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The Testamentary Life Insurance Trust

I. INTRODUCTION

In a testamentary life insurance trust proceeds of a life insurance contract are paid to trustees named in the will of the insured. The trustees hold or dispose of the proceeds as the terms of the will dictate. The distinctive characteristic of the trust is its dependence upon the will of the insured for completion; in contrast, the inter vivos life insurance trust is created before the insured's death. The dependence of the testamentary trust upon the will raises the problem of whether the disposition violates the Statute of Wills since the statutory formalities are not followed. Further, when the policies are assigned to trustees to be named in the last will, no trustees exist until the insured's last will is legally established raising the question whether a valid trust has been created. Consequently, validity of such a trust is uncertain.¹

The testamentary life insurance trust combines the individual advantages of the life insurance contract, the inter vivos trust, and the inter vivos trust with a pour-over from the will of the settlor.² One of the chief advantages of life insurance is to provide the estate with necessary liquidity. By having the proceeds made payable to someone other than the executor, the expense and delay of probate can be avoided. Further, when probate is avoided, the claims of creditors cannot be satisfied out of the insurance proceeds.

By placing the proceeds in trust, the insured can provide effective management and control of the funds for the beneficiaries. The trust provides flexibility as the trustee can be given discretionary power to withhold or distribute proceeds as circumstances warrant.

The testamentary insurance trust may be preferred to an inter vivos trust since the insured need not undertake the trouble and expense of erecting a trust when the insurance is

¹. See generally Cooper, Testamentary Trust for Insurance?, 97 TRUSTS & ESTATES 113 (1958) (Pennsylvania law); Lawthers, Designating Trustee Under Will as Beneficiary of Insurance—Home-Office Problems, 94 TRUSTS & ESTATES 826 (1955); Schipper, Designating Trustee Under Will as Beneficiary of Insurance—Legal Problems, 94 TRUSTS & ESTATES 819 (1955).

². The pour-over is a provision in the will adding estate property to an inter vivos trust. Such a device has been increasingly allowed by statute. E.g., MINN. STAT. § 525.223 (Supp. 1966); WIS. STAT. § 231.205 (1967).
purchased. Moreover, the denomination of a trustee may be deferred. Since the insurance proceeds will be administered as part of a trust set up under the will for the probate assets, the testamentary trust provides for a unified estate plan. This same unification can be achieved by establishing an inter vivos trust with the insurance proceeds payable to such trust and a pour-over of the assets of the estate passing under the will. However, the testamentary insurance trust is a much less complicated vehicle, with none of the disadvantages of establishing an inter vivos trust. An inter vivos insurance trust may be financially impractical if the insured is of small means and the insurance proceeds are relatively small. In addition, the testamentary trust will allow greater flexibility should the insured wish to put the proceeds of the policies in trust only under certain circumstances. For example, a trust may be deemed unnecessary if the beneficiaries have attained a certain age at insured’s death. In such a case the will could designate a trustee as beneficiary of the proceeds or, in the alternative, the named beneficiaries if they have attained the specified age.

The unique advantages of the testamentary life insurance trust being readily apparent, this Note will consider the validity of such a trust in the light of judicial precedent. A comparison will be made with the treatment afforded the simple life insurance contract and the inter vivos life insurance trust. It will be argued that the favorable judicial treatment shown the latter methods of circumventing probate should be extended to the testamentary insurance trust, notwithstanding its dependence upon the will. Also to be considered are the implications of such a trust as regards the spouse’s forced share and the rights of creditors.

II. JUDICIAL TREATMENT OF THE TESTAMENTARY LIFE INSURANCE TRUST

Although the case authority directly in point is limited, the authority which is available reveals a conflict of opinion concerning the validity of the testamentary life insurance trust on

4. See Schipper, supra note 1. In reference to a pour-over from the will into an inter vivos insurance trust, Schipper states:

To the insured all of this may seem complicated and unnecessary, particularly if he is a man of small means and the insurance in question is only a moderate amount. The obvious question he will ask is why his life insurance cannot be made payable directly to the trustees under his will.

Id. at 819.
both will and trust grounds. In *Frost v. Frost*, 5 insured assigned all his rights, title, and interest in certain life insurance policies to a "trustee to be named in my will" 6 for the use of his wife. The insured subsequently executed several wills, each of which provided for a different trustee of the insurance policies. In holding the trust invalid, the court proceeded on two grounds: (1) the assignments were of a testamentary nature and could not be operative after insured’s death without the formalities required by the Statute of Wills; and (2) since the assignments could not take effect during insured’s life without a trustee, there was nothing upon which to base the alleged trust. The *Frost* court emphasized that the language of the assignments pointed to a testamentary intention. Since different trustees were named in the several wills following the execution of the trust, the court concluded that the trustee could not be finally ascertained until after the death of insured.

