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# Totten Trusts - Rights of Surviving Spouse Prevail over Illusory Transfers

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# CASE NOTES

## TOTTEN TRUSTS—RIGHTS OF SURVIVING SPOUSE PREVAIL OVER ILLUSORY TRANSFERS

Bernice D. Montgomery created eight separate bank savings accounts, or Totten Trust[1] accounts. Under the terms of each trust she was to act as trustee, with the beneficial interest in her two children by a previous marriage. Six of these accounts specifically provided that the funds were to be paid to the beneficiaries on her death.[2] Funds could be deposited or withdrawn from the accounts any time during her lifetime. She died intestate, and her husband was appointed administrator. Because the accounts contained the great bulk of her estate, her husband, as administrator and as surviving spouse, filed a citation petition to recover the funds on the grounds that the creation of the trusts constituted a fraud on his marital rights. He contended that the trusts were illusory because the decedent retained complete control over them during her lifetime.

The appellate court affirmed the trial court dismissing the petition.[3] The Illinois Supreme Court, in a landmark decision, reversed, and held: that the trusts were illusory and invalid as against the surviving spouse; that the funds should be added to the decedent's estate for purposes of computing the survivor's statutory share; that the funds remaining should be paid to the beneficiaries under the trust proportionately; and that if the funds from the estate were insufficient, the trust funds, and not the legacies, would be available for debts, administration expenses and the surviving spouse's award. *Montgomery v. Michaels.*[4]

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1. So called because of the case Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904). These trusts have been held valid in Illinois. *See In re* Estate of Petralia, 32 Ill. 2d 134, 204 N.E.2d 1 (1965). *See also* Hayes, *Illinois Dower and "Illusory" Trust: New York Influences*, 2 DEPAUL L. REV. 1 (1952); Note, *The Rights of the Surviving Spouse and Creditors of Savings Account Trusts*, 50 CHI.-KENT L. REV. 159 (1973).

2. This condition is implicit, unless otherwise specified. ILL. REV. STAT. ch. 16½, § 145 (1971). A similar provision is made for savings and loan associations. ILL. REV. STAT. ch. 32, § 770(b)(3) (1971).

3. Montgomery v. Michaels, 2 Ill. App. 3d 821, 277 N.E.2d 739, 742 (1972).

4. 54 Ill. 2d 532, 301 N.E.2d 465 (1973).

The court stated:

> The balances in the savings-account trusts should be treated as the property of the decedent for the purpose of determining Dr. Montgomery's statutory share in his deceased spouse's estate, and, if necessary, he may draw upon the varying amounts in the respective trust accounts on a proportionate basis to the extent required to pay him one third of the net estate remaining after payment of all just claims. Such claims would include a surviving spouse's award, if such an award is appropriate, as well as the costs of administering the estate. (Ill. Rev. Stat. 1971, ch. 3, par. 202.) Thereafter the balance remaining in the accounts should be distributed to the beneficiaries named in the trust accounts.[5]

This holding has great significance as it fashions a new standard for overturning a trust as a fraud on marital rights. As will be illustrated later, the former test imposed the burden of proving actual intent to defraud at the time the trust was made. This element of intent has now been discarded.

The purpose of this note is to review the law with respect to the use of trusts to defraud marital rights and to attempt to forecast the impact of *Montgomery* on other forms of quasi-testamentary dispositions of property.

The property rights of a surviving spouse in Illinois are generally controlled by statute. Intestate rights give the surviving spouse a right to the entirety of the decedent's estate, except where decedent has surviving children, in which case the spouse receives one-third of the estate.[6] This provision cannot be avoided by will. Statutory provisions give the surviving spouse the option of renouncing testamentary dispositions. After renunciation the spouse receives one-half of the estate if there are are no descendents.[7] Where there is a descendent, the spouse receives one-third

5. *Id.* at 539, 301 N.E.2d at 468.

6. ILL. REV. STAT. ch. 3, § 11 (1971) provides:

> The intestate real and personal estate of a resident decedent, and the intestate real estate in this state of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:
>
> (1) *If* there is a surviving spouse and also a descendant of the decedent: one-third of the *entire* estate to the surviving spouse and two-thirds to the decedent's descendant's per stirpes.
>
> . . . .
>
> (3) *If* there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse.

