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Donee Beneficiaries—Deckler v. Fowler

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The LAW REVIEW regrets to announce that it has received the resignation of Mr. William Bevis. Mr. Bevis was elected president of the Student Editorial Board for the present year but has been forced by illness to discontinue his services in that office.

The REVIEW wishes to take this opportunity to express its appreciation for the excellent services rendered to it by Professor E. C. Luccock, who has been its editor-in-chief for the past two years. With this issue Professor Luccock retires and the position is resumed by Professor Alfred Harsch who acted in this capacity from 1935 to 1937.

COMMENTS

DONEE BENEFICIARIES—DECKER V. FOWLER*

A and *B* contract, *A* promising *B* to render at a future date some performance to *C*. What are the legal relations between *A* and *C*? *B* and *C*?

A hundred years ago the answers to these questions would have required consideration of something called "privity of contract" and might well have been "no legal relations". Today, however, we can, on the basis of many decisions, say with certainty that in most states *A* owes a contract duty to *C* on breach of which *C* may have the usual remedies of a contract obligee.[1] In now accepted terminology *C* is a beneficiary of the *A-B* contract. The legal relations between *B* and *C* will vary according to *B's* purpose in procuring *A's* promise. If his purpose was to confer upon *C* a gratuity, *C* will be described as a donee beneficiary and *B* is a donor of the right which *C* acquires against *A*. If *B's* purpose was to have rendered to *C* a performance which will discharge a duty owed by *B* to *C*, although in a sense the recipient of a gratuity, *C* is usually referred to as a creditor beneficiary and for some purposes the previously existing debtor-creditor relationship between *B* and *C* is changed to one of surety-creditor, *A* being regarded as now the principal debtor.[2] The following discussion will be limited to donee beneficiaries.

As a gift, the creation in *C* of a right against *A* by the means indicated above is concededly anomalous. Where is the delivery or the deed of gift so necessary in gifts of chattels? There is none, and by the cases there need be none.[3] This is a gift, and *C* is a donee simply because *C* gets something for nothing—not because of any more direct analogy to the traditional gift of chattel transaction. The "gift" here consists not of the transfer to *C* of an existing legal interest owned by *B* but in the making of a contract with *A* for a promise in terms performable to *C*. The "gift" is complete when the *A-B* contract is executed. *C* is a party to that contract, made so by judicial fiat creating

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*In an unpublished comment concerning the legal effects of this case, Mr. E. B. Herald of the Seattle Bar has indicated an additional problem. He suggests that the decision has, in effect, laid a restriction upon the constitutional power of the federal government to borrow money on the credit of the United States. If the suggestion has merit and a federal question is involved, the United States Supreme Court may have the last word upon this problem.

[1] 2 WILLISTON AND THOMPSON, CONTRACTS (Rev. ed. 1936) § 347 *et seq.*; Note (1932) 81 A. L. R. 1271. The Washington decisions are to be found in RESTATEMENT, CONTRACTS, WASH. ANNOT. (1935) § 133 *et seq.*

[2] First State Bank v. Arneson, 109 Wash. 346, 186 Pac. 889 (1920); Insley v. Webb, 122 Wash. 98, 209 Pac. 1093 (1922), 41 A. L. R. 277 (1926); Gillman v. Purdy, 167 Wash. 659, 9 P. (2d) 1092 (1932). But *cf.* Continental Mut. Sav. Bank v. Elliott, 166 Wash. 283, 6 P. (2d) 638, 81 A. L. R. 1055 (1932).

[3] Physical delivery of *A's* promise to *C* is of course impossible. Delivery to *C* of the instrument containing *A's* promise has not in general been required as a requisite to the creation in *C* of an enforceable right against *A*. 2 WILLISTON AND THOMPSON, CONTRACTS § 396; VANCE, INSURANCE (2d ed. 1930) p. 545.

a rule of law which gives the donee beneficiary the status of a contract obligee. In this analysis the concepts of delivery and surrender of dominion have no place. Handing *C* the paper on which *A's* promise is written can add nothing to *C's* position as a party to the *A-B* contract.

