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COMMENTS

REVOCAION OF INTER VIVOS TRUSTS UNDER SECTION 231.50 OF THE WISCONSIN STATUTES

This article deals with the power of the settlor of an inter vivos trust to revoke it pursuant to statute when he has not reserved a power of revocation in the trust instrument.¹ The prevailing common law rule is that such a settlor cannot revoke the trust prematurely unless *all* the beneficiaries are ascertained and are under no incapacity and consent to the revocation.² If any of the beneficiaries is unborn or, though living, unascertained or under an incapacity such as infancy or mental incompetency, the common law rule will not permit revocation because his consent cannot be obtained.³ Section 231.50 of the Wisconsin statutes has changed this common law rule by permitting, in essence, revocation of the trust by the settlor if he obtains the consent of all the living, ascertained beneficiaries.⁴

Wisconsin, however, has not been the leader in changing this common law rule by statute. North Carolina⁵ and Oklahoma⁶ have statutes of analogous import. It is the New York statute, however, which has

¹ WIS. STAT. § 231.50 (1961), see note 4 *infra*, expressly provides for termination or modification of a trust in addition to revocation but attempts no definition of these terms. For judicial definitions, see BOBERT, TRUSTS AND TRUSTEES §§ 998, 1001 (1955).

² 3 SCOTT, TRUSTS § 329A (2d ed. 1956).

³ 3 SCOTT, *op. cit. supra* note 2, § 340; RESTATEMENT (SECOND), TRUSTS § 340, comments *c* and *d* (1959). A student writer points out two cases, however, where the court permitted the settlor to revoke with the consent of the living beneficiaries only, although the writer admits that this is a minority rule. Note, 36 IND. L. J. 76, 77 (1960).

⁴ WIS. STAT. § 231.50 (1961): "(1) By unanimous written consent of the creator and all persons *in being* beneficially interested in a trust in real or personal property or any part thereof heretofore or hereafter created, such trust may be revoked, terminated or modified as to the whole or such part thereof. For the purposes of this section: (a) Such consent may be given on behalf of a minor or a person under disability by the county court for the county in which the creator of the trust or the trustee thereof resides, after a hearing in which the interests of such minor or such person under disability are represented as provided in s. 324.29. (b) Such consent by or on behalf of any person, including the creator, shall also be a sufficient consent on behalf of all persons, other than descendants in being of the consenting person, who are described by the terms of such trust solely by their relationship to the consenting person and whose *identity cannot be definitely ascertained prior to his death*. (2) Any such revocation, termination or modification, shall, upon execution and acknowledgement by all consenting persons as prescribed by ch. 235 for a conveyance, be entitled to be recorded or filed in the office of the register of deeds of any county in which any property subject to such trust is situated. (3) Nothing in this section shall inhibit the revocation, termination or modification of any trust pursuant to its terms or otherwise in accordance with law. No trust shall be subject to revocation, termination or modification by the creator alone solely by reason of this section." (Emphasis added.)

⁵ N. C. GEN. STAT. § 39-6 (1953). This statute declares, however, that the settlor may not revoke if he has expressly provided that the trust shall be irrevocable.

⁶ 60 OKLA. STAT. ANN. § 175.41 (1951). This statute has the same provision as the North Carolina statute cited note 5 *supra*.

attracted the most attention. This statute, section 23 dealing with trusts of personal property,⁷ was enacted in 1909, has a considerable body of case law construing it, and with this judicial gloss is most similar to the Wisconsin statute. The draftsmen of section 231.50 relied heavily on the New York law in constructing most of the Wisconsin statute.⁸ It is appropriate, therefore, to review the progress of the New York statute in the courts in order to better understand the purpose of section 231.50 and how Wisconsin courts may interpret it.

New York Law Prior to 1909

In looking to the law as it existed prior to 1909 in an attempt to construe the intent of the New York legislature in passing section 23, the articles written and the cases decided after that date agree in substance⁹ (1) that the statutory provisions in New York which prohibited the income beneficiary from transferring or otherwise disposing of his interest in the income of a trust of real or personal property (sections 15 and 103)¹⁰ in effect deprived the income beneficiary of the power to consent to revocation; (2) that the trustee was prohibited by statute from doing any act in contravention of such a trust (section 105);¹¹ (3) that these combined prohibitions endowed all active trusts with the attribute of indestructibility so that, once established, such a trust could not be revoked either by judicial proceedings or extra-judicial action of the parties; (4) that as to those beneficiaries whose interests were in the remainder, and not in the income of the trust, the statutes restricting alienation had never had any application, such interests being descendible, devisable, and alienable pursuant to statute;¹² (5) that

⁷ N.Y. PERS. PROP. LAW § 23: "Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof." In 1932 a similar section, § 118, was added to the New York Real Property Law, providing for a revocation of trusts of real property with somewhat more formality. Note that § 23 expressly refers only to revocation in whole or part.

⁸ The Legislative Committee of the Milwaukee Junior Bar Association in 1960-1961 proposed and drafted § 231.50. The thoughts of the committee are contained in a letter dated May 5, 1961, and a memorandum dated February 20, 1961, from Arthur H. Laun, Jr., chairman of the committee and a member of the firm of Quarles, Herriott & Clemons of Milwaukee.

⁹ *Hoskins v. Long Island Loan & Trust Co.*, 139 App. Div. 258, 260, 123 N.Y.S. 994, 996 (1910); *Culver v. Title Guarantee & Trust Co.*, 269 App. Div. 627, 58 N.Y.S. 2d 116, 118 (1945), *rev'd on other grounds*, 296 N.Y. 74, 70 N.E. 2d 163 (1946); 44 YALE L. J. 901, 906 (1935); Keating, *The Revocation of Irrevocable Trusts in New York*, 69 U.S.L. REV. 412 (1935); Scott, *Revoking a Trust: Recent Legislative Simplification*, 65 HARV. L. REV. 617, 618 (1951).

¹⁰ N.Y. PERS. PROP. LAW § 15; N.Y. REAL PROP. LAW § 103. WIS. STAT. § 231.19 (1961) is similar but applies to trusts of real property only.

¹¹ N.Y. REAL PROP. LAW § 105. That § 105 is applicable to trusts of personal property also, see *Genet v. Hunt*, 113 N.Y. 158, 168, 21 N.E. 91, 93 (1889). WIS. STAT. § 231.21(1) (1961) is similar but applies to trusts of real property only. *Evanson v. Rust*, 152 Wis. 113, 139 N.W. 766 (1913).

