Illinois Dower and the Illusory Trust: The New York Influence

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This article is intended to review, somewhat at large, certain current aspects of the Illinois law of dower; to explore the implications of an important recent New York decision relating to the impact of inter vivos trust transfers upon the statutory marital rights of a surviving spouse;¹ and to speculate as to whether or not Illinois lawyers may anticipate that Illinois courts will continue to follow the New York lead, even around this latest hairpin turn.

There is, of course, a presumption (rebuttable, one trusts) that most Chicago lawyers do not know much about dower or about any other specialized aspect of real property law, owing to our habit of relying on the Chicago Title and Trust Company and their staff experts. But even those Chicago lawyers whose interest in the administration of estates or in estate planning or in the negotiation of property settlements, incident to actions for divorce or separate maintenance, has given them proficiency in the law of dower—even they can be baffled by the Illinois decisions.

I myself am old enough to have wrestled both as student and as Wills instructor with the jungle-like legislative improvisations of the pre-1940 era in Illinois, for the clearance of which the brotherhood is permanently indebted to the committee which drafted the current Probate Act. In those years I usually managed to defer to the Property professor on such matters, but post-war personnel changes finally added the Real Property sequence to my own subject of Wills, and

¹ In re Halpern's Estate, 303 N.Y. 33, 100 N.E. 2d 120 (1951).

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it then became impossible for me to elude dower any further. Since then, I have even had the temerity to lecture on dower in the Trust Development School of the Illinois Bankers' Association and have learned a great deal about dower problems from the informal and exploratory interchange of ideas in these groups.

Put very bluntly, the burden of this article is that statutory marital rights (hereafter called statutory dower or substituted fee dower), created in Illinois as an optional substitute for our statutorily-retained common law dower (hereafter called simply common law dower), are defeasible by several types of inter vivos transfer; that, under the influence of New York case decisions, the revocable living trust is such a type of inter vivos transfer as will defeat statutory dower in Illinois, but the revocable and controllable living trust is not; that, within the last year, New York has reversed its position in respect to the ineffectiveness of the revocable and controllable living trust to defeat statutory dower, so that such a trust today in New York will defeat the New York statutory marital rights; and that the same reversal may be anticipated in Illinois.

COMMON LAW DOWER AND ITS STATUTORY SUBSTITUTE

By way of initiating the discussion, let me recall that dower, as it existed at the common law, is still optionally in effect in Illinois today under the provisions of Section 18 of the Illinois Probate Act, and that such common law dower has been extended by the same section to the surviving husband in lieu of curtesy and has also been extended to attach to equitable fees. I assume that the new statutory "right to elect to take [common law] dower" is identical with the right of common law dower. Common law dower may be defined as a legal life estate by which a surviving wife (by virtue of a valid marriage and of the possibility of the birth of issue capable of inheriting the husband's fees) became seised in her own right (upon the death of the husband and upon apportionment) of one-third of all fees of which the husband was or became seised (either in fact or in law) at any time during the continuation of the marriage. The interest is indefeasible except

2 The award to the surviving spouse and the homestead estate, if any, of the surviving spouse, though aptly described as statutory marital rights, are excluded from the scope of these remarks.


4 Ibid. The statute merely says, "... a third part of all real estate of which the decedent was seized of an estate of inheritance at any time during the marriage. . . ."
by (1) the voluntary act of the interest-holder (the surviving spouse) in releasing or in barring or permitting the bar of the dower; or by (2) the prior death of the interest-holder; or by (3) the defeasible status of the fee itself at the time the dower interest initially attached to the fee. It follows, therefore, that once the interest becomes attached to his fee, the owner-spouse has no available method by which he can unilaterally defeat common law dower. No type of conveyance by the owner-spouse alone, whether inter vivos or testamentary, will defeat the interest.

At common law, this dower interest was the sole interest which the surviving wife had in the realty of the deceased husband; she was never his heir under any Statute of Descent, and so never inherited any share of his realty. On the other hand, while the surviving spouse had no dower interest in the personalty of the deceased spouse, nevertheless, under the applicable Statute of Distribution, the surviving spouse was treated as one of the next of kin who succeeded to the personalty of an intestate decedent. Unlike dower, however, this statutory marital right of the surviving spouse to an intestate succession to personalty was defeasible by the owner-spouse either by inter vivos or testamentary transfers of his personalty to third persons, and the right was also subject to all debts of the owner-spouse. This statutory marital right of the surviving spouse in the personalty of the intestate deceased spouse was, therefore, strictly analogous to the mere expectancy of intestate succession in any of the next of kin.

To elaborate still further the contrast between the common law dower interest in realty and the statutory marital interest in personalty of an intestate deceased spouse, the former interest may be described as (1) gross, (2) for life, (3) during marriage, whereas the latter may be described as (1) net, (2) in fee, (3) at death. By the contrast of “gross” with “net” is meant that the common law dower interest was superior to, and took priority over, the debts of the deceased spouse with the important exception of a purchase-money mortgage, whereas the statutory marital right in the personalty was subordinate to all debts and expenses. The contrast between “for life” and “in fee” is self-explanatory; the common law dower interest was

5 Save for the one exception in Illinois in which the dower in a fee simple subject to executory limitation becomes consummate and assigned before the occurrence of the executory limitation. Aloe v. Lowe, 278 Ill. 233, 115 N.E. 862 (1917).

6 This expression of the comparison and contrast I first heard in a lecture of Professor Joseph F. Elward, at Loyola University School of Law, Chicago, Illinois.
merely a life estate in an undivided one-third of the realty, whereas the statutory marital right in the personalty was a full fee ownership of the specified fractional share. By the contrast between "during marriage" and "at death" is meant that the common law dower attached to every estate of inheritance in realty of which the deceased spouse was or became seised at any time during the continuation of the valid marriage, whereas the statutory marital right in the personalty attached solely to such personalty as the deceased spouse owned at the time of his death. There was, then, a sharp and critical difference between the common law dower in the realty and the statutory marital rights in the personalty of an intestate deceased spouse; inchoate dower contrasts with a mere expectancy of intestate succession as sharply as black with white.

