THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Marvin H. Dukes, III, Special Circuit Judge

Case No. 2019-000518
Opinion No. 5947

On Petition for a Writ of Certiorari
to the South Carolina 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 A WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

Mary J. Burnsed respectfully petitions the Court to grant a writ of certiorari by which to review the decision of the South Carolina Court of Appeals in *Meier v. Burnsed,* ___ S.C. ___, ___ S.E.2d ___ (Op. No. 5947, Sept. 28, 2022).

CERTIFICATION OF COUNSEL

The undersigned certifies that petitioner's petition for rehearing was denied by the Court of Appeals.

QUESTION PRESENTED

In Act No. 100 of 2013, did the General Assembly intend to nullify the life insurance beneficiary designation of one spouse by the other when they divorced eleven years before the statute was enacted?

STATEMENT OF THE CASE

In 1998, William Meier took out a $250,000 policy of life insurance, naming his wife Mary as beneficiary and his brother Richard as contingent beneficiary.

The parties divorced in 2002. As sometimes happens, they did better together as ex-spouses than they did as spouses.[1] Mr. Meier made no change in beneficiary following the divorce but retained Mary as beneficiary, writing a check for the insurance premium in each of the 180 months remaining in his life.

Sixteen months before his death, he was reminded that he could easily change his beneficiary if he wished to do so. He did not.

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

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

This interpleader action regarding entitlement to Mr. Meier's life insurance proceeds commenced on February 5, 2018 with a summons and complaint filed by Richard Meier and Conrad Meier against Mary J. Burnsed and the insurance company's successor. Richard Meier, the policy's contingent beneficiary, claimed that Act No. 100 of 2013 applied so as to revoke his brother's designation of Mary Burnsed as beneficiary when the parties divorced in 2002.

---

[1] The year before his death—fourteen years after divorce—Mr. Meier e-mailed a message to Mary: "You do not realize how much I love and respect you. Miss you so much it hurts." [R. 229]

In the absence of a genuine issue of material fact, both sides moved for summary judgment. Honorable Perry M. Buckner, III, Presiding Judge of the Fourteenth Judicial Circuit, heard and denied Richard Meier's motion for summary judgment by Order dated August 10, 2018. [R. 17.] Honorable Marvin H. Dukes, III, Presiding Judge of the Fourteenth Judicial Circuit, heard and granted Mary Burnsed's motion for summary judgment by Order dated March 25, 2019. [R. 1.]

The Court of Appeals reversed Judge Dukes' order in an opinion entered on September 28, 2022, holding that the revocation-upon-divorce provision of Act No. 100 of 2013 applied retroactively to the parties' 2002 divorce.

A SUMMARY OF REASONS TO GRANT THE WRIT

I. All parts of Act No. 100 of 2013 dealing with the statute's temporal reach point to prospective application.

The inclusion of an effective date is inconsistent with legislative intent to apply the statute retroactively.

Divorce *revokes* a beneficiary designation. The use of a present-tense verb means the present and the future, not the past.

The statute authorizes revocation to be prevented by a provision in the divorce decree. Even if the divorce decree does not preserve the beneficiary designation, the policyholder may reinstate it immediately "with the stroke of a pen," as the U.S. Supreme Court put it. The Meier/Burnsed divorce decree was written and filed eleven years before this statute existed. Neither of these ways to prevent revocation existed.

The statute requires the divorcing policyholder's attorney to notify the life insurer of the designation revocation. This provision could only come into force after the statute was enacted.

In its savings clause, Act 100 provides that it does not affect "acts done" and "rights acquired" before January 1, 2014.

Nothing in Act 100 suggests disregarding the fundamental principle against

retroactive application unless legislative intention to do so is clear beyond doubt.

II. The Court of Appeals relied upon cases from states with revocation statutes fundamentally different from ours.

The statutes of these states were construed to revoke the designation of beneficiary at the policyholder's death, not divorce. Since the triggering event would occur after enactment, these statutes were found to have no retroactive application. Whether this reasoning is sound makes no difference. Our South Carolina statute triggers revocation when the policyholder's divorce is filed, not at the moment of death.

The courts of states with statutes like ours have rejected retroactive application. The Illinois Court of Appeals rejected our Court's decision in this case a few weeks after it was filed.

The statutes of states having a revocation-upon-death trigger were construed by these courts to make the revocation provision a mere "rule of construction," so that the court would be construing the intention of a forgetful policyholder in the same way that it construes an ambiguous term in a will. Again, whether this reasoning is sound makes no difference. Unlike these other statutes, Act 100 names the provisions of the act which are rules of construction. The revocation provision is not one of them.

