

1961

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Recommended Citation

Henry T. Lowe, *Transfers in Fraud of Marital Rights*, 26 MO. L. REV. (1961)
Available at: <https://scholarship.law.missouri.edu/mlr/vol26/iss1/6>

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TRANSFERS IN FRAUD OF MARITAL RIGHTS

HENRY T. LOWE*

INTRODUCTION

For reasons which are well known and need no repetition here, the widow¹ has always enjoyed a special status in our legal system. Preeminent among the special rights afforded her are those she may assert against the property of her husband. Historically, by far the most important of these was her right of dower in real property.² Recently, however, her rights with respect to her husband's personal property have become increasingly important, a development which reflects the fact that a greater portion of the total wealth is now represented by personal property than ever before. In most of the states the widow is given a right to an absolute share in case of intestacy³ and a right to elect to take an absolute share in the event she is not satisfied with the provision made for her in the will.⁴ Usually, she is also entitled to receive outright certain so-called exempt property⁵ and an allowance to provide for her needs and those of her children during the period of administration.⁶ Frequently she also is given a homestead right;⁷ traditionally a right relating to real property,⁸ now this right is sometimes fixed in monetary terms and may be satisfied by transfers of personal property.⁹

These rights—and the list above is not exhaustive—have received the

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1. Throughout this article reference is made to the widow or wife for convenience in discussion and because the problems discussed here arise more often where the wife is the survivor. Many of the basic marital rights afforded to the widow are also given to the widower.

2. The basic definition of common law dower is the estate which a widow enjoyed for her life, in one-third of the lands and tenements of which her husband had been seized solely and beneficially at any time during the marriage, in fee simple and fee tail, to which issue of the marriage, if any, might by a possibility have succeeded. 1 AMERICAN LAW OF PROPERTY § 5.1 (Casner ed. 1952).

3. ATKINSON, WILLS § 20 (1937).

4. *Ibid.*; Phelps, *The Widow's Right of Election in the Estate of Her Husband*, 37 MICH. L. REV. 236, 401 (1938).

5. ATKINSON, WILLS § 48 (1937).

6. *Ibid.*

7. *Ibid.*

8. 1 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 2, §§ 5.75, 5.76, 5.114.

9. See, *e.g.*, § 474.290, RSMo 1957 Supp.

now familiar name of "marital rights." In Missouri, like most states, these rights have been spelled out carefully in legislation which dates back to the earliest territorial legislatures.¹⁰ And, as one would expect, the marital rights afforded by Missouri law today differ materially from those of the earlier period. Dower has been abolished;¹¹ the elective forced share has been given primary importance;¹² the right to exempt property and the family allowance have been enlarged significantly;¹³ and the homestead allowance, with no reference to occupancy of realty, is drafted in terms of a proportion of the estate not to exceed a fixed dollar amount.¹⁴

Most lawyers are familiar with the basic law, the rights the widow has and the manner in which they are asserted; and it is not the purpose of this article to discuss the basic provisions¹⁵—either the advisability of the current legislative scheme or the technical problems which may inhere in the particular provisions. Rather it is the purpose here to discuss in some detail one particular aspect of the law of marital rights, namely the extent to which under Missouri law a husband during his lifetime may transfer his separate property, by outright gift or otherwise, free of the marital rights of his wife.

At the outset the problem should be placed in its historical perspective. Before 1955 the Supreme Court of Missouri over a long period of time had developed a rule that transfers "in fraud of the marital rights" of the widow could be set aside to the extent necessary to protect the widow's rights.¹⁶ Usually the suit was commenced after the husband's death, but in a proper case relief was available to the wife even while the hus-

10. For the earliest enactments see Act July 4, 1807, 1 Mo. Terr. Laws 1815, at 128 (dower, intestate distribution); Act January 21, 1815, 1 Mo. Terr. Laws 1815, at 410, § 45 (exempt property and family allowance). The first homestead law was not enacted until 1863, Mo. Laws 1863, at 21; see Young, *Homestead—Effect of Remarriage By Widow*, 6 Mo. L. REV. 80 (1941).

11. § 474.110, RSMo 1957 Supp. The legislation extends to both dower and curtesy, but preserves any estate vested under the prior law. For comment on this section see Dribben, *Dower, Homestead Estate, Homestead Allowance, and Release of Marital Rights Under the New Missouri Probate Code*, 21 Mo. L. REV. 151 (1956).

12. § 474.160, RSMo 1957 Supp.

13. §§ 474.250-260, RSMo 1957 Supp.

14. § 474.290, RSMo 1957 Supp. Homestead as an exemption still exists, § 513.475, RSMo 1949, and the wife must join in a conveyance.

15. The basic provisions are discussed at some length in MISSOURI ESTATE ADMINISTRATION 249-266 (Mo. Bar CLE, 1960).

16. The cases are discussed in detail later in the article. The rule was first announced by the court in *Davis v. Davis*, 5 Mo. 183 (1838).

band lived.¹⁷ In 1955 the new probate code¹⁸ was enacted; it represents a comprehensive revision of the entire subject of probate law and includes many significant substantive changes,¹⁹ not the least of which was the abolition of dower.²⁰ One of the acknowledged sources²¹ of the new probate law was the Model Probate Code.²² Section 33 of the model code, incorporated in the Missouri code in slightly modified form,²³ deals specifically with the problem considered here by providing that any gift "in fraud of the marital rights of the surviving spouse to share in his estate" may be set aside. The similarity between the wording of the statute and the rule developed by the court raises one of the significant questions to be discussed here, i.e., did the General Assembly intend to make significant substantive changes in the rule relating to inter vivos transfers as developed in the preexisting case law or did it intend to codify the existing rule? One difficulty with this question is that there seems to be no general agreement about what the old law was, particularly in the most sensitive area of all, the revocable inter vivos investment trust created by the husband during marriage. As the subsequent discussion will show, some commentators

17. *Smith v. Holdoway Constr. Co.*, 344 Mo. 862, 129 S.W.2d 894 (1939); *Kober v. Kober*, 324 Mo. 379, 23 S.W.2d 149 (1929).

18. C. 472-475, RSMo 1957 Supp.

19. In addition to the discussion in *MISSOURI ESTATE ADMINISTRATION*, *op. cit. supra* note 15, several articles have discussed major changes incorporated in the new code: Shewmaker, *A New Probate Code*, 94 TRUSTS & ESTATES 1016 (1955); Summers, *The Proposed Probate Code for Missouri*, 20 MO. L. REV. 123 (1955); Welch, *New Probate Code*, 11 J. Mo. B. 145 (1955).

