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Investment of Fiduciary Funds in Life Insurance Policies and Annuities

Leo P. McNally

INVESTMENT OF FIDUCIARY FUNDS IN LIFE INSURANCE POLICIES AND ANNUITIES

By Leo P. McNally*

In 1927, when the now well known Miss Gloria Vanderbilt was three years old, she was first projected into the limelight by an application to the surrogate's court of New York County for permission to withdraw from the income of her estate the sum of approximately $24,000 annually for the payment of premiums on five policies of life insurance aggregating $500,000. The insured in these policies was to be Gloria Morgan Vanderbilt, the mother. Each policy was to be a twenty-year endowment of which the infant Gloria, with certain limitations, was to be the beneficiary. Upon the maturity of each policy, either by reason of the death of the insured or by expiration of the twenty-year period, the proceeds of the policies were to constitute a trust fund. During her life, the infant was to receive the income. Upon her death, the principal was to be paid to her surviving issue as she might provide by her last will and testament. If she left no will disposing of it, the principal was to be paid to her surviving issue in equal shares, per stirpes, and in default of such issue, to her executors or administrators for the benefit of her legatees or next of kin. It was estimated that the annual income to be derived by Gloria, either from the death of the insured or at the policies' maturity, would be not less than $23,850 and might reach the sum of $33,000.

In support of the application the guardian urged that Gloria's mother wished to secure for her daughter protection against the possibility of the mother's death; that the total annual income of the infant's estate was greatly in excess of her needs for support and education; that if accumulated, this excess would come into the absolute control of the infant when she attained the age of twenty-one years; and, to use the language of the application, "that the said infant will thereby be subjected at that immature age to the hazards and dangers of the loss" of her property; and that the policies of life insurance would secure to the infant a guaranteed income during her lifetime which would be adequate for her maintenance in the event of misfortune or the reduction or total loss of her estate.

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After stating that the mother's motives in recommending the insurance were unquestionably in the best of faith and designed to safeguard her daughter's welfare, Surrogate Foley decided that the absence of statutory authority compelled a denial of the application as a matter of law rather than of discretion. He said:[1]

"I hold that the statutes of this state do not permit the investment of infant's funds in policies of life insurance. In substance and in effect, the issuance of these policies and the payment of the premiums would amount to an investment of the infant's funds. Under our statutes a guardian may invest the funds of an infant's estate only in first mortgages on real estate, with certain limitations, and in bonds which are legal investments for savings banks. Domestic Relations Law, sec. 85; Decedent Estate Law, sec. 111, as amended by Laws 1926, c. 307; Banking Law, sec. 239. There is no statutory authority for the guardian to invest, or the surrogate to countenance the investment of the funds of the ward in policies of life insurance.

"I hold further that section 194 of the Surrogate's Court Act (Laws 1920, c. 928) does not permit under the guise of an application for the support of a ward, an allowance for the payment of insurance premiums. The word 'support' comprehends anything requisite to the housing, feeding, clothing, health, proper recreation, vacation, traveling expenses,' or other proper cognate purposes included within the scope of the word. Jessup-Redfield, Surr. (6th 2d.) 1924.

"By the established rules of equity, it is not within the power of the surrogate, or even of a judge possessing the widest chancery powers, to permit the impounding of the infant's funds, so as to deprive the infant of her right to absolute enjoyment of her estate at majority. Nor has the Surrogate's Court the power or authority to direct the conversion of the infant's estate or any part thereof from absolute ownership into a trust, the income of which only is made payable to the infant. We cannot set up as against the minor a compulsory judicial trust of her property. Chancellor Kent, in his Commentaries (volume 2 (14th Ed.) 230), says:

" 'So Lord Eldon, in Ware v. Pelhill, 11 Ves. (257) 278, and in Phillips, Ex Parte, 19 Ves. 122, was very guarded in laying down the power of the court in changing infant's property, *so as not to affect* the infant's power over it when he comes of age, or to change its descendible character.'[2]

"The advisability of enacting legislation to permit the use of a minor's funds for the procurement of insurance policies rests with the Legislature. The wisdom of confining the investment of infant's funds to a limited class of conservative securities has been based upon sound public policy and long experience. It is unnecessary to discuss here some of the abuses that might arise in per-

[1]In Re Vanderbilt's Estate, (1927) 129 Misc. Rep. 605, 223 N. Y. S. 314.
[2]Italics by Surrogate Foley.

mitting an infant's estate to be converted, wholly or partially, into life insurance, or into compulsory trusts imposed by judicial decree. Occasional examples, in this and other courts, of the cupidity of persons dealing with infants' estates, furnish indications of what may happen to an infant's property, if such practices were authorized."

The surrogate found additional objection to the proposed purchase of insurance because of the limitation it imposed upon Miss Vanderbilt's right to dispose of her property by testament when she reached her majority; and also because the devolution of the corpus of the trust derived from the policies might under certain contingencies be different from the distribution which would result if she died intestate. The court emphasized that it was beyond the power of the guardian to obligate the infant to continue the payment of premiums for a period of three years after she attained her majority. But as a practical matter, I think this objection probably could have been overcome by the purchase of a contract that would have matured prior to Miss Vanderbilt's majority.

In denying the Vanderbilt application, Surrogate Foley followed what always has been and still is the general rule governing a guardian's investment of his ward's funds; and similarly, in the absence of express authority in the trust instrument or statutory authorization therefor, such few courts as have passed upon the question have uniformly held that trustees may not invest trust funds in the purchase of life insurance policies and annuities. Perhaps because these rules are so commonly accepted there appears to be very little case law on the subject. The paucity of decisions, coupled with the prominence of the litigants and counsel and of the surrogate who wrote the opinion, combine to make the *Vanderbilt Case* both an interesting and an authoritative, perhaps the leading, decision on this subject.

The *Vanderbilt Case* has been cited with approval in a somewhat similar case, *Matter of Rooney v. Wiener*,[3] where a guardian's purchase of a single-payment $15,000 fifteen-year endowment policy naming the guardian individually as beneficiary, was held unauthorized under the rule that an infant's property should not be impounded beyond majority.

And similarly, in the Mississippi case of *In Re Guardianship of Horne*,[4] a guardian was held liable to the ward for premiums paid on the ward's life insurance policy, notwithstanding that the

[3](1933) 147 Misc. Rep. 48, 263 N. Y. S. 222.
[4](1937) 178 Miss. 714, 173 So. 660.

chancellor had authorized the procurement of the policy and expenditures thereunder. The liability was imposed on the ground that investments in life policies are not specified in the Mississippi statute authorizing investments by guardians.

