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COMMENTS
THE ILLUSORY TRUST AND COMMUNITY PROPERTY:
A NEW TWIST TO AN OLD TALE
by W. Richard Jones

It has long been considered desirable, as a matter of policy, to provide a surviving spouse with an interest in the property of a deceased mate. Thus in early common law the concepts of dower and curtesy were developed to provide for the survivor of the marital partnership. More recently, many common law jurisdictions have substituted for these rights a statutory share, which is usually a percentage of the decedent’s property or an allowance for a period of years. This statutory claim is in the nature of an expectancy. There is no limitation on the owner’s ability to deal as he wishes with his property during his lifetime—he can barter, sell, or give it away. Only at death does the survivor’s property interest become sufficiently mature to be asserted, and ownership must be measured at that time.

I. ILLUSORY TRUST DOCTRINE

Since the surviving spouse’s statutory share is usually a percentage of the assets owned by the other spouse at death, this share may be severely reduced in amount by any device which removes property from the decedent’s estate. One such device, and clearly the most popular, is the trust. By its probate-avoidance characteristics a trust provides a potential means of reducing the surviving spouse’s statutory share, and yet can be drafted so that the settlor retains all of the incidents of ownership over the property during his lifetime. The problem presented was vividly portrayed by Judge Kephart of the Pennsylvania Supreme Court:

1 In England the concept of dower, which may be described as essentially a right of the widow to a share (normally one-third) of all realty of which the husband was seized, either at the time of marriage or during marriage, was customary until given a statutory basis in the 1217 addition to the Magna Carta. The concept was abolished by the Administration of Estates Act of 1925, 15 Geo. 5, c. 23. Perhaps the best description can be found in 2 F. Pollock & F. Maitland, The History of English Law 404 (2d ed. 1923).
2 The statutes are collected in 6 R. Powell, Real Property § 970 (1918).
3 Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966, 968-69 (1937) declares: “Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life . . . .”

In other common-law jurisdictions the rule is the same, except that in some the limitation even of the doctrine of illusory trusts is not available: Cherniak v. Home Nat’l Bank & Trust Co., 151 Conn. 367, 198 A.2d 58, 59 (Sup. Ct. Err. 1964), “either spouse may, in his lifetime, without the consent or knowledge of the other, make a valid gift, or otherwise dispose of his property, to a third party.” Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299, 306 (Sup. Jud. Ct. 1945), “In this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife . . . .” Wright v. Holmes, 100 Me. 508, 62 A. 307, 310 (Sup. Jud. Ct. 1905), “the law places no restriction or limitation on the power of the husband to make such disposition by gift, voluntary conveyance or otherwise, of his personal property during his lifetime, as he may wish, even though his wife is thereby deprived of the distributive share therein . . . .” Dickerson’s Appeal, 115 Pa. 198, 8 A. 64, 70 (1887), “Nothing is better settled than the power of a husband to dispose of his personal property in good faith, by gift or otherwise, during coverture . . . .”

In other common-law jurisdictions, however, the rule is not so well settled. In the decision of In re Jeruzal’s Estate, 269 Minn. 183, 130 N.W.2d 473, 480 (1964), for example, the court qualified an earlier statement in Balafas v. Balafas, 263 Minn. 267, 117 N.W.2d 20, 26 (1962), as follows: “there may be circumstances where the transfer to a third party by a spouse will operate as a fraud on the other so that a court of equity will interfere.”
What the husband did in this case was to transfer to a third party, as trustee, personal property. He was to receive the entire income and all benefits from this trust for his life. He had the right to control and manage it in the hands of the trustee. He could change the beneficiaries even to the day of his death. He had the right to revoke the trust and retake physical possession at any time. In other words, his hand never left the property nor its benefits until his death severed the connection. He placed the property in the name of this third party solely to prevent his wife from having any share whatever in it after his death.*

Faced with this problem, many common law jurisdictions have developed a doctrine to limit such trusts and to prevent their use to avoid the spouse's statutory share. The doctrine is often described as the illusory trust doctrine of Newman v. Dore.7

Newman v. Dore was not the first case,* nor even the first New York case,7 to enunciate the doctrine of illusory trusts; but it has become the most famous. The case arose when Ferdinand Straus conveyed all of his property to a trustee, and then died three days later. The trust instrument reserved to Straus the income for life, the power to revoke the trust, and the right to control the trustees.* In addition, the express purpose of the conveyance was to prevent his widow from securing at his death the share of his estate to which she would be entitled by statute.* In holding the transaction illusory and an unlawful invasion of the expectant interest of the wife,10 the New York court enunciated this test and rationale:

Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory. . . . The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer. The 'good faith' required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property . . . .11

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7 375 N.Y. 371, 9 N.E.2d 966 (1937).
6 Walker v. Walker, 66 N.H. 390, 31 A. 14 (1891) enunciated this test at an early period. See also cases cited 9 N.E.2d at 969. The decision of Justice Holmes in Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902), seems to apply a test of whether the transaction was an agency, and not to distinguish between the agency doctrine and the marital property illusory concept. See text accompanying note 16 infra. In the case of Wright v. Holmes, 100 Me. 508, 62 A. 507, 509 (Sup. Jud. Ct. 1901) the court spoke in terms of "fraudulent" and "colorable," but set out this test: "where the transfer is a mere device or contrivance by which the husband, retaining to himself the use and benefit of the property during his life, and not parting with the absolute dominion over it, seeks at his death to deprive his widow of her distributive share . . . ."
8 This case might also have been subject to the objection of testamentary character. See text accompanying note 16 infra.
7 N.Y. Deced. Est. Law § 18 (1930). The same rule may now be found in N.Y. Deced. Est. Law § 18(b) (McKinney Supp. 1963), but it has been significantly modified by the addition of § 18(a).
10 9 N.E.2d at 969.
11 Id. at 968-69.
Newman v. Dore has been followed, approved, cited, distinguished, disavowed, and misunderstood in hundreds of decisions in dozens of jurisdictions. In fact, in New York alone several variations of the doctrine have been applied as the doctrine of Newman v. Dore. In addition, the courts have been less than precise in characterizing this situation. The term “illusory” is often used interchangeably with “testamentary” and “colorable” to explain that a trust is invalid because the settlor has retained too much control over the property. But these terms are in fact not interchangeable. Each should refer to a different rationale and a different test of invalidity. For example, suppose that the settlor reserves a life estate, the power to revoke, to modify, to change trustees, to control the actions of the trustees, to appoint the remainder, and to require invasion of the principal. Litigants—the trustee, the beneficiaries under a will, or the heirs at law of the settlor—may contend that the grantor retained so much control that the trust instrument is nothing more than an agency agreement. Since an agency terminates on the death of the principal, the property cannot pass by the purported trust instrument unless that instrument also happens to comply with the statutory formalities for wills. Invalidity of this trust is predicated upon the rationale that without conforming to the statute regulating testamentary disposition an agency agreement cannot pass property at death. The purported “trust” is testa-

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12 For illustration, compare these definitions: “[I]f the transfer is colorable only and the husband retains the power of revocation, it is fallacious, illusive and deceiving, and will be considered as fraud on the rights of the widow where she is deprived of her distributive share.” Ackers v. First Nat’l Bank, 192 Kan. 339, 387 P.2d 840, 851 (1963), opinion clarified on denial of rehearing, 192 Kan. 471, 389 P.2d 1 (1964). “[I]llusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed.” Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966, 969 (1917). “‘Colorable’ means merely that the conveyance or gift must be one legally binding on the settlor or donor, accomplished in his lifetime, and not testamentary in its effect.” Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299, 306 (Sup. Jud. Ct. 1945). “[I]f the title vests at or following the death of the settlor the trust is a testamentary trust.” Routson v. Hovis, 60 Ohio App. 536, 22 N.E.2d 209, 210 (1938). “The term ‘illusory’ . . . is intended to show that such trusts may not be used as a device to deprive the widow of her distributive share of the property possessed by her husband at the time of his death.” Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944).