20. See statute cited note 11 *supra*.

21. Senate Concurrent Resolution No. 9, 67th General Assembly, provided for the creation of the Probate Laws Revision Committee for the purpose of making a study and submitting to the General Assembly a general revision of the laws relating to probate of estates of decedents and incompetents. The final report of this committee included a bill which, with some amendments, was later enacted into law. In its report, *Final Report of the Joint Probate Laws Revision Committee to the Sixty-Eighth General Assembly* (1955), the committee pointed out that the proposed code was primarily a revision and restatement of existing statute and case law but also stated:

In formulating the proposed Code, however, the committee considered the provisions of the Model Probate Code as well as the recently adopted probate laws of Arkansas, Florida, Illinois, Indiana, Kansas, Michigan and other states. . . . (p. VIII)

22. The model code was prepared by a committee of the American Bar Association in cooperation with the Research Staff of the University of Michigan Law School. It is published in *SIMES, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE* (1946).

23. The report of the Probate Laws Revision Committee makes it clear that section 251 of its bill is from section 33 of the model code. *Final Report of the Joint Probate Laws Revision Comm.*, *supra* note 21, at 148. The differences between section 33 of the model code and its Missouri counterpart, § 474.150, RSMo 1957 Supp., will be discussed at a later point.

have read the cases to mean that any donative transfer of personal property made by a husband with the intent to reduce the share his wife would ultimately take was vulnerable to her attack; others have read the cases to mean that the husband had almost complete freedom to dispose of his personal property during his lifetime free of any claims of the wife, the principal limitation being that he could not do so in immediate contemplation of death with the intention of defeating the wife's rights which would otherwise attach.

Even though the 1955 legislation abolished dower in real property, the principal problem, now as before, relates to dispositions of personal property. The reason for this is that the wording of the Missouri statute precludes, as a practical matter, a conveyance of land without the wife's joinder.²⁴ And so the discussion to follow will emphasize the practical aspect of the problem—inter vivos dispositions of personalty by the husband either outright or in trust where the wife has not joined. These are matters in which every lawyer who does any estate planning should be vitally interested, for no matter how carefully prepared the plan may be the entire effort may be wasted if the widow has substantial property rights which she may assert against the transferee.

CASE LAW BEFORE THE NEW CODE

Before the enactment of the 1955 probate code the Supreme Court of Missouri had developed a rule with respect to transfers in fraud of marital rights. The common cases involved (1) transfers of property on the eve of marriage, referred to here as transfers in contemplation of marriage, (2) transfers during marriage not in contemplation of death and (3) transfers in view of impending death, referred to here as transfers in contemplation of death.

In some instances the husband transferred the property outright; in others he reserved a life estate, either legal or equitable; and often where the transfer was made in trust, in addition to reserving a life estate, he also reserved a power to revoke and perhaps also a power to control the trustee with respect to the administration of the property, particularly the

24. § 474.150(2), RSMo 1957 Supp., provides that any conveyance of real estate by a married person without the joinder or other written assent of his spouse is deemed to be in fraud of the marital rights of the spouse unless the contrary is shown. A conveyance of the homestead is still null and void without the wife's joinder. § 513.475, RSMo 1949.

investment and reinvestment of the principal and accumulated income. For convenience the cases will be discussed under the headings mentioned above, and since revocable transfers in trust are so common and since the principal uncertainties of the old law have arisen in the trust cases, these decisions will be discussed separately.

1. *Transfers in Contemplation of Marriage*

In a number of decisions the court has recognized that a donative transfer by the husband on the eve of marriage may be set aside by the wife. Here, as in the contemplation of death cases, the basis of the wife's case is fraud; she must establish that the husband in making the transfer was motivated primarily by a desire to prevent her from acquiring rights in his property. Usually the right the wife acquired on marriage was inchoate dower in the husband's real property.

*Hach v. Rollins*²⁵ is apparently the first contemplation of marriage case to be decided by the Supreme Court. There, not only did the wife (21 years of age) know of the property (the "homestead") before the marriage, it also appeared she was induced in part to marry the husband (67 years of age) on the strength of his representations that she would own the property on his death. A conveyance by the husband to his daughters by a previous marriage approximately five months before marriage was set aside after the husband's death almost twenty years later. The wife occupied the property with her husband throughout his lifetime and though she learned of the deed before his death, he assured her it amounted to nothing. Moreover the grantees asserted no ownership rights during his lifetime, although they also occupied a portion of the property. In its opinion the court reviewed at some length the authorities from England and other jurisdictions, which clearly supported the rule adopted by the court.²⁶

Interestingly, and contrary to what one might suppose, the wife's rights apparently do not depend on whether she knows of the existence of the property before the marriage. In *Hach v. Rollins* the court is careful to point this out,²⁷ even though the wife had made a very strong case for reliance on the strength of the husband's representations.

25. 158 Mo. 182, 59 S.W. 232 (1900).

26. In England the protection afforded to the wife came to be known as the custom of London. The custom is discussed in MACDONALD, *FRAUD ON THE WIDOW'S SHARE*, ch. 5 (1960).

27. 158 Mo. at 187, 188; 59 S.W. at 234. Apparently this was also true under the custom of London. See *Goddard v. Snow*, 1 Rus. 485, 38 Eng. Rep. 187 (1826).

The wife was also successful in subsequent cases²⁸ where the transfer on the eve of marriage was substantial in relation to the husband's entire estate.

The significance of the amount of the property transferred is shown in *Kinne v. Webb*,²⁹ a decision by the Court of Appeals for the Eighth Circuit, based on Missouri law. The husband on the day before his marriage conveyed certain property to a child of a previous marriage, avowedly for the purpose of making the same provision for that child as he had previously made for another. The court accepted this explanation and concluded the gift was reasonable in view of the amount and value of the property the husband owned. Unable to establish a fraudulent intent, the wife failed in her suit.

The *Kinne* case is unusual in that one element of the plaintiff's case, contemplation of marriage, was clearly established. Usually this is not the situation, and the court is able to justify a decision in favor of the transferee on the basis that both of the elements, fraud and contemplation of marriage, are lacking. Thus in *Noe v. Noe*³⁰ the husband, before he met the wife and three years before their marriage, executed the deed in question and handed it to his attorney with instructions to deliver it to his son upon the husband's death. Under the deed the husband reserved a life estate with remainder in fee to the son. The court concluded that the delivery of the deed to the attorney was sufficient to effect a gift; it followed that the transfer was neither in contemplation of marriage nor fraudulent as to the wife.

