Buffalo Law Review

Volume 1 | Number 1 Article 11

4-1-1951

Wills—Totten Trusts—Distribution of Balance of Deposit After Invasion by Widow

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WILLS — TOTTEN TRUSTS — DISTRIBUTION OF BALANCE OF DEPOSIT AFTER INVASION BY WIDOW

Decedent's will gave everything to his widow, but prior to his death he established four savings bank accounts in his own name in trust for a grandchild, the passbooks being retained by decedent. The widow instituted an action for determination as to whether these accounts were a part of the estate, contending that the transfers were illusory. The Surrogate ruled that the trust accounts (Totten trusts) belonged entirely to the estate and passed *in toto* to the widow under the will. *Held:* decree modified. The Totten trusts are illusory only to the extent that they encroach upon the widow's distributive share under Sections 18 and 83 of the New York Decedent Estate Law. The amount of the deposits is to be added to the value of the rest of the estate to determine the widow's share, and the balance of the trusts remaining after her expectancy is satisfied goes to the beneficiary of the trusts. *Application of Halpern,* 277 App. Div. 525, 100 N. Y. S. 2d 894 (1st Dep't 1950).

It is a generally accepted principle that if the settlor of a trust reserves not only the power to revoke and modify but also the power to deal with the trust property as his own, the intended trust becomes a testamentary disposition and is invalid unless it complies with the Statute of Wills. 1 SCOTT, THE LAW OF TRUSTS 354. An exception to this rule is recognized in New York where the creation of a savings bank deposit in the name of the depositor in trust for the benefit of another, the settlor retaining power to make deposits or withdrawals during his lifetime, results in a tentative trust. Though revocable at will, there is a presumption that an absolute trust was created as to the balance on hand at the death of the depositor. *Matter of Totten,* 179 N. Y. 112, 71 N. E. 748 (1904).

Totten trusts, however, are not fully effective for all purposes. When the depositor dies insolvent, or if the remaining assets of the estate are insufficient to pay the debts, creditors can reach the Totten trust deposit. *Beakes Dairy Co.* v. *Berns,* 128 App. Div. 137, 112 N. Y. Supp. 529 (2d Dep't 1908); *Matter of Weinberg,* 162 Misc. 867, 296 N. Y. Supp. 7 (Surr. Ct. 1937). Similarly, the deposits may be resorted to for the purpose of paying funeral and administration expenses. *Matter of Greniewich,* 243 App. Div. 811, 278 N. Y. Supp. 279 (2d Dep't 1935); *Mann* v. *Shrive,* 111 App. Div. 452, 97 N. Y. Supp. 688 (2d Dep't 1906); *Matter of Reich,* 146 Misc. 616, 262 N. Y. Supp 623 (Surr. Ct. 1933). Any excess however, goes to the trust beneficiary; the presumption of the trust being absolute is rebutted only to the extent necessary to make these payments. *Mann* v. *Shrive* and *Matter of Reich, supra.*

A widow may attack a Totten trust since as to her the transfer is illusory and in contravention of her rights under § 18 of the Decedent Estate Law. *Krause v. Krause,* 285 N. Y. 27, 32 N. E. 2d 779 (1941); *Steixner* v. *Bowery Savings Bank,* 86 N. Y. S. 2d 747 (Sup. Ct. 1949). [Section 18 gives a surviv-

ing spouse a personal right of election against the will, allowing her to take her share of the estate as in intestacy, i.e., as provided by Section 83, but with certain limitations and exceptions, so that her elective share may be somewhat less than she would take in intestacy.]

The ability to invoke § 18 to defeat an illusory trust has been held not to be dependent upon the existence of a will against which the widow could elect to take. *Burns* v. *Turnbull,* 294 N. Y. 889, 62 N. E. 2d 785 (1945); *Schnakenberg* v. *Schnakenberg,* 262 App. Div. 234, 28 N. Y. S. 2d 841 (2d Dep't 1941); *contra: Murray* v. *Brooklyn Savings Bank,* 258 App. Div. 132, 15 N. Y. S. 2d 915 (1st Dep't 1939).

The above decisions lead to the conclusion that Totten trusts in net effect are analogous to testamentary dispositions. The fiction, perhaps induced by a desire for convenience, is evidence of an underlying judicial policy to surmount the obstacles of formality required by the Statute of Wills.

Where the will provides for the widow the minimum statutory benefits required by § 18, she has no right of election. *Newman* v. *Dore,* 275 N. Y. 371, 9 N. E. 2d 966 (1937); *In re Kalina's Will,* 184 Misc. 367, 53 N. Y. S. 2d 775 (Surr. Ct. 1945). But, though possessing no right of election, the widow can maintain an action to set aside illusory transfers. *Newman* v. *Dore.* The grievance of the widow relates not to direct violation of § 18 but to evasion thereof by an apparent but not real reduction of the quantum of the estate. *Schnakenberg* v. *Schnakenberg, supra.*

A re-examination of the meaning of the word "illusory" may be helpful in considering the problems of the present case. This word has at times been used somewhat indiscriminately in the cases, as the decisions already noted may suggest. *Newman* v. *Dore, supra,* is the leading case on illusory trusts; there the testator set up a revocable trust whereby he reserved the right to enjoy all of the income for life and the power to control the trustees as well. Testator's will gave his widow a life income in one third of his estate so that she was barred from an election; but since the trust disposed of all of his property there was no effective provision for her. The court held that the trust failed entirely upon the widow's challenge so that all of the trust corpus was distributed according to the will. The Court of Appeals there determined that the true test of validity is whether the challenged transfer is "real or illusory," in the sense of whether or not the husband in good faith (as regards intent, not motive) *divested* himself of ownership of the property involved. *Krause* v. *Krause, supra,* applied this test to a Totten trust under attack by a widow and reached a similar conclusion: that the Totten trust was illusory because the decedent had not sufficiently divested himself of ownership. The court in the *Krause* case was not faced with the instant problem because the will had not been probated so as to allow final distribution of the estate; but there seems

little doubt that the court would have reached the same result as did the *Newman* case (entire failure of the trust), since the test applied and the reasoning employed were all in terms of failure to divest. In the light of the foregoing discussion, the present decision would seem to be erroneous.

