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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

H. Marvin Dukes, III, Special Circuit Judge

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Appellate Case No. 2019-000518

SC Court of Appeals

Richard Walter Meier and the Estate of
William Carl Meier, by and through
Conrad Meier, its Personal Representative, ... Appellants,

v.

Mary J. Burnsed, ... Petitioner.

PETITION FOR REHEARING
EN BANC

Your petitioner respectfully suggests that the Court overlooked or misapprehended certain legal principles surrounding the question of whether Act No. 100 of 2013 was intended to apply to divorces filed before the Act took effect. For this reason, your petitioner moves the Court to rehear the case and, because of its public importance, for the Court to rehear it *en banc*.

The Court's decision

In 1998 William Meier took out a whole life insurance policy with his wife Mary as beneficiary. The parties divorced in 2002. Mr. Meier retained Mary as beneficiary, writing a check for the insurance premium in each of the 180 months remaining in his life. Despite divorce, he never lost his affection for his ex-wife.¹

In 2013, the General Assembly passed Act No. 100, providing that divorce revokes the designation of an ex-spouse as life insurance beneficiary. The Act took effect on January 1, 2014.

¹ The year before his death, Mr. Meier sent her a message by e-mail telling her: "You do not realize how much I love and respect you. Miss you so much it hurts."

Mr. Meier died of a heart attack on December 26, 2017.

The Court has decided that although Mr. Meier died thinking that Mary Burnsed was his life insurance beneficiary, Act No. 100 reached back twelve years to the 2002 divorce to revoke her beneficiary designation without his knowledge.

I. The Court did not apply perhaps the strongest maxim of statutory construction — that the General Assembly is presumed to have intended prospective application of its laws.

The Court at first acknowledged that a statute is not applied retroactively unless that legislative intent is unmistakable — but then departed from it by relying upon cases where the statute dealt with *remedies*.² A statute altering a remedy can be and often is meant to apply retroactively, as in other cases cited by the Court. When a statute of limitations is altered without reviving a stale cause of action,³ or the amount of an attorney fee award as a remedy is adjusted,⁴ retroactive application is often appropriate. Such cases are no guide to the question presented here.

Our supreme court cited a federal district court order as an exemplar of the law against inferring a retroactive intent.⁵ That district court order reaffirms what the Fourth Circuit has called South Carolina's "robust presumption against statutory retroactivity."

² For example, *SCDSS/Child Support Enforcement v. Carswell*, 359 S.C. 424, 597 S.E.2d 859 (Ct. App. 2004) (statute "is of a remedial nature, which suggests a retroactive application to assist in the collection of past arrearages.").

³ *Goff v. Mills*, 279 S.C. 382, 385, 308 S.E.2d 778, 780 (1983) (statute altering beginning date for statute of limitations "obviously remedial"); *Hercules, Inc. v. South Carolina Tax Comm'n*, 262 S.E.2d 45, 48, 274 S.C. 137, 143 (1980) ("a statute of limitations affects the remedy and not the right").

⁴ *Bradley v. School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) (statute adjusting attorney fee awards is remedial).

⁵

See *Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09-CV-687-JFA, 2011 WL 2294146 (D.S.C. June 8, 2011). We adopt the sound and thorough reasoning of the highly regarded and learned federal judge expressed in *Montague* * * *.

Kirven v. Central States Health & Life Co., 409 S.C. 30, 760 S.E.2d 794, 800 (2014).

Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 172 (4th Cir. 2010) (applying South Carolina law).⁶ The district court searched the words of the statute intensely for any expression of retroactive intent.⁷

That robust presumption was not applied in the Court's decision today.

II. Neither section 4(B) nor section 62-2-507 contain anything suggesting that the General Assembly meant to apply the revocation provision backwards in time.

Justice Frankfurter's timeless gold standard for determining legislative intent was repeated by Judge Karen Henderson:

job one is to read the statute, read the statute, read the statute. * * * (* * * HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (“(1) Read the statute; (2) read the statute; (3) read the statute!” (quoting Justice Frankfurter's “threefold

⁶ The South Carolina cases are collected in respondent's brief.

