

# Insurance Trusts

by Lisbeth Hollaman, LL.B

It is not uncommon for an individual to settle a trust for another individual wherein the funding of the trust is anticipated to be the proceeds of a life insurance policy on the Settlor's life. In doing so, trust agreements are signed appointing individuals as trustees. These trusts are commonly referred to as "Insurance Trusts". Once the insurance policy has been purchased and the trustees and beneficiaries confirmed in the trust agreement, is the 'Settlor' able to change any terms of the insurance trust?

Generally, a completely constituted trust is binding upon the Settlor, though voluntary, just as a gift is binding upon the Donor. It is irrevocable unless an express power of revocation was reserved at the time of constituting the trust.<sup>1</sup> However, is the insurance trust a true trust such that it cannot be changed?

In the case of *Re Foster's Policy* (1966), 1 All E.R. 432, Justice Plowman found that the mere fact that [B] takes out a policy which is expressed to be for the benefit of [C] or on behalf of [C] does not constitute a trust for [C]; second, that the mere fact that the policy provides that policy monies are to be payable to [C] does not create a trust in favour of [C].

However, the fact that rights under a policy can be varied without the consent of the third party does not preclude a trust from existing<sup>2</sup> since a beneficiary can have an interest that is defeasible upon revocation of the trust or upon the exercise of a power of appointment in someone else's favour.<sup>3</sup>

An Insurance Trust is really a designation of a beneficiary of an insurance policy. Insurance policies in Ontario are governed by the *Insurance Act*. Section 190 of the *Insurance*

*Act* states that an insured may, by declaration, designate a beneficiary to receive insurance money and subject to section 191, the insured may from time to time alter or revoke the designation by a declaration.

Section 193 provides that an insured may appoint a trustee for a beneficiary and may alter or revoke the appointment by a declaration.

Section 191 deals with irrevocable designations of a beneficiary. An irrevocable designation is only valid if it is filed with the insurer at its head or principal offices in Canada during the lifetime of the person whose life is insured. In that event, the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or the insured's creditors and does not form part of the insured's estate. In the event that the purported irrevocable designation is not filed, the designation is not irrevocable.

Accordingly, if the Settlor has not assigned the policy itself, but merely appointed Trustees to receive the proceeds as beneficiaries of the policy, the Settlor is entitled to amend and change the beneficiary designation.

If there is some concern that the beneficiaries may claim that the insurance trust created an irrevocable entitlement to the proceeds of the insurance, the Settlor's attempt to unilaterally revoke the beneficiary designation or amend it, could be challenged. For complete certainty and protection, the Settlor may wish to apply to the Court to confirm variation of trust pursuant to the *Variations of Trust Act*.

<sup>1</sup> Underhill and Hayton, *Law of Trusts and Trustees*, 16th ed., p. 144.

<sup>2</sup> *Re Webb*, [1941] 1 All E.R. 321.

<sup>3</sup> Underhill and Hayton, p. 172.



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141 Adelaide St. W., Suite 1700, Toronto, Ontario M5H 3L5  
TEL: (416) 369-1140 FAX: (416) 369-1517  
EMAIL: [ihull@hullandhull.com](mailto:ihull@hullandhull.com) WEBSITE: [www.hullandhull.com](http://www.hullandhull.com)

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