The trend of modern legislation in the United States is to expand the participation of the surviving spouse in the estate of the intestate deceased spouse, with the aim thereby of benefiting the surviving spouse. Various legislative methods have been employed. New York, for example, in 1930, abolished any future right of common law dower altogether,7 and replaced it with a statutory marital interest in the realty of an intestate deceased spouse analogous to the existing statutory marital interest in the personalty of such a spouse, which latter interest was of course also retained.8 Thus, the intestate succession statute now spells out statutory marital rights in all of the estate of the deceased spouse. Illinois, on the other hand, chose to retain the common law dower interest at the sole option of the surviving spouse, who could elect to take it instead of retaining an automatically provided statutory marital right in the realty of an intestate deceased spouse strictly analogous to the existing statutory marital right in the personalty of such a spouse, which latter right was of course also retained.9 In New York, therefore, in the case of an intestate deceased spouse, the sole statutory marital rights of the surviving spouse are mere expectancies of intestate succession perfectly analogous to the expectancies of heirs and next of kin generally. The surviving spouse became an heir at the cost of her lost common law dower, and retained her status as next of kin. In Illinois, however, in the same case, the surviving spouse may, if she so elects, take common law dower in each parcel of realty of which the

7 N.Y. Real Property Law (McKinney, 1945) § 190.
8 N.Y. Decedent Estate Law (McKinney, 1949) §§ 82, 83.
intestate deceased spouse dies seised, instead of retaining the substituted statutory fee interest therein. And even though the deceased spouse was not seised at the time of his death, still, if he had been seised at any time during the continuation of the valid marriage, the surviving spouse may also elect to take a common law dower interest instead of enjoying no interest at all. In each case, however, the election by the surviving spouse requires an affirmative action within a given time under penalty otherwise of foregoing the common law dower.\(^{10}\) In intestate cases, therefore, the statutory marital right of the surviving spouse in the net personalty of the deceased spouse is a mere expectancy of intestate succession both in New York and in Illinois, and the surviving spouse has been grouped with the next of kin. Moreover, the statutory marital right of the surviving spouse in the net realty of the deceased spouse (which in New York is the sole right of the surviving spouse in the realty, but which in Illinois is merely a legislatively proffered automatic, but rejectable, substitute for common law dower) is also a mere expectancy of inheritance both in New York and in Illinois, and the surviving spouse has been grouped with the heirs.

To conclude these initial observations, one must now attend to the case in which the deceased spouse dies testate. As already noted, common law dower was indefeasible by any devise of the deceased spouse, but the testamentary transfer of personalty effectively removed such property from the scope of the Statute of Distribution and hence avoided and defeated the statutory marital right of the surviving spouse in the personalty owned at death.

In accord with the modern legislative trend to expand the marital rights of the surviving spouse for her benefit, the same substituted fee interest which was provided in intestate cases in lieu of common law dower (whether optionally or compulsorily) was also made available in testate cases with certain limitations. It was clear, of course, that this substituted statutory fee interest in the realty was being awarded to the surviving spouse at the expense of someone else and without any concurrence by the deceased spouse. In the intestate cases, it was awarded at the expense of the other heirs simply by including the spouse among their number; and now, in the testate cases, it was awarded at the expense of the devisees by allowing the spouse to siphon off a forced share. Moreover, the testate deceased spouse lost his former power to defeat the statutory marital right of the surviving spouse in his person-

\(^{10}\) Ill. Rev. Stat. (1951) c. 3, § 171.
alty, which power he had enjoyed by the simple expedient of dying testate as to such personalty; now, however, the statute which provided the substituted fee interest in the testate realty routinely added a provision for a forced share of the testate personalty as well. Thus, the statutory marital right to a substituted fee dower in testate cases provided a fee share of both realty and personalty which the deceased spouse owned at the time of his death.11

In order to claim this statutory substituted share in the testate estate, it was necessary for the surviving spouse to renounce the will in its entirety, including any and all provisions making testamentary gifts to the renouncer. The doctrine of election had not originally been applied to the surviving spouse in the absence of an express testamentary provision that the testamentary gift was in lieu of dower, but statutes then routinely reversed that situation so that the doctrine of election, as between the testamentary gift and the common law dower, applied unless a testamentary provision directed that the testamentary gift was in addition to dower.12 By extension of that position, in order to obtain the very generous statutory substituted interest, complete renunciation of the will was customarily required.13 Naturally, if the will proved even more generous than the statutory substitute, the surviving spouse would accept the testamentary provisions and such acceptance would preclude any further claim to the statutory substituted interest. In some states (for example, New York),14 the power of the surviving spouse to renounce was limited. In Illinois, however, Section 20 of the Probate Act provides that any will bars dower in all realty of the testator unless the will itself expressly directs otherwise or unless the will is renounced by the surviving spouse in the manner prescribed in Section 17; hence, a surviving spouse has an unlimited power of renunciation in Illinois.15 If the will is effectively renounced by the surviving spouse, the renouncer's forced share, spelled out in Section 16, includes a fraction of the net personalty owned at death and also provides the familiar statutory fee interest in every parcel of realty owned by the testator at death, subject to a further option to elect to take common law dower instead in any parcel of realty of

12 See, for example, Ill. Rev. Stat. (1951) c. 3, § 172.
13 Note 11 supra.
15 Note 12 supra.
which the testator was seised at any time during the marriage. The renouncer’s forced share, therefore, both in New York and in Illinois, normally consists of a fee interest in both personalty and realty owned by the testator at the time of his death.

**ADDITIONAL BACKGROUND: RECENT ILLINOIS DOWER DECISIONS**

It seems convenient here to notice two or three ancillary points relative to Illinois dower:

(A) By rather elaborate textual amendments adopted in 1951, the choice afforded to the surviving spouse, in respect of each parcel of realty of which the deceased spouse died seised, operates by way of a power in the surviving spouse to elect to take a common law dower interest in such parcel instead of retaining the substituted statutory fee interest which is automatically conferred upon the surviving spouse by the operation of Section 11 in the instance of an intestate decedent and by the operation of Section 16 in the instance of a testate decedent whose will the surviving spouse has chosen to renounce. This power seems in the nature of an executory or conditional limitation upon the statutory fee interest of the surviving spouse, so that the heirs or devisees, as the case may be, would have an executory interest in the realty during the limited period of time within which the power to elect to take the common law dower is exercisable. It seems clear that this resolution of the respective estates of the parties represents the original intent of the drafters of the Probate Act in Section 11. However, the Illinois Supreme Court, in *Bruce v. McCormick*, decided that such intent was not effectively expressed in Section 11, as then worded. Thus arose the necessity for the recent textual amendments.

I see no reason to attempt any distinction in this respect between Sections 11 and 16; therefore, I assume that the extension of the holding in the *Bruce* case would have produced a similar holding under Section 16, requiring the similar careful amendment to that section. Nor do I see any reason to doubt that the amended language satisfactorily expresses a practical scheme of estates in the realty of a deceased spouse and will be effective to secure the desired overruling of the doctrine of the *Bruce* decision. It has been suggested that “the right to elect to take dower” may turn out to be a new statutory interest distinguishable from common law dower, in which event its legal charac-

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16 Note 11 supra.
17 396 Ill. 482, 72 N.E. 2d 333 (1947).
teristics would remain to be hammered out in future decisions or enactments; I think the suggestion is groundless and merely demonstrates that the occasional obtuseness of the Illinois Supreme Court (generally understandable, I think, by attending to the equities of the particular fact situation) has some of the brotherhood looking under the bed.

