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## Revocation of Intervivos Trusts in New York

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## REVOCAION OF INTERVIVOS TRUSTS IN NEW YORK

Changing economic, social and family relationships have given rise to increased efforts to revoke intervivos trusts which were created under conditions which at the time were deemed propitious.

The revocation of such a trust cannot safely be effected by the voluntary acts of the donor and the trustee since vested or contingent rights of individuals, including possible unborn persons, are almost invariably involved which are not subject to summary dispositions by the parties to the trust instrument. Judicial determination is, accordingly, imperative.

In New York State the revocation of an intervivos trust is governed by Section 23 of the Personal Property Law and Section 118 of the Real Property Law—the written consent of all parties “beneficially interested” must be obtained.<sup>1</sup> This entails difficulty in many instances, because minors and those under legal disability cannot give valid consents.

The primary determination to be made at all times is whether a reversion in the donor or a remainder interest in others has been created. The line between the two is often shadowy and difficult of ascertainment. What did the donor of the trust intend to accomplish when he created it? The answer to this vital question must be found in the language of the trust instrument and the attendant circumstances.<sup>2</sup> Once it is determined that a reversion or a remainder is involved, then the next problem, an equally difficult and perplexing one, is to ascertain who are “beneficially interested” in

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<sup>1</sup> N. Y. PERS. PROP. LAW § 23. “Revocation of Trusts Upon Consent of All Persons Interested. Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.” N. Y. REAL PROP. LAW § 118. “Revocation of Trusts Upon Consent of All Persons Interested. Upon the written consent acknowledged or proved in the manner required to entitle conveyances of real property to be recorded of all the persons beneficially interested in a trust in real property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the whole or such part thereof by an instrument in writing acknowledged or proved in like manner and thereupon the estate of the trustee shall cease in the whole or such part thereof. If the conveyance or other instrument creating a trust in real property shall have been recorded in the office of the clerk (or register) of any county of this state, the instrument or instruments revoking such trust with the consents thereto as above provided shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust shall have been recorded.”

<sup>2</sup> *Richardson v. Richardson*, 120 N. Y. L. J. 411 (Ct. of App. Sept. 13, 1948); *Scholtz v. Central Hanover Bank and Trust Co.*, 295 N. Y. 488, 68 N. E. 2d 503 (1946); *Engel v. Guaranty Trust Co. of New York*, 280 N. Y. 43, 19 N. E. 2d 673 (1939); *City Bank Farmers Trust Co. v. Miller*, 278 N. Y. 134, 15 N. E. 2d 553 (1938); *Whittemore v. Equitable Trust Co. of New York*, 250 N. Y. 298, 165 N. E. 454 (1929).

the trust, and correlatively whether all the valid consents required by the statute have been obtained. Where the settlor has retained a reversion of the *corpus*, ordinarily only those who have or may have an interest in the income from the trust during its term must consent. Where, however, the settlor has created remainder interests in the *corpus*, those who have or may have some interest in the disposition of the *corpus*, may burgeon out into the vast reaches of the upper branches of family trees, to persons who may be presently unascertainable. Obstacles may then arise which make revocation impossible.

Ordinarily, a grant over to the donor's heirs-at-law or next-of-kin does not create in them remainder interests which require valid consents to extinguish. They acquire no rights "as purchasers" under the instrument and a reversion in the grantor usually results. However, this rule is only "a prima facie precept of construction" that must yield to the intention of the grantor as found by the courts from the language employed, together with the pertinent circumstances.<sup>3</sup>

When the language is clear and explicit and reflects an obvious intent, no interpretation is indulged in. Definite rules or principles of law are then applicable.

In *Doctor v. Hughes*,<sup>4</sup> the settlor created a trust, the income of which was to be used to pay his debts and an annuity to himself. Upon his death the trustee was directed to convey the property to the heirs-at-law of the settlor. The court held that a reversion had been reserved. ". . . to transform into a remainder what should ordinarily be a reversion, the intention to work the transformation must be clearly expressed. . . . No one is heir to the living and seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs."<sup>5</sup>

When, therefore, the trustees are directed simply to transfer the property to the next-of-kin of the settlor upon the expiration of the trust term, no remainder in such next-of-kin may be found.

