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## CONTRACTS-RIGHTS OF THIRD PARTY BENEFICIARY-EFFECT OF MICHIGAN BENEFICIARY CONTRACT STATUTE

Gordon W. Hueschen S. Ed.  
*University of Michigan Law School*

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CONTRACTS—RIGHTS OF THIRD PARTY BENEFICIARY—EFFECT OF MICHIGAN BENEFICIARY CONTRACT STATUTE—On agreement to make mutual wills, Stephen and his two sisters entered into an agreement whereby the sisters agreed to will to Stephen, or in event Stephen predeceased them, to his wife, all property which they should receive from their father. Stephen did predecease the sisters, whereupon they executed new wills with no provision for Stephen's widow. Upon death of the last sister, the widow's bill for specific performance of the agreement was dismissed by the circuit court. In affirming on appeal, the Michigan Supreme Court *held* that the agreement as to Stephen and all other persons except the sisters being without consideration, the sisters were each bound only at the option of the other while both lived, and each could revoke with the other's permission. Execution of the new wills showed a common purpose to do away with all agreements to leave plaintiff anything, the will of each sister amounting to a revocation of the agreement, to which the consent of the other sister is fairly to be inferred in the absence in the contract of any stipulation requiring revocation to be in writing. *Rose v. Southern Michigan National Bank of Coldwater*, 328 Mich. 639, 44 N.W. (2d) 192 (1950).

The court's treatment of the present fact situation as giving rise to a binding agreement between the sisters to make mutual wills even though the consideration of Stephen was held nonexistent,<sup>1</sup> is in line with *Phelps v. Pipher*<sup>2</sup> as the

<sup>1</sup> It is possible that the entire agreement might have been held void on a basis that, since Stephen's consideration failed, the bargained for inducement was not received by either sister, this including some consideration from Stephen. See 1 WILLISTON, CONTRACTS §§100, 115 (1936).

<sup>2</sup> 320 Mich. 663, 31 N.W. (2d) 836 (1948).

second consecutive case overlooking or ignoring the effect of the Michigan Beneficiary Contract Statute<sup>3</sup> on the rights of a beneficiary. Historically, Michigan was one of the last jurisdictions to depart from the English rule prohibiting beneficiaries from suing on the contract, a rule which has "been abandoned or radically modified by exceptions and qualifications in almost every State of the Union."<sup>4</sup> After a period during which third party beneficiaries, with the exception of the mortgagee beneficiary<sup>5</sup> and the insurance beneficiary,<sup>6</sup> were uniformly held to have no rights under the contract, the case of *Smith v. Thompson*<sup>7</sup> went far toward bringing the Michigan law into accord with the almost unanimous view elsewhere.<sup>8</sup> Finally, the question was believed put at rest by the Beneficiary Contract Statute of 1937.<sup>9</sup> But questions arose; at least counsel would appear not to have recognized any application of the statute to contracts to make mutual wills. In *Phelps v. Pipher*,<sup>10</sup> the court, after finding an agreement between husband and wife to make mutual and reciprocal wills established by the evidence,<sup>11</sup> though resting in parol,<sup>12</sup> held the plaintiff son to be a beneficiary under the agreement of his parents<sup>13</sup> and as such entitled to sue in equity for specific performance.<sup>14</sup> However, since the beneficiary's rights were held to vest only upon death of one of the parties to the contract,<sup>15</sup> revocation by the

<sup>3</sup> Act 296, Public Acts of Michigan (1937), 19 Mich. Stat. Ann. (1949 Supp.) §§26.1231 to 26.1235.

<sup>4</sup> *Guardian Depositors Corp. v. Brown*, 290 Mich. 433 at 438, 287 N.W. 798 (1939). The more significant Michigan decisions are collected in "Mich. Anno. to the Restatement of Contracts," 14 MICH. SR. B.J. 156 (1935).

<sup>5</sup> See 14 MICH. SR. B.J. 156 at 168 (1935).

<sup>6</sup> *Id.* at 165, 166.

<sup>7</sup> 250 Mich. 302, 230 N.W. 156 (1930). See 73 A.L.R. 1389 (1931); 29 MICH. L. REV. 365 (1931). This case, in holding that a donee beneficiary had a right, after the death of one party to the contract, to sue in equity to enforce a promise to make mutual wills for his benefit, overruled dicta to the contrary in *K.O.M.M. v. Sharp*, 163 Mich. 449, 128 N.W. 786 (1910).

