toman, the surviving spouse sought to impose a constructive trust upon shares of stock to which decedent's sister held title as a surviving joint tenant of a joint tenancy created by decedent. In Levites, decedent purchased savings bonds in joint tenancy with various relatives. In each case, the respective court held that a husband may absolutely dispose of a part or all of his personal property during marriage unless the transaction is a sham and colorable or illusory and tantamount to fraud.

55. 50 Ill. App.3d at 841, 365 N.E.2d 1064.

56. Id.
to the "equities" test in order to determine if a decedent intended to
defraud the surviving spouse.\textsuperscript{57} In Illinois, however, the "equities" test has not been adopted as a measure of intent.\textsuperscript{58} Hence, the Johnson court set forth in \textit{dicta} a standard for establishing the intent of a decedent to defraud the surviving spouse which was inconsistent with existing Illinois law.

A BETTER APPROACH

The policy behind the statute providing for the spouse's minimum statutory share is to "prevent a surviving spouse from being left destitute where the deceased spouse has assets which would prevent such a result."\textsuperscript{59} Therefore, the "retention of control" test as used by the appellate court in Johnson is applied inappropriately in certain circumstances because the policy is not always furthered. In other words, trusts should not be invalidated as against surviving spouses who have other substantial means of support.\textsuperscript{60}

To avoid this result, the appellate court should have adopted an approach combining the "retention of control" and the "equities" tests. In utilizing this combination test, the court first should have determined whether the decedent spouse maintained ultimate control over the trust property during the lifetime. If so, the trust should have been invalidated as against the surviving spouse only if the application of the "equities" test required such a result.

This approach combines the benefits of both the "retention of control" test and the "equities" test. The use of the retention of control portion of the combination test gives the court firm guidelines upon which to exercise its judgment. The equities portion of the test insures that a trust will not be invalidated in circumstances in which invalidation would be inappropriate because of the policy consideration behind the statute providing for the spouse's minimum share.\textsuperscript{61}

\textsuperscript{57} See notes 23-27 and accompanying text supra.

\textsuperscript{58} Contra Toman v. Svoboda, 39 Ill. App.3d 394, 349 N.E.2d 668 (1st Dist. 1976). In Toman, the appellate court upheld a transfer of stock made by a decedent spouse into joint tenancy with his sister. In its decision, the court ascertained by considering the equitable factors of Rose that the decedent had present, not testamentary, donative intent at the time the transfer was made. In doing so, the court, after finding that Rose was not indicative of Illinois law, cited no authority for finding the Rose factors relevant to the inquiry. Id. at 400, 349 N.E.2d at 674.

\textsuperscript{59} 50 Ill. App.3d at 840, 365 N.E.2d at 1062.

\textsuperscript{60} For example, the trust could be invalid against a surviving spouse to whom the decedent had made generous inter vivos transfers. \textit{See} MacDonald, supra note 13, at 96. \textit{See also} Schuyler, \textit{supra} note 20, at § 74.1301.

\textsuperscript{61} For example, under the combination test, a trust for the benefit of a relative of modest economic means would not be invalidated against a surviving spouse to whom the decedent had
In implementing this approach, the appellate court should have limited the application of *Montgomery* to Totten trusts. The factual situation in *Montgomery* was not "directly parallel" to the factual situation in *Johnson* because the degree of control a settlor can exercise over a Totten trust is greater than that which a settlor can normally exercise over other types of revocable trusts. In a Totten trust the settlor can control the corpus by merely making a withdrawal from his savings account. In other types of revocable trusts, however, the settlor must satisfy certain formalities to revoke or control the administration of the trust. Furthermore, a Totten trust is subject to claims of creditors while other types of revocable trusts customarily are not.

Also, the *Johnson* court's rationale for extending the *Montgomery* decision to the revocable inter vivos trusts is subject to still other criticism since the issue and the holding formulated by the *Montgom-

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made generous inter vivos transfers. Even if the court found the trust suspect because the settlor retained ultimate control of the trust assets during his lifetime, the trust would be valid because the equities would weigh in favor of upholding the trust.