When somewhat different language was employed a contrary result followed. In *Whittemore v. Equitable Trust Co. of New York*,<sup>6</sup> the income of the trust was given to two beneficiaries. Upon the death of the survivor the trustees were directed to convey the *corpus* to the settlor, if alive, if not, then to his appointees by will, or, in default thereof, to those who would take by intestacy had the settlor

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<sup>3</sup> *Whittemore v. Equitable Trust Co. of New York*, 250 N. Y. 298, 165 N. E. 454 (1929); *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919).

<sup>4</sup> 225 N. Y. 305, 122 N. E. 221 (1919). See Warren, *A Remainder to the Grantor's Heirs*, 22 TEX. L. REV. 22 (1943) for an interesting article by Prof. Warren on the applicability of the doctrine of "worthier title" to cases involving a gift over to the grantor's heirs.

<sup>5</sup> *Id.* at 312, 313, 122 N. E. at 222, 223.

<sup>6</sup> 250 N. Y. 298, 165 N. E. 454 (1929). For the sake of clarity Crane, J., referred to the three settlors in the singular.

then died the owner of the property. The court held that a remainder had been created in those persons who were the presumptive next-of-kin of the settlor. ". . . The settlor . . . makes rather full and formal disposition of the principal of the trust estate in case he died before the life beneficiary. . . . The creator of the trust reserves power of disposition only by will; he does something more than merely set up a trust for a life beneficiary; he disposes of the property at the termination of the life interests in case of his previous death . . . ." <sup>7</sup>

Emphasis is here placed upon two factors—(1) no power to transfer by deed or assignment was reserved by the settlors, and (2) the interest of the next-of-kin was subject to divestment only by the last will and testament of the settlors. <sup>8</sup>

Inextricably bound up with the primary problem is that of determining who are "beneficially interested" in the trust when a remainder is created, from whom valid written consents are necessary to effect revocation. An abortive attempt was made in *Beam v. Central Hanover Bank & Trust Co.*, *Thatcher v. Empire Trust Co.* and *Corbett v. Bank of New York & Trust Co.*,<sup>9</sup> to limit such persons to those who would be entitled to take if the settlor were to die at the time revocation was attempted. This reasoning was predicated upon the absence of language in the *Whittemore* case as to whether any consents other than those of presumptive next-of-kin (the minor children) of the settlor would have been necessary. It was felt that there was an implication in that case that if the children then living had not been minors and had consented, then all other possible contingent remaindermen would have been cut off.<sup>10</sup>

Many of the elements in the *Whittemore* case were present in *Berlenbach v. Chemical Bank and Trust Co.*,<sup>11</sup> yet a different result was reached. The settlor had made a full and formal disposition of the property. He retained no right to dispose of the *corpus* by deed or assignment, but did reserve some control over the investments to be made by the trustee. Additionally, the income, while payable to him for life, was limited to a twenty-year period. If he died within

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<sup>7</sup> *Id.* at 303, 165 N. E. at 456.

<sup>8</sup> It should be noted that the court completely disregarded the possibility of reverter should the settlor survive the life beneficiaries.

<sup>9</sup> *Beam v. Central Hanover Bank & Trust Co.*, 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936); *Thatcher v. Empire Trust Co.*, 243 App. Div. 430, 277 N. Y. Supp. 874 (1st Dep't 1935); *Corbett v. Bank of New York & Trust Co.*, 229 App. Div. 570, 242 N. Y. Supp. 638 (1st Dep't 1930); *accord*, *Hussey v. City Bank Farmers Trust Co.*, 236 App. Div. 117, 258 N. Y. Supp. 396, *aff'd*, 261 N. Y. 533, 185 N. E. 726 (1932). These cases were later superseded by *Engel v. Guaranty Trust Co. of New York*, 280 N. Y. 43, 19 N. E. 2d 673 (1939); *Schoellkopf v. Marine Trust Co.*, 267 N. Y. 358, 196 N. E. 288 (1935); *Hopkins v. Bank of New York*, 261 App. Div. 465, 25 N. Y. S. 2d 888 (1st Dep't 1941).

<sup>10</sup> See note 9 *supra*.