14 There seems to be no valid reason to prevent probate of a trust instrument executed with the requisite formalities, except possibly the requirement of publication common to many jurisdictions. See 1 A.W. Scott, The Law of Trusts § 56.7 (2d ed. 1956), where the author states: “If it cannot take effect as a disposition inter vivos because it is intended to take effect on death and is therefore testamentary, it would seem that it should not also fail as a testamentary disposition merely because the grantor did not think of it as such . . . .” See also A.W. Scott, Trusts and the Statute of Wills, 45 Harv. L. Rev. 521, 534 (1930). But even if a testamentary trust is executed with the formalities for a will there may still be extensive problems. Suppose, for example, that there is another will—one may revoke the other. And a difficult problem of incorporation of the two will result. Some of the problems are discussed, inferentially, in Flickinger, The Pour Over Trust and the Wills Statutes: Uneasy Bedfellows, 52 Ky. L.J. 731 (1964).

15 Cf. Restatement (First) of Trusts § 17(2) (1935):

Where the settlor transfers property in trust and reserves not only a beneficial life estate and 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 that the trustee is the agent of the settlor, the disposition so far as it is intended to take effect after his death is testamentary and is invalid unless the requirements of the statutes relating to the validity of wills are complied with.

This provision was expressly revoked by the Restatement (Second) of Trusts § 17 (1957). See the criticism which Scott levels at the Restatement view, in 1 A.W. Scott, The Law of Trusts § 57.2, at 410 (2d ed. 1956).
Suppose, however, that property is conveyed to a trustee by an instrument which on its face appears absolute and irrevocable, completely divesting the settlor of dominion and control. But in fact there is a secret agreement between the settlor and the trustee, whereby the former actually retains the ownership of the property. The purpose of this transaction may be to defeat the claims of creditors, or of the spouse who has a marital interest in the property. Anyone deprived of his interest may seek a judicial declaration of invalidity on the grounds that the transaction is tainted with a fraudulent intent. It is said that the transaction is colorable.  

On the other hand, the invalidity of an illusory trust is not predicated on any doctrine of agency nor on any argument of fraud. It rests on public policy. There is no secret agreement; the retention of power is plain from the face of the instrument. But the retention of power need not be so great as to render the trust a mere agency. Therefore, the trust may be valid as to all the world, complying with all formalities of the trust statutes. But if the surviving spouse challenges the trust the courts will set aside the transaction as to the marital interest therein. Since the doctrine of illusory trusts is predicated upon the marital property rationale, it may be asserted only by the widow or widower who has been deprived of a marital interest. Moreover, the doctrine is limited to the extent of the survivor's interest in the property.

The word 'testamentary' is the appropriate word to use to describe a person's inter vivos transaction relating to his property, when the transaction in question operates to transfer the property to another person only at the transferor's death. In order for such a transfer to be effective to pass the property to the other person, the transferor must, by the law of wills, execute a written document which fulfills the legal requirements for a will. Less precise words, like 'illusory,' 'void,' 'nugatory,' 'invalid,' 'colorable,' etc., are used sometimes to describe a person's inter vivos transaction when the transaction is ruled ineffective to accomplish some result intended by him—whether that result is to pass property at his death (for which, as noted above, 'testamentary' is the more precise word), whether it is to deprive his surviving spouse of her statutory right to elect a fractional share of his estate, or whether it is to immunize the transaction on his death from death taxes or from the claims of creditors. 


See text accompanying notes 24-40 infra. The tests for determining whether a trust is testamentary are not the same as those for determining whether a non-trust conveyance is testamentary. Even if it is valid as against his next of kin or residuary legatees, the widow is entitled to a distributive share of the trust property. A.W. Scott, The Effect of a Power To Revoke a Trust, 57 Harv. L. Rev. 362, 370 (1944). See also cases cited note 22 infra; A.W. Scott, Jr., The Revocable Trust and the Surviving Spouse's Statutory Share in Colorado, 36 Colo. L. Rev. 464, 464-65 (1964).

Smith v. Northern Trust Co., 322 Ill. App. 168, 14 N.E.2d 71 (1944) ("illusory" and "colorable" as to widow's statutory share); Ackers v. First Nat'l Bank, 192 Kan. 319, 387 P.2d 840
generally valid unless it falls under the prohibition of some other rule of invalidity.  

II. APPLICATION OF THE DOCTRINE: A STANDARD OF CONTROL

The major consideration in the application of both agency and the illusory trust doctrines is the amount of control retained by the settlor of the trust. Under the agency doctrine the test is whether the settlor parted with sufficient indicia of ownership so that title actually passed to the trus-

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Notes:

1. Opinion clarified on denial of rehearing, 192 Kan. 471, 389 P. 2d 1 (1964); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. 2d 381, 391 (1944) ("We are of the opinion that a wife's right to elect to take under the laws places her in a higher position than a mere creditor in respect of the personal property in an unrevoked revocable trust."); Harris v. Harris, 147 Ohio St. 437, 72 N.E. 2d 378 (1947) (following Bolles); Routson v. Hovis, 60 Ohio App. 156, 22 N.E. 2d 209 (1938). Bolles and Harris have been expressly overruled, Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E. 2d 60 (1961) and Routson has thereby been overruled by implication. See note 23 infra.

In those jurisdictions where the doctrine of illusory trusts is recognized there is some problem with this concept. In Burns v. Turnbull, 294 N.Y. 889, 62 N.E. 2d 278 (1945) the New York Court of Appeals reversed without opinion a decision of the lower court, Burns v. Turnbull, 37 N.Y.S. 2d 380 (Sup. Ct. 1943) which had misapplied the standards of Neuman v. Dore. The Court of appeals declared the entire trust illusory, not just the share of the surviving spouse. Thus it seems that the New York court was correct in reversing, but misapplied its own doctrine. See 1 A.W. Scott, THE LAW OF TRUSTS § 57.2 (2d ed. 1956). See also City Bank Farmers' Trust Co. v. Charity Organizations Soc'y, 238 App. Div. 720, 265 N.Y.S. 267, aff'd mem., 264 N.Y. 441, 191 N.E. 504 (1934); text accompanying note 71 infra.

