

# Joint Bank Accounts as a Fraud on the Marital Rights of the Surviving Spouse - Whittington v. Whittington

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Estates and Trusts Commons](#)

---

### Recommended Citation

*Joint Bank Accounts as a Fraud on the Marital Rights of the Surviving Spouse - Whittington v. Whittington*, 15 Md. L. Rev. 176 (1955)  
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol15/iss2/7>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

---

**JOINT BANK ACCOUNTS AS A FRAUD ON  
THE MARITAL RIGHTS OF THE  
SURVIVING SPOUSE**

*Whittington v. Whittington*<sup>1</sup>

Bessie E. Whittington and Luther E. Whittington were married November 20, 1935, both parties having been previously married, and their respective children of the former marriages were also married at this time. The parties lived together happily on a farm for 16 years until the death of Mr. Whittington on July 18, 1951. In May 1950, the deceased, who owned another farm, wanted to sell it, but his wife was unwilling to release her dower rights, contending that they should maintain a reserve for old age as the de-

---

<sup>1</sup> 106 A. 2d 72 (Md., 1954).

ceased had previously given his two sons various sums of money. Later the wife, upon the promise of her husband that she would receive  $\frac{1}{3}$  of the proceeds derived from the sale, consented to the sale, and she received the sum of \$2,000.00 which sum was deposited by her in a joint account with the deceased. The deceased, on June 13, 1950, took \$598.50 from an individual account along with the balance of the proceeds from the sale of the farm and deposited the fund equally in two joint bank accounts with his two sons, each account contained \$3,479.57. There were no additions to or withdrawals from the funds during Mr. Whittington's life. On September 8, 1950, Mr. Whittington took \$10,000 from an individual account and caused it to be placed in two more joint accounts with his two sons, and this left a balance of \$9,000.00 in the individual account. The deceased retained control and possession of all four pass books during his life time.

The widow, on the death of her husband, received \$1,500 from an insurance policy, and she also received the \$2,000.00 that she had deposited in a previously mentioned joint account with her deceased husband. The deceased's will was executed July 15, 1946, and was admitted to probate. By his will, a daughter was devised an 88 acre farm absolutely and the home farm was devised to a nephew upon condition that he pay unto testator's widow \$1,000 annually and allow her to live in the home. The residue of the estate went absolutely to the two sons equally. The two farms were appraised at \$13,200.00 and the personal estate at \$12,016.45. The widow renounced under the will and received  $\frac{1}{3}$  of the net estate. The total amount received by the widow was approximately \$12,000, \$8,300 of which she derived from the husband's estate, \$2,000.00 from the sale of the farm and \$1,500.00 from a policy of life insurance. The widow filed a bill of complaint in the Circuit Court for Prince George's County asking the court to either impose a constructive trust on the four savings accounts or decree that the assets in the joint accounts be declared part of the deceased's estate. The lower court denied relief holding that the four joint accounts were not a fraud on her marital rights.<sup>2</sup>

The particular problem presented in this case is whether "the act of creating a tentative trust of personal property

---

<sup>2</sup> There is also a problem in the case as to whether the execution of the joint accounts was valid, but the court held that all of the tentative trusts were validly executed without much difficulty by relying upon the *Mil-holland-Whalen* cases, 89 Md. 199, 43 A. 45 (1899) and 89 Md. 212, 43 A. 43 (1899).

enuring to the benefit of two sons by a previous marriage is a fraud on the marital rights of the second wife, gained under the statutory heirship provisions?" A definition of a tentative trust, also known as a "Totten Trust"<sup>3</sup> is an act "whereby depositor opens savings account in trust for named person, reserving right of revocation, depositor is both settlor and trustee, retains enjoyment of the entire income for life, may revoke the deposit by notifying the depository or withdrawing funds and can control his own actions as trustee".<sup>4</sup> The case at hand concerns itself with a conflict in two different policies of the law; namely the free alienation of personalty by the husband during his life and the protection of the wife's statutory heirship. The Court of Appeals in this case affirmed the lower court and held there was no fraud on the surviving spouse's marital rights. There are a number of factors to be considered in such a problem, but the Court relied strongly on the fact that the widow was not stripped of all property, and was left with reasonable means of support even though she was deprived of approximately forty per cent of what she otherwise would have received.<sup>5</sup>