Similarly in *Loe v. Downing*³¹ the husband and his first wife in October 1933 conveyed certain property to the husband's nephew and his wife; apparently one reason for this was to put the property beyond the reach of the husband's creditors. The first wife died in December 1933 and a little over a year later the husband married his second wife, the unsuccessful plaintiff. Since the conveyance was made at a time when the husband was

28. *Weller v. Collier*, 199 S.W. 974 (Mo. 1918), a transfer of a farm sixteen days before marriage, apparently the principal asset in the estate; *Vordick v. Kirsch*, 216 S.W. 519 (Mo. 1919), a transfer of at least eight-tenths of the estate approximately two weeks before marriage; *Breshears v. Breshears*, 360 Mo. 1057, 232 S.W.2d 460 (1950), a transfer five days before marriage of the remainder interest in the "homestead."

29. 54 Fed. 34 (8th Cir. 1893).

30. 359 Mo. 867, 224 S.W.2d 77 (1949).

31. 325 S.W.2d 479 (Mo. 1959).

already married, it could not be in contemplation of marriage and a fortiori the husband could have no fraudulent intent as to the plaintiff.³²

2. *Transfers During Marriage—Not in Contemplation of Death*

Before the new probate code the court often stated that the husband during marriage has an unfettered power of disposition over his personal property. For example in *Grecehus v. Horst*³³ the court said:

By the laws of this state the widow is endowed in the personal property of the husband, but she is endowed in such personal property only as he owned at the time of his death. Until then he may dispose of such property without her consent, freed from any claim for dower. He cannot by will, however, deprive her of her dower in the personal property, nor can he defeat her dower therein by resorting to a deed or other contrivance which is testamentary in its character.³⁴

Nevertheless in other cases the court has seen fit to set aside at the instance of the wife certain transfers by the husband during marriage which obviously were not in contemplation of death. The basis for these decisions is fraud, and often the court has spoken in terms of fraud on marital rights. However it would appear that in most of these cases the concept of fraud is different in kind from the doctrine which has been developed in the contemplation of marriage and contemplation of death cases where fraud is a state of mind. In these cases the fraud involved is not a state of mind, but rather a misrepresentation by the husband to the wife, a failure to disclose to her certain facts causing her to forfeit or release valuable property rights which she has or may have, or some other commonly recognized ground. Thus fraud in these cases is more like the traditional concept so pervasive throughout the body of the law.

In *Bitzenburg v. Bitzenburg*³⁵ the husband had represented to his wife that certain papers he asked her to sign would have the effect of transferring the title of certain realty owned solely by the husband to their joint names. In fact the papers the wife signed were a note and deed of trust to the property in favor of the husband's sister. Since no consideration passed from the sister the court quite properly affirmed a decree in favor of the

32. The same result was reached on similar facts in *Donaldson v. Donaldson*, 249 Mo. 228, 155 S.W. 791 (1913) (en banc).

33. 89 Mo. 356, 14 S.W. 510 (1886).

34. 89 Mo. at 358, 14 S.W. at 511.

35. 360 Mo. 70, 226 S.W.2d 1017 (1950).

wife cancelling the note and deed of trust. Here, because of the marital relationship, the husband was under a duty to disclose fully and accurately to the wife the significance of the documents he asked her to sign.

The court in *Resch v. Rowland*³⁶ reached the same result as in the *Bitzenburg* case. Here the husband induced his wife to join with him in conveying certain real property owned by the husband in order to raise money to buy a new piece of property; he represented to her that title to the new piece would be taken in his name. Instead the husband had the title to the new piece taken in the name of a straw party who in turn conveyed the property to the husband's children subject to a life estate in the husband.

The wife was also successful in *Hart v. Parrish*.³⁷ But here the transfer by the husband was involuntary; real property owned by the husband and worth approximately \$3500 was sold under a sheriff's deed at a tax foreclosure sale for \$37.50. The court concluded that this amount was so grossly inadequate as to amount to fraud and set the conveyance aside. Again the decision does not rest on any ground peculiar to marital rights; traditionally equity has intervened in cases like this where the consideration is grossly inadequate.³⁸

The decisions in *Bitzenburg*, *Resch*, and *Hart* do not require the application of any doctrine peculiar to the field of marital rights; under the traditional concepts of fraud they are clearly sound. This is not true, however, of the decision of the court in *Headington v. Woodward*,³⁹ where the traditional approach is clearly inadequate to support the decision.

In *Headington v. Woodward*, one of the few cases where the husband is the complaining party, the marriage occurred in 1871, and the spouses lived together until the death of the wife in 1914. In 1910 the wife, then owner of certain unimproved lots, quitclaimed the property to her nephews and asked that neither of the deeds be recorded during her lifetime, a request which apparently was honored. After the conveyance the wife remained in possession of the property and the husband expended some time and money in caring for the property until her death. The husband,

36. 257 S.W.2d 621 (Mo. 1953).

37. 244 S.W.2d 105 (Mo. 1951).

38. Gross inadequacy of price is a recognized ground for attacking a tax foreclosure sale. *Adams v. Smith*, 360 Mo. 1082, 232 S.W.2d 482 (1950); *Moore v. Brigman*, 198 S.W.2d 857 (Mo. 1947); *Bussen Realty Co. v. Benson*, 159 S.W.2d 813 (Mo. 1942) (en banc).

39. 214 S.W. 963 (Mo. 1919).

claiming an undivided one-half interest in each of the lots as heir,⁴⁰ was successful in having the deeds set aside on the ground the conveyances were in fraud of marital rights. Although at the time of the transfers the wife was advanced in years (approximately 70 years of age) the court does not even suggest, much less base its decision on, a finding that the transfers were made in contemplation of death. Indeed, the fact the wife lived four years after the conveyances points to the unlikelihood of any support for such a finding. Where is the fraud? For one thing the wife expressed her wish to defeat her husband's rights in conversations with her attorney. But apparently even more important than this was the fact she never told her husband of the conveyances and expressly asked the grantees not to record. The key to the decision seems to lie in this one sentence: "The lack of courage to submit a matter involving mutual interest to mutual consideration is an index to the state of mind of the grantor to which the maxim that secrecy is a badge of fraud has peculiar application."⁴¹

One cannot help but wonder in the *Headington* case what has happened to the oft-reiterated maxim that a married man has complete power of disposition of his separate property (subject to dower in the case of real property), and further what the result might have been had the wife disclosed the fact to the husband when the deeds were delivered.

Clearly the fraud present in *Bitzenburg*, *Resch* and *Hart* is a bird of a different feather than that present in *Headington*. Considered most favorably the decision in *Headington* stands like the star in Keats' incomparable sonnet "in lone splendor, hung aloft the night";⁴² in its least favorable light the decision ignored precedent and added an element of uncertainty to an area of the law badly in need of clarity and definition.

The court has denied relief in cases where there was no fraud in the traditional sense or no evidence to support a finding that the transfer was in contemplation of death.