The Court of Appeals mistook the import of the only U.S. Supreme Court case dealing with a revocation statute. The Court of Appeals mistakenly thought that the *Sveen* case[2] considered whether the application of a revocation statute to a divorce filed before the statute was enacted violated the Contracts Clause. The divorce in *Sveen* occurred years *after* the statute was passed. The issue in *Sveen* was whether revocation of the beneficiary designation of a policy *purchased* before the statute was passed—in other words, a preexisting contract—violated the Contracts Clause. The Court held that the statute abridged the insurance contract but not unconstitutionally, principally because the policyholder could reinstate the chosen beneficiary "with the

---

[2] *Sveen v. Melin*, 138 S.Ct. 1815 (2018).

stroke of a pen." The only pertinent aspects of the holding in *Sveen* are that Minnesota's revocation statute is a substantive act, not a rule of construction, and maintenance of the designated beneficiary is a contractual right of the policyholder.

III. The decision of the Court of Appeals raises questions about whether Act 100 applies retroactively to transactions and statuses thought to be settled. The decision is of public importance and deserves review.

Act 100 revokes or alters many things upon divorce in addition to life insurance beneficiary designations. Retroactive application of Act 100 raises questions in real estate, probate, trust, banking and other areas.

The question of whether the revocation provision of Act 100 applies retroactively should be resolved with finality.

ARGUMENT

I.

Everything in Act 100 points to prospective application of its revocation-upon-divorce provision.

The first principle of statutory construction has always been this:

> Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

Commissioners v. City of Fountain Inn, 428 S.C. 209, 215, 833 S.E.2d 834, 837 (2019) (majority and concurring opinions), *quoting Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), and many other cases.[3] The statute's language is the starting point—and often the ending point—of the search for legislative intent.

---

[3] Justice Frankfurter condensed the Court's task into three words:

> "(1) Read the statute; (2) read the statute; (3) read the statute!"

Goldring v. District of Columbia, 416 F.3d 70, 77 (D.C. Cir. 2005) (*per* Karen Henderson, J., *quoting* Justice Frankfurter's "threefold imperative to law students," found in HENRY J. FRIENDLY, BENCHMARKS 202 (1967)).

1. Effective date. The effective date of Act 100—January 1, 2014—is prescribed in section 4(B).

> [South Carolina] Courts have repeatedly held that the inclusion of an effective date is inconsistent with legislative intent to apply the statute retroactively. *See, e.g., S.C. Dep't of Revenue v. Rosemary Coin Machines, Inc.,* 339 S.C. 25, 528 S.E.2d 416, 418 (2000); *Pulliam v. Doe,* 246 S.C. 106, 142 S.E.2d 861, 863 (1965).

Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 175 (4th Cir. 2010) (applying South Carolina law). *Accord: Hyder v. Jones,* 271 S.C. 85, 245 S.E.2d 123 (1978); *Schall v. Sturn, Ruger Co.,* 278 S.C. 646, 300 S.E.2d 735, 737 (1983). The prescription of a future effective date does not even arguably suggest retroactive application of anything in the statute. *Landgraf v. USI Film Products, Inc.,* 511 U.S. 244, 257, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

2. Revocation on divorce. Section 62-2-507(c) provides: "the divorce . . . *revokes* any revocable . . . beneficiary designation . . . ." (Emphasis added.)

The divorce *revokes*—present tense. Throughout the South Carolina Code of Laws, "all words importing the present tense shall apply to the future . . . ." S.C. Code Ann. § 2-7-30.

Other courts have attributed the same import to statutory verbs of the present tense.

> [T]he legislature's use of present tense further belies plaintiffs' contention that the legislature intended retrospective application. [T]he legislature is fully capable of expressing its intent clearly as evidenced by the explicit language used in other statutes to specify retroactive application.

Chance v. American Honda Motor Co., 635 So.2d 177, 179 (La. 1994). *Accord: Bennett v. Procunier,* 262 Cal.App.2d 799, 69 Cal.Rptr. 116 (1968); *Hyle v. Porter,* 117 Ohio St.3d 165, 882 N.E.2d 899 (2008); *Strategic Envtl. Partners, LLC v. New Jersey Dep't of Envtl. Prot.,* 438 N.J.Super. 125, 102 A.3d 939, 948 (2014).

3. Named provisions of Act 100 which apply retroactively. Act 100 contains five provisions dealing with the Act's application to (1) documents executed, (2) lawsuits begun, and (3) legal entities created before the act was passed:

- First: the act applies to **estates of decedents dying after January 1, 2014.**[4]
- Second: the act applies to **trusts created before, on, or after January 1, 2014.**
- Third: the act applies to **judicial proceedings concerning estates of decedents and trusts commenced on or after January 1, 2014.**[5]
- Fourth: the act applies to **judicial proceedings concerning estates of decedents and trusts commenced before January 1, 2014** unless retroactive application would be prejudicial.
- Fifth: "any rule of construction or presumption provided in this act" applies to the terms of "**governing instruments executed before January 1, 2014**".[6]

None of the five apply to the revocation-upon-divorce provision of the statute.

4. Notice to the insurer. The 1990 revocation-upon-divorce provision of the Uniform Probate Code was amended by the Commissioners to add a provision which became our section 62-2-507(g)(2):

> Written notice of the divorce . . . must be mailed to the [insurer's] . . . main office or home by registered or certified

---

[4] "[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).

