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Etta Jean Horn v. First Security Bank of Utah Michael Peters, Peggy Peters cunningham, Kayleen Jones and Janice Jones : Brief of Appellant

Utah Supreme Court

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14161

IN THE SUPREME COURT OF THE STATE OF UTAH

ETTA JEAN HORN, Administratrix of the Estate of THRESSA G. JONES, deceased,

Appellant,

vs.

No. 14161

FIRST SECURITY BANK OF UTAH, N.A., a National Banking Association, MICHAEL PETERS, PEGGY PETERS CUNNINGHAM, KAYLEEN JONES and JANICE JONES,

Appellees.

BRIEF OF APPELLANT

Appeal from the Judgment of the
Fourth Judicial District Court
In and for Utah County
The Honorable J. Robert Bullock, Presiding

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BRIEF OF APPELLANT

NATURE OF THE CASE

Appellant, as the administratrix of the Estate of Thressa G. Jones, deceased, seeks a determination by this Court that the revocable inter vivos trust created by Clarence T. Jones on the eve of the marriage between the grantor and Thressa G. Jones constituted a fraud on the marital rights of Thressa G. Jones as the surviving spouse of the grantor or, in the alternative, that the retention of all incidents of ownership by the grantor constituted possession during the marriage of a legal or equitable estate in the real property that constituted a portion of the trust corpus so as to vest in the surviving widow a one-third distributive fee simple interest in said real property pursuant to Section 74-4-3, Utah Code Annotated (1953, as amended).

DISPOSITION OF CASE

The Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable J. Robert Bullock presiding, by Findings of Fact and Conclusion of Law, and Judgment, under date of May 22, 1975 (R. 141-152), held,

> "That the estate of Thressa G. Jones, deceased, has no interest in or to the real property conveyed by Clarence T. Jones, deceased, to the defendant, First Security Bank N.A., and held in trust by said defendant * * * ." (R. 152)

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Judgment of the lower Court and a determination by this Court that Thressa G. Jones, on the death of her husband, Clarence T. Jones, became vested with a one-third in value fee simple interest in the real property held by the trustee during the marriage between the parties pursuant to the terms of the revocable inter vivos trust.

STATEMENT OF FACTS

In March or April of 1961, Dr. Clarence T. Jones became acquainted with Mr. Thomas C. Cuthbert, a trust officer for the First Security Bank of Utah, N.A., relative to the establishment of a trust (T. 94). Pursuant to preliminary conversations, Mr. Cuthbert corresponded to Dr. Jones by letter under date of May 31, 1961 (Ex. 3) outlining various possibilities available to Dr. Jones. Mr. Cuthbert recommended a revocable lifetime trust that would: (1) Retain the possession, right of use,

and enjoyment of all non-income producing assets and tangible personal property in Dr. Jones during his lifetime; (2) pay the income of the trust to Dr. Jones as directed by the grantor; (3) reside in the grantor the right to obtain any of the principal of the trust at any time; and (4) restrict the sale, acquisition or investment of any trust asset without the prior authorization and consent of Dr. Jones (Ex. 3, p. 3). In summarizing this available alternative, Mr. Cuthbert observed:

> "From the foregoing, you can see that, except for the transfer of bear legal title to the assets, your control of your affairs would not be substantially different from that which you now have." (Ex. 3, p. 3) (Emphasis added.)

Mr. Cuthbert also noted:

> "You are also mindful of the possibility that you may remarry sometime in the future and desire to insure that your child and grandchildren be cared for in a manner which would insure that a future wife could not disrupt the program." (Ex. 3, p. 2)

The preliminary discussions and recommendations culminated in the execution between the parties of a Trust Agreement under date of June 23, 1961, (R. 26-41), that required the trustee to pay to Dr. Jones such amounts from the income or principal as Dr. Jones should from time-to-time direct in writing and further provided:

> "IV. RIGHTS RESERVED BY GRANTOR.
>
> A. The grantor expressly reserves the right at any time, and from time-to-time, to amend this agreement in any of its provisions, or to revoke the same in whole or in part, and to free

> any or all of the Trust Estate from the terms of this trust, and to withdraw all or any part of the principal of the Trust Estate by written notice to the Trustee of his election so to do, and demand upon the Trustee to reassign, convey, transfer or deliver [sic] to the Grantor the property so specified.
>
> * * *
>
> C. During the lifetime of the Grantor, the Trustee shall make no sale or other disposition of any property of the Trust Estate, and make no investment of any money held in the Trust Estate except as shall be designated in writing by the Grantor." (R. 26, 27)

By Warranty Deed (Ex. 5) under date of July 14, 1961, the grantor, Dr. Clarence T. Jones, transferred to the First Security Bank of Utah, N.A., as trustee, all of the real property then held by Dr. Jones (T. 109).