(B) Both the election to renounce the will of the deceased spouse and the election to take common law dower in any parcel of realty of which the deceased spouse died seised require affirmative action by the surviving spouse in a prescribed manner and within a prescribed time.\(^{18}\)

(C) There are routine situations in which the usual options do not exist in the surviving spouse. If, for example, the deceased spouse was seised in fee of lot 6 during his lifetime and conveyed the lot to another without the joinder or release of the surviving spouse, then, upon the death of the deceased spouse (whether testate or intestate), the surviving spouse does not enjoy a choice between a common law dower interest and a substituted statutory fee interest. The surviving spouse has merely the choice as to whether she will or will not elect to take the common law dower interest, which is the sole interest available to her by reason of the fact that the deceased spouse did not die seised of the lot. While it is not possible, therefore, for the deceased spouse to defeat the common law dower of the surviving spouse by the unilateral inter vivos conveyance, such a conveyance will defeat her statutory marital right to a substituted fee interest in that lot.

Again, suppose that the deceased spouse during his lifetime is vested merely with a future interest in fee in lot 6, viz., a vested remainder or an inherited reversion. When the deceased spouse dies, he is not, and by hypothesis never has been, seised of lot 6. In that event, the surviving spouse has no choice between common law dower and a substituted statutory fee interest because there can be no common law dower in a future interest due to a lack of seisin thereof. The great contribution of \textit{Barker v. Walker}\(^{19}\) to Illinois dower jurisprudence is that, under Section 11 of the Probate Act, a surviving spouse who neither has, nor can have, a common law dower interest nevertheless may and does have the substituted statutory fee interest in a vested future interest owned by the deceased spouse at the time of his death.


\(^{19}\) 403 Ill. 302, 85 N.E. 2d 748 (1949), noted in 38 Ill. Bar J. 150 (1949).
I see no reason to suppose that the same holding will not be made in the appropriate case under Section 16.

(D) The Illinois Supreme Court has recently had occasion to resolve a problem which has plagued many states which provide a renouncer's share to the surviving spouse of a testate decedent. The problem is how to amass the renouncer's share—from which testamentary donee or donees shall property be taken in order to marshal the share? In the case of legacies, Section 50 of the Probate Act directs that the distortional impact of the renunciation on legacies shall be equalized proportionately, but the section sheds no light on the matter of creating the original distortion by taking from some legatees rather than from others, except that it assumes that such a distortion may occur and is to be equalized somehow when it does occur. In a case construing the forerunner of Section 50, however, the Illinois Supreme Court thought that the legislature, in speaking of distortion of legacies, must have had in mind the distortion caused by the application of the normal order of abatement among legacies and so, by indirection, had provided that the renouncer's share of the net personalty was to be amassed by abating first any intestate personalty, next any residuary personalty, next any general legacies, and finally any specific and demonstrative legacies. Reflection will disclose that the amassing of the renouncer's share of the net personalty could "increase" legacies in value only relatively or only by following the doctrine under which the subject matter of a renounced legacy, originally given to the surviving spouse, falls into the residuary clause of the will. Section 50 authorizes and directs the court not to permit this latter result, but to use such subject matter equally to bind up the wounds of the injured testamentary donees.

The issue in the recent case of Gowling v. Gowling was how to amass the renouncer's substituted fee share in the realty of the testator. The court followed the literal language of Section 16 in holding that the share must come from each parcel of devised realty, and that such a legislative scheme itself equalized the loss incurred by the respective devisees, so that no further equalization was called for in the sense of

21 See, for example, In re Byrne's Estate, 149 N.Y. Misc. 449, 267 N.Y. Supp. 627 (Surr. Ct., 1933).
shifting the incidence of the burden from specific devisees to residuary devisees by requiring the residuary devisees to make whole the specific devisees. While Section 50 has no application to devisees, an equitable power of sequestration exists in respect of the subject matter of any renounced devise to prevent its intestate devolution or its plunge into the residuary clause, and to use it instead to redress the losses of the other devisees.

DEVICES TO DEFEAT STATUTORY MARITAL RIGHTS

We turn now to survey the devices available to defeat the statutory marital rights of a surviving spouse. Common law dower, as noted, is indefeasible by any unilateral act of the deceased spouse, whether inter vivos or testamentary. But the statutory substituted fee interest in the realty of the deceased spouse and the statutory marital right to a fee interest in the personalty of the deceased spouse, whether he dies testate or intestate, attaches solely to the realty and personalty which he owned at the time of his death. That being so, logic would suggest that such fee interests of the surviving spouse can be defeated by the simple expedient of arranging not to own the property at one's death through the transfer of the property in one's lifetime as a gift inter vivos, whether outright or in trust. Should this logic fully prevail, a statutory arrangement designed for the greater benefit of the surviving spouse, by increasing her share in the estate of the deceased spouse, could be, at the least, frustrated in those states in which the statutory fee interest was optional, and, at the most, completely destructive of all rights of the surviving spouse in those states in which the statutory fee interest had entirely replaced common law dower.

Such logic did prevail in the case of the outright gift inter vivos. Common law dower, of course, was confined solely to realty and there was no analogous inchoate right in personalty. There was, therefore, no restriction upon the right of an owner-spouse, without the concurrence of the surviving spouse, unilaterally to transfer his personalty by way of outright gift inter vivos. The right to succeed to the personalty of a decedent was a legislatively granted privilege, extended solely to the next of kin; and their expectancy of succession was no bar to complete freedom of inter vivos transfer. When, under the Statute of Distribution, the surviving spouse was treated as one of

25 The Illinois cases bearing on the devices about to be discussed will be found infra. For the collected cases bearing on all these devices, consult 157 A.L.R. 1184 (1945); 112 A.L.R. 649 (1938); 64 A.L.R. 466 (1929).
the next of kin and permitted, like them, to enjoy an expectancy of succession, the new statutory marital right was nothing more than such an expectancy. It was not an inchoate right nor an extension of common law dower into the field of intestate personality. That this right could, therefore, like any expectancy (but unlike common law dower), be defeated by an outright gift inter vivos was no surprise.