7. ILL. REV. STAT. ch. 3, § 16 (1971). SHARE OF SPOUSE ON RENUNCIATION OF WILL

> When a will is renounced by the testator's surviving spouse in the manner provided in Section 17, 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:

of the estate. Through the use of a trust, even if revocable, it is possible to avoid these two statutory provisions because trusts have been held not to be testamentary dispositions.[8] The Totten Trust is simply another form of revocable inter vivos trust.[9]

In determining the validity of trusts with respect to marital rights, prior Illinois decisions have looked at two factors: the revocability of the transfer and the intent of the transferor at the time the transfer was made. The general rule had developed that only a *colorable* or *illusory* transfer, when made with the intent to defraud the spouse, could be overturned as a fraud on marital rights.

In *Williams v. Evans*[10] a bill in equity was brought to obtain a construction and enforcement of a trust agreement executed by the decedent's wife. The spouses had not lived together for twenty years. The decedent had transferred all of her property into a trust and retained a life estate. On her death the trustee was directed to sell the trust property and to purchase property for a church. The decedent had retained possession of the realty, and prior to her death, had regained the possession of the personalty placed in the trust after the trustees resigned. The court held that although the trustees had breached their duty in allowing the decedent to retain possession of the trust property, the validity of the completed and absolute (irrevocable) transfers into the trust were not affected. The evidence showed that the decedent's motives were religious and not fraudulent as to her spouse. The court said, "[t]here is nothing in the transaction which tends to show that it was designed to take effect as a testamentary disposition . . .; the property was absolutely disposed of."[11] Thus the transfer was valid against the spouse.

Despite the suggestion in *Williams* that even an absolute conveyance could be overturned as a fraud, the recent decision in *Dennis v. Dennis* held that an irrevocable trust was so absolute and binding that it could not be overturned, even though made with the intent to defraud.[12] Further, it has been decided that a husband has the right to dispose of his

one-third of the *entire* estate if the testator leaves a descendant, or one-half of the *entire* estate if the testator leaves no descendant.

8. Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955); Gurnet v. Mutual Life Ins. Co., 356 Ill. 612, 191 N.E. 250 (1934); Bear v. Milliken Trust Co., 336 Ill. 366, 168 N.E. 349 (1929); Kelly v. Parker, 181 Ill. 49, 54 N.E. 615 (1899); Merchants Nat'l Bank v. Weinold, 12 Ill. App. 2d 209, 138 N.E.2d 840 (1956); Bergmann v. Foreman State Trust and Sav. Bank, 273 Ill. App. 408 (1934).

9. *In re* Estate of Petralia, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

10. 154 Ill. 98, 39 N.E. 698 (1895); Annot., 39 A.L.R.3d 40 (1971).

11. 154 Ill. at 107, 39 N.E. at 700-01.

12. 132 Ill. App. 2d 952, 271 N.E.2d 55 (1971).

property during his lifetime without the concurrence of his wife,[13] and that he may make an absolute gift or other voluntary disposition of his property without violating her rights.[14]

The Illinois Supreme Court suggested in *Padfield v. Padfield*[15] that absolute conveyances must be bona fide in order to escape the spouse's rights. The distinction between absolute and illusory conveyances was characterized as follows:

> Here, there was a final disposition of the property. It was irrevocably distributed among his children as an advancement, and he reserved no interest, present or ultimate, in the property; and the common law has always recognized the right of a father to advance his children when and as he might choose, without limit as to time or amount, and natural love and affection have always been held a sufficient consideration to support such gifts, when executed. And this followed from the undoubted right that all men possessed—the power of selling or disposing of their property as they choose.
>
> It is true that, where a husband still retained the right to control the property, and resume the same at pleasure, such a gift was held to be fraud of the rights of his wife. But there, the transfer was only colorable, the title still being in the husband, and, being thus entitled, the wife could claim and recover her share, on the death of the husband. In such a case, the husband still remained the owner, notwithstanding the apparent sale, and hence the wife was entitled to share in such property as in any other. The statute gives her a right to one-third of the personal estate owned by her husband at the time of his death, after the payment of his debts, in case he dies intestate. Hence, when the sale is only colorable, and the property may be resumed by the husband, and he thus dies the owner, the wife may participate in its distribution.[16]

Further, in *West v. Miller*[17] a federal court interpreting Illinois law held an inter vivos trust valid because irrevocable. The husband had retained a life estate and granted a successor life estate to his sisters, with the corpus going to the descendents of the sisters on their death. After first dismissing a contention that the trust was created *in causa mortis*, the court went on to say that if a settlor relinquishes all control over the property, in other words making an absolute transfer, and retains only a life estate, that the transfer cannot then be attacked as illusory and fraudulent.