The situation in Ohio is often cited as representative of both views. Prior to 1961 the doctrine applied in that state was clearly in line with Neuman v. Dore. In Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. 2d 381, 390 (1944) the court stated: "It is not necessary to hold that the terms and administration of either trust . . . created a mere agency to come to the conclusion that Mr. Bolles during his lifetime had substantial enjoyment and dominion over the [trust property]. . . . Therefore, we are led to the conclusion that as to the widow, [the trusts] were illusory." The court upheld the trust, but allowed the wife to receive therefrom her statutory share. Harris v. Harris, 147 Ohio St. 437, 72 N.E. 2d 378 (1947) followed and clarified the Bolles decision, dwelling on the control retained by the settlor. In Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E. 2d 60 (1961), however, the court overruled both of those decisions, stating, "If the trust was, in reality, 'illusory,' as the court held it to be, then it was not a valid trust, and all of the property in it should have passed to the settlor's administrator or executor." 197 N.E. 2d at 67. In Smyth the court approved and followed the decisions of Cleveland Trust Co. v. White, 134 Ohio St. 1, 17 N.E. 2d 627 (1938) and Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E. 2d 119 (1939). These decisions, however, were concerned with the doctrine of testamentary transfers, and did not involve a challenge by a surviving spouse. During the period between 1944 and 1961 the decisions of the Bolles line and those of the Cleveland Trust Co. line had existed together in apparent harmony.

In Pennsylvania the development was almost the reverse of that in Ohio. In the case of Dickerson's Appeal, 115 Pa. 198, 8 A. 64 (1887), the Pennsylvania Supreme Court upheld a self-declaration of trust against the claims of a surviving spouse: "If the bonds and bank stock in controversy were the subject of valid trusts imposed on them by the testator during his life-time in favor of his children, and so remained until after his decease, they were not his property in his own right at the time of his death, in 1884, and hence appellant, claiming as his widow against the will, has no interest in the securities, or the proceeds thereof." 8 A. at 68. In Beirne v. Continental-Equitable Trust Co., 307 Pa. 570, 161 A. 721 (1932) the court upheld a trust where the settlor reserved extensive powers. A vehement dissent protested that "by the simple expedient of a deed of trust a husband may accomplish that which he cannot do by his will, and may deprive
On the other hand, a trust is illusory, even if actual title has been conveyed, when the settlor retains so much power over the property that as a matter of policy it should be subject to the statutory share of the surviving spouse.\(^\text{24}\) The standards are different because the concepts are unrelated.

**The Control Standard.** It is still not clear what degree of control by the settlor will render a trust illusory. The indicia of ownership and control which can be reserved in a trust are almost endless, and the cumulative effect varies when different combinations of powers are retained. However, some guidelines are available.

Reserved powers may be classified under three broad headings for pur-

\(^{24}\) A.W. Scott, The Law of Trusts § 17.2, at 449-50 (2d ed. 1961). In 1939 the New York Supreme Court, Appellate Division, seemed to equate this with the doctrine of Newman v. Dore, which it cited for the proposition that "the determining factor as to the validity of the trust is the intent with which the settlor transferred the property to the trustee. If illusory, there is no transfer; if made with the intent to transfer the actual title, it is effective." Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S.2d 648, 651 (1939).
poses of analysis: (1) the power of revocation; (2) the beneficial enjoy-
ment of the property and the power to invade the corpus; and (3) the
power to control the acts of the trustee, to appoint a new trustee, or to
serve as trustee.

The Power of Revocation. A settlor may retain the power to revoke a trust,
in whole or in part; a power to modify some or all of the terms of the
trust; or a combination of these powers. No court has held that retention
by the settlor of the power to revoke the trust in whole or in part, stand-
ing alone, renders the trust illusory.26

Beneficial Enjoyment. A settlor may retain a great variety of powers over
the beneficial enjoyment of the trust property. He may possess alone, or in
conjunction with another person, the power to designate or change bene-
ficiaries. He may possess a life interest himself, or the power to invade the
corpus for his benefit. The latter power may be exercisable alone, or in
conjunction with another person, by the settlor in his sole discretion, or
limited by an ascertainable standard. Few cases have determined whether
the reservation of limited powers of beneficial enjoyment, such as a life
estate, will render a trust illusory. In Routson v. Hovis27 the Ohio Court of
Appeals examined a trust in which the reservation was limited to a life
estate. The court held that the trust was non-testamentary, but was illu-
sory as to the wife's statutory rights. This view seems logical, but very
strict; it is clearly a minority view.28

More significant powers designed to affect the beneficial enjoyment are
rarely found in isolation. Instead, it is the usual practice for the settlor
who retains significant beneficial enjoyment in addition to a life interest
to retain also the power to revoke, modify, or change the terms of the
trust. The holding of the New York court in MacGregor v. Fox,29 that
the reservation of the power to revoke plus the power to invade corpus
renders a trust illusory, indicates the probable result where such powers
exist in combination. The decision of In re Pengelly's Estate,30 where the
Pennsylvania court seemed to confuse illusory and "testamentary" trans-
fers, presents a different view: A trust "is not rendered testamentary in
character because the settlor reserves a beneficial life estate, and in addition,
a power to revoke or modify, in whole or part .... Where, however,
settlor, in addition to the reservations above mentioned, reserves the power
to control the trustee as to the administration of the trust, and thus makes
the trustee merely the agent of the settlor, the scheme becomes testamen-
tary ...."31 That trust, it should be noted, was challenged by a widow

26 But see 60 Mich. L. Rev. 1197, 1200 (1962) (suggesting that every revocable trust might
be illusory). In the Colorado decision of Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1951),
there is dicta that a surviving spouse can reach the property if there is a reservation of a power to
revoke, without more. This dicta was disposed of by holding such a trust valid against the widow
28 See note 29 infra, and accompanying text.
(1953).
30 374 Pa. 318, 97 A.2d 844 (1953).
31 97 A.2d at 846.
who alleged a deprivation of her marital share in the trust property. While the decision seems to require more than a life estate plus the power to revoke or to control the trustee in order to render a trust invalid at the behest of a surviving spouse, that decision is clearly distinguishable. First, the statement is dicta—facts supporting such a statement were not before the court. Second, the decision was based on statutory language. Third, the court was faced with the urgent job of changing its own ruling. Nevertheless, Professor Scott takes the same view.

Power To Control the Trustee. Power to control the trustee, to approve investments, to require or prevent sale of assets, or other limited powers over the trustee, are powers which indicate that the settlor is really acting as owner of the property. In addition, the settlor may act as trustee himself, or have the power to remove and appoint trustees at will. Where the reservation of power to control the trustee, regarding investments, for example, is the only power retained, it would be antithetical to general principles of trust law to declare that solely for this reason the trust was illusory.

It seems clear, however, that even a limited power over the actions of the trustee will render an express trust illusory when coupled with both beneficial enjoyment and the power to revoke. In Smith v. Northern Trust Co., a leading case in point, the Illinois Court of Appeals declared that the reservation of the power to prevent sale of trust assets, when coupled with the power to revoke, to alter or amend, and to invade principal, made a trust illusory and invalid as to the widow. Professor Scott also takes this view.

