

## Contractual Devices

### 1. UNITED STATES SAVINGS BONDS

United States savings bonds,<sup>1</sup> introduced only two decades ago,<sup>2</sup> constitute a convenient "evasive" device. The Treasury Regulations provide that the bonds may be registered in the names of natural persons in three forms: (a) in the name of one person as sole owner; (b) in the name of two, but not more than two, persons as co-owners; and (c) in the name of one person payable on death to one, but not more than one, other designated person as beneficiary.<sup>3</sup> These last two forms are effective substitutes for a will.<sup>4</sup>

Under the co-ownership form either co-owner may secure payment of the bond on his separate request without the signature of the other co-owner; and upon payment to either co-owner "the other person shall cease to have any interest in the bond."<sup>5</sup> A bond may be reissued during the joint lives of both co-owners only upon their joint request and under designated circumstances.<sup>6</sup> This prevents a husband from defeating his wife's rights by reissuance when the bond was issued originally in their joint names. On the other hand, he can still achieve his purpose by cashing the bond. Moreover, he can always buy bonds in the name of himself and a person

<sup>1</sup> Known also as Baby Bonds, War Savings Bonds, Defense Savings Bonds, and Security Bonds.

<sup>2</sup> A 1935 amendment to the Second Liberty Bond Act authorized the Secretary of the Treasury to issue savings bonds in such manner and subject to such terms and conditions as he may prescribe. 49 Stat. 21, Chap. 5, §6, Feb. 4, 1935, 31 U.S.C.A. 757 C.

<sup>3</sup> 31 Code Fed. Regs. §315.4 (Supp. 1958).

<sup>4</sup> But see Knecht, "Joint Ownership Reappraised," 88 TRUSTS & ESTATES 416, 418 (1949).

<sup>5</sup> 31 Code Fed. Regs. §315.60(a) (Supp. 1958).

<sup>6</sup> 31 Code Fed. Regs. §315.60(b) (Supp. 1958).

other than his wife, whether he uses the co-ownership form or the beneficiary form. On the death of either co-owner, the survivor "will be recognized as the sole and absolute owner of the bond."<sup>7</sup>

When the bond is issued in beneficiary form, it may be cashed by the registered owner "as though no beneficiary had been named in the registration."<sup>8</sup> But the bond may not be reissued so as to eliminate or change the beneficiary without her consent.<sup>9</sup> Similarly, under this form the only way to defeat the interest of a beneficiary without her consent is to cash the bond.

Some of the early cases on savings bonds adopted a narrow construction of the Treasury Regulations, and held against the surviving beneficiary. The *Deyo* case<sup>10</sup> is instructive in this regard because it also involved the right of the surviving spouse. In the *Deyo* case the husband had some four years before marriage invested \$7000 in savings bonds, the beneficiary at death being his sister. The widow, suing as executrix, claimed the bonds as estate assets. The court held that the complaint stated a good cause of action, reasoning that the Treasury Regulations were merely for the convenience of the federal government in determining "to whom the government may make payment of the bonds and thereby relieve the government of suits and claims or controversies."<sup>11</sup> Accordingly, under the laws of New York, the bonds were deemed invalid as a gift because of lack of delivery, and invalid as a will because of lack of testamentary formalities. On this view, of course, it was unnecessary to rule on the widow's rights under the New York forced share.

To remove doubts caused by this decision, and acting on

<sup>7</sup> 31 Code Fed. Regs. §315.61(c) (Supp. 1958).

<sup>8</sup> 31 Code Fed. Regs. §315.65(a) (Supp. 1958).

<sup>9</sup> 31 Code Fed. Regs. §315.65(b)(2) (Supp. 1958).

<sup>10</sup> *In re Deyo's Estate*, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing to follow* *Deyo v. Adams*, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942).

<sup>11</sup> 178 Misc. 859, 861, 36 N.Y.S.2d 734, 736 (1942).

the recommendation of the New York Law Revision Commission,<sup>12</sup> the New York Legislature passed the following statute:

“Where any United States savings bond is payable to a designated person, whether as owner, co-owner or beneficiary, and such bond is not transferable, the right of such person to receive payment of such bond according to its terms, and the ownership of the money so received shall not be defeated or impaired by any statute or rule of law governing transfer of property by will or gift or an intestacy. . . .”<sup>13</sup>

In a later proceeding in the *Deyo* litigation Surrogate Foley referred to the new legislation and ruled that “the form of registration of the bonds is sufficient to vest title of the proceeds in the surviving beneficiary. . . .”<sup>14</sup> Stating that public policy should encourage recognition of the rights of the designated beneficiary, he found a “present interest” in the beneficiary at the time the bonds were purchased. This “present interest,” he said, “may rest in contract,<sup>15</sup> and is . . . somewhat analogous to the rights of a beneficiary under an insurance policy, a beneficiary under a trust agreement or a beneficiary of a Totten trust.”<sup>16</sup> The suggestion that the Regulations relate solely to protection of the government was castigated as a “mere play on words,” producing a result that “certainly was never contemplated either by the Treasury Department or by the millions of purchasers of these bonds.”<sup>17</sup> Most courts now recognize the binding effect of the Treasury Regulations, either on the contract theory or on the

<sup>12</sup> 1943 Leg. Doc. No. 65(N); 1943 REPORT, RECOMMENDATIONS AND STUDIES, p. 636.

<sup>13</sup> L. 1943, Chap. 632, §1, N.Y. Pers. Prop. Law. §24. Similar statutes have been enacted in California, Michigan, Washington, and Wisconsin. See Note, 1947 Wisc. L. REV. 447.

<sup>14</sup> 180 Misc. 32, 35, 42 N.Y.S.2d at 387, 383 (1943).

<sup>15</sup> *Id.* at 40-1, 42 N.Y.S.2d at 387-88 (1943).

<sup>16</sup> *Id.* at 42, 42 N.Y.S.2d at 388.

<sup>17</sup> *Id.* at 42, 42 N.Y.S.2d at 387. For later proceedings in the *Deyo* litigation, see 182 Misc. 459, 48 N.Y.S.2d 419 (Sup. Ct. 1944).

power of the federal government to borrow money and to control the terms of its obligations.<sup>18</sup>

Many of the cases involving spouses' rights are from New York; and the New York cases uniformly deny the widow's claim.<sup>19</sup> We should notice that these cases do not always involve a direct attack by the widow under Section 18 of the Decedent Estate Law; and, in general, the equities are either not referred to or not clearly with the widow.<sup>20</sup> In *Matter of Kalina*,<sup>21</sup> however, the widow raised the issue squarely, in a

<sup>18</sup> Jones, "United States Savings Bonds, Series E, F, and G," 11 MD. L. REV. 265, 266 (1950); Note, 52 YALE L. J. 917 (1943). In general, see Gammon, "War Savings Bonds and State Succession Laws," 17 TENN. L. REV. 928 (1943); 1943 ANNUAL SURVEY OF AMERICAN LAW 604; Notes, 48 MICH. L. REV. 1038 (1950); 32 MINN. L. REV. 158 (1948); 4 MONT. L. REV. 61, 70 (1943); Annots. 173 A.L.R. 550 (1948); 168 A.L.R. 245 (1947). Most, but not all, courts have followed the regulations in prohibiting attempted transfers of the bonds either by way of gift inter vivos or gift causa mortis. For the view that the regulations do not in spirit prohibit a gift causa mortis, see Notes, 61 HARV. L. REV. 542 (1948); 38 MINN. L. REV. 401, 403 (1954). As to gifts inter vivos, see Note, 6 ALA. L. REV. 104 (1953).

