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The Life Insurance Trust

Arthur S. Margulis

and the courts and legislatures are striving diligently to round out the proper legal procedure.

BENNETT D. BROWN.

THE LIFE INSURANCE TRUST.

Although the insurance trust was employed in America as long ago as 1869 [1] and was actively advocated during the ensuing years,[2] it has assumed real importance during the last decade and a half.[3] Statistics indicate that at the close of 1930 over four billion dollars of insurance trusts were in existence.[4] These trusts have been classified in two outstanding groups, known as the unfunded and funded trusts.

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stimulate private enterprise in housing and provide the low-income groups with the necessary funds for paying their rent. N. Y. Times, Feb. 20, 1936, at 8.

In his interesting article, *supra* note 44, Mr. Holden suggests another solution to the troublesome problem of constitutional sanction. He proposes that the President make recommendations for slum clearance and low-cost housing through his various fact-finding agencies, which recommendations he is authorized to make by virtue of the power "to give to the Congress information of the state of the Union, and to recommend to their consideration such measures as he shall judge necessary and expedient," vested in him by Article II, Section 3, of the Constitution. It has been held that he may appropriate money to prepare such information. Then Congress, under its authority "to coin money, regulate the value thereof, and of foreign coin," granted in Article I, Section 8, clause 5, may put his recommendations into effect by appropriate legislation. Thus, "through intelligent exercise of monetary control," Mr. Holden concludes, "there is vested in Congress power adequate to accelerate or retard the flow of credit for housing and for rebuilding and rehabilitation of the undesirable sections of our cities."

[1] POWELL, TRUSTS AND ESTATES (1932) 48. The Girard Trust Co. of Philadelphia was trustee.

[2] STEPHENSON, LIVING TRUSTS (1926) 19. The Provident Life & Trust Co. of Philadelphia was its vigorous exponent.

[3] The late beginning of insurance is one of the reasons for the late rise of insurance trusts. Although the first life insurance company in the United States, the Presbyterian Ministers' Fund of Philadelphia, was chartered in 1759, most existing companies in the United States were chartered within the last fifty years. See STEPHENSON, *op. cit. supra* note 2.

In fact, up to 1926, the sums placed in insurance trusts were negligible. STEPHENSON, *op. cit. supra* note 2. In the three ensuing years, insurance trusts valued at over a billion dollars were created. 50 Trust Companies Magazine 363 (1930). See Address by F. H. Sisson, 1928, *A Record Year for Trust Service*, published by Guaranty Trust Co., New York City.

[4] Estimate by Trust Division of The American Banker's Ass'n, no later figures available; Note (1936) 45 HARV. L. REV. 896. The number of trusts that actually take effect at insured's death is not known. Revocations have not been considerable. One large trust company informed Professor Powell, *op. cit. supra* note 1, that revocations of trusts created before 1928 were 3% of the total; in 1929, 4.3%; in 1930, 2.4%, and in 1931, 2.9%.

The unfunded insurance trust is employed in the great majority of cases.[5] In this type of trust, the settlor who has procured an insurance policy on his life or the life of another either assigns it [6] to the trustee or executes a trust agreement naming a third party as *trustee-beneficiary,* that is, not only is a third party designated as the trustee in the trust agreement but, also, he is made the beneficiary under the insurance policy and receives the proceeds of the policy by virtue of the latter status. The *cestui* is the person for the benefit of whom the *trustee-beneficiary* receives the proceeds. The *cestui* is the beneficiary under the trust agreement, not under the insurance policy. The trust agreement provides for the disposition of the proceeds [7] of the policy for the benefit of persons named in the agreement, *i. e.,* the *cestuis.* The insured or settlor pays the premiums as they come due.

The funded trust [8] is created in the same manner as the unfunded trust. It possesses, however, one additional feature in that at the time of the agreement, the settlor transfers to the trustee securities,[9] the income from which is to be used to pay the premiums on the insurance policy.

The Non-Testamentary Character of the Insurance Trust.

In most states,[10] the life insurance trust, whether created by assignment of the policy or change of beneficiary, has been held to

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[5] William Ludwig, N. Y. L. J., Oct. 14, 1935, at 1254.

[6] REMSEN, in PREPARATION OF WILLS AND TRUSTS (1930) 313, declares that most funded insurance trusts and some unfunded trusts are created by instruments with words of assignment to the trustee.

The trustee, having the duty of collecting the proceeds, representing the *cestuis* and defending the trust in litigation, cannot be considered a passive trustee. N. Y. Life Ins. Co. v. O'Brien, 27 F. (2d) 773 (D. C. W. D. Mich. 1927), *appeal dismissed,* 22 F. (2d) 1016).

[7] Many states (Conn., Iowa, Mass., Miss., Ore., Vt., N. Y. [within restrictions], Del.) permit insurance companies to act as trustee and do not require the segregation of the trust fund. This would seem to be a violation of the principle that a trust *res* must exist before a trust can arise. See 2 BOGERT, THE LAW OF TRUSTS AND TRUSTEES (1935) § 240, for criticism of the insurance company trust.

