A Quarter-Century of Transition in the New York Law of Trusts and Estates

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Regardless of the announced topic and regardless of the occasion upon which it is being announced, it seems fashionable nowadays for every speaker to begin his performance by solemnly reminding his listeners that they are living in an age of transition. In order to be sure of complying with that custom, I have inserted the word “transition” into the title for this occasion. Otherwise, I was afraid I might forget to mention it, and that might be an unpardonable sin.

Not only is the emphasis upon transition or change the current fashion, but I have a strong suspicion that it has always been the fashion. If we had a tape recording of what transpired between Adam and Eve as they were making their exit from the Garden of Eden, my guess is that somewhere along the way we would see Eve looking up at Adam and saying, “Adam, old chap, I think we are entering an age of transition.”

In spite of that often repeated cliche, the truth is that we must always wait until tomorrow before we can be sure whether we are really in a period of transition today. But even now we can be sure that the New York law of trusts and estates has been in a state of transition for the past twenty-five years. The changes that have taken place within that period have been simply breath-taking in their dimensions. This fact can be demonstrated by taking a broad view of some of the more conspicuous estate planning problems of twenty-five years ago and seeing how obsolete many of them have since become.

At that time, New York property owners were burdened with a type of worthier title doctrine that made most attempts at trust

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revocation an exercise in futility, a two-lives rule calculated to discriminate against settlors who were so careless as to have more than two children, a compulsory spendthrift trust statute that made the very idea of trusts a thing to be feared, and a rule against accumulations that deprived New York residents of certain income tax advantages readily available to citizens of other parts of the country. These and many other rules existing in 1949 have been so modified that they are scarcely believable to the young people entering the practice of law in the Empire State in 1974.

The transition did not come through any one sweeping reform or statutory enactment. Although most of it has been accomplished through legislative means, it has been through a step-by-step process whose very gradualness has tended to conceal the gravity of the events taking place until they were already accomplished.

I shall not attempt to discuss more than a few of the significant developments that have occurred within the period covered. To do so within the time allotted would be impossible. In fact, standing before this audience that includes so many who have had so much to do with the reforms of the past twenty-five years, I would feel inadequate for the occasion regardless of how much time I had. I am in a position that is directly opposite to that of a certain lecturer who had a habit of beginning every address by admitting that there were lots of people in the world who knew more about the assigned topic than he did. He would then take a quick glance around the room and add, “But since none of those fellows are here, I shall begin.” My problem is that there are lots of people who know more about my topic than I do, and they are just about all here. Beginning with that handicap, my purpose is to select a few particular areas and see if any uniform pattern or consistent policy goals can be seen. Is there a golden thread running through the seemingly unrelated changes that have taken place? I might as well say at the outset that it is my belief that such a common thread does exist, and it is my hope that a faint ray of light may be cast upon that thread. If such a thread does exist, and if it can be seen, even through a glass darkly, the hoped-for result is that we can catch some slight vision of the work yet to be done.
If you were to turn the pages of history back to December 12, 1949, and inquire what New York trusts and estates lawyers were talking about at that time, I dare say that the Burchell and Worm cases would rate pretty high on everyone's list. These two cases, In re Burchell's Estate and Worm v. U.S. Trust Company, had been consolidated by the Court of Appeals and disposed of in a single opinion on July 19, 1949. When that opinion came down, there were quite a few people, including at least one judge of the Court of Appeals, who seemed to believe the world would never be the same again. The reverberations from that opinion echoed through the law offices of New York for several months and literally set in motion the legislative history of the period now under discussion.

And now, twenty-five years later, who remembers, or who even cares, what the Burchell and Worm cases were about? Each of the two cases involved a settlor who had made an inter vivos transfer of certain assets to a trustee to pay income to the settlor for life, remainder to such persons as the settlor should by will appoint, and in default of appointment to the settlor's next of kin. In one case the settlor attempted to revoke the trust within his lifetime. In the other the settlor died without attempting to revoke and without exercising the testamentary power of appointment. His next of kin claimed as remaindermen, not as reversioners.

Thus it was that the question of law to be determined in each case was the same. Did the settlor, by the inter vivos transfer, create any interest of any kind in his own next of kin or did he not? And the answer to that question depended upon the operation of a relic of ancient learning known as the worthier title doctrine, or as it has been more accurately described, the rule of worthier title. That rule was a simple prohibition against a property owner's creating an interest, by either deed or will, in his own heirs. While that rule was of ancient origin, its application is as current as last week's effort to escape the effects of an estate tax statute. In its essence, that is exactly what the rule was about. It was a rule of judicial origin designed to prevent tax avoidance.