<sup>19</sup> Estate of Morstatt, N. Y. L. J. 1 Feb. 1952, 4 P-H Wills, Trusts & Estates Service (Surr. Ct. 1952); Matter of Sturmer, 277 App. Div. 503, 101 N.Y.S.2d 25 (4th Dep't 1950); Superat v. Dylawski, 196 Misc. 707, 93 N.Y.S.2d 40 (Sup. Ct. 1949), *aff'd without opinion*, 277 App. Div. 969, 99 N.Y.S.2d 930 (1st Dep't 1950) (widow loses on alimony claim also); Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (Sup. Ct. 1948), *aff'd without opinion*, 274 App. Div. 1036, 85 N.Y.S.2d 917 (1st Dep't 1949); Matter of Kalina, 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945), *appeal dismissed by default*, 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946); Matter of Deyo, *supra*, note 10; Matter of Karlinski, 180 Misc. 44, (Surr. Ct. 1943), noted in 56 HARV. L. REV. 1006 (1943), 43 COLUM. L. REV. 260 (1943); *cf.* In re Staheli's Will, 57 N.Y.S.2d 185, (Surr. Ct. 1945), *aff'd without opinion*, 271 App. Div. 788, 66 N.Y.S.2d 271 (2d Dep't 1946) (nonevasive); Matter of Amols, 184 Misc. 364, 47 N.Y.S.2d 636 (Surr. Ct. 1944); Matter of Hager, 181 Misc. 431, 45 N.Y.S.2d 468 (Surr. Ct. 1944) (not clear whether or not surviving spouse involved).

<sup>20</sup> In the Deyo case, *supra*, note 10, for example, the bonds had been purchased a few years before the marriage and the marriage took place less than a year before the husband's death. Surrogate Foley also noted that the beneficiary was the decedent's sister, and stated that contracts for the benefit of third parties are recognized by the courts nowadays, "especially . . . where the beneficiary is a close relative." 180 Misc. 32, 40, 42 N.Y.S.2d 379, 387 (1943). In Hart v. Hart, *supra*, note 19, reasonable provision had been made by the decedent for the claimant spouse.

<sup>21</sup> 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945), *appeal dismissed by default*, 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946). The Kalina case was followed in Graham Estate, 3 D.&C.2d 218 (Pa. 1954).

case where her husband had given her the bare minimum in a small estate. The bonds were held not to be "illusory," on the ground that a "present interest" passed to the beneficiary. This "interest" was analogized to the interest passing in a joint savings account, as distinguished (in those pre-*Halpern* days) from that which passes under a Totten trust. Likewise, said the court, savings bonds are not testamentary; and it refused to read into the 1943 legislation <sup>22</sup> "a legislative intent to make a further exception in favor of a surviving spouse." Significantly, the court remarked that it was "naturally aware that the result here reached gives judicial approval to another medium by which the expectant rights of a spouse may be curtailed or even destroyed. It is only the latest to receive judicial consideration. . . . The remedy lies with the Legislature alone." <sup>23</sup>

But authority may be found in other jurisdictions for imposition of an *in personam* decree against the beneficiaries, in favor of the surviving spouse. In *Ibey v. Ibey* <sup>24</sup> the decedent husband purchased savings bonds payable at death to a son and two grandsons. The widow claimed that this was a fraud on her marital rights. Said the court: "The widow is entitled to what she has lost, but otherwise the bonds are payable in accordance with their terms. The measure of damages is what the widow would have gained if the bonds had been made payable to the decedent's estate. To this extent the bonds or their proceeds are subject to a constructive trust in favor of the plaintiff, if fraud is found." <sup>25</sup> Oddly

<sup>22</sup> See note 13, *supra*.

<sup>23</sup> 184 Misc. 367, 372, 53 N.Y.S.2d 775, 779-80 (1945).

<sup>24</sup> 93 N.H. 434, 43 A.2d 157 (1945), *exceptions overruled*, 94 N.H. 425, 55 A.2d 872 (1947).

<sup>25</sup> *Id.* at 436, 43 A.2d at 159, 31 Code Fed. Regs. §315.20(a) (Supp. 1958) states that no judicial proceeding will be recognized if it "would defeat or impair the rights of survivorship conferred . . . upon a surviving co-owner or beneficiary." Is imposition of a trust in favor of the widow consistent with this regulation? Presumably so; certainly the court in the *Ibey* case made that assumption, since it referred in passing to the section as it appeared in 1938. 93 N.H. 434, 436, 43 A.2d 157, 159 (1945).

enough, the *Ibey* case is one of the few evasion cases in which the standard of "reasonableness" is categorically rejected.<sup>26</sup> For this court, the decedent's motive is the touchstone.<sup>27</sup>

Authority for the widow may also be found by analogy in the cases dealing with inter vivos transfers in evasion of a contract to make a will.<sup>28</sup> In *Union National Bank v. Jessell*<sup>29</sup> the spouses executed a joint will providing for changes by mutual consent and stating that on the death of the survivor all the property of both of them should accrue to a trust created under the will. When the wife died the husband invested \$30,000 in savings bonds (Series G), naming his three children as beneficiaries. The husband's executor requested a declaratory judgment. The court declared that the children must surrender the bonds for redemption, and pay the proceeds over to the husband's executor to become part of the trust. The Treasury Regulations, said the court, "do not prevent the declaration of a resulting trust in bonds purchased in fraud of marital rights."<sup>30</sup>

<sup>26</sup> At the new trial the bonds were again "adjudged to have been purchased in fraud of the plaintiff's marital rights," 94 N.H. 425, 55 A.2d 872, 873 (1947). The Supreme Court of New Hampshire then overruled exceptions by the defendants. *Id.* at 425, 44 A.2d at 872. The *Ibey* case seems to be cited as holding entirely against the widow in 1 Scott, TRUSTS §57.5 (2d ed. 1956) and in Scott, "The Law of Trusts, 1941-1945," 59 HARV. L. R. 157, 176 (1945).

<sup>27</sup> The court admitted evidence that at various times from a month before the purchase of the bonds to within six months afterwards the decedent said in substance "I will fix it so that you, Maude, won't get any part of my estate." 93 N.H. 434, 437, 43 A.2d 157, 159 (1945).

<sup>28</sup> See Appendix D, *infra*, p. 366; *cf.* *Petersen v. Swan*, 239 Minn. 98, 57 N.W.2d 842 (Minn. 1953). In the *Petersen* case the decedent wife, entrusted by her husband with the joint marital savings, had purchased savings bonds for her mother. The court placed the burden on the mother to show that the bonds had been purchased with funds belonging to the wife.