*Tootle-Lacy Nat’l Bank v. Rollier* 7 is contrary to the *Frost* case. Policies with one company were payable to a bank as trustee if the insured died testate with a trust operating under the will and his wife survived him; otherwise, the proceeds were payable to his executors or administrators. Policies with another company were payable to the trustees named in the will of the insured if his wife survived and insured left a will; otherwise, the proceeds were payable to his executor or administrators. In upholding the trust in both variations, the court relied on the clear intent of the insured 8 that the proceeds of these policies pass according to the trust in his will, but not as a part of his estate. 9 The court maintained that if the insured had intended otherwise, he would have made the proceeds payable directly to his representatives or his estate. No distinction was made between the policies of the two companies—one

6. The designation of “trustee to be named in my will” raised the question of the will to which the insured was referring. The court held the designation to mean the trustees in the document finally admitted to probate as the will of the insured.
7. 341 Mo. 1029, 111 S.W. 2d 12 (1937).
8. See United States v. First Nat’l Bank & Trust Co., 133 F. 2d 886 (8th Cir. 1943). The insured made the bank beneficiary of four life insurance policies “as trustee, under the last Will and Testament of the insured.” However, the insured made no specific reference to the policies in his will, but left a residuary estate in trust for his wife and daughter. The court upheld the trust, resting its decision on the intention of insured.
naming a trustee, the other providing for the naming of a trustee in insured's will. The failure to make this distinction follows logically from the court's emphasis on the intention of the insured: the policies "differ in form and wording, though not in intent . . . ".

Unfortunately, the Rollier case, although conflicting with the Frost decision, does not meet the two contentions of Frost that the trust is testamentary and that no present trust is created. Thus, an analysis of the Frost objections is needed for a thorough understanding of the problem.

A. THE TESTAMENTARY OBJECTION

In examining the testamentary objection, it is helpful to consider the treatment accorded life insurance contracts in general, and the inter vivos life insurance trust. Conceptually, a life insurance policy is by its very nature testamentary. The insured contracts to pay premiums in return for an agreement by the insurer to pay a designated sum to a specified beneficiary on the insured's death. Since the insured may reserve the power to change the beneficiary or revoke the policy altogether, the insured has complete dominion and control over the policy until death. Nevertheless, the formalities which generally accompany a testamentary disposition are not required for the insurance policy. Some courts distinguish the life insurance contract from the will on the basis that life insurance does not operate on property owned by the insured at his death, and thus cannot be a part of his estate. Life insurance policies are also distinguished from wills on the rationale that the former are contracts between insured and insurer for payment of a stipulated sum upon the inevitable contingency of death.

10. 341 Mo. 1029, 1035, 111 S.W.2d 12, 15 (1937).
11. Fidelity & Columbia Trust Co. v. Glenn, 39 F. Supp. 322 (W.D. Ky. 1941) (dictum). The court in Sigal v. Hartford Nat'l Bank & Trust Co., 119 Conn. 570, 177 Atl. 743 (1935), suggests that the life insurance contract "somewhat resembles" a will because of the condition of payment on death and the ambulatory nature of the life insurance policy where the right to change the beneficiary is reserved.
Whatever the reasoning, life insurance contracts generally are held to be nontestamentary. Thus, the life insurance proceeds do not pass through the estate and are not subject to the expenses of probate, the spouse's forced share, and the claims of creditors.

The inter vivos life insurance trust has also been challenged as testamentary. The trust is created by designating a named trustee as beneficiary in the insurance contract and by attaching a trust agreement providing for the disposition of the insurance proceeds by the trustee. The insurance contract usually provides for an extensive reservation of rights to the settlor-insured beyond the traditional right of changing the beneficiary. The inclusion of these provisions has been the basis for the contention that the insurance trust is not a present disposition of property, but a mere cover for a testamentary disposition. For example, in Gurnett v. Mutual Life Ins. Co., the insured reserved the right to change the beneficiary, borrow money on the policies, use them as security, receive dividends from the policies, and surrender any policy for its cash value. He further reserved the right to terminate, modify, or amend the agreement. The court held the insurance trust valid, even against the claims of insured's creditors. The rationale was that since an ordinary life insurance policy is not testamentary, and since the recipient of an inter vivos life insurance trust is also a third-party beneficiary of a contract, a life insurance contract payable to a trustee should not be found testamentary.

The potential problem of the trustee-beneficiary taking a divided interest is a matter of trust law, not bearing on the testa-


15. See generally Atkinson, Wills §§ 39, 40, 44 (2d ed. 1953); Vance, Insurance § 108 (3d ed. 1951); Gulliver & Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1 (1941). In Fallon, Contract and Life Insurance, 59 Dick. L. Rev. 40 (1954), the writer argues: "Testamentary disposition" is a symbol that the cases use. All symbols carry an overcharge. The overcharge of "testamentary disposition" is the connotation that all dispositions of personal property are invalid which do not meet the special form that the Statute of Wills fixes. . . . The symbol of "testamentary disposition" never had a place in the field of life insurance. Life insurance rests in the field of contract.

Id. at 42.


Further, there is no reason to distinguish between rights reserved in the insurance trust and those reserved in the insurance contract since the extent of control is virtually the same. Thus the courts have had little difficulty in upholding inter vivos life insurance trusts in spite of several testamentary characteristics.