As noted, the theory upon which a spouse challenges doubtful transfers is not that of a direct violation of § 18, rather that the statute has been evaded. That is to say, the spouse invokes the policy of the section. There is some logical inconsistency in relying upon the policy of a statute when the terms thereof preclude its direct application; here, that is, bar an election. *Newman* v. *Dore* allowed the widow to invoke the spirit of the statute when there could be no election, however, as did *Burns* v. *Turnbull* and *Schnakenberg* v. *Schnakenberg,* both *supra.* The present case adds a further logical difficulty; not only was the policy of § 18 invoked when an election was barred by the will leaving everything to the widow, but almost all of the terms of the statute were applied as well. The spouse thus was allowed to invade the trusts but only to the exact extent specified by the statute, just as if there had been an election. It can well be argued, however, that the spouse should be allowed no more than her "property right" (so termed in *Newman* v. *Dore*) which is surely limited as well as contingent; that there is not practical need to give her more than the statute would allow; that the result here is just — compare the position of creditors as regards Totten trusts noted *supra;* and that consideration of logic should hardly be decisive as regards Totten trusts which are anomalous by nature in existing outside the Statute of Wills.

In *Application of Halpern,* the principal case, Totten trusts otherwise valid (i.e., outside the estate) failed only partially upon a widow's attack, while in *Newman* v. *Dore* a trust otherwise valid (expressly so assumed for purposes of the appeal) failed completely. Stated another way, in the *Newman* case the other beneficiaries of the will profited by the widow's challenge, whereas here they would not; here of course there were no beneficiaries except the widow. The *Halpern* decision was and only could be reached by ignoring the basic approach of the *Newman* and *Krause* cases, by disregarding the failure-to-divest criterion. Following that approach to the present result of partial invalidity might have necessitated a discussion in terms of divisible divestment or some such equally implausible fiction. But if the divestment test were employed to invalidate the present trusts completely, it might possibly mean that Totten trusts ultimately are no more secure than "Newman" trusts, which are presumably susceptible to attack ordinarily by persons other than the widow. Rather than suffer a diminution of the Totten magic, the court — by stressing the special nature of Totten trusts, their longstanding sanction by the courts and widespread use — chose to enhance the Totten doctrine and made Totten trusts even more like wills than has been the case hitherto—made them in effect additional "clauses" of the will. This means that the widow's action in such

case becomes much more like an election rather than an action to set aside an "illusory" transfer; it becomes an election in fact for most purposes. But even so, the widow remains excused from the procedural requirements of § 18, that is, from actually filing an election and doing so within six months of probate.

This decision may be termed just, considering the statute very generally. It should not be considered sound since it was made possible by a reading of the authorities, especially *Krause* v. *Krause,* so narrow as to vitiate their spirit. Further, the result was achieved at the expense of additional illogical inroads upon the statutory scheme of testamentary disposition, a course the courts would do well to avoid.

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ADMINISTRATIVE LAW — WORKMEN'S COMPENSATION — "ACCIDENTAL INJURY" AS A QUESTION OF FACT

Decedent steamfitter having a congenial aneurysm of a cerebral artery collapsed immediately after emerging from a boiler which he had been cleaning. The temperature inside the boiler was above normal and the working space limited; the work was such that it had to be performed in twenty to thirty minute relays. Death was caused by rupture of the defective artery and subsequent hemorrhage. The employer contended death was due to a condition, not an accident. *Held:* award of death benefits affirmed; whether an injury was accidental, and thus compensable within the meaning of § 2(7), N. Y. Workmen's Compensation Law, is a question of fact on which the decision of the Workmen's Compensation Board is conclusive. *Broderick* v. *Liebmann Breweries,* 277 App. Div. 422, 100 N. Y. S. 837 (Nov. 1950) [all compensation appeals are handled by the 3d Department.]

In determining the appropriate scope of review for a finding on a mixed issue of law and fact, the court here adopted a fresh approach to compensation appeals, one that emphasizes the administrative law aspect of compensation. Mixed issues have given the courts difficulty because the statutory directives regarding review are predicated on the traditional law/fact clasiification: fact findings of the Board are conclusive on review, but the courts are free to correct errors of law. N. Y. Work. Comp. Law, § 20, see BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK, first volume, p. 347. The substantial evidence test is applied to fact findings, however, so that they are conclusive only if there is substantial evidence to sustain them, and if that is determined the courts will not reweigh the evidence. *Matter of Helfrick* v. *Dahlstrom Metallic Door Co.,* 256 N. Y. 199, 176 N. E. 141 (1931), *aff'd,* 284 U. S. 594 (1931). The law versus fact distinction may be of little use however when the disputed issue is