There are only a few cases involving the investment of trust funds in policies and annuities. One of these is the early Rhode Island case of *Eldridge v. Green*,[5] decided in 1890. In this case there was a direction to a trustee in a deed to retain certain personalty for the support of a cestui que trust during his life, permitting withdrawal from principal from time to time of such sums as might be necessary to supply any insufficiency in the income, and at the cestui's death to divide the remainder equally among the other cestuis que trustent. The court held that neither the directions to the trustee nor the law of Rhode Island authorized the purchase of a life annuity although it seemed quite clear in the absence of such purchase that the entire principal might become exhausted and the beneficiary of the trust be left destitute during his lifetime.

In the case of *In Re Cohn's Estate*,[6] decided in January of 1936, it appeared that the testatrix directed that trust funds should be invested in legally authorized securities and that no securities yielding less than five per cent per annum should be purchased. It appeared further that it was impossible to purchase legally authorized securities yielding not less than five per cent per annum. Nevertheless the court held that the trustees were not justified in investing trust funds in a single payment life insurance policy which was not authorized by statute.

In February of 1940 one of the most recent cases on this general subject was decided by the New York court of appeals in *Latterman v. Guardian Life Insurance Company*.[7] The action was brought by Grace and Sylvia Latterman, infants, by their guardian ad litem, to compel specific performance of a life insurance agreement. The infant plaintiffs were the beneficiaries named in a policy of insurance issued by the defendant insurance company to their deceased father. In the policy the company agreed, upon the election of either the insured or a beneficiary to retain the proceeds of the policy during the lifetime of the beneficiary or for a specified period during which the company would pay thereon interest monthly at such rate as the company might declare for the year but never less than the equivalent of the yearly rate of three per cent,

[5](1890) 17 R. I. 17, 19 Atl. 1085.
[6](1936) 158 Misc. Rep. 96, 285 N. Y. S. 279.
[7](1940) 280 N. Y. 102, 19 N. E. (2d) 178.

with the obligation at the death of the payee, or at the end of the specified period, to make payment of the principal as provided in the particular option elected. The infant beneficiaries, through their guardian, chose to exercise the option and named a specified period, namely, until they had attained their majority, during which the interest was to be paid as above stated. When the company refused to comply with the option elected, the action was brought to obtain specific performance of the agreement. The company contended that because of their infancy, the plaintiffs were not entitled to exercise the option, so that its obligation under the contract was limited to payment of the face value of the policy. In support of its contention, the company pleaded as a complete defense sec. 85 of the Domestic Relations Laws[8] which limited the powers of a guardian and other fiduciaries holding trust funds for investment. That defense was sustained and judgment rendered for the defendant. The appellate division affirmed that judgment, but the court of appeals, Judge Lehman dissenting, reversed and granted judgment in favor of the plaintiffs; and in so doing said:

"The assured had the undoubted right to enter into the contract and to agree with the defendant upon the provisions in question. If these provisions enlarge, in a manner not against public policy, the power of the fiduciaries, effect thereto should be given. Otherwise, the solicitude of the law for the protection of infants is disregarded, and the provision becomes forfeited when the beneficiaries are minors. It cannot be held to have been without the contemplation of the contracting parties that the named beneficiaries might be minors at the death of the assured and that the assured might die without previous exercise by him of such option. The death of the assured while his children were minors was one of the likely happenings. The contract, however, contains no provisions indicating that the right of the beneficiary to exercise such option should be lost in the event that the death of the assured occurred during the minority of the beneficiaries. Section 85 of the Domestic Relations Law and section 111 of the Decedent Estate Law limit the powers of a guardian and other fiduciaries 'holding trust funds for investment.' These statutes have no application to the facts herein. The guardian does not first obtain funds as such plus the subsequent opportunity to invest, but a bundle of contractual rights, which have certain very valuable options as a component part thereof, all of which vest simultaneously.

"By the terms of the insurance policy the beneficiaries acquired a vested interest in the performance of the contract by the defendant. Hence the infants obtained a right in the exercise of the

[8]New York Consolidated Laws, ch. 14; sec. 111 of the Decedent's Estate Laws, Consolidated Laws, ch. 13.

option. Such an interest is in the nature of a property right. Accordingly, the problem at bar is not whether the guardian may invest funds already in the possession of the infants, in a non-legal security, but whether an infant shall be compelled to accept a portion of a gift and forfeit the balance. In other words, assume that the infants may receive by way of interest two per cent or two and one-half per cent upon deposit of a like sum in a savings bank, or a like amount of interest upon the price which must be paid for a security legal for the investment of the funds of infants, instead of three per cent upon this fund with accretions, must a court then compel the infants to sacrifice this difference every year, not only up to the coming of age of the infants, but during their entire lifetime? . . ."

In his dissenting opinion, Justice Lehman after referring to the terms of the policy, said:

"By exercise of that option a beneficiary may obtain an investment which he could obtain in no other way and which in the opinion of the beneficiary may be more advantageous than any other investment which the beneficiary can make. . . .

"In the investment of trust funds a fiduciary is not entirely free to weigh and balance conflicting considerations of safety and size of return. His choice of investments is limited by statute. The legislature has specified 'those types of investments which to the legislature seem to afford a maximum of safety.' . . . Concededly the statute does not permit a guardian to place moneys of an infant on deposit with an insurance company; concededly, if the insurance company had paid the amount of the policy to the guardian of the infant the guardian would not under the statute have been permitted to hand back the moneys to the insurance company to be held upon the terms specified in the option. That would have constituted an unauthorized investment; . . .

". . . Under the contract made by the assured the beneficiaries are entitled to payment of a sum of money. Because the beneficiaries are infants the moneys are payable to their guardian. He is under a duty to invest the moneys received in accordance with the statute. The policy confers a right to direct the insurance company to retain the money at interest. Beneficiaries who are free to invest their moneys as they choose can avail themselves of this contractual right. The assured has not expressly or by fair implication indicated that if the beneficiaries should be infants at the time when the moneys become payable their guardian should have the same choice as to the manner in which the trust funds should be invested as adult beneficiaries would have had. . . . Acceptance of an obligation from the debtor to hold at interest for a definite term moneys presently payable in settlement or substitution of an obligation to pay the moneys is an investment of the fund as much as if the moneys had been paid and then used to purchase a similar obligation. To hold that the guardian may use his judgment as to whether an obligation by the insurance company to retain at interest moneys due is the most desirable form of investment of moneys belonging to an infant is to reject the command of the Legislature that only specified types of investment, selected because of safety, shall be treated as proper investment of such funds."

Although the majority decision may have accomplished a good result for the minors, I think it achieved that end by what approaches judicial legislation.[9] To me, the decision of Judge Lehman seems much more consistent with both logic and well-settled rules of statutory construction. Inasmuch as both guardians and trustees have always been strictly limited as to the types of investment that they might make without express authority in the trust instrument, and in view of the decisions of the courts on the subject, it seems evident that no guardian or trustee may safely invest funds in life insurance policies or annuities unless such investment be expressly authorized by statute. In thirty-eight states there is no such statutory authority, and it appears clear that in these states this type of investment is unauthorized.