<sup>8</sup> For the various "incursions" previously made into the old Michigan rule, see *Smith v. Thompson*, 250 Mich. 302, 230 N.W. 156 (1930), and especially as related to a donee beneficiary, see 14 MICH. SR. B.J. 156 at 163 (1935).

<sup>9</sup> 19 Mich. Stat. Ann. (1949 Supp.) §§26.1231 to 26.1235.

<sup>10</sup> *Supra* note 2.

<sup>11</sup> The wills were executed at the same time and evidence of previous agreement was undisputed. But in *Eicholtz v. Grunewald*, 313 Mich. 666, 21 N.W. (2d) 914 (1946), distinguished by the court, mere execution of identical wills at different times was held insufficient to establish an agreement. See cases in *Eicholtz v. Grunewald*, *supra*, at 677, 678.

<sup>12</sup> Ample authority for this proposition exists in the Michigan cases. See, e.g., *Smith v. Thompson*, *supra* note 8; *Eicholtz v. Grunewald*, *supra* note 11.

<sup>13</sup> The beneficiary under such agreement is a "donee" or "gift" beneficiary. See 1 GRISMORE, CONTRACTS §231 (1947); 2 WILLISTON, CONTRACTS §356 (1936); 1 CONTRACTS RESTATEMENT §133(a) (1932); 14 MICH. SR. B.J. 156 at 161 et seq. (1935). This consideration is important since the Michigan beneficiary statute distinguishes between "donee" and "creditor" beneficiaries. 19 Mich. Stat. Ann. (1949 Supp.) §26.1233.

<sup>14</sup> 19 Mich. Stat. Ann. (1949 Supp.) §§26.1231 to 26.1235 was apparently ignored by counsel, reliance being placed on earlier cases.

<sup>15</sup> "It is the contract to make the will, not the will itself, which is irrevocable. This is true only because . . . equity will decree specific performance. . . . It is only the right of action to enforce the contract, if anything, which vests in the beneficiary at the death of one of the testators." *Keasey v. Engles*, 259 Mich. 178 at 182, 183, 242 N.W. 878 (1932)

parents before the death of either left the plaintiff without enforceable rights.<sup>16</sup> Thus both in *Phelps* and in the instant case the plaintiff was denied specific performance, though the statute would appear to indicate a contrary result.<sup>17</sup> Under the statute, the donee beneficiary's rights must vest at the moment the agreement is made, unless the court sees fit to read in some implied conditions or limitations, or to imply "some stipulation, agreement, or understanding . . . to the contrary."<sup>18</sup> Nor should the question of constitutionality present any obstacle to retroactive application of the statute,<sup>19</sup> since in several cases decided since the statute became effective its application has been retroactive.<sup>20</sup> While such retroactive application of the statute undoubtedly would be subjected to considerable

(dictum). While not mentioned specifically in *Smith v. Thompson*, note 8 *supra*, all the cases since *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888), seem to follow the view that death of one testator is necessary before rights can vest in the beneficiary. See *Sage v. Sage*, 230 Mich. 477, 203 N.W. 90 (1925) and *Elmer v. Elmer*, 271 Mich. 517, 260 N.W. 759 (1935) (dictum). It is of course true that, whatever the time a beneficiary's rights vest, a breach can be determined, except in the case of a contract to will specific property, only upon the death of a contracting party.

<sup>16</sup> The preferable view of text writers is that the beneficiary's rights vest immediately upon execution of a contract for his benefit, at least in the case of a donee beneficiary, his assent being assumed. The cases, however, are in conflict. 1 GRISMORE, *CONTRACTS* §238 (1947); 2 WILLISTON, *CONTRACTS* §396 (1936); 1 *CONTRACTS RESTATEMENT* §137, 142 (1932). Of course, if an express power of revocation or power to change the beneficiary were reserved, the beneficiary's rights could at best be vested subject to being divested. See generally 4 PAGE, *WILLS*, c. 53, esp. §§1709, 1723 (1941); Partridge, "Revocation of Mutual or Reciprocal Wills," 77 UNIV. PA. L. REV. 357 (1929); Eagleton, "Joint and Mutual Wills," 15 CORN. L.Q. 358 (1930); 69 C.J. §2722 et seq.; 57 AM. JUR. §694 et seq. See also *Edmundson's Estate*, 259 Pa. 429, 103 A. 277 (1918), 2 A.L.R. 1150.