One of the leading cases, *Crecehivus v. Horst*,⁴³ involved a situation where the husband and wife had separated but were not divorced. The husband

40. Frequently under the old law it was more advantageous for a surviving spouse to renounce dower and elect to take an intestate or forced share. For a discussion of the statutory election see 214 S.W. at 966.

41. 214 S.W. at 967.

42. *Hastings v. Hudson*, 359 Mo. 912, 224 S.W.2d 945 (1949), also a case where the husband was plaintiff, with somewhat similar facts, is based in large part on *Headington v. Woodward*. However the court in *Hastings* does find that the transfers in question were made in contemplation of death.

43. *Supra* note 33.

in 1871 purchased a piece of real property, taking title to a legal life estate in himself and the remainder in fee to his daughter. He died in 1874, and the wife sought to set the deed aside, her theory being that the purchase of the real property was made by the husband with the intent to defeat her marital rights. Apparently the husband during his lifetime never told the wife how title was taken. In reversing judgment for plaintiff the court pointed out that unless the transfer was made in contemplation of death the wife could not recover. Here there was insufficient evidence to support a contemplation of death finding.

In *Pollman v. Schaper*⁴⁴ the wife was unsuccessful in her attempt to set aside certain transfers of personal property on the ground they were made with the intent to defeat her marital rights. The court affirmed a judgment for the transferees on the basis of findings by the trial court that the gifts were not made in contemplation of death and that the wife, aware of the transfers while the husband was alive, had acquiesced in them.

3. *Transfers in Contemplation of Death—Irrevocable Transfers*

Under Missouri law before the new code a wife never had any rights in the personal property of her husband similar to her inchoate right of dower in real property. Although from the beginning the statutes have spoken in terms of the widow's dower right in personalty, this right attached only to property belonging to the husband at the time of his death.⁴⁵ While the wife's inchoate right of dower in real property was not affected by transfers made by the husband during marriage without her assent, the husband had almost complete freedom to dispose of his personal property without her assent, either by gift or otherwise. This power of disposition was limited in one very important respect, however: a husband could not dispose of his personalty by gift in immediate contemplation of death where his clear purpose was to defeat the rights of his wife which would otherwise attach upon his death.

Apparently *Davis v. Davis*,⁴⁶ decided by the court in 1838, was the first case in which this question was involved. An equity proceeding to set aside a gift made by the husband to his son, the case arose on the pleadings and the court upheld the sufficiency of the petition. The allegations are interesting in that they are typical of many later cases and present the issue

44. 258 Mo. 710, 167 S.W. 953 (1914).

45. *McLaughlin v. McLaughlin's Adm'r*, 16 Mo. 242 (1852).

46. 5 Mo. 183 (1838).

in a form most appealing from the widow's standpoint. The husband died on May 7, 1832; on March 19 of the same year he executed his will and on the same day made the disputed gift to his son. When the will and gift were made the husband was allegedly in a very low condition in the last stages of consumption with a conscious certainty of approaching death. The donee was aware that the transfer was made with the intention of depriving the wife of her dower rights, and he was an active participant in the scheme. Faced with these allegations the court had no difficulty in concluding the transfer was a fraud on the widow. For authority the court looked to early decisions in New York and Virginia and several English cases.⁴⁷

In *Stone v. Stone*,⁴⁸ the next case to come before the court, the husband, who died on February 10, 1849, had executed his will on January 27, 1849, and five days earlier had transferred a substantial portion of his personal property in trust for his children of a former marriage. The widow was able to establish that the husband at the time of the transfer was convinced he had consumption and would live but for a short time and further that he intended to deprive her of all rights in the property. In reversing judgment for the defendant on the authority of the *Davis* case, the court was careful to point out, as it did in many later cases, that the husband's control over his personal property during his lifetime was complete and absolute, subject only to the restriction that he could not give it away at the approach of death with a view to defeating his wife's rights.

The next case, *Tucker v. Tucker*,⁴⁹ arose on the pleadings, and on the authority of *Davis* and *Stone* the court upheld the sufficiency of the petition. Here the gift was made in April of 1858, but the husband did not die until June of the following year. As in *Davis*, the petition contained appropriate allegations with respect to intent and knowledge of impending death. The most interesting aspect of the case is that the husband, while purporting to make an outright gift, reserved a life interest in the property and retained possession until his death. Clearly, these facts influenced the court's decision; some language in the opinion goes so far as to ques-

47. The custom of London also embraced the contemplation of death cases, MACDONALD, *op. cit. supra* note 26, ch. 5.

48. 18 Mo. 389 (1853).

49. 29 Mo. 350 (1860). In *Tucker v. Tucker*, 32 Mo. 464 (1862), the court affirmed a judgment in favor of the wife.

tion any transfer where these factors are present.⁵⁰ Fortunately, as the later discussion will show, the court in subsequent decisions did not pursue this suggestion.

Newton v. Newton,⁵¹ often cited as a leading case, was a proceeding to set aside a conveyance of real property made by the husband approximately one month before his death. Following his death the widow filed her statutory election⁵² to receive one-half of the real and personal property "belonging to the husband at the time of his death absolutely." Essentially the problem was the same as that in *Davis, Stone and Tucker*, except here the disputed property was real property instead of personalty. On the basis of its decisions in *Davis* and *Stone* the court held the petition was sufficient where it contained appropriate allegations with respect to intent and knowledge of impending death.

These early cases established the rule and the court adhered to it in later decisions.⁵³ The elements of the plaintiff's case are: (1) a transfer made by the husband in immediate contemplation of death; (2) with intent to defeat the wife's marital rights by the transfer; and (3) the absence of a fair consideration passing from the transferee to the husband. In most of the cases the donee, transferee, was an active participant in the scheme, but apparently the court never considered that the donee's state of mind was controlling. But where one of the essential elements was lacking the court has denied the widow any relief. Thus in *Lusse v. Lusse*,⁵⁴ a decision by the St. Louis Court of Appeals, the court denied relief to the wife where the transferee, a son, had paid his father an amount which the court determined to be a fair price for the property he received. And in *Pollman v. Schaper*⁵⁵ the wife was unsuccessful where the lower court found that the transfers were not made under the shadow of impending death and she was aware of the gifts and acquiesced in them.

The court in the *Tucker* case was properly troubled by the fact that the husband had reserved a life interest in the property and retained pos-

50. 29 Mo. at 353. Apparently under the custom of London such a reservation made the transfer vulnerable to a later attack by the wife. MACDONALD, *op. cit. supra* note 26, at 55.

51. 162 Mo. 173, 61 S.W. 881 (1901).