Unfortunately, the willingness of the courts to uphold the life insurance contract and the inter vivos life insurance trust against testamentary attack has not been extended to the testamentary life insurance trust. Admittedly, the latter is different in that it depends on the will of insured to complete the trust, but this factor is of no real consequence. Both inter vivos and testamentary insurance trusts are skeletal until the death of insured. In both, the ultimate trustee-beneficiary is uncertain until the insured dies. Although in the inter vivos trust the trustee is currently designated, the insured may amend or revoke the trust, thus changing the trustee. Further, whether the trust is inter vivos or testamentary, the proceeds of the insurance will not be received by the beneficiary until the death of insured. The peculiar testamentary nature of life insurance should be recognized in the testamentary life insurance trust situation. The conceptual distinctions between the life insurance contract and the will are equally applicable where the life insurance is in a testamentary trust.

In addition, there seems no reason to require testamentary or inter vivos trusts to comply with the formalities of the Stat-
ute of Wills. Little danger of fraud exists. The writing of the insurance contract satisfies one requirement of the usual Statute of Wills. The insurance contract and the trust agreement serve an evidentiary purpose, insuring adequate protection to the settlor-insured that his intent will be fulfilled with as much certainty as the will. Furthermore, the requirement that the settlor-insured set up a trust agreement and sign the insurance contract, as well as filling in the beneficiary, serves a cautionary purpose in preventing him from acting in a casual manner. Finally, the testamentary life insurance trust conforms at least in part to the formalities of the Statute of Wills since the designation of the trustee, and sometimes the terms of the trust, are established by the will of the insured.

B. The Present Trust Objection

The second objection to the testamentary life insurance trust is that no present trust is created because of the dependence on the will to provide the trustee and sometimes the trust terms necessary to complete the trust. Again, it is helpful to refer to the treatment accorded the inter vivos life insurance trust. The objection of no present trust has also been made against the inter vivos insurance trust, however, on the basis that no trust property exists. The trust property requirement is met if the beneficiary acquires any property interest during the lifetime of the settlor, even though possession or enjoyment does not begin until the settlor's death. Absent extensive reservation of rights in the insurance contract, the beneficiary is considered to have a vested interest in an irrevocable trust, which interest constitutes sufficient trust property to satisfy the requirement. However, when extensive rights are reserved, it would seem that the beneficiary has little more than an expectancy. The real incidents of ownership are vested in the insured, and the beneficiary's interest is merely contingent.

26. See generally 1 SCOTT, TRUSTS § 57.3 (2d ed. 1956); SMITH, PERSONAL LIFE INSURANCE TRUSTS § 17, at 74 (1950).
27. The prerequisites for the creation of an express trust include a subject matter on which the trust can operate, one competent to create a trust, one capable of holding the property as trustee, and one for whose benefit the trust property is held. Waesche v. Rizzuto, 224 Md. 573, 168 A.2d 871 (1961). See generally 1 SCOTT, TRUSTS § 26 (2d ed. 1956).
28. 1 SCOTT, TRUSTS § 56.5 (2d ed. 1956).
The courts have avoided this argument in several ways. Some courts have labeled the beneficiary’s interest as vested subject to divestment. Courts which have conceded that the beneficiary takes a mere expectancy have held without explanation that a life insurance policy is sufficient res to validate an inter vivos trust. Other courts have held that the beneficiary has more than a mere expectancy, but fail to specify the nature of that interest. In Kerr v. Crane, while admitting “the beneficiary had no other interest than a mere expectancy dependent upon the will and pleasure of the insured member,” the court stated that this did not necessarily prohibit the beneficiary from dealing with this expectancy and enforcing it in equity upon the death of insured when it became vested. Under similar circumstances, the court in Hirsch v. Auer referred to the beneficiary’s interest in insurance policies as contingent while commenting that this fact was of no importance because the interest vests at the death of insured.

This stretching of trust principles in the inter vivos life insurance trust situation to uphold the sufficiency of the beneficiary’s interest in the proceeds of insurance policies indicates a desire and purpose to give effect to the intent of the settlor-insured. Conceptual rationalizations are accepted despite their tenuous nature. Arguably, however, the peculiar nature of life insurance requires a stretching of trust principles, as the interest of the beneficiary is very slight. Some states recognize

33. 212 Mass. 224, 98 N.E. 783 (1912).
34. Id. at 227-28, 98 N.E. at 784.
35. 146 N.Y. 13, 40 N.E. 397 (1895). See also Gordon v. Portland Trust Bank, 201 Ore. 648, 271 P.2d 653 (1954), which promulgated a new theory retaining a logical approach to the requirement of trust property:

Our own view is that the ownership of the modern policy is actually divided between the beneficiary and the insured. The various marketing or sales features, such as the loan and cash surrender values, are clearly the property of the insured. On the other hand, the beneficiary is the owner of a promise to pay the proceeds at the death of insured, subject to insured’s right of revocation. . . . The insured’s rights are secondary and have nothing to do with the basic purpose of life insurance.