<sup>11</sup> 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dep't 1932), *aff'd*, 260 N. Y. 539, 184 N. E. 83 (1932).

the twenty years the *corpus* was to be distributed according to the laws of intestacy, upon failure to exercise a reserved testamentary power of appointment. If the settlor was alive at the end of said period then the *corpus* was to revert to him. Here the court found that a reversion had been created and significantly noted that ". . . the only contingency upon which some one other than plaintiff could acquire an interest would be his death prior to the expiration of the 20-year period."<sup>12</sup> The decision appears to have been predicated upon the existence of two factors—that the settlor was the beneficiary for what amounted to a flat term of years and that he retained control to some degree over the investments to be made by the trustee.

The latter factor was controlling in *Guaranty Trust Co. v. Armstrong*.<sup>13</sup> The court held that where there is reserved the power to supervise or control the investments made by the trustee there is also reserved a reversion of the *corpus* upon the termination of all the life interests. It should be noted, however, that here the joint settlors had expressly reserved the power to revoke by joint action during their joint lives and that revocation was allowed only to the extent of the share contributed by the surviving settlor who was seeking revocation.<sup>14</sup>

The first factor, a flat term of years, came before the court in *City Bank Farmers Trust Co. v. Miller*,<sup>15</sup> although the problem of revocation was not directly involved. The question was whether the property bound up in the trust constituted part of the decedent's estate and the answer to that question depended upon whether the trust instrument created a reversion or remainder.

The settlor had provided that the income and the principal of the trust were to be paid to her until the balance was reduced to \$5,000 at which time it was to be paid over to her. If the settlor died prior to that time the principal was to be paid to her appointees by will or in default thereof, to those entitled to it by the intestacy laws of New York. It was held that a reversion had been retained, and that the property passed as a part of her estate. Since the payments were to be made in fixed installments it was only a simple mathematical calculation to determine just when the balance would be returned to the settlor and the trust term, therefore, was actually for a flat term of years.<sup>16</sup>

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<sup>12</sup> *Id.* at 173, 256 N. Y. Supp. at 566.

<sup>13</sup> — Misc. —, 43 N. Y. S. 2d 897 (Sup. Ct. 1943), *aff'd*, 268 App. Div. 763, 49 N. Y. S. 2d 286 (1st Dep't 1944), *aff'd*, 294 N. Y. 666, 60 N. E. 2d 757 (1945).

<sup>14</sup> See *Culver v. Title Guaranty & Trust Co.*, 296 N. Y. 74, 70 N. E. 2d 163 (1946).

<sup>15</sup> 278 N. Y. 134, 15 N. E. 2d 553 (1938).

<sup>16</sup> See *Berlenbach v. Chemical Bank & Trust Co.*, 235 App. Div. 170, 256 N. Y. Supp. 563 (1st Dep't 1932).

When the rights stem from the trust instrument itself and are clearly defined by the writing which indicates a purpose to make a gift of a remainder to those out of the ordinary line of succession, then effect will be given to the settlor's intent despite the rule that ordinarily a reservation to the heirs of a grantor results in a reversion.

In *Schoellkopf v. Marine Trust Co.*,<sup>17</sup> the settlor completely divested himself of any interest in the income from the trust as well as any reversionary interest, except that which might be found from the limitation over of the principal to the heirs of the settlor should the life beneficiary who was given the right to designate a person to receive the principal, fail to do so. The heirs of the settlor were defined by the instrument to be those who would be entitled to share in the distribution of the personal estate of the settlor "under the laws of the State of New York at the time of such distribution."<sup>18</sup> The court held that, "Any person who under the terms of the instrument has a right, whether present or future, whether vested or contingent, to income or principal of the trust fund, has a beneficial interest in the trust. . . . Any right given by the trust instrument to receive a benefit from the trust in some contingency is a 'beneficial interest' in the trust.

"Such a right is given by the trust instrument to the settlor's 'heirs' as defined by that instrument. . . . the trust instrument makes no provision for distribution among a class composed of those who would be entitled to share in the distribution of the personal estate of the settlor if he were to die *today*. The distribution must be made among the class of those who would be entitled to share in the personal estate of the settlor at the time of distribution of the income or corpus of the trust fund."<sup>19</sup> In short the ordinary line of succession had been varied.