These then are the incidents of control which the settlor may reserve. There is no clear-cut rule for determining whether a particular reservation will make a trust illusory. As the court declared in Newman v. Dore, "We do not attempt now to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than illusory." The approach is ad hoc, but the test under this view of the illusory trust doctrine is solely one of the quantum

82 See note 29 supra, and accompanying text.
85 If a husband, by creating a trust inter vivos and reserving the right to the income during his lifetime and the power to revoke the trust at any time until he dies, can deprive his widow of a share of the property, he is enabled to keep the benefits of the property as long as he lives and yet to deprive her of any interest in it when he dies. Nevertheless, the courts have held that the reservation by the husband of these rights does not entitle the widow to treat the trust property as a part of her husband's estate for the purpose of acquiring a distributive share thereof. It has been so held not only where the husband conveys property to another person as trustee but also where he declares himself trustee.

83 See also In re Pengelly's Estate, 374 Pa. 358, 97 A.2d 844, 846 (1953) which also takes this view.
80 It will be recalled that this is the rule declared by the Restatement (First) of Trusts § 37(2) (1935) as to what constitutes a testamentary transaction. And, Professor Scott's article was written prior to the change in 1957. Under the Restatement view prior to that time the trust under discussion was testamentary—to whether or not it was illusory was of little import.
87 9 N.E.2d at 969.
of ownership retained. In addition to the guidelines developed by the courts, two state legislatures have ventured into the area. In New York the statute provides in part that the reservation of a power of revocation, consumption, disposition, or invasion of the principal will render an express trust illusory.

The guidelines can be summarized as follows: In those jurisdictions where the problem is determined by statute, a power of revocation, a power of consumption of principal, or a power of appointment over the corpus will render a trust invalid as to the surviving spouse. The courts, however, have not been so willing to assert a protective mantle over the wife—the power of revocation and some limited powers of invasion have been upheld. The better view seems to be that any reservation of beneficial enjoyment renders a trust illusory to the extent of that interest. The analogy of the Internal Revenue Code is obvious.

The doctrine of illusory trusts has received other interpretations in many other decisions. In such decisions the major problem has been whether

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38 See, e.g., PA. STAT. ANN. tit. 20, § 301.11 (1950); N.Y. DECD. EST. LAW § 18(a) (McKinney Supp. 1968).
39 But see note 26 supra.
41 Intent, or All Facts and Circumstances Test: The pure ownership rule or control test derived from Newman v. Dore has certain disadvantages because it does not take into consideration the other factors which may be significant in determining whether to emasculate a carefully considered estate plan. Where, for example, a widow is amply provided for by other property, a rule of per se invalidity may be the most desirable, particularly if only small gifts in trust to justifiable recipients are included. Because of this, the ownership test has been modified in some jurisdictions, in one or another manner.

In order to avoid the harshness of the strict control test some jurisdictions employ a much broader rule. The question asked is whether the transaction, as viewed from all the facts and circumstances, indicates a "real" transfer. When this test is used facts outside of the trust instrument having nothing to do with retained control become admissible. In fact, what the courts are determining is the intention of the settlor—did he really intend to make a completed transfer? Under this view all the facts must be looked to, not just the incidents of ownership. The incidents of ownership are important, but are not controlling, and the retention of a small amount of power may make the transfer illusory in some circumstances while the retention of a large amount may be valid in others.

Speaking of the decision in Newman v. Dore, a New York court once declared, "While the court excludes intention to defraud the widow as a criterion of invalidity of the trust, it does not exclude such intention to defraud as a relevant circumstance to be taken into consideration in the process of determining whether the transfer is 'real' or 'illusory.'" Murray v. Brooklyn Sav. Bank, 169 Misc. 1014, 9 N.Y.S.2d 227, 233 (Sup. Ct. Spec. T. 1939). Although this reading of Newman v. Dore seems quite reasonable, the possible intent of the settlor to deprive his wife has been one extrinsic fact which the New York courts have thought relevant in determining trust validity. The intention of the settlor to deprive his wife of her statutory rights is not considered to determine whether there was fraud, but to determine whether the settlor "in good faith intended to divest himself of his ownership of the property." Although the settlor's intention to deprive his widow of a share of the property will not invalidate the trust in the absence of some retained power, such an intent may be considered quite important. Clavin v. Clavin, 41 N.Y.S.2d 377, 379 (Sup. Ct. 1943); Burns v. Turnbull, 266 App. Div. 779, 41 N.Y.S.2d 448 (1943), order clarified, 268 App. Div. 822, 49 N.Y.S.2d 138 (1944), aff'd, 294 N.Y. 889, 62 N.E.2d 785 (1945); Murray v. Brooklyn Sav. Bank, 169 Misc. 1014, 9 N.Y.S.2d 227, 233 (Sup. Ct. Spec. T. 1939); Marine Midland Trust Co. v. Stanford, 216 App. Div. 26, 9 N.Y.S.2d 648, 611 (1939). In one decision the court in New York noted the absence of any evidence of an intent to deprive the wife of her statutory share as an important element in upholding the trust: President & Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S.2d 371, 386 (Sup. Ct. 1939).

Another factor sometimes found significant in determining whether a trust is illusory is the size of the trust estate in relation to the remainder of the decedent's property. 14 N.Y.S.2d at 385-86; Marine Midland Trust Co. v. Stanford, 216 App. Div. 26, 9 N.Y.S.2d 648 (1939) ("In arriving at the intent, the equities between the spouses, as well as their settlements and acts, may be considered.") If the remainder is large, the courts are more inclined to find the trust valid. In addition, the objects of the bounty of the decedent are often significant—a mistress fares far worse
circumstances other than retention of control should be allowed to affect the validity of the trust. For example, is an intent on the part of the settlor to deprive his wife of her statutory rights a factor to be consid-
ern than do children of the spouses.

_Totten Trusts_: Those jurisdictions which recognize the so-called Totten (from the case enunciating their validity in New York, _In re Totten_, 179 N.Y. 112, 71 N.E. 748 (Ct. App. 1904)), or saving bank trust, are faced with an additional problem. The Totten trust represents the re-
servation of every power of ownership that can be retained by the settlor. Under a pure ownership test these trusts are per se illusory. _In re Halpern's Estate_, 103 N.Y. 31, 100 N.E.2d 120 (1951); Murray v. Brooklyn Sav. Bank, 169 Misc. 1014, 9 N.Y.S.2d 227, 234 (Sup. Ct. Spec. T. 1939).

Three views have been advanced in dealing with this troublesome device under the illusory doctrine. The first to be advanced was the Maryland view, an ad hoc balancing of the interests much like that applied in the non-Totten trust situations after Newman. The strict "control" test was modified to consider "all the facts and circumstances."