36. In case of an anticipatory breach by insurer, the insured, not the beneficiary, has a cause of action. Yet when a judgment creditor
this lack of interest by validating the inter vivos life insurance trust by statute.\textsuperscript{37} The attitude of the courts toward the inter vivos life insurance trust may be urged in support of the validity of the testamentary life insurance trust. Two points should be carried over to the testamentary trust situation: (1) that the courts have the tendency to ignore the technicalities of trust principles when life insurance is involved; and (2) that the settlor-insured's intent is accorded high respect.

Notwithstanding the favorable treatment accorded the inter vivos insurance trust,\textsuperscript{38} when the trust is dependent on the will of the insured for completion, the law is unclear as to its validity. An insurance trust dependent on an instrument other than a will for satisfaction of the requirements of a present trust is clearly valid. In \textit{Kendrick v. Ray},\textsuperscript{39} a life insurance policy was payable to a certain person as trustee, but neither the beneficiary nor the terms of the trust were expressed. After the death of insured, a sealed letter was found requesting payment of the insurance proceeds to named persons. The court held the insurance proceeds were payable to the trustee subject to the directions of the letter, commenting that it made no difference that the letter and policy remained in insured's possession until death.\textsuperscript{40} Furthermore, inability to identify the beneficiary except by reference to a testamentary instrument does not necessarily make the trust testamentary in character requiring execution in conformance with the Statute of Wills\textsuperscript{41} since the trust


\textsuperscript{38} Even without the assistance of legislation, inter vivos insurance trusts generally are held valid. \textsc{1 Restatement (Second), Trusts} § 57, comment f (1959).

\textsuperscript{39} 173 Mass. 305, 53 N.E. 825 (1899).

\textsuperscript{40} Frost v. Frost, 202 Mass. 100, 88 N.E. 446 (1909), distinguishing this case rather than overruling it, declares the invalidity of a testamentary insurance trust: "There the trustee was the beneficiary named in the policy; and the question was as to the terms of the oral trust upon which he received the insurance, and not as to the validity of the appointment of the trustee." \textit{Id.} at 103, 88 N.E. at 449.

\textsuperscript{41} \textsc{1 Scott, Trusts} § 56.4 (2d ed. 1956); \textsc{Smith, Personal Life Insurance Trusts} § 19, at 86-87 (1950).
requirement of a presently ascertainable beneficiary is satisfied.\textsuperscript{42}

The cases allowing reference to the will to complete an insurance trust often emphasize the intention of the insured and ignore any contention that the trust is testamentary. For example, in Prudential Ins. Co. v. Gatewood,\textsuperscript{43} the insured designated in the insurance contracts that the proceeds go to a specific bank as trustee of his estate. The insured also left a will in which his residuary estate was left to the same bank as trustee to be administered according to the trust set forth in the will. The court held that the designation in the insurance policies of the bank as trustee, rather than as executor, indicated that insured intended the bank to take the proceeds of the policies as trustee and to hold them in trust according to the terms set forth in the will, without making the estate the beneficiary of the policies.\textsuperscript{44} Clearly the insured's intent was the primary concern of the court.\textsuperscript{45}

\textsuperscript{42} In Douglas's Estate, 303 Pa. 227, 154 Atl. 376 (1931), the trust instrument referred to "her last will and testament bearing date the Thirtieth day of August, 1918, witnessed by . . . ." Accord, Hammett v. Farrar, 29 S.W.2d 949 (Tex. Civ. App. 1930). These cases restrict the debate over the validity of the testamentary life insurance trust to the case where no specific will is referred to for the completion of the trust. In the Douglas case, the will dated August 30, 1918, was eventually probated as the decedent's last will and testament. However, a conceptually difficult problem might have arisen if decedent had executed another will. The question would have been whether the trust was valid by the old will, or invalid because the new will revoked the old.

\textsuperscript{43} 317 S.W.2d 382 (Mo. 1958).

\textsuperscript{44} The court distinguished Prudential Ins. Co. v. Bloomfield Trust Co., 104 N.J. Eq. 372, 145 Atl. 735 (1929), discussed at note 55 infra and accompanying text, on the basis that designating in the insurance contracts that the proceeds go to the bank as "trustee of estate of John J. Gatewood" so correlated the trust to the will as to allow reference to the trust created in the will for determination of the powers and duties of the bank as trustee of the proceeds of the policies.

\textsuperscript{45} This contention and the Gatewood holding are supported in St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770 (Mo. 1962); Ramsey v. City of Brookfield, 361 Mo. 857, 237 S.W.2d 143 (1951). Although the court in Blue reached a decision contrary to Gatewood, the court stated:

Without detracting from these decisions and in full concurrence with the principle that an express trust will be found and declared upon proper facts when necessary to effectuate the intention of the party disposing of property and to prevent the thwarting of his objectives and purposes, we find . . . .

St. Louis Trust Co. v. Blue, supra at 778.