During the past few years a few states[10] have passed statutes giving either general or qualified authorization for the investment of trust funds in insurance contracts. Typical of the general authorization is the Minnesota statute which was passed in 1939.[11] It is as follows:

"13 (a) The district court, upon petition of a trustee under a will or other instrument may, if the trust does not otherwise provide, authorize the trustee to invest the income or principal of the trust fund in policies of life or endowment insurance or annuity contracts, issued by a life insurance company duly authorized to transact business in the state, on the life of any beneficiary of the trust or on the life of any person in whose life such beneficiary has an insurable interest.

"(b) The probate court, upon the application of a guardian, may authorize him to invest income or principal of the estate of his ward in policies of life or endowment insurance or annuity contracts issued by a life insurance company duly authorized to transact business in the state, on the life of the ward or on the life of a person in whose life the ward has an insurable interest."

[9]During the discussion following the giving of this paper at the May meeting of the Association of Life Insurance Counsel a member stated that in one of the western counties of New York state, a surrogate recently had approved the purchase of an annuity with trust funds on the ground that the Vanderbilt Case had been overruled by the Latterman decision.

[10]Illinois, Kentucky, Ohio, Pennsylvania, Tennessee, Texas, Wisconsin, Massachusetts, Florida and Minnesota.

[11]Minnesota, Laws 1939, ch. 400; Mason's Minnesota Statutes 1940 Supplement, sec. 7714 (13).

I have attempted to make a rather thorough investigation of the history and operation of the Minnesota statute. After interviewing many persons who presumably are familiar with the facts, I am convinced that none of the life insurance companies urged the passage of the Minnesota law. Apparently it was enacted at the instance of only a few life insurance agents because, curiously, most of the life insurance agents I interviewed had not heard of the law until I mentioned it to them in March, 1940.

In Minnesota the district court exercises general jurisdiction. Estates and guardianships are administered by the probate court. Testamentary trusts are administered by the district court. The state has eighty-seven counties, each having a probate judge; and there are fifty district court judges in nineteen judicial districts.

It has been my experience that life insurance agents are usually disposed to complain about a lack of prospects. I was, therefore, surprised to find that only a very small amount of insurance and annuities has been purchased under the Minnesota statute, though it has been in force for more than a year. I have communicated with all 137 of the Minnesota district and probate court judges. Their replies to my inquiries reveal that during the first year the Minnesota act was operative,[12] trust funds aggregating $20,000 were invested in one county; and wards' funds aggregating $87,000 were invested thereunder in eight counties of the state, while in the other seventy-nine counties no investments were made under the law. Curiously, too, one of the probate judges told me he had been authorizing the investment of wards' funds in life insurance policies and annuities for many years.

In addition to the information about the use of the statute, I asked both the probate and district court judges to comment on the Minnesota law. Thirty-eight of them complied. Out of this number seventeen district court judges and seventeen probate court judges commented favorably. None of the district court judges criticized the law, but four of the probate judges did so. Of these, two were good enough to write me rather lengthy letters in which they pointed out their objections.[13]

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[12]Year ending April 22, 1940.

[13]I believe these letters are of some practical interest; they are set forth in full:

LETTER No. 1

"We have not authorized the 'investment' of fiduciary funds in insurance, life insurance policies and annuities, especially where any contract gives a personal gain for somebody else and is being paid for in part with the ward's funds. Usually the estate of a ward is not very large and to place the money

In the main, the view-points of these two judges seem to grow

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in life insurance contracts ties it up in such a way that, if disaster comes to the parents it generally becomes necessary to use the ward's estate for living expenses and loss is almost sure to follow.

"The statute is only permissive and certainly does not require courts to give preference to insurance funds over other forms of real investments. The investment should be flexible so that it may be withdrawn and placed in something else if necessity warrants.

"We have seen insurance companies blow up and, of course, the policies go with them, to a large extent. If the money had been placed in a real investment which had a market value and which could be watched by the guardian, loss could be prevented.

"I carry quite a bit of life insurance for myself, more than I can afford. I believe in life insurance but I am not kidding myself into believing that it is an investment. It is a protection.

"See In Re Vanderbilt's Estate—223 N. Y. S. 314. There the application was denied as a matter of law and not as a matter of discretion, but the arguments are directed toward the latter phase of the question. How can we tie up a ward's money after the ward becomes twenty-one years of age? The whole matter was put by the legislature without consideration.

"Of course, the life insurance agencies will not like this and possibly the life insurance lawyers will not like it, but it is a fact. Incidentally, do banks invest in life insurance policies? And are you putting all your earnings into life insurance policies? That is what they ask us to do with money in our small estates. I assure you there is nothing against life insurance, as life insurance, but it certainly does not fit the picture as an investment.

"You are not the first to ask my views along this line and it seems that the insurance companies are putting on a life insurance campaign directed towards guardians and the probate courts. We know their arguments. They can advance no arguments that have not been advanced to us individually for our personal business. But investments as defined by our decisions, certainly does not permit the extension to include any form of insurance."

LETTER No. 2

"This is to acknowledge receipt of your letter with reference to chapter 409 of the 1939 Session Laws which, as you say, was passed by the Minnesota Legislature at its 1939 Session.

"Although this affects the probate courts this matter was never taken up with the probate judges that I know of and I have acted on practically every committee of the probate judges especially with reference to the matters of legislation affecting the probate courts. I believe this is bad legislation for several reasons.

"The probate judges have been opposed to any legislation of this kind because it would immediately subject them to bombardment by all the insurance agents operating in their territory to have the funds of every ward invested in insurance in their companies.

"Our attitude has been that, while in certain cases an investment of this kind may be suitable, a law authorizing the investment allows every company, whether good or bad, to come in under its provisions and ask the court for authorization to invest guardianship funds.

"There is no way in which a distinction can be made in the companies by the judges although we will all agree that there are certain companies authorized to do business in the state of Minnesota that are not as good as other companies.

"No judge can say that he will only allow investments in certain companies or he would immediately be subject to criticism. Each salesman feels that the company which he represents is a good company, at least during the time that he is acting as its agent.

"I have already had many calls from insurance agents representing different companies wishing to have the funds of wards invested in insurance.

out of a fear (not borne out by my investigation) that a swarm of

It has thus become necessary for me to try and explain why it cannot be approved. You, no doubt, have had enough dealings with salesmen to know that it is not a pleasant situation.

"Another reason for objecting to this statute is that a good many of our probate judges have not had experience in these matters and if the parents and relatives of the ward agree to such an investment the probate judge will allow the same although it may not be a suitable or proper investment for the ward at that time.

"There is a great difference between trusteeships and guardianships. The purpose of a guardianship is to invest the ward's funds in such a way that the ward will receive the greatest benefit and at the same time the investments should be in such form that they will be capable of liquidation for the full amount at the time of the ward's majority.

"Many of the contracts offered to the probate courts under this section will be such that they will not mature at the time of the majority of the ward or if liquidated at that time will result in a loss to the ward.