¹² N.Y. REAL PROP. LAW § 59. That § 59 is applicable to trusts of personal property also, see *National Park Bank v. Billings*, 129 N.Y.S. 846, 849 (App. Div.),

by providing in section 23 that the settlor could revoke the trust with the consent of "all the persons beneficially interested" and that "thereupon the estate of the trustee shall cease," the legislature in 1909 intended no more than to remove the prohibitions against the income beneficiary and the trustee under existing statutes when the settlor and all the beneficiaries desired revocation; (6) that this allowed the beneficiaries a limited type of assignment by their consenting to revocation with the agreement of the settlor, thus giving inter vivos trusts a measure of destructibility; (7) and finally, that this indicated on the part of the legislature an intent to revert to the common law rule permitting a settlor to revoke with the consent of all the beneficiaries when they are all living, ascertained, and under no legal incapacity.¹³

It is to be noted that implicit in this line of reasoning taken by the articles written and cases decided after 1909 was that the common law rule pertaining to revocation of inter vivos trusts was not applicable in New York prior to 1909 because the consent of the beneficiaries could not be obtained due to the statutory prohibitions against his disposing of his interest in the income of the trust. The cases that the authors and courts cited for this proposition, however, all involved testamentary trusts or inter vivos trusts where the settlor was no longer living (so that the common law rule would not apply anyway), with the exception of *Douglas v. Cruger*.¹⁴

In the *Douglas* case, although the settlor of the trust was still living, the court declared that the attempt of the trustee to convey his interest to the beneficiary was of no avail and did not destroy the trust. Although the court in *Douglas*, the earliest of the cases cited,¹⁵ did not expressly say that the beneficiary was deprived of his consent to revocation, it did use the broad language that such trusts, by virtue of the statutory prohibitions, were indestructible. The later cases which in-

aff'd mem., 96 N.E. 1122 (1911). WIS. STAT. § 230.35 (1961) is similar. That § 230.35 is applicable to trusts of personal property also, see *Meyer v. Reif*, 217 Wis. 11 at 16, 17, 258 N.W. 391, 393 (1935). The court in the *Meyer* case pointed out that the last part of § 231.19, see note 10 *supra*, which declares that "the rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created are assignable," could also be used to support the contention that the remainderman's interest in the trust was assignable. *Id.* at 13, 258 N.W. at 392. Sections 15 and 103 of the New York statutes, see note 10 *supra*, included this clause when they were first enacted in the nineteenth century, but the clause was dropped in 1903. FOWLER, REAL PROPERTY LAW OF NEW YORK 500 (3d ed. 1909). The dearth of case law in Wisconsin construing the last clause of § 231.19, however, makes it safer to use § 230.35 to accomplish the desired result.

¹³ For the reasons behind the common law rule pertaining to revocation of inter vivos trusts, see 3 SCOTT, *op. cit. supra* note 2, § 338.

¹⁴ 80 N.Y. 15 (1880); *Lent v. Howard*, 89 N.Y. 169 (1882); *Mabie v. Bailey*, 95 N.Y. 207 (1884); *Genet v. Hunt*, 113 N.Y. 158, 21 N.E. 91 (1889); *Cuthbert v. Chauvet*, 136 N.Y. 326, 32 N.E. 1088 (1893); *Stringer v. Young*, 191 N.Y. 157, 83 N.E. 690 (1908).

¹⁵ See note 14 *supra*.

volved testamentary trusts quoted this language with approval. With some difficulty, therefore, one can see that the common law rule pertaining to revocation of inter vivos trusts did not apply in New York prior to 1909 and that it was the intent of the legislature merely to revert to the common law rule by enacting section 23.

This conclusion is bolstered by one who was appointed in 1909 by the Board of Statutory Consolidation to comment on the statutory law of New York as it existed in 1909 subsequent to the passage of section 23. In commenting on section 23 he said :

But this section [23] does modify section 15 [which prohibited the beneficiary from disposing of his interest in the income of the trust]. It now permits in effect beneficiaries of a trust to receive the income of personal property to assign their interests, with the consent of the creator of the trust, by consenting to a revocation thereof. This would otherwise be an assignment in contravention of the prohibition expressed in section 15 of this act.

Before this section of this act an executed trust to pay over income was irrevocable by the settlor or the beneficiaries.¹⁶

*Judicial Construction of Sections 23 and 118 of
the New York Law, and the 1951 Amendment*

The New York courts quite early held that if the terms of section 23 were complied with, a trust could be revoked by the settlor even though he had expressly declared it to be irrevocable.¹⁷ This holding corresponded with the intent of the New York legislature in passing section 23, however, for the common law rule permits revocation by the settlor with the consent of all the beneficiaries if they are all living, ascertained, and under no legal incapacity, even though the settlor failed to reserve a power of revocation or expressly declared the trust to be irrevocable.¹⁸

In defining who was "beneficially interested" in a trust under section 23, the New York Court of Appeals in *Smith v. Title Guarantee & Trust Co.*¹⁹ declared that under the terms of the statute the consent of unborn beneficiaries was unnecessary. The court, in holding that the consent of unborn issue of the settlor's son and daughter, the only living beneficiaries under the trust instrument, was unnecessary, said: "The words 'persons beneficially interested' must be strained beyond their usual and natural meaning if construed to include those not in being who might in some contingency become entitled to an estate."²⁰ Thus,

¹⁶ FOWLER, PERSONAL PROPERTY LAW OF NEW YORK 124-25 (2d ed. 1909).

¹⁷ *Aranyi v. Bankers' Trust Co.*, 201 App. Div. 706, 194 N.Y.S. 614 (1922).

¹⁸ RESTATEMENT (SECOND), TRUSTS § 338, comment a (1959); cf. notes 5 and 6 *supra*. Some student writers erroneously viewed the holding in *Aranyi v. Bankers' Trust Co.*, *supra* note 17, as evidence that the New York legislature intended, by the passage of §§ 23 and 118, a policy favoring easier revocation of inter vivos trusts. 55 HARV. L. REV. 1223 (1942); 60 HARV. L. REV. 475 (1946); 26 ST. JOHN'S L. REV. 201 (1951).

¹⁹ 287 N.Y. 500, 41 N.E. 2d 72 (1942).

²⁰ *Id.* at 504, 41 N.E. 2d at 74.

it was established that to be "beneficially interested" under section 23, a beneficiary had to be *in being*.²¹

In *In re Peabody*²² the New York Court of Appeals in a well-reasoned opinion held that a child conceived, but yet unborn, is not "beneficially interested." The court reasoned that to hold otherwise would render revocation impossible, as a child *en ventre sa mere* cannot give his consent; and the court was not willing to impute to the legislature an intent to require the impossible. The court pointed out that any other view would create innumerable practical difficulties. For instance, the trustees could not act upon the proposed amendment until they determined that no woman whose offspring might have an interest in the trust was pregnant. And the discovery, years later, of a child born after revocation but allegedly conceived prior thereto would lead to litigation in which the decisive factor would be the time of conception, a matter rarely if ever capable of precise ascertainment. The court concluded that consent only of those persons who are born and alive at the time of the proposed revocation is required. Birth, rather than the date of conception, is the controlling factor in ascertaining a person beneficially interested.

The court rejected the trustee's argument that since a child *en ventre sa mere* is deemed "in being" for purposes of taking property, it should be likewise so regarded under section 23.²³ The court pointed out that the historical reasons surrounding the property rule were not the same as for the enactment of section 23; that the legislature had provided by statute, in the few situations where it chose to do so, for the protection of children conceived but not yet born when the prior interest in the property ended;²⁴ and that the legislature could have done so here if it had so desired.²⁵

²¹ Although the court in the *Smith* case did not discuss the question, its holding was a departure from the prevailing common law rule which prevented revocation by the settlor when some of the beneficiaries were unborn (see text accompanying note 3 *supra*) and, therefore, a departure from the legislative intent in 1909 which had been to merely codify the common law rule (see text accompanying note 13 *supra*). This departure is amazing in view of the fact that it was the only such departure by the courts prior to the 1951 amendment (the liberal policy of this amendment will be discussed at a later point) and that it went completely unexplained by the court.

²² 5 N.Y. 2d 541, 158 N.E. 2d 839 (1959).

²³ *Id.* at 546, 158 N.E. 2d at 844; *cf.* *Mackie v. Mackie*, 230 N.C. 152, 52 S.E. 2d 352 (1949), which holds to the contrary. The North Carolina statute, however, includes as persons beneficially interested those "in esse," which can be interpreted as more inclusive than those "in being" (the construction put upon § 23 by *Smith v. Title Guarantee & Trust Co.*, *supra* note 19).