52. For a comparable election made available to the husband see *Headington v. Woodward*, *supra* note 39.

53. *Szombathy v. Merz*, 148 S.W.2d 1028 (Mo. 1941); *Pollman v. Schaper*, 258 Mo. 710, 167 S.W. 953 (1914); *Rice v. Waddill*, 168 Mo. 99, 67 S.W. 605 (1902); see also *In re Bernays' Estate*, 126 S.W.2d 209 (Mo. 1939).

54. 140 Mo. App. 497, 120 S.W. 114 (St. L. Ct. App. 1909).

55. *Supra* note 53.

session until his death. Referring to several English cases,⁵⁶ the court indicated that reservation of a life interest was itself a badge of fraud. However in *Tucker* the court did not need to rest its decision on this ground because the other allegations of the petition were sufficient to bring the case within the principle enunciated in the *Davis* and *Stone* cases. But the question of reservation is one of first importance. For if the husband can retain the use and enjoyment of property during his lifetime and at the same time transfer the remainder interest free of the marital rights of the wife, the policy which lies at the foundation of the contemplation of death decisions is being thwarted, at least partially. Yet in subsequent cases the court rejected the suggestion found in *Tucker* that reservation of a life estate is itself a badge of fraud. This is made abundantly clear in two decisions, *Crececius v. Horst*,⁵⁷ decided in 1886, and more recently in *Wahl v. Wahl*,⁵⁸ decided in 1947.

It will be recalled that in *Crececius v. Horst*, the husband had separated from his wife shortly after their marriage in 1860. In 1871 he purchased a lot taking title in himself for life, remainder in fee to his daughter. He died in 1874. In reversing a judgment for the widow the court found the evidence was insufficient to establish either that the husband purchased the property in expectation of immediate death or that he intended by the purchase to defeat his wife's dower rights in the personal property he used to purchase the property.

The husband in the *Wahl* case approximately two years before his death attempted to create a legal life estate in himself in shares of a closely held company with remainders over to certain relatives. The shares were transferred on the books of the company and registered in the form requested by the husband. He retained possession of the new certificates until his death, and during his lifetime voted the shares and was entitled to all the dividends. Having concluded that there was a sufficient delivery of the subject matter to support a gift, the court upheld the title of the remaindermen against an attack by the widow. In view of the fact the gifts were made two years before the husband's death at a time when he was actively engaged in business and had no thought of impending death, there was no evidence to support one basic element of plaintiff's case. Moreover, the court

56. See note 50 *supra*.

57. *Supra* note 33.

58. 206 S.W.2d 334 (Mo. 1947). For a similar result in a trust case where Missouri law is considered see *West v. Miller*, 78 F.2d 479 (7th Cir. 1935).

stated that since the remaindermen were natural objects of the husband's bounty, there was no evidence to support the allegation that the husband by making the gifts intended to defraud the widow of her rights.

4. *Transfers in Contemplation of Death—Revocable Transfers*

By permitting the husband to reserve a life estate under transfers not in contemplation of death, the court made available to the careful planner a method whereby the wife's marital rights might be defeated. While arguably this may be unfair to the wife in some cases, probably the result is sound. By creating vested rights in the remaindermen, the husband has parted with some of the most important incidents of ownership in the property. Usually he has substantial non-death motives for making such a gift; these may vary from the case where for tax purposes he wants to contribute to a gallery the remainder interest in his favorite Cezanne to a situation where he wants to provide for children of a previous marriage. As long as the policy of the law is to recognize that the husband should have maximum freedom in the disposition of his separate property during marriage, transfers of this nature should be immune from later attack by the wife.⁵⁹

But where the husband reserves not only a life estate but also the power to revoke, an entirely different problem is present. No indefeasibly vested remainder interest is created; no substantial tax savings are possible;⁶⁰ and the husband during his lifetime retains, for all practical purposes, the same freedom of disposition over the remainder that he had before. Of course, the problem is not new or peculiar to the field of marital rights. Yet it has greater importance today, perhaps, than ever before, because the revocable inter vivos trust, which often entirely replaces the will, finds increasing favor.

The obvious objection to the inter vivos trust, that it is in essence

59. A gift or conveyance in trust of goods and chattels is void as to creditors, existing and subsequent where the settlor reserves a life estate. § 428.010, RSMo 1949. Apparently under this section creditors may not reach the remainder interest of an otherwise valid trust. *McFarland v. Bishop*, 282 Mo. 534, 222 S.W. 143 (1920).

60. The income of a revocable trust is taxed to the grantor. INT. REV. CODE of 1954, § 676. The corpus of a revocable trust is included in the gross estate of the grantor for federal estate tax purposes. INT. REV. CODE of 1954, § 2038. A revocable transfer is not a completed gift and no deduction for a charitable contribution is available. INT. REV. CODE of 1954, § 170; Treas. Reg. § 1.170-1(e) (1958).

a testamentary device subject to the Statute of Wills, has been settled for some time in Missouri. Neither the revocable investment trust⁶¹ nor the revocable life insurance trust⁶² is a testamentary instrument merely by virtue of the existence at the time of the settlor's death of a power to revoke. Moreover the settlor may also reserve a life estate⁶³ and substantial powers with respect to investments⁶⁴ without running afoul of the requirements of the statute. In reaching these conclusions the Missouri court is clearly in line with prevailing views.⁶⁵

But in resolving the related, but entirely different, question of the right of the wife to attack such a trust as a fraud on her rights, the court has left the law in a very puzzling state.

*Merz v. Tower Grove Bank & Trust Co.*⁶⁶ came before the court in 1939. Two weeks before his death the husband established an inter vivos investment trust of personal property and reserved the right to the income for his life and the power to revoke. After his death the trust provided for payment to the wife of the sum of \$200 per month during her lifetime; the balance of the income and ultimately the principal were payable to others including the husband's brother and a nephew. The wife was named as residuary beneficiary under the husband's will, executed at approximately the same time as the trust, but the amount which passed under the will was insignificant in comparison to the value of the trust corpus, which exceeded \$300,000. The lower court specifically found that by the transfer the husband intended to defeat the rights of the wife which would otherwise ripen on his death and that the transfer was made in immediate contemplation of death. From the summary of the evidence in the opinion it would appear that both findings were amply supported. Deferring to these findings the court on appeal affirmed judgment for the wife.

The same result was reached in *Wanstrath v. Kappel*,⁶⁷ decided in 1947, where again the evidence, as summarized by the court, supported findings on intent and contemplation of death. Here decedent, age 75 and suffering

61. *Sims v. Brown*, 252 Mo. 58, 158 S.W. 624 (1913).

62. *Tootle-Lacy Nat'l Bank v. Rollier*, 341 Mo. 1029, 111 S.W.2d 12 (1937).

63. *Davis v. Rossi*, 326 Mo. 911, 34 S.W.2d 8 (1930). In *St. Louis County Nat'l Bank v. Fielder*, 364 Mo. 207, 260 S.W.2d 483 (1953) (en banc), the court reached the same result where the estate reserved was a legal life estate with a power of revocation.