Nevertheless, it has been held that simply because the decedent maintained complete control over the trust assets, the trust was not thereby

13. Toman v. Svoboda, 4 Ill. App. 3d 148, 280 N.E.2d 499 (1972).
14. Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962).
15. 78 Ill. 16 (1875).
16. *Id.* at 18-19.
17. 78 F.2d 479 (7th Cir.), *cert. denied*, 296 U.S. 633 (1935).

invalidated as colorable, illusory or a fraud on marital rights.[18] But a transfer, though absolute, made on the eve of marriage,[19] was overturned as a fraud.

Of crucial importance in *Montgomery* was the fact that the trust was overturned without a showing of *actual* fraud, which was formerly required.[20] While there is no general rule for determining what facts constitute a fraud,[21] it has been established by a showing of circumstances of facts inconsistent with an honest purpose,[22] or by facts and circumstances which raise an inference of fraud.[23] The evidence must be clear and convincing,[24] but the fraud is seldom proved by direct evidence.[25] Furthermore, the Fraudulent Conveyance Act[26] does not apply to a spouse's statutory share[27] unless the transfer was colorable.

In *Smith v. Northern Trust Co.*[28] the decedent transferred all of his property (consisting of personalty) except a pension fund into trust, retaining a life estate with the power to alter or amend the trust at any time. After the creation of the trust the decedent and his wife became temporarily estranged. The decedent died intestate, leaving no appreciable assets to his wife under the laws of intestate succession, homestead or dower. The court held the transfer invalid as to the wife, reasoning that the decedent had conferred the indicia of ownership of the trust assets on the trustee for the purpose of deceiving the wife, and thus the transfer was merely colorable or illusory.

An opposite result was reached in a case where the decedent retained

18. Burnet v. First Nat'l Bank, 12 Ill. App. 2d 514, 140 N.E.2d 362 (1957). 362 (1957).

19. Toman v. Svoboda, 4 Ill. App. 3d 148, 28 N.E.2d 499 (1972). Transfer made on eve of marriage held prima facie fraudulent.

20. Frey v. Webbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); Deke v. Huenkenmeir, 389 Ill. 148, 124 N.E. 381 (1919); Padfield v. Padfield, 78 Ill. 16 (1875); Levites v. Levites, 26 Ill. App. 2d 274, 169 N.E.2d 574 (1960).

21. Majewski v. Gallina, 17 Ill. 2d 92, 160 N.E.2d 783 (1959).

22. Brubaker v. Gould, 34 Ill. App. 2d 421, 18 N.E.2d 873 (1962).

23. Powers v. Phillips, 166 Ill. App. 407, 412 (1911).

24. Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); Brubaker v. Gould, 34 Ill. App. 2d 421, 180 N.E.2d 873 (1962).

25. Powers v. Phillips, 166 Ill. App. 407 (1911).

26. ILL. REV. STAT. ch. 59, § 4 (1971) provides:

> Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing 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, decree or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons.

27. Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908).

28. 322 Ill. App. 168, 54 N.E.2d 75 (1944); Annot., 39 A.L.R.3d 41 (1971).

extensive powers over the management of the trust. In *Burnet v. First National Bank*[29] the decedent made a transfer in trust which was attacked as a fraud on his wife's marital rights. The settlor appointed himself a co-trustee, and held broad powers of revocation, amendment and removal. The court found that the wife was fully aware of the trust and in agreement with it.[30] The evidence negated any intent on the part of the settlor to defraud his wife.

