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Employment Contracts: New York Law Is No Shield for Brooke

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EMPLOYMENT CONTRACTS: NEW YORK LAW IS NO SHIELD FOR BROOKE

A picture is worth a thousand words. And those words can haunt you forever if you are a child model whose parent has given unrestricted consent for publication of your picture. New York law[1] provides for judicial approval of contracts entered into by infants who are performing artists.[2] This statute specifically applies to actors, actresses, dancers, musicians, vocalists and professional athletes.[3]

In *Shields v. Gross*,[4] the New York Court of Appeals specifically excluded child models from coverage under New York General Obligations Law section 3-105. This exclusion prevented the plaintiff, Brooke Shields, from obtaining a permanent injunction to stop the republication of photographs of her in the nude.[5]

In 1975, at age ten, Brooke Shields was employed as a model by the

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1. N.Y. GEN. OBLIG. LAW § 3-105 (McKinney 1978) (repealed effective December 31, 1983). Now covered by N.Y. ARTS AND CULTURAL AFFAIRS LAW § 35.03 (McKinney 1984).

2. California has a similar provision. CAL. CIV. CODE § 36 (West 1982). This section provides for judicial review and approval of employment contracts for children who perform "artistic or creative services." The statutory definition of artistic or creative services includes a more extensive listing of entertainment occupations than the New York statute. *Compare* CAL. CIV. CODE § 36(2)(b) (West 1982) and N.Y. GEN. OBLIG. LAW § 3-105(1)(a) (McKinney 1978). Despite the more extensive listing, California § 36 does not specifically include child models in its statute. Unlike the New York statute, California § 36 does not place a time limitation on the duration of the contract once it has been judicially approved, nor does it allow the court to later modify or revoke the contract. This is substantially different from New York's statute and suggests an even stronger emphasis on protection of the child's employer rather than the child. *See infra* note 16. For cases interpreting the California statute, see Warner Bros. Pictures v. Brodel, 31 Cal. 2d 766, 192 P.2d 949, *cert. denied*, 335 U.S. 844, *reh'g denied*, 335 U.S. 873 (1948) (section 36 deprives a minor of the right of disaffirmance even after minority); Loew's, Inc. v. Elmes, 31 Cal. 2d 782, 192 P.2d 958 (1948) (section 36 authorizes the court to approve a one year term of employment and grant six options to extend the term of employment); Morgan v. Morgan, 22 Cal. 2d 665, 34 Cal. Rptr. 82 (1963) (minor cannot upon obtaining majority recover money paid out on minor's behalf during minority). *See also* Note, *California's Emancipation of Minors Act: The Costs and Benefits of Freedom from Parental Control*, 18 CAL. W.L. REV. 482 (1982).

3. N.Y. GEN. OBLIG. LAW § 3-105 (McKinney 1978).

4. 58 N.Y.2d 338, 448 N.E.2d 108, 461 N.Y.S.2d 254 (1983).

5. The statute provides that contracts, for a period of more than three years, entered into by child performers, will not be automatically approved by the courts. Any conditions or covenants beyond three years may be approved if they are found to be reasonable. N.Y. GEN. OBLIG. LAW § 3-105. Brooke Shields argued that her contract with photographer Garry Gross was covered by this statute. Since the contract was for a period of more than three years, Shields argued that the contract expired prior to the republication of the photographs.

defendant, photographer Garry Gross. Before the photo session, Shields's mother signed two consent forms[6] which gave Gross unrestricted use of the photographs. The photographs, showing Shields nude in a bathtub, were later used in several publications and in the window of a New York City store.