<sup>17</sup> 19 Mich. Stat. Ann. (1949 Supp.) §26.1233 provides that a donee beneficiary's rights shall be deemed to have vested "subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement, or undertaking in the contract to the contrary. . . ." Sec. 26.1235 provides: "The provisions of this act shall be construed to be applicable to contracts made prior to its enactment—unless such construction be held to be unconstitutional. . . ."

<sup>18</sup> Such might even be implied from the very fact that the contract is one to make a will, by its nature ambulatory.

<sup>19</sup> Sec. 26.1235. Note 17 *supra*.

<sup>20</sup> *Hutchings v. Securities Exchange Corp.*, 287 Mich. 701, 284 N.W. 614 (1939) and *Aiton v. Slater*, 298 Mich. 469, 299 N.W. 149 (1941) (dictum) in which §26.1231, giving beneficiary same right of enforcement as promisee, was applied; *Ireland v. Lester*, 298 Mich. 154, 298 N.W. 488 (1941) in which §26.1233, vesting beneficiary's rights under contract at time it was executed, was applied. Indeed, in *Lutz v. Dutmer*, 286 Mich. 467 at 486, 487, 282 N.W. 431 (1938) and *Guardian Depositor's Corp. v. Brown*, 290 Mich. 433, 287 N.W. 798 (1939), retroactive application of the statute has been expressly upheld as constitutional since affecting only the remedy and not the right. *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398 at 430, 54 S.Ct. 231 (1934). No reason is apparent why the statute may not be similarly constitutionally applied in relation to time of vesting of a beneficiary's rights under a contract to make mutual wills. Since the beneficiary in such case was entitled to specific performance in equity (after *Smith v. Thompson*) before the statute upon death of one of the parties to the agreement, retroactive application of the statute to give the beneficiary a vested interest as soon as the contract was executed would appear merely to be giving the beneficiary a more effective remedy.

criticism, as would the statute's application to contracts to make mutual wills executed subsequent to its enactment, as in effect depriving a will of its ambulatory nature,<sup>21</sup> yet it is the contract and not the will which is specifically enforceable;<sup>22</sup> and it does not seem unjust to the contracting parties to require inclusion in the agreement of a condition or stipulation that the beneficial rights thereunder should not vest upon execution of the contract, if such is in fact their intent.<sup>23</sup> It is to be hoped that, in the next case of this type appearing before the supreme court, the effect of the beneficiary statute will be given full consideration in the attorney's briefs.

*Gordon W. Hueschen, S. Ed.*

See *Ireland v. Lester*, *supra* this note. Of course, it is possible to take the approach that this would be varying a substantial right in that the beneficiary previously was held to have no rights until one of the parties to the agreement died, but since a law which gives validity to a void contract, thus creating a legal duty where none existed before, is held to be constitutional, it would seem to follow that a statute can constitutionally expand a right in the beneficiary where a narrower one already existed, so long as that right, and the correlative duty, is consistent with the undertaking voluntarily assumed by the promisor. See Grismore, "Beneficiary Contracts in Michigan," 8 *DETROIT L. REV.* 1 at 18 et seq. (1938) and *Guardian Depositor's Corp. v. Brown*, *supra* this note, at 443, 444.

<sup>21</sup> This was the original argument against allowing enforcement of a contract to make a will, which was discarded when it was recognized that it was the contract and not the will which was irrevocable. 6 *CORN. L.Q.* 127 (1920); 15 *CORN. L.Q.* 358 (1930); 4 *IOWA L. BUL.* 189 (1918). So it would be in the case of a contract to make mutual wills; the contract would be irrevocable without the beneficiary's consent, not the will.

<sup>22</sup> Note 15 *supra*.

<sup>23</sup> Such view as to time of vesting accords with that of text writers and the Restatement. Note 16 *supra*. But see Page, "The Power of Contracting Parties to Alter a Contract for Rendering Performance to a Third Person," 12 *WIS. L. REV.* 141 (1937). It is noteworthy that some states have statutes making joint and mutual wills revocable, Bordwell, "Statute Law of Wills," 14 *IOWA L. REV.* 1 at 34 (1928), but even such statutes would not appear to affect contract rights under an agreement pursuant to which mutual wills might be made.