

**EPTL § 13-3.3: Trustee as Beneficiary Denied Right to Receive Proceeds of Insurance Policy Due to Decedent's Failure to Execute Trust Agreement Prior to Designation of Beneficiary**

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Taylor Law, the public-private dichotomy, and the legislative need to weigh various policy considerations before deciding whether or not a six-month period is appropriate.

*Russell G. Wohl*

## ESTATES, POWERS AND TRUSTS LAW

*EPTL § 13-3.3: Trustee as beneficiary denied right to receive proceeds of insurance policy due to decedent's failure to execute trust agreement prior to designation of beneficiary*

Fundamental to the law of trusts and estates is the canon that the subject matter of a trust, or trust res, be an existent interest recognized by law.<sup>1</sup> An exception has been carved out of the gen-

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<sup>1</sup> See RESTATEMENT (SECOND) OF TRUSTS § 75 (1959) [hereinafter RESTATEMENT]. In a similar vein, the RESTATEMENT provides that the subject matter of a trust can be neither indefinite, *id.* § 76, nor a mere expectancy interest, *id.* § 86. Contingent interests, however, have long been recognized as interests suitable for assignment to trusts provided they are transferable to begin with. *Id.* § 85; *cf.* Jones v. Mayor of New York, 90 N.Y. 387, 390 (1882) (non-existence of fund not fatal to validity of equitable assignment).

In addition to a sufficient trust res, the validity of any trust is further conditioned upon successful planning and drafting in regard to the rule against perpetuities and the doctrine of merger. See Lundgren, *Estate Planning With Life Insurance and Trusts*, 54 N.Y. Sr. B.J. 132 (1982). Generally, problems with the rule against perpetuities arise in irrevocable trusts concerning class gifts and "unborn widows." See *id.* at 133-34; see also EPTL § 9-1.3(c), commentary at 239-40 (McKinney 1967 & Supp. 1988) ("unborn widow" problem remedied by presumption that instrument refers to life in being at its effective date). Under the doctrine of merger, the ritual of appointing a trustee becomes meaningless when the legal rights of the trustee and the receiving rights of the beneficiary merge in a single person creating a legal life estate. See *Greene v. Greene*, 125 N.Y. 506, 510, 26 N.E. 739, 740 (1891). However, the merging must be almost complete for such life estate to be created. Compare *In re Estate of Duskis*, 76 Misc. 2d 411, 351 N.Y.S.2d 97 (Sur. Ct. New York County 1973) (legal life estate created where trustee-beneficiary had sole right to trust income and unfettered power to raid income producing assets) with *In re Will of Seidman*, 88 Misc. 2d 462, 389 N.Y.S.2d 729 (Sur. Ct. Kings County 1976) (legal life estate not created where trustee-beneficiary had right to raid income-producing assets only if income itself was insufficient for support and maintenance), *modified*, 58 App. Div. 2d 72, 395 N.Y.S.2d 674 (2d Dep't 1977).

As a prefatory matter, trusts and their concomitant requisites of formation are categorized by the time in which the trust comes into existence. See G. TURNER, *IRREVOCABLE TRUSTS* § 8.02 (1985). A transfer *inter vivos* is brought into being on the day of execution, see *id.*, whereas a testamentary transfer is an ambulatory disposition, i.e., one which is to take effect on the death of its creator. See 1 A. SCOTT, *LAW OF TRUSTS* § 53 (3d ed. 1967). As a general matter, a trust may be revoked by its creator provided he obtains written and acknowledged consent from the beneficiaries. EPTL § 7-1.9 (McKinney Supp. 1988); see *Warren v. Cropsey*, 29 App. Div. 2d 290, 296, 287 N.Y.S.2d 944, 950 (3d Dep't 1968) (not-

eral rule in situations where the trust res is the expectant interest of a trustee to receive the proceeds of an insurance policy.<sup>2</sup> New

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withstanding statement of irrevocability, trust subject to revocation with consent of parties having beneficial interest).