"There may be isolated cases where the wards are a year or under where the twenty-year policy would mature at majority. Even in this case a certain amount of the money paid has been for the insurance on the life of the ward and this has not been for his benefit, but for the benefit of the ones who would be his heirs or beneficiaries under the policy in case of his death.

"As I stated before, wards are entitled to their money when they become twenty-one years of age and I do not believe any guardian or any court should have the right to tie up the funds of the wards by investments or otherwise in such a way that the ward would not receive the full amount due him at majority.

"Another wicked feature of this law provides that insurance can be taken out on the life of a person in whose life the ward has an insurable interest. How under any stretch of imagination is there any justification for such an authorization? Where are you going to draw the line? Would you insure the father, the mother, the brothers, the sisters, the grandfather, or the grandmother and how under any situation of this kind would the ward receive his money in full at majority except on the death previous thereto of the one insured?

"The Probate Code Committee was appointed by the Bar Association and was supposed to have referred to it any legislation affecting the probate courts before the same was passed by the Legislature, but this bill was never submitted to this committee for approval or disapproval.

"As you, no doubt, know the insurance companies do not write as attractive an annuity policy as they used to because of a lowering of interest rates nor do the dividends which are now paid or will be paid over a period of years equal the dividends which were paid in former years. So from that angle neither an insurance policy or an annuity policy is as attractive for investments or other purposes as it was some years ago.

"According to certain reports on insurance companies they lost money on their annuity contracts, but made money on their insurance policies and, therefore, the annuity policies were changed although the insurance policies remained the same.

"I might say that I am a firm believer in insurance and have encouraged the taking out of policies wherever beneficial, but I do not think it is the right or the duty of the probate courts, or the guardians to make investments in insurance or annuities except in very special circumstances.

"I have found that in most guardianships where funds can be placed for investment U. S. Savings Bonds are superior to any other investment that can be obtained at this time.

"I have gone into detail on this so that you will have an idea of our problems in dealing with this and other investments."

agents might descend upon them in an effort to sell policies and annuities; also, they disliked to be put in the position of having to approve investments in insurance companies authorized to do business in this state which they regarded as being weak financially, or at least weak when compared with some of the stronger institutions. They also found objectionable the provision of the law authorizing the use of a minor's funds to buy insurance on the life of another.

The probate judge in our largest county, in which Minneapolis is located, believes that the insurance companies should adopt a standard form of contract, or a standard endorsement to the regular company contract, covering the purchase of an annuity or life policy out of funds of the ward. He says that under the present system, with many life insurance companies authorized to do business in the state,[14] the probate judges do not have time to make an adequate examination of the different contracts, or at least that such examination would impose an unduly heavy burden on busy judges.

A district judge of more than thirty years' experience on the bench in our largest county, after a meeting with his colleagues, suggested that the Minnesota statute might permit the investment in life policies and annuities of funds paid to minors in settlement of personal injury litigation, or that the statute might be amended to take care of such funds if the present statute is not now sufficiently broad to permit such investments. A fair construction of the Minnesota act, it seems to me, would warrant a finding that any funds belonging to minors might be invested thereunder, even though the statute on its face refers only to those funds of the minor being administered by the probate court.[15] In Minnesota, at least, these settlements have long been a source of much trouble to our district court judges. Formerly, moneys paid in settlement of personal injury litigation involving minors was turned over to their guardians (usually the father, or in case of his death, to the mother as natural guardian). Such funds were held under bond, often with private sureties. It was found from experience that the guardians frequently were confused as to who owned the

[14]Ninety-one legal reserve life insurance companies are authorized to do business in the state of Minnesota; thirty-three assessment and benefit life, sixty-seven fraternals and eight health & accident insurance companies also write life policies in Minnesota.

[15]It is suggested that if similar legislation is introduced in other states, the proposed statutes should clearly and specifically authorize the use of this type of trust funds.

money, and that very often the injured minor, upon reaching his majority, had no money left. Later, by court rule, and still later, by statute,[16] settlements of minors' claims were made pursuant to an order of the district court, under the terms of which the money paid in settlement was deposited in a savings bank or trust company and withdrawn only upon order of the district court. The statute authorizing this manner of settlement provides that the deposit book shall be filed with the clerk of district court, the moneys to be withdrawn only upon court order. This form of settlement is now generally used in Minnesota. An average of about two of those settlements is being approved in the city of Minneapolis each court day, and there is presently on deposit in the Minneapolis savings banks and trust companies approximately $200,000 which is being held for the minors until they reach their majority. Other states have similar statutes, and it may be safely said that several millions of dollars of minors' funds are now on deposit throughout the United States.

Minneapolis' largest purely savings bank pays only one and a half per cent per annum on these deposits, and the savings departments of our commercial banks pay only one per cent. The parents of the minors, who are the natural guardians under the Minnesota law, seemingly overlook the fact that the money which their children receive in settlement of personal injury claims belongs to the children and not to them. As a result the judges are frequently bothered, to the extent of harassment, by parents who petition for leave to withdraw a portion of the minors' funds, supposedly to be used for the children's benefit, but actually used for the benefit of others. Although the judges are careful in making orders for such partial distribution, it is virtually impossible for them to see to it that the money is spent for proper purposes. Consequently, it has been their experience that not infrequently much or all of the money belonging to the minors has been dissipated by the parents before the minors reach their majority. It is an interesting sidelight that during the past few years the relief authorities have been busily engaged in tracing moneys on deposit for the benefit of minor members of families on relief. The Hennepin County judges believe that investments under the Minnesota statute would at least serve to minimize the amount of such dissipation and at the same time would in all probability insure an income in excess of that now receivable on bank deposits.

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[16]Mason's 1927 Minnesota Statutes, 1940 Supplement, sec. 9172.

I have referred at length to the Minnesota statute because of its all-embracing terms and because I happen to be more familiar with the operation of it than I am with similar laws in other states. In addition to Minnesota, Massachusetts,[17] Ohio[18] and Florida[19] have statutes authorizing this type of investment without restriction. Illinois permits the purchase of fully paid endowment or annuity policies upon the life of the ward. Kentucky permits the use of

[17]Massachusetts, Acts & Resolves 1937, ch. 312.

"An Act Permitting Fiduciaries to Invest in Certain Insurance Policies and Annuity Contracts. Sec. 1, Chapter 201 of the General Laws is hereby amended in inserting after sec. 47, as appearing in the Tercentenary Edition, the following new section:

"Sec. 47A—The probate court, upon the application of a guardian, may authorize him to invest income or principal of the estate of his ward in policies of life or endowment insurance or annuity contracts, issued by a life insurance company duly authorized to transact business in the Commonwealth under Chapter 175, on the life of the ward or on the life of a person in whose life the ward has an insurable interest.