²⁴ N.Y. DECEDENT ESTATE LAW § 83(12): "Descendants and other distributees of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased and had survived him." WIS. STAT. § 237.07 (1961) is similar. N.Y. REAL PROP. LAW § 56: "Where a future estate is limited to heirs, or issue or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parents." WIS. STAT. § 230.30 (1961) is similar.

²⁵ The liberal holding of the court in the *Peabody* case is not surprising, however, in view of the fact that the case was decided eight years after the

The problem of determining who were those beneficially interested among those living presented many hurdles, however. A recurrent problem had arisen with respect to the construction of language used in the trust deed, which directed that the corpus of the trust be paid over to the "heirs at law or next of kin" of the settlor upon the termination of intermediate income interests. If the language was construed as creating a remainder interest in all those living who would possibly become the settlor's heirs upon his death (the court deciding that the settlor intended that his heirs would take a remainder as purchasers under the trust deed), they had an immediate beneficial interest and the settlor could *not* revoke without their consent.²⁶ If, on the other hand, the language was construed as reserving to the settlor a reversion (the court deciding that the settlor intended that his heirs would take his reversion by descent under the intestacy laws), those living who would possibly become the settlor's heirs upon his death took no interest in the trust property until his death, if at all, and the settlor *could* revoke without their consent.²⁷

The early common law had answered the problem by the use of the "worthier title" doctrine.²⁸ This hard and fast rule of property stated that where a grantor purported to convey a future interest to his own heirs, he could not thereby create a remainder in his heirs but there was a reversion in himself.²⁹ The effect of this rule was that the estate had never left the grantor. Applied to section 23 this would mean that the heirs apparent or presumptive (or those even more remote) were not beneficially interested. They would take the settlor's reversion, if at all, by inheritance at the settlor's death, when their interest would first arise.

The case of *Doctor v. Hughes*,³⁰ the leading case on what is now the prevailing common law rule, changed all this in New York and opened the door to interpretation by the courts of the settlor's intent

addition of the 1951 amendment to §§ 23 and 118. The court noted that the New York Law Revision Commission, commenting on the 1951 amendment, remarked about a general public policy in favor of the easier revocation of inter vivos trusts. *In re Peabody*, *supra* note 22, at 545, 158 N.E. 2d at 843.

²⁶ *Engel v. Guaranty Trust Co. of New York*, 280 N.Y. 43, 19 N.E. 2d 673 (1939). The consequence of this was that the settlor could not revoke the trust, for in such a case the consent of the persons who would be heirs if he now died, the heirs apparent, was not sufficient to permit revocation since they might not turn out to be his heirs on his death. Scott, *Revoking a Trust: Recent Legislative Simplification*, 65 HARV. L. REV. 617, 620 (1951). Also contributing to the impossibility of obtaining the necessary consent was the fact that every human being born in lawful wedlock had innumerable relatives living who might conceivably become the settlor's next of kin. *Engel v. Guaranty Trust Co.*, *supra*.

²⁷ *Whittemore v. Equitable Trust Co.*, 162 App. Div. 607, 147 N.Y.S. 1058 (1914).

²⁸ The basis for the rule lay in the feudal system. Where property passed by descent, all the incidents of feudal custom attached to the property continued in force; however, if the property passed by way of purchase, these incidents were severed. SIMES & SMITH, *FUTURE INTERESTS* §§ 1601, 1602 (2d ed. 1956).

²⁹ 2 SCOTT, *op. cit. supra* note 2, § 127.

³⁰ 225 N.Y. 305, 122 N.E. 221 (1919); 2 SCOTT, *op. cit. supra* note 2, § 127.1.

in each case by relegating the worthier title doctrine to a rule of construction rather than retaining it as a rule of property³¹ as it had been: "But at least the ancient rule survives to this extent, that to transform into a remainder what would ordinarily be a reversion, *the intention to work the transformation must be clearly expressed.*"³² (Emphasis added.)

The court in the *Doctor* case found a reversion, but in subsequent years there were enough cases³³ in which the courts found a remainder on similar facts that the law on this subject in New York was rendered so confused that precedent was no longer reliable.³⁴

This confusion prompted the New York legislature in 1951 to amend sections 23 and 118 to provide that persons described only as heirs or next of kin or distributees of the settlor are not beneficially interested.³⁵ By legislative direction, then, such contingent beneficiaries are deemed not to be remaindermen and their consent is not required. No room was left by the amendment for giving effect to the settlor's intention to create a remainder interest in his own heirs. Obviously, this amendment has greatly relieved the situation which had existed in New York on this point.

Notwithstanding the 1951 amendment, some questions remained to be answered by the New York courts.

Authors writing in 1951³⁶ and commenting on the future effect of the 1951 amendment in New York recognized that the insertion of the word "only" in the amendment³⁷ by the legislature might cause a problem of construction. If the New York courts would construe the word "only" as meaning that any qualification added to the words "heirs or next of kin or distributees" (or words of like import) would take the situation out of the statute, the courts would have to look to New York law prior to 1951 for guidance.

³¹ As a rule of property, the worthier title doctrine was strictly applied, leaving no room for construing the intent of the grantor. SIMES & SMITH, *op. cit. supra* note 28, § 1603.

³² 225 N.Y. at 312, 122 N.E. at 222. Of course, there are some phrases that clearly indicate the settlor's intention to retain a reversion: a direction to the trustee to reconvey the corpus to him at the expiration of a term of years, or a direction to the trustee to convey the corpus to the settlor's estate on his death. On the other hand, the settlor clearly intends to create a remainder in others when he directs the trustees to deliver the corpus to his children or issue or definitely specified persons. 2 SCOTT, *op. cit. supra* note 2, § 127.1.

³³ For an excellent review of the cases prior to 1949, see *Richardson v. Richardson*, 298 N.Y. 135, 81 N.E. 2d 54 (1948).

³⁴ Scott, *supra* note 26, at 621; see dissenting opinion in *In re Burchell's Estate*, 299 N.Y. 351, 362, 87 N.E. 2d 293, 298 (1949), calling for legislative clarification.

³⁵ N.Y. Laws 1951, ch. 180: "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, does not create a beneficial interest in such persons." (Emphasis added.)

³⁶ 26 ST. JOHN'S L. REV. 201, 207 (1951); Scott, *supra* note 26, at 621.

³⁷ See note 35 *supra*.

Such an added qualification might be that the heirs or next of kin of the settlor be ascertained according to the laws of a jurisdiction in which the settlor may not in fact be domiciled at the time of his death, or that the heirs or next of kin of the settlor be ascertained at a time other than the death of the settlor.

Prior to 1951, a test frequently resorted to by the New York courts was the determination of whether the class to take, although denominated heirs or next of kin, was in any way distinct from the ordinary distributees of the settlor.³⁸ If it was, its members were deemed to take a remainder interest and the trust, therefore, could not be terminated. The test as applied to the aforementioned qualifications resulted in the usual conflicting and confusing decisions.³⁹

The law in New York may have been settled by *Walsh v. Chase Manhattan Bank*,⁴⁰ a case arising in the lower courts in 1961. In that case the settlor, a New York resident, attempted to revoke an inter vivos trust which she had created in 1960. The trust deed directed that upon her death before age fifty and without issue, the corpus was to be distributed to such parties as she should by will appoint, and in default of such appointment, to such parties as would be entitled to inherit the corpus under the laws of intestacy of the *state of Connecticut*. The court in deciding the case under the 1951 amendment dismissed the cases on the subject decided prior to 1951⁴¹ as not controlling "in view of the legislative policy expressed in that amendment to favor the easier revocation of inter vivos trusts."⁴² The court concluded that the qualification directing the ascertainment of those who would inherit under the laws of intestacy of Connecticut did not prevent revocation by the settlor under the 1951 amendment: "Giving a liberal interpretation to the statute to effectuate the legislative policy [in favor of easier termination] . . ., I conclude that the words used here are 'words of like import' as contemplated in the statute."⁴³

The case may pave the way for the same determination in a future case in New York involving the revocation of a trust which directs that the heirs or next of kin be ascertained at a time other than the death of the ancestor, for the same arguments can be advanced.⁴⁴

³⁸ 26 ST. JOHN'S L. REV. 201, 204 (1951).