If we vary the elements of our assumed contract so that *A's* promise is to pay *C* after *B's* death provided *B* does not during his lifetime demand performance to himself, we have merely made *C's* contract right conditional. He acquires that right only in the form and subject to the conditions of *A's* promise.[4] *B's* failure to exercise the election which is the subject of the condition, *B's* death and the extinguishment thereby of the power of election which he had, creates no interest in *C*. Those cases in which there is an expression of donative purpose to be consummated in the future, which fails because dominion over the thing to be given was not relinquished and because the promise, being gratuitous, is not enforceable as a contract, and not being in proper form, is not operative as a will, are not here in point.[5]

Decker v. Fowler,[6] recently decided by our supreme court, is opposed to these conclusions and is, we suggest, erroneous. *B* purchased a government bond which provided: "The United States of America, for value received, promises to pay to *(B)* payable on death to *(C)*." Since the bond was redeemable by *B* any time after 60 days from the date of issue, the government's promise seems to means, first "pay *B* if he so requests during his lifetime" and, second, "pay *C* after *B's* death provided *B* does not during his lifetime demand performance to himself." The issue presented is simply one of the rights of a donee beneficiary under such a promise. The court, however, said:

> "The question is whether *(B)*, during his lifetime, had made a valid gift of the proceeds of the bonds to *(C)* in the event of his death without having called for payment.
>
> "In order to constitute a gift of personal property, one of the things necessary is that there must be a delivery, and that delivery must be such as will divest the donor of the present control and dominion over the property absolutely and irrevocably, and confer upon the donee the dominion and control."

On this reasoning the court held that, although the beneficiary was the proper person to collect from the government, the proceeds col-

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[4] 2 WILLISTON AND THOMPSON, CONTRACTS § 354A; RESTATEMENT, CONTRACTS (1932) § 140; RESTATEMENT, CONTRACTS, WASH. ANNOT. (1935) § 140. There are a number of life insurance cases where the policy reserved to the insured the power to change beneficiaries or to take the cash value or a loan therefor, without the beneficiary's consent, and the court described the beneficiary's interest as an "expectancy" and not "vested". The significance of such language must, however, be derived from the circumstances with regard to which it was used. These show that the beneficiary's interest is usually so described only in contests between beneficiary and insured during the latter's lifetime with regard to control of the policy, and in contests between a beneficiary named in the policy and an alleged substitute beneficiary. Toole v. National Life Ins. Co., 169 Wash. 627, 14 P. (2d) 468 (1932); VANCE, INSURANCE (2d ed. 1930) p. 559 *et seq.*

[5] See note 10, *infra*.

[6] 99 Wash. Dec. 485, 92 P. (2d) 254 (1939).

lected must be surrendered to *B's* estate. Four cases were cited in support of the decision. Three are not in point.[7] The fourth involved analogous facts and reached a similar result on a similar basis.[8]

In acknowledging that the beneficiary was by the contract given the right, and the sole right, to enforce payment after *B's* death, the court in effect acknowledged that the beneficiary's cause of action arose out of the contract and that *B* had done whatever had to be done to perfect it. The next step, holding that the money belonged to *B's* estate because dominion was not surrendered during *B's* lifetime, is inconsistent. The government held no money in trust for *B*. It was a borrower. The money paid to it was a loan. It made a promise to pay, became a contract obligor and nothing more. Apparently, under this decision, to accomplish his purpose *B* would have to surrender to *C* dominion over the written evidence of *A's* promise—a promise which was by its terms performable to *C*. This would complicate exercise by *B* of his own rights under the contract. In so holding the court ignored the

[7]In re Slocum's Estate, 83 Wash. 158, 145 Pac. 204 (1915); In re McCoy's Estate, 189 Wash. 103, 63 P. (2d) 522 (1937); Shaw v. Camp, 160 Ill. 425, 43 N. E. 608 (1896). The first involves choses in action (stock certificates and promissory notes) and failure of the alleged gift because the donor had not surrendered dominion thereof. The second involves an attempt to make a gift by issuance of stock certificates in a personal holding company in the name of the children of the corporation's owner, the latter retaining the certificates in his possession and continuing to exercise complete control over corporate affairs. The third case involved a promissory note payable at the maker's death, executed without consideration and with the purpose of conferring a gratuity upon the payee. Enforcement was denied for lack of consideration. The Washington court said in citing this case: "It may be that the analogy between that case and the one before us is not complete, but to this extent there is an analogy. In that case the promise to pay was evidenced by a promissory note. In this case, the promise to pay was evidenced by a bond." (*sic.*)