Once all the requisites of the inter vivos trust have been gathered, there remains the choice of the method of creation. See E. CLARK, L. LUSKY & A. MURPHY, CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION 430 (3d ed. 1985) [hereinafter GRATUITOUS TRANSFERS]. The first method, transfer in trust, occurs when the settlor transfers the legal title of the res to the trustee for the benefit of the third party beneficiary, the cestui, who retains equitable title. See *id.* The second situation, the declaration of trust, concerns the situation in which the owner of the subject property declares himself trustee for the benefit of the cestui. See *id.*

<sup>2</sup> See RESTATEMENT, *supra* note 1, § 82 comment b (exception for life insurance). Historically, the interest of the beneficiary under a life insurance trust was deemed a vested one, i.e., the beneficiary-trustee was held to be the owner-recipient of the benefits provided that the trust was irrevocable. See *Central Bank v. Hume*, 128 U.S. 195, 206 (1888)("[i]t is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries"). This result may be attributed to the fact that the doctrine of third-party beneficiaries had not yet been fully developed. See *Vance, The Beneficiary's Interest in a Life Insurance Policy*, 31 YALE L.J. 343, 343 (1922). Gradually, courts began to develop divergent positions. Some reasoned that the contingent interest or expectancy of the beneficiary vests upon the death of the insured. See, e.g., *Grimm v. Grimm*, 26 Cal. 2d 173, 175-76, 157 P.2d 841, 842 (1945) (interest in revocable trust characterized as expectancy of gift at insured's death); *Cook v. Cook*, 17 Cal. 2d 639, 646, 111 P.2d 322, 327 (1941) (beneficiary's rights vest upon death of insured). Other courts have held that the interest of the beneficiary is vested subject to divestment upon change of beneficiary. See, e.g., *Wodell v. John Hancock Mut. Life Ins. Co.*, 320 Mass. 1, 2, 67 N.E.2d 469, 470 (1946) (recognition of qualified property interest); *Metropolitan Life Ins. Co. v. Woolf*, 138 N.J. Eq. 450, 454, 47 A.2d 340, 343 (1946) (interest of beneficiary is vested property right); see also RESTATEMENT, *supra* note 1, § 84 comment b (discussing vesting of rights).

In addition to being characterized as inter vivos or testamentary, insurance trusts may be classified as funded or unfunded. See *Adams & Bieber, Irrevocable Life Insurance Trusts*, 12 CUMB. L. REV. 283, 283 nn.2-3 (1982). In the funded insurance trust, the insured settlor transfers the policy to the trustee as well as income producing property to be used to pay the premiums. *Id.* at n.3. In the unfunded trust situation, the more common of the two, the insured-settlor pays the premiums. *Id.* at n.2. One disadvantage of the funded trust, which may explain its relative disfavor, is that the generation of income by the trust may be treated as income to the insured. 26 U.S.C.A. § 677 (a)(3) (West Supp. 1988); see *Friedman & Wheeler, New Look at Insurance Trusts*, 100 TR. & EST. 396, 396 & n.8 (1961).

A particularly attractive feature of insurance trusts lies in the fact that they furnish a considerable source of liquid assets available for use upon the insured's death, possibly preventing the forced liquidation of other assets at terms unfavorable to the estate. See *Hershman, Life Insurance For Instant Creation and Subsequent Conservation of Estates*, N.Y.L.J., Aug. 25, 1986, at 6, col. 1 (quoting 81-6 NEW YORK LIFE, ADVANCED UNDERWRITING BULLETIN). However, proceeds of an insurance policy will be subject to an estate tax, as are other assets of the insured, if the insured retains any "incidents of ownership" over the policy. 26 U.S.C. § 2042 (2) (1982); see *Friedman & Wheeler, supra*, at 396. In effect, when this situation arises, a portion of the proceeds normally available for use by the estate for administrative expenses and executor/trustee compensation go to "provide death benefits