An example of the total retention of incidents of ownership over the real property after the same had been transferred by the grantor to the trustee, is a Lease Agreement (Ex. 4) under date of August 1, 1961, between the trustee and one James M. Levie. The agreement provided for a six year lease of one and one-half to two acres of real property that had been previously transferred to the trustee by the grantor and specifically set forth this acknowledgment by the grantor:

> "I, Clarence T. Jones, state that I am the beneficial owner of the premises leased herein, and the Seller referred to in Paragraph No. 3 of this agreement, and hereby agree to all the terms and provisions hereof insofar as they relate to or place any obligation upon me." (Ex. 4, p. 4)

Mr. Cuthbert, as the administrating trust officer, conceded that the grantor retained the free power to revoke, amend, or modify the trust agreement (T. 110, 111); that the grantor could order and direct the trustee to return any and all properties by so designating in writing (T. 111); that any disposition of the trust property, either by sale or lease, required the trustee to gain the grantor's prior permission (T. 111); that investments of any proceeds or income by the trustee required the grantor's prior permission (T. 111); and, that had the grantor elected and demanded the trustee by written notice to reassign, convey, transfer or deliver to the grantor any or all of the property in the trust estate, the trustee would have done so (T. 113).

Mrs. Thressa G. Jones first became acquainted with Dr. Clarence T. Jones at approximately the time the second World War ended (T. 14). After Dr. Jones' daughter passed away and certain grandchildren went to live with him, Dr. Jones asked Mrs. Jones to move into Dr. Jones' residence in American Fork, Utah, and assist the Doctor and his wife in taking care of the grandchildren (T. 17). Mrs. Jones refused this request (T. 17).

Dr. Jones' prior wife died in June of 1960 (T. 20) and Dr. Jones again requested Mrs. Jones to move into his residence (T. 21) and represented that if Mrs. Jones did so and it was agreeable with Mrs. Jones, the two would get married (T. 21). Mrs. Jones did move into the Doctor's residence in July of 1960 (T. 23) and assisted the Doctor with the three

grandchildren (T. 21). In addition, Mrs. Jones performed the housework, cooking and washing chores and also assisted the Doctor in his veterinarian work (T. 22). After moving into the residence, Mrs. Jones repeatedly inquired of Dr. Jones as to when the marriage would take place. Dr. Jones would respond by saying that he had certain business to attend to before the marriage. (T. 30).

In the latter part of November, 1960, Etta Jean Horn, the sole child of Thressa G. Jones, accompanied Dr. Jones on a shopping trip in Salt Lake City, Utah (T. 57). Dr. Jones had asked Mrs. Horn to go with him as he planned to buy Mrs. Jones an engagement and wedding ring (T. 58). A full wedding ring set was purchased by Dr. Jones (T. 59) and Dr. Jones gave Mrs. Jones the engagement ring either for Christmas of 1960 or for her birthday in January of 1961 (T. 59). Mrs. Jones further testified that before her mother went to American Fork to Dr. Jones' residence, her mother assured her that Dr. Jones had agreed that the two would be married within a reasonable length of time (T. 66).

Mrs. Erma Uddy Smith testified that in January of 1961, Mrs. Smith and her husband were at the Jones' residence in American Fork, Utah, and that Mrs. Jones showed her the engagement ring (T. 50). Mrs. Smith further testified that at approximately 4:00 a.m. on November 11, 1961, she and her husband accompanied Mr. and Mrs. Jones to Las Vegas, Nevada, where Mr. and Mrs. Jones were married with Mr. and Mrs. Smith

acting as witnesses (T. 51).

By way of summary, Mrs. Jones initially moved into the American Fork residence in July, 1960 (T. 23); became engaged to Dr. Jones on Christmas, 1960 or her birthday in January, 1961 (T.59); Dr. Jones executed the trust agreement June 23, 1961 (R. 26-41), executed the Warranty Deed on July 14, 1961 (Ex. 5) and the Lease Agreement on the 1st day of August, 1961 (Ex. 4); and, Dr. Jones and Thressa G. Jones were married in Las Vegas, Nevada on the 11th day of November, 1961 (T. 51).

Mrs. Jones did not have any knowledge of the trust prior to the marriage between the parties (T. 24) and even after Mrs. Jones became aware of some arrangement between Dr. Jones and the First Security Bank of Utah, N.A., it was not until after the Doctor's death on the 9th day of August, 1973, that Mrs. Jones discovered that the Doctor's real property holdings had been transferred to the trust (T. 35, 36). The administrating trust officer, Mr. Cuthbert, acknowledged that he did not meet Mrs. Jones at the bank offices until 1964 or 1965 (T. 108) and that Mrs. Jones never actively participated in any conversations between Mr. Cuthbert and Dr. Jones regarding the establishment or management of the subject trust (T. 108).

