Contracts--Third Party Beneficiaries--Beneficiary's Right Arising at Death of Promise

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Recent Cases

Contracts—Third Party Beneficiaries—Beneficiary’s Right Arising at Death of Promisee.—Appellant’s aunt entered into a contract to convey certain lands to another. The contract provided, inter alia, that in the event the aunt should die before the entire purchase price was paid, all subsequent payments would be made to the appellant. The aunt died before the entire purchase price had been paid. The probate court ordered the unpaid balance to be distributed to the residual legatees. Appellant claimed the unpaid balance as a third party beneficiary under the contract. Held: Affirmed. Where a third person is to receive any unpaid balance remaining on a contract at the death of the promisee, there is no intent to create in the third person a present interest that would constitute a valid gift inter vivos. The third party is merely an incidental beneficiary and not entitled to the unpaid balance. Coley v. English, 357 S.W.2d 529 (Ark. 1962).

The principal case is disconcerting not because of any departure by the court from the well established rules of third party beneficiary law but because of apparent confusion by the court in the application of these rules. The third party beneficiary doctrine is firmly established in most jurisdictions. Moreover, the courts exhibit a strong tendency to follow the classification used in the Restatement of Contracts as to those beneficiaries who may sue on a contract. Under the Restatement classification, beneficiaries who may sue on a contract are divided into two classes—donee and creditor. A person is a donee beneficiary

if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.

A person is a creditor beneficiary

... if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the

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2 Restatement, Contracts §133 (1932) classifies the beneficiaries. Sections 135-36 of the Restatement provide which beneficiaries may sue. See 2 Williston, Contracts 823 n.3 (3rd ed. 1957) for cases following the Restatement classification.
3 Restatement, Contracts §133(1)a (1932).
promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds.\textsuperscript{4}

Beneficiaries who may not enforce a contract are termed incidental beneficiaries by the Restatement. A person is an incidental beneficiary if the facts stated in the above quoted sections do not exist.\textsuperscript{5}

It is evident in the principal case that the appellant was not a creditor beneficiary. There was no evidence to indicate that the aunt owed him any duty. However the facts strongly substantiate that the appellant was a donee beneficiary under the contract. Under the Restatement category, he only had to show that the aunt intended to make a gift or to confer a right. In the principal case the court seemed bothered by the possibility that the promisor's duty to perform under the contract might have ended before the appellant's right to receive performance began. But this possibility should not be controlling because if the aunt did not make a gift in the sense that it was a transfer of an indefinite amount, the contract itself is strong evidence of intent to confer a right to a sum of money at her death. Contingent as it was, it was still a right.\textsuperscript{6}

In attempting to recover as a protected beneficiary, the plaintiff relied on a similar case\textsuperscript{7} in which the only real distinction was that the promisee owed the third person a duty. In distinguishing the cases the court said that in the principal case the appellant was an incidental beneficiary because the promisee owed him no duty.\textsuperscript{8} This reasoning is a misapplication of third party beneficiary law since a person does not have to be a creditor beneficiary to be protected. A donee beneficiary is also protected. The result, then, is that the Arkansas court is protecting creditor beneficiaries but not donee beneficiaries under these circumstances. However the majority of the courts treat the creditor and the donee beneficiary at least on equal terms.\textsuperscript{9} The Restatement even favors the donee.\textsuperscript{10}

Although it appears that the appellant was a donee beneficiary and therefore entitled to recover, the court was further troubled by the

\textsuperscript{4} Id. §133(1)b.
\textsuperscript{5} Id. §133(1)c.
\textsuperscript{7} Freer v. J. G. Putman Funeral Home, Inc., 195 Ark. 307, 111 S.W.2d 463 (1937).
\textsuperscript{8} Coley v. English, 357 S.W.2d 529, 530 (Ark. 1962).
\textsuperscript{9} 2 Williston, Contracts §356 (3rd ed. 1957).
\textsuperscript{10} Restatement, Contracts §§135-36 (1932). The creditor-beneficiary's right arises with the formation of the contract, but, unlike the donee-beneficiary's right, it is not immediately indefeasible. The creditor may lose his right unless he changes his position in reliance on the contract. Section 136(1), comment a.
fact that the beneficiary’s right arose only at the death of the promisee. However the strong majority rule is that a contract is not made testamentary by the fact that the donee beneficiary’s right is postponed until the death of the promisee. If it were otherwise, life insurance contracts in which the insurance is payable to one other than the estate of the insured would be testamentary. Also, since the contract was in full force during the promisee’s lifetime, there is no reason to surround it with the formalities which safeguard a will.

The court thought the contract testamentary mainly, it seems, because the promisee “retained full control over the contract.” It appears that the court in using this reasoning misunderstood the problem. “Control,” in this context, is a personal property term. But this is not a case of a personal property right, as such, but a contract right. The third party beneficiary’s right is a contract right whether he be creditor or donee. The right in question in the principal case is created by a contract between the promisor and the promisee, the validity of which is determined by the law of contracts and not by the law of gifts of personal property. Therefore, the court should have upheld the appellant’s right to recover as a donee beneficiary.

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Contracts—An Interpretation of the Uniform Commercial Code Section 2-207(1).—Plaintiff, a manufacturer of cellophane bags, ordered a drum of emulsion from defendant. In replying, defendant mailed a standardized form of acknowledgment stating various terms of sale which included a clause disclaiming any warranties whatsoever. Plaintiff received the emulsion, but bags produced with it failed to adhere. In an action for breach of warranty plaintiff contended

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11 Mutual Benefit Life Ins. Co. v. Ellis, 125 F.2d 127 (2d Cir. 1942); Robinson’s Women’s Apparel, Inc. v. Union Bank & Trust Co., 67 F. Supp. 395 (S.D.N.Y. 1946); Kansas City Life Ins. Co. v. Ramey, 353 Mo. 477, 182 S.W.2d 624 (1944); In re Koss’s Estate, 106 N.J. Eq. 323, 150 Atl. 360 (1930); Roberts v. Ellis, 229 Ore. 609, 368 P.2d 342 (1962); People’s Bank v. Baxter, 41 Tenn. App. 710, 298 S.W.2d 732 (1956); But see McCarthy v. Pieret, 281 N.Y. 407, 24 N.E.2d 102 (1939), criticized in 53 Harv. L. Rev. 1060 (1940) and 51 Yale L.J. 1 (1941).

12 Robinson’s Women’s Apparel, Inc. v. Union Bank & Trust Co., supra note 11.

13 Kansas City Life Ins. Co. v. Ramey, 353 Mo. 477, 182 S.W.2d 624 (1944).

14 Coley v. English, 187 S.W.2d 529, 531 (Ark. 1945).

15 See Brown, Personal Property §39 (1955). Control is an aspect of the delivery requirement in the law of gifts of personal property. If after an alleged delivery the donor still retains control over whatever is given, there is no gift.

16 Roberts v. Ellis, 229 Ore. 609, 368 P.2d 342 (1962); see 4 Corbin, Contracts 71 (1951).