York has recognized the right to receive insurance proceeds as a sufficient res statutorily, in section 13-3.3 of the Estates, Powers and Trusts Law.<sup>3</sup> Generally, the provisions set forth in section 13-3.3 espouse preferential treatment of the proceeds of insurance policies,<sup>4</sup> in regard to estate taxation<sup>5</sup> and the rights of third party creditors.<sup>6</sup> Recently, in *In re Stein*,<sup>7</sup> the Appellate Division, Sec-

for the government, through the operation of the estate tax." Huff, *Uniting Life Insurance With Trusts*, NAT'L L.J., Mar. 16, 1987, at 15, col. 1; see 26 U.S.C. § 2042 (1) (1982). The surest way to remove the proceeds from the estate of the insured is to place the policy in an irrevocable trust and concomitantly remove all incidents of ownership from the insured. See Saks, *Insurance Trends and Topics*, 7 EST. PLAN. 246, 246 (1980); see also Friedman & Wheeler, *supra*, at 397 n.14 (power to appoint trust principal may be deemed incident of ownership).

Generally, much of the discussion surrounding incidents of ownership and degrees of control focuses on the issue of whether the trust in question was testamentary, i.e., a will substitution. Such "trusts" are invalid if executed without the formalities attendant to the creation of a proper will. See Annotation, *Testamentary Nature of Life Insurance Trust*, 53 A.L.R.2d 1112, 1114 n.7 (1957). As a matter of course, life insurance trusts have been held non-testamentary, notwithstanding the reservation of substantial powers of control in the insured. *Id.* at 1118; see RESTATEMENT, *supra* note 1, § 57 comment f; see also Gordon v. Portland Trust Bank, 201 Or. 648, 655-57, 271 P.2d 653, 653-56 (1954) (trust held valid notwithstanding reservation of cash surrender, loan rights, and right to change beneficiary).

Finally, the proceeds of insurance trusts are a significant factor to be considered in post-mortem planning of the surviving spouse, payment of tax on estate assets, and income replacement if the insured was the principal wage earner. Swirnoff, *Life Insurance: Filling the Need for Estate Liquidity*, NAT'L L.J., Aug. 23, 1982, at 15, col. 3; see Petrie, *Increasing the Liquidity of an Estate Involves Combination of Pre- and Post-Death Planning*, 11 EST. PLAN. 98, 99-100 (1984).

<sup>3</sup> EPTL § 13-3.3(a)(1) (McKinney Supp. 1988). Section 13-3.3(a)(1) provides in part that "[i]t shall not be necessary to the validity of any such trust agreement or declaration of trust that it have a trust corpus other than the right of the trustee as beneficiary to receive such proceeds." *Id.* This provision was patterned on a similar Wisconsin statute. See WIS. STAT. ANN. § 206.52 (West 1957).

<sup>4</sup> See EPTL § 13-3.3(a) (McKinney Supp. 1988). In 1976, this section was repealed by ch. 626, § 1, [1976] N.Y. LAWS 1340 (McKinney) which, *inter alia*, broadened the scope of the section to include proceeds other than those derived from insurance policies. See EPTL § 13-3.3(a) (McKinney Supp. 1988). The statute provides in part:

The proceeds of thrift, savings, pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts, of life, group life, industrial life or accident and health insurance policies and of annuity, endowment and supplemental insurance contracts (hereinafter referred to as "proceeds") may be made payable to a trustee designated as beneficiary . . . .

*Id.*

<sup>5</sup> See EPTL § 13-3.3(c) (McKinney Supp. 1988). The section provides that "for . . . estate tax purposes [the proceeds] shall not be deemed payable to . . . the estate." *Id.*

<sup>6</sup> See *id.* The section provides further that the "proceeds received by the trustee shall not be subject to the debts of the insured." *Id.* Regarding policy considerations underlying the rule, one author has noted that "[b]ecause family preservation has been and still is considered the firm foundation of our society's health and well being, creditor laws prefer insurance beneficiaries over creditors with respect to life insurance proceeds." Hershman,

ond Department, set forth the conditions under which a trustee-beneficiary may receive the proceeds of an insurance policy, holding that payment is proper only if the trust agreement predates the designation of the beneficiary under the insurance policy and if that trust agreement is identified in the beneficiary designation.<sup>8</sup>