Clarence T. Jones died on the 9th day of August, 1973 (R. 5), leaving Mrs. Jones as his surviving spouse. The Trust Agreement was in full force and effect during the marriage between the parties and at the time of Dr. Jones' death.

Mrs. Thressa G. Jones died intestate on the 25th day of November, 1974, and on the 24th day of February, 1975, her sole surviving child, Mrs. Etta Jean Horn, was duly appointed administratrix of the estate of Thressa G. Jones, deceased. Accordingly, Etta Jean Horn as the administratrix of the estate of Thressa G. Jones, was substituted as the party-plaintiff by order under date of March 31, 1975 (R. 113, 112).

ARGUMENT

POINT I

BY THE PREMARRIAGE CREATION OF A REVOCABLE INTER VIVOS TRUST THAT INCLUDED RETENTION OF INCIDENTS OF OWNERSHIP OF THE PROPERTY, BOTH REAL AND PERSONAL, THAT CONSTITUTE THE TRUST CORPUS, THE GRANTOR REMAINED POSSESSED DURING THE COURSE OF THE MARRIAGE OF A LEGAL OR EQUITABLE ESTATE IN SAID REAL PROPERTY TO THE EXTENT THAT THE SURVIVING WIDOW WAS VESTED WITH A ONE-THIRD DISTRIBUTIVE SHARE INTEREST IN AND TO SAID REAL PROPERTY.

Section 74-4-3, Utah Code Annotated (1953, as amended) provides in part:

> "One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him * * * ." (Emphasis added)

The nature of the distributive share interest reserved to a surviving widow by Section 74-4-3 Utah Code Annotated (1953, as amended) has been described as an inchoate

right that is contingent on the existence of a valid marriage between the parties and the survival by the wife of the husband. If these two contingencies are satisfied, the interest vests in the wife immediately on the death of the husband. As stated in Gee vs. Baum, 58 Utah 445, 199 Pac. 680 (1921), at 58 Utah 452:

> "While it is true that under our statute dower by that name is abolished and the wife takes one-third of her husbands real estate in fee if she survive him, yet, unless she does survive him, she has no interest in his real estate. The interest of the wife, although in fee, is, nevertheless, a mere inchoate interest, and depends entirely upon the condition that she survive her husband."

Even though the interest of the wife is inchoate and vesting thereof dependent on the occurence of certain contingencies, a husband may not extinguish this right by contract, Kelsey vs. Crowther 7 Utah 519, 27 Pac. 695 (1891); further,

> " * * * A married man shall not devise away from his wife more than two-thirds in value of his legal or equitable estates in real property without her consent in writing." (Section 74-1-1 Utah Code Annotated (1953, as amended)

In Hilton vs. Sloan et al. 37 Utah 359, 108 Pac. 689 (1910), the court stated at 37 Utah 378:

> "We concede that the law favors the dower right, and is tenacious in protecting the wifes right in her husbands estate."

This protection is illustrated by In re Reynolds Estate 90 Utah 415, 62 P. 2d 270 (1936), wherein it was

determined that the surviving wife was entitled to one-third in value of all real property possessed by the husband during the course of the marriage whether the same was mortgaged or free of a mortgage lien. The Utah State Tax Commission had petitioned the court to have the inheritance tax computed on the basis that the surviving widow's one-third interest attached only to the difference between the value of the land and the balance of the outstanding mortgage as of the date of the husband's death. The court stated at 90 Utah 420:

> "When she signs for accommodation purposes, she relinquishes that one-third interest only in case the mortgagee shall require to resort to it for collection. If the mortgage overlaps the one-third interest, i.e., there is a necessity for resorting to more than two-thirds of the proceeds of the property, by her joint signing she consents to that incursion on such one-third of the proceeds."

Even by the execution of the mortgage, the surviving wife's one-third interest could be invaded only if the value of the remaining two-thirds was insufficient to redeem the mortgage.

An attempt to contract by the husband without the concurrence of the wife does not render the contract void but the wife's distributive share interest will be protected as an encumbrance on the property. As stated in McNeill vs. McNeill, et al. 61 Utah 141, 211 Pac. 988 (1922), at 61 Utah 149:

> "If this was a case in which he (husband) held legal title encumbered by an inchoate right of dower even then he (husband) should be required to convey the interest he has in the lands subject to such right of dower."