64. *Id.*

65. 1 SCOTT, TRUSTS § 57 (2d ed. 1956).

66. 344 Mo. 1150, 130 S.W.2d 611 (1939).

67. 356 Mo. 210, 201 S.W.2d 327 (1947).

from a chronic heart condition, created the trust of personal property four months and eight days before his death, reserving the right to the income for life and the power to revoke. The wife, while not excluded from participation in the trust, was restricted to the right to receive one-half the income during her lifetime or until her remarriage. As in the *Merz* case the trust estate (in excess of \$400,000) was much greater than the probate estate (about \$10,000).

The decision in *Wanstrath* came down on April 21, 1947, less than nine months before the court rendered its decision in *Wahl*⁶⁸ where, it will be recalled, the husband (age 73) two years before his death had transferred a substantial block of closely held stock, reserving in himself a life estate with remainders to certain relatives. There the wife was unsuccessful because the court resolved both issues, intent and contemplation of death, in favor of the transferees. Unlike *Wanstrath* the transfer in *Wahl* was irrevocable and importance of that fact is shown in this statement:

We are convinced that the conveyance of this stock was not testamentary in character, that James S. Wahl had no right to change the interest or in any way to deprive the donees of their legal interest created by the conveyance. At the time of the conveyance the donees had an irrevocable interest in the stock, subject only to the donor's life interest in the stock.⁶⁹

In its decision the court does not refer to *Wanstrath*, but does refer to *Merz* for the proposition that a transfer in immediate contemplation of death made with the requisite intent is vulnerable to an attack by the wife.

The most recent decision on this question is *Potter v. Winter*.⁷⁰ Here the husband (age 79) established the revocable trust on July 9, 1948, and died October 11, 1948. Evidence was introduced to show the husband was in failing health when the trust was established, but the court, in rejecting the wife's suit, rested its decision on the element of intent and not on contemplation of death. On the issue of intent the court emphasized the substantial rights the wife received under the trust—the income from and a general testamentary power of appointment over one-half the corpus (one trust), with the trustee having discretionary power to distribute other income and portions of corpus (a separate trust) to her under standards

68. Case cited note 58 *supra*.

69. *Wahl v. Wahl*, *supra* note 58, at 339.

70. 280 S.W.2d 27 (Mo. 1955).

established in the trust instrument. In distinguishing *Merz* the court said: "In the *Merz* case, there was evidence that defeating the marital rights of the wife was the husband-settlor's sole purpose."⁷¹ Here a substantial part of the estate consisted of shares of a closely held family business; one of the husband's motives was to provide for the operation of the business after his death free from possible conflicts which might arise if the stock ownership were divided.

The reader will recognize that the plan embodied in the *Potter* trust is the familiar two trust plan where one trust is drafted to qualify for the federal estate tax marital deduction.⁷² Although the court does not mention this point, the date of the execution of the trust instrument coincides closely with the enactment of the Revenue Act of 1948,⁷³ which gave birth to the federal estate tax marital deduction; the act was dated April 2, 1948, and the trust was dated July 9, 1948. Of course, the same estate tax advantages were available under a will, but the coincidence of dates is significant on the question of intent, particularly in view of the husband's desire to provide for unified ownership of the shares of his closely held business.

Although the *Potter* case leaves some important questions unanswered, it does at least stand for the proposition that a reserved power of revocation did not in and of itself vitiate the transfer. On the basis of the decisions in *Merz* and *Wanstrath*, the attitude of the court in similar cases under the Statute of Wills, and the prior development of the "fraud on marital rights" theory, the decision in *Potter* appears to be clearly correct.

It would appear that the *Merz*, *Wanstrath* and *Potter* decisions can all be reconciled under the contemplation of death rule. In the first two cases both elements, fraud and contemplation of death, were present; in the latter case there was no fraud. If this be true, what then is the basis for saying that the court has left the law in a puzzling state? One has only to turn to the comments of the writers to find this to be the fact. One expresses the view that intent alone is to be considered;⁷⁴ another seems to adopt the same view;⁷⁵ and yet another questions whether contemplation of death

71. 280 S.W.2d at 36.

72. INT. REV. CODE OF 1954, § 2056. See particularly § 2056(b)(5), the counterpart of which in the Internal Revenue Code of 1939 was § 812(e)(1)(f).

73. 62 Stat. 110 (1948).

74. Fratcher, *Trusts and Succession in Missouri*, 25 Mo. L. REV. 417, at 420 (1960).

75. Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108, at 125 (1960). The same view is expressed in CASNER, *ESTATE PLANNING, CASES, STATUTES, TEXT AND OTHER MATERIALS* at 83 (2d ed. 1956).

is still an element the wife must prove.⁷⁶ On the other hand we find the opinion, expressed after the decision in the *Potter* case, that contemplation of death remains a necessary element of the wife's case.⁷⁷

The source of the difficulty probably can be traced to this statement in the *Merz* case:

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, and recover the property so fraudulently transferred to the extent of her interest therein.⁷⁸

Here there is absolutely no mention of contemplation of death; yet, curiously, at two other places in the same opinion contemplation of death is mentioned as an element.⁷⁹ In *Wanstrath* the court quotes with approval the statement from *Merz* set forth above,⁸⁰ but refers elsewhere to contemplation of death.⁸¹ And in *Potter* the court again indicates that intent alone may be sufficient.⁸²

The briefs in the *Potter* case show clearly that counsel for defendants emphasized the importance of contemplation of death as one element of

76. McDONALD, *op. cit. supra* note 26, at 115.

77. 4 MAUS, MISSOURI PRACTICE, PROBATE LAW AND PRACTICE § 1193 (1960).

78. *Merz v. Tower Grove Bank & Trust Co.*, *supra* note 66, at 1161, 130 S.W.2d at 617. In support of this statement, the court cites *Rice v. Waddill*, *supra* note 53, *Davis v. Davis*, *supra* note 46, *In re Bernays' Estate*, *supra* note 53, *Straat v. O'Neil*, 84 Mo. 68 (1884), *Tucker v. Tucker*, *supra* note 49, *Stone v. Stone*, *supra* note 48, and *Dyer v. Smith*, 62 Mo. App. 606 (K.C. Ct. App. 1895). In *Straat v. O'Neil* and *In re Bernays' Estate*, the court's decision was not based on the "transfers in fraud of marital rights" rule. In the other cases contemplation of death was present and the court phrased the rule in terms of contemplation of death.