In *Stein*, the decedent designated a trustee as beneficiary of his life insurance policy,<sup>9</sup> and thereafter notified the insurance carrier of the designation.<sup>10</sup> Subsequently, the decedent executed a trust agreement in which he appointed that same beneficiary of the policy as trustee of the proceeds flowing therefrom.<sup>11</sup> Some time later, the decedent died intestate.<sup>12</sup> Relying on the designation of the trustee as beneficiary, the insurance company paid to the beneficiary the face amount of the policy, less outstanding loans.<sup>13</sup> The administrator of the estate instituted a discovery proceeding to recoup the proceeds of the policy,<sup>14</sup> prompting the trustee to commence a formal accounting procedure joining as parties the administrator of the estate, the insurance carrier, the decedent's creditors, and the beneficiaries of the estate.<sup>15</sup> The Surrogate's Court, Suffolk County, awarded summary judgment to the insurance carrier, dismissing the proceedings on the premise that payment of

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*supra* note 2, at 6, col. 1.

<sup>7</sup> 131 App. Div. 2d 68, 520 N.Y.S.2d 157 (2d Dep't 1987).

<sup>8</sup> *Id.* at 72, 520 N.Y.S.2d at 159.

<sup>9</sup> *Id.* at 69, 520 N.Y.S.2d at 157. The decedent, Jules Stein, purchased a \$550,000 insurance policy from Greater Beneficial Union of Pittsburgh. *Id.* Thereafter, Stein designated "James Hume as Trustee" as the beneficiary of the policy. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* The instrument directed Hume, upon Stein's death, "to collect the proceeds of [the] policy and satisfy all valid claims . . . for unpaid debts. . . . After all claims have been satisfied, he is directed to pay any remaining proceeds, less expenses, to my estate." *Id.* at 69-70, 520 N.Y.S.2d at 158.

<sup>12</sup> *Id.* at 70, 520 N.Y.S.2d at 158. Without having left a will, Stein died on Sept. 19, 1981. *Id.* Greater Beneficial Union of Pittsburgh was notified of the death in writing on Sept. 30, 1981. *Id.*

<sup>13</sup> *Id.* The amount paid under the policy was \$516,718.58. *Id.*

<sup>14</sup> *Id.* at 70, 520 N.Y.S.2d at 158. The discovery proceeding was instituted upon application of the decedent's creditors. *Id.* Later, the parties stipulated that the discovery proceeding would be held in abeyance pending initiation of formal accounting procedures by Hume. *Id.*

<sup>15</sup> *Id.* The fifty-four creditors joined as parties were seeking in excess of one million dollars. See *Insurance Proceeds Barred To Trustee As Beneficiary*, N.Y.L.J., Oct. 23, 1987, at 1, col. 3. The accounting showed that the trustee paid \$464,969.36 on claims he deemed valid. See *id.* The remainder of the proceeds were distributed as trustee commissions and legal fees. *Id.*

the proceeds to the trustee relieved it of further liability.<sup>16</sup>

On appeal, the Appellate Division, Second Department, denied the insurer's motion for summary judgment and held that the insurance proceeds were improperly distributed to the trustee-beneficiary,<sup>17</sup> within the meaning of the 1976 amendment to section 13-3.3 of the EPTL.<sup>18</sup> Writing for a unanimous court, Justice Spatt took issue with the surrogate's interpretation of section 13-3.3, which declared that the legislature did not require that the trust agreement predate the designation of the trustee as beneficiary.<sup>19</sup> Adhering to general principles of statutory construction,<sup>20</sup> the court reasoned that the surrogate placed undue reliance on section

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<sup>16</sup> *Stein*, 131 App. Div. 2d at 70, 520 N.Y.S.2d at 158. The insurance company's initial motion for summary judgment was denied due to opposition by the administrator and two claimants. *Id.* Upon renewal of the motion, summary judgment was granted to the insurer. *Id.*