Once the distributive share interest has vested in the surviving wife, she becomes a tenant in common as to the real property subject only to a proper renunciation of the husband's will pursuant to Section 74-4-4 Utah Code Annotated (1953, as amended). As stated in Free vs. Little, et al. 31 Utah 449, 88 Pac. 407 (1907), 31 Utah 456:

> "When the writing in question was executed, as well as when this action was commenced and the decree entered, Section 2826 giving the wife one-third of the husband's interest in real estate, whether legal or equitable, possessed by him during the marriage, was in full force and effect. This one-third interest she holds as an inchoate right during the life of the husband, and upon his death it passes to her in fee simple. * * * Alice S. Little, the wife, therefore, claiming under the statutes, and no specific devise having been made of this real estate she and her children, immediately upon the death of the husband and father, under the statutes of this state became vested with the legal title as tenants in common; the children as heirs holding the title subject only to the claim of the creditors of the father, while the wife, in view of Section 2826, took her interest in fee simple discharged from all such claims. The husband could not effect the rights of the wife either by an agreement to sell, or by a conveyance made by him alone. The wife and the children, in legal effect, thus were and remained tenants in common, she holding a one-third undivided interest and the children the undivided remainder until such time as the court made distribution * * * ." (Emphasis added)

The preliminary consideration in this proceeding is whether a trust that reserves to the grantor the right to direct the payment of income and principle to the grantor during his lifetime, to amend or revoke the trust in whole or in part, to free the trust corpus from the terms of the trust, withdraw all or any part of the trust corpus, designate in writing the investment, sale or other disposition of any of the trust corpus and otherwise resides in the grantor complete dominion and control over the trust res, is a legal or equitable estate in the real property comprising a portion of the trust corpus. If so, the lower court must be reversed because these incidents of ownership were possessed by the grantor during the marriage to Mrs. Jones and until his death in August of 1973. In Sayre vs. Mohney et al. 30 Or. 238, 47 Pac. 197 (1896), the court stated at 47 Pac. 198:

> "Formerly * * * every estate was legal, in the proper acception of that term: and in the contemplation of law, there is and can be, but one estate, which may properly be denominated 'legal estate.' But the introduction of what were known as 'uses,' and the subsequent origination of trusts, where one party held the title, but upon some trust or confidence for another, early led the courts of chancery to take cognizant of the rights of the beneficiary; and thus there grew up a double ownership of lands thus situated, the interests which were cognizable as such only in court of equity taking the name of 'equitable' to distinguish them from 'legal estates.' "

That portion of Section 74-4-3 Utah Code Annotated (1953, as amended) hereinunder consideration, was originally taken from the state of Iowa (In re Reynolds Estate, 90 Utah 415, 62 Pac. 2d 270 (1936) and it is a familiar rule of statutory construction that the judicial interpretation of the original statute by the state of Iowa should be persuasively considered. 73 Am Jur 2d Statutes, Section 335. In Curtis et al. vs. Reilly et al., 188 Iowa 1217, 177 N.W. 535 (1920), the court stated at 177 N.W. 538:

> "An 'equitable estate' or interest in land is, generally speaking, some definite right or interest in the property such as will furnish ground for equitable relief against a trustee or against any person or persons asserting a hostile right or interest therein." (Emphasis added)

By the clear and unambiguous wording of the subject Trust Agreement, the grantor was entitled the income therefrom, alter, amend or revoke the trust, withdraw any or all of the trust corpus from the operation of the trust and the sale, and investment or other disposition of any of the trust property was subject to the written designation and direction of the grantor. The fact that the only power exercised by the grantor was the receipt of income from the trust is immaterial. As stated by this Court in Leach vs. Anderson, Utah 2d , 535 P. 2d 1241 (1975) at 535 P. 2d at 1243:

> "Whether the trust should be regarded as one created for the use and benefit of the trustor, is to be determined upon what she has a right to take under its terms during her lifetime,

rather than upon what she has actually used therefrom." (Emphasis added)

Had the trustee refused to reassign, convey, tranfer or deliver any property to the grantor after written notice of the grantor's election, the trustee would have been in overt violation of the expressed terms and conditions of the Trust Agreement and appropriate legal proceedings would have been available to the grantor to compel such action by the trustee. The grantor did retain such a right and interest in the subject real property that equitable relief would have been available to the grantor had the trustee not abided by the grantor's direction. Such a protectabel interest is clearly within the definition of "legal or equitable estate" within the context of Section 74-4-3 Utah Code Annotated (1953, as amended).

The second consideration thus becomes the definition of the word "possessed" as the same is used in the subject statute.

The word "possessed" does not refer to physical possession of the real property but, rather, refers to possession of the legal or equitable estate. In O'Conner vs. Halpin, 166 Iowa 101, 147 N.W. 185 (1914), the court considered Section 3366 of the Iowa Code which provides:

> "One-third in value of the legal or equitable estate in real property possessed by the husband at any time during the marriage, which have not been sold on the execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set apart as her property in fee simple, if she survives him."

The court determined that a daughter who had survived the testator father but predeceased her mother, was vested with the remainder of the father's estate subject only to the mother's life estate therein even though the daughter was not entitled to physical possession or right of immediate enjoyment of the real property.

