University of Richmond Law Review

Volume 1 | Issue 4 Article 4

1961

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The "pour-over" will devising or bequeathing property to the trustee of an existing revocable and amendable inter vivos trust created by the testator has become quite popular during the last few years with attorneys, trust officers, and estate planners. In a number of states important legal pitfalls relating to such "pour-overs" not resolved by the decided cases have been eliminated by statute. In Virginia the General Assembly of 1958 enacted a "pour-over" statute (Va. Code Ann. 64-71.1 [1950]) settling some difficult questions. However, a serious problem still exisits in Virginia with respect to devises and bequests to trustees of life insurance trusts.

The problem—When is a life insurance trust created?

Section 64-71.1 so enacted in 1958 provides in part:

"A devise or bequest in a will . . . may be made in form or substance to the trustee . . . of a trust established in writing prior to the execution of such will. . . ."

The question to be considered here is: When is an inter vivos life insurance trust created, so that a devise or bequest to its trustee will be valid under the Virginia "pour-over" statute?

The case—Execution of "pour-over" will just after signing of life insurance trust agreement.

A desires to have his life insurance administered in a revocable and amendable inter vivos trust for the benefit of his family, and he wishes to devise and bequeath the residue

of his property to the trustee of this life insurance trust to be administered as a part of that trust. His counsel prepares the life insurance trust agreement and the will. *A* and the trustee appear to execute both instruments at one sitting. Both of them first execute and deliver the life insurance trust agreement, and immediately thereafter the will is executed by *A* with the appropriate formalities. Then *A* signs the proper change of beneficiary forms to make the trustee the beneficiary under the insurance policies mentioned in the insurance trust agreement, and these forms and the policies are mailed to the home offices of the respective insurers for indorsement of the change of beneficiary on the policies. In due time such indorsements are made, and the policies are sent by the insurers to the trustee. Upon *A's* later death, is the devise or bequest to the trustee under the life insurance trust effective?

The procedure outlined above has been followed in many instances in Virginia by attorneys and trust officers. However, the effectiveness of the devise or bequest is open to serious question.

A trust cannot be created without trust property.

The statute quoted in part above validates a devise or bequest to the trustee of a "trust established in writing". Hence, if a trust arises immediately upon the execution of the life insurance trust agreement, the statute is satisfied.

However, a "trust" cannot come into being until and unless there is some kind of property held by one person for the benefit of another. The *Restatement of Trusts,* (Second) § 2, comment *k* says: "A trust cannot be created, however, unless there is trust property in existence and ascertainable at the time of the creation of the trust." The authorities all accept this proposition.

In an inter vivos trust other than a life insurance trust, the trust instrument itself usually assigns property to the trustee to be administered upon the trusts therein expressed. When the instrument is executed and delivered, the title to the property passes by virtue of the assignment to the

trustee, and the trust is created at once. A devise or bequest contained in a will executed immediately following the execution and delivery of such an inter vivos trust agreement is therefore made to the trustee of a "trust established in writing" prior to the execution of the will, and the provisions of the statute are complied with.

But when the property that is to be the subject matter of the inter vivos trust is transferred to the trustee *after* the will is executed, it has been held that the pour-over bequest in the will is ineffective. In *Clark* v. *Citizens National Bank,* 30 N. J. Sup 69, 118 A. 2d 108 (1955), the testator executed an inter vivos trust agreement on March 1. The trust instrument did not assign property to the trustee but recited that the grantor had deposited with the trustee certain securities to be held upon the trusts therein set out. On the same day the grantor executed his will bequeathing certain property to the trustee of the inter vivos trust to be administered upon the trusts therein provided. However, not until March 3 did he take the above mentioned securities from his safe deposit box and deliver them to the trustee. The court held that the inter vivos trust did not come into existence until March 3 when the securities were actually delivered to the trustee and that the "pour-over" bequest was ineffective.

When is the usual life insurance trust created?

The usual form of life insurance trust agreement does not purport to assign the policies to the trustee. It states that the insured "has made payable and has delivered or will make payable and will deliver" to the trustee specified policies on the insured's life. Almost invariably the change of beneficiary to the trustee is effected after the life insurance trust agreement is executed and delivered. This mode of making the trustee the beneficiary of the policies but reserving to the insured the right to change the beneficiary has so many advantages for the insured that the policies are seldom assigned to the trustee.