In Maryland Totten trusts are subject to the survivor's marital interest, but only where there is some additional fact or circumstance which the court can point to as tipping the scales. For example, in Mushaw v. Mushaw, 39 A.2d 465 (Md. Ct. App. 1944), the Maryland Court of Appeals explained: "The salient fact is that the widow is completely stripped of her marital rights in the personal property of her husband. This may be a matter of degree, but it appears to be the only basis on which the decisions can be reconciled." _Id._ at 467-68. This view was followed for a time by the lower courts in New York. As the court explained in Burns v. Turnbull, 266 App. Div. 411 N.Y.S.2d 448 (1973), "In re Halpern's Estate, 103 N.Y. 31, 100 N.E.2d 120 (1951); _aff'd_, 294 N.Y. 889, 62 N.E.2d 285 (1945);

What evidence is required to establish that test [of Newman]? May the Plaintiff rest upon the agreement and its consequences? In other words, should trusts of this kind be rendered illegal because they remove property from the estate taking effect at death? Is intent not to divest oneself of title to be presumed because the settlor of the trust retained control of her property during her lifetime and because the survivor's share was lessened by operation of the trust? 37 N.Y.S.2d at 385. That court concluded that "some evidence in addition to the trust agreement and its legal consequences is necessary . . . ." _Id._ at 387.

Then came the landmark decision of _In re Halpern's Estate_, 303 N.Y. 33, 100 N.E.2d 120 (Ct. App. 1951), _aff'd_ 100 N.Y.S.2d 894 (Sup. Ct. 1950), which established the second rule for dealing with these trusts. In that decision the New York Court of Appeals thoroughly disemboweled _Newman v. Dare_, at least as it had been applied to Totten trusts. _Halpern_ declares that a Totten trust is not illusory unless it is testamentary, _i.e._, unless it is a mere agency as opposed to a trust. In short, every Totten trust in New York is valid under the marital property doctrine unless it is also invalid under some rule regulating general property transfers.

The third view of the illusory character of Totten trusts is that of the _Restatement_ (Sec-

_of Trusts_ § 18 (1957)). In essence the _Restatement_ rule is that the widow will include the amount of the Totten trust in calculating her statutory share, but other assets of the estate will be exhausted to fulfill this statutory obligation before the trust assets will be used. It is based on the rationale that (1) a Totten trust is valid; (2) it cannot deprive the widow of her statutory share; (3) it does represent the desires of the decedent as to the disposition of his property.

_In re Jeruzal's Estate_, 269 Minn. 181, 130 N.W.2d 473 (1964), apparently the only deci-
sion to adopt the _Restatement_ view, the Supreme Court of Minnesota noted this criticism of the Maryland and _Halpern_ views:

We are not satisfied that either the New York rule or Maryland rule should be adopt-
ed. While the Maryland rule is more equitable, it provides no clear standard of application. Under both the New York and Maryland rules, the trust is either good against the spouse or void altogether. We would prefer the _Restatement_ rule, by which the beneficiaries receive what the decedent intended them to have except so far as the trust funds are necessary to satisfy the statutory interest of the spouse after the general assets of the estate have been exhausted.

_130 N.W.2d_ at 481.

_In addition to these tests another has been paid lip service, but in fact never adopted. It might be termed a "net effect" test. The effect concerned with here is the economic effect of the transfer on the wife—does it have the effect of depriving her of a statutory share of the husband's property? Although not applying a strict net effect test, Bolles v. Toledo Trust Co., 144 Ohio St. 191, 57 N.E.2d 381, 384 (1944), set forth the result test in clear terms: "[I]n respect of the husband's intention, if the device resorted to is such as to cut down or deprive the widow of [her statutory rights] such device is voidable when challenged by the widow." The court held the trust "illusory," and defined the term thusly: "The term 'illusory' . . . is intended to show that such trusts may not be used as a device to deprive the widow of her distributive share of the property possessed by her husband at the time of his death." 58 N.E.2d at 390. Another statement of the rule is found in _Clay v. Smith_, 377, 379 (Sup. Ct. 1931), 169 Misc. 1014, 9 N.Y.S.2d 227, 234 (Sup. Ct. Spec. T. 1939). Although the decision was probably not predicated upon such rationale: "[A] man may not, while married, make an illusory trust having the effect in form to divest his wife of her inheritance."
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tered in determining whether a trust is illusory? Is it relevant that a large estate remains outside of the trust and subject to her statutory interest?

In setting aside transactions as illusory the courts have used several different standards for determining invalidity but only rarely has there been an attempt to distinguish among them. In what appears to be the original doctrine of Newman v. Dore, the courts look solely to the transfer instrument to determine the amount of retained control, and from that fact alone decide whether a trust is illusory as to a surviving spouse. The Newman court found that an intent of the settlor to injure his spouse was totally irrelevant to the decision. Intent was declared relevant only in a fraud situation, and in Newman there was no question of fraud because the wife, during her husband’s lifetime, could not be defrauded of an interest which she did not then possess in his property. The test is one of control—does the settlor retain the indicia of ownership? If he does, then the widow is entitled to a share of the property irrespective of ownership for purposes of probate jurisdiction, because it was controlled by the decedent until his death.

Although the Newman court specifically rejected the intent of the settlor as a relevant circumstance in determining the validity of a trust, the language of intent has been used in later cases to illustrate this doctrine, and such language often only clouds the issue. For example, in MacGregor v. Fox a New York court determined that a trust was illusory solely from the fact that the settlor retained the power to revoke plus the power to invade principal. The language of the court is illustrative. Instead of saying that the reservation of these powers indicated that the settlor did not part with sufficient control over her property, the court pointed to these incidents of ownership as facts which “indicated that she intended the agreement to be testamentary in character, effective only upon her death.”

It is submitted that the incidents of ownership can always be pointed to as indicative of such an intent, but that the intent is really not the relevant factor. The retention of control is itself the relevant circumstance, not some intent which can always be inferred from the instrument.

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43 “[I]f his intent is to use an illusory transfer as a means to retain the property but to divest his wife of a share in it, then such intent becomes part of a wrongful fraud.” Clavin v. Clavin, 41 N.Y.S.2d 377, 379 (Sup. Ct. 1943).


45 In Newman the court explained that:

Motive or intent is an unsatisfactory test of the validity of a transfer of property. In most jurisdictions it has been rejected, sometimes for the reason that it would cast doubt upon the validity of all transfers made by a married man outside of the regular course of business; sometimes because it is difficult to find a satisfactory logical foundation for it. Intent may, at times, be relevant in determining whether an act is fraudulent, but there can be no fraud where no right of any person in invaded. . . . Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory.

9 N.E.2d at 968-69.


47 Id.
Conclusion. The complications associated with the doctrine of illusory trusts are enormous. Its independence from other trust doctrines is confused and frequently denied. Its standards are shifting and elusive and many times nonexistent. Nevertheless, the doctrine has much to offer, and the Texas Supreme Court has recently held that it is applicable in this state. The problems associated with the doctrine itself will occupy the courts for some time, and in Texas an additional problem is created by superimposing what is essentially a common law doctrine on a community property system.