The court stated at 147 N.W. 187:

> "The word 'possessed,' as used in Section 3366, relates to the estate in the property, and not the property itself."

In Clarken vs. Brown, 258 Iowa 18, 137 N.W. 2d 376 (1965) the testator devised a life estate with the remainder to his statutory heirs. The question was when the remainder interest vested because two brothers had predeceased the life estate and their surviving spouses claimed a distributive share in each deceased brother's interest. The court determined that the deceased husbands were "possessed" of the remainder, thus entitling their surviving widows to assert their distributive share interest. See also Hanke vs. Bjorgo, 152 N.W. 2d 262 (Iowa, 1967).

As previously noted, the grantor in this proceeding retained a legally and equitably protectable interest in and to the real property that constituted a portion of the trust corpus. This retention constituted possession of a protectable legal and equitable estate.

The establishment of the trust prior to the marriage of the parties did not defeat appellant's distributive share

interest in the real property that formed a portion of the trust corpus because after the execution of the Trust Agreement the grantor possessed a legally and equitably protectable estate and this possession continued throughout the course of the marriage until the instant of the grantor's death. The grantor never divested himself of this legal and equitable estate and appellant's distributive share interest in and to the real property vested on the grantor's death.

POINT II

THE CREATION OF A REVOCABLE INTER VIVOS TRUST ON THE EVE OF THE MARRIAGE BETWEEN THE GRANTOR AND THRESSA G. JONES CONSTITUTED A FRAUD ON THE SURVIVING SPOUSE'S MARITAL RIGHTS.

The element of fraud required to set aside a conveyance as a fraud on the marital rights of a surviving spouse is not the same as that normally present in situations involving fraudulent misrepresentation. In Wilson vs. Wilson, 32 Utah 169, 89 Pac. 443 (1907), the court stated at 32 Utah 178:

> "The general rule, undoubtedly, is that a voluntary conveyance by either party to a marriage contract of his or her real property made without the knowledge of the other, and on the eve of the marriage, is a fraud upon the marital rights of such other, and that such a conveyance will be treated as fraudulent and void as against the party surprised, and his or her marital rights in the land so conveyed will not be effected thereby. (Daniher v. Daniher, 201 Ill. 489, 63 N.E. 239, and cases there cited.) It is also there stated that some courts have held that the purpose to deceive and defraud the other prospective spouse is imputed to the one who makes the attempted transfer and conceals the fact till after the marriage,

> and that it makes no difference in principal whether actual fraud was intended or not, in support of which is cited Ward v. Ward, 63 Ohio St. 125, 57 N.E. 1095, 51 L.R.A. 858, 81 Am. St. Rep. 621, and Arnegaard v. Arnegaard, 7 N.D. 475, 75 N.W. 797, 41 L.R.A. 258. But it is also there stated that the better rule is, where any such voluntary conveyance is made without the knowledge of the other of such contracting parties, it presents a prima facie case of fraud subject to be explained by the parties interested, and the burden is on the grantee to establish the validity of the deed, in support of which is cited Fennessey v. Fennessey, 84 Ky. 519, 2 S.W. 158, 4 Am. St. Rep. 210; Hamilton v. Smith, 57 Iowa, 15 10 N.W. 276, 42 Am. Rep. 39; Champlin v. Champlin, 16 R. I. 314, 15 Atl. 85."

The evidence is conclusive that the grantor, Dr. Clarence T. Jones, purchased an engagement and wedding ring set while accompanied by Mrs. Jones's daughter in late November, 1960. The engagement ring was given to Mrs. Jones either during the holidays of 1960 or her birthday on January 2, 1961. Prior to their marriage, the grantor had told Mrs. Jones that he had a large farm and chicken ranch (T. 15); that he had certain business to attend to before the marriage (T. 30); and, that the creation of the trust and subsequent transfer of real property thereto was accomplished by Dr. Jones in contemplation of his forthcoming marriage to Thressa G. Jones.

The evidence is clear and convincing that the primary motivation for the establishment of the trust was to avoid the statutory rights of the grantor's anticipated bride while preserving in the grantor all of the incidents of ownership

enjoyed by Dr. Jones prior to the creation of the subject trust.

POINT III

THE TRANSFER OF REAL PROPERTY TO THE SUBJECT TRUST WAS ILLUSORY AND DID NOT OPERATE TO DEPRIVE THRESSA G. JONES OF HER SUBSEQUENTLY VESTED DISTRIBUTIVE SHARE INTEREST.