The most burdensome form of estate tax during that early period of our legal history consisted of certain feudal dues paid to
the superior lord. Since the crown was the ultimate lord, the feudal dues were relied upon by the crown as a primary source of revenue. Somewhere along the way somebody got the idea of avoiding that form of tax by making some kind of inter vivos conveyance by which he could retain a life interest in himself and create a future interest in his own heirs. The hoped for result was that the heirs would then take as purchasers, not as heirs, and thereby avoid paying any death taxes. What appeared to be a rather neat arrangement was frustrated when the common law judges construed the scheme as nothing more than an effort by the taxpayer to retain a reversion in himself which would still pass to his heirs by inheritance and would therefore be subject to the death tax.

This result soon hardened into an absolute rule of law which no expression of intent could overcome. As a rule of law, it meant that no attempt to create a remainder in the heirs of the transferor would be given effect for any purpose. Presumably this was the state of the common law of England as it was received into the New World, including New York. And presumably this was the state of the law when the case of *Doctor v. Hughes* came before the Court of Appeals in 1919. Involved was a conveyance of real estate to a trustee in trust to pay a fixed annual sum from the rental income to the transferor for life, and on the death of the transferor to convey the premises to his heirs. The conveyor's two daughters were, for the time being, his prospective heirs. While the conveyor was still alive, a judgment creditor of one of the daughters sought to levy upon the daughter's interest in the real estate in satisfaction of the judgment. Application of the rule of worthier title as a rule of law would dictate that the daughter had no interest. The provision for conveyance to the conveyor's heirs would be treated as a provision for a reversion in the conveyor. The court so held, but in doing so Judge Cardozo, speaking for the court, added a bit of dicta to the effect that he was not sure whether the rule of worthier title still operated in its absolute form. He then justified his decision on the theory that the rule of worthier title still operated in New York at least to such an extent
that to create a remainder in the heirs of the conveyor, the intent to do so "must be clearly expressed.""

It seemed strange that such dicta should come at a time when remainders to unascertained, and even unborn, persons were freely recognized in New York. More specifically, a property owner was free to create remainders in the heirs of identified living persons other than himself any time he chose. In spite of all this, the Cardozo dictum laid down the proposition that some kind of unusual manifestation of intent was necessary to create a remainder in the conveyor's own heirs. The intent to do so must "be clearly expressed."

About a decade later, in the case of *Whittemore v. Equitable Trust Co.*, a settlor conveyed certain personal property to a trustee in trust to pay income to two successive life tenants. Upon the death of the survivor of the two life tenants, the principal was to go to the settlor if living, and if the settlor should then be dead, to such persons as the settlor should by will appoint, and in default of appointment to the settlor's heirs. After the death of one of the life tenants, the settlor and the surviving life tenant joined in an action to terminate the trust under the terms of the familiar statute giving a settlor a power to revoke a trust upon "the written consent of all persons beneficially interested." Since the settlor had the consent of the only life beneficiary, it was clear that he had all consents necessary if there were no remaindermen. It was equally clear that the only possible remaindermen were the heirs of the settlor. In *Doctor v. Hughes* it had been held that an attempted remainder to the heirs of the grantor was nothing more than a provision for a reversion in the grantor. If that case should be followed in *Whittemore*, the settlor would have a reversion and there would be no remaindermen to worry about. The settlor could revoke the trust at his own election. But there was that haunting dictum from the *Hughes* case that a remainder to the heirs of the settlor could be created if the intent to do so were clearly expressed. As the court searched for a clear expression of intent to create a remainder in the *Whittemore* trust, they reasoned that if the settlor had intended a reversion only, he
would have known that he could dispose of that reversion by any means by which property could be lawfully transferred. If he had intended a remainder to his heirs, he would have known that such a remainder would be beyond his control unless he retained in himself some peculiar or unique means of exercising that control. In the Whittemore trust that peculiar or unique means was found in the retention of a testamentary power in the settlor. The reservation of a power to appoint in a particular manner (in this instance by will and not by deed) was taken as a clear indication of an intent to create a remainder in the settlor's heirs. Since the heirs had a remainder, and since their identity could not be ascertained within the settlor's lifetime, the consent of such heirs to the revocation of the trust could not be obtained prior to his death. Therefore, the trust was irrevocable even though the whole world joined in a petition for its revocation.

