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Life Insurance—Passage of Property Under New Option Held Violative of Statute of Wills

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of intelligently pleading guilty. *Bute v. Illinois, supra;* (f) where the issues were not so complex and the defendant was of ordinary intelligence, capable of caring for his own interests. *Betts v. Brady, supra.*

Elements which the Court has examined carefully and relied on in finding whether absence of counsel permitted an unfair trial can be categorized as follows: (1) the gravity of the crime, (2) the age and education of the defendant, (3) the conduct of the court or prosecuting officials and (4) the complicated nature of the charge and its possible defenses. In the instant case, the crime was one of gravity as is illustrated by a sentence of thirty years imprisonment; petitioner was a youth of twenty-one when convicted; the prosecution used deception by informing the defendant that he was pleading guilty to breaking and entering and not to robbery, and the differences between breaking and entering and robbery are not easily understood by even the average layman. See *Rice v. Olson,* 324 U. S. 786 (1945). These facts show sufficient "special circumstances" to require that the defendant be assisted by counsel or at least informed of his rights to such assistance. The additional fact of the defendant's general mental deficiency adds considerable weight to the Court's decision that the petitioner has been denied his liberty without due process of law.

Richard M. English

LIFE INSURANCE—PASSAGE OF PROPERTY UNDER NEW OPTION HELD VIOLATIVE OF STATUTE OF WILLS

In 1925, the defendant company issued a life insurance policy to Arthur Corlies, who died in 1941. The proceeds of the policy were payable to his daughter Barbara. She elected the interest-option, (under which the insurer retained the funds, paying a guaranteed rate of interest to the beneficiary, who had the right to make withdrawals from the principal sum at any time, and in any amount). Instead of the annual interest payments as prescribed in the 1925 form, Barbara desired quarterly interest payments in accordance with the current practice. At this time, plaintiff was the husband of Barbara, and was named contingent payee under the "supplementary policy of insurance" issued by the company in compliance with the beneficiary's request; plaintiff to take any amount of the principal sum remaining at Barbara's death. Barbara and the plaintiff were subsequently divorced, and Barbara remarried. Upon Barbara's death, plaintiff brought an action for the proceeds of the policy. Decedent's executors, who were impleaded by the defendant, moved for a dismissal of plaintiff's complaint, and for a summary judgment. In granting impleaded defendant's motion, the Court held that the beneficiary's request for quarterly, instead of annual interest payments constituted a counter-offer, which defendant's acceptance ripened into a new contract uncon-

nected with the original policy of insurance. The new contract no longer being one of insurance, the plaintiff was not entitled to the proceeds, because the new agreement amounted to an attempted testamentary disposition, invalid as not complying with the requirements of §21 of the Decedent Estate Law. *Hall v. Mutual Life Ins. Co. of New York et al.*, ———Misc.———, 109 N. Y. S. 2d 646 (Co. Ct. 1952).

Many attempts have been made to devise an acceptable substitute for a will, and thus circumvent the necessity for probate and administration, with the expenses and taxes incident thereto. See 82 U. of Pa. L. Rev. 384 (1934). Placing the property to be disposed of in trust has long been established as one such method, *In re Totten*, 179 N. Y. 112, 71 N. E. 748 (1904), and for this reason, much argument has been advanced that in this situation, the insurer and beneficiary stand as trustee and cestui que trust. Robbins, *Vested Interest of a Beneficiary Under a Policy of Life Insurance*, 53 Cent. L. J. 184 (1901). See also, *Deferred Settlements in Life Insurance: "Trusts" or "Debts,"* 36 Yale L. J. 394, 396 (1926). However, since the insurance company does not segregate a particular fund for a particular beneficiary, the situation lacks the essential element of a valid trust—an identifiable trust *res. Gough v. Satterlee*, 32 App. Div. 33, 52 N. Y. Supp. 492, 497 (2d Dept. 1898). 1 Bogert, Trusts And Trustees, §111 (rev. ed. 1951). Thus in New York the resultant relationship has been settled to be one of debtor-creditor, and not trustee-cestui que trust. *Noyes v. First Nat'l. Bank of N. Y.*, 180 App Div. 162, 167 N. Y. Supp. 288 (1st Dept. 1917), *aff'd.* 224 N. Y. 542, 120 N. E. 870 (1918). *Erb v. Banco Di Napoli*, 243 N. Y. 45, 152 N. E. 460 (1926). See also, Restatement, Trusts §12(h) (1935); 1948 Supp., §12 (gg). 1 Scott, Trusts, pp. 87, 93, 94 (1939).