Like any expectancy, however, it could not be defeated by a gift inter vivos which for some reason was not a real gift: if, for example, the deceased spouse had had no bona fide donative intent (i.e., no real intent presently to divest himself of his title); or if he had made no effective delivery; or if the gift inter vivos was revocable; or if, though real and present and irrevocable, it was made upon an agreement by the donee to retransfer to, or to hold for or subject to the control and direction of, the donor in furtherance of a scheme to defeat the expectancy of succession, then, either there was no gift inter vivos at all or the tainted transfer inter vivos could be set aside by the victims of the scheme. But the mere intent to defeat the expectancies of succession would not of itself constitute any fraud upon the next of kin if the gift inter vivos, made to accomplish that purpose, was real and was not accompanied by any collateral condition or agreement by which the donor retained control of the personality. The motive was immaterial if the means used were otherwise unobjectionable because "there can be no fraud where no right of any person is invaded."

The same result was obtained for the substituted statutory marital right of the surviving spouse in the realty of an intestate deceased spouse. The status as surviving spouse did not convert her substituted fee interest into an inchoate interest analogous to common law dower; her interest remained a mere expectancy like that of the heirs, and equally defeasible by a real gift inter vivos, even when the sole and explicit motive for such a gift was the defeat of the said marital interest. Nor was the statutory marital interest, spelled out in the renouncer's share of a testate estate, any different, even though it was granted in a statutory provision which might be judged more closely analogous to common law dower.

The same result defeating the statutory marital right of a surviving spouse in personality was produced by a gift inter vivos made through the medium of an irrevocable living trust of personality. The mere fact that the inter vivos transfer in trust was made solely to defeat the

20Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. 2d 736 (1940).
statutory marital rights of the surviving spouse in the trust res was still an irrelevant factor, and the donor-settlor was even permitted to make himself the life beneficiary of the trust and, thus, retain the benefit of the trust res, though not its control. The reservation of the equitable life estate in the donor-settlor meant that the real subject matter of the gift was merely the equitable reversion in the res; such an arrangement worked no distortion of the trust and could be equally well applied to an outright gift inter vivos which reserved a life estate in the subject matter.

The fear of disaster to the surviving spouse through the ability of the deceased spouse to defeat the former’s statutory marital rights by a real gift inter vivos, whether outright or in trust, though logical enough, might well be largely academic if experience demonstrated that men found the price of defeating such marital rights too high, that is, if the joist of the inter vivos transfer was too severe. The surviving spouse’s statutory marital rights in personalty had always been subject to this very threat of defeasance, but no unusual recourse to such a device would appear to have been made, and in practice the surviving spouse had not suffered. When, however, modern legislation added a statutory marital fee interest in realty, then, especially in states where such statutory interests entirely replaced common law dower, the inspiration to impose a more damaging defeat on the surviving spouse was enhanced and the game became more often worth the candle, especially in the strong play of emotion between spouses whom disenchantment had affected.

More important than any other factor, however, in the growing temptation to defeat the surviving spouse, was the remarkable ingenuity of lawyers in inventing devices by which one might give and yet retain. Such devices removed all the sting from the formerly stern remedy: the statutory marital rights of the surviving spouse could be frustrated without any appreciable cost or discomfiture. Such a device and engine of defeasance was the revocable living trust in which the life income was also reserved to the settlor, without any further reserved control, however, over the res, which was genuinely transferred to an uncontrolled trustee. The reserved power to revoke the trust in whole or in part (plus the subsidiary powers to alter and amend the trust) does not conflict with the reality and genuine character of the trust under the law of trusts, as such a power would conflict with
the reality of an outright gift inter vivos under the common law of gifts. As a result, the device worked to defeat the statutory marital rights of the surviving spouse, except in Ohio.\textsuperscript{27}

It is interesting to note that, while the power to revoke is irreconcilable with the common law theory of an outright gift inter vivos (except the gift of an engagement ring and of certain choses in action), the power to revoke is an essential element of the gift causa mortis. One would expect, perhaps, that the utility of the gift causa mortis to defeat the statutory marital rights of the surviving spouse would be as great as the utility of the revocable living trust. Yet, such is not the case in the majority of states.\textsuperscript{28} It is believed that the principal reasons for the ineffectiveness of the gift causa mortis to defeat the surviving spouse are to be found in the historical development of the true nature of the gift causa mortis, particularly in respect to the time when the transfer of title occurred, and in the intimate relationship of this species of gift to the death of the donor. Today, all agree that the title is presently transferred upon delivery, but it was formerly thought that the title was transferred only upon the death of the donor. In other words, under the modern doctrine, the death of the donor is a condition subsequent to the transfer of title, whereas, in older days, it was regarded as a condition precedent to the transfer of title. Under the older view, the transfer obviously came too late to defeat either creditors or the surviving spouse. Under the modern view, that objection is no longer true, and the situation should be equated to that of the revocable living trust. That such has not happened seems to be due to the factor of imminent death, by reason of which the transfer is still regarded as quasi-testamentary. Similarly, even an outright gift inter vivos, if in fact made in contemplation of imminent death or just before death and with the motive to defeat the statutory marital rights of the surviving spouse in the subject matter of the gift, will not accomplish the donor's purpose because the donor will be regarded as having retained control of the subject matter too long. Illinois agrees, if one adds the further qualification that the subject matter of the gift constitutes the bulk of the donor's estate;\textsuperscript{29} if, however, it does not, and the donor retains sufficient property to take adequate care of the

\textsuperscript{27}Harris v. Harris, 147 Ohio St. 437, 72 N.E. 2d 378 (1947); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. 2d 381 (1944).

\textsuperscript{28}Note 25 supra.

\textsuperscript{29}Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908).
surviving spouse, the gift is effective to block the marital rights of such a spouse in the subject matter of the gift.\textsuperscript{30}

To use another approach, the \textit{primary} test of the efficacy of the inter vivos transfer to defeat the statutory marital rights of the surviving spouse was its reality, its genuinity. If the inter vivos transfer was real and operated presently to divest the donor of his title, the transfer was effective to defeat the surviving spouse's statutory interest. The donor's reservation of a life estate in the subject matter of the inter vivos transfer was a troublesome modification, but that concept was familiar both in the law of trusts and in the law of property (although the recognition of the reality of future interests in personality was slow to develop). One simply examined the reality of the inter vivos transfer of the \textit{future} interest, whether outright or in trust. The troublesome factor lay in the ability of the owner-spouse to retain the use and enjoyment of the subject matter until he died, i.e., to retain to the end so appreciable a measure of control over the subject matter and yet defeat the statutory interest of the surviving spouse.\textsuperscript{31} Legally, however, the retained control which was involved in the reservation of a life estate was minor compared to the final present transfer of the future interest in fee.