[8] Hanna, *Some Legal Aspects of Life Insurance Trusts* (1930) 78 U. OF PA. L. REV. 346; see also SHATTUCK, LIVING TRUSTS (1928) 18 *et seq.*

[9] See *Funded Insurance Trust Agreement,* Equitable Trust Co. of N. Y., where insurance policies are designated "Trust Estate B" and the securities from which income to pay premiums is to be derived is termed "Trust Estate A."

For an exposition of three minor variations of the funded and unfunded trusts, the retiring, cumulative and business trusts, see Hanna, *loc. cit. supra* note 8; the Financial Digest, May, 1928, p. 4; N. Y. PENAL LAW § 665 (1907); N. Y. ANN. CONSOL. LAWS (2d ed. 1917) § 732; Topken, Loring & Schwartz, Inc. v. Schwartz, 249 N. Y. 206, 163 N. E. 735 (1928).

[10] The various states have passed "countless" statutes, but Mr. Grahame, *The Insurance Trustee as Non-Testamentary 'Disposition'* (1934) 18 MINN. L. REV. 391, has found that most of them deal with mainly non-testamentary insurance trusts and therefore do not help in the solution of doubtful cases.

be a non-testamentary disposition.[11] According to substantial authority, the entire interest, subject to the reservation of the power of revocation, passes to the *trustee-beneficiary* during the life of the settlor, and the only effect of his death is to end the possibility that the interest might be revoked.[12] If the settlor does not reserve the right to revoke the assignment[13] or change the beneficiary, there is

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[11] BOGERT, *op. cit. supra* note 7, § 235. See POWELL, CASES ON TRUSTS AND ESTATES (1933) 1021, 1022. Johnston v. Scott, 76 Misc. 641, 137 N. Y. Supp. 243 (Sup. Ct. 1912); Gurnett v. Mutual Life Ins. Co., 268 Ill. App. 518, 191 N. E. 250 (1932); Bose v. Meury, 112 N. J. Eq. 62, 163 Atl. 276 (1932) (Question as to testamentary disposition was considered irrelevant here, but since New Jersey has always staunchly upheld the rights of the beneficiary, requiring the procedure set forth in the policy to be followed before beneficiary loses his rights, Mr. Grahame, *loc. cit. supra* note 10, at 403, declares, "it may be assumed that the beneficiary-trustee was considered to have had rights during the insured's lifetime."); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925); Matter of Haedrich, 134 Misc. 741, 236 N. Y. Supp. 395 (Surr. Ct. 1929), *aff'd*, 256 N. Y. 608, 177 N. E. 160 (1931) (Court held that the insurance trust could not be testamentary because the insured did not own the insurance fund and that such fund accrued to the beneficiary only upon the death of the insured and, therefore, did not *pass* upon the death of the insured, never having existed during his life.); TENN. CODE 1932 § 9596 (insurance trust is valid and need not be executed as a will); VANCE, INSURANCE (2d ed. 1930) § 147; REMSEN, *op. cit. supra* note 6; Note (1933) 46 HARV. L. REV. 818; Grahame, *The Rights of a Beneficiary* (1933) 2 Ins. Dec. 318.

[12] See BOGERT, *op. cit. supra* note 7. Funded insurance trusts are usually irrevocable, the trustee or beneficiary having the right to borrow, to dividends, cash surrender value, *etc.;* Hanna, *loc. cit. supra* note 8; see also note 18, *infra.*

[13] In order to avoid conflict between the assignee and a prior designated beneficiary, or a preliminary change to the insured's estate, the beneficiary or estate's consent to the change must be secured. 37 C. J. 432; Anderson v. Broad Street Nat. Bank, 90 N. J. Eq. 78, 105 Atl. 599 (1918). The trust companies usually have the trustee named also as beneficiary, avoiding assignments. See Note (1924) 73 U. OF PA. L. REV. 295; Dickie, *Life Insurance Trusts* (Sept.-Oct. 1930) 14 U. OF DETROIT BI-MONTHLY L. REV. 23. This policy is in line with the theory that the settlor is also an insured and should be allowed to retain benefits usually accruing to him, *i. e.,* rights to dividends, cash surrender value and to borrow. See Ludwig, *loc. cit. supra* note 5. In Schoenholtz v. N. Y. Life Ins. Co., 234 N. Y. 24, 136 N. E. 227 (1922), it was held that an assignment of the policy had no effect on the already designated beneficiary. It merely assigned insured's rights to proceeds if he outlived the beneficiary. In order to eliminate the confusion that prevails as to the effect of assignment when insured reserves right to change beneficiary but does not follow procedure set forth in policy, it is suggested that the insurance companies include in policies a provision that, if the insured reserves the right to change the beneficiary he can assign without beneficiary's consent and the assignment will include the beneficiary's interest. This would also avoid a large number of needless policy changes. A few companies now include such a clause in the policy. See Holland, *Assignment by the Insured of Policies which Reserve to the Insured the Right to Change the Beneficiary* (1929) 4 Ass'n of Life Insurance Counsel Proceedings 181; 37 C. J. 583, ¶ 349; Shandy v. Shandy, 203 Pac. 433, 55 Cal. App. 344 (1921).

