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Corporations—Merger—Lawful Business Purpose

Gordon L. Jaynes

property leased to the beneficiary. By this agreement rights passed which were much more substantial than that relied on in the instant case.

A fact situation similar to the principal case was encountered in *Hall v. Mutual Life Ins. Co. of N.Y.*, 201 Misc. 203, 109 N.Y.S. 2d 646 (1952). The court recognized a contract for the benefit of the distributee but held it invalid because testamentary without required form, saying "The plaintiff's right, at best, arose only on her (the donee's) death; he had no present interest; nothing was transferred to him."

The reasoning in the *Hall* case is sound, but the decision, if undisturbed, would have outlawed an institutional arrangement widely established and socially desirable. Statutory enactment has since validated this arrangement in New York State in Laws of New York 1952 c.820 § 24-a whereby "If a person entitled to receive payment of (a) . . . (b) money payable by an insurance company . . . designates . . . a payee or beneficiary to receive payment thereof upon death of the person making designation . . . , the right of the person so designated . . . [is] not defeated by any statute or rule of law governing transfer of property by will or gift or intestacy."

The *Toulouse* case is antithetical to the *Hall* case. It uses reasoning dyadic and tenuous but reaches a result at once desirable and in accord with contemporary custom. Legislative clarification is therefore improbable. It will remain for the Washington Supreme Court to say on another occasion which of the theories was the operative one, and which one was dictum. Are all, or perhaps some, types of third party beneficiary contracts to be considered immune from attack under the Statute of Wills or, on the other hand, is the transfer of a mere defeasible right adequate to make a donation non-testamentary?

Perhaps this decision is best considered as a recognition of a widely used insurance practice and should not be strained beyond its own particular fact structure.

IVOR LUSTY

Corporations—Merger—Lawful Business Purpose. *P*, a minority stockholder in *Z* Corp., voted against a proposed agreement between *Z* and *X* Corp., whereby the shareholders of *Z*, in consideration of payment of $100, were to grant an option for over eighteen months, to purchase all shares of *Z*. *D*, a principal stockholder and director in *Z*, organized *Y* Corp., in which *D* was principal stockholder and director. *Y* had an authorized capitalization including both common and redeemable preferred stock. The directors of *Z* and *Y* approved a merger agreement between the two corporations, wherein shareholders of *Z* received one share of redeemable preferred stock in *Y* for each of their shares of *Z* common. *D* gave all principal minority stockholders except *P* an option to purchase the same number of shares of common stock in *Y* as they had held in *Z*. The merger was approved by holders of two-thirds of the voting shares of *Z*, *P* only dissenting. *Y* and *X* then entered an option agreement similar to the original proposal. *P* seeks to set aside the merger agreement. Judgment for *D* affirmed, *Matteson v. Ziebarth*, 40 Wn. 2d 286, 242 P. 2d 1025 (1952).

The court held: (a) the use of the merger device for recapitalization was not illegal; (b) the appraisal and sale statute prescribes the exclusive remedy available to a dissenting stockholder in merger or change in corporate structure, absent either unfairness or breach of fiduciary duty unknown to the dissenter at the time of the merger or change, or actual fraud.

Discussing (a), the court sought to determine whether *Y* was a corporation of the kind which may emerge. The power to merge is granted in RCW 23.40.010 [RRS § 3803-42] if the corporations are formed for purposes recognized under RCW, Title 23 [RRS, Title 25], which provides that a corporation must be formed for "lawful

business purposes." RCW 23.12.010 [RRS § 3803-2]. This refers to the proposed business activities of the corporation. A reference to the articles of incorporation of *Y* and *Z* indicates both had the same business purposes. Consummating the option agreement was the *motive* for forming *Y*, but not the "business purpose" of *Y*. Yet, the court equates "lawful business purpose" with the motive for creating the corporation. Terming the motive of *Y's* incorporators "lawful" seems to avoid the principles that a freeze-out is not in good faith and therefore is a breach of the fiduciary duty owed by a director to minority stockholders, *Tefft v. Schaefer*, 148 Wash. 602, 269 Pac. 1048 (1928), and a breach of the limited fiduciary duty owed by the majority to the minority stockholders. *Wunsch v. Consolidated Laundry Company*, 116 Wash. 44, 198 Pac. 383 (1921); 13 Fletcher Cyclopedia Corporations 5881 (Perm. Ed. 1943).

Discussing (b), the court pointed out that RCW 23.16.160 [REM. SUPP. 1949, 3803-41] provides for appraisal and sale. The preceding section provides that a shareholder who does not vote in favor of a merger or change in corporate structure and does not file written objection and demand for payment within the alloted time shall be bound as though he had voted in favor of the merger or change. RCW 23.16.150 [REM. SUPP. 1949, 3803-41]. The court regards this estoppel provision as prescribing the appraisal and sale as an exclusive remedy for any aggrieved stockholder unless he be defrauded. This is questionable when applied to a *dissenting* stockholder, particularly since this is a case of first impression in Washington, and other jurisdictions with similar statutes have held to the contrary. For example, Maine has a statute largely similar to that of Washington; yet the Maine estoppel provision has not been regarded as making the Maine appraisal and sale remedy exclusive, *May v. Midwest Refining Co.*, 121 F. 2d 431, (C.A. 1st 1941) *cert. denied* 314 U.S. 688 (1941).