⁷ In pertinent part, Judge Anderson's order in *Montague* reads as follows:

a. The Presumption Against Statutory Retroactivity

The intent of the South Carolina General Assembly determines whether a state statute will have prospective or retrospective application, *Kiawah Resort Assocs. v. S.C. Tax Comm'n*, 318 S.C. 502, 504, 458 S.E.2d 542, 543 (1995), and as the parties are well aware, both the federal and South Carolina courts utilize a presumption against statutory retroactivity as a means of giving effect to legislative intent. *Ward*, 595 F.3d at 172. “Under this presumption, the courts assume that statutes operate prospectively only, to govern future conduct and claims, and do not operate retroactively, to reach conduct and claims arising before the statute's enactment.” *Id.* When determining whether the presumption against retroactivity bars the application of a statute in a given case, courts perform a three-step analysis. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 12 (4th Cir. 2010). First, the court must determine whether the legislature expressly prescribed the statute's temporal reach. *Id.* If so, the presumption against retroactivity does not apply. *Id.* If the legislature has not prescribed the statute's reach, however, a court must then determine whether the new statute would have a retroactive effect if applied to the case at hand. *Id.* If the statute would not have a retroactive effect, the presumption against retroactivity again does not apply to the case. *Id.* But if the statute does have a retroactive effect, the presumption against retroactivity is triggered, and the court must then determine whether the legislature has overcome the presumption with clear [legislative] intent in favor of retroactivity. *Id.*

Under the first step in the analysis, the court must decide whether the South Carolina General Assembly expressly prescribed the temporal reach of the statute, as opposed to merely its substantive reach. This is a “demanding standard,” requiring a prescription that is “truly express and unequivocal.” *Ward*, 595 F.3d at 173. Of course, if the General Assembly expressly prescribed the statute's temporal reach to cover the matters being litigated, then “there is no need to resort to judicial default rules.” *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). Because the court finds that the General Assembly expressly and unequivocally prescribed section 38-71-242's temporal reach, the presumption against retroactivity and the doctrine of constitutional avoidance do not arise in this case.

imperative to law students”))).

Goldring v. District of Columbia, 416 F.3d 70, 77 (D.C. Cir. 2005).

Section 4(B) of Act No. 100 contains only a few lines prescribing the Act’s temporal reach.⁸ The words “apply” or “applies” appear six times in section 4(B).

Summarizing the temporal language of section 4(B), the Act:

- (1) applies to estates of decedents dying after January 1, 2014, and to all trusts created **“before, on, or after”** January 1, 2014. [This is the first of three application of Act 100 taking effect **before** January 1, 2014.];
- (2) applies to “judicial proceedings concerning estates of decedents and trusts commenced **on or after**” January 1, 2014;
- (3) applies to “judicial proceedings concerning estates of decedents and trusts commenced **before**” January 1, 2014 unless, in a word, retroactive application would be “prejudicial”;
- (4) [applies] “any rule of construction or presumption provided in this act * * * to governing instruments [*i.e.*, life insurance policies] executed **before**” January 1, 2014, with exceptions irrelevant here, except that:
 1. “an act done and any right acquired or accrued before [January 1, 2014] is not affected by this act.”; and

⁸ SECTION 4.

(A) This act * * * takes effect on January 1, 2014.

(B) Except as otherwise provided in this act, on the effective date of this act:

- (1) this act applies to any estates of decedents dying thereafter and to all trusts created before, on, or after its effective date;
- (2) the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date;
- (3) this act applies to judicial proceedings concerning estates of decedents and trusts commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;
- (4) subject to item (5) and subsection (C) of this section, any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date of the act unless there is a clear indication of a contrary intent in the terms of the governing instrument; and
- (5) an act done and any right acquired or accrued before the effective date of the act is not affected by this act. Unless otherwise provided in this act, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust and a substantive right in the decedent’s estate accrues in accordance with the law in effect on the date of the decedent’s death.

(C) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded.

2. [the Act does not affect rights acquired under other statutes of limitation, etc., not pertinent here.]

Nothing in the Act suggests a legislative intent to apply the revocation provision backward to divorces entered before the statute was passed. Everything in the statute suggests prospective intent.

The Court overlooked the fact that the General Assembly requires in section 62-2-507 that every insurer of a policy held at divorce, where the ex-spouse is a beneficiary, be informed of the divorce by registered mail or service of process, so as to prevent payment to a revoked designee. This notification could not have been given to Transamerica or any other pre-2014 insurer because the statute had not yet been enacted. This notification requirement points to a *future* application of the law.