As to bonds other than savings bonds, see *Robertson v. Robertson*, 147 Ala. 311, 40 So. 104 (1905) (state bonds; valid); *Lonsdale's Estate*, 20 Pa. 407 (1857) (bonds secured by mortgages; invalid); *Norris v. Barbour*, 188 Va. 723, 51 S.E.2d 334 (1949) (delivery, eleven years before death, of a bond for \$20,000 payable one year after death; invalid).

<sup>29</sup> 358 Mo. 467, 215 S.W.2d 474 (1948).

<sup>30</sup> *Id.* at 475, 215 S.W.2d at 477. *Accord*, *Anderson v. Benson*, 117 F. Supp. 765 (D.C. Neb., 1953); *Chase v. Leiter*, 96 Cal. App. 2d 439, 215

A commentator has stated that the chief goals of the savings bond program are "to halt inflation through encouraging private savings and to spread ownership of the national debt."<sup>31</sup> But pursuit of these worthy goals does not and should not necessitate the denial of a deserving widow's claim for support.<sup>32</sup> The point is vital, because savings bonds are obviously designed for the small investor.<sup>33</sup> Undoubtedly

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P.2d 756 (1950); *cf.* *Olsen v. Olsen*, 189 Misc. 1046, 70 N.Y.S.2d 838 (1947); *Rohn v. Kelley*, 156 Neb. 463, 56 N.W.2d 711 (1953), *cert. denied*, 75 Sup. Ct. 68 (1953); *Makinen v. George*, 19 Wash.2d 340, 142 P.2d 910 (1943) (resulting trust in favor of the real purchaser).

In *Katz v. Driscoll*, 86 Cal. App.2d 313, 194 P.2d 822 (1948) the rights of creditors were involved. The court stated that the Treasury regulations "are not intended to confer on the beneficiary the right to retain permanently the proceeds from the bonds irrespective of fraud or any illegality in the manner in which the bonds were obtained. To hold otherwise would, in effect, say that the treasury regulations not only guarantee payment to the named beneficiary, but, thereafter, when he receives the proceeds, follow him around indefinitely, and, like a protective halo, render him completely immune from any ordinarily legitimate claims thereto." *Id.* at 322, 194 P.2d at 828. *Cf.* *Estate of Lundwall*, 242 Iowa, 430, 46 N.W.2d 535 (1951) (confidential relationship; noted, on the evidentiary questions involved, in 37 IOWA L. REV. 299 (1952)); *Reynolds v. Reynolds*, 325 Mass. 257, 264, 90 N.E.2d 338 (1950); *In re Laundree's Estate*, 195 Misc. 754, 91 N.Y.S.2d 482 (1949), *rev'd*, 277 App. Div. 994, 100 N.Y.S.2d 145 (2d Dep't 1950); *In re Di-Santo's Estate*, 142 Ohio St. 223, 231, 51 N.E.2d 639, 642 (1943) ("There is no question in this case of a transfer in fraud of creditors or the widow").

In *Succession of Geagan*, 212 La. 574, 33 So.2d 118 (1947) in which the widow was given judgment for the amount of her community property interest in savings bonds, the court stated: "In modern times, when movable property may and often does constitute the great bulk of the wealth, the husband should have no more right to dispose of movables gratuitously without the consent of his wife than he has to dispose of immovables. It appears to be a matter of sufficient importance to warrant the Legislature's giving this provision of our law serious consideration." *Id.* at 599, 33 So.2d at 126. A useful note in 22 *TUL. L. REV.* 650 (1948) contrasts this decision with decisions denying the widow's rights against the beneficiaries of her husband's life insurance. Also see *Oliphint v. Oliphint*, 219 La. 781, 54 So.2d 18 (1951); *Comments*, 9 *LA. L. REV.* 147, 184-86 (1949); 8 *LA. L. REV.* 571 (1948).

<sup>31</sup> Note, 38 *MINN. L. REV.* 401, 402 (1954).

<sup>32</sup> See discussion of community values, *supra*, pp. 24-29.

<sup>33</sup> "In planning this security a primary objective was to avoid a recurrence of one of the unpleasant aftermaths of the first World War. Then, you will recall, many who had purchased Treasury Bonds to help finance the war found their bonds sinking well below par on the

they comprise a significant portion of the holdings of the average man of modest means, perhaps ranking next to the family home, life insurance, and the joint bank account as a medium for holding and transferring family wealth.<sup>34</sup>

Under existing Treasury regulations the widow cannot attach the bond before payment or reissuance.<sup>35</sup> The model statute suggested in Chapter 22, however, would permit the widow to seek contribution from the surviving beneficiary or co-owner. The court would also have the power to enjoin transfer of the bond or dispersal of its proceeds.<sup>36</sup>

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market. To prevent this from happening again a non-marketable bond was offered—one that would not be subject to the vagaries of speculation. To emphasize non-marketable and insulate further against market fluctuations the new bonds were also made non-transferable and their use as collateral was prohibited. At the same time, the bonds were made easily redeemable by their owners at fixed and readily ascertainable values. The result was a security which was safe for the inexperienced investor. . . ." Lynch, "Legal Problems Affecting the Use of Saving Bonds in Estate and Trust Planning," PROCEEDINGS OF THE SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, AMERICAN BAR ASSOC. 13 (1948).

<sup>34</sup> In predicting that savings bonds are not as likely to be employed as an evasive device as the Totten trust, a recent writer refers to them as "cumbersome," and states that "[T]he amount of government savings bonds that one person may purchase in any one year is limited by statute and this method again involves tying up money in a device which is not as liquid as a Totten trust." Comment by Norman Penney, 37 CORNELL L. Q. 258, 268, note 60 (1952). It is true, of course, that with the Totten trust the husband is not vulnerable to *ex parte* depletion of the fund, as is the case with savings bonds held in co-ownership, and to that extent the Totten trust, in jurisdictions where it is authorized, affords more control to the "fraudulent" spouse. But to pursue the comparison further is as unprofitable as the enquiry into whether it takes more mental capacity to make a contract than to make a will. It all depends on the circumstances. Five thousand dollars looms large in a small estate. Given the desire to evade the statutory share, there is nothing particularly "cumbersome" about savings bonds, either in buying them or in cashing them; and the limitations on holdings are not oppressive. 31 Code Fed. Regs. §315.10 (Supp. 1958).

<sup>35</sup> A legislature that adopted the Suggested Model Decedent's Family Maintenance Statute, see Chap. 22, could also clarify the rights of the surviving spouse by amending any existing legislation that protects the rights of beneficiaries of the bonds. For instance, §24 of the New York Personal Property Law (*supra*, note 13) would need the same exemption for the surviving spouse as is now provided for payment of creditor's claims and estate taxes.

<sup>36</sup> See §13.