79. 344 Mo. at 1162, 1163; 130 S.W.2d at 618. In *Szombathy v. Merz*, *supra* note 53, where the wife was successful in setting aside a completed gift of a note made by the husband a week before his death the court states the rule in terms of contemplation of death. The two cases involved transfers by the same decedent.

80. *Wanstrath v. Kappel*, *supra* note 67, at 216, 201 S.W.2d at 330.

81. 356 Mo. at 216, 201 S.W.2d at 329, 330.

82. The court reached the tentative conclusion that the trust instrument was not "testamentary in character." 280 S.W.2d at 35. It then discussed the question of intent and in doing so again referred to the statement from *Merz*, quoted in the text. 280 S.W.2d at 35. Later the court mentioned contemplation of death, but came to no conclusion other than to indicate that the evidence "did not necessarily indicate that the husband made the indenture in contemplation of impending death, with the view of defeating his wife's marital rights in his property." 280 S.W.2d at 36.

the legal rule. And one may conclude that the failure of the court in *Potter* to state definitely whether contemplation of death is or is not an element in the revocable transfer cases was deliberate. There is a reason for this. Some time the hard case will come before the court—a revocable transfer not in contemplation of death where the wife receives little or nothing. Understandably the court was reluctant to phrase the rule in such a way as to sanction transfers of this nature. If contemplation of death is carried over into the revocable transfer cases the protection afforded to the wife by the forced share statute has largely vanished.⁸³

The dilemma faced by the court in these cases is real, and perhaps the decisions mean that for revocable transfers the court under a broadly phrased intent rule will seek to do justice case by case. If so, the very uncertainties inherent in the judicial process will serve to deter husbands from abusing the revocable transfer devices, especially the trust. But the difficulty with this approach is obvious; thus far the court has not recognized that the revocable transfer cases are *sui generis*. The difference between a revocable trust and an irrevocable trust or other completed gift is basic; there is no reason the rule should be the same for both situations. By failing to recognize this the court in *Merz*, *Wanstrath* and *Potter* has left the status of the contemplation of death rule in doubt, a rule which for so many years was never questioned, and which, it would seem, worked reasonably well in the completed gift cases in resolving conflicts between the policies of freedom of disposition on the one hand and protection to the widow on the other.

THE RULE UNDER THE NEW CODE

With the enactment of the new probate code Missouri for the first time has a statutory rule, section 474.150,⁸⁴ relating to transfers in fraud of

83. The problem, of course, has arisen elsewhere. The two most famous decisions are *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944), and *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937). Professor Macdonald in his recently published work, *FRAUD ON THE WIDOW'S SHARE*, *op. cit. supra* note 26, has reviewed extensively all the leading cases and the theories adopted by the courts. The book, a complete examination and discussion of the entire problem, contains the author's suggestions as to proposed legislation.

84. 1. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate

marital rights. As stated before, this section derived from section 33 of the Model Probate Code,⁸⁵ which provides:

(a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

Basically, this section is a statement of a general rule in (a) and a rebuttable statutory presumption in (b). No attempt is made to define the words "in fraud of the marital rights." Indeed the draftsmen of the model code make this revealing comment about the phrase: "This section makes no attempt to define the expression 'in fraud of marital rights.' It is believed that only by judicial decision can that be done."⁸⁶ The rebuttable two year presumption is similar to a corresponding provision in the 1939 Internal Revenue Code relating to transfers "in contemplation of death."⁸⁷

Section 251⁸⁸ of the bill submitted to the General Assembly by the

consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

2. Any conveyance of real estate made by a married person at any time without the joinder or other written express assent of his spouse, made at any time, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse, if the spouse becomes a surviving spouse, unless the contrary is shown.

3. Any conveyance of the property of the spouse of an incompetent person is deemed not to be in fraud of the marital rights of the incompetent if the probate court authorizes the guardian of the incompetent to join in or assent to the conveyance after finding that it is not made in fraud of the marital rights. Any conveyance of the property of a minor or incompetent made by a guardian pursuant to an order of court is deemed not to be in fraud of the marital rights of the spouse of the ward. § 474.150, RSMo 1957 Supp., as amended by Mo. Laws 1959, S.B. 141, at 8.

85. *SIMES, op. cit. supra* note 22, at 72.

86. *Id.* at 73.

87. INT. REV. CODE of 1939, § 811(c), provided that the gross estate shall include a transfer in contemplation of death "except in case of a bona fide sale for an adequate and full consideration in money or moneys worth." The language of the rebuttable presumption was:

Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this sub-chapter.

88. H.R. 30, 68th Gen. Assem. (1955).

Joint Probate Laws Revision Committee follows section 33 closely. Subsection (1) is the same as section 33(a); subsection (2), however, contains a provision (italicized below) not found in section 33(b) and omits an adjective (bracketed below). Section 251(2) provided:

2. Any gift made by a married person within two years of the time of his death, *and any conveyance of real estate made by a married person at any time without the express assent of his spouse, duly acknowledged*, is deemed to be in fraud of the marital rights of his [surviving] spouse, unless shown to the contrary.

Subsection 2, like its counterpart in section 33, remained a statutory presumption, now two-pronged. However before the bill was enacted subsection 2 was amended by removing altogether the two year presumption; so, when the bill was enacted subsection (2) read:

2. Any conveyance of real estate made by a married person at any time without the express assent of his spouse, is deemed to be in fraud of the marital rights of his spouse (*if the spouse becomes a surviving spouse*) unless the contrary is shown. (Italicized language added by the amendment).⁸⁹

Since its enactment in 1955, section 474.150 has been amended, but the basic structure remains. Subsection 1, the basic rule, is unchanged. Technical changes in subsection 2 do not affect its basic provisions.⁹⁰ Subsection 3 has been added to provide a means whereby a guardian may release or convey property free of marital rights.⁹¹

Dower being contemporaneously abolished, the presumption relating to conveyances of real estate was added to preserve the requirement that the wife join.⁹² But why was the two year presumption removed? Perhaps it was felt the two year presumption gave the section too much of a contemplation of death appearance, the intention being to draft a broad statute in favor of the surviving spouse. Another, and more cogent, explanation is that contemplation of death was provided for in the phrase "in fraud of marital rights"; the presence of the two year presumption might unduly prejudice donative transfers by elderly persons and therefore was

89. Senate Committee Amendment No. 1 to H.R. 30, *supra* note 88.

90. Mo. Laws 1957, at 852; Mo. Laws 1959, S.B. 141.

91. *Id.*

92. Comment to section 251 in the *Final Report of the Joint Probate Laws Revision Comm.*, at 148 (1955).

deleted. A third possibility is that the two year presumption was omitted inadvertently; the code was long and time was short.

The court has not yet indicated what scope it will give the statutory language, but in time certain basic questions will call for an answer. First, does the phrase "in fraud of marital rights" have a new content not previously found in the old judicial rule? Second, what is the status of donative transfers of real and personal property in view of the statutory presumption?