It was therefore considered immaterial that all those had consented who would be the "heirs" defined in the instrument were the settlor to die *today*. "A person can consent to the destruction of a beneficial interest in trust which is or may hereafter become vested in him, and thus deprive his heirs or descendants of an expected benefit; yet no person can by his consent destroy an interest, even of his own descendants, derived directly from the trust instrument and not derived from the ancestor by succession."<sup>20</sup>

Whether unborn members of the class designated by the instrument who would have upon birth, a contingent interest in the principal were also persons "beneficially interested" in the trust was expressly left open.<sup>21</sup>

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<sup>17</sup> 267 N. Y. 358, 196 N. E. 288 (1935).

<sup>18</sup> *Id.* at 362, 196 N. E. at 290.

<sup>19</sup> *Id.* at 362, 196 N. E. at 291.

<sup>20</sup> *Id.* at 364, 196 N. E. at 291.

<sup>21</sup> *Ibid.*

The decision in this case would also seem to have presaged the end of the rule that the only consents necessary to revoke were from those who would be entitled to take if the settlor had died at the time revocation was requested. The pronouncement in the *Corbett* case that such had always been the rule,<sup>22</sup> had lost significance and was put to final rest in *Engel v. Guaranty Trust Co. of New York*.<sup>23</sup> There the settlor directed that the income be paid to him for life and that payments from principal not to exceed an aggregate of \$15,000 be made to him at any time. Upon his death the trust was to terminate and the principal was given to his wife, if she survived him, if not then to those whom he appointed by will, and in default thereof to those entitled thereto as if he had died intestate. When revocation was attempted, the settlor's only next-of-kin had he then died, were his wife and a brother. They were of full age, and both had consented to the revocation but there were other living blood relatives of the settlor. The court held that the attempted revocation was ineffectual, that remainder interests had been created in the presumptive next-of-kin of the settlor who, while not now ascertainable, nevertheless had beneficial interests in the trust which could not be defeated without their consent.

The court further stated, "It is true that our opinion in the *Whittemore* case assumed that transfers of personal property are embraced by the ancient rule 'that a reservation to the heirs of the Grantor is equivalent to the reservation of a reversion to the Grantor himself.' (*Doctor v. Hughes*, 225 N. Y. 305, 310.) But this rule (as the *Doctor* and *Whittemore* cases show) is with us no more than a *prima facie* precept of construction which may serve to point the intent of the author, when the interpretation of a writing like this trust agreement is not otherwise plain. Inasmuch as for us that rule has now no other effect, it must give place to a sufficient expression by a grantor of his purpose to make a gift of a remainder to those who will be his distributees. . . .

"Although it is not an agreed fact that persons now living (other than James Mack Engel) are blood relatives of the grantor it is quite impossible to make a different assumption. . . . From any one of the ancestors of this grantor may stem another family line that is related to him by consanguinity. This whole group has a contingent remainder created by this trust indenture. They take as purchasers through a beneficial right derived from the trust instrument, and all who have a share in that right and who may, by survival or other event become members of the class entitled to the remainder have a beneficial interest in the trust which cannot be destroyed with-

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<sup>22</sup> *Corbett v. Bank of New York & Trust Co.*, 229 App. Div. 570, 242 N. Y. Supp. 638 (1st Dep't 1930).

<sup>23</sup> 280 N. Y. 43, 19 N. E. 2d 673 (1939).

out their consent.' (*Schoellkopf v. Marine Trust Co.*, 267 N. Y. 358, 363.)"<sup>24</sup>

The court here found a sufficient expression by the settlor of a purpose to make a gift of the remainder to those who would be his next-of-kin which it would be beyond his power to defeat except by testamentary disposition. Stress was placed upon the fact that the settlor expressly reserved a part (\$15,000) of the principal but made no provision for a return of any of the balance. This it was felt was much more indicative of an intent to divest himself of the rest than if no part at all had been retained.<sup>25</sup> The *Engel* case seemed to sound the death knell to hopeful revokers.