## 2. PARTNERSHIP

At common law the deceased partner's interest in the partnership assets passed to the surviving partners. They took as quasi-fiduciaries, however, for purposes of winding up the partnership. Any surplus after payment of partnership liabilities was returned to the estate of the deceased partner, and the widow then took her distributive share.<sup>37</sup> These provisions of the common law appear, in substance, in the Uniform Partnership Act, adopted in two thirds of the states.<sup>38</sup>

Let us assume that the decedent partner had entered into an arrangement with the other partners that on the death of any partner the survivors would be entitled to the interest of the decedent.<sup>39</sup> Seemingly the decedent's widow has no complaint if this arrangement was on a bona fide "buy and sell" <sup>40</sup> basis; the consideration paid by the surviving partners would enure to her benefit. Occasionally, however, the partners provide that they hold the partnership assets as joint tenants with the right of survivorship; or they may agree that on the death of any partner his interest in the partnership

<sup>37</sup> Crane, PARTNERSHIP, §§83, 86 (2d ed. 1952). The widow's right to inchoate dower, where such an interest still exists, depends on whether the jurisdiction concerned follows the "pro tanto" theory of equitable conversion of partnership realty into personalty—in which event the realty would be considered personalty only for settlement of partnership affairs, and thereafter would be considered realty for purposes of administration of the decedent's estate, the widow then taking dower—or the English "out-and-out" theory of equitable conversion, in which event the widow would be denied dower. 3 AMERICAN LAW OF PROPERTY, §14.16 (1952); Edmonds, "Problems in Administration of Partnership Assets," [1951] U. ILL. L. FORUM 507.

<sup>38</sup> Uniform Partnership Act, §25(2)(d) and (e); *id.*, §26.

<sup>39</sup> These agreements are generally held not to be testamentary. See cases cited in Atkinson, WILLS, 166 (2d ed. 1953). *But cf.* Thomas v. Byrd, 112 Miss. 692, 73 So. 725 (1916).

<sup>40</sup> Frequently this arrangement is funded with insurance on the lives of the partners; and it may have complicated administration and tax consequences. Blackwell, "Contracts for the Purchase of Property or an Interest in a Business from a Decedent's Estate," 27 N. C. L. REV. 81 (1948); Darlington, "Buy and Sell Provisions of Partnership Agreements," 29 ORE. L. REV. 286 (1950); Edmonds, *supra*, note 37, 519-22; Matthews, "Estate Tax Consequences of Agreements for the Sale of a Partnership Interest Effective at the Partner's Death," 26 TEXAS L. REV. 729 (1948).

assets will "belong" to the surviving partners.<sup>41</sup> An arrangement of the first type is exemplified in *Hirsch v. Bartels*.<sup>42</sup> In that case the decedent, while a bachelor, formed a partnership in 1933 with two others, to deal in merchandise. The articles stipulated that the partnership would "continue until the death of two of the members . . . and at the death of the second of these . . . the business [should] belong to the surviving one . . ."; also that "should one die and two remain, then the two survivors [should] each receive a half and upon the death of two, the third [should] receive the whole . . ." The decedent married in 1941, and he died in 1949. The court ruled that the partners had intended a joint tenancy with right of survivorship. "Appellant has asked," said the court, "whether the articles of partnership were void as contrary to public policy where they will in effect preclude the widow from taking her dower interest. It seems to us the act of the legislature making such an agreement legal, hence such a situation possible, is a complete answer."<sup>43</sup> The *Hirsch* case is significant, as the Florida legislature and courts have in the main displayed solicitude for the widow.<sup>44</sup> To be sure, the "transfer" in the *Hirsch* case

<sup>41</sup> Arrangements of this sort are usually found in close family relationships, *e.g.*, husband and wife (where permitted); father and son; but not normally between brothers, as in the Fleming case, *infra*, note 46.

<sup>42</sup> 49 So.2d 531 (Fla. 1950).

<sup>43</sup> *Id.* at 532.

<sup>44</sup> The other Florida evasion cases stress, *inter alia*, the reasonableness of the financial provisions for the widow, *e.g.*, *Smith v. Hines*, 10 Fla. 258 (1863-4), (widow wins: not reasonably provided for); *Williams v. Collier*, 120 Fla. 248, 162 So. 868 (1935), (widow loses: "apparently ample provision" made for her); *Bee Branch Cattle Co. v. Koon*, 44 So.2d 684 (Fla. 1949), (widow loses: reasonably provided for). By way of statutory protection, the widow has inchoate dower in addition to her forced share in the husband's personalty owned at death, Fla. Stat. Ann. §731.34 (1957); her dower and forced share take precedence over her husband's creditors and the expenses of administration, Fla. Stat. Ann. §731.34 (1957); and all accident and life insurance policy proceeds payable by reason of an insured's death are free of debts and claims against him if the insured is survived by either his spouse or child or both, unless these proceeds are actually assigned or bequeathed to a creditor or creditors, Fla. Stat. Ann. §222.13 (1957). Unlike the rule prevailing in all but nine or ten states, this last-mentioned benefit

took place some ten years<sup>45</sup> before the marriage: but the language of the opinion seems broad enough to cover post-nuptial transfers.

*Fleming v. Fleming*,<sup>46</sup> an Iowa case, is unusual both in length<sup>47</sup> and in the spirited — if not acidulous — opinions rendered by a divided court. The litigation concerned the following agreement made by four brothers carrying on an insurance business:

“2d. That upon the death of either one of the undersigned, the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock<sup>48</sup> in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of the said partnership . . . .”<sup>49</sup>

Upon the death of one of the partners, his widow claimed her distributive share in the partnership assets. The majority opinion sustained the widow's claim. “In view of the legal status of the wife,” it said, “in view of the relationship which she sustains to her husband, in view of those provisions of

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applies even if the insurance is made payable to the insured's estate (*ibid.*).

<sup>45</sup> But it did not obtain legal sanction until just before the marriage. At the time the partnership was formed Florida did not permit survivorship in joint tenancies. In 1941, however—approximately two months before the marriage—Florida restored the privilege of survivorship if “the instrument creating the estate shall expressly provide for the right of survivorship. . . .” Fla. Laws Chap. 20954 (1941). The court concurred in the view of the chancellor “that the agreement was ratified by the partners after the amendment was enacted, when they continued to operate under it, before and after the marriage . . . for many years until the former's death.” 49 So.2d 531, 532 (Fla. 1950).

<sup>46</sup> 194 Iowa 71, 174 N.W. 946, 180 N.W. 206, 184 N.W. 296 (1921) *writ of error dismissed*, 264 U.S. 29 (1924).

<sup>47</sup> The proceedings in the Supreme Court of Iowa occupy fifty-three pages of the state reports. The usual evasion case rarely runs over four or five pages.

<sup>48</sup> “. . . This corporation issued to each of the brothers stock in equal parts . . . and each undertook to assign his stock by writing his name on the back thereof, without naming the assignee, and deposited it in a receptacle which it is claimed was under the control of all four of the brothers.” 194 Iowa 71, 84, 174 N.W. 946, 951 (1919).