62. See note 39 *supra*.

63. The settlor would have to make a written request or revocation to his trustee. If the settlor was his own trustee he would still have to document any action he took in regard to the trust assets since he was acting in a dual capacity.

64. *Montgomery v. Michaels*, 54 Ill.2d 532, 538, 301 N.E.2d 465, 468 (1973). See generally *Restatement (Second) of Trusts* § 58 Comment (1959). The authors of the *Restatement* state:

> Although creditors of the settlor cannot reach the trust property merely because he has reserved the power of revocation... creditors of a person who makes a savings deposit upon a tenative trust [Totten] can reach his interest, since he has such extensive powers over the deposit as to justify treating him as in substance the unrestricted owner of the deposit. So also, on death of the depositor if the deposit is needed for the payment of his debts, his creditors can reach it. So also, if it is needed it can be applied to the payment of his funeral expenses and the expenses of the administration of his estate, if he had not sufficient other property which can be applied for these purposes.

65. Unlike in the case of the Totten trust, creditors cannot reach the assets of a revocable trust merely because of the amount of control reserved by the settlor. They can, however, reach the trust asset if the conveyance was fraudulent through rights given to them by statute. ILL. REV. STAT. ch. 59, § 54 (1975). The statute provides:

> Every gift, grant, conveyance, assignment or transfer of or charge upon any estate, real or personal, or right or think in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, or judgment entered, with like intent, shall be void as against such creditors, purchasers and other persons.

court was phrased to include only Totten trusts.\textsuperscript{66} Moreover, the Montgomery court’s assertion that a savings account trust was no different in substance from other revocable trusts was made in reference to the general validity of the Totten trust as an acceptable estate planning tool.\textsuperscript{67} The court’s statement was not made to establish the separate legal issue of the invalidity of the Totten trust \textit{vis-à-vis} the surviving spouse.

\section*{The Effect of Illusory Transfer Act}

Subsequent to the decision of the appellate court in \textit{Johnson}, the legislature passed Public Act 80-737\textsuperscript{68} (hereinafter called the Illusory Transfer Act). The Act provides that a lifetime transfer cannot be found illusory because the decedent retained any power or right with respect to the property unless there is intent to defraud.\textsuperscript{69}

Since the Illusory Transfer Act does not specifically refer to transfers made in fraud on the marital rights of a surviving spouse,\textsuperscript{70} the question remains whether the supreme court will interpret the scope of the Act to include such transfers.\textsuperscript{71} Although the Act purports to

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\textsuperscript{66} 54 Ill.2d 532, 535, 301 N.E.2d 465, 466. "The question in the case at bar is whether a 'Totten Trust' is sufficiently testamentary in nature that by analogy the statutory policy of permitting a surviving spouse to renounce under the decedent's will and share in the proceeds of such estate should be applicable to such trust to the same extent as to an estate passing under a will."

See City of Genesco v. Illinois N. Util. Co., 378 Ill. 506, 39 N.E.2d 26 (1941) for the proposition that a judicial opinion applies only to the facts involved.

\textsuperscript{67} The trust is valid despite the depositor's non-compliance with the formalities required by the Statute of Wills. See note 39 supra.

\textsuperscript{68} ILL. REV. STAT. ch. 3, §§ 701, 702 (1977) provides:

Section 701. An otherwise valid transfer of property in trust or otherwise, by a decedent during his or her lifetime, shall not in the absence or an intent to defraud, be invalid, in whole or in part, on the ground that it is illusory because the decedent retained any power or right with respect to the property. Section 702. This Act takes effect upon becoming a law and applies to savings account trusts established on or after its effective date, and as to all other transfers this Act is declaratory of existing law.

As House Bill 803, the Act was drafted and proposed as part of the Joint Legislative Program by the Illinois State Bar Association and the Chicago Bar Association, introduced in the 80th Illinois General Assembly on March 17, 1977, and adopted by the 80th Illinois General Assembly on June 24, 1977. House Bill 803 was approved by the Governor on September 16, 1977, as Public Act 80-737. Brief for the Appellant at 32.

Furthermore, the Act was passed by unanimous vote in both the House and Senate. No formal debate was conducted. Interview with Austin Fleming, of Counsel, Northern Trust Co., in Chicago (February, 1978).