III. The Texas Doctrine of Illusory Trusts

Land v. Marshall\(^4^9\) is a Texas marital property trust case—the first case in any community property jurisdiction to adopt the doctrine of illusory trusts.\(^4^9\) In Land the settlor created a revocable *inter vivos* trust, funded with community property, in which he named himself, and thereafter his wife, as lifetime beneficiaries, with remainders over to their grandchildren.\(^4^9\) He retained extensive management power over the trust: to vote trust stock, to invade principal, to require sale, encumbrance, or purchase of assets. The settlor's spouse, who did not join in the transaction, brought suit after his death, alleging that the trust was a fraud on her community interest and an illusory transfer. The supreme court, relying heavily on Newman v. Dore,\(^5^0\) held that the case was governed by the doctrine of illusory trusts. Under this rationale\(^5^0\) the court declared the trust invalid as to the wife's community interest.

In community property jurisdictions\(^5^0\) the husband has extensive powers of management, control, and disposition over the community estate during the existence of the marriage.\(^5^0\) In Texas this power is specified in the newly enacted article 4621, which reads as follows:

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49 426 S.W.2d 841 (Tex. 1968).
48 Hereafter the doctrine applied to protect the spouse's interest has been to determine whether there was actual or constructive fraud on her rights. See note 60 infra. The doctrine of testamentary-agency transactions has been applied in community property jurisdictions. E.g., Nichols v. Emery, 109 Cal. 323, 41 P. 1089 (1891) (beneficial enjoyment plus control held testamentary); Chaison v. Chaison, 114 S.W.2d 961 (Tex. Civ. App. 1941) (trust with reservation of beneficial enjoyment for period of fifteen years held "agency"). The Chaison decision seems to have been severely limited by the decision of Schmidt v. Schmidt, 261 S.W.2d 892 (Tex. Civ. App. 1953), error ref. (reservation of life estate does not render a trust testamentary).
50 This trust might also have been subject to the objection that it was an agency. See note 15 supra. The supreme court, however, effectively avoided ever reaching that question. Declaring that this trust, with one-half of the principal now removed, would not effectuate the intent of the decedent, the court declared that portion invalid also. See text accompanying note 71 infra.
51 275 N.Y. 371, 9 N.E.2d 966 (1937).
52 This provision was somewhat modified during the lifetime of the settlor. A more complete statement of the facts can be found in the opinion of the lower court. Marshall v. Land, 413 S.W.2d 820 (Tex. Civ. App. 1967).
53 This trust might also have been subject to the objection that it was an agency. See note 15 supra. The supreme court, however, effectively avoided ever reaching that question. Declaring that this trust, with one-half of the principal now removed, would not effectuate the intent of the decedent, the court declared that portion invalid also. See text accompanying note 71 infra.
54 The concept of community property is essentially Germanic (Visigothic) in origin, although the women of Athens are said to have had similar rights and privileges. R. Ballinger, Community Property 6 (1891). Transported to Spain during the early part of the fifth century, the concept of marital partnership was first codified in the *Fuero Juzgo* of 693. See generally G. Schmidt, Laws of Spain and Mexico 28 (1811). A compilation of Spanish statutes relating to community property may be found in L. Robbins, Community Laws with Translations of the Commentaries Thereon of Matienzo, Azevedo, Gutierrez 7-8 (1940). See also W. DeFuniak, Community Property (1943).
54 See, e.g., The pre-1913 Texas rule, note 55 infra.
During marriage each spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person, including (but not limited to) his or her personal earnings, the revenues from his or her separate property, the recoveries for personal injuries awarded to him or her, and the increase, mutations and revenues of all property subject to his or her sole management, control and disposition; . . . if community property subject to the sole management, control and disposition of one spouse is mixed or combined with community property subject to the sole management, control and disposition of the other spouse, the mixed or combined community property is subject to the joint management, control and disposition of the spouses unless the spouses provide otherwise; any other community property is subject to the joint management, control and disposition of the husband and wife. 58

58 In the Sixtieth Legislature (1967) extensive revision was made by the passage of S.B. 33, which amended, repealed or replaced, among others, arts. 4610-4627, Tex. Rev. Civ. Stat. Ann. The bill became effective January 1, 1968. Tex. Laws 1968, ch. 309, § 1, at 735. This provision represents a significant change in the powers of management, control and distribution conferred on the husband. Prior to these enactments the husband had extensive powers of management, control and disposition of all of the community property.

In 1840 the Texas Congress provided by statute that Spanish matrimonial property law should remain in effect in this state:

Sec. 3: Be it further enacted, That neither the lands nor slaves which the wife may own, or to which she may have any right, title or claim at the time of her marriage, nor the land nor slaves to which she may acquire, during the coverture, any right, title, or claim, by gift, devise or descent, nor the increase of such slaves in each case, nor the paraphernalia as defined at Common Law, which the wife may have at the time of the marriage, or which she may acquire during the coverture as aforesaid, shall, by virtue of the marriage, become the property of the husband, but shall remain the separate property of the wife; Provided, however, That during the continuance of the marriage, the husband shall have the sole management of such lands and slaves.

Sec. 4. Be it further enacted, That all property which the husband or wife may bring into the marriage except land and slaves and the wife's paraphernalia and all the property acquired during the marriage, except such land or slaves, or their increase, as may be acquired by either party, by gift, devise or descent, and except also the wife's paraphernalia, acquired as aforesaid, and during the time aforesaid, shall be the common property of the husband and wife, and during the coverture may be sold or otherwise disposed of by the husband only.

2 Gammel, Laws of Texas 178 (1840).

In 1913 the legislature conferred on the wife the power to manage, control, and dispose of her separate property, and that portion of the community which derived from her separate property or from her personal earnings. H.B. 22 as enacted provided:

Art. 4621. . . . During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal, and the wife shall have the sole management, control and disposition of her separate property, both real and personal; provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance by the wife of her lands . . .

Art. 4622. All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only, provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest of bonds and notes belonging to her and dividends on stocks owned by her shall be under the control, management and disposition of the wife alone. . . .

Tex. Laws 1913, ch. 32, § 1, at 61.

In 1925 the provision giving the wife management over her personal earnings, the rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her was omitted from the statute.

However, the omission was given no significance in Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950) which gave additional definition to the wife's power over the mutations of the wife's separate property. But cf. Strickland v. Wester, 131 Tex. 23, 112 S.W.2d 1047 (1938); Hawkins v. Britten, 122 Tex. 371, 52 S.W.2d 243 (1932).

Former art. 4619, Tex. Rev. Civ. Stat. Ann., provided: "All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be
Under the new statute the husband possesses vast powers of management over the community because in the normal situation the great majority of the community property will be that which the husband earns. In addition, that part of the community subject to the wife's powers of management now presents her with the opportunity to deprive the husband of his share. The rules relating to the husband's managerial power, which were developed under previous statutes, apparently will apply with equal force to the wife's power to manage her portion of the community.

When interpreting the husband's managerial power, the Texas courts have often declared that he occupies a fiduciary position. But his managerial powers are described in strong terms: "as he sees fit," "final and conclusive," and "absolute." Because of his power to manage the community property, the husband through *inter vivos* transfer is able to effectively deprive the wife of property which she owns and which otherwise would become subject to her exclusive management at his death. This is much like the power of the husband in a common law jurisdiction to deprive his wife of her statutory share.