<sup>17</sup> *See Stein*, 131 App. Div. 2d at 72, 520 N.Y.S.2d at 159. Accordingly, the court entered summary judgment against the insurer on the issue of liability and remitted the action for a determination of damages. *Id.*

<sup>18</sup> *See id.* at 69, 520 N.Y.S.2d at 157. Prior to 1976, section 13-3.3(a) outlined the method of payment of insurance proceeds as follows:

(a) Life insurance may be made payable to a trustee to be named as beneficiary in the policy and the proceeds of such insurance shall be paid to such trustee and be held and disposed of by him as *provided in a trust agreement made by the insured during his lifetime.*

EPTL § 13-3.3(a) (McKinney 1967)(emphasis added). Pursuant to ch. 626, § 1, [1976] N.Y. Laws 1340 (McKinney), the section was repealed and a new section 13-3.3 was added to provide in part:

(a) The proceeds [of benefit plans and insurance policies] may be made payable to a trustee designated as beneficiary in the manner prescribed by this section and named as:

(1) Trustee under a trust agreement or declaration of trust *in existence at the date of such designation, and identified in such designation . . .*

EPTL § 13-3.3(a)(1) (McKinney Supp. 1988)(emphasis added).

<sup>19</sup> *See Stein*, 131 App. Div. 2d at 71, 520 N.Y.S.2d at 159. Specifically, the court's interpretation differed sharply from that of the surrogate as to the impact of section 13-3.3(f) on the statute as a whole. *Id.* Section 13-3.3(f), added in 1976, provides: "This section shall be construed as declaring the law as it existed prior to its enactment and not as modifying it." EPTL § 13-3.3(f) (McKinney Supp. 1988). The surrogate reasoned that section 13-3.3(f) required the court to look back to the law as it existed prior to 1976. Under such an interpretation, the designation in issue would be upheld, since the insured executed the trust agreement within his lifetime. *See Stein*, 131 App. Div. 2d at 71, 520 N.Y.S.2d at 159. The Appellate Division, Second Department, summarily dismissed this analysis as unsound, concluding that "subdivision (f) cannot mean that the prior law supersedes the present amended statute." *Id.* at 72, 520 N.Y.S.2d at 159.

<sup>20</sup> *Stein*, 131 App. Div. 2d at 71-72, 520 N.Y.S.2d at 159. The court reasoned that "[w]hen the Legislature amends a statute, it is presumed that the amendment was made to effect some purpose and make some change in the existing law." *Id.* at 72, 520 N.Y.S.2d at 159.

13-3.3(f),<sup>21</sup> resulting in an interpretation that ran afoul of the intent of the legislature as evidenced by the plain meaning of the language employed.<sup>22</sup> The scope of section 13-3.3(f), the court held, is limited by the language of section 13-3.3(a), which clearly mandates that the validity of the designation of a trustee as beneficiary is contingent upon the execution of a trust agreement prior to designation of the beneficiary and identification of the trust agreement therein.<sup>23</sup>

Notwithstanding the argument that the sole impact of the 1976 amendment to section 13-3.3 was to extend the contractual bases from which proceeds may be derived,<sup>24</sup> it is suggested that the court was correct in its conclusion that the plain meaning of the present version of section 13-3.3(a)(1) requires the execution of a trust agreement before the designation of a trustee as beneficiary and the identification of that agreement within the designation.<sup>25</sup> In addition, the court's determination that the trust agreement

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<sup>21</sup> See *supra* note 19 and accompanying text.

<sup>22</sup> See *Stein*, 131 App. Div. 2d at 72, 520 N.Y.S.2d at 159. The Second Department argued that the analysis of the surrogate's court, "if carried to its logical extreme, could render the 1976 amendment of the EPTL § 13-3.3(a)(1) a nullity." *Id.* at 71-72, 520 N.Y.S.2d at 159.

<sup>23</sup> See *id.* at 72, 520 N.Y.S.2d at 159.