Delivery of the policy to assignee might not only decrease likelihood of the court holding transaction to be testamentary but also would help to counteract somewhat the criticism that the trustee has no duties to perform during the insured's life. See Grahame, *loc. cit. supra* note 10; HORTON, LIFE INSURANCE TRUST HANDBOOK 22.

no testamentary problem. In such a case, the assignee or beneficiary has a present vested interest that cannot be altered by the settlor [14] and is not affected by the settlor's death. The irrevocable trust is not usual; [15] ordinarily, the settlor reserves the power to revoke the trust or change the trustee-beneficiary. There is a divergence of opinion as to the effect of this clause. Many courts hold that the trustee-beneficiary has only a contingent interest [16] or an expectancy [17]

If the insurance company has no notice of assignment, it would be protected in paying proceeds to whatever beneficiary was named on the face of the policy. See Wright, *Designation of a Trustee as Beneficiary*, Best's Insurance News, Aug. 1, 1930, 282 *et seq.;* Fraser, *Personal Life Insurance Trusts in N.-Y.* (1930) 16 CORN. L. Q. 19.

Efforts are being made to introduce a uniform form for change of beneficiaries in the creation of insurance trusts. For a list of insurance companies and a statement of their requirements, see Insurance Trust Bulletin, No. V, Jan., 1931, issued by American Bankers' Ass'n.

[14] REMSEN, *op. cit. supra* note 6; 7 COOLEY, BRIEFS ON INSURANCE (2d ed. 1928) 6399 ff.; Gurnett v. Mutual Life Ins. Co., 268 Ill. App. 518, 191 N. E. 250 (1932); Central Nat. Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41 (1881); Olmstead v. Keyes, 85 N. Y. 593 (1881); Ruppert v. Union Mutual Ins. Co., 30 N. Y. Super. Ct. (7 Rob. 155) 155 (1867); Butler v. State Mutual Life Assur. Co., 55 Hun 296, 8 N. Y. Supp. 411 (Sup. Ct. 1890); Jones v. North Carolina Mutual & Provident Ass'n, 105 S. C. 472, 90 S. E. 30 (1916); Roberts v. Northwestern Nat. Life Ins. Co., 143 Ga. 780, 85 S. E. 1043 (1915); see also Hanna, *loc. cit. supra* note 8; Vance, *The Beneficiary's Interest in a Life Insurance Policy* (1921) 31 YALE L. J. 343. Even if policy expressly reserves to insured the cash surrender value and loan value, the failure to expressly reserve right to change beneficiary makes beneficiary's right vested and irrevocable. Condon v. N. Y. Life Ins. Co., 183 Iowa 658, 166 N. W. 452 (1918). However, one exception to the rule that if no power to change beneficiary is reserved, beneficiary has vested right to proceeds in the case of a beneficiary under a fraternal benefit society certificate. In such case it is claimed beneficiary had only a naked expectancy. See 1 WILLISTON, CONTRACTS (1920) 396a and cases there cited with criticism of Brandeis, J.

[15] Ludwig, *loc. cit. supra* note 5.

[16] 37 C. J. 579, 580; Holland, *loc. cit. supra* note 13; Grahame, *loc. cit. supra* note 10 (Mr. Grahame suggests that, in the trend of the courts away from the old common-law theory that the beneficiary owned the policy, the courts have leaned over backward and have belittled beneficiary's interest, calling it "expectant" where, in fact, "contingent" was meant): Elmore v. Continental Life Ins. Co., 131 Kan. 335, 291 Pac. 755 (1930); Atlantic Mutual Life Ins. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933 (1901); Barbour v. Equitable Life Assur. Society of U. S., 174 App. Div. 759, 161 N. Y. Supp. (3d Dept. 1916); Rosman v. Traveler's Ins. of Hartford, 127 Md. 689, 96 Atl. 875 (1916); Broga v. Rome Trust Co. of Rome, N. Y., 151 Misc. 641, 272 N. Y. Supp. 101 (Sup. Ct. 1934) (part of the trust was held testamentary and, therefore, revoked by a subsequent will); Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N. E. 389 (1929) (Case only reversed because the Ohio statute declared such a trust non-testamentary); Warsco v. Oshkosh Savings & Trust Co., 183 Wis. 156, 196 N. W. 829 (1924); Northwestern Mutual Life Ins. Co. v. Collamore, 100 Me. 578, 62 Atl. 652 (1905) (Where assignor-insured reserved right to divert proceeds to his estate without assignee's consent, court held that this was an effort to deprive widow of insured of her interest in his estate and still retain ownership).