A proper conveyance of a present interest in real property may not be conditioned or subject to retention by the grantor of a subsequent power of disposition during his lifetime. Where, as here, the grantor retains the absolute power to make a disposition of the real property inconsistent with the terms of the trust, it cannot be said that the grantor in fact transferred anything. In discussing the validity of a deed that did not convey a present interest because it did not become certain and effective until the death of the grantor terminated his right of recall, the court in Thuet vs. Thuet, 128 Colo. 54, 260 P. 2d 604, stated at 260 P. 2d 606:

> "In such case, the delivery would be a mere pretense by which in fact the grantor retained the ownership and power of disposition of the property during his lifetime and sought by means of the deed to give the property to the grantee only upon his death. Hence such purported conveyance would be colorable only and the transfer not real, but illusory."

This same rationale has been applied in instances involving revocable inter vivos trusts whether created before or after a marriage. In Ackers vs. First National Bank of Topeka, 192 Kan. 319, 387 P. 2d 840, the court concluded at 387 P. 2d 851:

> " * * * [t]hat the husband of a nonresident wife may, by absolute sale, gift or other transfer made in good faith during his lifetime, deprive the wife of her distributive share. However, if the transfer is colorable only and the husband retains the power of revocation, it is felacious, elusive, and deceiving, and will be considered as fraud on the rights of the widow where she is deprived of her distributive share."

In Smith vs. Northern Trust Company, 322 Ill. App. 168, 54 N.E. 2d 75 (1944), the court held that the transfer to a trust, although absolute in form, was illusory and void as to the rights of the surviving widow. The court cited Newman vs. Dore, 275 N.Y. 371, 9 N.E. 2d 966, 122 A.L.R. 643, wherein it was stated:

> " ' * * * [grantor] reserved the enjoyment of the entire income as long as he should live, and a right to revoke the trust at his will, and in general the powers granted to the trustees were in terms made 'subject to the settlor's control during his life,' and could be exercised 'in such manner only as the settlor shall from time to time direct in writing.' Thus, by the trust agreement which transferred to the trustee the settlor's entire property, the settlor reserved substantially the same rights to enjoy and control the disposition of the property as he previously had possessed, and the inference is inescapable that the trust agreements were executed by the settlor, as the court has found, 'with the intention and for the purpose of diminishing his estate and thereby to reduce in amount the share' of his wife in his estate upon his death and as a 'contrivance to depirve * * * his widow of any right in and to his property upon his death.' "

The court further observed at 54 N.E. 2d 78:

> "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. In no jurisdiction has a transfer in trust been upheld where the conveyance is intended only to cover up the fact that the husband is retaining full control of the property though in form he has parted with it." (Emphasis added)

The court further discussed and cited with approval the case of Martin vs. Martin, 282 Ky. 411, 138 S.W. 2d 509 as follows:

" * * * [t]he surviving wife sought to reach the unexpended part of approximately $30,000 deposited in several banks to the credit of her deceased husband and by him transferred to his sister several weeks before his marriage with plaintiff; it appeared that the sister expended no part of the money for her own uses, but gave to her brother in his lifetime such sums as he requested. The transfer was held invalid as to the wife, and the court said (419, 420 of 282 Ky., 514 of 138 S.W. 2d): 'It must be conceded that the decided weight of authority is that an absolute bonafide gift of personalty by a man contemplating marriage with a woman, or even by a husband during his life, is not a fraud on the marital rights of the wife, or intended wife, even though made with the intention and purpose of depriving her of the right of sharing in such property. [Citing cases.] This rule is generally stated with the qualification that if a transfer by a husband be colorable merely, that is, a mere device by which the husband does not part with absolute dominion over the property, it will be considered a fraud on the wife's marital rights, and it is also generally held that a gift causa mortis by a husband to a third person is a fraud on the wife's marital rights, where the gift is made to prevent her sharing in the property, since the gift does not take effect until the death of the donor'." (54 N.E. 2d at 78) (Emphasis added.)

The court concluded at 54 N.E. 2d 78:

"Here the trust estate constituted all of the husband's estate, except his pensions;

> he reserved for himself all of the income from the trust and the right, in event of illness or changed business conditions, to request of the trustee enough of the principal of the trust estate to maintain him in the manner in which he was accustomed to live; under the terms of the agreement by which the settlor reserved the right to revoke, alter or amend the trust agreement, any request by the settlor for any part of the principal would be equivalent to a command, which the trustee could not disobey except at the risk of having the trust terminated; the trust agreement expressly reserved to the settlor a veto over the sale, disposition or investment of trust assets by the trustee, and the right to revoke, alter or amend the trust agreement gave the settlor power to direct and control any change in the securities or any investment of trust funds; hence, as in the case as heretofore discussed, the transfer of title to the trustee, although absolute in form, was merely colorable and illusory. It was therefore invalid as to plaintiff, who is entitled to a widow's award and to one-third of the estate of her deceased husband . . . ." (Emphasis added.)