"Sec. 2, Chapter 203 of the General Laws is hereby amended by inserting after sec. 25, as appearing in the Tercentenary Edition, under the heading 'Purchase of Insurance Policies or Annuity Contracts,' the following new section:

"Sec. 25A—The probate court, upon petition of a trustee under a will or other instrument, may, if the trust does not otherwise provide, authorize the trustee to invest the income or principal of the trust fund in policies of life or endowment insurance or annuity contracts issued by a life insurance company duly authorized to transact business in the commonwealth under chapter 175, on the life of any beneficiary of the trust or on the life of any person in whose life such beneficiary has an insurable interest."

[18]7 Ohio, General Code Annotated (Page) sec. 10506-41.

"Investments by Fiduciaries—Except as may be otherwise provided by law or by the instrument creating a trust, a fiduciary having funds belonging to the trust which are to be invested may invest them in the following:

"1. Life, endowment or annuity contracts of legal reserve life insurance companies regulated by the provisions of Chapters 1 and 2 of subdivision 1 of Division III of Title IX (sec. 9339, et seq.) of the General Code of Ohio, and duly licensed by the Superintendent of Insurance of Ohio to transact business within the state. The purchase of contracts authorized by this subsection shall be limited to executors or their successors to their powers when specifically authorized by the will, and to guardians and trustees. Such contracts may be issued on the life or lives of a ward or wards or beneficiary or beneficiaries of a trust fund, or according to the terms of a will, or upon the life or lives of persons from whom such ward or beneficiary has an insurable interest. Such contracts shall be so drawn by the insuring company, that the proceeds or avails thereof shall be the sole property of the person or persons whose funds are invested therein."

[19]Florida, Laws 1937, ch. 17949.

"An Act Providing for the Investment of Funds Held by Executors, Administrators, Trustees and Guardians, and Repealing Conflicting Laws:

"Sec. 1. Legal Investments: Subject to the conditions herein contained, executors, administrators, trustees, and guardians holding funds to be invested may invest such fund only in the following:

. . .

"(d) Annuity or endowment contracts with any life insurance company which is qualified to do business in the state of Florida under the laws thereof.

war veterans' funds to purchase life insurance and annuities.[20] Tennessee permits the investment of the principal of trust funds and wards' funds in single-premium life, endowment or annuity contracts and the investment of earnings in annual premium life, endowment or annuity contracts. Texas permits the court to authorize policies on the life of the ward to be continued in force and authorizes the purchase of new single premium endowment insurance or single premium annuities. Wisconsin authorizes trustees and guardians to purchase single premium endowment insurance policies and single premium annuities. Arkansas, with the approval of the probate court where the minor is under the age of fifteen, permits the investment of any available funds of the minor in the purchase of life, health and/or accident insurance.[21]

[20]Kentucky, Statutes, sec. 2043-12, was contained in an Act regulating the appointment, etc., of guardians of or committees for the beneficiaries of the United States Veterans' Bureau. While the language of that section was quite broad, it seemed questionable whether it applied to guardians and committees generally or only to the type specified in the Act (See sec. 2043-17). However, this section was amended and reenacted in 1938, and as so reenacted clearly applies only to guardians or committees who have received or are receiving funds from the Veterans' Bureau. In Kentucky the powers and duties of a committee are in all respects the same as those of the guardian of an infant, except as to education. (Kentucky, Stats., sec. 2153.)

[21]The statutes of the states of Illinois, Kentucky, Tennessee, Texas, Wisconsin and Arkansas are set out in full:

ILLINOIS

Illinois, Laws 1939, Art. 20, sec. 259, Illinois, Rev. Stat. 1939, ch. 3, art. 20, sec. 413.

"Sec. 259. Classes of Investments—Guardians and conservators with the approval of the court may make only the following investments:

"1. Endowment or annuity policies upon the life of the ward, the cost thereof being fully paid at the time of the investment, when the policies of insurance are issued by companies, associations, and fraternal organizations licensed to engage in the business of insurance in the State of Illinois."

KENTUCKY

Kentucky, Statutes (Carroll 1933 Supplement) sec. 2043-12.

"Every guardian or committee shall invest the funds of the estate in such manner or in such securities, in which the committee or guardian has no interest, as allowed by the law or approved by the court, or in annuities."

(The foregoing general section was amended and reenacted in 1938, and as so reenacted clearly applies only to guardians and committees who have received or are receiving funds from the Veterans' Bureau.)

TENNESSEE

6 Tennessee, Code Annotated (Williams 1934) 1939 Supplement, sec. 9596.6

"Sec. 9596.6. Life, endowment or annuity contracts of legal reserve life insurance companies. Executors, trustees and guardians legally holding funds or assets belonging to, or for the benefit of, minors or others are hereby authorized, with the approval of a probate court or other court of competent jurisdiction to invest such funds or assets, or part thereof, in single premium life, endowment or annuity contracts; or the earnings or part thereof from such funds or assets, without encroaching upon the principal, in annual

Two other states, Kentucky and Pennsylvania, have unsuccessfully endeavored to approve generally this type of investment.

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premium life, endowment or annuity contracts in legal reserve life insurance companies as are duly licensed and qualified to transact business within the state.

"Such contracts may be issued on the life, or lives, of a ward, or wards, and beneficiary, or beneficiaries, of a trust fund, and shall be so drawn by the insuring company, that the proceeds or avails thereof, shall be the sole property of the person, or persons, whose funds are invested therein.

"Such contracts may not be purchased from any such company for which such executor, guardian or trustee is acting as agent, or receives any commission, or part of any commission, directly or indirectly paid by such company to its agent soliciting and/or selling such contract. (1939, ch. 133, sec. 1-3.)"

TEXAS

Texas, Rev. Civil Stats. (Vernon 1939) cumulative Supplement, art. 4190.

"If, at any time, the guardian of the estate shall have on hand money belonging to the ward or wards beyond that which may be necessary for the education and maintenance of such ward or wards, he shall invest such money in bonds of the United States, in tax supported bonds of the State of Texas . . . provided, that the bonds . . . may be purchased subject only to the following instructions: the net funded . . . Provided, however, the above restriction shall not apply to bonds issued for road purposes . . ., or such collateral bonds . . ., or purchase for said ward or wards a contract for life insurance and/or annuity in a legal reserve life insurance company, operating under and complying with the laws of the state of Texas, that may be approved by the court having jurisdiction of the minor's estate. If a contract for life insurance and/or annuity has been issued on the life of the ward or wards (or for the benefit of the ward or wards in the event of annuity) prior to the date of guardianship, and it is made to appear that such contracts were issued by a company or companies operating under the legal reserve system, it shall be lawful to continue such contracts in full force and effect; all future premiums shall be paid out of the surplus funds of said ward or wards; provided, that said guardian shall first apply to the probate court having jurisdiction, and, obtaining an order therefrom to continue said contracts according to the original terms or modify the same to fit any new development affecting the welfare of said ward or wards; provided, that before any application is granted by the probate court, the guardian shall file a report in said court showing the financial condition of the ward's or wards' estate at the time said application is made, said report to be filed in detail, provided further, that before the judge of the probate court shall approve the application, there shall be filed with said probate court a financial statement approved by the chairman of the board of insurance commissioners showing the solvency of said company.