\textsuperscript{69} ILL. REV. STAT. ch. 3 at § 701.

\textsuperscript{70} Id.

\textsuperscript{71} The supreme court could refuse to consider the Illusory Transfer Act in hearing \textit{Johnson} since it can be argued that to do otherwise would give the Act retroactive effect. See, County
codify existing common law in Illinois, it is at variance, however, with existing case law concerning the validity of the inter vivos trust vis-à-vis the surviving spouse. The Act requires, inter alia, a determination of the transferor's intent to defraud, while the courts in Montgomery and Johnson would find a trust invalid vis-à-vis a surviving spouse only upon a determination that the settlor had retained ultimate control over the trust corpus. This variance can be rationalized by interpreting the Act as a restatement of the law as to the general validity of inter vivos transfers. This interpretation would be consistent with existing case law.

If the Illusory Transfer Act is read to apply to an inter vivos trust vis-à-vis the surviving spouse, the statute would appear to require a two-step procedure to be followed before finding a revocable inter vivos trust void as against a surviving spouse. First, a decedent will have had to retain a power with respect to the property which would lead to a determination by the court that the trust in question is "illusory." It is clear under existing case law that an illusory trust is,

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Mut. Ins. Co. v. Knight, 40 Ill.2d 423, 240 N.E.2d 612 (1968) (Statutes are presumed to operate prospectively and not retroactively unless statutory language is so clear as to admit no other construction.) However, it can be argued that the legislation did clearly intend to give the Illusory Transfer Act retroactive effect by making it declaratory of existing law. See ILL. REV. STAT. ch. 3 § 702. Also, even if the court rules the Act should be applied prospectively, the court could still rule on Johnson cognizant of legislative policy. See Schroeder v. Benz, 9 Ill.2d 589, 138 N.E.2d 496 (1956). In Schroeder, the supreme court stated:

Since the testatrix here died prior to the enactment of the statute, it is not controlling. However, we are convinced that the same rule should be applied. For although not directly applicable, the Illinois statute does reflect a legislative policy which should be taken into consideration.

Id. at 594, 138 N.E.2d at 499.

72. ILL. REV. STAT. ch. 3 at § 702.

73. See notes 50-53 and accompanying text supra.

74. The general validity of an inter vivos trust in which the settlor has retained the right to the property has been established so long as the trust has not been attacked by the surviving spouse. Such trusts have been challenged as attempted testamentary dispositions which should be invalidated because of non-compliance by the settlor or with the Statute of Wills. See, e.g., Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955). In Farkas, the administrators of decedent's estate claimed that an inter vivos trust created by decedent was invalid in absence of compliance with the statute governing the execution of wills. The supreme court held the trust valid even though the settlor made himself sole trustee, reserved a life interest, and retained a power of revocation. The court reasoned that the purpose behind the enactment of the Statute of Wills was to prevent fraud and forgery by requiring that a will be executed in a solemn and formal manner. The court found that the trust at issue was also created with such formalities so as to insure against the presence of fraud and forgery; and therefore, should be valid. Id. at 433, 125 N.E.2d at 608-09. For discussion of application of this principal to Totten or savings account trusts, see note 39 supra.

75. Should the court follow this interpretation of the Act, it would still be faced with the issue of whether to extend the holding of Montgomery to revocable inter vivos trusts or to formally recognize equitable factors in applying the retention of control test.
inter alia,\textsuperscript{76} one in which the decedent retains the power to control the trustees and reserves the right to receive income for life and the right to revoke the trust.\textsuperscript{77} Thus, this portion of the test will not present much difficulty.