Some cases cited by the Court speak in terms of a “presumption” that the policyholder wished to change beneficiary. The word is used there, not to mean a legal device but rather a commonly held belief. A legal presumption is a device used to establish a fact, shifting the burden of proof. See, e.g., *Shirey v. Bishop*, 431 S.C. 412, 432, 848 S.E.2d 325, 336 (Ct. App. 2020) (confidential relationship creates presumption of breach by trusted party). Act No. 100 prescribes six presumptions, only three of which apply to any governing instruments. All three of those apply only to wills.⁹ Act No. 100 creates no presumption touching an insured’s designation of beneficiary.

III. The decisions from other states relied upon by the Court were misleading.

Several courts accepted Professor Waggoner’s theory, discussed below, before they were rejected in the *Sveen* case.¹⁰ None of these cases are good law today. The Court was misled in relying upon them.

⁹ 1. Section 62-2-506(b)(1): Testator is presumed to have intended a substitute will to place an earlier will if the substitute completely disposes of the estate.

2. Section 62-2-506(b)(2): Testator is presumed to have intended a substitute will to supplement rather than replace an earlier will if the substitute does not completely dispose of the estate. 3. Section 62-2-701: The execution of a joint will does not create the presumption of a contract not to revoke it.

¹⁰ *Sveen v. Melin*, 138 S.Ct. 1815 (2018).

A. Professor Waggoner's theory: (1) the beneficiary designation is not part of the insurance contract; (2) the revocation statute is a "rule of construction."

Professor Waggoner's theory figured in every pre-*Sveen* case relied upon by the Court. These cases cannot be understood without an explanation of the origin of Professor Waggoner's theory, discredited in the *Sveen* decision.

Professor Waggoner feared a Contracts Clause challenge to his model revocation act when applied to a life insurance policy issued *before* the statute was passed. He fashioned two devices to shield the revocation statute from Contracts Clause attack.

First, he theorized that the beneficiary designation is not part of the life insurance contract at all. The beneficiary designation is a "donative transfer," like a will. Waggoner, 26 REAL PROPERTY PROBATE & TRUSTS J. 683, 699-700 (1992). Professor Waggoner explained that a life insurance policy is bifurcated. Half of the policy is a contract between insured and insurer. The other half is not part of the contract but is a "donative transfer," subject to regulation by "rules of construction," like a will.

B. *Sveen v. Melin*, 138 S.Ct. 1815 (2018).

In its *amicus* brief in the *Sveen* case, Professor Waggoner's academy told the U.S. Supreme Court **twenty times** that Minnesota's revocation-on-divorce act was a mere rule of construction which did not impair the life insurance contract. The Court did not even acknowledge Professor Waggoner's theory. On the contrary, the Court held that "an insurance policy is a contract under the Contracts Clause, and a will is not." The Supreme Court took no notice of the "donative transfer" theory but held that the revocation statute nullifies the key term of the insurance contract. But the abridgement is not unconstitutional. The policyholder can restore the ex-spouse as beneficiary instantly with "the stroke of a pen."

The *Sveen* decision ended Professor Waggoner's plan to merge seamlessly the laws of testamentary and non-testamentary transfers of wealth.

Before the *Sveen* decision, at least four courts had already accepted the theory devised by Professor Waggoner to shield the statute.¹¹ Because these cases accepted the “half-contract, half-donative transfer” idea, they were wrongly decided. The Massachusetts case cited by this Court,¹² decided after the briefing here was done, practically says as much.

C. The Court today relied upon pre-*Sveen* cases which accepted the discredited “donative transfer/rule of construction” rationale.

1. The *Stillman* case.¹³

The Tenth Circuit began its prediction of Utah law in *Stillman* by saying that it wasn’t sure whether Utah’s revocation statute was retroactive in the first place. The court concluded that if a statute is “fair,” it is not subject to the rigors of retroactive analysis. *Id.* at 1315-16. That surely is not the law of South Carolina.¹⁴

The *Stillman* court adopted both of Professor Waggoner’s devices: First, the designation of beneficiary in a life insurance contract is not part of the insurance contract but is a “donative transfer.”