The Whittemore opinion gave express approval to the Cardozo dictum that in order to create a remainder in the heirs of the settlor, the intent to do so must be clearly expressed. But the Whittemore opinion went further and held that that clear expression of intent could be found in a provision no more substantial than the reservation of a testamentary power of appointment. The courts of New York followed that position with a surprising degree of consistency for the next two decades. In spite of this fact, judicial opinions through that period were widely criticized and were often characterized as being arbitrary and unpredictable. Identical language purporting to create interests in the settlor's heirs was sometimes construed to create remainders and sometimes reversions. Tempers ran high. The court seemed to be at war with itself. It gave verbal expression to a requirement that, in order to be effective, the intent to create a remainder in one's own heirs had to be clearly expressed; at the same time it was finding that clear expression upon evidence that the bar's rank-and-file considered of little significance and almost fortuitous.

Although litigation concerning attempted remainders to the heirs of the transferor could arise upon questions concerning creditors' rights, tax matters, rights of a surviving spouse, and
many others, the bulk of the attention during that period between 1929 and 1949 was centered around petitions by settlors to terminate their own inter vivos trusts. In that situation, each time a remainder to the heirs of the settlor was found, the petition to revoke was denied; and the property was left tied up in an irrevocable trust.

Such was the state of affairs in 1949 when the Burchell and Worm cases were decided. Both Worm and Burchell fell into the classic pattern of a life estate in the settlor, remainder to such persons as the settlor should by will appoint, and in default of appointment to the settlor's next of kin. Both cases were decided in strict compliance with the line of authority running back to Whittemore. The presence of the testamentary power of appointment was regarded as sufficient evidence of an intent to create a remainder in the next of kin. The presence of that remainder prevented the settlor from revoking the trust within his lifetime. It also dictated that if the power was not exercised, the remaindermen would receive the corpus as purchasers.

The one thing that was new in the Burchell-Worm combination was an admission by the court that the rule it had been applying for the finding of remainders ever since the Cardozo dictum was announced had been less strict in its application than the language used would seem to indicate. This was true, but such an admission by the court resulted in more confusion than clarification. One member of the court provided a vigorous dissenting opinion in which he invited the legislature to try its hand at the clarification project.

The legislature tried. A statute was enacted. But the provisions of that statute came as a surprise to just about everyone. What was enacted was an amendment to the existing trust revocation statute under which a settlor was authorized to revoke an inter vivos trust if he had the written consent of all persons beneficially interested. The amendment provided that, "For the purposes of this section, a gift or limitation . . . in favor of a class of persons described only as heirs or next of kin or distributees of the creator of the trust, or by other words of like import," did not create any
beneficial interest in such persons. The effect of the statute was that the worthier title doctrine was restored to its medieval position as an absolute rule of law at least for this one purpose. After the amendment, it was impossible for a settlor to create an irrevocable trust for the benefit of his own heirs. But what about other purposes? What happened if a conveyor attempted to make a present transfer to his heirs or next of kin, and thereafter a case arose involving tax questions or the rights of the settlor's creditors, subsequent transferees, or surviving spouse? As to all these questions, the New York law was left in the same state of hopeless confusion where it had been since Judge Cardozo announced his dictum transforming the rule from one of law to one of construction. For all these purposes, it was still possible to create a remainder in one's own heirs, but the legal presumption was against it; therefore, the intent to do so had to be clearly expressed. In 1966 even that presumption was removed. This left New York in the peculiar position of having enacted legislation specifically restoring a bit of medieval dogma for one purpose and having expressly abolished that same dogma for all other purposes.

Strange as these contradictory positions might appear, it is submitted that they have their own reasonably rational justification. It is also submitted that that justification will define the policy goals that have dictated the trend in trusts and estates law during the past twenty-five years.