[17] Fraser, *loc. cit. supra* note 13; Burnett v. Mutual Life Ins. Co. of N. Y., 66 Ind. App. 280, 114 N. E. 232 (1916); Insurance Co. v. Swett, 222 Fed. 200 (C. C. A. 6th, 1915); Fisher v. Donovan, 57 Neb. 371, 77 N. W. 778 (1899);

and that a testamentary disposition during the settlor's life is attempted. However, the preponderance of authority is to the effect that the beneficiary-trustee has a vested right subject to easy divestment and that no testamentary disposition has been made.[18] The tendency to characterize the trustee-beneficiary's rights, as contingent or expectant,[19] is further checked by the movement of the law toward

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Staples v. Murray, 124 Kan. 730, 262 Pac. 558 (1928). Bogert, in *Funded Insurance Trusts and the Rule v. Accumulations* (1924) 9 CORN. L. Q. 113, 132, declared that "beneficiary during the life of the insured has nothing in the present. All his rights to *enjoyment* are in the future." It would seem that a present vested interest could exist even though enjoyment is in the future. St. Louis Union Trust Co. v. Bassett, 85 S. W. (2d) 569 (Mo. 1935); see Ludwig, *loc. cit. supra* note 5, Oct. 15, 1935.

[18] 1 WILLISTON, CONTRACTS (1926) 369; Grahame, *loc. cit. supra* note 11; JOYCE, INSURANCE (2d ed.) §§ 730-a, 731; Corbin, *Contracts for Benefit of Third Person* (1918) 27 YALE L. J. 1008 (Third party contract theory will account, also, for the beneficiary's rights; even though the beneficiary has no notice of the assignment to him, he has vested interest). Continental Life Ins. Co. v. Palmer, 42 Conn. 60 (1875); Kocharek v. Prudential Ins. Co., 262 Mass. 174, 159 N. E. 520 (1928); Prudential Ins. Co. v. Swanson, 111 N. J. Eq. 477, 162 Atl. 597 (1932); Barbin v. Moore, 85 N. H. 362, 159 Atl. 409 (1932); Gurnett v. Mutual Life Ins. Co., 268 Ill. App. 518, 191 N. E. 250 (1932); Johnston v. Scott, 76 Misc. 641, 137 N. Y. Supp. 243 (Sup. Ct. 1912); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925) (Settlor also reserved the power to withdraw principal and defeat the trust). Even though both the life income and the power of revocation are reserved, the Statute of Wills is not considered violated. Lauterbach v. N. Y. Investment Co., 62 Misc. 561, 117 N. Y. Supp. 152 (Sup. Ct. 1909); Minrath v. Gifford, 137 App. Div. 919, 122 N. Y. Supp. 1137 (1st Dept. 1910); Noble v. Leonard, 87 Pac. 402, 7 Cal. Unrep. 297, *aff'd*, 94 Pac. 1047, 153 Cal. 245 (1908); McEvoy v. Boston Five Cents Savings Bank, 201 Mass. 50, 87 N. E. 716 (1909). See also Rawley, *Living Testamentary Dispositions* (1929) 3 CINN. L. REV. 361.

However, if donor retains full control over the trust *res*, even the liberal Massachusetts courts hold the disposition to be testamentary. Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925). See also Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535 (1911); Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359 (1906).

It has been contended that *no* title passed to the trustee during the life of the insured unless the policy is assigned and, therefore, no trust arises. Trustee is merely a bailee of the policy, the insured remaining owner. See Fraser, *loc. cit. supra* note 13.

Even though the view that it is a contingent interest prevails, the beneficiary may still have an interest enough to form the basis for a presently arising trust. See 1 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 68; Title Ins. and Trust Co. v. Duffill, 191 Cal. 629, 218 Pac. 14 (1923).

Yet, several courts have held that *the retention of the life interest* coupled with the reservation of the power of revocation, was consistent with a present trust, Barlow v. Loomis, 19 Fed. 677 (C. C. A. 5th, 1184); Nichols v. Emery, 109 Colo. 323, 41 Pac. 1089 (1895); Braun v. Fidelity Trust Co., 126 Md. 175, 94 Atl. 523 (1915); National Newark, *etc.* Bank v. Rosahl, 97 N. J. Eq. 74, 128 Atl. 586 (1925). It would seem that these trusts assume a quasi-testamentary aspect. See Horton, *The Testamentary Nature of Settlements of Life Insurance Elected by the Beneficiary* (1932) 17 CORN. L. Q. 72; 1 PERRY, TRUSTS (7th ed. 1929) § 97.

[19] Grahame, *loc. cit. supra* note 10.

greater certainty.[20] It should be noted that the tax cases also treat the insurance trust in which the right to revoke is reserved as a non-testamentary arrangement.[21]

As long as no obvious attempt is made to avoid the Statute of Wills and the insurance trust is used solely for its administrative utility,[22] it will not be invalidated.[23] Only the elements of a trust need be present to cause the courts to treat it with leniency.[24]

The Rule Against Remoteness of Vesting.

The principal purpose of the *Rule Against Remoteness of Vesting* is to prevent the tying up of property and to keep it in commerce[25] by stipulating that, at the end of a specified period,[26] the absolute interest of each person in the property must vest.[27] If there is a possibility that the interests will not vest within the period, the whole transaction is bad.