<sup>24</sup> See EPTL § 13-3.3, commentary at 105 (McKinney Supp. 1988). A meritorious argument can be made that section 13-3.3(f) mandates that the present version of the statute was not intended to abrogate prior law, and hence the sole effect of the 1976 amendment was the expansion of the term "proceeds" to include payments made other than through life insurance policies. See *id.* Indeed, this analysis is given further credence by the seemingly contradictory nature of the section 13-3.3(a) expansion of "proceeds" and the section 13-3.3(a)(1) restriction requiring that the trust instrument predate the designation of the beneficiary. See EPTL § 13-3.3(a)-(a)(1) (McKinney Supp. 1988). It is submitted, however, that the restriction relating to designation may be the legislature's exaction of a *quid pro quo* for the concomitant expansion of the includable proceeds.

The court's summary treatment of section 13-3.3(f) of the EPTL, without discussing section 13-3.3(e), creates an area of opacity. See *Stein*, 131 App. Div. 2d at 72, 520 N.Y.S.2d at 159; *supra* note 19. Section 13-3.3(e) provides that "[n]othing in this section shall effect the validity of any designation heretofore made," EPTL § 13-3.3(e) (McKinney Supp. 1988), while section 13-3.3(f) purports to declare the law as it existed prior to the amendment. See EPTL § 13-3.3(f) (McKinney Supp. 1988); *supra* note 19. The court offered no opinion as to whether section 13-3.3(f) was intended to have a retroactive or prospective effect, but merely stated that the section "does not require a contrary result" to the one reached by the court. See *Stein*, 131 App. Div. 2d at 72, 520 N.Y.S.2d at 159. It is suggested that section 13-3.3(f) be viewed as declaratory of prior statutory law. In this way, the apparently conflicting provisions may, to some extent, be reconciled. See *Eastern Milk Producers Coop. Ass'n v. N.Y. Dep't of Agric. & Mkts.*, 58 N.Y.2d 1097, 1101, 449 N.E.2d 708, 711, 462 N.Y.S.2d 814, 817 (1983) ("amendment must be regarded as but a legislative amplification of its previous intent").

<sup>25</sup> See *supra* note 17 and accompanying text.

must predate the designation of a beneficiary is consistent with section 3-3.7 of the EPTL, a related provision, which sets forth the formalities governing "pour over" trusts.<sup>26</sup> Finally, the practical effect of the *Stein* decision is that the insurer would be given notice of the identity of the trustee-beneficiary, a posture which is consistent with the principles of section 13-3.2(d)(2) of the EPTL.<sup>27</sup>

Whatever the merits of the court's analysis, however, the decision is troublesome for a number of reasons. First, the *Stein* decision violates a basic precept of trust law, namely, that the courts ought to give effect to, and, where necessary, divine the intent of the parties creating the agreement.<sup>28</sup> Furthermore, although the

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<sup>26</sup> See EPTL § 13-3.3, commentary at 415 (McKinney 1967). Section 3-3.7 furthered the design of section 13-3.3 in providing a statutory base for "pour over" trusts, i.e., trusts to which the residuary estate of a decedent may pass, thereby defeating distribution by the laws of intestacy. See *id.*; see also EPTL § 3-3.7, commentary at 500-01 (McKinney 1967). Section 3-3.7 provides that the testamentary disposition to a trustee under an existing inter vivos trust agreement is valid as long as "such trust instrument is executed and acknowledged . . . prior to or contemporaneously with the execution of the will, and such trust instrument is identified in such will." EPTL § 3-3.7 (McKinney 1967)(emphasis added). The 1976 amendment to section 13-3.3, see *supra* note 4, closely resembles section 3-3.7, and interpreting the sections as contemplating similar requirements furthers the design of the legislature to effect a harmonization of the laws regarding the designation of beneficiaries. See, e.g., Recommendation of the Law Revision Commission to the Legislature Relating to Designation of Beneficiaries to Receive Payment of Certain Funds on Death of the Person Entitled, [1952] N.Y. LAW REV. COMM'N REP. 163, note at 171 (articulated purpose of consolidation and harmonization); Recommendation of the Law Revision Commission Relating to Unification of the Rules Governing Payment of Funds Payable by Banks, Insurance Companies, Government Agencies and Other Institutional Debtors on the Death of the Person Entitled, [1951] N.Y. LAW REV. COMM'N REP. 587, note at 592 (purpose is "to unify rules governing designation of beneficiaries").