Further, the intent to defraud test has not been limited to the normal trust situation. It has been applied to joint tenancies in realty[31] and in savings and loan accounts.[32] A recent case suggested that it could even be applied to land trusts.[33]

There are many unanswered questions in *Montgomery*. The decision is not clear as to what forms of inter vivos transfers the decision applies. The question before the court was framed purely in terms of Totten Trusts:

> The question . . . 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.[34]

However, the extent of the decision is clouded by the court's reference to inter vivos transfers in general:

> The infirmities and difficulties in determining the intent of the decedent in connection with an *inter vivos* transfer of his personal property and in ascertaining whether such intent is so tainted with fraud as to cause such transfer to be ineffective in the deprivation of a spouse of his, or her, statutory share in the decedent's estate are readily apparent.[35]

Further, the confusion is compounded by the court's holding which alluded to savings account trusts:

> While we recognize the general validity of "Totten" savings-account trusts for the reasons set forth above, we conclude that the savings-account trusts in question were illusory and invalid as against Dr. Montgomery and that they did not deprive him of his statutory share in his deceased spouse's estate.[36]

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29. 12 Ill. App. 2d 514, 140 N.E.2d 362 (1957); Annot., 39 A.L.R.3d 42 (1971).

30. *Cf.* Stice v. Nevin, 344 Ill. App. 642, 101 N.E.2d 873 (1951) (mem.).

31. Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E.2d 684 (1945).

32. Estate of Anderson, 69 Ill. App. 2d 352, 217 N.E.2d 444 (1966).

33. Stoxen v. Stoxen, 6 Ill. App. 3d 445, 285 N.E.2d 198 (1972).

34. 54 Ill. 2d at 535, 301 N.E.2d at 466.

35. *Id.* at 536, 301 N.E.2d at 467.

36. *Id.* at 537, 301 N.E.2d at 468.

It is clear that all savings-account trusts are not Totten Trusts.[37]

As a result of this imprecise language there is a serious question as to whether *Montgomery* applies only to Totten Trusts or whether it extends to savings-account trusts generally, or if it applies to *all* revocable inter vivos trusts. A reasoned approach to the decision indicates that it would apply to all revocable trusts.

The court quoted a text writer[38] and the *Restatement of Trusts*,[39] both of which referred to Totten Trusts unfavorably. But the court held such trusts valid because they are "not different in substance from other revoc-

37. Estate of Anderson, 69 Ill. App. 2d 352, 217 N.E.2d 444 (1966). Savings and loan revocable trust accounts are not Totten Trusts, but express inter vivos trusts.

38. 54 Ill. 2d at 537, 301 N.E.2d at 467-68, *citing* 1 A. SCOTT, LAW OF TRUSTS § 58.5 (3d ed. 1967):

> It would seem that a strong argument could be made against this result, on the ground that it violates the policy of the statute which gives a distributive share of the decedent's estate to the surviving spouse. It is true that it is generally held that the creation of a revocable trust is sufficient to cut out the surviving spouse, at least if the settlor does not reserve too great a control over the property. In the case of the savings-deposit trust, however, the depositor reserves such complete control that it would seem that, even though the trust is valid as against the personal representative of the depositor, it should not be valid as against the surviving spouse. Certainly the policy underlying the statute protecting the surviving spouse is stronger than the policy underlying the statute providing for certain formalities to evidence a testamentary disposition. It may well be held that the creation of a savings deposit trust is valid but not effective to cut out the surviving spouse.

39. 54 Ill. 2d at 538, 301 N.E.2d at 468, citing RESTATEMENT (SECOND) OF TRUSTS § 58, comment *d* (1959):

> 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 tentative 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 has not sufficient other property which can be applied for these purposes.

This is an exception to the general rule, *see* RESTATEMENT (SECOND) OF TRUSTS § 58 (1959):

> Where a person makes a deposit in a savings account in a bank or other savings organization in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust.

*See also In re* Estate of Petralia, 32 Ill. 2d 134, 204 N.E.2d (1965).

able inter vivos trusts."[40] Finally, the court stated:

> Under these circumstances, the expressed statutory policy of protecting a surviving spouse's statutory share in the estate should prevail, regardless of the intent of the deceased spouse in creating the savings-account trust. In *Blankenship v. Hall, (1908), 233 Ill. 116*, at page 129, this court stated: "There has been a manifest desire on the part of the lawmakers of this State to provide for the support of the wife, not only during the lifetime of the husband but also after his death, until, as this court said in *In re Taylor's Will, 55 Ill. 252*, on page 259: 'We do not go too far when we say that it has become a sort of common law in this State that this support shall be in all cases one third of the husband's real estate for life, and one third of the personal estate forever, which shall remain after the payment of debts.' "[41]

The court's broad language could lead one to the same conclusion. But the weight clearly falls in favor of a wider application to all inter vivos transfers when one considers *Rose v. St. Louis Union Trust Co.*,[42] cited by the court as an example of the "infirmities and difficulties" of establishing the intent of the decedent.[43] It must be noted that *Rose* was not a Totten Trust case.