In 1980, Shields discovered that the photographs had appeared in a French magazine, and that Gross planned to use them in other publications. After an unsuccessful attempt to purchase the negatives, Shields brought a suit against Gross for compensatory and punitive damages and for a permanent injunction to prevent further use of the photographs.[7]

The New York Special Term granted a preliminary injunction, stating that whether the consent forms were invalid or restrictive was a question of fact.[8] If the consents were found to be valid or unrestricted, New York Civil Rights Law sections 50 and 51 barred any cause of action.[9] The trial court dismissed the complaint, finding that the consents were unrestrictive as to time and use. However, the trial court permanently enjoined Gross from using the photographs in any pornographic publica-

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6. The consent forms provided in pertinent part:

> I hereby give the photographer, his legal representatives, and assigns, those for whom the photographer is acting, and those acting with his permission, or his employees, the right and permission to copyright and/or use, reuse and/or publish, and *republish* photographic pictures or portraits of me, or in which I may be distorted in character, or form, in conjunction with my own or a fictitious name, on reproductions thereof in color, or black and white made through any media by the photographer at his studio or elsewhere, *for any purpose whatsoever*; including the use of any printed matter in conjunction therewith.
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> I hereby waive any right to inspect or approve the finished photograph or advertising copy or printed matter that may be used in conjunction therewith or to the eventual use that it might be applied. (Emphasis added.)

Shields, 58 N.Y.2d at 342, 448 N.E.2d at 109, 461 N.Y.S.2d at 255.

7. *Shields*, 58 N.Y.2d at 342, 448 N.E.2d at 109, 461 N.Y.S.2d at 255-56.

8. *Id.*

9. A person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without having first obtained the *written consent* of such person, or *if a minor of his or her parent or guardian*, is guilty of a misdemeanor. (Emphasis added.)

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976). Section 51 provides for equitable relief and exemplary damages for violation of section 50. For cases interpreting these statutes, *see* Davis v. High Society Magazine, Inc., 90 A.D.2d 374, 457 N.Y.S.2d 308 (1982) (courts construe broadly what constitutes commercial misappropriation); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981) (previous written consent did not constitute implied authorization for subsequent use); Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 472 N.Y.S.2d 254 (1984) (use of a celebrity lookalike was an impermissible misappropriation); Namath v. Sports Illustrated, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (1975) (no violation of right of publicity where magazine uses pictures of celebrity who had previously appeared in magazine in subscription advertisement). *See also* Savell, *Right of Privacy — Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALBANY L. REV. 1 (1983).

tions.[10] The Appellate Division expanded the scope of the trial court's injunction by enjoining the use of the photographs for advertising or trade purposes.[11] The parties filed cross appeals to New York's highest court, debating the legal effect of the parental consent forms.[12]

Previously, New York common law allowed an infant tremendous freedom to disaffirm written consent given by the infant[13] or by the infant's parent.[14] This protected infants from their own and their parents' inexperience.[15] However, the New York Legislature limited an infant's common law right to disaffirm a contract.[16] In General Obligations Law section 3-105 and Civil Rights Law sections 50 and 51, the legislature provided protection for the infant's employer.[17] The *Shields* court reasoned that Civil Rights Law section 51 was the legislature's attempt to provide a method for the employer to obtain consent and avoid liability.[18]

The court stated that sections 50 and 51 supersede common law and prohibit infants from disaffirming consent given by their parents.[19] Since the consent forms signed by Shields's mother complied with the statutory requirement of section 50, the consent was valid and could not now be

10. *Shields*, 58 N.Y.2d at 343-44, 448 N.E.2d at 109-10, 461 N.Y.S.2d at 256.

11. Shields v. Gross, 88 A.D.2d 846, 451 N.Y.S.2d 419 (1982).

12. The case was also heard by the United States District Court in New York. Shields by Shields v. Gross, 563 F. Supp. 1253 (S.D.N.Y. 1983). Attempting to try the issue on federal grounds, Shields argued that her first amendment right to privacy had been violated by the republication of the photographs and requested a preliminary injunction. The court found two independent reasons for denying this injunction. The first was a lack of equity. The court found that Shields's counsel had timed the litigation so as to impose unnecessary hardship on Gross, and this strategy abused equitable remedy. *Id.* at 1254-55. Secondly, the court found that Shields lacked standing for her first amendment argument because she was unable to show any likelihood of success in her cause of action. *Id.* at 1256.