The second step of the procedure is problematical. It requires the court to make a determination that the decedent intended to defraud his spouse by making the transfer. The meaning of “intent” to defraud, however, is unclear under existing case law. The proponents of the statute intended to make the statute consistent with earlier cases\textsuperscript{78} in which a lifetime transfer of property made by a decedent spouse was upheld against attack by the surviving spouse. The Illinois Supreme Court in these cases acknowledged that a husband has an absolute right to dispose of property during his lifetime provided the transfer is not merely colorable and is unattended by circumstances indicative of fraud upon the rights of the surviving spouse.\textsuperscript{79}

A colorable transfer is a sham in which there is no transfer at all or a transfer accompanied by some secret agreement between the parties that negates a donative intent on the part of the donor.\textsuperscript{80} If the transfer is absolute, the transfer will be valid even though the precise motive of the decedent was to minimize the statutory right of the spouse.\textsuperscript{81} In the past, transfers which have been found to be colorable and attended by circumstances indicative of fraud have arisen in cases in which the transferor has retained control and the right to the

\textsuperscript{76} See note 52, supra.

\textsuperscript{77} See notes 28-44 and accompanying text supra.

\textsuperscript{78} Remarks by Sherwin Corwin, Judiciary Committe I of the Illinois House of Representatives (April 6, 1977). As examples, Mr. Corwin cites Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); Holmes v. Mims, 1 Ill.2d 274, 115 N.E.2d 790 (1953); Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E.2d 684 (1945). In all three cases, transfers involving joint tenancy arrangements were attacked by the surviving spouse. For a general discussion of the cases, see note 54 supra.

\textsuperscript{79} In each of these cases, the supreme court quotes O. Bump, KERR ON FRAUD AND MISTAKE 220 (1872).

\textsuperscript{80} In this book McDonald explains:

A typically colorable ('sham') arrangement would be a secret deed, handed over by the husband to the obliging friend or relative whose name appears as 'grantee'. The parties have previously agreed that the husband may demand the return of the deed at his pleasure, in particular, if his wife should predecease him. If it is also agreed that the deed in no circumstances is to be legally effective, the transfer is clearly "colorable."

\textsuperscript{81} Padfield v. Padfield, 78 Ill. 16, 19 (1875).
income from a revocable inter vivos trust.\textsuperscript{82} In no case has the court found circumstances indicative of fraud solely because of the transferor’s subjective intent to defraud his spouse.\textsuperscript{83}

Since the prior law is not illustrative of what “intent to defraud” means, its interpretation under the statute remains to be resolved. It could be interpreted to mean a subjective intent to diminish the decedent’s estate in order to minimize the spouse’s statutory share. Alternatively, it could be interpreted to mean intent as measured by objective manifestations of the factors announced in \textit{Rose}.

The “subjective” intent test should not be adopted by the Illinois courts because evidence as to the decedent’s intent is unreliable. Since the transferor is dead, evidence will usually be obtained from litigants who do not have a detached point of view. Also, an intent to transfer assets outside one’s probate estate may be praiseworthy or deplorable depending on the circumstances of the case. For example, a settlor may have provided for his spouse amply by other inter vivos transfers, and he may wish to provide for an aging parent by means of a trust. On the other hand, the decedent may have ill feelings toward his spouse and, therefore, wish to disinherit the surviving spouse leaving her without any means of support.\textsuperscript{84}

Since the “intent” aspect of the combination test required by the Illusory Transfer Act is open to interpretation, the Illinois courts should adopt an intent to defraud test which will inquire into objective manifestations of intent. This approach would be more consistent with Illinois precedent inasmuch as the courts prior to \textit{Montgomery} seemed to have impliedly weighed the “equities” of the case.\textsuperscript{85}

\textbf{THE ILLINOIS SUPREME COURT’S DECISION}

Because of the numerous considerations involved, it is difficult to predict whether the Illinois Supreme Court will uphold or invalidate the trust at issue in \textit{Johnson}. One factor which will affect the decision is the weight, if any, given by the court to the Illusory Transfer Act. If the court finds that the Act does apply in this case,\textsuperscript{86} the validity of the trust will rest intimately on whether the court finds that the de-

\textsuperscript{82} Smith v. Northern Trust, 322 Ill. App. 168, 54 N.E.2d 75 (1st Dist. 1944).
\textsuperscript{83} See note 58 \textit{supra}.
\textsuperscript{84} See generally \textit{MACDONALD}, \textit{supra} note 13, at 117. In the “equities” approach motive as intent to minimize the surviving spouse’s statutory share would be relevant, but not essential. \textit{Id.} at 118.
\textsuperscript{85} See note 23 and accompanying text \textit{supra}.
\textsuperscript{86} The court could either give the Act retroactive effect or weigh the Act in its decision stating that the Act reflects legislative policy. See note 71 \textit{supra}.  