What is meant by the worthier title doctrine anyway? Simply stated, it is a rule against the creation of an interest in one's own heirs. Its reason for being is centered around the doctrine of seisin and the avoidance of feudal dues. But both seisin and feudal dues are obsolete concepts. Does the worthier title doctrine have any place in the industrialized society of present-day New York? By nullifying all attempts to create interests in the heirs of the transferor, it avoids that means of tying up property. It tends to promote economic mobility. Economic mobility is more essential to an industrialized community than it was to the agrarian society of Lord Coke. And if the preservation of the worthier title doctrine in any form is to be justified, it must be justified on that basis.
Now let's look at the record. How did the cases involving the worthier title doctrine between 1919 and 1949 arise? The great bulk of the litigation within that period concerned the efforts of settlors to revoke inter vivos trusts. If the settlor's heirs had an interest, there could be no revocation; if the heirs did not have any interest, revocation was allowed. The outcome depended upon the application of the worthier title doctrine. So long as its application or non-application was a matter of construction, there was always room for uncertainty. Predictability was difficult. The market place was demanding economic mobility. The legislature responded by providing that for this purpose the doctrine would be made absolute. Economic mobility would have been furthered even more if the legislation had extended to all purposes. But no serious problem had arisen except in the area of trust revocation. The legislature addressed itself to that problem and that problem only.

The statute is helpful, but it is doubtful if even the trust revocation problem is completely solved. As previously indicated, a literal application of the statute makes it impossible for a settlor to create an inter vivos, irrevocable trust in favor of his own heirs. Although that was the intended purpose of the statute and is currently assumed to be the result, there is a fair possibility that the ingenious draftsman who diligently searches for a way to avoid that result might succeed. Suppose a settlor really does want an irrevocable trust for the benefit of his own heirs. Could he achieve that purpose, even after the statute, by making a transfer in favor of those who for all practical purposes will be heirs but who are not heirs in the technical sense? What about a limitation to such persons as would have been the settlor's heirs if the settlor had died one week before he actually died? And there are numerous other possibilities. The fact that these possibilities have not been tried thus far does not alter the likelihood of their being tried at some future date.

In spite of the legislative policy in favor of economic mobility, it is doubtful if a restriction on the creation of interests in the heirs of the transferor is the best way to accomplish that goal.
There are too many possible escape routes available to the careful draftsman. It is suggested that the time is right for the legislature to try again. And if it does try again, a direct attack upon the very concept of an indestructible trust might prove to be a better approach.

In any event, the 1951 legislation concerning the creation of interests in the heirs of the transferor did affirm a legislative policy in favor of economic mobility, and that policy has become the hallmark of the legislative development during the two decades that followed. A short step toward greater mobility had been taken a year earlier when the statutory standard for trust investments was modified.

Any indestructible trust under any circumstances has some tendency to tie up property and to hinder the normal market flow of economic assets. At best, the trustee is restricted in the kind of investments he can make. Prior to 1950 that restriction was especially severe under the statutory legal list requirement. Not only was the trustee frustrated in his efforts to earn a satisfactory income for his beneficiaries; the market itself was being frustrated by having large amounts of needed capital withheld from corporate investment. The 1950 legislation brought some relief by extending to the trustee power to invest up to 35% of the trust assets outside the legal list so long as the investment complied with the requirements of the prudent-man rule. That percentage was increased to 50% in 1965, and 100% in 1970.

The transition from the legal list requirement to the prudent-man rule accomplished at least two purposes. It gave the trustee a wider range of choice in the selection of investments, thereby enabling him to tailor each portfolio more to the particular needs of particular beneficiaries. It also released a quantity of accumulated capital for investment in corporate enterprises, thereby contributing toward the industrial development of society as a whole. Such an enlargement in investment powers is by its very nature an enhancement in economic mobility.

But even the trustee's freedom to invest in corporate stocks does not mean that assets being held in trust are completely free or
completely mobile. The trustee is still confined to established enterprises whose favorable dividend records have already been demonstrated. He cannot invest in new or untried ventures. But there is no such thing as a business enterprise that was not at one time new and untried. Risk was involved in bringing every business venture into existence. But trust assets are never available for use as risk capital. And if new industries are to be developed and if new products are to come on the market, high risk capital must be supplied by somebody. There is no suggestion here, and so far as I know nobody has suggested, that trustees should be permitted to speculate. But somebody must speculate or else further industrial development will cease.

If venture capital is to be available, it must come from people who own absolute interests, not people who are holding title for the benefit of others. But when property is held in an indestructible spendthrift trust, there is no absolute interest in anyone. Ownership is divided between the trustee and the beneficiary. The trustee is restricted in the kind of investments he can make. The beneficiary is restricted in that he can neither terminate the trust nor transfer his interest in it. He has a limited kind of benefit from his wealth but he has neither the control of nor the responsibility for that wealth.