[Revocation] is no more an impairment of a contract than if [the insured] had made the beneficiary designation in his will.

343 F.3d at 1322. *Sveen* put the not-a-contract idea to rest.

Second, the *Stillman* court found that the Utah statute identifies its revocation-on-divorce provision as a mere “rule of construction,” as might be applied to an

¹¹ *Stillman v. Teachers Ins. & Annuity Ass’n College Retirement Equities Fund*, 343 F.3d 1311 (10th Cir. 2003); *Estate of DeWitt v. DeWitt*, 54 P.3d 849 (Colo. 2002); *Thrivent Financial for Lutherans v. Andronescu*, 368 Mont. 256, 300 P.3d 117 (2013); and *Buchholz v. Storsve*, 2007 S.D. 101, 740 N.W.2d 107 (2007).

¹² *American Family Life Assur. Co. [AFLAC] v. Parker*, 178 N.E.3d 859 (Mass. 2022).

¹³ *Stillman v. Teachers Ins. & Annuity Ass’n College Retirement Equities Fund*, 343 F.3d 1311 (10th Cir. 2003).

¹⁴ After *Stillman*, the Utah Supreme Court reaffirmed that state’s rigorous test of retroactive application, ignored in *Stillman*. The statute must contain language “that evinces a clear and unavoidable implication that the statute operates on events already passed.” *Waddoups v. Noorda*, 321 P.3d 1108 (Utah 2013).

ambiguous will.

As an afterthought, the *Stillman* court opined that the person whose beneficiary designation in that case was revoked probably realized it when the revocation statute was passed — twenty-eight years after his divorce!

The Utah legislature later amended the revocation statute to require the family court explicitly to inform the parties about the statute, something which could not be done if the divorce preceded the enactment of the statute. Section 30-3-5(1)(e)(1), UTAH STATUTES (2017).

2. The *DeWitt* case.¹⁵

The Colorado court in *DeWitt* read that state's revocation statute, COLO. STATS. § 15-11-804(2), to apply only when the policyholder dies. The ex-spouse remains the designated beneficiary until the moment when the policyholder breathes his last.¹⁶

In South Carolina, as in every jurisdiction adopting the language of the model act, it is *the divorce* — not the policyholder's death perhaps decades later — which revokes the designation.¹⁷

The *DeWitt* court, like the *Stillman* court, accepted Professor Waggoner's theory that the designation of beneficiary is a "donative transfer." 54 P.3d at 856. The court relied upon a 1991 publication of Professor Waggoner's academy. 54 P.3d at 875. This is the same academy whose *amicus* brief in *Sveen*, sponsoring the not-a-contract theory, the Supreme Court did not even acknowledge.

The Colorado court characterized the revocation statute of that state as "procedural" because statutory revocation is a "procedure" and the insured may undo it if desired. This is frankly absurd.

¹⁵ *Estate of DeWitt v. DeWitt*, 54 P.3d 849 (Colo. 2002).

¹⁶ Use of the masculine pronoun is deliberate. It is almost always the ex-wife who pays the penalty of unintended revocation in these cases, as the *amicus curiae* brief for Women's Law Project in *Sveen* makes clear.

¹⁷ Section 62-2-507(c): "the divorce * * * revokes any revocable * * * beneficiary designation * * *."

The court concluded by finding that the revocation statute is remedial, not substantive. The idea here is that the revocation statute “remedies” the policyholder’s forgetfulness. The Colorado court may be the only one to justify retroactive application by this means.¹⁸

3. The Thrivent case.¹⁹

The Montana court accepted both halves of Professor Waggoner’s discredited theory.

As in Colorado, the court further construed the Montana statute to mean that revocation takes place not at divorce but when the policyholder dies.

4. The Buchholz case.²⁰

The South Dakota court reasoned that its revocation statute would not operate retroactively unless it were found to be a rule of construction. Without reading the statute itself to answer that question, the court accepted the Tenth Circuit’s holding in *Stillman* that revocation statutes are rules of construction, and that rules of construction apply retroactively.

IV. The revocation-on-divorce statute is not a “rule of construction.”

The Court today quoted section 4(B)(4)’s provision that “any rule of construction or presumption provided in this act *applies to governing instruments executed before the effective date of the act*”. (Court’s emphasis.) The Court emphasized the wrong phrase of the sentence. The statute applies the rules of construction **provided in this act** to all governing instruments. The only governing instruments to which any rules of construction **provided in Act No. 100** apply are wills.