<sup>49</sup> *Id.* at 78, 174 N.W. at 948-49.

statute that protect and guard her interest during his life and after he is dead, it would seem to be against the policy of the law, expressed in the statutes, to permit men to legally get together and agree with each other that, upon their death their wives and children shall receive no portion of the estate which they spent their lives in accumulating. It is a clear fraud on the marital rights of the wife."<sup>50</sup> At first glance these sentiments seem admirable, but somewhat later, as stated by the dissenting judge, "one finds a qualm of unrest suggested, such as sometimes follows too enjoyable a banquet."<sup>51</sup> The court takes it for granted that "the policy of the law" may be defeated by apt draftsmanship on the part of the decedent. The opinion slithers like a serpent to avoid labeling the partners' agreement a joint tenancy: it is assumed that a survivorship device will defeat the widow. In holding for the widow the court thus feels obliged to announce these curious propositions:

(1) No joint tenancy can arise out of a commercial enterprise.<sup>52</sup>

(2) The partner's agreement was in any event not a joint tenancy, because only the four original partners were involved: there was no transfer to a fifth party, nor was there any grant to the brothers by a fifth party.<sup>53</sup>

(3) If anything, it is a contract to make a will; the widow can prevail against a will, likewise with a contract to make a will.<sup>54</sup> Moreover, the widow's need, although referred to

<sup>50</sup> *Id.* at 81, 174 N.W. at 950.

<sup>51</sup> *Id.* at 90, 174 N.W. at 953. Salinger, J., dissenting, took the opposite—and equally arbitrary—view that the partners had entered into a joint tenancy and that the resulting right of survivorship would defeat the widow's claim.

<sup>52</sup> *Id.* at 82, 174 N.W. at 950. *But cf.* *Hirsch v. Bartels*, 49 So.2d 531 (Fla. 1950) discussed, *supra*, p. 232.

<sup>53</sup> *Id.* at 104, 180 N.W. 206, 207 (1920).

<sup>54</sup> *Id.* at 107, 180 N.W. at 208. As to spouses' rights in contracts to make a will, see appendix D, *infra*, p. 366. In *Matter of Karlinski*, 180 Misc. 44, 43 N.Y.S.2d 40 (Surr. Ct. 1943) the surrogate stated that "in the absence of proof that the contract was intended to operate as a substitute or subterfuge for a will, and made for the purpose of defeating the right of the widow under section 18 of the Decedent Estate

obliquely,<sup>55</sup> is not examined with care; in consequence, the decision may have been unduly favorable to the widow. As a corollary, it may have been unnecessarily harsh on the surviving partners. The court awarded the widow an interest in the partnership business, in spite of an offer of generous support by the partners.<sup>56</sup> Ten years later the parties were still litigating the nature of the widow's interest.<sup>57</sup>

The difficulties occasioned by the mechanical jurisprudence of the *Fleming* case could be avoided by application of the maintenance and contribution formula. The result would hinge on the widow's need and the "reasonableness" of the transfer,<sup>58</sup> not on the label applied to the transfer. The surviving partners might well be called upon to contribute to the widow's maintenance, but there would be no unwarranted interference with the partnership business.

### 3. LIFE INSURANCE

Life insurance may be described as a contract to pay a named or ascertainable sum on the death of a person. As such, it is not considered testamentary;<sup>59</sup> and neither is the

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Law, the interest of the decedent in the partnership belongs to the surviving partner." The case involved \$150 in war savings bonds. On reargument the beneficiary's right to the bonds was sustained, on similar (but more meandering) reasoning to that used in *Matter of Deyo*, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing to follow* *Deyo v. Adams*, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942) discussed, *supra*, pp. 224-226. *But see* *Buehrle v. Buehrle*, 291 Ill. 589, 126 N.E. 539 (1920) (widow permitted to invade partnership assets).

<sup>55</sup> It is hinted at in 194 Iowa 71, 81, 174 N.W. 946, 949-50 (1919), but receives no detailed attention.

<sup>56</sup> *Id.* at 107, 108, 180 N.W. 204, 208 (1920).

<sup>57</sup> 211 Iowa 1251, 230 N.W. 359 (1931).

<sup>58</sup> Suggested Model Decedent's Family Maintenance Statute, §§2-4, *infra*, Chap. 22.

<sup>59</sup> *Vance, INSURANCE* 673 (3rd Ed. 1951). Legislation was enacted recently in New York to dispel doubts caused by a lower court decision labelling as testamentary a supplementary contract arising out of an optional mode of settlement in a matured policy. *Hall v. Mutual Life Ins. Co. of New York*, 201 Misc. 203, 109 N.Y.S.2d 646 (Sup. Ct. 1952), *rev'd*, 282 App. Div. 203, 122 N.Y.S.2d 239 (First Dep't 1953). On the lower court opinion see 1952 ANNUAL SURVEY OF AMERICAN LAW, 329. See also Land, "Life Insurance Option Settlements—Trusts or Debts,"

insurance trust, an arrangement in which the policy itself or its proceeds is held in trust.<sup>60</sup> Life insurance may function as a form of investment, aided by options which permit the insured to surrender the policy for its cash value and also to obtain loans either for cash or for payment of premiums. Primarily, however, it is a device for achieving family security. In the vast majority of cases life insurance owned by the husband<sup>61</sup> will be used for family support — payable to the widow, to the widow and children, to the children alone, or to the estate. And the goal of family protection is furthered by the statutes which exempt life insurance proceeds from the claims of creditors.<sup>62</sup> These statutes, to be found in all states, were passed originally to protect the wife and family.<sup>63</sup> Most of them impose no monetary restriction on the amount of exempt insurance that may be carried.

When we look at the evasion cases, however, life insurance is revealed as a potential weapon of evasion.<sup>64</sup> The decedent may take out a policy for that express purpose, or he may

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42 COLUM. L. R. 32 (1942); *cf.* *White v. White*, 212 S.C. 440, 48 S.E.2d 189 (1948) (life insurance not part of husband's estate under South Carolina "mistress" statute); *Bynum v. Prudential Ins. Co. of America*, 77 F. Supp. 56 (E.D.S.C. 1948).

<sup>60</sup> Smith, PERSONAL LIFE INSURANCE TRUSTS, 73-82 (1950). *But see* *Bickers v. Shenandoah Valley National Bank*, 197 Va. 145, 88 S.E.2d 889 (1955), *rehearing denied*, 197 Va. 732, 90 S.E.2d 865 (1956), noted in 31 N. Y. U. L. REV. 697 (1956); 42 VA. L. REV. 256 (1956); also see Note, "The Testamentary Nature of Revocable Inter Vivos and Life Insurance Trusts—Liberalizing Legislation in Wisconsin," 1956 Wisc. L. REV. 313.

<sup>61</sup> As distinguished from business insurance taken out by others on the life of the husband.

<sup>62</sup> Vance, INSURANCE, §124 (3rd ed. 1951); *cf.* Arnold, "Life Insurance as an Asset Available to Creditors in Maryland," 6 MD. L. REV. 275 (1942).

<sup>63</sup> The legislative tendency has been to extend the protection to include any beneficiary. In some states it even includes insurance payable to the insured's estate, annuities, and the disability benefits under insurance policies.