In Gatewood, the appellant argued unsuccessfully that the beneficiary designation in the insurance contracts, along with the statement in the will naming the same bank as executor and trustee under a testamentary trust, indicated that decedent intended the proceeds of the insurance policies to be a part of his estate.
In *Boston Safe Deposit & Trust Co. v. Commissioner*, the insured made the policy payable to a trust company without specifying the objects or terms of the trust. With no specific reference to the policy, the will disposed of the residue of the estate in trust, naming the same trust company as trustee of the testamentary trust. The court held that the insurance proceeds were subject to the provisions of the testamentary insurance trust without passing through the estate. The decision was based on the clear intent of the insured "as though the policies had stated that they were payable to the Boston Safe Deposit & Trust Company, trustee, under the trust set up in the will . . . ." The court, as in *Gatewood*, ignored any question as to the testamentary character of the insurance disposition.

While these cases are not directly in point with the testamentary insurance trust in which the trustee is specifically named in insured's will, they suggest that such a trust should be upheld to effectuate the intent of insured. This seems to be a reasonable rationale for validating a trust dependent on an insured's will, at least in the case of the testamentary insurance trust where the insured's intent is very clear. If the settlor-insured wants the insurance proceeds paid to his estate, he can designate the beneficiary in the capacity of executor rather than trustee.

However, case authority is not unanimous in allowing reference to the will to complete a trust. In *Pavy v. Peoples Bank & Trust Co.*, the insured designated the bank as trustee-beneficiary without naming the beneficiary or terms of the trust. The trial court found that the following items created a trust and effected the designation of beneficiaries: (1) the change of beneficiary of the life insurance policy to the bank "to be held in trust by;" (2) the will, which was executed three days later naming the same bank as testamentary trustee of testator's residuary estate; and (3) a suicide note found at the time of in-

46. 100 F.2d 266 (1st Cir. 1938).
47. Id. at 267.
48. See also *Union Trust Co. v. McCaughn*, 24 F.2d 459 (1927), in which the proceeds of life insurance policies were made payable to insured's wife as trustee without naming a beneficiary. The will, without mentioning the trust, gave half the proceeds of the insurance to the wife. The court held that the half of the proceeds not disposed of by will was part of the gross estate because of failure of the trust, and that the wife of decedent took no beneficial interest therein; but as to the other half, the clause in the will operated as a declaration of the trust and upon the death of insured the trust was complete.
sured's death which stated that the bank would have control of all property and insurance proceeds for the family. However, the appellate court reversed, holding that the trust failed and the policy proceeds were a part of the residuary estate.\textsuperscript{50} In justification, the court stated that the changing of the beneficiary in the insurance policy failed to meet the formal requirements of a valid trust demanded by law.\textsuperscript{51}

This decision, however, is not necessarily contrary to the completion of a trust by reference to the will of insured. The appellate court may have only disagreed with the lower court's opinion that the testator intended the insurance trust be completed by reference to the will or note. Thus, it is unclear whether this court would hold a trust invalid for failure to have the necessary elements of a trust if specific reference to insured's last will were required to complete the trust.

In \textit{Bickers v. Shenandoah Valley Nat'l Bank},\textsuperscript{52} there was no question as to whether insured intended to relate an insurance trust to his will. The insurance trust specifically provided for dependence upon insured's will to determine the disposition of the insurance proceeds. The life insurance policies had been deposited with the trustee and the proceeds were to be divided into certain shares, the respective size contingent on whether the widow accepted or renounced the will of insured. The court held the trust testamentary in character and invalid because no interest passed at the creation of the trust.\textsuperscript{53} Although agreeing

\textsuperscript{50} The significance of the proceeds passing to the estate was that the creditors who claimed over $50,000 against an estate of less than $1,000 without the insurance proceeds, would receive a larger pro rata share on their credit to insured. Although the court does not mention the creditors' claims as a factor in its decision, it may have been swayed by this.

\textsuperscript{51} The appellate court suggested that the essential elements that must exist to satisfy the law were the purpose of the trust, the subject matter, the objects or beneficiaries, and the manner in which the trust's assets are to be disposed.

\textsuperscript{52} 197 Va. 145, 88 S.E.2d 889 (1955).

\textsuperscript{53} Three justices dissented from the holding. \textit{Id.} at 157, 88 S.E.2d at 897. While conceding that the sole issue was whether the trust agreement was testamentary in character and therefore invalid because of its failure to comply with the Statute of Wills, the dissent, as stated by Justice Whittle, emphasized the peculiar character of life insurance: "[A]t the outset it must be remembered that we are here dealing with a life insurance trust as distinguished from trusts involving other classes of property." \textit{Id.} at 158, 88 S.E.2d at 898.

The dissent further objected to the majority statement that the settlor did not intend the insurance trust agreement to become effective until after his death, claiming "the insurance trust creates definite, contingent limitations in favor of the widow and the four daughters of the
that "the alleged *inter vivos* trust agreement between the settlor and the trustee must be construed according to its intent...,” the court stated that dependence on the will was evidence of a lack of intent to pass a present interest. In support, the court maintained that the addendum to the trust agreement, which declared the duty of the trustee during the life of settlor was merely to hold the policies, was unequivocal language indicating that no present interest passed.54

In *Prudential Ins. Co. v. Bloomfield Trust Co.*,55 insured designated the trust company as trustee-beneficiary of his life insurance proceeds without naming beneficiaries of the trust. Later, insured executed a will giving the residue of his estate in trust to his wife and children. The will did not mention the life insurance proceeds. The court refused to allow reference to the will to complete the life insurance trust stating that the two documents had neither common purpose nor common subject. Although this decision may be interpreted as hostile toward reference to the insured's will to complete a trust, it may also be interpreted as being based upon a lack of intent to refer to the will.56 The latter interpretation, of course, is not con-
terary to the testamentary life insurance trust situation where specific reference is made to the will of insured.