¹⁸ The *DeWitt* court did make one decision with which your petitioner agrees: The revoked ex-spouse beneficiary has standing to bring before the court the deceased insured’s Contracts Clause claim. 54 P.3d at 855 n.4. Accord: *Sveen v. Melin*, 138 S.Ct. 1815 (2018); *Paronese v. Midland Nat’l Ins. Co.*, 550 Pa. 423, 706 A.2d 814, 815 (1998). There is no such claim in the case at bar. The point today is to construe the statute so as to avoid an arguably unconstitutional construction.

¹⁹ *Thrivent Financial for Lutherans v. Andronesco*, 368 Mont. 256, 300 P.3d 117 (2013).

²⁰ *Buchholz v. Storsve*, 2007 S.D. 101, 740 N.W.2d 107 (2007).

The “rule of construction” idea has no application here, in any case. A rule of construction is a maxim which aids the court in determining the intent of the parties to an ambiguous document. See, e.g., *Snow v. Smith*, 416 S.C. 72, 88, 784 S.E.2d 242, 250 (Ct. App. 2016). “Construction” is

[t]he process, or the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, written instrument, or oral agreement * * * .

BLACK’S LAW DICTIONARY (7th ed. 1999). Construction presupposes ambiguity. *Lee v. Citizens & Souther Nat’l Bank*, 253 S.C. 556, 559-60, 172 S.E.2d 114, 115 (1970).

Section 62-2-507 is not a “rule of construction”. There is nothing to **construe**.

The revocation statute reaches into the heart of the life insurance policy and abridges the central element of all such contracts: the insured’s choice of beneficiary. As our Supreme Court said in *Bartley v. Bartley Logging Co.*, 293 S.C. 88, 359 S.E.2d 55, 56–57 (1987):

If this [statute] is not substantive in nature, it is difficult to envision [one] which would be.

As discussed above, section 4(B)(4) identifies the rules of construction to which the Act applies. The revocation statute itself is not one of them. As the Massachusetts court held in *American Family Life Assur. Co. [AFLAC] v. Parker*, 178 N.E.3d 859 (Mass. 2022), the Massachusetts equivalent to our section 4(B)(4) plainly identifies the rules of construction to which it applies. There are three. All three concern the construction of wills.²¹ The revocation-on-divorce statute *itself* is not a “rule of construction.”

The decision in *Sveen*, and the Massachusetts court’s dismissal of the result-oriented “rule of construction” rationale of *Stillman* and cases which relied upon it, put “finished” on the claim that the revocation statute is somehow a rule of construction.

²¹ 1. SECTION 62-2-602. Construction that will passes all property * * * . 2. SECTION 62-2-609. Construction of generic terms * * * . 3. SECTION 62-2-611. Construction that devise passes fee simple. * * *

V. The revocation-on-divorce statute is neither “remedial or procedural.”

The Colorado court labeled the revocation statute of that state a “remedial” or “procedural” matter. In its opinion here, the Court relied upon *Hercules, Inc. v. South Carolina Tax Comm’n*²² and several other cases for the view that remedial statutes often are applied retroactively.

Changes in remedy vary the relief available when a cause of action is proved. The revocation-on-divorce statute does not. The revocation statute is as far from remedial as a law can be. It is a substantive act which nullifies the key provision of a life insurance contract. The Pennsylvania Supreme Court said this about a similar revocation statute:

[T]he contractual impairment effected in this case is indeed severe, virtually total. Selection of a beneficiary is the entire point of a life insurance policy. The statute in this case eliminated the insured’s designation and replaced his primary beneficiary * * * with contingent beneficiaries who were not intended by the insured to be primary beneficiaries. The very essence of [the insured’s] contract with [the insurer] was undermined by the operation of the statute.

Paronese v. Midland Nat’l Ins. Co., 550 Pa. 423, 432, 706 A.2d 814, 818 (1998). As the Supreme Court remarked in *Sveen*:

[I]n revoking a beneficiary designation, the law makes a significant change. * * * [T]he “whole point” of buying life insurance is to provide the proceeds to the named beneficiary.