On the other hand, even when the present use and enjoyment of the subject matter was transferred to the donee rather than retained by the donor, the law would consider a reserved power of revocation a far greater measure of control. Hence, even though the accepted underlying theory of the gift causa mortis eventually proved to be a transfer of title in the lifetime of the donor and not merely at his death, still the existence of the power of revocation in the donor as a condition subsequent to the inter vivos transfer of the title constituted such a major retention of control by the owner-spouse that the gift causa mortis, despite its reality, was not effective to defeat the statutory marital rights of the surviving spouse in the majority of states.\textsuperscript{32}

The same consideration underlies the identical holding in many states in respect to the gift inter vivos made just before, and in contemplation of, imminent death: the full control over the subject matter of the gift had been retained by the owner-spouse too long to permit even a real


\textsuperscript{31} Patterson v. McClenathan, 296 Ill. 475, 129 N.E. 767 (1921).

\textsuperscript{32} Note 25 supra.
and irrevocable transfer on the threshold of death to defeat the statutory marital interest of the surviving spouse. The initial focus was upon the reality of the inter vivos transfer; but even reality was not enough where reality did not involve the loss of substantial control by the donor-spouse. From this point of view, the normal holding that the revocable living trust is effective to defeat the statutory marital rights of the surviving spouse is a remarkable holding, and the Ohio minority view seems much more in accord with the underlying general principles. Under the law of trusts, the revocable living trust is of course a reality, presently creating property rights in the trustee and the beneficiary and presently divesting the donor-settlor of his property rights in the trust res. But reality alone had not been sufficient to defeat the surviving spouse where the deceased spouse had retained control over the subject matter of the inter vivos transfer, and the retention of the power to revoke the living trust is certainly a plenary measure of control.

In the cases involving the revocable living trust, however, the initial focus on reality seemed to become the ultimate focus as well, perhaps because the trust res was almost invariably personalty. When to the power of revocation the settlor added the reservation of the life interest, the trust was still real and its reality still made it effective to defeat the statutory marital rights of the surviving spouse in the trust res. Moreover, when to the power of revocation and the reservation of the life interest, the settlor also added the designation of himself as a co-trustee along with an independent trustee (usually a corporation), to which the present delivery of the res was made by the settlor, still the trust was real and its reality continued to make it effective to defeat the statutory marital rights of the surviving spouse. Even where the settlor went still further and designated himself the sole trustee under a well-defined trust instrument which controlled his conduct as trustee and removed his power to deal with the trust res as he wished, the trust was still real and, therefore, effective as against the surviving spouse.\(^3\)

Ultimately, however, lawyers drew too fine a line of distinction when they invented the “controllable” revocable living trust, in which the settlor reserves, in addition to the power to revoke (and the subsidiary powers to alter and to amend), the power to control the trustee or the co-trustee in the management of the trust res to a substan-

\(^3\) Note 25 supra.
tial degree. Such a trust, although a reality under the law of trusts, was finally held ineffective to defeat the statutory marital rights of the surviving spouse in the celebrated New York case of *Newman v. Dore*; in that respect at least, the trust was "illusory" and not real.

The statement that such a trust was held to be real under the law of trusts is made deliberately, but with a lingering uncertainty. I studied this case as a law student in the year in which it was handed down. In the following years, I studied it again and again as an instructor in Wills. From the first, my problem lay in deciding whether the court had held that there was no real trust at all or that, though there was a real trust, even a real trust in which the settlor retained so high a degree of control over the res was ineffective to defeat the statutory marital rights of the surviving spouse. I have raised this issue each year as the class encounters the *Newman* case and I am still doubtful as to the correct answer. But I think it is incontestable that, correctly or incorrectly, the case was accepted as holding that there was a real trust but that it could not defeat the statutory marital right of the surviving spouse despite its reality because a retention of control in the settlor brought the inter vivos transfer, insofar as the surviving spouse was concerned, too close to a testamentary transfer, which the statute made ineffective to defeat the surviving spouse.

I realize that the inter vivos trust transfer was made three days before the settlor's death and that the trust res constituted the entire estate of the settlor. These facts may account for the result favorable to the surviving spouse, but they do not militate against the reality of the trust transfer nor are they considered to be essential to the favorable result for the surviving spouse, as they would be under Illinois law, for example, had the transfer been by outright gift inter vivos.

I realize also that there was a finding that this trust transfer was made for the sole purpose of defeating the statutory marital right of the surviving spouse; but this purpose or motive was clearly held immaterial to the resolution of the issue because such a purpose is not in itself a fraud on those rights (as it is under statute or case decision in minority states, and as it may even have been in New York prior to the *Newman* case). It is also clear that the statutory marital rights

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36 Notes 29 and 30 supra.
37 Note 25 supra.
of the surviving spouse under New York law are mere expectancies and are not inchoate rights in any degree.

Prescinding from these incidental matters, recall that the *Newman* case was an action by a surviving spouse to invalidate a revocable and controllable living trust as a testamentary transfer in violation of her marital right under Section 18 of the New York Decedent Estate Law. The court stated that the test of the legality of the means here used for the sole purpose of defeating the statutory marital right was whether those means were real or illusory. Was there a genuine, real inter vivos transfer, or was the transfer colorable only? The court, in holding that it was merely colorable, stated:

We need not now determine whether such a trust is, for any purpose, a valid present [inter vivos] trust. It has been said that "where the settlor transfers property in trust and reserves not only * * * a power to revoke and modify the trust but also such power to control the trustee as to the details of the administration of the trust, ... the disposition so far as it is intended to take effect after his death is testamentary * * *." (American Law Institute, Restatement of the Law of Trusts, § 57, sub. 2.) [This section of the Restatement refers to the situation in which the alleged trustee is actually merely an agent.] We assume, without deciding, that except for the provisions of section 18 of the Decedent Estate Law [renouncer's share section] the trust would be valid. That is enough to render it an unlawful invasion of the expectant interest of the wife.