"The signatures of the guardian and probate judge having jurisdiction of the estate of the minor or minors shall appear on all applications and any amendments thereto made to any insurance company under the provisions of this article.

"It is expressly provided that the guardian shall in no event be authorized to contract for any life insurance on the life of such ward or wards wherein such guardian is made the beneficiary of said policy, except in such cases where the guardian is a natural parent of the ward or wards. Each and every right, benefit, and interest accruing under any contract for insurance or annuity coming under the provisions of this title shall become the exclusive property of said ward or wards when disability has been terminated.

"All contracts for new life insurance issued under the provisions of this Act shall be limited to some form of single premium annuity, and it is further provided, that all such contracts shall show the cash surrender value avail-

In 1934 the Legislature of Kentucky passed an act[22] authorizing guardians and committees to invest the funds of their wards' estates in annuities. That act, however, was held unconstitutional because the lieutenant governor declined, at the time it was passed, to sign it as the presiding officer of the Senate.[23]

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able at the age of twenty-one (21) in excess of all premium deposits made prior thereto and according to the contract; provided, that at no time shall more than twenty-five (25) per cent of the estate be invested in insurance premiums.

"By the term 'Life Insurance Company' is meant any stock or mutual legal reserve company that maintains the full legal reserve required under the laws of the state of Texas, and approved by the commissioner of insurance."

WISCONSIN

Wisconsin, Stat. 1939, ch. 320; sec. 320.01.

"Executors, administrators, guardians and trustees may invest the funds of their trusts in accordance with the provisions pertaining to investments contained in the instrument under which they are acting, or in the absence of any such provision, then in the securities of the following classes:

"(14) in single premium endowment insurance policies and single premium annuities of life insurance companies authorized to do business in Wisconsin."

ARKANSAS

Arkansas, Acts 1933, Act. No. 251, Arkansas, Digest of Statutes (Pope) sec. 6303.

"Any minor of the age of fifteen years or more, as determined by the nearest birthday, may, notwithstanding such minority, contract for life, health and/or accident insurance on his or her person and may exercise all such contractual rights with respect to any such contract of insurance, heretofore or hereafter effected, as might be exercised by a person of full legal age and may at any time surrender his or her interest in any such insurance or give valid discharge for any benefit accruing or money payable thereunder.

"In all cases where any minor is under such age of fifteen years, it shall be lawful for any guardian or curator or trustee of the estate of such minor to invest any available funds of such minor in the purchase of life, health and/or accident insurance insuring such minor, without personal liability therefor on the part of said guardian, curator or trustee provided the application for the purchase of such insurance be approved by the probate court of the county in which such guardianship, curatorship or trusteeship is pending.

"Any insurance contract or policy made under the provisions of this act may be payable to such minor or to the estate of such minor, or to any person or persons having an insurable interest in the life of such minor. The insurance may be ordinary life, a definite period payment, endowment, single premium, or any other form of policy issued by standard insurance companies authorized to do business in the state of Arkansas. Provided that where a minor is possessed of an estate that is being administered by a guardian or curator no such contract of insurance shall be binding upon the estate of said minor, as to the payment of premiums, except as and when consented to be any such guardian or curator and approved by the probate court of the county in which the administration of any such estate may be pending, and such consent and approval shall be required as to each annual premium payment."

[22]Kentucky, Statutes, sec. 2032-1.

[23]Kavanaugh v. Chandler, (1934) 255 Ky. 152, 72 S. W. (2d) 1003.

In Pennsylvania the pertinent statute[24] reads:

"Any guardian of the estate of a minor, having sufficient income, may, upon petition to the orphan's court, of the proper county, and allowance of said court, invest a portion of the income of such minor in contracts of life insurance for the benefit of such person or persons, or the estate of such minor, as the court may direct. The court may at any time upon the petition of the Guardian direct that the beneficiary of such policy be changed; and the minor, upon reaching the age of twenty-one years, shall have the right to change any such beneficiary in the same manner as any other person having a policy of life insurance."

This enactment was declared to be unconstitutional in the case of *Solomon's Petition*[25] in 1929. At the time the act was passed, the Pennsylvania, constitution, article 3, sec. 22, provided:

"No Act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians, or other trustees in the bonds or stocks of any private corporation, and such Acts now existing are avoided save in investments heretofore made."

On November 7, 1933, there was submitted to the vote of the people of Pennsylvania the following amendment to the constitution:

"The General Assembly may, from time to time, by law, prescribe the nature and kind of investments for trust funds to be made by executors, administrators, trustees, guardians, and other fiduciaries."

Subsequent to the approval of the constitutional amendment, Pennsylvania passed the amending Acts of 1935 and 1937 to the Fiduciaries Act of 1917. There was no specific inclusion of life insurance in the amendments. It would seem reasonable that there was no such inclusion by implication and it must be concluded that an investment of a ward's funds in life insurance is not now authorized under the law of Pennsylvania.

In addition to the states that have enacted legislation expressly authorizing investment of trust funds or wards' funds in life insurance policies and annuities, two states have general legislation that is broad enough to bear upon that subject.

There is no statutory authority in California for the investment of trust funds by a trustee in life insurance policies and annuities, but I think it reasonable to conclude that the first paragraph of sec. 1557 of the California Probate Code affords a sufficient basis

[24]Pennsylvania, Laws 1929, ch. 150, sec. 1; Purden's Pennsylvania Statutes, 1936 Compact Edition, sec. 803.

[25](1929) 77 Pitts. Leg. J. 545.

for the approval of the purchase of life or endowment insurance or annuities with funds of a ward.[26] This paragraph reads:

"On the application of the guardian or of any person interested in the estate of the ward, the court may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real property, *or in any other manner most to the interest of the ward;* and the court may make such orders and give such directions as are needful for the management, investment and disposition of the estate as circumstances require."[27]

From the quoted provision, I am inclined to believe that, in a proper case, if the purchase of a life insurance or annuity contract appeared to be to the interest of the ward, such investment could be approved. In this connection, consideration should be given to sec. 1012 of the California Insurance Code, authorizing minors to enter into life, disability or annuity contracts, since this evidences legislative approval of the investment of the funds of minors in such contracts.

