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Insurance—Contract to Assign Policy

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The dissent in the instant case, replying both on prior decisions³⁴ and the "clean hands" doctrine, bitterly attacked the value of the testimony of a twelve year old in a matter of this sort. Although this position is better founded in strict legal principles, the majority has probably made a more practical compromise with reality. To uphold the agreement would then have forced the court to admit its unenforceability. However harsh the decision may have been on these parties, in fact no more could have been granted the husband by any decision. The legal denouncing of these agreements as unenforceable would have the effect of wreaking havoc upon a fundamental principle behind innumerable mixed marriages,³⁵ without any legal benefit.

INSURANCE

Contract to Assign Policy

In New York every contract to assign or assignment of a life insurance policy, or promise to name a beneficiary of any such policy, is void unless in writing and subscribed by the party to be charged.¹ In *Katzman v. Aetna Life Ins. Co.*,² plaintiff, wife of deceased insured, alleged that she and her husband orally agreed that he should take out a policy on his life, naming her as beneficiary. This he did, and then delivered the policy to her. She alleged also that deceased surreptitiously took the policy from plaintiff's possession and made his sister beneficiary. Plaintiff claimed that she was entitled to the life insurance proceeds as the beneficiary under a constructive trust which she desired to be placed upon the proceeds. The Court, reversing the order of the Appellate Division,³ held, that the action was not barred by the Statute of Frauds;⁴ a constructive trust could be imposed if plaintiff proved the facts alleged.

Plaintiff in this case paid at least a substantial part of the premiums each year, paid the burial expenses and had in large part supported her husband for several years during his illness. The majority believed that, assuming the facts

34. The cases relied upon by the dissent, *Bunim v. Bunim*, 298 N. Y. 391, 83 N. E. 2d 848 (1949), and *Weinberger v. Van Hessen*, 260 N. Y. 294, 183 N. E. 429 (1932), are actually somewhat distant from the issues, and themselves rely on rather unstable authority. However, they do constitute at least some precedent, whereas there is no direct precedent available in this state for the majority ruling.

35. Although dispensation for mixed marriages by Catholics is left to the individual Bishops, *Codex Juris Canonici* (1918) Canons 1040, almost all dioceses require such antenuptial agreements.

1. N. Y. PERSONAL PROPERTY LAW §31, subd. 9 (Statute of Frauds).

2. 309 N. Y. 197, 128 N. E. 2d 307 (1955).

3. 285 App. Div. 446, 137 N. Y. S. 2d 583 (1st Dep't 1955), in which court granted summary judgment to defendant, and dismissed the complaint.

4. Note 1, *supra*,

alleged by plaintiff to be proven, there was a valid assignment of the policy to plaintiff by means of delivery; consequently, deceased insured had lost the right⁵ to change the beneficiary, and therefore a constructive trust should be imposed on the proceeds. The legislature in amending section 31 of the Personal Property Law,⁶ did not intend to abrogate the well established doctrine applicable to express

The dissenting opinion claimed that the statute⁸ was passed to avoid any such parol trusts.⁷

assignments as this, and that the constructive trust doctrine could not be used to overcome the statute. In the cases cited by the dissent the circumstances did not warrant consideration of a constructive trust.⁹ It does not seem so patent that the legislature intended to do away with the constructive trust doctrine by the amendment of section 31 where the facts alleged indicate some confidential relationship together with other equitable considerations, and are sufficiently proven. The abolition of such an old, commonly used common law doctrine would seemingly have been more explicit.

Appraisal Provisions Not Enforceable

Insured applied for an order pursuant to section 1450 of the New York Civil Practice Act¹⁰ to compel insurers to comply with a provision for appraisal contained in a fire insurance policy. The trial court granted the order to proceed to appraisal; this was reversed by the Appellate Division.¹¹ The Court of Appeals

5. The policy reserved to insured the right to change the beneficiary provisions at any time. In *Bernstein v. Prudential Ins. Co. of America*, 204 Misc. 775, 124 N. Y. S. 2d 624 (1953), the Court held that insured, after naming a beneficiary and delivering a policy to her, had lost the right to change the beneficiary. The first named had by the delivery become the owner; her consent was necessary. The same result was reached in *John Hancock Mut. Life Ins. Co. v. Sandrissor*, 95 N. Y. S. 2d 399 (1950).

6. Amended in 1943 to add subd. 9, pertaining to the assignment of policies and the agreement to name a beneficiary.

7. In *Blanco v. Velez*, 295 N. Y. 224, 66 N. E. 2d 171 (1946), the court held that it was not within the purview of §31, subd. 9. Here a constructive trust was imposed on proceeds of a policy in which one of several sisters was named as beneficiary. The sisters had orally agreed to pay the premiums and to share the proceeds, even though only one sister was named as beneficiary. See also, *Foreman v. Foreman*, 251 N. Y. 237, 167 N. E. 428 (1929).

8. Note 1, *supra*.

9. In *Goldberg v. Colonial Life Ins. Co. of Am.*, 284 App. Div. 678, 134 N. Y. S. 2d 865 (2d Dep't. 1954), the agreement was between agent and insured. There was no confidential relationship on which to impose a constructive trust. In *In re Keeler's Estate*, 186 Misc. 20, 53 N. Y. Supp. 61 (1954), the oral agreement was ante-nuptial and was never executed. In *Fischer v. N. Y. Savings Bank*, 281 App. Div. 747, 118 N. Y. S. 2d 742 (1st Dep't. 1953), deceased orally agreed to name a creditor as beneficiary. *Held*: there being no delivery and no confidential relationship, the actually named beneficiary takes the proceeds.

10. This section provides for court enforcement of arbitration agreements.

11. *In re Delmar Box Co.*, 285 App. Div. 398, 137 N. Y. S. 2d 491 (3rd Dep't 1955).