Whose Policy Is It Anyway? The Management of Insurance Policies for ILITs

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Lawrence J. Rybka and Frederick V. McNair discuss the fiduciary duty of a trustee in the ownership and management of insurance policies as part of an irrevocable trust.

Synopsis

Life insurance policies held in irrevocable trusts (ILITs) are one of the most common wealth transfer techniques in planning for intergenerational transfers. The primary focus of estate planning practitioners has been the avoidance of incidents of ownership for these policies under Code Secs. 2036 and 2042. In an effort to leave no paper trail between grantor and trustee, creation of ILITs may inadvertently cause a different problem: a trustee who is responsible for selection and configuration of a policy for which he/she has little knowledge of or guidance in its true purpose. In the real world, it is often not clear where the responsibility for the selection and ongoing maintenance of these policies lies. This article will address how the standards set out in the Uniform Prudent Investor Act apply to trust-owned policies and how trustees can enhance the outcome for the trust beneficiaries by proper selection, configuration and management of ILIT policies. By adhering to a clearly defined process, trustees will also be in compliance with a new standard that is developing in this area of the law.

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Editor's Choice

The Life Insurance Policy Held in an Irrevocable Life Insurance Trust (ILIT)

Whose Policy Is It?

Whose policy is it—the grantor's, the trustee's or the beneficiaries'? While the grantor initiates the process of purchasing a policy, in order to avoid inclusion in the estate of the grantor, he or she cannot own the policy. The policy is purchased by the trust for the benefit of beneficiaries named by the grantor in the trust agreement. However, trust beneficiaries do not have physical title nor are they responsible for management of assets held in trust for their benefit. The actual title of the policy is designated in the name of a third-party trustee. The trustee manages all property as a fiduciary for the beneficiaries during the term of the trust.

The benefits of a properly structured ILIT are enormous. By establishing an irrevocable trust, the grantor of the trust creates an important benefit for the family: the exclusion of the proceeds of the policy from the estate.[1] Thus, the principal and any appreciation can pass to the grantor's family without incurring estate tax.[2] However, the tradeoff is that the grantor can have no ongoing control of the assets held in trust. This creates a series of practical real world problems. How will the policy be selected, configured and ultimately managed throughout the lifetime of the grantor?

Duties of the Trustee

In order to avoid inclusion in the grantor's estate, the irrevocable trust must be separate from the control of the grantor and the grantor must have no incidents of ownership under Code Sec. 2042. Case law holds that the grantor cannot serve as trustee where he or she is also the insured.[3] There is also the practical issue of management of a life insurance policy during and after the grantor's death. Thus a corporate trustee, friend or relative of the grantor is selected to serve as trustee.

The trustee of an irrevocable trust is under the same fiduciary obligations and duties as the trustee of any trust.[4] He or she serves to protect the interests of the beneficiaries of the trust and to manage the assets of the trust for their benefit. Dating back to the Common Law in England, case law held that the trustee must adhere to a very high standard of care in the selection and management of these assets.[5] The legal standard of that duty was known as the Prudent Man Standard.[6] The trustee must exercise his or her duties for the benefit of the trust beneficiaries in all areas, including the selection and management of all trust assets, including life insurance policies. This duty has been modified somewhat under the Uniform Prudent Investor Act of 1994 (UPI); however, the overarching standard continues to be prudence. The new standards allow the trustee to delegate some investment responsibility to professional advisors and impose a duty on the trustee to prudently select and monitor the advisor. If adopted by the state, the new standards generally apply not only to new trusts but to all actions taken by trustees in existing trusts after the date of adoption in the state.[7] In some instances, the new standards apply unless specific language in the trust agreement precludes adherence to the standard.

> Establishing a planning horizon is critical to making an informed decision for any type of investment, including life insurance.