In *Rose* the plaintiff individually, and as co-executor of her husband's estate, brought an action to set aside an irrevocable inter vivos trust created by the decedent. The action was against St. Louis Union Trust Company individually, as co-executor, and as trustee. The decedent created an irrevocable trust some six years prior to his death, giving his wife a life estate in forty percent of the corpus, with the remainder of the property going to his children by a prior marriage.

The court, in deciding whether the transfer was intended to defraud the spouse, considered certain statements of the decedent. Following the creation of the trust, the decedent allegedly made remarks to the effect that he had arranged his property so that his wife would receive nothing upon his death.[44] He also purportedly stated that he was going to disinherit his wife under the terms of his will.[45] Prior to the creation of the trust, the decedent had made references to his death.[46]

The plaintiff contended that the trust was voidable, *inter alia*, because it was a fraud on the surviving spouse's rights. After determining that

40. 54 Ill. 2d at 534, 301 N.E.2d at 466.

41. *Id.* at 536, 301 N.E.2d at 467.

42. 43 Ill. 2d 312, 253 N.E.2d 417 (1969).

43. 54 Ill. 2d at 535-36, 301 N.E.2d at 467.

44. Rose v. St. Louis Union Trust Co., 99 Ill. App. 2d 81, 83, 241 N.E.2d 16, 18 (1968).

45. *Id.* at 84, 241 N.E.2d at 18.

46. *Id.* at 83, 241 N.E.2d at 18.

the trust was not a testamentary disposition, the court went on to say that, under Missouri law (which the parties conceded was controlling) not only must fraud be shown, but the transfer must also be made on contemplation of death. The court found the trust a fraud on the wife's marital rights, and voidable to the extent of those rights.

The reliance of the court in *Montgomery* upon the decision in *Rose*, which voided an irrevocable inter vivos transfer in trust, indicates that the *Montgomery* holding is not limited to Totten Trusts.

In overturning transfers into trust, the determination of the decedent's intention for making the transfer is of crucial importance. The rationale for this intent test seems unsound. The purpose of the statute relating to intestate distribution is a legislative presumption of how the decedent would have had his property distributed on his death, had he written a will,[47] while the right of renunciation[48] was written for the purpose of providing for the personal welfare of the surviving spouse.[49] Under the old intent test, the funds became a part of the estate for purposes of the spouse's marital share only upon a showing that the trust was created with the intent to defraud. But if not created to defraud, the spouse had no rights in those assets. Thus, while the legislature evidenced a purpose to provide for the *welfare* of the surviving spouse,[50] the courts merely *punished* fraudulent intent with total disregard of the only truly relevant question—the well-being of the survivor.[51] Was the surviving spouse, who may be unable to work and may have no other assets or source of support, required to subsist on the gratification that he or she was *honestly* deprived of financial independence?

To gain an insight into the factors which should be considered by a court in reaching a decision as to whether a transfer in trust is an evasion of the surviving spouse's statutory share, the decision in *Windsor v. Leonard*[52] will be considered. It should be noted that the *Windsor* court reached a result opposite to that in *Montgomery*.

The Court of Appeals for the District of Columbia upheld a revocable

47. ILL. REV. STAT. ch. 3, § 11 (1971).

48. ILL. REV. STAT. ch. 3, § 16 (1971).

49. *In re* Klekunas' Estate, 56 Ill. App. 2d 70, 205 N.E.2d 497 (1965).

50. *Id.*

51. What might now be called the "control" test (*i.e.*, the "control" the decedent retains over the transferred property) will not, of course, operate where there is an absolute transfer. But it does not seem equitable to permit a spouse to fraudulently deprive his spouse of property even by an absolute transfer where the transferee is a fellow conspirator; whereas, this is the only result available when the transferee is a bona fide purchaser.