In summarizing the case authority on testamentary life insurance trusts, two approaches to the problem are apparent. On the one hand are those cases denying the validity of such a vehicle, relying upon the testamentary and present trust objections expressed in the Frost case. On the other are those cases upholding such a trust, relying for the most part on the intent of the insured.

The arguments advanced in the Frost case reveal their own weaknesses. The court emphasized the testamentary objection, but this question is more easily answered by prior case authority recognizing the inherently testamentary nature of life insurance. The stronger argument, that there is no present designation of a trustee, an essential element for a valid trust, is weakened by the following statement of the Frost court:

While it is true . . . that the trustees when finally ascertained would derive their appointment under the assignment and not under the will, still it remains equally true that they could not be appointed nor even ascertained until after the death of the assignor. 57

The court suggests by this statement that the ascertainment of a trustee after the death of insured relates back to the formation of the trust rather than to the will. Consequently, the trust originally incomplete without a definite trustee would now be valid.

Unfortunately, those cases upholding the testamentary life insurance trust do not counter effectively the two objections raised by Frost. One possible explanation is that the courts, while recognizing the testamentary nature of the trust, consider it more important to give effect to insured's intent. This explanation follows from the recognition that insurance is by nature testamentary 58 and creates no danger of fraud. 59 Another approach to the testamentary attack of Frost is the argument that the testamentary insurance trust is not the equivalent of a will. Support for this argument may be derived from the contractual nature of life insurance. A third explanation may be that the testamentary question is irrelevant because a valid trust has been created. Union Trust Co. v. McCaughn, 60 

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58. See note 11 supra.
59. See note 26 supra and accompanying text.
60. 24 F.2d 459 (E.D. Pa. 1927).
icates a conceptual way to satisfy the formal requirements for a valid trust:

In considering the effect of the trust finally effectuated by the will, it cannot be said that the contract of insurance is one thing, and the manner of proceeds entirely a separate thing, and that the trust related only to the proceeds, and therefore did not come into existence until the testator's death. Under a contract of insurance, the rights of the beneficiary do not arise from the death of the insured. . . . [T]he provision in the will by which the trust was completed related back to the time when the policy was taken out.61

This relation back doctrine62 may be considered logically correct, but still a rather thin rationalization. However, this doctrine is not the first thin conceptual rationalization of a present trust. As discussed previously, the inter vivos insurance trust is held valid despite attacks that life insurance is not sufficient property to be the subject of a trust.63 Furthermore, the relation back doctrine is consistent with the liberal view that no particular formalities are necessary for the creation of a valid trust; all that is necessary is evidence supplying every essential requirement of a trust.64

III. STATUTORY AUTHORIZATION

Several states have enacted statutes expressly authorizing the use of the testamentary life insurance trust to avoid probate.65 Such legislation avoids the confusion and uncertainty of the current case authority, and provides full deference to the insured's intent.

Of those statutes allowing completion of a life insurance trust by reference to the will of the insured, the Wisconsin statute is typical.66

A policy of life insurance may designate as beneficiary a

61. Id. at 462.
62. The Frost case appears to recognize the validity of the relation back doctrine, but ignores it in making a decision holding the trust invalid. See note 60 supra and accompanying text.
63. See notes 32-38 supra and accompanying text.
64. See Union Trust Co. v. McCaughn, 24 F.2d 459 (E.D. Pa. 1927); Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382 (Mo. 1958).
66. Compare Md. ANN. CODE art. 93, § 350C (1964); Pa. STAT. ANN. tit. 20, § 301.7a (Supp. 1966). These statutes illustrate different wording, resulting in the same effect as the Wisconsin statute.
trustee or trustees named or to be named by will, if the designation is made in accordance with the provisions of the policy and the requirements of the insurance company. The trustee or trustees may be appointed immediately after the proving of the will, and upon appointment and qualification the proceeds of such insurance shall be paid to the trustee or trustees to be held and disposed of under the terms of the will as they exist at the death of the testator. The proceeds of the insurance as collected by the trustee or trustees shall not be subject to debts of the insured and inheritance tax to any greater extent than if such proceeds were payable to any other named beneficiary other than the estate of the insured. For purposes of trust administration such proceeds shall be subject to the court jurisdiction over the trust but shall not otherwise be considered as payable to the estate of the insured. Such insurance proceeds so held in trust may be commingled with any other assets which may properly come into such trust as provided in the will.