The Problem

Cash value life insurance represents a complex financial instrument. For a life insurance policy to perform properly, there must be special attention paid to its design and selection pre-implementation, as well as the ongoing maintenance of the policy post-implementation. The necessary disconnection between the funding of the policy by the grantor and the actual ownership of the policy by the trustee greatly complicates this process. The grantor is making decisions on trust funding while the trustee is responsible for actual policy management issues. Even if this separation did not exist, the complex mechanics of how a policy functions are mysterious to all but those who delight in understanding the multifaceted actuarial assumptions that go into a policy's construction. Failure to properly select, configure and manage ILIT policies can result in the loss or reduction of coverage, thus depriving trust beneficiaries of their anticipated benefit. The well-publicized failure of whole life policies implemented in the early 1980s to meet projections in the mid-90s was more the result of underperformance of underlying financial instruments than

insurance companies purposely deceiving policyholders.[8] The fact that consumers received lower mortgage rates and businesses incurred lower finance costs on corporate bonds had a flip side. Insurance companies purchased these same instruments to support their general account (whole life/universal life) products. Falling interest rates were passed through to policyholders, and these lower rates ultimately impacted premiums that did not vanish.

Trustees discovered, much to their dismay, that they were caught between a rock and a hard place. Going forward, trustees must give greater attention to how the policies they manage are selected, the assumptions that are used in their construction and the actual systematic monitoring of the policies once purchased. This article explores how trustees can work with grantors and their insurance advisors to create a process that assures the life insurance policy will accomplish what it was intended to do: mature at the death of the grantor. How, then, can trustees adequately discharge their obligation to select and manage this complex financial instrument?

The Challenge for Trustees

A clear vision of the grantor's objective in establishing the trust is a good starting point for the trustee. The trustee should understand how this trust strategically fits into the overall estate plan. More specifically, the trustee should understand how the cash value accumulation and the policy death benefit, through trust ownership, are intended to fulfill the interests of the trust beneficiaries. Typically, policies held in ILITs are used to provide liquidity for transfer taxes, redeem a business interest, replace lifetime gifts of assets or for estate equalization where one or more assets are not easily divided between beneficiaries. In any case, the advisory team should be clear about the specific purpose and time horizon for the policy purchased by the trust.

In a book on the subject, John Train and Thomas A. Melfe[9] outline how trustees can effectively discharge their duties. Proper understanding of the standard used to evaluate the trustee's performance is based on three fundamental principles:

1. Identify the standard used to measure "care" that a fiduciary must demonstrate in selecting and managing assets.
2. Apply this standard to insurance policies held in trust.
3. Create a detailed process that complies with the standard and assures that appropriate procedures are in place to select, configure and manage trust-owned life insurance policies.

What Is the Standard?

We established earlier that the trustee is acting as a fiduciary. "A Fiduciary is under a duty to the beneficiaries to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if a trustee has or procures his appointment as trustee by representing that he has greater skill than that of an ordinary person, he is under a duty to exercise such a skill."[10] A breach of this duty may subject the trustee to liability for loss to the principal of the trust even if they acted in good faith.[11]

For hundreds of years, dating back to the Norman Conquest, the standard of care for a fiduciary has been the "Prudent Man Standard," which revolved around the question, "What would a prudent man do in the management of trust assets?" Naturally, the Common Law developed this standard in an era when real property was the primary asset held in trust. The notion of preserving the property's value for future generations was paramount. Thus, as trust law developed in the United States, a corollary to the Common Law was the preservation of principal. In the late 1800s and early part of the 21st century, a body of case law evolved that held a trustee liable if loss of principal resulted from a trustee's breach of duty of prudent investment.[12] As a result, the focus of the Prudent Man Standard became the avoidance of risk in trust investments. A trustee would be deemed to have met his or her fiduciary duty by selecting "safe assets" with low volatility that emphasized preservation of principal. Interestingly, this standard has a close correlation to characteristics of general account life policies, the only type of cash value product available through the late 1970s.

While the Prudent Man Standard promoted the preservation of principal, it ignored two significant risks to trust assets. First, the focus on principal ignored *inflation risk.* A trust established in 1950 with a $50,000 corpus represents the equivalent of $368,774 in today's inflation-adjusted dol-

lars.[13] So a trustee who adhered to a preservation of this principal strategy for 50 years without appreciation would inherently harm the beneficiaries. Why? Because the income yield from $50,000 today will buy significantly less than it did in 1950.