³⁹ *Minc v. Chase Nat'l Bank*, 31 N.Y.S. 2d 592 (App. Div. 1941); *Hopkins v. Bank of New York*, 25 N.Y.S. 2d 888 (App. Div. 1941); *Hussey v. City Bank Farmers Trust Co.*, 258 N.Y.S. 396 (App. Div. 1932); *In re City Farmers Trust Co.*, 69 N.Y.S. 2d 235 (Sup. Ct. 1947); *City Farmers Trust Co. v. Miller*, 278 N.Y. 134, 15 N.E. 2d 553 (1938); *Fish v. Chemical Bank & Trust Co.*, 59 N.Y.S. 2d 62 (App. Div. 1945); *Green v. City Bank Farmers Trust Co.*, 72 N.Y.S. 2d 442 (Sup. Ct. 1947). See also 2 SCOTT, *op. cit. supra* note 2, § 127.1.

⁴⁰ 216 N.Y.S. 2d 103, 28 Misc. 2d 1025 (Sup. Ct. 1961).

⁴¹ See note 39 *supra*.

⁴² 216 N.Y.S. 2d at 108, 28 Misc. 2d at 1029.

⁴³ *Ibid.*; this case was not appealed.

⁴⁴ One leading writer in 1951 foresaw a result in favor of revocation in both these situations. SCOTT, *supra* note 26, at 621.

Prior to 1951 it was impossible in New York to revoke an inter vivos trust where there were minor beneficiaries, because they could not give a legal consent to revocation.⁴⁵ The New York legislature did not include in the 1951 amendment any language which would modify this restriction (except that the minor persons would not be "beneficially interested" if described as "heirs or next of kin" of the settlor), and the question whether the policy behind the amendment would permit another to consent on their behalf has not been litigated.⁴⁶

Prior to 1951, the question had arisen in New York as to whether or not the survivors of joint settlors could revoke the whole or even part of the trust in the absence of language in the trust instrument permitting revocation. In *Culver v. Title Guarantee & Trust Co.*⁴⁷ there were three joint settlors. Two of them, the plaintiffs, had contributed real and personal property to the trust, while the third, Mary de Brabant, had contributed a large amount of cash. The trust instrument provided that the income was to be paid to the plaintiffs for life and then to the survivor of them for life. Thereafter, the corpus was to be paid to whomsoever Mary might appoint, and, in default of appointment, to Mary's daughter. No power of revocation was reserved, and Mary died without exercising her power of appointment. The plaintiffs, with the consent of the daughter, sought to revoke the trust in its entirety or, in the alternative, to the extent of their original contribution to the trust.

The Appellate Division did not allow revocation of the entire trust,⁴⁸ pointing out that in the absence of statute and where joint settlors have reserved a power of revocation, they must all exercise it (citing cases).⁴⁹ The court said that there was nothing in the *origin* of sections 23 and 118 to indicate otherwise in this case. The court added that the word "creator" in the statutes includes the plural, pursuant to section 35 of

⁴⁵ *Whittemore v. Equitable Trust Co.*, 250 N.Y. 298, 165 N.E. 454 (1929); *In re Holman*, 67 N.Y.S. 2d 90 (App. Div. 1946). This common law prohibition applies to mentally incompetent beneficiaries as well, and for the same reason.

⁴⁶ Scott suggests that the court may appoint a guardian to represent those under a legal incapacity and that the court may consent on their behalf, but he cites no cases. 3 SCOTT, *op. cit. supra* note 2, § 340. *But see* *Randall v. Randall*, 60 F. Supp. 308 (S.D. Fla. 1945), cited by BOGERT, *op. cit. supra* note 1, § 1005, which supports Scott's suggestion.

⁴⁷ 58 N.Y.S. 2d 116, 269 App. Div. 627 (1945), *rev'd*, 296 N.Y. 74, 70 N.E. 2d 163 (1946).

⁴⁸ In holding that all settlors must join in order to terminate the entire trust, the decision was in accord with the rule of *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454 (1889), which calls for giving effect to the intent of the deceased settlor. 46 COLUM. L. REV. 328, 329 (1946).

⁴⁹ 58 N.Y.S. 2d at 119. "It may be noted that although New York Real Property Law § 166, provides that a power, jointly exercisable, may be executed by the survivors, nevertheless it has been held that § 166 is designed to aid in the preservation of trusts and not in their termination, and that it is therefore inapplicable to powers of revocation." 46 COLUM. L. REV. 328, 329 (1946). WIS. STAT. § 232.37 (1961) is similar to § 166 above, but there has been no holding in Wisconsin similar to the above holding.

the New York General Construction Law,⁵⁰ and that the consent of Mary's daughter added nothing, as a power of revocation is neither alienable or descendible.⁵¹ However, the Appellate Division held that the surviving joint settlors could revoke to the extent of the property originally contributed by them, stating: "Here, the purpose of the statute is accomplished, since the consent of those who made the disposition is obtained."⁵²

The New York Court of Appeals felt differently, however, pointing out that it would be fairer and more in line with the legislative intent not to deprive the deceased settlor, by reason of her death, of her right to refuse to consent to partial or total revocation. The court felt that the deceased settlor may have "departed this life secure in her belief" that she had provided for her daughter. The court distinguished *Guaranty Trust Co. v. Armstrong*,⁵³ relied upon by the lower court, in that the trust instrument in the *Armstrong* case provided for a reversion and power of appointment in the survivor, whereas the trust instrument in the instant case vested the remainder in the daughter upon Mary's death and gave the survivors no power whatsoever.⁵⁴

A lower court case arising after the 1951 amendment referred to the holding of the *Culver* case with approval.⁵⁵ The real issue in the case, however, had to do with the construction of the express language in the trust deed and did not revolve around the construction of section 23.⁵⁶ Consequently, the question presented in the *Culver* case is yet to be squarely met by the New York Court of Appeals in the light of the policy behind the statute given by the 1951 amendment.

Section 231.50 of the Wisconsin Statutes

The Legislative Committee of the Milwaukee Junior Bar Association proposed and drafted section 231.50 in 1960-1961.⁵⁷ Although there is no formal legislative history evidencing the intent of the Wisconsin legislature in passing 231.50, it is clear that the draftsmen of the statute, the Milwaukee Junior Bar Association, relied heavily on the New York law with its judicial gloss, both before and after the 1951 New York

⁵⁰ WIS. STAT. § 990.001 (1) (1961) is similar.

⁵¹ RESTATEMENT (SECOND), TRUSTS § 338, comment *a* (1959).

⁵² 58 N.Y.S. 2d at 119, citing for its authority *Guaranty Trust Co. v. Armstrong*, 43 N.Y.S. 2d 897, *aff'd mem.*, 294 N.Y. 666, 60 N.E. 2d 757 (1945).