138 S.Ct. at 1822.

Section 62-2-507 is substantive, not procedural or remedial.

VI. The *AFLAC* decision of the Massachusetts court correctly construes the revocation statute of that state, identical to ours, and should be followed.

This Court cited the opinion of the Supreme Judicial Court of Massachusetts in the recent case of *American Family Life Assur. Co. [AFLAC] v. Parker*, 178 N.E.3d 859 (Mass. 2022). The timeline in *AFLAC* was the same as in *Sveen*: Statute first. Divorce second.

²² 262 S.E.2d 45, 48, 274 S.C. 137, 143 (1980).

2010	2012	2016
Policy Issued	Statute Enacted	Divorce Filed

1987		2000		2005
Policy Issued	← statute applies to <i>all</i> policies when statute precedes divorce	Statute Enacted	→ statute precedes divorce →	Divorce Filed

The court went out of its way to say what it thought of an issue not briefed or necessary for its decision: the result-oriented rationale of the Tenth Circuit in *Stillman*. It observed that the *Stillman* court was dealing with a Utah statute which might not have led to the desired result of retroactivity unless labeled as a “rule of construction.” The Tenth Circuit therefore adopted Professor Waggoner’s contention that the revocation-on-divorce statute is a mere “rule of construction.” The Massachusetts court commented on the result-oriented approach of the Tenth Circuit:

The Massachusetts court said this (emphasis added) about whether the revocation-on-divorce provision is a “rule of construction”:

[I]n defending the constitutionality of the retroactive application of the Uniform Probate Code [revocation statute] prior to the Supreme Court's decision in *Sveen*, Lawrence Waggoner, the chief reporter for the Uniform Probate Code editorial board, stated, "[Section 2-804] [*i.e.*, the revocation-on-divorce provision] merely establishes a rule of construction * * * ." * * * [W]e decline to adopt such an * * * interpretation of rules of construction and presumptions * * * , relying instead on the plain language of our statute. * * * **[Massachusetts] Section 43(5) [*i.e.*, South Carolina section 4(B)(4)], on its face, applies only to those rules of construction and presumptions so entitled [in the act].** * * *

Like the Massachusetts' statute, section 4(B)(4) of Act No. 100 provides that "any rule of construction or presumption ***provided in this act*** applies to governing instruments executed before the effective date of the act * * * ." (Emphasis added.) As the Massachusetts court said, those words mean exactly what they say: ***provided in this act***. The Massachusetts court looked to the plain language of the statute — the first rule of statutory construction in South Carolina as well. The court concluded:

[Section] § 43(5) [*i.e.*, South Carolina section 4(B)(4)] is limited to those sections expressly defined as rules of construction or presumptions * * * and thus does not apply to § 2-804 [*i.e.*, South Carolina section 62-2-507], which is not described as a rule of construction or presumption * * * .

The *Parker* court's interpretation of the model act in this way is plainly right, and should be followed for uniformity in the interpretation of this uniform act.²³ Only three states — South Carolina, Massachusetts, and New Mexico — have adopted verbatim the section of the Uniform Probate Code found in our section 4(B). See Brief of *Amicus Curiae* American College of Trust & Estate Counsel, *Sveen v. Melin*, *supra*, p. 15. For this Court to find that the revocation statute is a rule of construction would split the authorities in the two of these three jurisdictions reaching this question.

VII. The two Federal District Court decisions do not support retroactive application of the statute.

The Court relied upon a decision of the U.S. District Court for the District of South Carolina, Judge Quattlebaum presiding, holding that section 62-2-507 applies to

²³

SECTION 62-2-1085. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

a divorce which preceded the statute. Without proper briefing, the court mistakenly relied upon section 4(B)(2) of Act No. 100, which provides that “the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date * * * .”

An insurance interpleader is not a “judicial proceeding[] concerning [the] estate[] of [a] decedent[.]” “[P]robate estate means the decedent’s property passing under the decedent’s will,” *etc.* S.C. Code Ann. § 62–2–202 (2009). Life insurance is a non-probate asset passing outside the insured’s estate. *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920, 925 n.11 (2011). *The insured’s estate has no interest in the outcome of this litigation.*²⁴

Even if an insurance interpleader were thought to be a judicial proceeding concerning an estate, Section 4(B)(2) of the Act says nothing about the question of whether the General Assembly intended the revocation-on-divorce provision to apply retroactively.