The second significant deficiency of the Prudent Man Standard was the exclusive focus on *preservation of principal.* This strategy eliminated most assets that offer the best long-term potential for appreciation. Beneficiaries were harmed under this standard because it caused the trustee to focus on short-term value, not long-term results. Though principal was preserved, the tradeoff was a significantly lower portfolio value over the lifetime of the beneficiaries. Thus, using the example of the $50,000 portfolio invested in certificates of deposits in 1950, the trustee could at any point demonstrate preservation of principal. However, if the same amount were invested in the S&P 500, it would have grown to $26,782,569 rather than $1,018,038. Against this background, and especially in light of the high inflation of the 1970s and 80s, judges and legislators completely refashioned trust law. In 1992, the American Law Institute published the RESTATEMENT (THIRD) OF TRUSTS and significantly altered the standards by which trustees are judged.[14] The National Conference of Commissioners on State Laws adopted this new standard now known as "The Prudent Investor Rule." It has now been adopted into law by approximately 40 states. Even in those states that have not yet formally adopted the Uniform Prudent Investor Rule (UPI), there exists strong precedent requiring trustees to balance the need for principal preservation with that of long-term appreciation.

The Standard of Trustees: The Uniform Prudent Investor (UPI)

The UPI requires that a trustee acting in his or her fiduciary capacity demonstrate a process for selecting and managing all assets held in the trust. The trustee can no longer exonerate him or herself by merely demonstrating maintenance of principal. The trustee must not only follow the dictates of the trust instrument itself, but also balance the need to preserve principal with the maximization of appreciation and income. In short, the UPI endorses the work of noted economist Harry Markowitz.[15] The UPI recognized the direct trade-off between short-term preservation of principal and long-term returns. Academic research has consistently demonstrated that a conservative bond portfolio would lose 500 basis points over longer periods.[16] Thus, courts in UPI jurisdictions have consistently found that trustees can be liable for failing to observe the standards of UPI, even though they maintained principal.[17] The UPI is focused on process. It is based on five principles enumerated by the American Law Institute in its THIRD RESTATEMENT:

1. diversification of assets;
2. duty of trustee to analyze and make conscious decisions, balancing risk and return appropriate to the purpose of the trust;
3. avoidance of expenses that are not justified by the purpose of the trust;
4. conscious effort to balance the needs of income beneficiaries versus remaindermen; and
5. duty and authority to delegate where outside expertise is needed.[18]

The UPI Applied to Trust-Owned Life Insurance (TOLI)

The trustee must understand and adhere to those fundamental issues that address the essence of his/her fiduciary duties.

Fundamental Questions

For what purpose is the insurance being purchased? Is it to provide liquidity for transfer taxes? If so, in looking at the second element of the test, the purpose of an irrevocable life insurance trust is generally to provide a designated sum of money, at any given time, simultaneous to the insured's death.

What are the anticipated needs of the beneficiaries? ILITs are a unique form of trust because of their long-term focus. Most other trusts must carefully balance the needs of a current income beneficiary with the long-term need of remainder men. However, the ILIT is almost exclusively focused on a long-term liquidity need. Thus, the fourth part of the test in the RESTATEMENT (THIRD) OF TRUSTS is not relevant. Other than the requirement for short-term liquidity created by withdrawal rights, the trustee can focus on long-term performance without the need to provide income in the short term. This translates into a policy design that seeks to maximize the death benefit at life expectancy (single or joint). If there are other needs defined by the trust, these should be quantified as well. For example, if the trust is also required to repay a loan resulting from a split-dollar agreement, this will impact design and funding of the life insurance.

What is the time horizon that the trustee is confronting? At the core of the Uniform Prudent Investors Act of 1994 is an obligation to understand the unique circumstances of the trust and its distribution requirements.[19] If the trustee is trying to match a policy that correlates with transfer taxes, the time horizon may be the joint life expectancy of both a husband and wife. In most plans, the need for liquidity is most acute at the second death because estate taxes are deferred through the unlimited marital deduction. The health of the insureds will impact both the time horizon and the feasibility of insurance as a funding vehicle. Establishing a planning horizon is critical to making an informed decision for any type of investment, including life insurance. For example, if the death benefit need is short-term, the trustee will most likely buy term insurance.

What funds will be required by the trustee to fund the trust? For the trustee to make an informed decision on how to best meet the needs of the beneficiaries, he must formulate a funding strategy over the anticipated life of the trust. How regular and predictable will the gifts to the trust be? What will happen to gifts at the death of one of the insureds, especially if this insured is the primary source of income?