The effect of these statutes is to provide assurance of the validity of a testamentary life insurance trust whereby insured designates a trustee to be named in his will as beneficiary of his life insurance contract. Under such legislation, the trustee named in the will of the insured as beneficiary of the insurance proceeds may administer such proceeds as part of a testamentary trust established in the will for the assets of the estate. No special insurance trust need be drafted since any testamentary trust can receive the proceeds. Thus the insured has an uncom-

67. This clause adopts the law of the individual state as to inheritance tax on ordinary insurance policies. Under Colorado law, for example, the first $75,000 of insurance proceeds payable to a named beneficiary other than the estate of insured would be exempt from taxation. COLO. REV. STAT. ANN. § 138-3-9 (1963). In Minnesota, the clause would have little tax significance since insurance proceeds in which insured has retained incidents of ownership are taxable without an exemption. MNI. STAT. § 291.01 (5) (Supp. 1965). The clause is flexible enough to handle the particular state law and also to follow any change in the state law without amendment.

Under the federal estate tax, the tax considerations of a testamentary insurance trust are neutral. The proceeds of insurance policies, in trust or not, will be includible in the insured's gross estate and consequently subject to taxation, if the proceeds are payable to insured's estate or if insured retains any incidents of ownership. INT. REV. CODE OF 1954, § 2042. For a more detailed discussion of the taxation of insurance trusts see Huff, Life Insurance Trusts for Everyman, 39 COLO. L. REV. 239, 253-57 (1967).

68. WIS. STAT. ANN. § 231.49 (1) (Supp. 1966). The provision for a testamentary insurance trust is not a completely new idea. The change in section number illustrates the dichotomy of the testamentary insurance trust which relates to both trust and insurance law. See generally, Note, 1956 WIS. L. REV. 313. The Wisconsin statute was originally enacted in 1955 as § 206.52 under the “Insurance” title, but was changed in 1963 to § 231.49 under the title of “Uses and Trusts.”
plicated, flexible, and inexpensive method of disposing of insurance proceeds in trust.

IV. THE RIGHTS OF SPOUSE AND CREDITORS

Even if it is conceded that the testamentary life insurance trust provides the insured with an uncomplicated and flexible method of disposing of insurance proceeds, notice must be taken of the possible conflicting public policies of the protection of the wife and creditors. Strong objection has been made to the testamentary life insurance trust and to legislation authorizing its use upon these policy grounds. The critics argue that while the will substitute may be conceptually distinguishable from a testamentary disposition, an extension of will substitutes to the detriment of the widow or creditors is undesirable. The Wisconsin statute clearly puts creditors in the same position as they have been under the usual life insurance contract. However, case authority indicates that creditors may reach the proceeds of an insurance trust when the trustee is to be named by will. In In re Kenin’s Trust Estate, insured executed a will leaving his residuary estate in trust for his wife and his descendants. On the same day, he executed a trust deed by which life insurance policies were put in trust with directions to a named trustee to collect the proceeds on his death and to pay them over to trustees to be named in his will, to be held by them in accordance with the disposition of the residuary estate. The court held that the

69. See generally McDonald, Fraud on the Widow’s Share (1960).
72. 343 Pa. 549, 23 A.2d 837 (1942); see In re Estate of Rothenbuecher, 76 Ohio App. 425, 64 N.E.2d 680 (1945); In re Myers’ Estate, 309 Pa. 581, 164 Atl. 611 (1933).
73. The Frost case suggests that under this fact situation the testamentary life insurance would be valid:

There is nothing to indicate that he intended to make any delivery to any third person to hold for the trustees until they were finally ascertained, nor is it shown upon the facts in the case that he intended to hold the policies himself as trustee. Frost v. Frost, 202 Mass. 100, 102, 88 N.E. 446, 447 (1909). See notes 5-6 supra and accompanying text. If a court is to hold the testamentary life insurance trust invalid, the Kenin rationale seems more desirable. Under the Frost rationale, the mere technicality of naming oneself as trustee to pay the insurance proceeds to a trustee to be named is sufficient to accomplish the results denied under a testamentary life insurance trust—the passing of insurance proceeds according to provisions of the will by the trustees named therein, without being part of the assets of the estate.
disposition of the proceeds was testamentary, and that such proceeds were not exempt from claims of creditors, since they became assets of the estate on failure of the transfer to the trust.

Although the *Kenin* case has been overruled by legislation in Pennsylvania, it does illustrate what courts may do in the absence of similar legislation. Protection of creditors admittedly is desirable; however, public policy also favors the exemption of life insurance proceeds from such claims. Apparently all states exempt life insurance proceeds from the claims of creditors, at least in some degree. Such statutes are appropriate in that insured receives little personal benefit from the policies other than the assurance a beneficiary will be paid at his death. If creditors are to be protected, a point of division at the testamentary insurance trust seems quite arbitrary. There is little difference between life insurance payable to a designated person or trustee and a testamentary trustee, at least from the creditor's standpoint. To allow creditors rights in the insurance proceeds of a testamentary insurance trust would merely discourage use of such a trust with a consequent disposition by the ordinary means of life insurance beneficiary designation. Besides, the creditor is protected to a certain extent in some states by statutory limits on the amount of protection and the class of beneficiary. In other states no limits are set, but the creditor is protected against fraud. The Wisconsin statute gives the same protection to testamentary insurance trusts accorded the ordinary insurance contract. Thus the statute merely as-