Judged by the substance, not by the form, the testator's conveyance is illusory. ... In this case ... the settlor never intended to divest himself of his property.39

I say that this case was understood to hold that the trust was real but nevertheless ineffective. In *Manhattan Company v. Janowitz*,40 a 1939 action by a surviving spouse to set aside a revocable and controllable living trust in which the life income had been reserved to the settlor-spouse, a New York Surrogate Court entered judgment for the plaintiff-spouse to set aside the trust to the extent to which it affected her present statutory rights under Section 18 at the death of the owner-spouse. The opinion well demonstrates the sense in which the lower New York courts understood the *Newman* decision, because the court expressly remarked that there was no substantial difference between the cases. It stated that the alleged inter vivos trust established by the deceased spouse could be regarded, as to the surviving spouse under Sections 18 or 83, as in one of three general categories: (1) irrevocable

(which would involve the defeat of the surviving spouse); or (2) no trust at all (which would involve the victory of the surviving spouse); or (3) "... there may be a situation where a trust is created, generally lawful, but under which the reserved control of the donor is so great as to render it illusory or unreal as against a surviving widow whose rights are thereby prejudiced. Such a trust would be valid as to all parties except the widow and as to her it is invalid only to the extent that she is prejudiced thereby. Such a trust comes within the rule that while 'from the technical point of view such a conveyance does not quite take all that it gives, but practically it does,' which is enough to render it an unlawful invasion of the expectant interests of the wife."\(^1\) The court added that such a trust might be set aside only by the surviving spouse and then only to the extent to which it affected her present existing rights.

The most extreme form of revocable and controllable inter vivos trusts is the "Totten" trust (a tentative trust or savings account trust), defined as follows in the case from which it derives its name:

A savings bank trust is a deposit by one person of his own money in his own name as trustee for another. Such a deposit, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.\(^2\)

Whatever holding was made in *Newman v. Dore*\(^3\) in respect to the statutory marital right of the surviving spouse under Section 18, as affected by a revocable and controllable living trust, would logically have to apply a fortiori to Totten trusts (even though, prior to the *Newman* case, Totten trusts had been held invulnerable to the rights of the surviving spouse\(^4\)). This logical application was actually made four years later in *Krause v. Krause*.\(^5\) This case, which reaffirmed the New York recognition of the Totten trust, held that where the de-

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\(^2\) In re Totten, 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904).

\(^3\) 275 N.Y. 371, 9 N.E. 2d 966 (1937).


\(^5\) 285 N.Y. 27, 32 N.E. 2d 779 (1941).
positor died, the form of the deposit alone was sufficient evidence of the depositor's intent to establish a Totten trust; that the depositor had during his lifetime neither revoked the trust nor yet completed it so as to make it irrevocable; and that the balance in the account at the depositor's death was subject to the statutory marital right of the surviving spouse under Section 18. This case was understood to uphold the reality of a Totten trust, despite language in the opinion indicating that there had been no inter vivos gift to the beneficiary, who had no real interest in the deposit while the depositor lived, so that the trust was an illusory transfer as to the right of the surviving spouse. The "reality" test of the Newman case was expressly followed.

That such was the understanding of the Krause case in respect to the inability of the Totten trust to defeat the statutory marital rights of the surviving spouse is evident from a concurrent series of New York cases. These cases sought to differentiate between the surviving spouse's statutory marital rights under Section 18 (the renouncer's share of a testate estate) and those rights under Section 83 (the expectancy of succession in an intestate estate) of the New York Decedent Estate Law. The original thought seems to have been that the statutory right under Section 18 was more closely related to common law dower than was the mere expectancy under Section 83; hence, though, under the Newman holding, a revocable and controllable living trust could not defeat the marital right under Section 18, there was as yet no holding that such a trust could not defeat the marital right under Section 83.

In Murray v. Brooklyn Savings Bank, the surviving spouse, as the administratrix of the deceased spouse, attacked Totten trusts (which had been neither revoked nor completed in the lifetime of the settlor) as illusory in respect to her statutory marital rights under the Newman decision, and demanded that the bank pay the balances to her as administratrix. The lower court held that the Totten trust was directly analogous to the revocable and controllable living trust in the Newman case, so that, while it was not an illusory trust generally, it was illusory as to the statutory right of the surviving spouse under Section 18. The court reasoned that a Totten trust, as to the surviving spouse, is equivalent to a testamentary transfer; this transfer, being in derogation of the statutory marital rights granted under Sec-

tion 18, was forbidden thereby. The New York Appellate Division, First Department, reversed because the plaintiff-spouse was not claiming under Section 18 but rather under Section 83, which section gave to a surviving spouse no preferential status but merely grouped her with all other heirs.\footnote{Murray v. Brooklyn Savings Bank, 258 App. Div. 132, 15 N.Y.S. 2d 915 (1st Dep't, 1939).} Hence, Section 83 conferred no specially protected marital right, but granted merely the same expectancy of intestate succession as was enjoyed by any other heir or next of kin, and no one had suggested that a Totten trust was illusory as to heirs and next of kin generally. The Second Department of the Appellate Division disagreed with this decision of the First Department in \textit{Schnakenberg v. Schnakenberg},\footnote{262 App. Div. 234, 28 N.Y.S. 2d 841 (2d Dep't, 1941).} where the spouse of a testate decedent had no standing under Section 18 because the will had been executed prior to the statutory critical date. The said spouse attacked a revocable and controllable living trust established with the intent to defeat her statutory marital rights. The court held that her rights, though under Section 83, were nevertheless entitled to the same protection against the illusory trust transfers as were the rights under Section 18. In the later case of \textit{Burns v. Turnbull},\footnote{266 App. Div. 779, 41 N.Y.S. 2d 448 (2d Dep't, 1943).} the Second Department of the Appellate Division reaffirmed its \textit{Schnakenberg} decision, and the \textit{Burns} case was then affirmed on appeal to the New York Court of Appeals.\footnote{Burns v. Turnbull, 294 N.Y. 889, 62 N.E. 2d 785 (1945).} Thereupon, the First Department of the Appellate Division agreed that the issue between the Departments had been settled in favor of the Second Department, and, in a 1946 case,\footnote{Marano v. Lo Carro, 62 N.Y.S. 2d 121 (S. Ct., 1946), aff'd without opinion 270 App. Div. 999, 63 N.Y.S. 2d 829 (1st Dep't, 1946).} held that the rights of the surviving spouse under Section 83 were to be protected against an illusory trust transfer. The whole story is skillfully related in the decision of \textit{Steixner v. Bowery Savings Bank}.\footnote{86 N.Y.S. 2d 747 (S. Ct., 1949). See, also, Illusory Transfers in New York, 37 Cornell L. Q. 258 (1951).} There, the court, while upholding the statutory right of the surviving spouse under Section 83 in the face of a Totten trust, pointed out that the marital right granted by the statute is not in or to the deposit balance itself, but rather in or to the intestate estate, for which reason an order on the bank to pay the surviving spouse was erroneous; rather, the order should require the bank to pay the administrator who will then compute the balance as a part of the
ILLINOIS DOWER AND THE "ILLUSORY" TRUST

intestate estate and make a proper accounting as between the surviving spouse and the beneficiary.