In Land vs. Marshall, 426 S.W. 2d 841, the court adopted the proposition that, " * * * [t]he failure of an illusory trust need not rest upon proof of an intent to defraud the wife." (426 S.W. 2d at 848) The court further stated the true test as:

> "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?" (426 S.W. 2d at 848)

In Comments Edward A. Smith, 44 Mich. L. Rev. 151, it is stated at page 152:

"The courts have been very watchful, however, to see that such transfers are made in good faith. The doctrine of 'fraud on the marital right' developed early. The rule is usually stated that if a man conveys his real property on the eve of marriage with the intent of depriving his wife of dower therein, she is entitled to dower as if the deed had not been made."

The Comment further distinguished between trusts that are avoided on the ground that they are illusory as stated in Newman vs. Dore, supra, and those avoided on grounds involving an improper intent to the effect that they are "colorable." The distinction between the two was admittedly "arbitrary" with the term "colorable" indicating, " * * * [a] transfer which may be absolute on its face, but which, actually, is not a transfer at all because, through some secret or tacit understanding, the parties intended that ownership is to be retained by the donor." (At page 153)

In discussing Newman vs. Dore, supra, it is stated:

"The court specifically rejected all theories of intent and fraud, and held that the only sound test was whether the husband had in good faith divested himself of ownership of his property or had made an illusory transfer.

* * *

"Evidently the court did not mean 'colorable' when it used the term 'illusory.' Nor did it mean to include any element of bad motive or intent to defraud the wife; though it would seem that it was unfortunate to include the phrase 'in good faith' in its explanation of the term. The test which the court was laying down, at least if we are to interpret it in the light of subsequent New York's decisions was this: Did the decedent, by the conveyance in his lifetime, retain such a large interest in the property that, at

transfer was illusory' Or to use the phrase of Mr. Justice Holmes, quoted by the court from Leonard vs. Leonard, can we say that 'from the technical point of view such a conveyance does not take back all that it gives, but practically it does?'" (At pages 154, 155) (Emphasis added.)

The Comment concludes:

"To draw some conclusions from our study it would seem first, that substantially all of the recent case cite Newman v. Door and at least consider the doctrine it sets forth. A great majority of these follow it in general principle; some give it a modified application. (At page 159)

"What have we then which we can call a basic principle that will give coordination to our thinking and lend a degree of harmony to the decisions? Only the bare fundamental principle of Newman v. Dore that the test is whether the settlor intended to divest himself of his property or whether he intended only to cover up the fact that he was retaining full control. (Emphasis added)

"You may feel that this conclusion merely brings us back to our starting point; but we must keep in mind that the intent by which we test the transfers is not the 'intent to defraud' of the earlier decisions, but an intent to retain, or part with, the ownership of the property in question. If arriving at the end of our discussion with the rule of intent seems somewhat dissappointing, we must remember that we have not only rule of intent, but a rule of intent with guideposts." (At page 162)

The totality of the evidence overwhelmingly establishes that the grantor, Dr. Clarence T. Jones, created a trust and transferred real property thereto but nothing really happened. By any standard or legal theory, the trust was illusory to the extent that it attempted to deprive Thressa G.

Jones of her marital rights. This charade by the grantor should not be sanctioned or condoned by this Court.

POINT IV

A REVOCABLE INTER VIVOS TRUST RETAINING ALL INCIDENTS OF OWNERSHIP IN THE GRANTOR MAY NOT DEFEAT THE DESIGNED STATUTORY POLICY ESTABLISHED TO PROTECT A SURVIVING SPOUSE.

Section 74-1-1, Utah Code Annotated (1953, as amended), provides in part:

> " * * * [t]hat a married man shall not devise away from his wife more than two-thirds in value of his legal or equitable estates in real property without her consent in writing."

The intestate succession statute provides in part:

> "If the decedent leaves a surviving husband or wife, and only one child or the issue of one child, in equal shares to the surviving husband or wife, and child or issue of such child; if the decedent leaves a surviving husband or wife, and more than one child living or one child living and the issue of one or more deceased children, one-third to the surviving husband or wife, and a remainder in equal shares to his children and to the issue of any deceased child by right of representation; but if there is no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the decedents are in the same degree of kindred to the decedent, they share equally, otherwise they take by right of representation. The share in the legal and equitable estates in real property of which an intestate husband dies possessed, secured by this section to his widow, shall not be additional to the interest to such estate provided for her in Section 74-3-3. (74-4-5, Utah Code Annotated, (1953, as amended) (Emphasis added.)

The clear purpose of the statutory scheme above noted is to provide for a surviving widow by prohibiting a married man from devising away from his wife more than two-thirds of his estate in real property and protecting the widow in the event the husband dies intestate. The question thus becomes whether a husband through the guise of a revocable inter vivos trust that retains all incidents of ownership created prior to but in contemplation and on the eve of the marriage, may accomplish what he would otherwise be statutorily prohibited from attempting.

In Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E. 2d 465 (1973), a surviving husband was allowed to claim a one-third distributive share interest in eight savings account trust (Totten Trusts) created by his deceased wife. The court recognized 301 N.E. 2d 466:

> "In Petralia (In re Estate of Petralia, 32 Ill. 2d 134, 204 N.E. 2d 1 (1965)) we held that if the settlor is also the trustee and retains complete control over the account during his or her lifetime, such a savings account is not different in substance from other revocable inter vivos trusts, which this court has found to be valid . . . ."
>
> The court further stated the issue to be:
>
> " * * * [w]hether such a trust is valid for every purpose, and particularly whether it is effective to defeat a surviving spouse's statutory share in the estate of his deceased spouse, and his right to a widower's award." (301 N.E. 2d 466)

The court then discussed the expressed policy of The Probate Act in protecting the expectancy which a sur-

viving spouse may anticipate from the others estate. It was recognized that, "[s]ome cases suggest that the answer should depend upon the intent of the deceased spouse in creating the trust." (301 N.E. 2d 466) However, it was further recognized that the difficulties and infirmities in determining the intent of a decedent were readily apparent. It was then recognized that the settlor, during her lifetime:

> " * * * [r]etained absolute, unqualified control over the bank accounts, and possessed and exercised all incidents of complete ownership, including the right to receive interest payable thereon and withdraw the principal thereof." (301 N.E. 2d 467)

The court concluded at 301 N.E. 2d 467:

> "Under these circumstances, the expressed statutory policy of protecting a surviving spouses' statutory share in the estate should prevail, regardless of the intent of the deceased spouse in creating the savings-account trust."

In I A Scott, Law of Trusts, Supplement, Section 57.5 (3d ed. 1967) it is stated at pages 36, 37:

> "The statutes enacted in most of the states giving a forced share of the estate of the deceased spouse to the surviving spouse are quite recent. In New York, for example, the statutes so providing was annexed in 1929. The courts generally have taken a strict view of the statutes, applying them only to dispositions made by the will of the deceased spouse. They were generally worded as allowing the surviving spouse an election to take against the will of the deceased spouse. But it seems clear that the deceased spouse should not be permitted to evade the policy underlying the statutes by making dispositions inter vivos in which he retained the advantages

> of ownership up to the time of his death, as in the case of a revocable trust. Such a disposition is not, as we have seen, invalid as a testamentary disposition not complying the requirements of the Statute of Wills. But it is sufficiently like a testamentary disposition so that it should be subject to the rights of the surviving spouse." (Emphasis added.)

Whether considered as an element in determining the intent of the grantor or independently to render a trust illusory, the main thread tying all of the decisions together is the consideration of the nature and extent of the power, control and dominion over the trust corpus retained by the grantor. Where the retention of control is as complete as in this Trust Agreement, it matters little whether it be termed evidence of the grantor's fraudulent intent, sufficient in and of itself to render the trust illusory or contrary to the policy underlying the statutory scheme of providing for and protecting the interest of a surviving spouse.

An analogous situation was recently considered by this Court in Leach vs. Anderson, supra, wherein a spendthrift trust was invalidated as against a judgment creditor. This Court recognized that Section 25-1-11 Utah Code Annotated (1953, as amended) precluded a conveyance in trust for the use of the trustor as against existing or subsequent creditors and stated at 535 P. 2d at 1243:

> "That a trustor can deal generally with his property as he desires we have no doubt; and this includes placing it in an irrevocable trust, beyond his own

> power to reclaim, or to sell or alienate it; and may include a so-called 'spendthrift trust' provision to safeguard against improvident dissipation thereof. But as the trust may affect third parties, the situation is different. The intent and the effect of the statute is to prevent a person from using a trust as a devise by which he can retain for himself and enjoy substantially all of the advantages of ownership and at the same time place it beyond the legitimate claims of his creditors. (Emphasis added.)

Although a distributive share interest is inchoate, the same does vest in favor of the surviving spouse on the death of the husband and the same policy that protects subsequent creditors from a debtor insulating his assets while enjoying the benefits thereof should also protect a surviving spouse. The end result should be the same, to-wit: that the transfer of real property to a revocable inter vivos trust wherein all of the incidents of ownership are retained by the grantor will not operate to defeat the statutorily protected distributive share interest of the surviving spouse.

CONCLUSION

Appellant respectfully submits that the Findings of Fact and Conclusions of Law, and the Judgment of the lower court are clearly erroneous and not supported by the record herein. Accordingly, appellant is entitled to a reversal thereof with a direction from this Court that Judgment be entered in favor of appellant awarding appellant a fee simple interest in one-third in value of all real property held by

the trustee at any time from the creation of the trust until the death of the trustor.

DATED this 20th day of August, 1975.

Respectfully submitted,

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