In community property jurisdictions, and in many common law jurisdictions, the marital property concept used to prevent such action is the doctrine of fraud. This doctrine was expressly rejected in *Newman v.*...
Dore, but many of the cases which purport to follow Newman actually adopt an approach closer to the fraud cases, and look to intent as the standard rather than the amount of control which is retained. If some doctrine other than the strict control test of Newman is applied, the illusory trust doctrine becomes a method for judicial balancing of the equities between the spouses on an ad hoc basis. The fraud test is similar. For example, in Burns v. Turnbull, a New York illusory trust case, the court

part of the husband. 16 Tex. at 666. In Brown v. Brown, 282 S.W. 90, 92 (Tex. Civ. App. 1955), gifts of life insurance premiums totaling almost $3,000 were held not to be "excessive, fraudulent, or capricious" where the community estate totaled $250,000. Where, however, a transaction involves substantially all of the community estate, the courts readily find the existence of actual fraud. Gutheridge v. Gutheridge, 161 S.W. 892 (Tex. Civ. App. 1913) (gift of one-half of total community constitutes fraud). The case of Aaron v. Aaron, 137 S.W. 310 (Tex. Civ. App. 1914) presents an interesting fact situation, but cannot be cited as controlling because of the treatment of life insurance policies by the Texas courts at that time. Here a jury finding of fraud was upheld where the beneficiary on life insurance policies totaling $14,447.69 was changed, when the remainder of the community was $100 plus personal property. The insurance policies in question were originally the separate property of the husband. The jury found that he made a gift thereof to the community by making his wife beneficiary and by using community funds to pay the premiums. Therefore, the act of changing the beneficiary to his mother was held to be fraud on his wife.

The Kentucky decision of Payne v. Tatem, 236 Ky. 106, 33 S.W. 2 (1930) indicates a similar view. "The rule in this state is that, while the wife cannot complain of reasonable gifts or advancements by a husband to his children by a former marriage, yet, if the gifts constitute the principal part of the husband's estate and be made without the wife's knowledge, a presumption or advancements by a husband to his children by a former marriage, yet, if the gifts constitute the principal part of the husband's estate and be made without the wife's knowledge, a presumption of fraud arises ...." 33 S.W. at 3. See also Harrison v. Harrison, 198 Ark. 64, 127 S.W. 270 (1939).

A related factual circumstance bearing on intent is whether or not the object of the gift is a reasonable one. Where children or parents of one spouse are the object, which is the typical case, an intent to defraud is not inferred as easily as where the object is some unrelated third party, especially a paramour. As the court remarked with obvious disapproval in Coss v. Coss, 207 S.W. 270 (Tex. Civ. App. 1921). But cf. Krenz v. Strohmeier, 177 S.W. 178 (Tex. Civ. App. 1915) (father and son collusion held fraud on wife). Contra, Marquis v. Marquis, 178 Misc. 702, 35 N.Y.S. 675 (Sup. Ct 1942) (no relief although there was a paramour). Even where the funds are appropriated to his own use, the courts often find no fraud. Cf. Martin v. McAlister, 94 Tex. 567, 63 S.W. 624 (1901). See also Moore v. Moore, 73 Tex. 382, 11 S.W. 396 (1889); Locke v. Locke, 143 S.W. 637 (Tex. Civ. App. 1940). A.W. Scott, Jr., The Revocable Trust and the Surviving Spouse's Statutory Share in Colorado, 36 Colo. L. Rev. 464, 470 (1964) states "the widow is more apt to win if her husband creates the trust for the benefit of his mistress, than if he does so in favor of his children."

Another related factor in determining fraud is the existence of strained relations between the spouses. Such facts as intent to abandon, harsh words, the existence of a mistress, and pending divorce proceedings are significant as bearing on the intent of the husband.

See supra note 41. Conversely, the Missouri Supreme Court compared the doctrine of Newman v. Dore with the concept of fraud, and determined to reject the former in favor of the latter. Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1110, 130 S.W. 611, 618 (1939): Appellant insists that by the weight of authority the test applied is essentially a test of whether the husband has in good faith divested himself of the ownership of the property ... Appellant cites: Newman v. Dore ... Appellant would have us hold ... that the husband may make a voluntary disposition of his personality during his life even with intent to deprive his wife of dower ... The general rule of law (long in effect in this state) is that a conveyance of property by the husband without consideration and with the intent and purpose to defeat his widow's marital rights in his property, is a fraud upon such widow, and she may sue in her own right, and set aside such fraudulent conveyance ... We adhere to the rule as applied by this court.

Maryland is one of the few states to admit that this is what is in fact occurring. See note 41 supra. See also Burnet v. First Nat'l Bank, 12 Ill. App. 2d 514, 140 N.E. 362 (1957) (widow "estopped" to challenge trust because she was lifetime beneficiary).

held that intense dislike of the wife was a sufficient factor to justify setting a trust aside. Although the court said that the test was the intent of the settlor to divest himself of ownership, it held the trust to be illusory. Patterson v. Patterson, a Kentucky fraud case, held that the fact that the decedent had an intense hatred for the widow did not constitute proof that a gift was made with the intent to defraud. Yet the factor of hatred seems significant only in determining whether the surviving spouse had been treated inequitably.

In Land v. Marshall the court indicated the distinction to be applied in Texas: "In our opinion fraud may be a basis for invalidating a trust; however, the failure of an illusory trust need not rest upon proof of an intent to defraud the wife . . . ". The court set forth the following test for determining illusory transfers: "Did the decedent, by the conveyance in his lifetime, retain such a large interest in the property that, at least as to his wife, his inter vivos trust was illusory?" The court cited the early Texas decision of Crain v. Crain, involving the Texas forced heirship statute. Crain apparently set out a control test:

The language in Land, taken with the court's reliance on Crain, indicates that the Texas Supreme Court adopted the strict control test—that the illusory character of the trust is to be determined from the incidents of control reserved by the settlor, and not from other surrounding facts and circumstances.

The result is that a deprived spouse in Texas now seemingly has two remedies—the older fraud doctrine and the new untested illusory trust doctrine with a strict control test. Any other view would mean that the fraud test was redefined in a new and confusing form.

The Test of Control. If Texas has adopted the control test, what elements will be sufficient to make a trust illusory? While a definitive answer must await future decisions of the court, some guidelines are available. In Land v. Marshall the supreme court expressly declared that the standards for

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64 24 S.W. 880 (Ky. Ct. App. 1894).
65 426 S.W.2d at 846.
66 Id.
67 17 Tex. 81 (1856). See also Epperson v. Mills, 19 Tex. 66 (1857).
68 Id.
69 17 Tex. at 97. See generally Dainow, The Early Sources of Forced Heirship; Its Sources in Texas and Louisiana, 4 LA. L. REV. 42 (1941). The "custom" described by the court is the custom of dividing a decedent's property into three parts, one share for the wife, one for the children, and one for the decedent to dispose of as he desired. See also C. Fifoot, History and Sources of the Common Law 30 (1949).
determining whether a trust is illusory are not the same as the standards for determining whether it is an agency. Noting that the argument of the proponents of the trust was predicated upon cases determining "whether the trustor retained such dominion over the trust property and control of the trustee as to constitute an agency rather than a trust," the court rejected this line of cases as controlling: "In the present case, we deal with a problem created by our community property protection of the wife's distributive share, a factor not present in the cases defendants rely upon. The scheme of our community property law brings additional policy considerations to bear."