It is generally assumed that the insurance trust is limited by the Rule Against Remoteness.[28] The lives on which the trust must be

[20] Ludwig, N. Y. L. J., Oct. 16, 1935, at 1278. The condition subsequent is favored over the condition precedent, thereby strengthening the trend toward the theory of vested remainder subject to defeasance.

[21] Succession tax does not apply to insurance trust funds. Tyler v. Treasurer and Receiver General, 226 Mass. 306, 115 N. E. 300 (1917).

[22] For example, the insurance trust need not be probated. It should be noted that the transaction presents few opportunities for fraud. Both insurer and trustee will be alert to detect forgeries, fraud and undue influence. See Note (1924) 38 HARV. L. REV. 243; Note (1933) 46 HARV. L. REV. 818.

[23] See Prof. Bordwell's letter to Mr. Grahame, *loc. cit. supra* note 10, at 410. See Hanna, *loc. cit supra* note 8, at 357.

[24] REMSEN, *op. cit. supra* note 6, at 330; for methods to avoid testamentary question, see Yost, Paper presented before the Ass'n of Life Insurance Counsel, Dec. 9, 1930, at 588, where the suggestion is made merely to designate a trustee in the trust agreement to receive the proceeds. No effort is here made to assign the policy or designate the trustee as beneficiary; see also Lauterbach v. N. Y. Investment Co., 62 Misc. 561, 117 N. Y. Supp. 152 (1909); Minrath v. Gifford, 137 App. Div. 919, 122 N. Y. Supp. 1137 (1st Dept. 1910).

[25] Hanna. *loc. cit. supra* note 8, at 358; GRAY, RULE v. PERPETUITIES (3d ed. ed. 1919) 201; Danziger, Proceedings, Ass'n of Life Insurance Counsel, May, 1930.

[26] In New York, the period is two lives in being. See Hanna, *loc. cit. supra* note 8, at 387 *et seq.* for list of statutory modifications of the common-law rule, lives in being and twenty-one years. See KALES, FUTURE INTERESTS (2d ed. 1920) (Illinois law); CHAPIN, SUSPENSION OF THE POWER OF ALIENATION (3d ed. 1928) (New York law).

[27] Professor Gray is the leading exponent of the widely accepted view that the Rule is a bar *only* to remoteness of vesting. GRAY, *op. cit. supra* note 25, §§ 2a, 118a, 268, 278; for criticism of this view, see REEVES, REAL PROPERTY (1909) §§ 95, 75.

[28] See Proceedings, Equitable Trust Co. Conference, at pp. 44, 45; Proceedings, Twelfth Midwinter Conference, Feb., 1931, at pp. 101, 130. The Rule is considered applicable to all future equitable interests in property that are not vested. GRAY, *op. cit. supra* note 25. § 323. The Rule applies to changeable

based are lives in being at the time of the execution of the trust agreement.[29] As insurance trusts are rarely created by will,[30] it may be that children will be born to the settlor after the execution of the trust agreement. But, the trust cannot by its terms last for their lives because they were not in existence when the agreement was executed. However, if the period runs from the date of the settlor's death, such provision may be validly made in the trust agreement for them. Although there have been no cases decided on this point,[31] the few authorities who have considered this problem have concluded that, since an interest arises in the trustee-beneficiary during the life of the insured to which a trust may attach, the period should run from the time of the trust agreement.[32]

But, when a trust agreement provides that the settlor retain a power of revocation of the trust, one person is given complete control [33] and the courts wisely exclude the period of the settlor's life from the computation.[34] The Rule seeks only to prevent the tying up of actual property interests and when the settlor retains complete control, the interest of the *cestuis* [35] is so slight that it should not be regarded as an interest at all and the Rule should not concern itself with it during the life of the settlor, that is, the life of the settlor

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funds as well as interests in particular pieces of property. § 202a. Thus it is immaterial whether the claim of the trustee-beneficiary is against the insurance company's funds during the insured's life or against the proceeds of the policy at the insured's death. But, it seems that the Rule does *not* apply to settlement options of insurance companies, although this has been questioned. See HORTON, POWER OF AN INSURED TO CONTROL THE PROCEEDS OF HIS POLICIES (1926) c. IV.

[29] GRAY, *op. cit. supra* note 25, § 201.

[30] Hanna. *loc. cit. supra* note 8, at 359.

[31] Note (1930) 45 HARV. L. REV. 896; O'TOOLE, LAW OF TRUSTS (1935) § 120.