52. 475 F.2d 932 (D.C. Cir. 1973).

trust against a surviving husband where the wife, as settlor, had retained the powers of revocation and amendment, a life estate, and the right to withdraw principal. After renouncing the wife's will the husband contended he was also entitled to his statutory share in the trust. He argued that since the decedent has retained sufficient control over the trust assets for them to be includible in her gross estate for federal estate tax purposes,[53] that these assets should also be included in her probate estate for purposes of his statutory share, fifty percent in this case. In rejecting this contention, the court, citing the case of *Whittington v. Whittington*,[54] reaffirmed the following standard for determining whether the transfer is made for the purpose of evading the surviving spouse's statutory share:

—"completeness" of the transfer;
—motive for the transfer;
—participation by the transferee in the alleged fraud on the surviving spouse;
—amount of time between the transfer and death;
—degree to which the surviving spouse is left without an interest in the decedent's property or other means of support.[55]

Based on these factors the trust, even though revocable, did not constitute an impermissible evasion of the husband's rights.

Even though the analogy to the federal estate tax was ineffective in *Windsor*, it may be an effective guide to the application of *Montgomery* in the future. As a general rule, all assets over which the decedent had control at the time of his death are included in his gross estate.[56] Thus a person cannot transfer property away, while retaining rights to it, without having it included in his gross estate for tax purposes.

The Internal Revenue Code specifically provides for inclusion in a decedent's gross estate of property the decedent held at the time of his death,[57] transactions made in contemplation of death,[58] transfers with retained life estates,[59] transfers taking effect at death, such as reversionary interests,[60] transfers revocable by decedent during his lifetime,[61] annu-

53. *See* INT. REV. CODE OF 1954, § 2033.

54. 205 Md. 1, 106 A.2d 72 (1954).

55. 475 F.2d at 934. This is actually a misstatement of the rule in *Whittington*, which also considered control retained by the transferor as one of the tests. *See* 205 Md. at 12, 106 A.2d at 77.

56. *See, e.g.*, Lober v. United States, 108 F. Supp. 731 (Ct. Cl. 1952), *aff'd*, 346 U.S. 335 (1952). Tax determined by realities of economic interests rather than the niceties of conveyancer's art. Helvering v. Safe Deposit & Trust Co., 316 U.S. 56 (1942); Annot., 139 A.L.R. 1513 (1942).

57. INT. REV. CODE OF 1954, § 2033.

58. *Id.* § 2035.

59. *Id.* § 2036.

60. *Id.* § 2037.

61. *Id.* § 2038.

ities if payable to beneficiaries surviving the decedent,[62] joint interests,[63] powers of appointment,[64] life insurance proceeds,[65] and transfers made by decedent for insufficient consideration.[66] It is conceivable, as contended in *Windsor*, that the criteria employed in determining whether property is includible in the decedent's estate for estate tax purposes could be employed to attack transfers into trust when a surviving spouse's rights are concerned.

In conclusion, the question for the future is what types of quasi-testamentary devices will be allowed to defeat the surviving spouse's statutory rights.[67] While the facts in *Montgomery* apparently limit the holding to Totten Trusts,[68] there is no reason to believe that the rule laid down could not be applied to all inter vivos transfers of property which are illusory in nature. Thus, not only revocable inter vivos trusts, but jointly held property, accounts payable on death, reversionary interests, retained powers or the like, which now merely act as a conduit for evading marital rights, could be subject to the rule.

The *Montgomery* decision may have started a trend toward rectifying the rights of a surviving spouse. In its decision the court quoted[69] from *Newman v. Dore*[70] which held that, "motive or intent is an unsatisfactory test of the validity of a transfer of property."[71] Rather, "the only sound test of the validity of a challenged transfer is whether it is real or illusory."[72]

How far the Illinois courts will go to carry forward the holding of *Montgomery* to other transfers is limited only to the perception of its spirit and broad language. At this point there appears to be no limit to its application.

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62. *Id.* § 2039.
63. *Id.* § 2040.
64. *Id.* § 2041.
65. *Id.* § 2042.
66. *Id.* § 2043.
67. ILL. REV. STAT. ch. 3, § 16 (1971).
68. *See* City of Geneseo 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.
69. 54 Ill. 2d at 536, 301 N.E.2d at 467.
70. 275 N.Y. 371, 9 N.E.2d 966 (1937).
71. *Id.* at 379, 9 N.E.2d at 968.
72. *Id.* at 379, 9 N.E.2d at 969.