HOW THESE DEVICES HAVE FARED IN ILLINOIS

What law there is in Illinois today, in this whole area of the effect of voluntary transfers in trust upon the statutory marital rights under Sections 11 and 16 of the Illinois Probate Act, is in accord with the New York law, including specifically the doctrine of Newman v. Dore. The Illinois cases may be conveniently organized as follows:

(1) The fact that the sole and express purpose of a gratuitous inter vivos transfer is to defeat the statutory marital rights of the surviving spouse is as immaterial in Illinois as it is in New York. In Haskell v. Art Institute of Chicago, the court stated:

The law is well settled that a husband may dispose absolutely of his property during his lifetime even though he intended to deprive his wife of her right to take one-half of such property where she renounces the provisions of the will. If the gift or disposition of the property, however, is but a scheme of the husband to deprive the wife of her property rights, at the same time retaining the benefits of the property himself during his lifetime, the transaction may be set aside. If the title to the paintings passed from the husband to the Art Institute, then, regardless of what his intentions were, there was no fraud practiced on the wife. There can be no fraud where no right of any person is invaded.

(2) The primary test in Illinois of the effectiveness of a voluntary inter vivos transfer to defeat the statutory marital rights of the surviving spouse is the reality of the transfer. But the reality of the transfer is not always sufficient to accomplish the end of defeating the spouse's rights: (a) in Blankenship v. Hall, even though the outright gift inter vivos was real, such gift was ineffective where it was made just before, and in immediate contemplation of, death and involved the transfer of the bulk of the husband's property; (b) dicta in three Illinois cases indicate that a gift causa mortis, though real, would not defeat the surviving spouse in Illinois.

54 Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E. 2d 684 (1945); Padfield v. Padfield, 78 Ill. 16 (1875); Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. 2d 736 (1940).

55 304 Ill. App. 393, 26 N.E. 2d 736 (1940).

56 Ibid., at 398 and 739.

57 Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. 2d 736 (1940).

58 233 Ill. 116, 84 N.E. 192 (1908).

(4) A gift of personal property made by irrevocable living trust defeats the statutory rights of the surviving spouse, exactly as does an outright gift inter vivos, even where the settlor-spouse retains a life income for himself and so makes a beneficial gift of the future interest only in the trust res.

(5) The reservation by the settlor-spouse of the power to revoke the living trust (and of the subsidiary powers to alter and amend the trust) does not make the trust any less a trust, nor does it make the post-mortem provisions of the trust testamentary in nature, even when subsequent creditors of the settlor attack the validity of the trust.

(6) A combination of a reserved life income and a reserved power of revocation in the settlor-spouse does not make the trust any the less a valid trust.

(7) The status of the settlor-spouse as himself the trustee or a co-trustee does not, of itself, destroy the reality of a living trust.

(8) Even a revocable and controllable living trust is nevertheless a real trust and not illusory or testamentary, and Illinois is traditionally very liberal in sustaining the reality of revocable and controllable trusts.

(9) Although the revocable and controllable living trust is a real trust, it is nevertheless ineffective to defeat the statutory marital rights of a surviving spouse under Section 11 of the Probate Act because such a transfer is equivalently testamentary as to the surviving spouse.

No distinction seems to be taken between the rights of the surviving spouse under Sections 11 and 16; but, even if such a distinction were to be taken, any decision protecting the right under Section 11 would be obliged all the more to protect the right under Section 16.

(10) There is no Illinois case dealing with the reality or legal characteristics of a Totten trust. Generally speaking, there are no Totten

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62 Bergman v. Foreman State Trust & Savings Bank, 273 Ill. App. 408 (1934) (wherein the attack on the reality of the trust was made by a surviving spouse on the basis of the contractual right to a fractional share in the estate of the settlor-spouse).

63 Yokem v. Hicks, 93 Ill. App. 667 (1900).

64 Bear v. Millikin Trust Co., 336 Ill. 366, 168 N.E. 349 (1929); Kelly v. Parker, 181 Ill. 49, 54 N.E. 615 (1899).

trusts as such in Illinois, since Illinois banks require a trust agreement to be filed with a trust account or deposit. But Illinois banking practice as to trust savings accounts varies widely, probably because the very absence of litigation permits a wide spread of opinion and because a statute protects the banks themselves. Some Chicago banks accept savings bank deposits which are indistinguishable from a Totten trust, though they are not referred to under that description (e.g., savings account trust established by parents for their own minor children). Other Chicago banks accept savings account trusts which are indistinguishable from Totten trusts, but in which the signature card bears an express trust agreement. In view of the traditionally liberal attitude of Illinois courts as to what constitutes a real trust, and in view of the increasing acceptance of Totten trusts in midwestern states, and in view of the existence in some Chicago banks of trust savings deposits which are indistinguishable from Totten trusts, it seems highly probable that Illinois, in an appropriate case, will adopt the basic Totten trust doctrine. Logically, Illinois should then extend the holding in Smith v. Northern Trust Co. to cover such trusts, exactly as the New York courts extended the Newman holding in the case of Krause v. Krause, unless, by that time, Illinois, still sensitive to the New York influence, shall have decided to follow New York in abandoning the Newman doctrine altogether.

THE NEW YORK ABOUT-FACE

A year ago the New York Court of Appeals, in In re Halpern’s Estate, changed its mind about the Newman doctrine that, in the case of a revocable and controllable living trust, reality was not enough to defeat the statutory marital rights of the surviving spouse. In a case involving Totten trusts (the pluperfect example of the revocable and controllable living trust), the court held instead that reality was not only a sufficient test but was the sole test of the utility of the Totten trust to defeat the statutory marital rights of the surviving spouse under Section 18, even where the trust balances constituted

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67 Smallwood v. Boyd, 237 S.W. 2d 66 (Ky., 1951); Hale v. Hale, 313 Ky. 344, 231 S.W. 2d 2 (1950); Rickel v. Peck, 211 Minn. 576, 2 N.W. 2d 140 (1942); Walso v. Latterner, 140 Minn. 455, 168 N.W. 353 (1918).
68 Note 65 supra.
69 Note 45 supra.
70 303 N.Y. 33, 100 N.E. 2d 120 (1951).
about eighty per cent of the estate of the deceased testator. The court said that the prior New York cases (especially the *Newman, Krause,* and *Burns* decisions) had not held that the trusts there involved were real as a matter of fact but illusory as a matter of law in respect to the statutory marital rights of the surviving spouse; instead, they had held that those particular trusts were *not* real as a matter of fact, and so, of course, did not and could not operate to defeat either the statutory rights of the surviving spouse or the expectancies of the testate or intestate donees, as the case might be. There is, however, nothing illusory about a *Totten trust as such*; unless there is factual evidence of the absence of an intent by the settlor to divest himself of title, the Totten trust is not only real and valid, but also completely effective to vest in the beneficiary the absolute title to the balance in account at the death of the settlor, even as against the opposing claims of the surviving spouse under the statutory rights conferred upon her by Sections 18 or 83. Moreover, there is no power to divide up a valid trust and to call part of it illusory and part of it good; there is only one test for the whole trust and that is its reality; and the result of the application of that test is either the total validity or the total invalidity of the trust in respect of any and all persons whatever.