The Court also cited the decision of Judge Norton in *State Farm Ins. Co. v. Murphy*, Case No. 2:15-cv-04793-DCN (D.S.C. 10/12/17). The Court quoted Judge Norton as “making somewhat of an educated guess as to the intent of South Carolina’s legislature in drafting * * * § 62-2-507.” Judge Norton’s “educated guess” was not as to whether the legislature intended the revocation statute to apply retroactively. No one in the *Murphy* case, including Judge Norton, thought that the statute might apply retroactively. Judge Norton’s educated guess concerned whether the parties’ pre-statute settlement agreement “qualifies as a ‘divorce or annulment’ as contemplated by the plain language of * * * § 62-2-507(a)(2).” The Judge ruled that it did qualify. “Accordingly, [the parties] were divorced before the January 1, 2014 effective date of * * * § 62-2-507,” and the revocation statute did not apply retroactively.

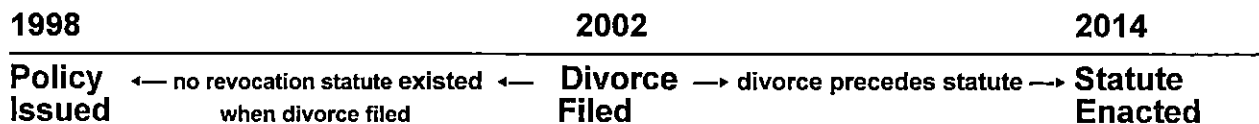
²⁴ The estate’s personal representative joined his uncle, the alternate beneficiary of Mr. Meier’s policy, to give him support. His participation as a plaintiff is nominal and harmless. The estate has no interest in the proceeds of the insurance policy, and this is not “estate litigation.”

VIII. The court failed to recognize and apply the principle that a statute should be construed if possible to avoid a serious constitutional question.

The Court noted that a life insurance beneficiary has no vested right. It is not the beneficiary's right which is constitutionally protected in the insurance contract. As the Supreme Court noted in *Sveen*, it is *insured's* right, protected by the Contracts Clause of the Constitution, which may not be abridged except under limited circumstances.

The vested right of the insured to choose the beneficiary would be stripped without his knowledge by a statute still twelve years away.

***Meier v. Burnsed*, ___ S.E.2d ___, (S.C. App. 2022)**
Policy Issued – Divorce Filed – Statute Enacted



The question presented by the case at bar has nothing to do with the retroactivity question presented in *Sveen v. Melin* — whether the statute constitutionally applies to policies issued before the statute was passed. *Of course it does*. When the statute applies to a divorce, it applies to every policy then in existence. The question presented by the case at bar is whether the statute was meant to reach back to *divorces filed before the statute was enacted*.²⁵ That is the meaning of “retroactive application” in this case: Policy issued. Divorce filed. Statute enacted.

The *Sveen* case involved no question about whether Minnesota’s revocation statute was intended to apply to the parties’ divorce. The divorce came five years after the statute was enacted. When the revocation statute precedes the divorce, the statute is as much a part of the state’s divorce law as equitable distribution or child support. Every insurance policy held by either spouse is amended to cancel the ex-spouse as

²⁵ Professor Waggoner probably did not even foresee that his revocation statute might be applied in a divorce-first, statute-second case. In his criticism of *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991), Professor Waggoner was careful to note that “the divorce which revoked [the designation] * * * occurred **after** enactment.” Halbech & Waggoner, *The UPC’s New Survivorship and Antilapse Provisions*, 55 ALB.L.REV.1091, 1129 (1992) (emphasis added).

beneficiary. The divorce court lawyers and judge know it. The divorcing policyholder knows it. The divorcing ex-spouse knows it. And importantly, the insurance company knows it because the statute requires the insurer to be warned about the automatic revocation, lest it pay the wrong beneficiary.²⁶ Every actor knows of the revocation because they know of the statute.

If applied retroactively, Act No. 100 would unconstitutionally destroy the vested right of the owner of an insurance policy to maintain his chosen beneficiary without his knowledge. *Aetna Life Ins. Co. v. Schilling*, 67 Ohio St.3d 164, 616 N.E.2d 893 (1993).