It was followed by *Hopkins v. Bank of New York*,<sup>26</sup> in which case the settlor was domiciled in Connecticut and limited the gift over to her next-of-kin under the intestacy laws of New York. It was held that the ordinary line of succession was varied; this indicated very strongly an intent to make a gift of the remainder to those persons making up the class designated. It was argued that all those who would constitute the class, were the settlor to die when revocation was attempted, had consented thereto. The court said, however, "When a remainder is created in next of kin, consents by those who would be next of kin at the time of the attempted revocation are insufficient. (*Schoellkopf v. Marine Trust Co.*, 267 N. Y. 358; *Engel v. Guaranty Trust Co. of New York*, *supra.*)"<sup>27</sup>

A limitation over to the heirs-at-law or next-of-kin of the settlor was again found in *Minc v. Chase National Bank*,<sup>28</sup> to be indicative of intent to vest them with a remainder interest even though the property was to pass under the laws of the state in which the settlor was domiciled. The settlor who was also the life beneficiary and domiciled in New York directed that the trustee convey the *corpus* to those entitled thereto "under the Statute of Descent and Distribution of the State of New York" in the absence of any testamentary disposition of it by her. The court held that the designation of a particular state's laws to determine the class that would take constituted a gift by purchase and negated an intent that the class take by descent.

But where a trust was created solely to avoid a will contest and the principal was to be returned to the settlor if he survived the life beneficiary, it was held that there was no intent to create a remainder by a limitation over in certain contingencies to the next-of-kin of the donor though they were to be determined by the laws of a particular state (New York).<sup>29</sup>

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<sup>24</sup> *Id.* at 47, 19 N. E. 2d at 675.

<sup>25</sup> *Id.* at 47, 19 N. E. at 674.

<sup>26</sup> 261 App. Div. 465, 25 N. Y. S. 2d 888 (1st Dep't 1941).

<sup>27</sup> *Id.* at 467, 25 N. Y. S. 2d at 890.

<sup>28</sup> 263 App. Div. 141, 31 N. Y. S. 2d 592 (1st Dep't 1941).

<sup>29</sup> *Fish v. Chemical Bank & Trust Co.*, 270 App. Div. 251, 59 N. Y. S. 2d 62 (1st Dep't 1945).

The question left open in the *Schoellkopf* and *Engel* cases as to whether the unborn members of the class designated by the instrument who would, upon birth, have a contingent interest in the trust *corpus* were persons "beneficially interested" in the trust was answered in *Smith v. Title Guaranty & Trust Co.*<sup>30</sup> In that case the income from the trust was to be paid to the daughter of the settlor and upon the death of the settlor she was to receive the principal. If she predeceased the settlor, her brother was to take, or if he was dead, his issue if any, would take. If there were no such issue then the principal was to go to the legal representatives of the settlor. The brother and sister who had no children, executed written consents. The court held that there was a reversion, and that the consents of the possible unborn children of the brother were not necessary to effect revocation during the life of their father though at birth they would have had a contingent remainder.

This case re-instilled hope in those who would revoke. It seemed that the court was leaning towards interpreting trust instruments in favor of reversions unless precluded by explicit language to the contrary. The ancient rule that a reservation to the heirs of a grantor is equivalent to the reservation of a reversion to the grantor himself seemed to take on added force as "a precept of construction." This view became more discernible in the following three cases:

In *Scholtz v. Central Hanover Bank and Trust Co.*,<sup>31</sup> the income of the trust was given to the son of the settlor for life and upon his death the principal to his descendants. If he died without descendants the principal was to be distributed to the next-of-kin of the settlor at the time of the son's death. No testamentary power of disposition was reserved and no provision made for the possible contingency of the son predeceasing the settlor. The court applied the rule of *Doctor v. Hughes* that a very clear expression of intent must appear to transform into a remainder what would ordinarily be a reversion.<sup>32</sup> No such clear intention was found and accordingly it was held that a reversion had been created. The consent of the unmarried son was sufficient even though at the time of the revocation the settlor had several married brothers, sisters, nephews and nieces. Furthermore the designated class under the terms of the instrument could not be ascertained until the son's death without descendants.<sup>33</sup>

Although not expressed in the decision, implicit therein is the "remote contingency" rule soon to be invoked in succeeding decisions. Had the court found that a remainder was intended the property might have been distributed to collateral next-of-kin of the settlor

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<sup>30</sup> 287 N. Y. 500, 41 N. E. 2d 72 (1942).

<sup>31</sup> 295 N. Y. 488, 68 N. E. 2d 503 (1946).