[32] SCULLY, LIFE INSURANCE TRUSTS (1927) 31; REMSEN, *op. cit. supra* note 6; SHATTUCK, THE LIVING INSURANCE TRUST (1928) 40; Note (1930) 45 HARV. L. REV. 896. See cases cited in footnote 18, *supra*, in support of theory of vesting at the time the trust was created, but *cf.* Fraser, *loc. cit. supra* note 13, at 21 *et seq.*

[33] In Reinecke v. Northern Trust Co., 278 U. S. 339, 49 Sup. Ct. 123 (1929), the settlor received the right to revoke a trust holding property for himself during his life and remainder over at his death. The settlor was considered the owner of the property, in complete control of it and subject to an estate tax. *Cf.* Minot v. Treasurer, 207 Mass. 588, 93 N. E. 973 (1911). *Contra:* Matter of Lansing, 182 N. Y. 238, 74 N. E. 882 (1905) (two Judges dissenting); Matter of Chapman, 133 App. Div. 337, 117 N. Y. Supp. 679, *aff'd*, 196 N. Y. 561, 90 N. E. 1157 (1909) (two Judges dissenting).

[34] See GRAY, *op. cit. supra* note 25, §§ 203, 268; Note (1933) HARV. L. REV. 896; Mifflin's Appeal, 121 Pa. 205 (1881) (When power of appointment is granted, period runs from time of exercise, not from time of creation). Wheeler v. Fellowes, 52 Conn. 230 (1884) is distinguishable because there, although one person was in complete control, the beneficial interests in the trust were tied up too long. GRAY, § 269.

[35] The beneficiary named in the trust agreement, not to be confused with the trustee-beneficiary, who is designated in the insurance policy as beneficiary.

should not be one of the lives in being by which the period of the Rule is measured.[36]

Hence, by considering the power of the settlor over the policy, we can determine whether his life is to be one of the two lives in being during which New York permits an interest to remain unvested. Where the right to change the beneficiary is not reserved and where the trustee is the beneficiary under the policy, the period of limitation plainly is to run from the date of creation of the trust.[37] But, where the right to change the beneficiary is reserved, the insured is the *dominus* of the policy during his lifetime and that period should be disregarded. The settlor is considered the owner of the policy for most purposes. Thus, under the Federal Estate Tax, the proceeds of the policy above the $40,000 exemption are regarded as part of the insured's taxable estate.[38] Further, during the insured's lifetime, the policy may pass to his trustee in bankruptcy.[39]

If the power to revoke the trust is reserved in the trust agreement but the insurance policy irrevocably designates the trustee as beneficiary, the settlor does not possess the power of revocation because it would destroy the trustee-beneficiary's vested interest.[40] In such a case, the settlor is divested of his remaining interest, the power to revoke, and the interest of the *cestuis* becomes correspondingly substantial (but not vested) during the settlor's life, as well as during the period that the trust agreement is to continue after his death. This interest is, therefore, within the scope of the Rule. The settlor's life, therefore, must be included in the computation of the period.

If the insurance policy does not refer to the trust agreement and the trust agreement creates an irrevocable trust, the agreement controls. Here the settlor does not possess the power of revocation and the Rule above stated prevails.[41]

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[36] GRAY, RULE AGAINST PERPETUITIES (2d ed. 1906) 167, 196. At best, it would seem that the *cestui* had a contract right in the trust *res*. The Rule does not apply to creation of contract rights. See GRAY, 291. The exponents of this theory would in all probability maintain that, while the interest that passed to the *cestui* was too slight to come under the Rule Against Remoteness of Vesting, the interest that the trustee-beneficiary acquired was great enough to be considered an inter-vivos transaction and therefore non-testamentary.

[37] See 1 WILLISTON, *op. cit. supra* note 18, § 396; 7 COOLEY, BRIEFS ON INSURANCE (2d ed. 1928) 6399; Wells, *The* "Change of Beneficiary" *Clause in Insurance Policies* (1914) 2 VA. L. REV. 49. It is said that the beneficiary has an indefeasible, vested right. In fact, an attempt by the legislature to deprive the beneficiary of his interest may be unconstitutional. Blum v. N. Y. Life Ins. Co., 197 Mo. 513, 95 S. W. 317 (1906).

[38] Chase Nat. Bank v. United States, 278 U. S. 327, 49 Sup. Ct. 126 (1929).

[39] Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36 (1917); *In re* Greenberg, 271 Fed. 258 (C. C. A. 2d, 1921); see COLLIER, BANKRUPTCY (13th ed. 1923) 1697. See also note 34, *supra*.

[40] 37 C. J. 423; Low, Paper presented before the Ass'n of Life Ins. Counsel, May 24, 1929.

[41] Danziger, *loc. cit. supra* note 25.

If the settlor reserves the right in the insurance policy to change the beneficiary and the trust agreement irrevocably designates a trustee who is beneficiary under the policy, the trust agreement controls, the settlor being permitted to restrict the rights he possessed under the policy by a later agreement [42] and again the life of the settlor must be included in the computation of the period.

Only where the insurance policy provides that the settlor can change the beneficiary and the trust agreement grants the settlor the right to revoke, should the life of the settlor be excluded from the computation.

Where it is doubtful whether the settlor's life should be included in the computation, a safety clause may be inserted in the trust agreement providing for an automatic termination of the trust within the legal period.[43]

It would seem that a completely satisfactory result would be achieved only if the Rule is confined to its proper sphere, that is, for two lives in being at the death of the insured, because only then would the ordinary limitation to the donor's wife and children for life and then, after the death of the last survivor to then living grandchildren be considered valid.