⁵³ See note 52 *supra*.

⁵⁴ 296 N.Y. at 78, 70 N.E. 2d at 165. Presumably, the court was trying to point out that the survivor in the *Armstrong* case was the only one beneficially interested in the trust, whereas in the instant case the daughter had an interest also. This distinction and the court's decision that the surviving joint settlors cannot revoke to the extent of their own contribution have been criticized. 60 HARV. L. REV. 475 (1946).

⁵⁵ Application of Eyre, 113 N.Y.S. 2d 511, 517 (App. Div. 1953).

⁵⁶ *Ibid.*

⁵⁷ Wis. Laws 1961, ch. 407.

amendment, and attempted to incorporate the best parts thereof in section 231.50.⁵⁸

It will be remembered that the New York law, prior to the adoption of its section 23 in 1909, was to the effect that the common law rule as to revocation of inter vivos trusts did not prevail, because the statutory provisions prohibiting the beneficiary from transferring his interest in the income of a trust of real or personal property deprived him of the power to consent to revocation and, therefore, the intent of the New York legislature in enacting section 23 was merely to revert to the common law rule.⁵⁹

Wisconsin's statutory prohibitions against the alienation of the income beneficiary's interest and against the acts of the trustee in contravention of the trust are not as broad as were the prohibitions placed upon these parties in New York prior to 1909, because Wisconsin's prohibitions are restricted to trusts of real property only.⁶⁰ Consequently, it can be presumed, for there are no reported cases in Wisconsin dealing with the revocation of inter vivos trusts, that the common law rule pertaining to revocation of inter vivos trusts prevailed, at least as to trusts of personal property in Wisconsin before passage of section 231.50, so that the intent of the Wisconsin legislature in 1961 was to change the common law rule as applied to trusts of personal property.

In fact it would be difficult to ascribe to the Wisconsin legislature a different purpose as to trusts of real property for the following reasons: (1) The *Restatement of Trusts* had, for twenty-five years prior to the enactment of section 231.50, declared the prevailing rule in the United States to be that the settlor of an inter vivos trust could revoke it with the consent of all the beneficiaries if they are all living, ascertained, and under no legal incapacity, *even though by statute* or by the terms of the trust *the interest of one or more of the beneficiaries was made inalienable by him*.⁶¹ Since the beneficiaries were not, therefore, deprived of their power to consent to revocation, as in New York prior to 1909, the common law rule as applied to *all* inter vivos trusts presumably prevailed in Wisconsin prior to 1961. The intent of the legislature in enacting section 231.50, therefore, could be none other than to change the common law rule by easing the common law restrictions that did exist in reference to revocation of inter vivos trusts of personal and real property. (2) The legislature, by including trusts of real and personal property in the same section, probably intended that the procedure and effect of the revocation be alike as to both types of trusts. (3) The tenor of section 231.50 indicates a broader purpose than was true of

⁵⁸ See note 8 *supra*.

⁵⁹ See text accompanying note 13 *supra*.

⁶⁰ See notes 10 and 11 *supra*.

⁶¹ RESTATEMENT, TRUSTS § 338, comment, *d* (1935); RESTATEMENT (SECOND), TRUSTS § 338, comment *d* (1959).

section 23 in New York in 1909 in view of the fact that section 231.50 covers more subjects and in greater detail than did section 23 in 1909 in New York. (4) The Wisconsin legislature was presumably aware in 1961 of the broad policy in favor of the easier revocation of inter vivos trusts as expressed by the Law Revision Committee of the New York legislature when the legislature passed the 1951 amendment, so that it could be said that the Wisconsin legislature intended the same liberal policy in passing section 231.50.

It seems to be clear, therefore, that the major purpose of the Wisconsin legislature in enacting section 231.50 was to change the common law rule by easing the common law restrictions on the revocation of inter vivos trusts; that is, to require no longer the consent of unborn and living, but unascertained, beneficiaries.

That the statute embodies a strong public policy favoring easier revocation of inter vivos trusts is the view taken by the New York courts in *In re Peabody*⁶² and *Walsh v. Chase Manhattan Bank*,⁶³ construing New York's 1951 amendment to sections 23 and 118, and is the view supported by the draftsmen of section 231.50.

It was noted by the draftsmen of section 231.50 that more and more persons were creating irrevocable inter vivos trusts early in their lives for tax and non-tax reasons.⁶⁴ In later years it was not at all unusual for tax laws to be substantially revised or for the circumstances under which the trust was established to change radically so that the original purpose of the trust may have disappeared or the trust may have become unworkable or extremely restrictive on those living and ascertained who were beneficially interested in the trust due to their immediate need of the corpus of the trust. It was noted by the draftsmen of section 231.50 that the common law permission to revoke was often extremely restrictive to the point of making revocation impossible under the usual inter vivos trust instrument.⁶⁵ The avowed purpose of the

⁶² 5 N.Y. 2d 541, 158 N.E. 2d 839 (1959).

⁶³ 216 N.Y.S. 2d 103, 28 Misc. 2d 1025 (Sup. Ct. 1961).

⁶⁴ Some non-tax motives that a settlor would have for creating an irrevocable inter vivos trust could be: (1) his desire to protect himself against his own indiscretions by preventing his dissipating the principal of the trust on indiscreet adventures; (2) his desire, under certain circumstances, to make a dependent family member financially independent, which dependent could have no feelings of financial independence if the financial benefits to him could be cut off by the settlor at any time; and (3) his desire to protect his family against financially hazardous business ventures which he undertakes and may not develop in his favor. If the trust is revocable, his creditors may, under some circumstances, compel him to exercise his power of revocation in their favor. CASNER, ESTATE PLANNING 150-52 (3d ed. 1961).

⁶⁵ It can be argued that a settlor should be able to create an irrevocable inter vivos trust if he so desires, for there are valid non-tax motives for doing so. See note 64 *supra*. It is true that under § 231.50 it is no longer possible to create an irrevocable inter vivos trust unless the living ascertained beneficiaries refuse to consent to revocation. However, this is a policy question, the pros and cons of which are beyond the scope of this article. Whether § 231.50 could conceivably cause adverse tax consequences is also beyond

Legislative Committee of the Milwaukee Junior Bar Association was to ease these common law restrictions so that changed and unforeseen circumstances that were causing hardship could be met by the settlor and the living, ascertained beneficiaries of the inter vivos trust.

The similarity of the New York statutes, as construed by the New York courts, to section 231.50; the similarity of purpose of the New York statutes, as expressed by the New York courts after the 1951 amendment, to the purpose of the Wisconsin statute as expressed by the draftsmen thereof and deduced from the circumstances surrounding common law revocation in Wisconsin when section 231.50 was enacted; and the reliance by the draftsmen of section 231.50, when constructing the Wisconsin statute, on the New York law with its judicial gloss would seem to indicate that the New York law as it stands today could be an important source of argument to offer the Wisconsin courts in any cases arising under section 231.50 that involve issues similar to those already decided in New York. With this in mind it is appropriate to undertake an analysis of section 231.50.

Subsection (1) of section 231.50⁶⁶ is worded substantially the same as section 23 of the New York Personal Property Law (and section 118 of the New York Real Property Law⁶⁷) except that the words "in being" were inserted in the Wisconsin statute to reflect the construction put upon section 23 in the *Smith* case⁶⁸ in New York.

It is probable that the Wisconsin courts will decide as did the New York court in the *Peabody* case (that is, conceived but unborn children are not beneficially interested under the statute) in view of the cogent arguments advanced by that court⁶⁹ and in view of the policy behind section 231.50 favoring easier revocation of inter vivos trusts by easing the restrictions on common law revocation of inter vivos trusts.