<sup>32</sup> 225 N. Y. 305, 122 N. E. 221 (1909).

<sup>33</sup> *Scholtz v. Central Hanover Bank and Trust Co.*, 295 N. Y. 488, 492, 68 N. E. 2d 503, 505 (1946).

while she was still alive if her son predeceased her without descendants.

This case was followed by *Julier v. Central Hanover Bank & Trust Co.*,<sup>34</sup> in which the income of the trust was payable to the settlor for life, then to his wife during her life. Upon the death of the wife, or if the settlor survived her, upon his death to the children of the settlor or their descendants *per stirpes*; if there were no children or descendants then to the then next-of-kin of the settlor according to the laws of New York (the settlor's domicile) then in force. The wife and two children (both of age) had consented to the revocation. Under the terms of the trust instrument the next-of-kin could take only if there were no children or descendants of deceased children alive at the time of distribution. The settlor had provided for the immediate objects of his bounty. The limitation over to the next-of-kin was a provision for "remote contingencies" and for persons outside of the direct line of descent. The court found that a reversion had been created; at most the settlor intended by his language that the next-of-kin would take only in accordance with the laws of descent and not by purchase.

The instrument varied the ordinary line of succession and the class was to be determined by the laws of a particular state. Those elements had been found sufficient to create remainders in *Hopkins v. Bank of New York*<sup>35</sup> and *Minc v. Chase National Bank*.<sup>36</sup> Revocations were being regarded still more favorably.

The third case which then followed in point of time was *Glanckopf v. Guaranty Trust Co. of New York*<sup>37</sup> in which the income of the trust was payable to the settlor's daughter for life; upon her death the principal to her appointee by will, in default thereof to the persons entitled thereto had *the life beneficiary* died seized of the property. The indenture further provided however, that the trust was to terminate and the principal revert to the settlor if his daughter predeceased him. The daughter, life beneficiary, and presumptive next-of-kin joined with the settlor in seeking revocation. "Possessing as she does this general power of appointment by will, the act of the *cestui* for life in consenting to the revocation of the trust may be regarded as tantamount to the cutting off of any possible contingent rights of her future next-of-kin not now ascertainable."<sup>38</sup> Revocation was decreed.

The three foregoing cases not only intensified the trend toward a liberal interpretation of trust instruments so as to permit revocation but also injected a new element as a basis therefor. Directly, and by implication, they advance the concept that it is not normal or

<sup>34</sup> 272 App. Div. 598, 74 N. Y. S. 2d 262 (1st Dep't 1947).

<sup>35</sup> See note 26 *supra*.

<sup>36</sup> See note 28 *supra*.

<sup>37</sup> 274 App. Div. 39, 80 N. Y. S. 2d 54 (1st Dep't 1948).

<sup>38</sup> *Id.* at 42, 80 N. Y. S. 2d at 57.

natural for a settlor to intend investing possible future next-of-kin with irrevocable interests beyond his power to defeat, no matter how far removed, particularly when unborn descendants in the direct line of descent may be cut off.<sup>39</sup>

The courts had made a natural and realistic approach to the problem and the policy of liberalizing revocations had gone forward to a marked degree since the *Engel* case. Then came the latest pronouncement of the Court of Appeals in *Richardson v. Richardson*<sup>40</sup> and the pendulum seems to have swung back. In that case the settlor provided for the income to her for life; upon her death the trust was to terminate and the principal be distributed to her appointee by will; in default of appointment to the settlor's mother if living and if not to those entitled thereto by the New York laws of intestacy. The mother died and the settlor requested revocation. Had she then died intestate, her husband and three children (ages 21, 18 and 15) would have been entitled to take the property.

The Appellate Division<sup>41</sup> unanimously found that the mother's remainder became divested on death; that the *corpus* of the estate on the death of the settlor would pass by descent to those entitled thereto under the intestacy laws, in the absence of exercise by the settlor of the testamentary power of appointment. Furthermore that this power of appointment, after the mother's death, was merely an expression of the settlor's testamentary capacity to dispose of her own property and that if the settlor left no will she intended to die intestate as to the property. The cases of *Scholtz v. Central Hanover Bank & Trust Co.*,<sup>42</sup> *City Bank Farmers Trust Co. v. Miller*<sup>43</sup> and *Fish v. Chemical Bank and Trust Co.*,<sup>44</sup> were cited in support of the finding that a reversion was created.