What macro-economic assumptions should be made about fixed income and equity returns? For the trustee to make informed decisions about investment in any asset, including life insurance, there should be general agreement with regard to the assumed yield of fixed and equity instruments over specific time horizons. Interest rate or investment rate yields will ultimately impact any policy purchased by the trustee.[20]

Translating UPI into Appropriate Policy Design

Type of Death Benefit

The two primary types of policies used in the wealth transfer market are individual life and second-to-die or survivorship life. The first type pays a death benefit at the death of the insured. The second insures two lives and pays a death benefit only upon the occurrence of the second death. Survivorship life is most common in estate planning situations, but if the estate plan provides that taxes be paid at the first death, or if specific requests are earmarked for children from a first marriage, or for other siblings, *etc.*, individual coverage may be appropriate. The trustee should match the timing for liquidity with the timing for the death benefit.

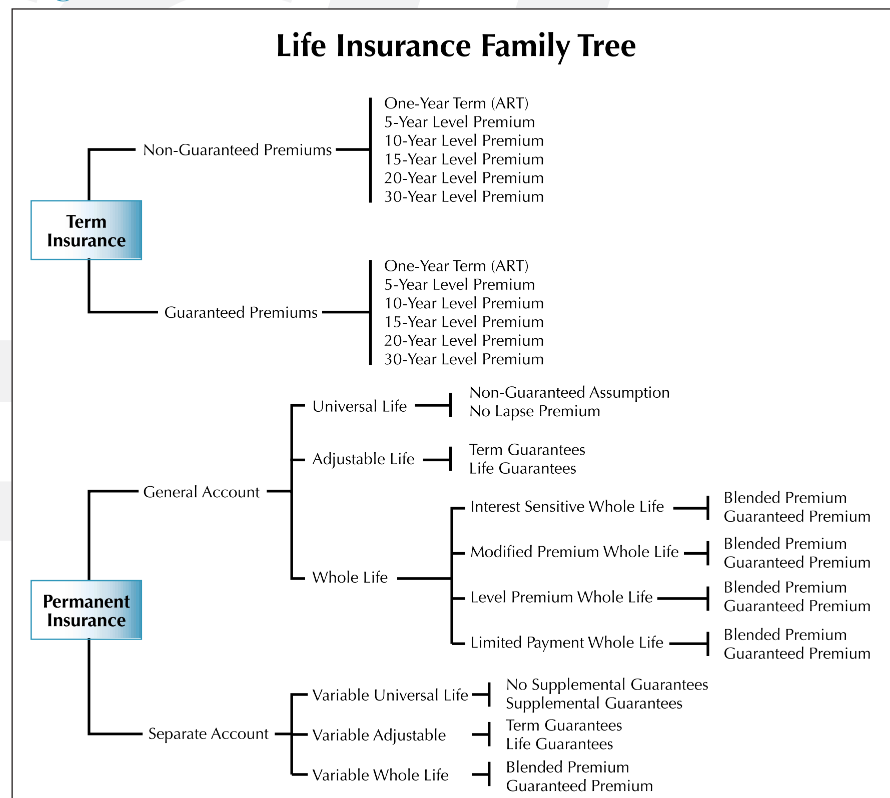
Insurance Product

There is a panoply of insurance products and policies available today. Every insurance company seeks to differentiate its product lineup with unique features (*see* Diagram 1). However, three fundamental questions will aid the trustee in the selection process.

1. Is the need for protection short- or long-term? Short-term needs, such as estate tax exposure from a QPRT reverting to the estate, may be best covered by term insurance. Long-term needs are best covered by policies offering lifetime protection.

2. Does the policy allow the trustee to allocate a significant part of the cash values to equities? The life insurance product world is divided into two basic kinds of insurance: general account products and separate account products. General account products leave the control of investments to the insur-

Diagram 1



ance company and are primarily invested in high quality corporate bonds and commercial mortgages. The cash value *is subject to* creditors of the insurance company in the event of an insolvency.

Separate account insurance products, by contrast, are regulated by the Securities and Exchange Commission and deemed to be securities. These products give the policyholder choice within the policy as to where to invest the cash value and future premiums. Unlike general account products, the policyholder can invest in U.S. and international equities, as well as traditional fixed income, bond and mortgage investments. The cash value of separate account products *is not subject to* creditors of the insurance company in the event of a company's insolvency. The trustee should document a process of selecting the type of product that is consistent with Section 2 of the Uniform Prudent Investor Act of 1994.