This restriction upon the beneficiary's power to control was never a problem under the common law of trusts as it developed in the mother country where neither the spendthrift trust nor the indestructible trust were ever recognized. If John Settlor conveyed property, whether real or personal, to a trustee to pay income to Albert for life with remainder to Ben, Albert could further convey his right to receive income any time he chose to do so. Ben could do the same with his remainder. Either or both of these transfers could take place while the trust continued undisturbed. If instead of conveying their respective interests, both Albert and Ben were desirous of terminating the trust and claiming their beneficial interests as absolute owners, they could do that. They did it on the theory that they were the sole beneficial owners; and that if all beneficiaries, that is to say all persons bene-
ficially interested, joined in a petition to terminate the trust, there was no one with standing to object. This freedom of each beneficiary to sell or give away his individual interest, as well as the freedom of all beneficiaries to join hands and terminate the trust, continued to exist without regard to any contrary provisions in the trust instrument. If the settlor had disposed of his entire interest, he was no longer beneficially interested; therefore, he was without standing to object to the actions of persons who were beneficially interested.

But suppose we move that same trust to the United States. Let it still be a trust to pay income to Albert for life with a duty upon the trustee to transfer the corpus to Ben upon Albert's death. In this simple illustration Albert has an equitable life estate, Ben has an equitable remainder, and the two of them together own the entire beneficial interest. The settlor owns nothing. And if the settlor inserts a provision into the trust instrument purporting to prohibit either or both Albert and Ben from further transferring their respective interests or terminating the trust within the lifetime of Albert, the settlor still owns nothing. He disposed of all that he had when he created the trust. But the American concern for freedom of the human will led many of the American courts to the conclusion that the settlor's wishes should be given effect. If the instrument creating the trust expressly prohibited the beneficiary from transferring his interest, that prohibition was upheld.\textsuperscript{17} The relationship became known as the "spendthrift trust." If the creating instrument expressly prohibited the termination of the trust by the beneficiary or beneficiaries, that prohibition was also upheld.\textsuperscript{18} The relation created was an "indestructible trust," or as it is more popularly known, a "Claflin trust." And both the spendthrift trust and the indestructible trust were justified on the ground that their enforcement was necessary to the carrying out of the human will, the human involved being the settlor. The trusts were enforced even after the settlor was dead and even if no living person could be found who desired the enforcement. Thus, two separate, but somewhat related, doctrines were introduced into the law, the spendthrift trust and the indestructible trust.
This emphasis upon freedom of the will tended to obscure the question, freedom of whose will? Was it the will of the living or the will of the dead? Should control of the world’s assets be in the hands of the living generation or in the hands of some remote ancestor? Questions such as these were largely ignored in the 19th century, and the indestructible spendthrift trust became a reality. It represented a strange, new concept in the law of trusts. It meant that the sole beneficial owners of certain kinds of property interests were without power to sell, give away, or deal in the property they owned. It meant that property owners who were sui juris and not under any legal disability of any kind were nevertheless denied the power to deal with one particular kind of property interest. It meant that although absolute restraints on the alienation of legal interests were prohibited, the same kind of restraints on equitable interests were acceptable.

But the new doctrine was not universally accepted, and to this day there is much dispute as to its desirability. The strange thing is that while other jurisdictions were debating whether spendthrift trusts should be permitted, New York went all the way and provided as early as 1830 that such trusts were required. The legislature accomplished this result by enacting a law that a beneficiary’s right to receive income from a trust could not be transferred. This meant that in our trust to pay income to Albert for life with remainder to Ben, Albert was disabled from conveying his interest whether the settlor imposed any such restriction or not. Albert was given a valuable asset. He was sui juris in all other respects. But as to this particular asset, this right to receive income from a trust, Albert was disabled from making any disposition of that interest.

The New York legislation making spendthrift trusts mandatory removed much of the settlor’s freedom of choice in arranging for his own estate plan, and at the same time imposed unnecessary restraints on the further economic mobility of the assets being transferred without regard to whether or not the settlor or anyone else wanted such restraints. The paradoxical consequences of the statute can be more fully appreciated when it is laid along side of that other statutory provision which gave the settlor the
power to revoke the trust and reclaim ownership in himself if he
had the consent of all persons beneficially interested. Just why
the settlor, who had at least theoretically parted with all incidents
of ownership, was given such a power has never been explained.
Neither has any good reason been offered as to why all persons
having a beneficial interest could not, by joining together, termi-
nate the trust without consulting the settlor who had no benefi-
cial interest. But since the statute expressly prohibited the income
beneficiary from alienating his interest, expressly provided a
means by which the settlor could revoke, and was silent as to any
power of revocation in the beneficiaries, it seemed reasonable to
assume that the income trust was necessarily indestructible unless
there was a live settlor who chose to make the first move. Thus,
New York found itself burdened, not only with a spendthrift
trust, but with a spendthrift trust that was also indestructible.
The Claflin doctrine was firmly established.