Although Michigan does not expressly permit this type of investment, it passed a statute in 1937 which vests in fiduciaries very broad powers so far as investments are concerned.[28] The pertinent sections of the act are as follows:

"Sec. 1. Trust funds received by any person or corporation acting in a trust or fiduciary capacity and available for investment shall be invested at the time and in the manner specified in and by the agreement, instrument or order creating or defining the trust or other holding. In the absence of investment specifications or limitations in the agreement, instrument or order, trust property or funds shall within a reasonable time, be invested in such common or preferred stocks, bonds, mortgages, mortgage notes (but not including certificates or evidences of participation or undivided

[26]The state of Washington has no statute specifying the securities in which the guardian may invest the funds of his ward, and its courts apparently have not been called upon to define the limits of permissive investments of such funds. Perhaps the probate court in that state, which is a court of general jurisdiction, might validly authorize a guardian to invest the funds of his ward in life insurance policies or annuity contracts. In that state an order of the court on such matters, made upon the ex parte application of the guardian, is considered prima facie correct and valid. However, because the order is upon ex parte application of the guardian, it is subject to review upon the guardian's final accounting; and it may at that time be set aside as improvident.

In Oregon the power of the court to prescribe the investment of the funds of wards is that which inheres in the general powers of courts over the estates of wards, and I understand as a practical matter that in a few instances the lower courts of that state have permitted the investments of wards' funds in annuities or endowment policies.

[27]Italics added.

[28]Michigan, Public Acts 1937, Act No. 177.

interests in real estate mortgages and mortgage notes), notes, debentures, securities or other properties, real or personal, as an ordinarily prudent man of intelligence and integrity, who is a trustee of the moneys of others, would purchase, in the exercise of reasonable care, judgment and diligence, under the conditions existing at the time of purchase, having due regard for the management, reputation, and stability of the issuer and the character of the particular securities:[29] Provided, however, That no such funds shall be invested in any securities or property purchased from said trustee, whether a person or a corporation, or from any subsidiary or affiliate of said corporation."

"Sec. 2. Nothing in this act contained shall be construed as limiting or affecting the power of any court to decree or order the kind or manner of investment of any funds by any trustee or fiduciary appointed by such court."

"Sec. 3. This act shall not apply to investments on the date this act shall become effective, or renewals thereof."

Sec. 37, Chapter IV of the Michigan Probate Code,[30] which became effective in September, 1939, provides that a fiduciary may make only such investments as conform to Act No. 177 above.

In some states, including West Virginia and Indiana, the pertinent statutes vest broad discretion in the courts to approve investment of trust funds in securities. In both of these states the court of general jurisdiction administers all trust funds and although the appellate courts of these jurisdictions never have been called upon to review the validity of the purchase of life policies and annuities, it may be that such purchases, made with the proper court approval, are valid, and as a practical matter I am reliably informed that in Indiana such investments have been authorized for a considerable period by the lower courts.

The Iowa statute[31] specifies twelve types of investments that a fiduciary can make. Annuities and life insurance policies are not included. However, the statute does state that,

"All proposed investments of trust funds by fiduciaries shall first be reported to the court or a judge for approval and be ap-

[29]Exclusion of annuities and life insurance policies from the rather extensive list of specifically authorized investments under the Michigan statute, notwithstanding the very general language of the balance of the law, creates some doubt as to the validity of the purchase of life insurance contracts under the Act, and largely for this reason, I understand, Michigan underwriters intend to seek an amendment of the present law to authorize expressly the use of trust funds for the purchase of life policies and annuities. Perhaps it is superfluous to mention that where other states undertake to enact legislation similar to that of Michigan, the purchase of life insurance policies and annuities without restriction should be expressly authorized.

[30]Sec. 27.3178 (288).

[31]Iowa, Code 1939, sec. 12772.

proved and unless otherwise authorized or directed by the court under authority of which he or it acts, or by the will, trust agreement or other document which is the source of authority, a trustee, executor, administrator or guardian shall invest all moneys received by such fiduciary, to be by him or it invested, in securities which at the time of the purchase thereof are included in one or more of the following classes: . . ."[32]

Then are set forth the twelve types referred to above. The underlined portion of the foregoing statute would seem to indicate that the court has authority to approve investments "under authority of which he or it acts," in addition to those specified, and in the case of *In Re Guardianship of Durgy*[33] the Iowa supreme court held that a guardian's investment in life insurance for the ward should not be charged against him on his account where the policies were for modest amounts and had a cash surrender value. With respect to the policies in that case, the Iowa court said:

"The guardian also procured life insurance policies for his wards. This was done at the instance and request of the mother. It was in good faith, without profit to the guardian, and in the obvious belief that it was for the best interests of the wards. The investment was fully presented to and authorized by the court. The policies are in full force *and, while the investment may not be of a character that should be encouraged as suitable for trust funds,* we are of the opinion that the guardian should not be charged with the premiums paid as demanded. It is not material that the mother is named as beneficiary. The policies are for modest amounts and have cash surrender value."[34]

I believe it is fair to conclude that the Iowa court in the foregoing decision, although not disapproving the purchase of the insurance to the extent of surcharging the guardian's account, suggested, inferentially at least, that it might be well for fiduciaries in the future to use some other form of investment. The decision is of interest in considering the validity of the investment of trust funds, with court approval, under a statute vesting broad discretion in the court, and, moreover, causes one to speculate as to whether the result would have been the same had the policies been in substantial rather than modest amounts.

So far as I have been able to determine, there is nothing in the law of England, the Canadian Provinces, New South Wales or South Australia authorizing the investment of the funds of wards or trust funds in life insurance policies and annuities. In fact, the

[32]Italics added.
[33](Iowa 1934) 257 N. W. 791.
[34]Italics added.

English Children's Act of 1908,[35] contains this interesting provision:

"A person by whom an infant in respect of which notice is required to be given under this part of this act is kept shall be deemed to have no interest in the life of the child for the purposes of the life assurance act of 1774[36] and, if any such person directly or indirectly attempts to insure the life of such an infant, he shall be guilty of an offense under this part of this act, or, if a company, within the meaning of the Life Assurance Companies Acts, 1870 to 1872, or any other company, society or person. . . ."

It seems to me that this statute, originally enacted in 1906, in all probability was designed to apply to persons who board children at their homes and take care of them for remuneration, and does not relate to children generally.

Whether due to the inertia of the agents, the unpopularity of the law with the judges, the reluctance upon the part of guardians and trustees to purchase life policies and annuities, or the failure upon the part of the companies to encourage the sale of annuities and single payment policies during the low interest era, the significant fact is that the experience in other states has been similar to that in Minnesota so far as the use of the statutes is concerned. I do not mean to suggest that my investigation with respect to the use of the statutes has been at all exhaustive, but I have endeavored to obtain information from life insurance counsel and trust companies in the various states authorizing this type of investment; and this information leads me to believe that little, if any, of the money of trust beneficiaries or wards has reached the life insurance companies. For instance, in Massachusetts one of the large insurance companies advises me that it has issued only one contract covering a minor under the Massachusetts statute. Similarly, the amount of use that has been made of the Wisconsin statute is negligible; and that is true also of the statutes of both Florida,[37] and Texas and Ohio. Indeed, I am informed that in one of the larger cities of Ohio, certain trust officers feel that, notwithstanding the statute, they would be improperly delegating their authority and discretion as trustees for the investment of funds if they turned the money under their care over to an insurance company. The reason they assign for this attitude is that they personally feel bound to look after the investment of the funds and ought not,

[35] 8 Edw. 7, ch. 67, sec. 7.