For the same policy reason, the insertion of an express declaration of irrevocability by the settlor should be no bar to revocation under section 231.50, for to hold otherwise would frustrate the purpose of the Wisconsin statute.⁷⁰ If the legislature had intended such a restriction, it could have easily included it in the Wisconsin statute.⁷¹

Subsection (1)(a) of section 231.50 allows the county court to consent on behalf of minors or other persons beneficially interested and under a legal incapacity after a hearing in which their interests are

the scope of this article. Cf. Leary, *Termination of Inter Vivos Trusts Under State Law and the Internal Revenue Code Section 2038*, 47 MARQ. L. REV. 323, 332-41 (1963).

⁶⁶ See note 4 *supra*.

⁶⁷ See note 7 *supra*.

⁶⁸ See text accompanying note 19 *supra*.

⁶⁹ See text accompanying note 22 *supra*.

⁷⁰ New York allows revocation under its statute in such a case; see text accompanying note 17 *supra*.

⁷¹ North Carolina and Oklahoma have so provided in their statutes cited notes 5 and 6 *supra*.

represented as provided by the guardian *ad litem* statute.⁷² As already noted,⁷³ New York may not allow revocation under its statutes if there are minor beneficiaries. Subsection (1)(a) thus represents an important improvement over the New York statutes in this respect.

Of course, representation must be *real* and not merely formal.⁷⁴ Consent may not be given on their behalf with total disregard of their interests. The court cannot give consent on their behalf to revocation of the trust if such consent would be adverse to their interests or if they received no consideration. Yet the consideration, it would seem, need not necessarily be direct or pecuniary. An indirect benefit to the minor or incompetent⁷⁵ would seem sufficient to justify consent on their behalf in view of the policy behind the statute favoring easier revocation of inter vivos trusts. For example, if revocation of the trust would prove beneficial to the parents or the family as a whole, the minor or incompetent may derive an indirect benefit in the form of more substantial support and care.

Subsection (1)(b) of section 231.50⁷⁶ has captured New York's 1951 amendment and a little more.⁷⁷ In effect it states that consent given by the creator or by the court on his behalf if he is incompetent, and by a living beneficiary or by the court on behalf of a minor or incompetent beneficiary, will also be consent on behalf of those described by the trusts instrument solely as heirs or next of kin or distributees of that consenting person, except that issue in being of the consenting person must also consent (through the court if they are minors or incompetent) if they take some interest by virtue of the trust instrument.

For example, if the trust terms direct that upon termination of the income interest(s) in the settlor and/or a third person(s) the corpus is to be paid to the *settlor's* heirs or next of kin, the consent(s) required will be that of the settlor, the living income beneficiary(s) if he be other than or in addition to the settlor, and the issue in being, if any, of the settlor. The consent of the issue in being, if any, of the living income beneficiary(s), if he be other than or in addition to the settlor, is not required, because such issue takes no interest by virtue of the trust instrument.

Using the same example as above except that the trust terms direct that the corpus is to be paid to a *third person's (s')* heirs or next of kin, the consent(s) required will be that of the settlor, the living income beneficiary(s) if he be other than or in addition to the settlor, and the issue in being, if any, of the third person(s). The consent of the issue

⁷² WIS. STAT. § 324.29 (1961).

⁷³ See text accompanying note 46 *supra*.

⁷⁴ 49 A.L.R. 2d 1087.

⁷⁵ 3 SCOTT, TRUSTS § 340 (2d ed. 1956); BOGERT, TRUSTS AND TRUSTEES § 994 (1955).

⁷⁶ See note 4 *supra*.

⁷⁷ See note 78 *infra*.

in being, if any, of the settlor is not required because such issue take no interest by virtue of the trust instrument.⁷⁸

The use of the word "solely" in subsection (1)(b)⁷⁹ could conceivably cause difficulty in Wisconsin. It will be remembered that some writers in New York in 1951 expressed concern over the inclusion of the word "only" in the 1951 New York amendment to sections 23 and 118.⁸⁰ Wisconsin's section 231.50 does not include the words "or by the words of like import" as does the New York statute, and those words allowed a lower New York court to hurdle part of the objectionable language⁸¹ (to wit, that the heirs or next of kin of the consenting person be ascertained according to the laws of a jurisdiction in which he may not in fact be domiciled at the time of his death, or that the heirs or next of kin of the consenting person be ascertained at a time other than his death). On the other hand, the policy behind section 231.50 which favors the easier revocation of trusts may be strong enough and broad enough to overcome the objectionable language.

Subsection (2) of section 231.50 provides that upon execution and acknowledgment by all consenting persons as prescribed by chapter 235 for a conveyance, the instrument is entitled to be recorded. One reason for subsection (2) is apparently to provide a prospective purchaser of the real property a record of the transfer of title from the trustee, to show that the revocation followed the directions of section 231.50, to show the person in whom title resides and, in addition, to point out that such transfer of title by the trustee was not in breach of trust. This record in turn would presumably protect the trustee from a subsequent claim by the consenting persons, and possibly contingent beneficiaries whose consent was not required, that the trustee acted in violation of the trust, although it would appear that as to such a subsequent claim the production by the trustee of an executed and acknowledged copy of

⁷⁸ The 1951 New York amendment cited note 35 *supra*, by making provision for the heirs of the creator *alone*, has created a loophole in that the amendment does not provide for the situation where the trust instrument directs an interest to be limited to the *heirs of a third person*. Consequently, the amendment would not apply to such a situation. The law in the absence of statute is that when a settlor gives a life interest in the income to a third person with a limitation over to the heirs of the third person, the inference is that the settlor intends to give the third person only a life interest and to create a contingent remainder interest in the persons who may be the third person's heirs or next of kin on his death. 2 SCOTT, *op. cit. supra* note 75, § 127.2. If this inference was not overcome, a remainder would be created and revocation in New York would still be impossible, unless the New York courts are extremely liberal in interpreting the words "or of words of like import" contained in the amendment. For example, see text accompanying note 43 *supra*. Section 231.50 has gone this one step further by providing that consent of *any* person shall be consent on behalf of *all* persons described as *heirs of the consenting person* (except living issue of the consenting person that take an interest under the trust instrument). However, see discussion of subsection (3) in text *infra*, which points out a probable conflict with subsection (1)(b).

⁷⁹ See note 4 *supra*.

⁸⁰ See note 37 *supra* and accompanying text.

⁸¹ See text accompanying note 43 *supra*.

the revocation, preserved by the trustee, would be a complete defense. Such a record of the transaction, moreover, would deter consenting persons who had changed their minds about the transaction from bringing suit against the trustee, especially in the absence of a preserved copy of the transaction.