Such a restraint upon economic mobility necessarily raised new
questions of social policy concerning the duration of trusts, and
to a lesser extent the purposes for which trusts would be per-
mitted. In the days when beneficiaries were free to convey their
respective interests and also free to join together in a termination
of the trust when they chose to do so, the trust itself had very little
tendency to tie up property. But when that power was taken away
from beneficiaries, a whole new problem was introduced.

The revisors apparently realized they were placing a severe re-
striction upon the mobility of accumulated wealth. They attemp-
ted to alleviate the condition they had created by restricting both
the duration and the purpose for which trusts could be created.
As to duration, there was no restriction upon the duration of
trusts as such. There was a provision that any transfer that sus-
pended the power of alienation of real property or the absolute
ownership of personalty for more than two lives in being at the
creation of the interest was absolutely void. When these provi-
sions were construed along with the spendthrift trust provisions,
the result was that any income trust that might extend for more
than two lives in being at the time of its creation was void. Within
the context of the spendthrift trust, the two-lives rule did tend to shorten the period within which property could be withheld from commercial channels. To that extent, it did tend to promote economic mobility.

But the weakness of the two-lives rule was that it had no rational relation to the normal and reasonable wishes of heads of families trying to provide for the natural objects of their bounties. There is nothing abnormal or eccentric about a father's desire to leave his fortune to a trustee to distribute income among his children until the death of the last child, and then distribute the corpus among his grandchildren. But neither was it easy to explain to that father that such a plan would be acceptable so long as the father had not more than two children, but that any time he went over that limit his estate plan would fall apart. And any lawyer who even tried to explain that rule to a client was likely to be suspected of being some kind of a birth control nut—or maybe just a nut.

But clients still had families for whom they wished to provide, and lawyers were still being called upon to find ways to carry out the clients' wishes. Clients with large families as well as those with small families were knocking at the door of justice. And if justice was really inside, the door had to open. The burden of finding the appropriate key was upon the lawyer. And many keys were found. There were the concurrent separable trusts, the successive separable trusts, and numerous others. Some plans worked and some didn't. But the one thing most of them had in common was that they were totally irrational except when they were seen as efforts to fit reasonable family desires into the requirements of an irrational statute. The result was that the making of a simple will was more complicated and less likely to meet with success in New York than in any other place in the world. By the time we were trying to fit all that into an equally complicated estate tax structure of the 1930's and 1940's, New York was probably the only place in the world where it took more brains to transmit a fortune from one generation to the next than it did to earn the fortune in the first place.
The solution seemed to be to bring the restrictive period into harmony with the normal and natural desires of testators without opening the door to an opportunity for the excessive tying up of property. The common law perpetuities period of lives in being plus twenty-one years had worked well in other jurisdictions. It had worked well because it was a period that permitted a family man to tie up his property for the lives of all his children, however many he might have, and at the same time withhold vesting for the minority of any or all his grandchildren. Since very few testators ever wanted to do more than that, even their failure to understand the rule did not often lead to its violation.

The common law rule worked well in other jurisdictions but would it work well in New York? The common law rule was really a rule against remote vesting. But in New York we were concerned about the duration of an indestructible spendthrift trust. Should such a trust be permitted to endure for such a long period of time? That was the problem that hindered New York reform for so many years. There was much ferment throughout the 1950's. The profession was searching for a way to avoid the artificiality of estate plans being demanded in those days. The first action came in 1958 when the two-lives rule was extended to include any number of lives. The effect was to end the discrimination against large families. But the absence of any period in gross still hindered decedents in their efforts to withhold control from infant grandchildren during their age of indiscretion. That relief came only two years later when the permitted period was further extended to include a period of twenty-one years beyond lives in being, thereby making the permitted period for the suspension of the power of alienation in New York identical with the permitted period for the postponement of vesting under the common law Rule Against Perpetuities.