<sup>64</sup> The insured may designate as payee one who has no insurable interest in the insured's life, provided the beneficiary was not an active and moving party in securing the issuance of the policy. In Texas, however, the beneficiary must have an insurable interest. *Cf.* Patterson, "Insurance Law During the War Years," 46 COLUM. L. REV. 345, 360-62 (1946).

assign or change beneficiary rights on existing policies. Two fairly recent cases are illustrative of the general problem.

In *Mitchell v. Mitchell*<sup>65</sup> the husband changed the beneficiary rights on his insurance policies, aggregating \$48,000, from his estate to his mother. The trial court invalidated the transfers as being illusory and also as constituting a "fraud" on the wife. The "fraud" lay in the finding that she had become reconciled with him on the strength of his statement that he had not made any change in his insurance. In holding life insurance illusory the court compared it with the Totten trust, stating that when the assured can change beneficiaries, the rights of those beneficiaries "are contingent and revocable; they do not vest until the death of the assured or settlor."<sup>66</sup> Needless to say, this opinion was of interest to the insurance business; and the New York State Association of Life Underwriters, as *amicus curiae*, filed a brief on the appeal. The First Department reversed. It found that the insurance had nothing to do with the reconciliation; and there was nothing illusory about the change in beneficiaries, it said, since the assured had an "absolute right" to do so under his contract of insurance. Moreover, the court drew attention to the reasonableness of the transaction. The decedent had given the widow \$7,000 in cash on the day of his suicide; he left a net estate of \$9,000; and the donee had supported the decedent as a child. The Court of Appeals affirmed without opinion.

In *Bullen v. Safe Deposit & Trust Company*,<sup>67</sup> the decision was also against the spouse, and likewise the equities ran against her.<sup>68</sup> The husband had made a revocable declaration of trust involving a substantial amount of life insurance. He retained control of the policies, including the power to

<sup>65</sup> 177 Misc. 1050, 32 N.Y.S.2d 839 (Sup. Ct. 1942), *rev'd*, 265 App. Div. 27, 37 N.Y.S.2d 612 (1st Dep't 1942), *aff'd without opinion*, 290 N.Y. 779, 50 N.E.2d 106 (1943).

<sup>66</sup> 177 Misc. 1050, 1052, 32 N.Y.S.2d 839, 842 (1942).

<sup>67</sup> 177 Md. 271, 9 A.2d 581 (1939).

<sup>68</sup> The insurance aggregated \$146,000; the widow received by gift or operation of law \$150,000.

change beneficiaries. Said the court: "the wife has not a statutory interest in her husband's life insurance merely by reason of his retaining the right to change the beneficiary, and the right to exercise complete dominion and control over it . . . ."

The surviving spouse has prevailed in several instances, but these cases have some distinguishing factors. In a New York case, *Weisman v. Metropolitan Life Insurance Co.*,<sup>69</sup> the decedent named his wife as beneficiary and gave her the policies. Later, he recovered the policies from her to obtain a loan thereon; and in contemplation of a reconciliation with her, he agreed in writing to make her the beneficiary "unreservedly." Subsequently he assigned the policies to another. The widow's claim was upheld. Likewise, in *Reiss v. Reiss*,<sup>70</sup> a lower court in New York ruled in the widow's favor when the husband had changed beneficiaries in violation of a settlement agreement. In denying a motion to dismiss the wife's action the court made the interesting statement that the decedent's conduct was "a violation of Section 18 of the Decedent Estate Law." Neither the *Weisman* case nor the *Reiss* case was specifically overruled in the *Mitchell* case.<sup>71</sup> But the *Weisman* case (and possibly the *Reiss* case) may be distinguished on its facts; and certainly the dictum in the *Reiss* case has little weight in view of the later holding in the *Mitchell* case.<sup>72</sup>

On the whole, then, we may say that the courts appear to take it for granted that life insurance is immune to the widow's attack;<sup>73</sup> and, aside from the *Mitchell* and *Bullen*

<sup>69</sup> 7 N.Y.S.2d 565 (Sup. Ct. 1938), *aff'd without opinion*, 256 App. Div. 914, 10 N.Y.S.2d 414 (1st Dep't 1939).

<sup>70</sup> 166 Misc. 274, 2 N.Y.S.2d 358 (Sup. Ct. 1937).

<sup>71</sup> *Supra*, note 65.

<sup>72</sup> *But cf.* Application of Barasch, 267 App. Div. 830, 45 N.Y.S.2d 790 (2d Dep't 1944), *motion for reargument denied without opinion*, 267 App. Div. 905, 47 N.Y.S.2d 486 (2d Dep't 1944) (favoring widow, but facts obscure, and no discussion).

<sup>73</sup> *Holzbeierlein v. Holzbeierlein*, 91 F.2d 250 (D.C. Cir. 1937); *Moskowitz v. Equitable Life Assur. Soc. of the United States*, 252 App. Div. 75, 297 N.Y.S. 45 (1st Dep't 1937); *Estate of Kerr*, 1 Fiduc. Rep. 239,

cases, the point has excited little judicial discussion. But it would be unwise to assume that the matter is settled. It happens that no case has as yet arisen in which the equities clearly favor the surviving spouse. Doctrine, in the evasion cases, oftentimes will defer to the exigencies.<sup>74</sup> Moreover, in some of the insurance cases the "transfer" was by way of an assignment or pledge as collateral for a loan.<sup>75</sup> This circumstance

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38 Del. Co. Rep. 205 (Pa. 1951); *Benkart v. Commonwealth Trust Co.*, 269 Pa. 257, 112 Atl. 62 (1920); *cf.* *Exchange Nat. Bank of Winter Haven v. Smith*, 4 So.2d 675 (Fla. 1941); *Milewski v. Milewski*, 351 Ill. App. 158, 114 N.E.2d 419 (1953); *Matter of Smith*, N. Y. L. J. 20 Dec. 1939, 1 P-H Unreported Trust Cases, ¶25,288 (Surr. Ct. 1939); *Auch's Estate*, 70 Montg. 370, 68 York 137 (Pa. 1955); *American Trust & Banking Co. v. Twinam*, 187 Tenn. 570, 216 S.W.2d 314 (1948). *But cf.* *Estate of Brown*, 384 Pa. 99, 119 A.2d 513 (1956) (unfounded life insurance trust).