The Effect of Being Termed "Illusory." When a trust is declared illusory, the effect is to render it invalid as to the wife's community interest in the property. An interesting twist was added by Land v. Marshall: The court also declared the trust invalid as to the husband's community property because with one-half of the corpus gone, the trust would no longer ef-

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69 426 S.W.2d at 848.
70 The guidelines for determining whether a trust is testamentary may, however, be significant because they represent the outer limit on retention of power. The view of the Restatement (Second) of Trusts § 57(1) (1977), cited in Land v. Marshall, is the majority view of what constitutes a testamentary transfer:

Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.

But compare Restatement (First) of Trusts § 57(2) (1931). And see Ambrosius v. Ambrosius, 239 F. 471 (2d Cir. 1917) (intent of decedent to pass only interest at death); Atlantic Nat'l Bank v. St. Louis Union Trust Co., 357 Mo. 770, 211 S.W.2d 2 (1948) (no trust); Tunnell's Estate, 125 Pa. 154, 190 A. 906 (1937) (self-declaration of trust with reserved life estate and power of control held invalid). Nevertheless, the majority rule is clearly that of the Restatement. See, e.g., Roberts v. Roberts, 286 F.2d 647 (9th Cir. 1961); Nichols v. Emery, 109 Cal. 323, 41 P. 1089 (1897); In re Morrison's Estate, 189 Kan. 704, 371 P.2d 171 (1962); Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956); Smith v. Deshaw, 116 Vt. 441, 78 A.2d 479 (1951). See also A.W. Scott, The Effects of a Power To Revoke a Trust, 57 HARV. L. REV. 362, 368 (1944); A.W. Scott, Trusts and the Statute of Wills, 43 HARV. L. REV. 521, 527-40 (1930).

Moreover, prior Texas decisions adopt a relatively more stringent view of what constitutes a testamentary trust. For example, the reservation of income for a term of years plus the power to revoke was held in one case to make a trust testamentary. Chaison v. Chaison, 154 S.W.2d 961 (Tex. Civ. App. 1941). But considerable doubt is cast on that holding by the decision in Schmidt v. Schmidt, 261 S.W.2d 892 (Tex. Civ. App. 1953), error ref. It is reasonable to assume that any reservation sufficient to invalidate the trust on an agency theory would clearly be sufficient to make the trust illusory. The agency problem can be avoided by having all trust instruments wherein the grantor reserves beneficial enjoyment plus the power to revoke executed with the formalities for wills. But this will not prevent a trust from being declared invalid as illusory.

In addition, the standards for determining whether a trust is illusory are not those used in determining whether an outright inter vivos gift is valid. There is a clear distinction between trust law and the law relating to inter vivos gifts. The court in Land noted "the clear conceptual differences between an inter vivos trust and an inter vivos gift." 426 S.W.2d at 845. The validity of an alleged gift inter vivos is to be determined in Texas by whether the donor intended to presently divest himself of control and dominion over the subject-matter of the gift. See generally Fleck v. Baldwin, 141 Tex. 440, 172 S.W.2d 976, 978 (1943), and cases cited therein.

Texas courts have been quite strict in the application of this standard, and have not looked with favor on inter vivos gifts. The courts often refer to such transactions as "testamentary," but the distinction between an inter vivos trust and an inter vivos gift is significant, and the standards for the former are much less demanding than those for the latter. In common law jurisdictions the illusory doctrine has not been confined to transfers in trust. Instead, outright transfers of beneficial enjoyment, to take effect in the future, transfers creating joint tenancies, and similar transactions have been declared subject to the doctrine and judged by the same standards. In Texas, presumably, the stricter standards will continue to apply to inter vivos gifts.
fectuate the intention of the settlor. This result is justified in light of the fact that the trust was in large measure emasculated by the decision. It is arguable that a trust will never be able to effectuate the intent of the settlor after the wife withdraws one-half of the corpus. Therefore, such a fate for the remaining one-half of the trust property is not unforeseeable.

An illusory trust is not void; it is voidable only at the election of the surviving spouse. Thus the doctrine of the "widow's election" provides a significant analogy because the will in that situation is not void, but only voidable. Under the widow's election doctrine the survivor who elects to take back her own property disposed of in the will in lieu of taking under a will is not entitled to the benefits of the latter. It seems clear that as to the remaining trust property this rule should be applied—the widow should not be entitled to take back her portion of the corpus and still take as a beneficiary of the trust. However, this raises a significant question. If the deceased settlor leaves a will in addition to the trust, is the widow entitled to contest the trust as to her community property and also take a specific bequest under the will? It seems that an election against the trust should be considered an election against the will although it is by no means clear. If the will incorporates the trust by reference this problem should be avoided; in this situation, an election against the trust should be clearly an election against the will.

If there is no will, the wife is ordinarily entitled to an intestate share of her husband's estate. Yet the question remains: Can she take back her share of the community from the trust and still take by intestacy? The widow's election cases indicate that she cannot elect against the will and still take an intestate share of property not included in the will. By analogy the same result should obtain when she contests a trust.

If the surviving spouse elects against the trust, and the entire trust is held invalid, she may thereafter be able to withdraw her share of the community from the trust and take a share of the remainder of the invalid trust by intestacy unless the doctrine of the widow's election is applied. It seems that the rule should be that when the surviving spouse challenges a trust as illusory, an election has been made. If there is a will, both the will and the trust should be considered together as a single instrument. An election against one should be an election against both. If there is no will, the election against the trust should be considered as though it were an election against a will, and the body of precedent applicable to the widow's election should be equally applicable to the illusory trust situation.

IV. Conclusion

The Texas doctrine of illusory trusts is circumscribed by an uncharted periphery. In the opinion of the author the following rules provide a framework for avoiding its pitfalls: (1) the doctrine is predicated upon

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71 426 S.W.2d at 847.
72 See note 28 supra.
75 See Comment, supra note 73. Note, however, that there is no Texas holding directly on point.
a standard of control; (2) the doctrine must be distinguished from the agency and from the colorable transactions; (3) the doctrine will probably not invalidate a revocable trust unless some measure of beneficial enjoyment is retained; (4) the doctrine of the widow's election should provide a sufficient analogy.

The draftsman should take the following steps to avoid having a trust declared illusory: (1) both spouses should, if possible, join in the creation of the trust; (2) the provisions of the trust should be carefully explained to both; (3) the trust should be altered, amended, or revoked only by the spouses acting jointly. A recent article suggests that the draftsman "give the wife the right to elect to withdraw her one-half of the community property upon the death of the husband." It is submitted that such a provision is tantamount to an admission that a given trust is illusory, and it is suggested that such a provision not be included.

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76 Brorby, Pitfalls in Drafting the Revocable Trust in Texas, 31 Texas B.J. 479, 565 (1968).
77 Id.