The Maryland Court of Appeals in *Allender v. Allender*<sup>6</sup> said:

"The doctrine of fraud on marital rights represents an effort to balance the social and practical undesirability of restricting the free alienation of personal property against the desire to protect the legal share of a spouse. It has always been recognized that a husband, in the absence of statutory regulation like that

<sup>3</sup> 42 WORDS AND PHRASES (1952), 153.

<sup>4</sup> *Ibid.*, 154, citing *Murray v. Brooklyn Savings Bank*, 169 Misc. 1014, 9 N. Y. S. 2d 227, 232 (1939). See also: RESTATEMENT OF TRUSTS (1935), Sec. 58:

"Tentative Trust of Savings Deposit.

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

There is no distinction between free share account in building association and savings account in bank as respects creation of trusts. *Bireau v. Bohemian Building Loan and Savings Ass'n.*, 109 A. 2d 120 (Md., 1954).

<sup>5</sup> This decision is in line with the weight of authority in the United States; see 64 A. L. R. 467. The case is also in conformity with other Maryland cases as analyzed in Sykes, *Inter Vivos Transfers in Violation of the Rights of Surviving Spouses*, 10 Md. L. Rev. 1 (1949).

<sup>6</sup> 199 Md. 541, 550, 87 A. 2d 608 (1952), noted in 14 Md. L. Rev. 350 (1954), dealing for the most part with a different aspect of the case. Italics supplied.

in the case of dower, has an unqualified right to give away his personal property during his life time even though the effect is to deprive the wife of her statutory share. But if the gift is not absolute and unconditional and the donor retains dominion and control over the property during his lifetime, the courts have held that the gift, is colorable and *may be set aside.*"

The facts of the *Allender* case were that the deceased husband during his life had added the names of two sons by a previous marriage to the registry for access to his safe deposit box, and had stocks transferred from his name individually to his name and one of his children using the terms "jointly and to survivor". The husband died intestate and if the widow could have defeated the transfers, she would have gained only \$3,000.00. Also in that case the deceased had exercised considerable dominion and control over the stock by voting and collecting the dividends, but it was held this did not invalidate the transfers as being a fraud on the marital rights of the wife. In the *Whittington* case the widow only stood to gain approximately \$5,700.00 if the joint bank accounts had been set aside and was substantially well taken care of otherwise.

In another leading case, *Sturgis v. Citizens National Bank*,<sup>7</sup> the facts were that the husband and wife had been married for many years and then were estranged for 10 years. Later they were reconciled, living together for 5 years until the husband's death. There were no children or descendants involved, but the beneficiary was a grand-niece of the deceased. The widow was to receive  $\frac{1}{3}$  of \$40,000 to \$50,000 over and above the bank accounts in question and the court held that there was no fraud. Again it is apparent that the widow was adequately provided for.

But the leading case of *Mushaw v. Mushaw*,<sup>8</sup> holds that there was a fraud on marital rights of the wife where the husband died leaving almost all his property in four tentative trusts for his four children by a previous marriage. He left no estate except \$90.00 in the bank, some shares of stock and a bond worth \$100.00, a house and lot where he resided, and some personal effects. In this case the widow was virtually stripped of all property and the court rightly held that this was a fraud on her marital rights.

By its very nature the test as to whether a gift is absolute and unconditional will vary in different situations, and

---

<sup>7</sup> 152 Md. 654, 137 A. 378 (1927).