The Court of Appeals reversed unanimously and found as a legal conclusion that the settlor intended to and did create a remainder in favor of her mother, if alive, and if not to her next-of-kin, which she could not defeat except by an affirmative testamentary act—the exercise of the power of appointment which had been reserved; and that if a reversion were intended the power of appointment by will would have been superfluous. In coming to this conclusion the Court of Appeals also re-examined with approval among others, the cases of *City Bank Farmers Trust Co. v. Miller*,<sup>45</sup> *Scholtz v. Central Hanover Bank & Trust Co.*<sup>46</sup> and *Julier v. Central Hanover Bank & Trust*

<sup>39</sup> See note 37 *supra*; see *Smith v. Title Guaranty & Trust Co.*, 287 N. Y. 500, 504, 41 N. E. 2d 72, 74 (1942).

<sup>40</sup> 120 N. Y. L. J. 411 (Ct. of App. Sept. 13, 1948).

<sup>41</sup> *Richardson v. Richardson*, 272 App. Div. 321, 71 N. Y. S. 2d 1 (1st Dep't 1947).

<sup>42</sup> See note 31 *supra*.

<sup>43</sup> 278 N. Y. 134, 15 N. E. 2d 553 (1938).

<sup>44</sup> 270 App. Div. 251, 59 N. Y. S. 2d 62 (1st Dep't 1945).

<sup>45</sup> See note 43 *supra*.

<sup>46</sup> See note 31 *supra*.

Co.,<sup>47</sup> upon which the lower court relied. “. . . we believe the settlor evidenced her intention to give a remainder to her next of kin because she (1) made a full and formal disposition of the principal of the trust property, (2) made no reservation of a power to grant or assign an interest in the property during her lifetime, (3) surrendered all control over the trust property except the power to make testamentary disposition thereof and the right to appoint a substitute trustee, and (4) made no provision for the return of any part of the principal to herself during her lifetime.”<sup>48</sup>

The *Richardson* case now gives rise to perplexity as to the course which the courts may follow hereafter. The policy of liberalizing revocations and the realistic approach seem to have been abandoned. Certainly the atmosphere is shrouded in doubt and heavy and dark clouds once more hang over *Doctor v. Hughes*. Clarification is indicated, if not imperative. There is no comfort to be found in the recently enacted Article 79 of the Civil Practice Act which merely defines procedural methods to be followed in trust accountings.<sup>49</sup> The remedy would lie in retroactive statutory enactments and should receive the closest consideration of the New York State Law Revision Commission.

DANIEL M. SHIENTAG.

#### LIABILITY OF CORPORATIONS WHERE STATUTE REQUIRES AGENT'S AUTHORITY TO BE IN WRITING

A majority of jurisdictions in the United States have Statutes of Frauds which require an agent's authority to be in writing under certain circumstances.<sup>1</sup> There is considerable variation as to the situations which require written authority on the part of the agent; some statutes require such authority in all situations wherein the Statute of Frauds applies,<sup>2</sup> while others make no provision that the agent's

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<sup>47</sup> See note 34 *supra*.

<sup>48</sup> 120 N. Y. L. J. 411 (Ct. of App. Sept. 13, 1948).

<sup>49</sup> N. Y. CIV. PRAC. ACT §§ 1307-1319. But see Ninth Annual Report of the Judicial Council, 1943 LEG. DOC. NO. 20, pp. 311-312.

<sup>1</sup> Typical of these statutes are CAL. CIV. CODE § 2309 (1937); DEL. REV. CODE § 3106 (1935); ILL. REV. STAT., c. 59, § 2 (1943); KAN. GEN. STAT. ANN. § 106 (1935); N. J. REV. STAT. §§ 25:1-1, 25:1-2 (1937); PA. STAT. ANN., tit. 33, § 1 (1936); TEX. STAT. REV. CIV., art. 1288 (1936); VT. PUB. LAWS § 1675 (1933).

<sup>2</sup> A typical statute is CAL. CIV. CODE § 2309 (1937): "An authorization is sufficient for any purpose, except that an authority to enter into a contract required to be in writing can only be given by an instrument in writing."