3. What are the contractual guarantees? Ultimate policy performance is a function of the underlying assets that the policy holds. While neither UPI nor the THIRD RESTATEMENT address life insurance and its attributes, guarantees are a vitally important characteristic of a life insurance product. Guarantees depend on the type of policy selected and the level of funding available to the trustee. The most important of these guarantees is a contractual assurance of a death benefit when premiums are paid, regardless of cash value performance. A practical method of measuring this guarantee is for the trustee to hold premium constant and determine what level of death benefit is guaranteed for a given level of premium payment. Under this test, there exists a very wide disparity between types of policies. Some may provide a five-year guarantee, while others at the same premium may provide guarantees beyond age 100.

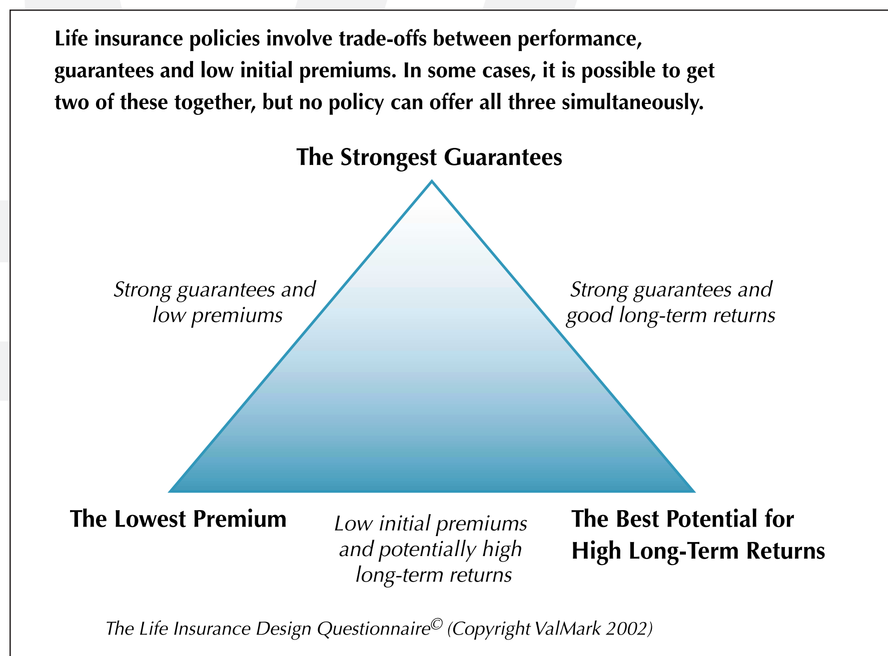
With these questions addressed, the trustee is better positioned to make an evaluation that is required as a fiduciary. Just as in the selection of investments, his analysis will involve tradeoffs of risk versus return. The enclosed model can be helpful in discussing with the grantor which type of policy would best meet the needs of the beneficiaries (*see* Diagram 2, which highlights inherent tradeoffs in insurance policy design between death benefit guarantees, a low initial premium and the potential for higher returns from equities). The trustee should discuss with the grantor and his advisors which two of these three attributes meet the needs of the trust beneficiaries and the overall estate plan.

Configuration and Policy Assumptions

Careful analysis of insurance carrier products can only occur once the appropriate levels of death benefit and policy type have been selected. Failure to first establish the appropriate type of policy is almost certain to create confusion. For example, comparing a whole life policy and a variable universal life product is the equivalent of comparing a Lincoln Town Car and a Corvette. The body responsible for regulating the activities of those involved in the sale of securities, The National Association of Securities Dealers (NASD), prohibits the direct comparison of different types of insurance products, other than term insurance, as illegal conduct, because these comparisons are inherently misleading.[21] It should be noted that any insurance professional not licensed to offer both types of products is unable to assist the trustee in an informed and objective manner. The trustee should make sure that the insurance professional warrants in writing that all policies compared are of the same type. Comparison criteria to consider includes:

- the understanding that the policy is funding for a permanent insurance need;

Diagram 2



The Life Insurance Design Questionnaire© (Copyright ValMark 2002)

- whether the insurance product is a general account or separate account product; and
- the assurance that the product provides a certain level of guarantee, *i.e.*, a guaranteed death benefit to joint age 100.