13. Joseph v. Schatzkin, 259 N.Y. 241, 181 N.E. 464 (1932).

14. Lee v. Silver, 262 A.D. 149, 28 N.Y.S.2d 333 (1941); *aff'd*, 287 N.Y. 575, 38 N.E.2d 233 (1941).

15. *Joseph*, 259 N.Y. at 243, 181 N.E. at 465.

16. The court cited N.Y. GEN. OBLIG. LAW § 3-101(3), which does not allow disaffirmance of a loan contract entered into by a minor husband or wife. *Shields*, 58 N.Y.2d at 346, 448 N.E.2d at 111, 461 N.Y.S.2d at 257. Also cited was N.Y. GEN. OBLIG. LAW § 3-102(1), which does not allow disaffirmance of hospital, medical or surgical treatment by a married minor. *Id.* Section 3-103 gives veteran benefit loans to minors. *Id.* In citing these statutes, the court set forth examples of minors who have taken on traditionally adult roles and who, therefore, should be treated as adults. However, Shields, as a model, was performing a role which is not necessarily adult, but traditionally is performed by children as well. Therefore, the court's analogy is unsupported. Child models should not be dealt with in the same manner as minors who have taken on traditional adult roles.

17. *Shields*, 58 N.Y.2d at 345, 448 N.E.2d at 111, 461 N.Y.S.2d at 257. *Accord In re* Prinze v. Jonas, 38 N.Y.2d 570, 575, 345 N.E.2d 295, 299, 381 N.Y.S.2d 824, 828 (1976).

18. *Shields*, 58 N.Y.2d at 345, 448 N.E.2d at 111, 461 N.Y.S.2d at 257.

19. *Id.*

disaffirmed by Shields.[20]

The court also rejected Shields's argument that the consent forms should be considered void because of the failure to comply with General Obligations Law section 3-105.[21] The statute refers to performing artists and specifically lists actors, musicians, dancers and professional athletes. It does not list models and therefore, the court reasoned, the legislature knowingly made a distinction between child performers and child models.[22]

In support of its conclusion, the court cited Education Law section 3229[23] (formerly section 3216(c)) which relates to the employment of child performers and is specifically mentioned in section 3-105.[24] Education Law section 3230,[25] relating to the employment of child models, was not specifically mentioned in section 3-105.[26] The court also noted that child performers and child models are separately classified in Labor Law section 172.[27] The distinction between child performers and child models in other statutes led the court to conclude that the same distinction applied to section 3-105; therefore, child models may not obtain judicial approval of their employment contracts.[28] The court also stated, in dicta, that it would be impractical to allow child models to have their contracts judicially approved because models work from session to session with many different photographers. The short term nature of their employment would place an unnecessary burden upon the court system.[29]

The *Shields* court has elevated the interests of business and commer-

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20. *Id.*

21. *Id.* N.Y. GEN. OBLIG. LAW § 3-105 (McKinney 1978) states that:

> A contract made by an infant or made by a parent or guardian of an infant, . . . under which (a) the infant is to perform or render services as an actor, actress, dancer, musician, vocalist or other performing artist, or as a participant or player in professional sports . . . may be approved by the supreme court or the surrogate's court as provided in this section . . . .

22. *Shields*, 58 N.Y.2d at 345, 448 N.E.2d at 111, 461 N.Y.S.2d at 257.

23. N.Y. EDUC. LAW § 3229 (McKinney 1981) was repealed effective December 31, 1983. Now covered by N.Y. ARTS AND CULTURAL AFFAIRS LAW § 35.01 (McKinney 1984).

24. N.Y. GEN. OBLIG. LAW § 3-105(2)(a) states that:

> Approval of the contract pursuant to this section shall not exempt any person from the requirements of section thirty-two hundred sixteen-c [later covered by § 3229, *but see supra* note 23] of the education law or any other law with respect to licenses, consents or authorizations required for any conduct, employment, use or exhibition of the infant in this state . . . .