A concurring opinion agreed that the *Newman* case held that the statutory right of a surviving spouse, under Section 18, could not be defeated by an illusory revocable and controllable inter vivos trust. But no case had treated the issue of the extent to which such an illusory trust should be set aside when attacked by a surviving spouse on the basis of her statutory rights under Sections 18 or 83; however, that issue was not decided in this case because this surviving spouse had no such statutory rights owing to her failure to file a timely election to take as in intestacy, and owing to the fact that this surviving spouse sued, not in the capacity of a surviving spouse, but in the capacity of an executrix.

Realizing that Illinois, in the *Smith* case, has followed the *Newman* doctrine, it behooves the Illinois lawyer to determine how seriously the *Halpern* case should be regarded. Should the *Halpern* case be distinguished from the *Newman* case or should it be accepted literally as overruling the *Newman* doctrine? It would be very easy to distinguish the *Halpern* case on the ground that the surviving spouse in that case had no statutory marital rights to assert against the Totten trust, either because, as the concurring opinion pointed out, no timely election to renounce the will and to take as in intestacy had been
made under the provisions of Section 18, or because, as the majority opinion pointed out, a surviving spouse who is the sole beneficiary under the will of the deceased spouse cannot elect to take as in intestacy under Section 18. Under either view, the surviving spouse in the Halpern case, suing in the capacity of executrix, could assert merely the expectancy of the testamentary donee, which is not analogous, of course, to the specially protected rights of a surviving spouse.

Would it be safe, however, to rely on this facile distinction of the Halpern case? The lower New York courts, in the past year, have cited the Halpern decision in six different cases, three of which are directly in point. In no case has the lower court attempted to distinguish the Halpern decision and to maintain the Newman doctrine; rather, in each case, the court has accepted the Halpern decision as overruling the Newman doctrine and as establishing that a real revocable and controllable trust may not be regarded as illusory, as a matter of law, in respect to the statutory marital rights of the surviving spouse.71

The only real doubt which the Halpern case has created is in respect to one's understanding of the basic nature of a real revocable and controllable trust or a real Totten trust. If, as the Halpern case insists, the Krause case merely held that the Totten trust there involved was not a real Totten trust at all, one wonders in what respect it failed to achieve reality. The court suggested that the settlor could never actually have intended his remote and alien daughter to have the property; but such a flaw in his intent is hardly self-evident and could scarcely have escaped notice all these years. Similarly, if, as the Halpern case insists, the Newman case merely held that the revocable and controllable living trust there involved was not a real trust at all, one wonders wherein it lacked reality. I admit, however, that I have remained doubtful all these years as to the accurate holding of the Newman case on this very point, and I find it impossible to criticize the Halpern resolution of that doubt, except to say that the case, during all these years, was not so understood by the New York lower courts and that the Halpern denial of reality runs counter to the current liberal holdings on that issue.72


my understanding of the Smith decision in Illinois, I think it clear that
the Illinois Supreme Court would find it very simple to disavow the
Smith doctrine and to explain that the case merely held that the
revocable and controllable living trust there involved was not a real
trust at all.

These doubts, however, as to the essential elements of such real
trusts do not appear to have seriously disturbed the lower New York
courts in their application of the new Halpern doctrine. Their tacit
assumption is that neither the Totten trust nor the Newman trust has
changed its elemental spots. Such trusts are still what they always
were, neither more nor less real or illusory than ever, when tested by
the same factual standards. But they can no longer fail, as a matter of
law, to defeat the statutory marital rights of a surviving spouse.

WHAT NOW IN ILLINOIS

What, if anything, may one anticipate that Illinois will do, either
by decision or by statute, about the Smith doctrine? The following
speculative straws lead to the conclusion that Illinois would follow
the Halpern doctrine, disavow the Smith doctrine, and distinguish the
Smith case as one merely holding that a particular revocable and
controllable living trust was not real:

(1) The Smith case expressly followed the Newman case, and the
Newman case has been abandoned by its own authors.

(2) The Newman doctrine has also been rejected (whether by
statute or by case decision) in the majority of states which have
treated the issue. The Newman decision today is the minority posi-
tion; the Halpern decision, which focuses on reality alone and on let-
ting the chips fall where they may, is the currently popular position.

(3) The statutory marital rights of the surviving spouse in Illinois
have been fully equated to mere expectancies, so that the surviving
spouse, under Section 11 or 16 of the Probate Act, is viewed merely
as one of the heirs or next of kin of the deceased spouse, whether
testate or intestate. This concept of the basic nature of the statutory
rights of the surviving spouse makes it difficult to single out the sur-
viving spouse for a special protected status, and requires that the posi-
tion relative to the surviving spouse must be the same as the position
relative to any other heir or next of kin. No one has yet suggested that

73 Harris Trust & Savings Bank v. Jackson, 412 Ill. 261, 106 N.E. 2d 188 (1952)
[citing Dillman v. Dillman, 409 Ill. 494, 100 N.E. 2d 567 (1951); Bundy v. Solon,
384 Ill. 137, 51 N.E. 2d 183 (1943)].
mere expectancies cannot be defeated by inter vivos transfers of any kind.

The sole opposing consideration is that, in Illinois, reality alone has not been sufficient to defeat the statutory rights of the surviving spouse in the instances of the gift causa mortis and of the gift inter vivos made just before, and in contemplation of, imminent death, at least where these gifts transfer the bulk of the estate and are made with the motive of defeating the surviving spouse.

The weight of the straws, therefore, favors the prediction that Illinois courts will continue to follow New York in its rejection of the Newman doctrine in favor of the Halpern position. The legislature is unlikely to intervene in favor of the surviving spouse unless and until experience may reveal that the defeat of the statutory rights of the surviving spouse has been facilitated to a degree involving sound public policy. The Halpern decision itself announced the court’s regret that the deceased spouse would resort to a Totten trust transfer to defeat his surviving spouse; similar legislative regret could be expected to produce some controlling statutes. Until that time, estate planners can be reasonably safe in advising the use of the revocable and controllable living trust as the most painless method of defeating the statutory marital rights of the surviving spouse in Illinois and of restricting her interest to the irreducible minimum of common law dower in realty.