Subsection (3) of section 231.50 states that no trust shall, *solely* by reason of that section, be subject to revocation by the settlor alone. This was inserted presumably to avoid possible adverse tax consequences. This, of course, was not intended to prevent common law revocation by the settlor alone if he is the sole beneficiary *by virtue of the trust instrument*, for subsection (3) also makes it clear that section 231.50 shall not inhibit the revocation of a trust pursuant to its terms or *otherwise in accordance with law* (leaving open the other methods of termination and revocation—express or implied reservation of a power of revocation; mistake; fraud; mental incapacity; undue influence; expiration of the period for which the trust was created; the impossibility of carrying out or illegality of trust purposes; emergency; merger; consent of the beneficiaries and settlor, or the settlor alone if he is the sole beneficiary, under the common law rule; and the like).⁸² For example, if the trust instrument gives the income to the settlor for life with a direction to pay over the corpus to the settlor's estate upon his death, the settlor is the only one beneficially interested in the trust and can revoke the trust without the consent of anyone under the common law rule or section 231.50.⁸³

Subsection (3) does purport, however, to prohibit revocation by the settlor alone when, *solely by virtue of section 231.50*, he is the only one beneficially interested in the trust and thus the only one whose consent is required to revoke. For example, if the settlor having no issue directed that the income was to be paid to him for life, corpus to those whom he should appoint by will, and, in default of his appointment, to his heirs, this would, under the common law rule, create a remainder interest in the heirs and their consent would be required in order for the settlor to revoke under the common law rule.⁸⁴ However, *solely by virtue of section 213.50(1)(b)*,⁸⁵ the settlor, being the only one beneficially interested by virtue of the statute, could revoke the trust alone because only his consent is required in such a case under the statute; yet subsection (3) says that he may not revoke in such a case.

Although the prohibition against the settlor in subsection (3) is explicit, its conflict with subsection (1)(b) in a fact situation like the

⁸² 3 SCOTT, *op. cit. supra* note 75, ch. 10. Discussion of the various methods of common law revocation and termination is beyond the scope of this article.

⁸³ *Id.* § 339.

⁸⁴ See *In re Burchell's Estate*, *supra* note 34, applying the rule formulated by *Doctor v. Hughes*, *supra* note 32.

⁸⁵ See note 4 *supra*.

above will presumably have to be settled by the courts, for both subsections cannot be given effect at the same time.

The question whether the surviving joint settlors can revoke to the extent of their original contributions to the inter vivos trust has not been squarely met by any New York court since New York's 1951 amendment,⁸⁶ although the *Culver* case, decided prior to the amendment, held that the surviving joint settlors could not do so.⁸⁷

Whether Wisconsin will follow the *Culver* case will presumably depend upon just how strong the policy behind section 231.50 favoring easier revocation of trusts is, as interpreted by the Wisconsin courts, for section 231.50 does not purport to cover the situation by express language.

Constitutionality of Section 231.50 as to Pre-existing Trusts

The common law principle pertaining to revocation of inter vivos trusts⁸⁸ is just that—a common law rule.⁸⁹ The common law can be changed by statute,⁹⁰ but only to the extent that the statute does not impair constitutional guaranties of the state or federal constitution.⁹¹

Section 231.50 in changing the common law rule has retroactively eliminated the necessity for the consent of unborn and living, but unascertained, beneficiaries.⁹² The question thus arises whether such beneficiaries have been deprived of property without due process of law.⁹³

New York in 1917 construed its statute, section 23 (which is also retroactive),⁹⁴ to be constitutional.⁹⁵ New York, however, made this decision before it was clear that the above constitutional question had arisen under its statute. Until 1942, when the *Smith* case⁹⁶ was decided by the New York Court of Appeals' holding that unborn beneficiaries were not beneficially interested, section 23 had been interpreted consistently with the common law.⁹⁷ The court in the *Smith* case raised no constitutional question. And no constitutional question has arisen in New York since. Furthermore, the 1951 amendment⁹⁸ is prospective in its effect,⁹⁹ thus creating no constitutional problems,¹⁰⁰ for trusts created after 1951 are drafted subject to the amendment, which prevents any

⁸⁶ See text accompanying notes 55 and 56 *supra*.

⁸⁷ See note 47 *supra*.

⁸⁸ See text accompanying note 2 *supra*.

⁸⁹ 3 SCOTT, *op. cit. supra* note 75.

⁹⁰ WIS. CONST. art. XIV, § 13.

⁹¹ 11 AM. JUR. *Common Law* § 15 (1941).

⁹² Section 231.50, see note 4 *supra*, applies to trusts "heretofore or hereafter created."

⁹³ U.S. CONST. amend. XIV, § 1; WIS. CONST. art. I, § 1.

⁹⁴ See note 7 *supra*.

⁹⁵ *Court v. Bankers Trust Co.*, 221 N.Y. 608, 116 N.E. 1041 (1917).

⁹⁶ *Smith v. Title Guarantee & Trust Co.*, *supra* note 19.

⁹⁷ See note 21 *supra*.

⁹⁸ See note 35 *supra*.

⁹⁹ *In re Decker's Trust*, 177 N.Y.S. 2d 598, 13 Misc. 2d 121 (Sup. Ct. 1958).

¹⁰⁰ 16A C.J.S. *Constitutional Law* § 414 (1950).

interest from arising in the first instance. Therefore, the 1951 amendment takes nothing away from the possible heirs because no interest was created in them.

North Carolina and Oklahoma have considered the question, however. Oklahoma has and North Carolina had statutes¹⁰¹ similar to Wisconsin's section 231.50 in their retroactive effect¹⁰² in cutting off interests of unborn and unascertained beneficiaries.

North Carolina in 1929 declared its statute to be constitutional. After pointing out that the interests in question were contingent interests, the court said:

But there is no provision in the state or Federal Constitution which prohibits the passage of retroactive laws . . . unless they are such as . . . disturb [vested] rights. . . . We do not see how the statute disturbs any vested rights. . . . [A] mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws does not constitute a vested right. Contingent rights arising prior to the enactment of a statute, and inchoate rights which have not been acted on are subject to legislative control. The power that proposes to give may always revoke before an interest is perfected in the donee.¹⁰³

The Oklahoma court concurred, saying:

While the statute enacted subsequent to the creation of the trust may not constitutionally operate to the detriment of vested rights . . . mere expectancy of future contingent interests do not constitute 'vested rights' such as would deprive the Legislature of the power to enact the statute authorizing revocation of a voluntary grant.¹⁰⁴

In the constitutional sense

. . . rights are said to be vested in contradistinction to their being contingent. . . . A right is 'vested' where there is an *ascertained* person with a present right to present or future enjoyment; . . . [it] is 'contingent' when it depends on the performance of some condition or the happening of some event before some other event or condition happens or is performed.¹⁰⁵ (Emphasis added.)

There may be some cases where the vested-contingent classification for constitutional purposes would not be the same for property law purposes.¹⁰⁶ This is not the case here. It is clear under either view that the interests created in the unborn and living, but unascertained, bene-

¹⁰¹ See notes 5 and 6 *supra*.

¹⁰² By amendment in 1943, North Carolina provided that its statute would no longer operate retroactively. N.C. Laws 1943, ch. 437.

¹⁰³ *Stanbach v. Citizens Nat'l Bank*, 197 N.C. 292, 148 S.E. 313, 315 (1929); *accord*, 16A C.J.S. *Constitutional Law* §§ 417, 599 (1950).

¹⁰⁴ *Atchison v. Dietrich*, 315 P. 2d 265, 268 (Okla. 1957).

¹⁰⁵ 11 AM. JUR. *Common Law* § 370 (1941).

¹⁰⁶ *Ibid.*

ficiaries are contingent, and not vested.¹⁰⁷ No interest can "vest" in an unborn beneficiary until he is born; and no interest can "vest" in persons living as heirs or next of kin until the death of the ancestor, for until such time the ones who will take are unascertained as "no one is heir to the living."