In the present case, *P* contended the appraisal and sale remedy should be exclusive except where there is any generally recognized basis for equitable relief, including breach of fiduciary duty. In rejecting the cases cited by *P*, the court said they involved statutes containing no provision making corporate action binding on a stockholder who does not comply with requirements for securing an appraisal and sale. In two of the five cases cited, the jurisdiction involved has a statute with such a provision. *MacArthur v. Port of Havana Docks Co.*, 247 Fed. 984 (S.D. Me. 1917); *May v. Midwest Refining Co.*, 121 F. 2d 431 (C.A. 1st 1941). The court states that jurisdictions which have statutes generally similar to Washington's have "uniformly" held that a minority shareholder may not obtain relief in equity where his claim is based on unfairness or breach of fiduciary duty short of "actual fraud."

Of the five cases cited as authority for the court's statement, none discussed the problem of breach of fiduciary duty. Two involved dissenting stockholders who had already begun proceedings under an appraisal and sale statute. *Adams v. United States Distributing Corp.*, 184 Va. 134, 34 S.E. 2d 244 (1945); *Wall v. Anaconda Copper Mining Co.*, 216 Fed. 242 (Mont. 1914). One holds contrary to the court's stated position. *Homer v. Crown Cork & Seal Co.*, 155 Md. 66, 141 Atl. 425 (1928). Two involve appraisal and sale statutes substantially different from Washington's. *Wall v. Anaconda Copper Mining Co., supra; Homer v. Crown Cork & Seal Co., supra.*

If the estoppel provision is to be interpreted as defining the scope of the remedy of appraisal and sale, it seems reasonable to make the remedy exclusive in cases of difference of business judgment, but there seems scant authority, and no policy basis, for making the remedy exclusive where fraud, breach of fiduciary duty, or unfairness is involved. See Lattin, *Remedies of Dissenting Stockholders Under Appraisal*

Statutes, 45 HARVARD L. REV. 233, 234-237 (1931). Such an interpretation changes the appraisal and sale statute from a provision of protection for dissenting minority stockholders, and allows the use of merger to freeze them out, thus providing an instrument for their destruction.

GORDON L. JAYNES

Domestic Relations—Rights of Putative Father. *P* (a putative father) obtained possession of his infant illegitimate child in 1947. In 1950 the mother took the child from the father and gave it to *H* and *W,* a married couple. *H* and *W* filed a petition for adoption in the juvenile court. *P* filed an intervening petition asking that custody of the child be awarded to him by virtue of his rights as a putative father. Trial court held against *P* on the grounds that (1) the putative father has no rights in the bastard child, and (2) even if he does, this father is not a fit person to have custody of the child. On Appeal, *Held:* dismissed on procedural grounds. (See 27 WASH. L. REV. 228). As to the rights of the putative father, the Washington court for the first time indicated that the putative father, if fit, would have a right to custody of the child superior to that of everyone but the mother. *Wade* v. *State,* 39 Wn. 2d 744, 238 P. 2d 915 (1951).

It would seem that any discussion of the rights of the putative father would be merely academic since he would rarely desire to assert such rights; however, such rights have been claimed in the Washington Supreme Court on three different occasions during the last eight years. In re *Blake,* 21 Wn. 2d 547, 151 P. 2d 825 (1944); *State* ex rel *Smith v. Superior Court,* 23 Wn. 2d 357, 161 P. 2d 188 (1945); *Wade v. State, supra.* This note will explore the origin of these rights and, further, will discuss the unusual relationship which exists between the putative father and the child *after* the father has obtained custody.

At common law the bastard child was *nullius fillius*—a child of no one. See *State v. Tieman,* 32 Wash. 294, 73 Pac. 375 (1903). The child had no parents, the putative father being treated as a complete stranger. "He (the putative father) is at most a putative father in reputation only, but not in law." *Appeal of Gibson,* 154 Mass. 378, 28 N.E. 296 (1891).

In spite of this early common law conception, the courts of the United States have generally honored the father's right to custody of the child as against everyone but the mother. *French v. Catholic Community League,* 69 Ohio App. 442, 44 N.E. 2d 113 (1942); *Commonwealth* ex rel *Human v. Hyman,* 164 Pa. Super. Ct. 64, 63 A. 2d 447 (1949). Perhaps the best explanation for this departure from the theory of the common law may be found in *Moritz v. Garnhart,* 7 Watts 302, 32 Am. Dec. 762 (Penn. 1838): "Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it (the child) is so far considered its natural guardian as to be entitled to the custody of it. . . ." The Ohio Court, in *French v. Catholic Community League, supra,* in giving custody to the putative father stated: "We perceive little profit to be gained in a dissertation upon what would have been the rights of the parties under the common law. . . ."

With the principal case, Washington has definitely committed itself to honor the putative father's right to custody in accordance with the majority of jurisdictions. The putative father then will apparently be given custody when: (1) the mother is dead and the father is a fit person, see *State* ex rel *Smith v. Superior Court, supra;* (2) the mother is "unfit" or does not want the child, see *People* ex rel *Meredith v. Meredith,* 272 App. Div. 79, 69 N.Y.S. 2d 462 (1947), cited in the principal case; (3) someone *other* than the mother is demanding the child. *Wade v. State, supra.*