In *Wissner v. Wissner*, 89 Cal. App.2d 759, 201 P.2d 874 (1949), *rev'd*, 338 U.S. 655 (1950), 18 GEO. WASH. L. REV. 587 (1950), the widow lost to her husband's mother, the designated beneficiary of a National Service Life Insurance Policy. But other types of family claims have prevailed against veteran's benefits: In *re Guardianship of Bagnall*, 238 Iowa 905, 29 N.W.2d 597 (1947) (disability compensation, war risk insurance, and bonus paid to mentally incompetent veteran held vulnerable to alimony claim); *Gaskins v. Security—First National Bank of Los Angeles*, 30 Cal. App. 2d 409, 86 P.2d 681 (1939) (mentally incompetent veteran's war risk insurance and compensation; children's support); *Hodson v. New York City Employees' Retirement System*, 243 App. Div. 480, 278 N.Y. Supp. 16 (1935) (maintenance for abandoned wife and minor child); *Hallis v. Bryan*, 166 Miss. 874, 143 So. 687 (1932) (disability compensation, alimony); *Schlaefer v. Schlaefer*, 112 F.2d 177, 130 A.L.R. 1014 (D.C. Cir. 1940) (alimony); *Annots.* 130 A.L.R. 1014 (1941), 106 A.L.R. 669 (1937), 11 A.L.R. 123 (1921). *But cf.* *Brewer v. Brewer*, 19 Tenn. App. 209, 84 S.W.2d 1022 (1933) (incompetent veteran's compensation and war risk insurance; support and maintenance).

<sup>74</sup> But not always in accord with the maintenance and contribution formula. And insensitivity to the criterion of need may also be observed in those cases that perhaps award the widow *too much*. For example, life insurance payable to the widow is usually not charged against her statutory share. In *re Schulman's Will*, 115 N.Y.S.2d 169, 172 (1952); In *re Perlmutter's Will*, 199 Misc. 330, 98 N.Y.S.2d 968 (Surr. Ct. 1950); *cf.* In *re Weil's Estate*, 73 N.Y.S.2d 370 (Surr. Ct. 1947). *But cf.* *Johnson v. Remy*, 220 F.2d 73 (5th Cir. 1955); *Buehrle v. Buehrle*, 291 Ill. 589, 126 N.E. 539 (1920).

<sup>75</sup> *Fleming v. Fleming*, 194 Iowa. 71, 184 N.W. 296 (1921); *Chamberlin v. First Trust & Deposit Co.*, 172 Misc. 472, 15 N.Y.S.2d 168 (Sup. Ct. 1939); *Matter of Kelley*, 160 Misc. 421, 289 N.Y. Supp. 1079 (Surr. Ct. 1936); *aff'd*, 251 App. Div. 847 (2nd Dep't 1937). In general, see a valuable comment, "The Assignment of Life Insurance as Collateral Security for Bank Loans," 58 YALE L. J. 743 (1949); Bloys, "Collateral Assignments of Life Insurance Policies," 1 C. L. U. J. 61 (1946).

should militate against the widow's chances, as the husband's "estate" would have been augmented by the loan.

Life insurance as a method of disinheritance is not entirely practicable. It involves loss of immediate income;<sup>76</sup> and, as time goes by, the medical restrictions tighten, and the rates increase. Nevertheless, a husband may use this device to remove property from his estate, while retaining the right to liquidate or borrow on the policy and to change beneficiaries. The statutory share is no better off in this respect than is the civil law *légitime*. "The weedy growth of the law of insurance," says Daggett, "really emasculates some of the ancient provisions for forced heirship. . . . The jurisprudence of France and Louisiana has maintained the right of the individual to defeat the laws of forced heirship upon the theory that the insured never possessed the death benefit himself, and consequently, that it was not part of his succession, except when made payable to his estate."<sup>77</sup>

The arguments for protecting life insurance from the widow's claim are not entirely convincing. To urge the "functional nature" or "social utility" of the device seems inappropriate; the primary function of life insurance is to

<sup>76</sup> As to annuities, see p. 242, *infra*.

<sup>77</sup> Daggett, "General Principles of Succession on Death in Civil Law," 11 TULANE L. REV. 399, 405 (1937). Several views are followed when the husband pays for the premiums out of community property and designates someone other than the widow as beneficiary. In California, and probably in Washington, the widow can recover one half the proceeds. In Louisiana the widow apparently has no remedy. In Texas and other community property states she can recover the proceeds if the evidence discloses that the beneficiary had no moral claim on the decedent, and that the amount of community funds expended for premiums was unreasonably out of proportion to the remaining community funds. Cf. *Metropolitan Life Ins. Co. v. Baker*, 107 F. Supp. 1 (D.C. N.D. Texas 1952), in which the widow's claim was rejected, in the absence of "fraud." The opinion is indecisive as to whether or not "fraud" would require misrepresentation, but it is significant that the court noted that the widow was beneficiary on another policy and "received the home and other property." In general, see 1 DeFuniak, COMMUNITY PROPERTY, §123 (1943); Huie, "Community Property Laws as Applied to Life Insurance," 18 TEXAS L. REV. 121 (1940); notes, 32 TEXAS L. REV. 608 (1954); 18 TULANE L. REV. 487 (1944); Annot. 17 A.L.R.2d 1118 (1951)

provide an estate to take care of the widow and family.<sup>78</sup> Nor should there be any legitimate fear that if the widow be permitted to invade, so should "creditors": the basic purpose of the statutes exempting insurance from creditors is to protect the *family*. Moreover, life insurance forms a substantial proportion of the total holdings of many decedents, especially among decedents of modest means.<sup>79</sup> In many instances life insurance proceeds will be the only property left.

Occasionally the suggestion is made that life insurance be amenable to the widow's claim to the extent that the insurance is includible in the decedent's gross estate for federal estate tax purposes.<sup>80</sup> Some writers have advocated restricting her recovery either to the extent of the premiums paid by the husband,<sup>81</sup> or the cash surrender value at death.<sup>82</sup> I believe that my statutory formula is preferable, because it does a better job of reconciling the opposing interests. For one thing, the reliance interest of the insurance beneficiary will be weighed. Normally, of course, his reliance interest will be low, since he does not receive the insurance proceeds until the decedent's death.<sup>83</sup> For another thing, the "need" criterion should help the decedent to plan his estate. He can

<sup>78</sup> Inconvenience to the insurance companies could be alleviated by legislation similar to that which permits banks to pay with impunity to the survivor in a joint bank account—or even legislation permitting payment of the insurance proceeds into court if the company should be served with a notice of pending maintenance application. Cf. Grossman, "Problems Of The Insurer When Attempted Change Of Beneficiary Is Incomplete, Irregular Or Of Doubtful Validity," 13 B. U. L. REV. 391 (1933).

<sup>79</sup> It has been estimated that insurance proceeds constitute nearly four-fifths of the property left by decedents. Stephenson, *LIVING TRUSTS*, 64 (2d ed. 1937), cited in Smith, *PERSONAL LIFE INSURANCE TRUSTS* 9 (1950).

<sup>80</sup> Under this plan the widow would be defeated if the husband paid the premiums but retained none of the "incidents of ownership." Int. Rev. Code of 1954, §2042.

<sup>81</sup> *E.g.*, Note 27 N. Y. U. L. REV. 306, 315, note 63 (1952).

<sup>82</sup> Note, 16 BROOKLYN L. REV. 229, 244 (1950).

<sup>83</sup> In some instances it might be more equitable to exact contribution from another inter vivos transferee. The insurance beneficiary's contribution would in any event be measured by the widow's need, not by some predetermined fraction of the insurance proceeds.

preclude invasion of his insurance by the widow if he leaves her adequate support. Under the plans suggested above, however, the widow could invade regardless of need, and regardless, indeed, of other inter vivos benefits, including insurance, already given her by the decedent.