With regard to the meaning of the phrase "in fraud of marital rights," it has been suggested that the court should look to the prior case law.⁹³ Since the statutory language is the same as that previously used by the court, generally recognized canons of construction support the argument that the General Assembly has carried forward the meaning developed in the case law.⁹⁴ Indeed in *Reinheimer v. Rhedans*,⁹⁵ the only case to come before it under section 474.150, the court, in finding no fraud, hints at this by stating: "That section does not attempt to establish or create any new definition of fraud."⁹⁶ If this construction is adopted in later cases, the principal effect of section 474.150 will be to codify the rules that previously existed.

The statutory presumption relating to conveyances of real property has complicated the question of interpretation. For one thing the statutory presumption in subsection 2 refers to "any conveyance" whereas the general rule in subsection 1 refers to "any gift." Because of this the court in the *Reinheimer* case suggests that subsection 2 may be more comprehensive than subsection 1. However in view of the basic protective purpose of section 474.150 this difference in wording should not be overly significant since under subsection 1 the court in determining whether there is a gift should always look to the adequacy of consideration as it did before.

93. MAUS, *op. cit. supra* note 77.

94. In 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5303 (3rd ed. 1943), the familiar rule is stated as follows:

Words and phrases having a well-defined meaning in the common law are to be interpreted in the same sense under the statute when used in connection with the same or similar subject matter with which they are associated at common law.

For a similar statement of the rule see *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, at 912 (Mo. 1934).

95. 327 S.W.2d 823 (Mo. 1959).

96. *Id.* at 828.

In *Reinheimer* the presence of consideration, while not controlling, was considered relevant on the issue of fraud.⁹⁷

The presence in subsection 2 of the statutory presumption relating to conveyances of real estate seems clearly to indicate that transfers of personal property are subject only to the general rule in subsection 1, which is to say the wife must prove her case without the aid of any presumption.

Perhaps this means that the rules under section 474.150 relating to transfers of realty and personalty are the same except that the wife has the initial advantage in cases involving realty of having in her favor a statutory presumption. The statutory language itself would seem to require this construction, and there is no sound policy reason which dictates a different result. There were cases⁹⁸ decided before the 1955 code where transfers of realty by a married husband were challenged by a wife, dissatisfied with dower, who sought to assert her rights as statutory heir. The court never suggested the rules should be different than in the personal property cases.

PROSPECT AND RETROSPECT

If in the future the court looks to the old law for the meaning of the word "fraud," the cases give a good indication of the limits beyond which the husband may not go. This assumes that the broad language of *Merz* will be restricted to the revocable transfer cases, an assumption which may not be warranted. The uncertainty in the revocable transfer cases will persist until the contemplation of death question is settled. Regardless of the rationale of the decision in the *Potter* case, it does suggest that the revocable inter vivos trust remains a valuable estate planning device in Missouri, particularly in instances where the wife receives substantial benefits under the trust and there are solid reasons for establishing the trust other than to defeat the wife's forced share. Happily, this is the usual case. Irrevocable transfers in contemplation of marriage and those made during marriage and not in contemplation of death should be resolved under the statutory rule as before.

Certainly it is fair to pose the question whether a rule founded on intent is the best way to handle the problem. It does leave the court

97. *Id.* at 829.

98. An example is *Newton v. Newton*, 162 Mo. 173, 61 S.W. 881 (1901), discussed previously. See text accompanying note 51 *supra*.

enough elbow room to help the wife in the aggravated cases. Findings on intent and contemplation of death depend on the peculiar circumstances of each case. The proof may be overwhelming or slight. In the clear cases intent is established by the timing of the transfer and the fact the wife is left with little or nothing after death. But in the borderline cases where contemplation of death may or may not be present and where a more than token provision is made for the wife intent may not be a very satisfactory test: the transfer may have occurred years before the law suit; many witnesses may be dead or unavailable; and the available witnesses are likely to have a monetary interest in the outcome of the litigation. Certainly the husband in the usual case intends to defeat the rights of his wife which would otherwise attach or he would not have made the transfer. Intention will always have many facets and may embody one or all of the following desires: to protect the wife from inexperience or folly; to preserve the family business; to provide for charity; to save estate taxes; or to provide for other relatives or future generations. All are, or should be, laudable motives to be encouraged, not thwarted. To realize these aims, the husband may have to give the wife less than she would otherwise receive.⁹⁹ How much less is permissible? Presumably, this is a question for the chancellor's conscience to be resolved ultimately in terms of a finding of intention.

Alternatives have been proposed. One suggestion is to abandon the forced share approach entirely.¹⁰⁰ Another, and far less drastic, solution is to deal with the hard problem, revocable transfers, through legislation which

99. The probate code includes provisions for ante-nuptial and post-nuptial agreements which may bar the widow from asserting any inheritance or statutory rights against the property of the deceased husband. §§ 474.120, .220, RSMo 1957 Supp. The sections may not be exclusive, since some agreements which do not comply with the statutory provisions may nevertheless be effective. For a discussion of the problem see 6 PETERSON & ECKHARDT, MISSOURI PRACTICE, LEGAL FORMS, §§ 582, 583 (1960).

In certain situations where a waiver or release can be obtained from the wife it may be advisable to do so. In many situations it is neither advisable nor possible to obtain it.

The writer has been advised that the practice of many of the leading trust institutions in Kansas City in accepting inter vivos trusts of personal property is not to suggest or require the execution of a waiver in the usual case; these institutions do recommend that the wife join if the transfer covers substantially the whole estate or if there is reason to believe that there is or may be marital trouble.

In view of the statutory presumption in § 474.150 relating to conveyances of real property the joinder of the wife in the usual case will be necessary to make the title marketable. Also, as mentioned before, *supra* note 24, the wife must join in a conveyance of the homestead.

100. MACDONALD, *op. cit. supra* note 26.

permits the wife to attack the transfer.¹⁰¹ Any such solution is perforce a compromise between the competing policies of freedom of disposition on the one hand and protection of the wife on the other. Here, as elsewhere, preference is probably more a matter of taste than of morals.

Hopefully, the uncertainty resulting from the revocable transfer cases will be resolved when the question again arises. Otherwise, the solutions of the court in the past have much to recommend them, and if they are carried over under the statute, estate plans prepared by lawyers of sound judgment will be secure.

101. PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1956). In general this section is aimed at transfers where the husband has retained a power of revocation, a power of consumption over the principal, or a testamentary power of appointment.

CAL. PROB. CODE § 201.8 (Supp. 1960) is directed to any donative transfers "if the decedent had a substantial quantum of ownership or control of the property at death."