The Suspension of the Power of Alienation.

If there are not persons *in esse* during the legal period who could together convey the entire fee, the power of alienation is suspended.[44] In most jurisdictions there are no strictures placed on the power to execute a trust creating an inalienable interest in the beneficiary.[45] In New York, however, the interest of the *cestui* in the ordinary trust to receive the income from the proceeds of the matured policy is rendered inalienable by statute.[46] Such a trust must be limited to two lives in being [47] at the date of the instrument.[48]

Where the policies are irrevocably assigned to the trustee, the power of alienation is suspended at the time of the assignment unless all the *cestuis* are in being and are capable of consenting to revocation by the settlor. In the latter case, there are persons in being

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[42] *Ibid.*

[43] For other methods used to keep the trust within the Rule, see Proceedings, *loc. cit. supra* note 28.

[44] Hanna, *loc. cit. supra* note 8, at 360.

[45] See Hanna, *loc. cit. supra* note 8, 387 *et seq.*

[46] N. Y. REAL PROP. LAW (1923) § 103; N. Y. PERS. PROP. LAW (1923) § 15.

[47] Coster v. Lorillard, 14 Wend. 265 (N. Y. 1835); *cf.* OKLA. COMP. STAT. ANN. (1921) § 8412; N. Y. PERS. PROP LAW § 11, as amended by N. Y. Laws 1929, c. 229, § 18.

[48] There has been no express adjudication of the meaning of the phrase "date of instrument" in the New York statute (CONSOL. LAWS) c. 41 (PERS. PROP. LAW) § 11. It would seem that the legislature means the *effective* date of the instrument, not the date of execution of the instrument.

who can convey absolute title in possession and therefore there is no suspension during the life of the settlor.[49]

Where the trust is funded, a different situation exists because the income from a trust fund is to be applied to the use of another, and such a trust has been declared inalienable by statute in New York.[50] The reasoning with respect to the possibility of alienation of the interests of the *cestuis* is, therefore, inapplicable.[51]

Where there is an irrevocable assignment of the policy and all the *cestuis* are not adults, it has been suggested that the power of alienation will have been suspended for one life when the insured dies and may be suspended for but one more life.[52] If the power of revocation is reserved and the policy assigned to the trustee, it would seem that there is no suspension of the power of alienation during the insured's life as a practical consideration,[53] because, after the exercise of the power of revocation, the settlor can deal with the policy as he pleases.[54]

The Rule Against Accumulations.

The unfunded insurance trust does not come within the *Rule Against Accumulations* because in such a case there is no disposition of an estate that would deprive someone of the present enjoyment of the income from the estate and augment the value of the trust estate.[55] However, an estate is set aside in the funded insurance trust and the alleged violation of the Rule Against Accumulations by the funded

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[49] N. Y. CONSOL. LAWS, c. 41, PERS. PROP. LAW § 23. Williams v. Sage, 180 App. Div. 1, 167 N. Y. Supp. 179 (2d Dept. 1917); Cozzani v. Title Guaranty Trust Co., 175 App. Div. 369, 161 N. Y. Supp. 884 (1st Dept. 1916), *aff'd,* 220 N. Y. 683, 116 N. E. 1040 (1917); Whittemore v. Equity Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929); Wells v. Squires, 117 App. Div. 508, 102 N. Y. Supp. 597 (1st Dept. 1907), *aff'd,* 191 N. Y. 529, 84 N. E. 1122 (1908). See CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION AND POSTPONEMENT OF VESTING UNDER LAWS OF N. Y. (3d ed. 1928) § 490.

[50] N. Y. CONSOL. LAWS, c. 41, PERS. PROP. LAW § 15. *In re* U. S. Mortgage & Trust Co., 130 Misc. 635, 224 N. Y. Supp. 599 (Surr. Ct. 1927); Matter of Flint, 118 Misc. 354, 193 N. Y. Supp. 319 (1922).

[51] See Fraser, *loc. cit. supra* note 13, at 27.

[52] See Fraser, *loc. cit. supra* note 13.

[53] See Fraser, *loc. cit. supra* note 13.

[54] Equitable Trust Co. of N. Y. v. Pratt, 117 Misc. 708, 193 N. Y. Supp. 152 (Sup. Ct. 1922), *aff'd,* 206 App. Div. 689, 199 N. Y. Supp. 921 (1st Dept. 1923). A bill was introduced in the present session of the New York Assembly by Mr. H. R. F. Piper, which was a legislative adoption of the rule in Equitable Trust Co. of N. Y. v. Pratt, providing that the period of suspension of alienation run from the death of the settlor for two lives *in esse* at the time of his death. The bill was killed in committee. See Bill introduced in Pennsylvania Legislature, 52 T. C. M. 723; see also Ludwig, *loc. cit. supra* note 5, Oct. 17, 1935, at p. 1324.