Yet, Wisconsin by statute recognizes that contingent interests are "real" enough to be descendible, devisable, and alienable;¹⁰⁸ does not allow the destruction of contingent interests by owners of intermediate estates;¹⁰⁹ and does not follow the early common law rule which destroyed a contingent remainder in land¹¹⁰ when it did not vest in possession, if at all, upon the termination of the preceding freehold estate.¹¹¹ And the Wisconsin courts too have been zealous in protecting the interests of unborn beneficiaries (and by analogy, the interests of living, but unascertained, beneficiaries) by requiring representation of their interests.¹¹² What then is the *underlying* basis for destroying these contingent interests by saying that to do so is not violative of due process?

The strong policy and purpose behind section 231.50 (favoring easier revocation of inter vivos trusts) is clear. It will probably be conceded by all that it is in the public interest to provide for easier termination of inter vivos trusts when unforeseen circumstances present themselves with increasing frequency. To tie up the corpus of a trust which provides for inadequate or no invasion of the principle is to deprive the settlor and income beneficiaries of the full use and potential of the property when it is needed—*now*. The doctrine of virtual representation¹¹³ could not consistently be used because the interests of the settlor or the income beneficiaries in termination would often be adverse to those having a contingent interest in the trust property, and they could therefore not consent for them. The appointment of a guardian *ad litem* or the allowance of the trustee to represent the contingent interests would also be frustrated because such representatives would not be able to consent on behalf of unborn or unascertained beneficiaries where such consent would be adverse to their interests.¹¹⁴

These considerations are to be weighed against the unfairness to the contingent beneficiaries as evidenced by the reliance placed upon these

¹⁰⁷ SIMES & SMITH, FUTURE INTERESTS §§ 152, 154 (2d ed. 1956).

¹⁰⁸ WIS. STAT. § 230.35 (1961).

¹⁰⁹ WIS. STAT. § 230.32 (1961).

¹¹⁰ WIS. STAT. § 230.34 (1961).

¹¹¹ SIMES & SMITH, *op. cit. supra* note 107, § 193.

¹¹² Estate of Evans, 274 Wis. 459, 80 N.W. 2d 408 (1957).

¹¹³ In the case of property subject to contingent interests of unborn or unascertained remaindermen, such interests may be sufficiently represented by living members of the class who are made parties to the action. This doctrine of virtual representation is founded on necessity and the assumption that *identity of interest* will result in adequate protection for absent parties. FREEMAN, JUDGMENTS § 489 (1925).

¹¹⁴ See text accompanying note 74 *supra*.

interests by the contingent beneficiaries (for what is due process except "reasonableness" and a balancing of the interests?). Does the remoteness of these contingent interests, the mere possibility that they may vest, the insignificant pecuniary value they represent while inchoate, outweigh the object to be accomplished by the statute?¹¹⁵

The North Carolina court has recognized this balancing of interests under its statute:

In dealing with such interests the statute is in line with modern trends both in legislation and judicative, and reflects an advanced public policy in providing for readjustments to social and family necessities which supervene before vesting of the interest, of greater importance than the prospect involved in a contingency that may never happen.¹¹⁶

In *Will of Allis*¹¹⁷ the Wisconsin Supreme Court, in holding that subsection (5)(a) of the Uniform Principal and Income Act¹¹⁸ was constitutional although applicable to trusts in existence when the act was passed pursuant to subsection (12), used language that was similar to the language used by the North Carolina and Oklahoma courts in upholding their statutes on revocation of inter vivos trusts.¹¹⁹

In the *Allis* case a stock dividend was paid on stock held by the trustee as part of the corpus. The stock dividend was declared and paid after the effective date of the act. Prior to the passage of the act, such a dividend would have been allocated to income pursuant to the then prevailing judicial rule, thus benefiting the income beneficiary. Due to subsection (5)(a) of the act, however, stock dividends on stock held as part of the corpus would be allocated to principal, thus benefiting the remainderman. The income beneficiary contended that, as to stock dividends received subsequent to the passage of the act by the trustee of a trust existing prior to the passage of the act, subsection (5)(a)

¹¹⁵ Cf. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 at 697, 717, 727 (1960). It is true that in some cases contingent interests are not very remote; in fact, the distinct probability of their vesting in some cases may make them quite valuable. However, the early common law did not accord this probability much weight, for it destroyed contingent interests in some instances for what it considered the greater good of an unbroken chain of seisen. This was the early common law method of clearing up title to land. See text accompanying note 111 *supra*. See also SIMES & SMITH, *op. cit. supra* note 107, § 193. And although the protection of contingent interests has been created by statute, see notes 103, 109, and 110 *supra*, so also may this protection be destroyed by statute before the contingent interest vests. See text accompanying note 103 *supra*. "[W]hatsoever is given by statute may be taken away by statute, except vested rights acquired under it" State *ex rel. Voight v. Hoeflinger*, 31 Wis. 257, 263 (1872). The point being made is that contingent interests are not so inviolate as they may appear to be at first glance.

¹¹⁶ *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 40 S.E. 2d 690, 693 (1946).

¹¹⁷ 6 Wis. 2d 1, 94 N.W. 2d 226 (1959).

¹¹⁸ WIS. STAT. § 231.40 (1961).

¹¹⁹ Notes 5 and 6 *supra*; see text accompanying notes 103 and 104 *supra*.

impaired vested rights of the income beneficiary contrary to the due process clause of the fourteenth amendment to the federal constitution.

In rejecting that contention, the court said:

It is fundamental that the life beneficiary possessed no vested property right in the earnings of a corporation, shares of whose stock constituted part of the portfolio of investments of the trust at the time of the enactment of the Wisconsin Uniform Principal and Income Act, prior to a declaration of a dividend by the board of directors payable therefrom. We consider it to be equally clear that she also has no vested property right in the [judicial] rule with respect to the allocation of corporate stock dividends, which had been established by court decision and was in effect at the time of the death of the testatrix. Therefore, it is our considered judgment that the legislature could change such rule with respect to any stock dividends subsequently declared without violating the due process clause of the Fourteenth amendment.¹²⁰

It is suggested that the principles set forth in the *Allis* case could be applied by analogy to the constitutional question arising under section 231.50 in any future effort to strike the "due process" balance in favor of the purpose to be served by the statute.

A constitutional question also might arise from the point of view of the settlor. Suppose, for example, that prior to 1961 the settlor created an inter vivos trust which was irrevocable under then existing law in order to secure an estate tax advantage. If it be subsequently held that section 231.50 prevents inter vivos trusts from being irrevocable for estate tax purposes under section 2038 of the Internal Revenue Code, the trust corpus would be included in the settlor's estate upon his death.¹²¹ Therefore, section 231.50, by virtue of such a tax ruling, would retroactively eliminate the tax advantage that had been relied upon by the settlor when he purposely created an irrevocable inter vivos trust prior to 1961.¹²²

The constitutional question stripped to its essentials would be whether the unfairness to the settlor as evidenced by his reliance on the pre-existing common law rule in order to gain a tax advantage would outweigh the purpose to be served by the statute.¹²³ (It is to be noted that the question would arise only when the injury occurred—upon the death of the settlor—and the economic loss would be borne by those who shared in the estate.)

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¹²⁰ 6 Wis. 2d at 11-12, 94 N.W. 2d at 232.

¹²¹ For a discussion showing the possibility of such a holding, notwithstanding the *Helmholz* case, see Leary, *supra* note 65, at 332-41. It is worth noting that the retroactive language of the North Carolina statute was repealed, see note 102 *supra*, after publication of an article discussing the tax implications of such a statute. See Lowndes, *Federal Taxation of North Carolina Trusts for Unborn and Unascertained Beneficiaries*, 20 N.C. L. Rev. 278 (1942).

¹²² See note 65 *supra*.

¹²³ Hochman, *supra* note 115, at 727.