When an insurer enters into a revocable and amendable life insurance trust agreement with the trustee for the ad-

ministration after his death of the proceeds of policies upon his life and makes the trustee the beneficiary of those policies but reserves the right to change the beneficiary, a valid inter vivos trust results and the agreement need not be executed with will formalities. The courts have had no difficulty in upholding these trusts as operative living trusts. *Scott on Trusts,* Section 57.3 (2d ed. 1956). While *Bickers* v. *Shenandoah Valley National Bank,* 197 Va. 145, 88 S.E. 2d 889 (1955), *rehearing denied* 197 Va. 732, 90 S.E. 2d 865 (1956) held (three Justices dissenting) that the life insurance trust there involved was testamentary because it was so closely tied in with the insured's will and the widow's renunciation or acceptance thereof as to show the insured had no intent to pass a present interest to anyone, it is not believed that this case endangers the validity of the usual inter vivos life insurance trust. The best reasoned cases hold that prior to the insured's death the trust *res* is the right of the trustee to receive the proceeds of the policies involved provided the insured does not change the beneficiary prior to his death. See *Gordon* v. *Portland Trust Bank,* 201 Ore. 648, 271 P. 2d 653, 53 A. L. R. 2d 1106 (1954).

Trust created only when trustee would be entitled to proceeds if insured were then deceased.

Then when does the life insurance trust come into being? It is submitted that the trust is created when and only when such minimal acts have been done that, if the insured had died just when those acts had been completed, the proceeds would be payable to the trustee and no one else. Prior to that time, the death of the insured would cause the proceeds to be payable to some one else, who would certainly not hold such proceeds subject to the terms of the life insurance trust agreement.

Clearly the mere delivery of the policy by the insured to the trustee will not suffice, as the insured does not intend an assignment of the policy to the trustee and the delivery of the policy to the trustee does not of itself constitute a change of beneficiary. It would seem that the trustee must have

been effectively made the beneficiary of the policy before the trust can be deemed to arise. At any time prior to that point, the death of the insured would cause the proceeds to be payable to someone other than the trustee. We have no authority in Virginia to aid us in determining when the trustee is effectively made the beneficiary, but under the weight of authority in other jurisdictions the change of beneficiary does not become effective by the insured's merely signing the change of beneficiary form or by his delivering or mailing the policy alone to the agent or to the insurer's home office or by his delivering or mailing the duly executed change of beneficiary form alone to the agent or to the insured's home office.

Naturally the provisions of the particular policy relative to the procedure to be followed to change the beneficiary are pertinent with respect to what further acts by the insured suffice to make the change of beneficiary operative.

Many insurance contracts, especially the older ones, contain a provision that the change of beneficiary must be consented to or approved by the insurer. However, the great majority of contracts do not require such consent or approval but provide that the change may be accomplished by the insured's filing a written request at the home office of the insurer accompanied by the policy itself for the indorsement of the change of beneficiary thereon by the insurer. Often it is stipulated that the change shall be effective only after such indorsement is made.

When change of beneficiary effective if insurer must consent thereto.

When the policy provides that the change of beneficiary may be effected by the insured with the consent or approval of the insurer, the rule in the majority of jurisdictions appears to be that no change of beneficiary is operative unless such consent or approval has been given. That consent or approval is not deemed a mere formal ministerial act. If the policy contains such a provision, then clearly prudence demands that the duly executed change of beneficiary form and the policy be received by the insurer and the indorsement that

the trustee is the beneficiary be made by the insurer on the policy before the trust can be considered created. In such case, the pour-over will should not be executed by the insured until after such indorsement is made on at least one policy. There is respectable authority that even with such a policy provision the change of beneficiary becomes effective when the insured has done all that he is required to do. However, as Virginia has not passed upon this question, danger certainly exists until the endorsement of the change is made by the insurer on one policy.

When change of beneficiary effective if consent of insurer not required.

The great majority of policies do not require the consent or approval of the insurer. Where the right to change the beneficiary is reserved, the usual policy provision permits the change to be accomplished by filing the duly executed form of change at the home office of the insurer accompanied by the policy for indorsement. The weight of authority is that under such a provision the change of beneficiary can be accomplished without strict or complete compliance with the provision. Substantial compliance by the insured with the conditions required of him as to the change of beneficiary is deemed sufficient. The indorsement of the policy is considered a mere ministerial act by the insurer.