All policy comparisons should be evaluated with minimum criteria and a common set of assumptions. These may include:

Financial Strength. What is the minimum criterion for inclusion? This can be quantified with ratings from the major ratings agencies. The trustee may want to consider companies with an A+ or better from A.M. Best and an AA rating and above from Moody's or S&P. Ratings are important for all policy types, but are even more important with the consideration of a general account product.

Conservative Interest Rate or Investment Rate Assumptions. A trustee must be very cautious when examining policy illustrations. Control of these assumptions becomes the most important variable in policy evaluation. Actual policy performance will be reflected by interest or investment return credited to policy cash values as a result of its underlying instruments. Current interest crediting rates are generally in effect for the first policy year only, so credible, uniform assumptions should be made for all policies of the same type. The key question is, "Are rates illustrated in the policy uniform and consistent with the anticipated economic environment?" Here, a strong measure of conservatism is prudent. For example, if a separate account product is selected and a mean 11-percent total return has been historically earned by this asset allocation, the trustee may want to require configuration of an illustration that reflects an eight-percent total return to keep the policy in force through a designated age (90–100). This more conservative assumption would then be the basis for evaluating all variable policies. The policies can be evaluated at both total return rates. Earnings in excess of eight percent will then project either increasing death benefits or reducing future premium levels.

Historical Data on Selected Policy Type. How long a history has the company had with this policy type? What is the experience of existing policyholders? Different companies excel with different policy types. For example, First Colony Life has long been considered a market maker in term insurance. Equitable Life was an early pioneer with separate account products. Ten or more years of experience with a given product type and sufficient market share to assure that the company is committed to the product are minimum considerations.

Underwriting Classification. The only viable mechanism for reducing the cost of insurance coverage is having policyholders classified in a favorable underwriting category. This results in a lower cost of insurance being assessed on a continual basis. The underwriting process is still very much an art. Therefore, how various companies classify an insured has a significant impact on how much the insurer charges for insurance. For example, if one insurer classifies a 60-year-old insured as a preferred risk, the initial cost per million of insurance would be $17,695. While a different insurer may view the same individual as a table B substandard risk, the cost of insurance would be $29,692. In situations where significant health insurance issues manifest when applying for a large face amount of insurance, a skilled, independent insurance professional is best equipped to work with the trustee and the insured by underwriting through multiple insurance carriers to obtain the most favorable classification.

Diversification

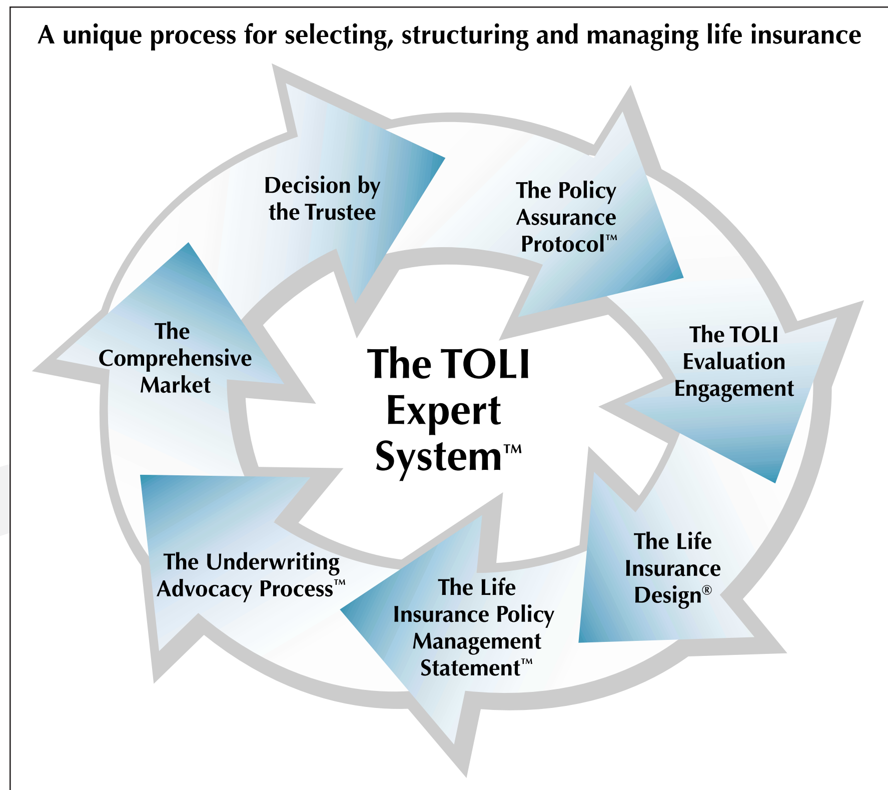
The UPI requires trustees to diversify investments in the trust unless they can demonstrate compelling reasons not to do so.[22] When this standard is applied to the purchase of life insurance, there is a demonstrable advantage of having considered more than one life insurance carrier in the selection process. Multiple policies decrease the risk that the total death benefits will be adversely impacted by the insolvency of a single insurer. Multiple policies also decrease the risk that a given carrier may arbitrarily increase costs of insurance and/or decrease the crediting rates it applies to its general account products. With separate account products (variable life), there is an argument that these products do not need to be diversified because the differentiation of subaccounts inside the product provide diversification. While this does alleviate much of the performance risk, it does not address how the policy would function if the insurer became insolvent. Separate account products afford additional levels of protection for cash values because they are *not* assets of the insurer. However, financial trouble or failure within a company may result in the company increasing costs of insurance in