[36] 14 Geo. 3, ch. 48.

[37] This may be due in some measure to the fact that the Florida statute authorizing this type of investment is hidden under the heading "Mortgages."

therefore, to delegate their authority and discretion to some other person. Offhand I find it somewhat difficult to discern how an investment specifically authorized by statute, and not prohibited by constitution, would be regarded as an improper delegation of authority. It may be that these trust officers have heretofore had some unfortunate experiences in dealing with minors, which may account for their extreme caution.

In at least four states this type of investment is prohibited by a constitutional provision.[38] The constitutional provisions, which are substantially similar, prohibit the state legislative body from authorizing the investment of trust funds by administrators, executors, guardians or trustees in the bonds or stock of any private corporation. Such prohibition has been held broad enough to cover life policies and annuities issued by a private insurance corporation.[39] Typical of the constitutional province is that of Wyoming, which provides:[40]

"*Investment of Trust Funds.* No acts of the legislature shall authorize the investment of trust funds by executors, administrators, guardians or trustees, in the bonds or stock of any private corporation."

In considering applications submitted by guardians and trustees, it seems to me that the home office lawyer should check the constitution and the statutes of the state involved to determine whether any power has been or may be vested in the court to authorize such investments, bearing, of course, in mind that courts

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[38]Alabama, Colorado. Montana and Wyoming. These constitutional provisions are set forth below:

Alabama, constitution, art. 4, sec. 74.

"No act of the Legislature shall authorize the investment of any trust fund by executors, administrators, guardians or other trustees in the bonds or stock of any private corporation; and any such acts now existing are avoided, saving investments heretofore made."

Colorado, constitution, art. 5, sec. 36.

"No acts of the General Assembly shall authorize the investment of trust funds by the executors, administrators, guardians or other trustees, in the bonds or stock of any private corporation."

Montana, constitution, art. 5, sec. 37.

"No act of the Legislative Assembly shall authorize the investment of trust funds by the executors, administrators, guardians or trustees in the bonds or stock of any private corporation."

Wyoming, constitution, art. 3, sec. 38.

"No acts of the Legislature shall authorize the investment of trust funds by executors, administrators, guardians or trustees, in the bonds or stock of any private corporation."

[39]Solomon's Petition, (1929) 77 Pitts. L. J. 543. Such construction seems reasonable inasmuch as the constitutional prohibition appears to be aimed at securities of a private corporation. Particularly would this seem to be true when consideration is given to the fact that such investments uniformly have been held to be unauthorized by the courts.

[40]Art. 3, sec. 38.

usually evidence great solicitude for the welfare of the minors, sometimes at the expense of innocent persons. Even though the constitution and statutes of a particular state do permit such an investment, probably it would be desirable to require that there be furnished a certified copy of the decree authorizing the investment, a certified copy of the petition for such decree, as well as satisfactory proof of appointment and qualification of the fiduciary, and, with respect to the minor, proof as to his age. The petition and decree should be examined carefully to make certain that any statements regarding the contract proposed to be issued, its provisions and benefits, conform with the terms of the contract which the company would issue.

Our duty as lawyers will have been adequately performed if we carefully examine the applicable law and carefully scrutinize the court proceedings incident to the application, to the end that the sale of a contract may not turn out to have been the purchase of a lawsuit. Perhaps we should stop there, leaving to the legislators and agents the task of determining whether the law's solicitude for the minors requires additional legislation. But at the risk of being charged with making additional work for lawyers, I suggest that we might give some consideration to the need for revising the archaic statutes now governing the investment of trust funds by fiduciaries, for I think all will agree that they are imperfectly suited to our streamlined age.

Unquestionably there are times when the purchase of life insurance is as necessary for the protection of a minor as the purchase of clothing or other necessaries. When such circumstances exist, I think it is regrettable that statutes and constitutions should interpose insurmountable obstacles to the meeting of such a necessity. If life insurance and annuities were new and untried, the present situation would be understandable; but so far as antiquity may supply a standard of value or safety of investment, insurance and annuities, particularly the latter, outrank mortgages, government and municipal securities, and other investments now generally authorized under statutes governing fiduciaries. An annuity is one of the oldest forms of investment, the private sale thereof having originated long before there was any corresponding development of life insurance.[41]

[41]For information with respect to the history of annuities I am indebted to Mr. Ray D. Murphy, President of The Actuarial Society of America and Vice-President and Actuary of the Equitable Life Assurance Society of the United States.

The use of life annuities or their equivalent by the church was recorded as far back as the eighth century. Monasteries and other religious bodies extended the use of their lands for the life of the contributor in return for sums of money handed over to them. In the fifteenth century the Church of Rome employed life annuities extensively to carry on its philanthropic work. The first instance on record of the use of life annuities for the financing of affairs of a national government was in 1554 when Holland raised 200,000 guilders to supply the expenses of a war with France. Half of this sum was raised by the sale of annuities, part of which were life annuities sold to yield 16 2/3 per cent per annum, irrespective of the subscriber's age. In England the first attempt to raise funds for national financing by means of life annuities was made in 1692, to raise a million pounds to finance the war with France. In 1808 the British Government first embarked on the sale of life annuities as an integral part of its regular fiscal program.

Although life insurance, either as a means of protection or investment, is not as old as annuities, the significant fact is that life insurance presently is regarded as being a more desirable form of investment, either from the standpoint of yield or safety, than farm mortgages and other investments formerly regarded as gilt edged.

Neither the 1929 crash nor low interest rates seem to have resulted in misfortune or loss of Miss Gloria Vanderbilt's estate (a possibility adverted to by her guardian); in fact, according to newspaper reports the young lady is still able to get along with reasonable comfort. However, I believe it is fair to state that there are thousands of other minors whose estates have been completely dissipated during minority solely because their guardians were compelled to invest their funds in securities valuable only because legislatures considered them to be so seventy-five years ago. And if we view this matter entirely unselfishly, it seems to me that we ought to do what we can to afford to minors and trust beneficiaries the privilege of having the advantage of annuities and life policies. It is not likely that insurance lawyers would enthusiastically recommend the passage of legislation authorizing this type of investment. They know from experience that they must carefully scrutinize any contracts issued for the benefit of minors and trust beneficiaries because of the favoritism which the courts usually evidence toward such persons. Infants have long been favored by the courts under horse and buggy rules entirely inappropriate to the present age. It may be suggested that if the insurance companies do extend their efforts toward a change in the rules, by which minors shall be given the benefit of investments in annuities and insurance, they might well take upon themselves the additional obligation of seeing to it that duties and burdens commensurate with those benefits are imposed upon the minors, so that the companies may deal with them with more assurance of not later being the victims of a disgruntled minor and a sympathetic court disposed to decree that an infant may have his cake and eat it, too.