By enlarging the permitted period for the suspension of the power of alienation, the new legislation operated to enlarge the permitted duration of the indestructible spendthrift trust. It was a retreat away from the trend toward economic mobility. It expanded the time for the permitted tying up of property. To that
extent, it might be looked upon as a surprise and even regrettable. But it was a necessary step if we were to be done with the artificial and unreal estate plans dictated by the two-lives rule. It also added a degree of certainty which actually facilitated alienability by making transfers more dependable.

Almost concurrently with the modifications of the rule against the suspension of the power of alienation, significant changes were being made in the statutory restrictions upon the accumulation of income. The legislation of 1830 had prohibited all accumulations by trustees except during an actual minority and then only for the benefit of the minor. Not only did this restriction complicate efforts of estate planners to make sensible family arrangements in many situations; it made it unsafe to provide for reserves for depreciation or to authorize trustees to make decisions as to what was income and what was principal. These and many other inconveniences were tolerated by New Yorkers until the Internal Revenue Code made it possible to use the accumulation trust as a means of reducing the income tax burden. It then became clear that the restrictive accumulation statutes were depriving New Yorkers of a tax advantage that was readily available to taxpayers in other parts of the country. Such discrimination by a state against its own citizens could not long endure. In 1959 the old restrictions were abandoned. The permitted purpose for an accumulation trust was expanded to include just about any purpose for which a trust could exist, and its permitted duration was expanded to make it coextensive with the period allowed for the suspension of the power of alienation.

The result of this legislation was that the suspension rule and the accumulation rule were made harmonious with each other, and both rules were made harmonious with the reasonable demands of family planning. Will drafting became easier. Families consisting of more than two children no longer presented special problems for the estate planner. Separable trusts, equitable charges, and other unrealistic schemes were no longer needed. More attention could be given to family needs and less to the drafting of artificially contrived provisions designed to comply
with restrictive rules that were unrelated to the needs of either the family or the market. The legislature was doing a good job.

But problems did remain. The permitted period for the duration of an indestructible spendthrift trust had been expanded to include a period measured by any number of lives plus twenty-one years. And even the income from such a trust could be withheld from commercial channels for a like period. It seemed that our commitment to the doctrine of economic mobility was being forgotten. There had to be a missing link somewhere.

The missing link was soon found. The legislature discovered what a number of commentators had known for a long time. It was not the duration of the trust nor even the duration of the period of income accumulation that kept property tied up in the first place. It was the indestructible spendthrift nature of the trust that did the harm. There was where reform was really needed.

The mandatory spendthrift trust, at least as to the beneficiary's right to receive income, had been law in New York for well over a hundred years. But in the 1950's more people than ever before were asking why. And in 1964 a small dent was made in the spendthrift armor when the beneficiary was given a limited right to assign to members of his family that part of his trust income that was in excess of $10,000. In 1965 a limited right to invade principal was added. And in 1973 the big event happened. The mandatory spendthrift trust was actually abolished.

The spendthrift trust itself was not abolished; it merely ceased to be mandatory. The old statute had provided that a beneficiary's right to receive income was a non-transferable right. The new statute provided that it was a non-transferable right unless the settlor provided otherwise. The statute is an improvement over what we had before, but it still leaves us with a substantial barrier to free economic mobility. It is also a barrier that is completely out of harmony with the public policy of New York as revealed by its statutory trend for the past twenty-five years. As to all other assets capable of being owned we presume freedom of alienation unless a valid restriction is otherwise provided. But when it comes to this one asset, this equitable estate for years or for life, the New
York law now provides that it will be inalienable unless the set-
tlor takes the trouble to tell us that it is alienable. We are left with
a peculiar rule applicable to a simple trust to provide income to
Albert for life with remainder to Ben. Albert’s interest will be
inalienable unless the creating instrument makes it alienable.
Ben’s interest will automatically be alienable unless the creating
instrument makes in inalienable.\textsuperscript{38} I assume that most of us would
agree that such inconsistency has little relevance to the settlor’s
intent, and that the legislature should taken another look at that
just for the sake of harmony if nothing else.

And while we are looking for ways to harmonize two incon-
sistent rules, it might be wise to go further and consider the
possibility of eliminating the indestructible spendthrift trust
completely. There is a golden thread running through the legis-
lative achievements of the past quarter-century, and that golden
thread is economic mobility. I have mentioned only a few of the
high points along the way. In addition to these there have been
numerous reforms of only slightly less magnitude. By way of illus-
tration, the estate planner and draftsman has been relieved of
many of the old bugaboos associated with fertile octogenarians,
unborn widows, magic gravel pits, and similar strange beings.\textsuperscript{39}
And there have been others. Through it all the clear policy goal
has been to make the movement of wealth from one person to an-
other or its transmittal from one generation to another just a
little easier.