Passage of property via life insurance policies has also been held to constitute a proper non-testamentary disposition, since, as in a valid trust, a (contractual) right is vested in the recipient *inter vivos*. Atkinson, Wills, pp. 124-6 (1937). Given a similar *inter vivos* divestment by the donor, contracts though not identifiable with ones of insurance have been upheld as valid substitutes for wills. Atkinson, *supra*, p. 150. The test as to whether the instrument is a valid contract or an attempted testamentary disposition lies in an examination of the donor's intent. *Earl v. Peck*, 64 N. Y. 596 (1876). *McCarthy v. Pieret*, 281 N. Y. 407, 24 N. E. 2d 102 (1939). If the intent is to confer an immediate, fixed right upon the beneficiary, it is a valid contract, and the rules governing testamentary dispositions will not apply. *Matter of Tilley's Estate*, 166 App. Div. 240, 151 N. Y. Supp. 79 (3d Dept. 1915). *Chase Nat'l. Bank v. Manufac. Trust Co.*, 265 App. Div. 406, 408, 39 N. Y. S. 2d 370 (1st Dept. 1943). *Matter of Fairburn*, 265 App. Div. 431, 433, 40 N. Y. S. 2d 280 (4th Dept. 1943). Therefore, the fact that the "supplementary contract" in the instant case was held not to be one of insurance does not, *ipso facto*, render it invalid. The plaintiff in the instant

case acquired a fixed, "vested" right upon the formulation of the contract, since the beneficiary could not add or change the contingent payees. *Mutual Ben. Ins. Co. v. Ellis,* 125 F. 2d 127, 131 (2d Cir. 1942). *In re Deyo's Estate,* 180 Misc. 32, 42 N. Y. S. 2d 379, 388 (Surr. Ct. 1943). When such a present interest is transferred, it is immaterial that its enjoyment be subject to postponement, conditions, or complete defeasance (via the beneficiary's exercise of her right to withdraw the principal sum). *Ga Nun v. Palmer,* 216 N. Y. 603, 609, 111 N. E. 223, 225 (1916). *Matter of Tilley's Estate, supra. Chase Nat'l. Bank v. Manufac. Trust Co., supra.* The payee, as a third-party beneficiary, may enforce the conditional right, since the contingency has taken place. *Mutual Ben. Ins. Co. v. Ellis, supra. Glandziz et al., v. Callinicos,* 48 F. Supp. 732, 733 (S. D. N. Y. 1942). Restatement, Contracts, §134 (1932).

In the *Ellis* case, *supra,* the factual situation was almost identical with the instant case, and the defendant raised the similar contention that the agreement was invalid as an attempted testamentary disposition. As in the principal case, the court ruled that no trust existed, and that the beneficiary's counter-offer had resulted in a contract unconnected with one of insurance. Nevertheless, the court held against defendant, and ruled that since plaintiff had acquired a fixed, vested right upon the formulation of the contract, plaintiff was entitled to the proceeds as a third-party donee-beneficiary, citing *Seaver v. Ransom,* 224 N. Y. 233, 120 N. E. 639 (1918). *Accord: In re Koss' Estate,* 106 N. J. Eq. 323, 150 Atl. 360 (1930).

Since, in the instant case, the right was vested in the plaintiff *inter vivos,* its enjoyment contingent upon the death of the beneficiary, it is submitted that the property did not pass by reason of the death, and thus did not violate the Statute of Wills.

Robert Alan Thompson

CONFLICTS—STATUTE OF FRAUDS—SUBSTANCE OR PROCEDURE

Plaintiff brought an action in N. Y. for specific performance against the executor of Harold Rubin and others to enforce an oral agreement by which the decedent had agreed not to change his existing will. The agreement was made in Florida, decedent's domicile, and the contract was valid by Florida law. The N. Y. Pers. Prop. Law Sec. 31(7) requires such contracts to be in writing. Held: the Statute of Frauds is substantive as to cases involving conflicts of law, and consequently does not preclude enforcement of a contract valid according to the law of the place in which it was made unless it violates the forum's paramount public policy. *Rubin v. Irving Trust Co. et al.,* ———Misc.———, 107 N. Y. S. 2d 847 (Sup. Ct. 1951).