25. N.Y. EDUC. LAW § 3230 was repealed effective December 31, 1983. Now covered by N.Y. ARTS AND CULTURAL AFFAIRS LAW § 35.05 (McKinney 1984).

26. *Shields*, 58 N.Y.2d at 345, 448 N.E.2d at 111, 461 N.Y.S.2d at 257.

27. *Id.*

28. *Id.* at 346, 448 N.E.2d at 111, 461 N.Y.S.2d at 257.

29. *Id.*, 448 N.E.2d at 111-12, 461 N.Y.S.2d at 258. For a recent case consistent with this opinion, *see* Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D. Tex. 1985).

cialism above the interest of protecting children.[30] This decision has rendered child models virtually helpless to prevent exploitation by their employers or even by their parents. The child model's common law right to disaffirm a contract has been eliminated by the court's decision. Unlike child performers, who are protected under New York General Obligations Law section 3-105, child models cannot have their contracts reviewed by the court. As the court stated, section 3-105 was intended to protect the child's employer.[31] However, section 3-105 also provides protection for the child. The statute limits employment contracts to three years and any contract over three years must be reasonable to be approved. The court also retains the discretion to revoke or modify the contract later if the court finds that the child's well-being is impaired.[32] Unable to rely upon section 3-105 or the common law right to disaffirm, child models are forever bound by the decisions of their parents, even if those decisions are exploitive or bring embarrassment, humiliation and distress to the child.[33]

The court stated that such unanticipated consequences as befell Brooke Shields can be prevented by having parents limit the time and use authorized in the consent forms.[34] The court's suggestion avoids the problem by simply shifting all of the responsibility for protecting the child to the parent. Additionally, the court ignores the state's long standing concern for the protection of children and their interests.[35] If parents do not protect their child's interest, either from lack of experience or for other reasons, the state must assume the role of *parens patriae* and place the interests of minors above economic protectionism. The distinction the court made between child models and child performers has placed models outside of the state's protective arms. This is unfortunate given the reality of a child model's career. A child's parents are not always aware of the potential problems involved in signing a release form. Their main concern is advancing their child's career. Therefore,

30. *Shields*, 58 N.Y.2d at 353, 448 N.E.2d at 115, 461 N.Y.S.2d at 261 (Jasen, J., dissenting).

31. *See supra* note 16.

32. N.Y. GEN. OBLIG. LAW § 3-105(2)(d) and (e) (McKinney 1978). Now covered by N.Y. ARTS AND CULTURAL AFFAIRS LAW § 35.03(2)(d) and (e) (McKinney 1984).

33. *Shields*, 58 N.Y.2d at 347, 448 N.E.2d at 112, 461 N.Y.S.2d at 258 (Jasen, J., dissenting).

34. *Shields*, 58 N.Y.2d at 347, 448 N.E.2d at 112, 461 N.Y.S.2d at 258.

35. *Shields*, 58 N.Y.2d at 350, 448 N.E.2d at 113, 461 N.Y.S.2d at 259 (Jasen, J., dissenting). *See also* Sternlieb v. Normandie Nat. Sec. Corp., 263 N.Y. 245, 188 N.E. 726 (1934); Rice v. Butler, 160 N.Y. 578, 55 N.E. 275 (1899); Kaufman v. American Youth Hostels, 13 Misc. 2d 8, 174 N.Y.S.2d 580 (1957), *modified*, 6 A.D.2d 223, 177 N.Y.S.2d (1958), *modified*, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

the state has the obligation to give child models the same extraordinary protection against exploitation as it gives child performers.

The only purpose served in distinguishing child models from child performers is judicial economy. However, the cost of allowing models to have their contracts reviewed by the court seems minimal compared to the benefit of protecting these children from exploitation. Who, more than a child model, needs protection from the continued invasion of privacy by an unscrupulous photographer given unrestricted consent to use and reuse photographs?

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