the policy (most of the other elements in a separate account product are restricted in the prospectus). A downside of multiple polices are small policy charges or price breaks offered at face amounts over $1 million of death benefit. Therefore, in most circumstances involving more than $3 million to $5 million of death benefit, the trustee should consider diversifying coverage between two to three carriers, all meeting the selection criteria. A notable exception would be where one carrier clearly offers a better underwriting classification or better guarantees than the others.

A Documented Process for Selecting, Configuring and Managing Policies

There are several major changes for trustees under the UPI that require the trustee to rethink the nature of the services offered to the ILIT. The first is that the trustee is not liable for unfavorable results as long as he or she can point to a documented process demonstrating consideration of the aforementioned issues and careful decision making based on the facts.[23] The revisions in the UPI recognize that the old "Prudent Man" system placed too much emphasis on safety of principal and ignored its potential growth. Therefore, the issue of trustee liability will not turn on results, but instead on whether the trustee acted prudently in conformance with accepted investment practices and this prudence in investment and monitoring must be documented.

Diagram 3



The documentation will note that the trustee exercised care and had a process that considered the individual circumstances of this trust. Secondly, the UPI changed the notion that a trustee could not delegate his or her duty as a trustee.[24] The UPI delegation is encouraged and supported if the trustee lacks expertise in this area. The UPI only required this delegation to persons of competence and that it continue to be monitored by the trustee. In working with trustees who have special expertise in this area, we have created a seven-step process to aid the grantor and trustee called the TOLI Expert System™. (*See* Diagram 3.) I will highlight five of the steps that may be common to any selection of trust-owned life insurance (TOLI).

Step 1: Quantify the Desired Result. The first phase of the engagement establishes the purpose for the insurance, time horizon and needs of the beneficiaries, anticipated funding and the macro-economic assumptions.[25]

Step 2: Select Policy Type and Create Specifications. With these broad parameters established, the grantor could then create guidelines for the trustee to aid in the selection, configuration and management of the policy or policies. These parameters become minimum specifications that can be used to select the appropriate type of policy and then compare policies of the same type. At ValMark Securities, we use a document called The Life Insurance Design Questionnaire® to memorialize and quantify this process. It provides a discussion for the policy selection and policy configuration assumptions.

Step 3: Produce Written Policy Guidelines for the Trustee. With data from the Life Insurance Design Questionnaire®, we then

incorporate these guidelines into an expanded set of instructions to help the trustee make all of the decisions required in the acquisition and maintaince of the insurance. For those in the investment business, they will recognize this document as being akin to an investment policy statement for managing assets. In our practice, we call this statement, The Life Insurance Policy Management Statement™. These instructions also help the grantor address beforehand how any shortfall in policy performance will be reflected in the management of the policy(s). For example, if dividends on a whole life policy were lower than originally projected, the grantor might indicate a preference for a reduced paid-up policy as opposed to continuing the premiums for additional years.