<sup>8</sup> 183 Md. 511, 39 A. 2d 465 (1944).

the Court of Appeals has recognized that the test for determining the existence of such fraud is a matter of degree.<sup>9</sup> Such a test is not a sound one when dealing with tangible property rights.<sup>10</sup> It has been held in Maryland that even if the widow shows that the tentative trust was created for the expressed purpose and intent of defeating her statutory heirship, this in and of itself is not sufficient to make the widow's case conclusive as to the existence of a fraud on the widow's marital rights.<sup>11</sup>

A glance at the historical background may throw some light on the development of the above rules. Throughout the history of the common law, society has sought to protect widows from husbands that have attempted by means of a will or otherwise to deprive the surviving spouse of her rightful share in their property. The law says that a husband must provide reasonable support for his wife during his life. Can he deprive her of such support after death? In the days of the common law, when land was such an important essential to the economic structure and man's wealth was determined by land, the law gave the widow dower rights in the land held by her husband to protect her. Later as the importance of land decreased in relationship to other material goods, many states passed statutes giving the widow statutory heirship in both personalty and realty. This was done in order that the widow would receive a sufficient share in her husband's estate to take care of her economic needs and thus not become a public charge on the state.<sup>12</sup> Several states, including Maryland, have enacted election statutes whereby if the widow is not satisfied with the provisions made for her in her husband's will she can renounce under the will and take her statutory share.<sup>13</sup> But in order for statutory heirship to accomplish the intended result, there must be something in the estate left by the husband.

Thus, a loophole in the legislative scheme has been found by the creation of tentative trusts. Where the hus-

---

<sup>9</sup> *Ibid.*, 517: "This may be a matter of degree, but it appears to be the only basis upon which the decisions can be reconciled."

<sup>10</sup> In *Allender v. Allender*, *supra*, n. 6, 549, it was said:

"It must be admitted, however, that the test of degree does not commend itself as a legal criterion."

<sup>11</sup> *Sturgis v. Citizens National Bank*, *supra*, n. 7, 660; *Poole v. Poole*, 129 Md. 387, 99 A. 551 (1916); *Whitehill v. Theiss*, 161 Md. 657, 158 A. 347 (1932). See also 64 A. L. R. 466.

For the minority rule, see: 64 A. L. R. 492.

<sup>12</sup> It is submitted that no equity court would allow the husband to completely strip the widow of all property, so that she would become a public charge, by use of a tentative trust. *Mushaw v. Mushaw*, *supra*, n. 8.

<sup>13</sup> Md. Code (1951), Art. 93, Sec. 325.

band does not have his wealth in land, dower is of no benefit to the widow; and where through the use of a tentative trust he does not hold it in such a manner that it will go into his estate, statutory heirship is of no benefit to the widow. He employs a bank account trust and names someone other than his wife as beneficiary, and on his death the proceeds of the tentative trust pass to the named beneficiary and not to his estate. The cases having shown how very difficult it is for the widow to have a court of equity set aside a tentative trust, it is suggested that if the policy of the law is to protect the interests of surviving spouses the legislature could enact legislation whereby the entire balance left in a tentative trust by the husband at the time of his death would become a part of his estate for the purpose of increasing the statutory share of the surviving spouse. The balance after the widow has received her share should go to the named beneficiary and the fund should not remain in the estate for other purposes. The law does not want to hinder the free alienation of personalty because trade and commerce are too dependent upon its free and unlimited alienability. The tentative trusts have also been found to be a good method for the handling of small estates, so no ban is advocated upon their further creation. Inheritance tax statutes treat tentative trusts as part of the decedent's estate for statutory heirship purposes.

Pennsylvania has recognized the foregoing problem and has enacted a statute treating a tentative trust as part of the husband's estate as to statutory heirship.<sup>14</sup> Actually the Pennsylvania statute deals with problems other than tentative trusts by providing that the statute shall apply to powers of appointment retained by the donor of such a power; it also applies if the person has a right to consume the principal of a fund. In conclusion, it is suggested that consideration might well be given by the Maryland Legislature to the enactment of similar legislation to provide for the widow of a deceased husband who has part of his property in one or more tentative trusts.

---

<sup>14</sup> Purdon Penna. Statutes (1950), Title 20, Sec. 301.11 — Powers of Appointment — Rights of surviving spouse:

"A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor."

1947, April 24, P. L. 100 Sec. 11.