75. 5 Couch, Insurance § 29:118 (2d ed. 1960); Vance, Insurance § 124 (3d ed. 1951). These authorities suggest that the purpose of the exemption is to benefit the beneficiary, rather than the insured. The exemption seems to be based, at least originally, on the desire to protect the wife and children.
77. The testamentary insurance trust can be distinguished from the savings bank trust (Totten trust), where creditors can reach the trust corpus during the life of the settlor and after death: The settlor of the insurance trust can have no present benefit whereas the settlor of the Totten trust may revoke the trust at will and enjoy the corpus of the trust. See *In re Campbell's Estate*, 140 N.Y.S.2d 863 (Surv. Ct. 1955).
80. E.g., Minn. Stat. § 61.14 (1957): All premiums paid for insurance in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy, if the company be specifically notified thereof, in writing before payment.
sures that the method of disposition of insurance proceeds will not mean a difference in immunity from creditors.

The Wisconsin statute does not refer to the widow's rights in the estate. The purpose of such legislation leads to the conclusion that the testamentary insurance trust is exempt from the widow's rights in the same manner as the ordinary insurance contract. Generally, life insurance payable to a designated beneficiary other than the spouse has been upheld against the widow's claims.81 As in the case of creditors' claims, the Wisconsin statute is not designed to take away any rights the wife already has. The objection to allowing the imposition of the wife's claims is that it would distinguish between the life insurance contract or inter vivos trust and the testamentary insurance trust. Thus, if a state wishes to make life insurance subject to the wife's claims, the proposed legislation for testamentary insurance trusts would not have to be changed. Such a statute provides only for identity of treatment of all life insurance. Moreover, the wife is not defenseless against life insurance, in trust or otherwise. Some jurisdictions, in application of the forced share statute to the nontestamentary disposition of property, inquire whether the transfer was "illusory";82 other jurisdictions inquire whether there was intent to defraud;83 still another jurisdiction considers various factors such as intent to disinherit, retention of control, and other means of support for the wife.84 Where these defenses have failed, the legislatures have passed statutes protecting the wife.85 A Pennsylvania statute86 allows the wife to treat an inter vivos conveyance of assets as a testamentary disposition, but specifically exempts the privilege as to life insurance, whether payable in trust or otherwise. This specific exemption emphasizes the distinctive and peculiar characteristics of life insurance.

V. CONCLUSION

Legislation validating the testamentary life insurance trust is desirable to clarify the law in states where the issue as to the

83. E.g., Wanstrath v. Kappel, 356 Mo. 210, 201 S.W.2d 327 (1947).
85. N.Y. DECED. EST. § 18-a (Supp. 1966); PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1966).
86. PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1966).
validity of such a trust has never been decided. Such legislation should, like the Wisconsin statute, provide for the specific validation of the testamentary life insurance trust, for the treatment of the trust in the same manner as the ordinary life insurance contract with respect to the debts of insured and inheritance tax, and for the commingling of the insurance proceeds and other trust assets as provided for in the will. The Wisconsin legislation does not specifically provide for the assertion of the spouse's forced share. However, in keeping with the spirit of effectuating insured's intent and of not distinguishing between ordinary life insurance and life insurance in trust, a provision should be added to give the same treatment to the insurance trust as to the insurance contract with respect to the spouse's forced share. In most states such a provision would bar the spouse from asserting a claim against insurance proceeds within a testamentary life insurance trust.

Such legislation is desirable in that it will give effect to the intent of insured without adversely affecting creditors' or wife's claims to any greater extent than under the ordinary insurance contract. The legislation will provide a simple and flexible way for insured to dispose of his insurance proceeds through a unified estate plan. The prospective insured need only check with his insurance agent to be certain the insurance company will allow the designation as beneficiary of the insurance policy, "trustee to be named in my last will and testament." Assuming the agreement of the insurance company, insured will merely make the designation. A will completing the trust and providing for disposition of the proceeds under a testamentary trust for the probate assets set up in the will can then be drawn up. If insured is uncertain as to the identity of the trustee or the beneficiary of the trust, he may wait to execute a will. Meanwhile, if he dies the insurance proceeds will pass as part of his probate estate, the trust failing for lack of a definite trustee.

While objections have been made to the validity of the testamentary insurance trust, such authority has failed to consider the peculiar nature of life insurance. The insurance contract, often subject to debate, has been clearly held to be nontestamentary, although life insurance by its very nature may operate only at death. Even though courts have found it hard to justify the inter vivos insurance trust conceptually, it has generally been upheld, sometimes without facing these conceptual difficulties. Although the testamentary insurance trust can be explained as a valid trust by using the relation back doctrine, such rationaliz-
tion is unnecessary in light of the interpretation of a life insurance contract as nontestamentary and the life insurance trust as a valid trust. Consequently, legislation validating the testamentary insurance trust is consistent with earlier developments of the insurance concept.