[8]Hicks v. Meadows, 193 Ala. 246, 69 So. 432 (1915). That the Alabama court mistakenly regarded the problem before it as an attempted gift of money appears both in its opinion and in its later cases. Sudduth v. Holloway, 212 Ala. 24, 101 So. 733 (1924); Davis v. Wachter, 224 Ala. 306, 140 So. 361 (1932). There is some other support for the position that a certificate of deposit taken by *B* in *C's* name is ineffective to create any interest in *C* where the certificate is not delivered to *C*. Telford v. Patton, 144 Ill. 611, 33 N. E. 1119 (1892); Lindner & Boyden Bank v. Wardrop, 370 Ill. 310, 18 N. E. (2d) 897 (1938); Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229 (1929); Nannie v. Pollard, 205 N. C. 362, 171 S. E. 341 (1933). These cases assume, erroneously, that the subject of the gift is the certificate itself. *Cf.* the joint savings account cases, 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 47. *Cf.* also the joint checking account cases, 5 MICHIE, BANKS AND BANKING (1932) c. 9, § 46, and Myers v. Albert, 76 Wash. 218, 135 Pac. 1003 (1913), where the principal issue properly is the existence of a gift purpose in the depositor. In the Meyers case, however, we find the court again concerned with the transfer of dominion: "The subject matter of the gift, if there were a gift, was the right to withdraw or recover the money on deposit with the bank. In order to constitute a gift, it is necessary that there be a delivery, actual, constructive or symbolical, which will pass the dominion and control of the subject-matter from the donor to the donee." See also Compton v. Westerman, 150 Wash. 391, 273 Pac. 524 (1928) (promissory note, separate writing relieving maker of duty to pay should payee die before the note was paid: *held*, that this writing controlled).

many life insurance and joint bank account cases to the contrary,[9] and in fact, ignored the whole doctrine of donee beneficiaries.[10]

Judges Steinert and Robinson recognized the case as involving a donee beneficiary and joined in a well-written dissent which concludes: "The result of the majority opinion will be that what heretofore has been thought to be an attractive form of government security will prove but a snare to those who rely upon it." The rule of the case will do more than defeat the purpose of those who purchase this type of bond. It strikes at every life insurance policy which contains the now usual clauses reserving to the insured the power to effect a change of beneficiary or realize the cash value of the policy, without consent of the named beneficiary.

WARREN L. SHATTUCK.

EXEMPTIONS OF REMAINDER INTERESTS IN THE INHERITANCE TAX STATUTE OF THE STATE OF WASHINGTON

Three recent cases involving the application of the inheritance tax statute of the State of Washington have raised some problems which should receive immediate attention.[1] The statute provides three different schedules of rates, the schedule applicable to any gift being determined by the relationship of the beneficiary to the deceased.[2] Class A includes any devise, bequest, legacy, gift or beneficial interest to any property or income therefrom which shall pass to or for the use or benefit of any grandfather, grandmother, father, mother, husband, wife, child or stepchild, or any lineal descendant of the deceased. The schedule of rates for class A provides for a tax of 1 per cent on amounts from $10,000 to $25,000; of 2 per cent on amounts from $25,000 to $50,000, and of higher rates for larger amounts. Class B includes gifts to a brother or sister. The schedule of rates for class B begins with a tax of 3 per cent on amounts from $1,000 to $5,000, 4 per cent on amounts from $5,000 to $10,000, and continues at an increasing rate for larger amounts. Class C includes gifts to all others. The schedule of rates for class C begins with a tax of 10 per cent on all amounts up to $10,000, 15 per cent on amounts from $10,000 to $25,000, and continues at an increasing rate for larger amounts. The classification set up by the statute is inclusive in that it covers all possible gifts to all persons. The statute provides for appraisement of property subject

[9]VANCE, *op. cit. supra* note 3; 1 BOGERT and 5 MICHIE, *op. cit. supra* note 8.

[10]The Washington court made no mention of the possibility that the transaction before it might be controlled by the Statute of Wills and In re Murphy's Estate, 193 Wash. 400, 75 P. (2d) 916 (1938), *rehearing denied*, 195 Wash. 695, 81 P. (2d) 779 (1938). Several unsuccessful attempts have been made to induce application of that statute to life insurance contracts in which the beneficiary's interest was not absolute. Martin v. Modern Woodmen, 253 Ill. 400, 97 N. E. 693 (1912); Johnston v. Scott, 76 Misc. Rep. 641, 137 N. Y. S. 243 (Sup. Ct. 1912). It would appear equally inapplicable to the contract in issue in Decker v. Fowler, 99 Wash. Dec. 485, 92 P. (2d) 254 (1939).

[1]In re Gochnour's Estate, 192 Wash. 92, 72 P. (2d) 1027 (1937); In re Hallstrom's Estate, 98 Wash. Dec. 193, 88 P. (2d) 405 (1939); In re Bolstad's Estate, 100 Wash. Dec. 25, 93 P. (2d) 726 (1939).

[2]REM. REV. STAT. (Supp. 1939) § 11202.