The legislature has done its work well. But much of its effort
thus far has been directed toward the treatment of symptoms. The
time is now ripe to attack the disease itself. The disease is that
rule of law, or any rule of law, that enables the past generation to
dictate to the living generation the use to be made of the wealth
now in the world. It is the rule that separates ownership from re-
sponsibility even when owners are sui juris and capable of hand-
ling their own affairs.

A small step toward the cure of the disease was taken last year
when the mandatory nature of the spendthrift trust was elimina-
ted. It is now time to reexamine the extent to which the indestruc-
tible spendthrift trust should be permitted even when expressly provided by the settlor. To what extent should a settlor who has made a complete disposition of his assets be permitted to dictate what future owners can do with those assets? To what extent should control of and responsibility for property be separated from its beneficial owners? To what extent should the wealth of the world be controlled by the past rather than by the living generation? Can the evils of dead-hand control be eliminated while some form of protective trusts or support trusts remain? These are questions that are left unanswered by the twenty-five year movement toward greater economic mobility that has just ended. I suggest them as a starting point for the quarter-century immediately ahead.

FOOTNOTES

1 299 N.Y. 351, 87 N.E.2d 293 (1949).
2 See dissenting opinion, id. at 361, 87 N.E.2d at 298.
3 225 N.Y. 305, 122 N.E. 221 (1919).
4 Id. at 312, 122 N.E. at 222.
5 Such remainders would seem to be valid, not only in New York, but throughout the United States. See generally, Simes & Smith, Future Interests secs. 152–153 (2d ed. 1950).
6 As early as 1869, in the case of Moore v. Littel, 41 N.Y. 66 (1869), the dispute concerned whether a remainder to the heirs of a living person could be a vested, rather than a contingent, remainder. Its validity as a remainder of some sort did not appear to be in doubt.
8 The current form of this statute is found in N.Y. E.P.T.L. sec. 7–1.9(a).
10 Enacted as an amendment to the trust revocation statute, the amendment in its present form is found in N.Y. E.P.T.L. sec. 7–1.9(b).
12 N.Y. E.P.T.L. sec. 6–5.9.
14 The current form of the legislation is found in N.Y. E.P.T.L. sec. 11–2.2.
15 Bogert, Trusts and Trustee's sec. 221 (2d ed. 1965); 2 Scott, Trusts sec. 152 (3d ed. 1967).
16 Bogert, Trusts and Trustee's sec. 1008 (2d ed. 1962); 4 Scott, Trusts sec. 337 (3d ed. 1967).
17 It appears that the American case most frequently cited in support of the spendthrift trust is Broadway National Bank v. Adams, 133 Mass. 170 (1882).
18 The leading case on the indestructible trust and the one from which the doctrine gets its popular name, "the Claflin doctrine," is Claflin v. Claflin, 149 Mass. 19, 20 N.E.454 (1889).
One of the most carefully analyzed statements of a critical nature concerning the viability of the spendthrift trust came at an early date. Gray, Restraints on the Alienation of Property (2d ed. 1895). See also Scott, Protective Trusts, Harvard Legal Essays 4:19 (1934); Walsh, Indestriuctible Trusts and Perpetuities in New York, 43 Yale L.J. 1211 (1934). One of the most frequently cited defenses of the spendthrift doctrine is Costigan, Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined, 22 Calif. L. Rev. 471 (1934).

Sherrow v. Brookover, 174 Ohio St. 310, 189 N.E.2d 90 (1963) (rejecting the spendthrift trust at least in those cases where creditors' rights are concerned). See also Sparks, Policy Considerations: Alienable of the Beneficial Interest in a Trust in New York, 9 Buffalo L. Rev. 26 (1959).

The current form of this much-amended legislation is found in N.Y. E.P.T.L. sec. 7-1.5.

That charge was made by John Chipman Gray in 1886. Gray, The Rule Against Perpetuities sec. 750 (1st ed. 1886).


These and other pitfalls that have previously frustrated the efforts of careless draftsmen have been eliminated by the adoption of certain rules of construction. N.Y. E.P.T.L. sec. 9-1.3.