Step 4: Market Search. Only after these criteria are established is a market search undertaken. The trustee is comparing policies of the appropriate type under similar assumptions using the screens created in the Life Insurance Policy Management Statement™. It is also helpful if actual carrier underwriting approvals are secured so that the trustee can consider actual policies that can be issued on the insured as opposed to hypothetical illustrations.

Step 5: Written Service Agreement. Given that the UPI allows delegation of some duties, it makes sense that the trustee obtain a written service contract with a skilled agent who will service the selected[26] policies post-implementation. Here, it is helpful to be specific about the role of each member of the estate planning team and their ongoing responsibility. The insurance agent should be specific about the type and frequency of the reports. In evaluating who can best perform these duties, the trustee may want to request samples of the reports they can expect on a continuing basis. Other considerations may include:

- Spell out specific duties of trustee, insurance professional and investment advisor.
- Clarify how often the policies should be reviewed and by whom. This should include provisions for rebalancing sub-accounts, review of sub-account performance and new options in the policy.
- If significant events occur, such as the death of one of the insureds, divorce, change in tax law, significant market corrections or change in company ratings, extra care should be given by the trustee to ascertain the impact on the trust and its beneficiaries.
- Ensure that the insurance professional is licensed to offer all types of products in the state where the trust is located. This will necessitate that the agent have both securities and insurance licenses.

Conclusion

There is significant opportunity to improve the results of using trust-owned life insurance in the estate plan. The winners in an evolving trust-owned life insurance market will be those trustees and insurance professionals who adopt these new procedures to meet UPI standards and apply these processes to reflect the services (pre- and post-implementation) required for today's more complex insurance products. Trustees and advisors will need to adapt the process of selecting and managing trust-owned life insurance to fit the new products and standards. A properly implemented process for the irrevocable trust will protect both beneficiaries and trustees by giving enhanced guidance in selecting and managing life insurance policies. Grantors and beneficiaries will benefit from a more thoughtful process in the consideration of the purchase of life insurance. Insurance professionals and investment advisors will be able to demonstrate expertise and bring new value to all parties by facilitating the process of creating an Investment/Insurance Policy Statement for their client's irrevocable trust as standard operating procedure.

ENDNOTES

1 Frederick K. Hoops, Family Estate Planning Guide (3d ed. 1982), at 231.

2 *Id.*, at 232.

3 *C.M. Rose*, CA-5, 75-1 ustc ¶13,063, 511 F2d 259; *G.G. Terriberry Est.*, CA-5, 75-2 ustc ¶13,088, 517 F2d 286; *supra* note 1, at 232.

4 *Gurnett v. Mutual Life Ins. Co.*, 356 Ill. 612, 191 NE 250 (1934).

5 Austin Wakeman Scott, The Law of Trusts §228 (3d ed. 1967), at 1855.

6 American Law Institute, Restatement (second) of Trusts §174 (1957).

7 Uniform Prudent Investor Act of 1994, §11.

8 Joseph B. Treaster, *A Tale of Unraveled Fortune*, New York Times, May 25, 1997, at 3-1.

9 John Train and Thomas A. Melfe, Investing and Managing Trusts under the New Prudent Investor Rule (1999).

10 *Supra* note 6.

11 *Id.*, at 13.

12 *Harvard College v. Amory*, 26 Mass. 446, 9 Pick. 446 (1831).

13 Roger G. Ibbotson and Rex A. Sinquefield, Stocks, Bonds, Bills and Inflation: The Past and the Future (1982).

14 American Law Institute, Restatement (Third) of Trusts (1992).

15 Harry M. Markowitz, *Portfolio Selection*, J.

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FINANCE, Mar. 1952, at 77.

[16] *Supra* note 13.

[17] Dominic J. Campisi, *The Perils of Prosperity: What Goes Up Will Likely Result in a Surcharge*, Heckerling Institute (2001).

[18] *Supra* note 14, at §227.

[19] *Supra* note 7, at §2(a).

[20] *Supra* note 7, at §2(c).

[21] NASD Conduct Rule 2210 and IM-2210-2(b)(5)(c).

[22] *Supra* note 14, at §227(b); *supra* note 7, at §3.

[23] *Supra* note 9, at 36.

[24] *Supra* note 7, at §9.

[25] *See* "Fundamental Questions" section of this article.

[26] *Supra* note 7, at §9.

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