#### 4. ANNUITIES

Annuities involve payment of a lump sum to the insurance company in return for annual payment by the company of a definite sum to the annuitant or to a designated beneficiary, payable during the life of the annuitant.<sup>84</sup> The contract may or may not provide for minimum aggregate payments, to be made to a designated beneficiary in the event of the prior death of the annuitant. When the consideration paid by the annuitant was based on a recognized annuity table the contract will be sustained even though the annuitant did not live to receive the first payment.

It is apparent that the average annuitant is thinking of himself, not of his family. Nevertheless, annuities have played a very minor part<sup>85</sup> in evasion litigation — the leading roles being taken by popular substitutes for the will. The widow should have a justifiable complaint if her husband, as annuitant, contracted for death benefits in an amount that was unreasonably large.<sup>86</sup> Absent any death benefits, however,

<sup>84</sup> But there are variations: the annuitant may pay in premiums instead of a lump sum; the company may make payments monthly (not yearly) and over a stated period of years (not for life); the annuity may be for one person or the contract may provide annuities for a group. Group annuities ordinarily make no provision for death benefits. Vance, *INSURANCE* §200 (3rd ed. 1951).

<sup>85</sup> Annuities have become popular only in the last quarter-century, beginning with the depression of the thirties.

<sup>86</sup> *But cf.* Penn. Mutual Ins. Co. v. Fields, 81 F. Supp. 54, 57 note 2, (S.D. Cal. 1948), *aff'd*, 178 F.2d 200 (9th Cir. 1949). The comedian, W. C. Fields, purchased a single premium insurance policy "in the nature of an annuity," with death benefits payable to his brother and sister. His widow, having established that the premium had been paid with community property while he was domiciled in California, was awarded one half of the proceeds on Field's death. Much of the judgment is occupied with the question of domicile. The trial judge stated,

the widow's rights, *qua* widow, are questionable. She should have attacked the annuity in the husband's lifetime, in conjunction with divorce or maintenance proceedings.

But what if the wife had no knowledge of the annuity, or her husband died before suit could be brought? The latter contingency occurred in *Maruska v. Equitable Life Assurance Society*.<sup>87</sup> Here the purchase price was obtained partly from the decedent's personalty and partly by sale of the homestead. The wife's consent to sale of the homestead was procured by fraud. She brought suit in her own name, and also as administratrix, to recover damages against the insurance company and another for conspiring to defraud her of her marital interest in her husband's property. In granting the widow's motion to have the case remanded to a state court the Federal court was careful to point out that it was not concerned with the "real merits" of the suit. It did intimate, however, that although the widow might have the transfer of the homestead set aside, she had no real case as to the transfer of the personalty, as "the husband has absolute power to dispose of his personal property, providing that no fraud be committed against his wife's marital rights. See *Smith v. Wold*, 125 Minn. 190, 145 N.W. 1067."<sup>88</sup> The word "fraud" in this dictum is equivocal; but the references to *Smith v. Wold*<sup>89</sup> may have some significance. That case used the word "fraud" to connote an unreasonably large inter vivos transfer of personalty, stating that "a court cannot say with minute exactness just how much the husband may give away without subjecting himself to a just charge of fraud."<sup>90</sup> We may speculate that a widow would have some chance of prevailing against an

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parenthetically: "I am convinced that, *absent actual fraud*, a gift of the character here involved, could be made, under the common law by a husband legally domiciled in a common law state."

<sup>87</sup> 21 F. Supp. 841 (D. Minn. 1938).

<sup>88</sup> *Id.* at 842. The court indicated that the widow was not a "creditor" because she had not instituted a suit for divorce or separate maintenance before her husband's death.

<sup>89</sup> This case is also reported *sub. nom.* *Smith v. Corey*.

<sup>90</sup> 125 Minn. 190, 192, 145 N.W. 1067, 1068 (1914).

unreasonably large annuity purchased close to the husband's death, particularly if the insurance company was aware of the circumstances at the time the contract was made.

### 5. EMPLOYEE DEATH BENEFITS

There is very little authority on the power of a surviving spouse to set aside or invade beneficiary rights under retirement plans, pension schemes, profit-sharing and stock-purchase agreements, and other types of employee benefits. These devices originated, for all practical purposes, with the entry of the insurance companies into the employee benefit field in the last few decades; and they have achieved enormous popularity in the last few years.<sup>91</sup>

In *Moyer v. Dunseith*<sup>92</sup> a surviving husband contended that his wife's designation of her mother as beneficiary under the Teachers' Retirement Fund was an illusory transfer. The wife had taught for a good portion of her life. Sixteen days before death she changed the beneficiary rights from her mother to her sister. The court stated that retirement benefits resemble neither the Totten trust nor life insurance, and rejected the widower's claim.

Since the *Moyer* case was decided the New York legislature has enacted Section 24a of the Personal Property Law.<sup>93</sup> This

<sup>91</sup> ". . . upwards of 10 million people are now covered by privately supported pension plans which hold funds totaling about \$17 billion." Dunckel, "Pension Trusts for Millions," 93 ESTATES & TRUSTS 284 (1954).

<sup>92</sup> 180 Misc. 1004, 46 N.Y.S.2d 360 (Sup. Ct. 1943), *aff'd without opinion*, 266 App. Div. 1008, 45 N.Y.S.2d 126 (2d Dep't 1943).

In *Gristy v. Hudgens*, 23 Ariz. 339, 203 Pac. 569 (1922), the husband, a member of an employees' benefit association, changed beneficiary rights about a year before his death from his wife to a twelve-year old girl, not a member of his family. The transfer was sustained even though the benefits had been purchased out of community property, because no "fraud" had been shown. See Chap. 20, note 21; *cf.* Callahan v. Mooney, 190 Misc. 736, 72 N.Y.S.2d 924 (Sup. Ct. 1947) (fraud, undue influence); *Fischer v. Fischer*, 24 N.J. Super. 180, 93 A.2d 788 (1952) (wife held not entitled to invade husband's policemen's pension fund for alimony).

<sup>93</sup> New York Laws, Chap. 820 §1 (1952).

provision purports "to remove any uncertainty which may exist as to the validity of a designation of a beneficiary . . . under a pension, retirement or employee profit-sharing plan or under an annuity or a contract supplemental to an annuity or life, accident or health insurance policy."<sup>94</sup> As was the case with its companion Section 24, dealing with United States savings bonds, Section 24a makes no mention of the rights of the surviving spouse. Undoubtedly Section 24a will also be construed to preclude any attack by the surviving spouse.<sup>95</sup> The need for corrective legislation is apparent.

<sup>94</sup> New York Law Revision Commission, Leg. Doc. (1952) No. 65 C; 1952 Report, Recommendations and Studies, p. 166.

<sup>95</sup> See *In re Deyo's Estate*, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing to follow* *Deyo v. Adams*, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942), discussed, *supra*, p. 224.