<sup>27</sup> See EPTL § 13-3.2(d)(2) (McKinney 1967). Section 13-3.2(d)(2) requires the designation to be "[a]greed to by the insurance company." *Id.* It appears, however, that notice of the designation of the trustee as beneficiary was not dispositive of the issue in *Stein* since the designation of the beneficiary "as Trustee," see *supra* note 9, effectively identified the beneficiary of the policy. See *Stein*, 131 App. Div. 2d at 69, 520 N.Y.S.2d at 157.

It should be noted that the formalistic view of section 13-3.3 advanced by the court requires careful consideration by estate planners in order to preserve the significant liquidity and tax benefits enjoyed by insurance trusts, as such benefits may be lost if the requisite formalities of proper designation are not adhered to. See Huff, *supra* note 2, at 15, col. 1. The ability to shield the face amount of the life insurance proceeds from the decedent's gross estate remains an investment tax advantage under the Tax Reform Act of 1986. *Id.* at 17, col. 1, Swirnoff, *supra* note 2, at 15, col. 6.

<sup>28</sup> See *Stratford Fin. Corp. v. Finex Corp.*, 367 F.2d 569 (2d Cir. 1966). In *Stratford*, the Second Circuit held that "[t]he formation of a trust relationship is dependent upon the intention of the parties, which, if not clearly indicated by the language of the parties, is to be inferred from all the circumstances." *Id.* at 571 (citing 1 A. SCOTT, TRUSTS § 12.2 (2d ed. 1956)). See also *Glidden v. Metropolitan Life Ins. Co.*, 41 App. Div. 2d 621, 622, 340 N.Y.S.2d 718, 719 (1st Dep't 1973) (decedent's intent controls designation notwithstanding

court's insistent adherence to the plain meaning of the statutory language of section 13-3.3 is consistent with principles of statutory interpretation,<sup>29</sup> it is suggested that the better solution would have been to vitiate the trust in question, notwithstanding the intent of the parties involved, by concluding that the trust was an invalid attempt to give preference to some creditors over others upon the decedent's death.<sup>30</sup> It is suggested that in so doing, the court would have advanced a decision consistent with both principles of statutory interpretation *and* the law of trusts and estates.

The Appellate Division, Second Department's decision in *In re Stein* sets forth an analysis of section 13-3.3 of the EPTL that adheres to the language of the statute as amended. However, it is submitted that the court failed to consider Article 13 of the EPTL as a fully integrated provision and consequently left certain issues unresolved as to the proper implementation of the section. Regardless of the wisdom of the rule, the decision in *In re Stein* merits careful attention from the attorney-draftsman and insurer alike.

*Andrew Bonzani*

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ambiguity in policy). It appears from the court's opinion in *Stein* that the intent of the decedent to create a trust was undisputed. *See Stein*, 131 App. Div. 2d at 69-70, 520 N.Y.S.2d at 157-58. *See generally* RESTATEMENT, *supra* note 1, § 2 (trust definition premised on intention of the parties).

<sup>29</sup> *See supra* note 20 and accompanying text.

<sup>30</sup> *See* N.Y. Surr. Ct. Proc. Act § 1811(3) (McKinney 1981). Section 1811(3) provides that "[p]reference shall not be given in the payment of a debt over other debts of the same class." *Id.* Generally, attempts to give preference to certain creditors of a decedent when the estate is insolvent have been struck down. *See, e.g., In re Plotkin*, 56 Misc. 2d 754, 762, 290 N.Y.S.2d 46, 54 (Sur. Ct. New York County 1968)(attempt to prefer claimant creditor of insolvent estate invalid).