If, however, the court determines that the Act is inapplicable, it could follow one of two alternatives. The court could invalidate the trust finding that Montgomery and Smith are clear precedents for establishing a "retention of control" test without giving any consideration to the decedent's intent or to any equitable factors. Alternatively, the court could adopt a combination test by recognizing both the precedent for establishing the "retention of control" test and the equitable factors which Illinois courts, prior to Montgomery, had impliedly weighed in deciding whether a trust should be invalidated when attacked by a surviving spouse.

In applying this combination test to the facts in Johnson, the supreme court should first hold that the trust is illusory, but not as yet void, pursuant to the "retention of control" portion of the test because Mrs. Johnson retained the right to control the assets of the trust, the right to receive income from those assets and the power to revoke the trust. The validity of the trust would then depend upon the factual determination to be made by the court after weighing the equitable factors of the case. Thus, the court should first consider the factors which weigh in favor of upholding the trust including the knowledge of the surviving spouse that his wife was creating a trust and his choice not to involve himself in the matter. The court might also note the extreme wealth of the surviving spouse in relation to the value of the assets in the trust, the economic needs of the decedent's family, the devise by the decedent under her will of her realty to her husband, and the trial court's finding that a loving and harmonious relationship existed between the spouses. Secondly, the court should

87. See notes 78-85 and accompanying text supra.
88. In so doing, the court could interpret the Act to apply only to the general validity of lifetime transfers, not to transfers made vis-à-vis the surviving spouse. See notes 70-75 and accompanying text supra. Alternatively, the court could hold that the Act should not be considered in Johnson because to do so would improperly give the Act retroactive effect. See note 71 supra.
89. See notes 28-34 and 38-44 and accompanying text supra.
90. See notes 33-37 and accompanying text supra.
91. See note 23 and accompanying text supra. After finding Rose not controlling in reaching its decision, the appellate court in Johnson found in dicta that the equitable factors should be weighed in favor of invalidating the trust. The court stated that the factors which militate most strongly against the trust were that the decedent gave nothing away before she died and that she virtually excluded her spouse from sharing in her wealth upon her death. The court was silent as to other factors which should have been considered in the determination. 50 Ill. App.3d 830, 840, 365 N.E.2d 1056, 1063. This finding seems to conflict with the trial court's finding that the allegations of fraud made by the plaintiff were untrue, made in bad faith and without reasonable cause. Id. at 832, 365 N.E.2d at 1058.
consider the equitable factors which may invalidate the trust. These factors include the decedent’s exclusion of the surviving husband from the majority of her wealth, the decedent’s creation of the trust after learning about her terminal illness, and the absence of consideration given by the beneficiaries of the trust.\textsuperscript{92}

CONCLUSION

The Illinois Supreme Court in \textit{Johnson} should adopt an approach combining the “retention of control” test with the “equities” test. This would be consistent with Illinois decisions prior to \textit{Montgomery} which indirectly considered equitable factors in applying the “retention of control” test and with the Illusory Transfer Act which the drafters intended to be a codification of existing law. Moreover, if the Justices weigh the Illusory Transfer Act in reaching their decision, they should not adopt a “subjective intent to defraud” test because evidence as to the decedent’s intent is unreliable. The court also should reject any approach requiring the sole application of the “retention of control” test because the policy behind the spouse’s minimum statutory share is not promoted when the surviving spouse has other substantial means of support.

In implementing this combination approach, the supreme court should uphold the validity of the trust based upon the equities. Since the surviving husband knew that his wife was creating a trust and chose not to involve himself in the matter during her lifetime, he should be estopped from claiming that the trust operated to his detriment after his wife’s death. Furthermore, the surviving husband in this case will not be left destitute if he is unable to reach the assets of the trust. Therefore, since the policy behind the spouse’s statutory minimum share is no longer served, the policy favoring free alienability of property should prevail.

\textit{Janice Neumark}

\textsuperscript{92} See notes 6-8 and accompanying text \textit{supra}.