The constitutional issue is not presented in the case at bar because no such issue existed when the circuit court entered judgment in the beneficiary's favor. But the point is not whether the judgment entered in *this* case effects an unconstitutional result. The point is that the revocation-on-divorce statute should be construed to avoid a serious question about its constitutionality. There are undoubtedly cases yet to come where, given the Court's decision today, the constitutional question *will* arise. But whether those cases come or not, the court's goal in statutory construction is always to avoid an arguably unconstitutional construction where a sensible construction avoids the danger.

IX. The Court overlooked the statute's grandfather clause.

Section 4(B)(5) of Act No. 100 provides that "an act done and any right acquired or accrued before the effective date of the act is not affected by this act."

Walter Meier designated Mary Burnsed as his life insurance beneficiary in 1998 — "an act done" sixteen years before Act No. 100 was passed. At that same moment, Mr. Meier acquired a contractual right with Transamerica Premier Life Insurance Company to *keep* Mary Burnsed as his life insurance beneficiary for as long as he chose. Mr. Meier was satisfied with the "act [he had] done" in 1998 and desired to the end of his life to keep that right as he had exercised it.

²⁶ There is no revocation of which to notify the insurer when there is no revocation statute (and may never be one).

Applying Act No. 100 backwards would destroy an act done and a right acquired twelve years before the Act took effect, in contravention of section 4(B)(5).

X. The implications of retroactivity.

Suppose, as Judge Buckner imagined, that William Meier had retained a lawyer to monitor the doings of the General Assembly for the fifteen years left in his life after divorce to make sure that his choice of beneficiary was not voided. If that lawyer had spotted Act No. 100 of 2013, what is the chance that this lawyer would have warned his client that the revocation provision might be declared, nine years later, to apply to the 2002 divorce? It is clear that Mr. Meier had no real chance to re-effectuate his desire with the stroke of a pen, as does the insured in a statute-first, divorce-second case such as *Sveen*.

And suppose that Mr. Meier had died after his 2002 divorce but *before* Act No. 100 was passed in 2013. His alternate beneficiary could have made the same claim to the proceeds that he makes today: the designation of Mary Burnsed was revoked by the divorce, with the insured having died thinking his life insurance would go to whom he chose.

Everything that points to prospective application of a statute is here.

Your petitioner submits that the Court was misled in its reliance upon cases based upon statutes unlike ours, academic ideas since rejected, or erroneous findings of “remedial” or “procedural” or the like.

CONCLUSION

For these reasons, your petitioner respectfully moves the Court to rehear the case *en banc*.

Respectfully submitted,

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by 
Attorneys for Petitioner.

October 31, 2022.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

H. Marvin Dukes, III, Special Circuit Judge

OCT 31 2022

SC Court of Appeals

Court of Appeals Case No. 2019-000518

Richard Walter Meier and the Estate of
William Carl Meier, by and through
Conrad Meier, its Personal Representative, ... Appellants,

v.

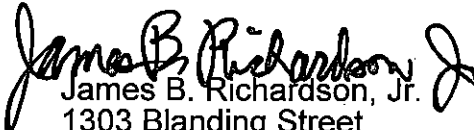
Mary J. Burnsed, ... Respondent.

CERTIFICATE OF SERVICE

I certify that I served a copy of respondent's petition for rehearing *en banc* by first class mail, postage prepaid, addressed to appellants' attorney at his address of record, namely:

H. Fred Kuhn, Jr., Esq.
Moss & Kuhn
P.O. Drawer 507
Beaufort, SC 29901-0507

on October 31, 2022.


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(803) 600-6375

October 31, 2022.

Attorney for Respondent.

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RECEIVED

OCT 31 2022

SC Court of Appeals

October 31, 2022

Honorable Jenny A. Kitchings
Clerk of the S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

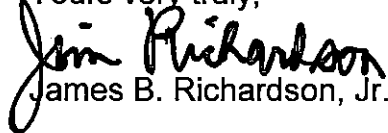
Re: Meier v. Burnsed
Court of Appeals Case No. 2019-000518

Dear Ms. Kitchings:

Enclosed for filing is respondent's petition for rehearing *en banc*.

Thanking you, I remain

Yours very truly,


James B. Richardson, Jr.

cc: H. Fred Kuhn, Jr., Esq.
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