[55] Hascall v. King, 162 N. Y. 134, 145, 58 N. E. 515, 518 (1900); see N. Y. REAL PROP. LAW § 61; N. Y. PERS. PROP. LAW § 16.

insurance trust [56] has provoked considerable debate. Those who hold that it is an accumulation claim that each payment of the premiums from the trust fund increases the size of the chose in action by increasing the cash surrender value. Such a contention is open to serious attack. The chose in action never increases in size but always remains the value of the insurance. What actually occurs when the premiums are paid is that the claim is maintained at the amount of the insurance and is prevented from shrinking to nothing by default. The cash surrender value is simply the portion of the chose in action that is left after default.[57]

Even if were assumed that the insurance trust does involve a technical accumulation, there is no difficulty because in practically all cases the insured's life is the period of such accumulation and in the great majority of states an accumulation for one life is permitted.[58]

In New York [59] and several other states, only accumulations for a minority and for a minor's benefit are sanctioned.[60] However, the funded insurance trust has been specifically excepted from the operation of the rule.[61] This amendment permits an accumulation if the policy is part of the trust *res*, that is, the policy must be assigned to the trustee. If not assigned, the trust in its entirety would be subject to attack as an accumulation.[62] Also, the statute refers only to the income from the fund that is used to pay the premiums. It is still unlawful to accumulate the surplus over the amount needed for the premiums. Therefore, provision should be made for the payment of the surplus to a third party or for the purchase of more insurance and, also, the disposition of any proceeds that might be realized be-

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[56] See McCarliss, 37 T. C. M. 695; Redfield, 38 T. C. M. 355; Milne, 38 T. C. M. 515; Bogert, *loc. cit. supra* note 17, 113 *et seq.;* BOGERT, *op. cit. supra* note 7, §§ 215–17; Hanna, *loc. cit. supra* note 8, at 360; 1 JARMAN, WILLS (4th ed. 1881) 316, 317 (6th ed. 1910) 391 *et seq.*

[57] The English courts refuse to apply the Rule Against Accumulations to insurance trusts. Bassil v. Lister, 9 Hare 177; *In re* Vaughn, 18 Wk. N. 89; Cathcart's Trustees v. Heneagel's Trustees, 61 Ct. Sess. Cas. 1205; *In re* Gardiner, 1 Ch. 697 (1901); Thellusson Act, 39 and 40 Geo. III, c. 98 (1800).

[58] See 2 BOGERT, *op. cit. supra* note 7, § 216(b) for list of states.

[59] In Matter of Hartman's Estate, 126 Misc. 862, 215 N. Y. Supp. 802 (Surr. Ct. 1926), the settlor transferred a policy on *another's life* to a trustee under a funded trust agreement. The court held that it was not an accumulation. The reasoning of the court has been seriously challenged. See HANNA, *op. cit. supra* note 8, at 368–70.

[60] N. Y. REAL PROP. LAW § 61; N. Y. PERS. PROP. LAW § 16.

[61] N. Y. Laws 1927, cc. 384, 681; Laws 1928, c. 172; PERS. PROP. LAW (1927) c. 41, § 16, last paragraph.

[62] When an invalid accumulation occurs in an insurance trust created by will only the invalid portion is stricken out. If it is an inter-vivos transaction, the entire agreement is declared invalid because the settlor, being alive, has another opportunity to make a valid trust. Mann-Vynne v. Equitable Trust Co., 201 App. Div. 149, 194 N. Y. Supp. 50 (1st Dept. 1922); Herzig v. Herzig, 140 App. Div. 514, 125 N. Y. Supp. 402 (1st Dept. 1910).

fore the insured's death. For example, if a policy lapsed and the cash surrender value is taken, it cannot be accumulated.

Many funded insurance trust agreements provide that, on the insured's death, the proceeds from the policy should be added to the trust fund that the trustee already holds and that the income from the entire fund be paid to certain life beneficiaries until the end of the trust.[63] Such a provision might violate the Rule Against Perpetuities because the ownership of the trust income fund may have been already suspended for one life in being at the death of the insured.

Conclusion.

The life insurance trust is of great value to the person who wishes to provide for periodic payments to his wife or child, who has several policies, who desires to arrange for certain contingencies: marriage, births, deaths, or, who wants to benefit various friends and relatives. It is also useful where the insured does not know exactly what disposition to make of the proceeds. A discretionary trustee is far better than a rigid option settlement in such a case. Further, the clauses protecting the donees against creditors may be attached to trusts generally but may not be available in favor of beneficiaries of option settlements. Finally, it stimulates saving if the trust is unfunded and, in the case of a funded trust, guarantees provision for the donor's family, even though he suffers financial reverses. However, the fact that insurance trusts are socially desirable should not blind us to the tendency to mingle trust funds with general corporate funds. The consequent absence of a specific *res,* one of the primary requisites of a trust, creates doubt as to whether, in such cases, a trust actually exists in the form that we have known it in the past.

ARTHUR S. MARGULIS.

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[63] 2 BOGERT, *op. cit. supra* note 7.