However, it appears that the change of beneficiary is not effected (a) by a mere oral request by the insured for the change, even if the policy is surrendered at the time of the request, (b) by a request of the insured to the insurer to send him the necessary form to change the beneficiary to a person named by him and his receipt of the form, (c) by the insured's signing the appropriate change of beneficiary form without forwarding it to the insurer, or (d) by the insured's doing everything required of him by the policy provision except delivering the policy to the insurer, unless such failure to deliver the policy was caused by the loss or inaccessibility of the policy or by the refusal of the person possessing the policy to deliver it for indorsement of the change by the in-

surer in spite of reasonable efforts by the insured to procure it. On the other hand, a great number of cases uphold the proposition that, if the insured has mailed the change of beneficiary form duly executed and the policy to the insurer's home office or to the local agent for transmission, the change of beneficiary is effected although the insured dies while the papers are in transit. The insured has done all he was required to do to make the change operative. The indorsement of the change on the policy is deemed a purely ministerial act, which the insurer could not refuse to perform.

If the policy provision does not require the consent or approval of the insurer to the change of beneficiary, the mailing of the properly executed change of beneficiary form together with the policy to insurer's home office or to its local agent for transmission to the insurer's home office may well suffice in Virginia. However, until this question is cleared by the Virginia Supreme Court of Appeals or by statute, the only safe course to pursue is to obtain the indorsement of the change of beneficiary to the trustee on at least one policy before the "pour-over" will is executed by the insured.

Nominal funding to create an immediate trust will not suffice.

It has been suggested that the insurance trust be partially funded by the delivery of a small sum to the trustee at the time the trust agreement is executed, so that the trust will be created immediately through the existence of some property held by the trustee subject to the terms of the trust. It is urged that, if the will is then executed, the devise or bequest will be made to the trustee of an existing trust. However, there are decisions holding that a trust cannot be created with a merely nominal sum as the trust property, as the circumstances would indicate that no actual operating trust of the tiny amount was intended to be created at that time. An elaborate trust agreement to pay the income to named person or persons for life and then to pay the corpus to others could hardly thrive on a ten dollar bill. It would seem clear that the testator intended this nominal inter vivos trust to have

no real significance apart from its effect on the "pour-over" devise or bequest. See *Scott on Trusts,* Section 54.3 (2d ed. 1956).

Doctrine of incorporation by reference will not help.

If the will is executed before the life insurance trust is created, can the doctrine of incorporation by reference be invoked to save the devise or bequest? Of course, incorporation by reference is recognized in Virginia. *Lawless* v. *Lawless,* 187 Va. 511, 47 S. E.. 2d 431 (1948). For an extrinsic document to be incorporated by reference in a will, the document must be a paper in actual existence when the will is executed, it must appear on the face of the will that such document is a paper in actual existence, and the document must be identified and described with reasonable certainty in the will. However, it would appear that for incorporation by reference to result it must be manifest from the language of the will itself that the testator intended to make the writing a part of his testamentary disposition. *Second &c. Co.* v. *Pinion,* 170 N.E. 2d 350 (Mass. 1960).

Here no such intent is manifest. The intent is to make a devise or bequest of property to the trustee of the life insurance trust established by the testator before the will was executed. It can hardly be tortured into an intent to do something basically different—to make an existing paper writing a part of the will. Besides, if the revocable life insurance trust agreement were deemed incorporated by reference and the agreement were later amended, the property devised or bequeathed to the trustee would have to be administered under the terms of the trust agreement as originally written and not as amended. However, Section 64-71.1 in part provides: "Unless the will directs otherwise as hereinafter stated, the property so devised or bequeathed shall be subject to the terms of the trust as they appear in writing at the testator's death. . . ." Thus, the use of incorporation by reference would in such case give a result entirely different from that contemplated in the statute.

Conclusion.

Therefore, under the present status of the Virginia law, if an insured desires to establish a revocable and amendable inter vivos life insurance trust and to devise or bequeath property by his will to the trustee of that trust to be subject to the terms thereof, the only safe mode of procedure is to have the trust agreement executed and delivered by the insured and the trustee and to have the trustee made the beneficiary of at least one policy mentioned in the agreement by proper indorsement of the change of beneficiary by the insurer on the policy before the "pour-over" will making such devise or bequest is executed by the insured. It will not suffice to create a trust of a nominal amount before the will is executed or to invoke the doctrine of incorporation by reference.