[5] As noted, 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). This insurance interpleader is not a "judicial proceeding concerning the estate" of William Meier. Mr. Meier's estate has no interest in the outcome of this action. The estate's personal representative joined his uncle, the alternate beneficiary, as a co-plaintiff to give him litigation support. His participation as a co-plaintiff is nominal and harmless. Stopping to obtain his dismissal would have done nothing but delay the litigation.

[6] As shown below, the revocation provision is neither a rule of construction nor a presumption provided in Act 100. "Governing instruments" are documents executed pre-divorce, including "wills, revocable inter vivos trusts, powers of attorney, life insurance beneficiary designations, annuity beneficiary designations, retirement plan beneficiary designations and transfer on death accounts." Section 62-2-507(a)(4).

> mail, return receipt requested, or served upon the [insurer] . . . in the same manner as a summons in a civil action.

This notice can only be done with respect to divorces entered *after* the statute took effect. The insurer-notification provision is irreconcilable with the contention that section 62-2-507 applies to divorces entered before January 1, 2014.

5. The savings clause. Section 4(B) provides that any "act done and any right acquired or accrued before [January 1, 2014] is not affected by this act."

William Meier designated Mary Burnsed as his life insurance beneficiary in 1998—"an act done" fifteen years before Act 100 was passed. Mr. Meier thereby acquired a contractual right 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 acquired it.

Applying Act 100 backwards would nullify this act done and this right acquired in contravention of section 4(B)(5), without William Meier's knowledge. Unlike the case where a revocation statute is part of a state's family law when the divorce takes place, as in the *Sveen* case, the policyholder in a pre-statute divorce cannot defeat the revocation by the stroke of a pen since there has been no revocation.

* * * * *

A South Carolina statute is not applied retroactively unless that legislative intent is clear beyond a reasonable doubt. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf* [*v. USI Film Products, Inc.*], 511 U.S. at 265, 114 S.Ct. 1483 (1994).[7]

---

[7] Among the cases going back a century and a half are *Ex parte Graham,* 47 S.C.L. (13 Rich. L.) 277, 279–80 (1864); *South Carolina Dep't of Revenue v. Rosemary Coin Machines, Inc.,* 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000); *American Nat'l Fire Ins. Co. v. Smith Grading & Paving, Inc.,* 317 S.C. 445, 454 S.E.2d 897, 899 (1994); *Hyder v. Jones,* 271 S.C. 85, 245 S.E.2d 123, 125 (1978). *And see Kirven v. Central States Health & Life Co.,* 409 S.C. 30, 760 S.E.2d 794, 800 (2014), approving (continued...)

The Fourth Circuit noted that "South Carolina courts employ a robust presumption against statutory retroactivity. . . . South Carolina courts have been, if anything, even more insistent than federal courts in demanding an unambiguous expression of legislative intent before applying a statute retroactively . . . ." *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 172, 179 (4th Cir. 2010) (applying South Carolina law).

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

II.

In the states whose cases were relied upon by the Court of Appeals, revocation was triggered not by divorce but by the policyholder's death.

The Court of Appeals did not compare the structure and language of Act 100 with that of the revocation statutes of the states whose cases so heavily influenced its decision. Not only do these statutes differ from one another, but each of them differs signally from Act 100 and section 62-2-507.

Construing specific language in the statutes of their jurisdictions—none like ours—four of the five courts relied upon by our Court of Appeals concluded that the revocation of the insured's choice of beneficiary does not take effect upon divorce but when the insured dies.[8] Unlike those revocation-upon-death states, in South Carolina it is the insured's divorce which revokes the designation.

---

[7](...continued)
the rigorous test of retroactive intent conducted by the district court in *Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09–CV–687–JFA, 2011 WL 2294146 (D.S.C. June 8, 2011).

[8] *Estate of DeWitt v. DeWitt,* 54 P.3d 849 (Colo. 2002); *Stillman v. Teachers Ins. & Annuity Ass'n*, 343 F.3d 1311 (10th Cir. 2003) (predicting Utah law); *Thrivent Financial for Lutherans v. Andronescu*, 368 Mont. 256, 300 P.3d 117 (2013); *Buchholz v. Storsve*, 2007 S.D. 101, 740 N.W.2d 107 (2007).

III.

The Court of Appeals lost sight of the rule against retroactive application when it mistakenly viewed the revocation-upon-divorce provision as remedial and procedural.

The Court of Appeals disregarded the presumption against retroactive application when it relied upon cases dealing with remedial or procedural statutes.

In the cases from other states relied upon by the Court of Appeals, the courts considered their revocation statutes to be remedial in nature. Whatever the soundness of that holding in other states, our South Carolina statute is not remedial. A remedial statute grants, expands, or contracts a remedy for the enforcement of an existing right.

A statute altering a remedy can be and often is meant to apply retroactively, as cases relied upon by the Court of Appeals show. When a statute of limitations is altered without reviving a stale cause of action,[9] or the amount of an attorney fee award as a remedy is adjusted,[10] or child support remedies are expanded,[11] retroactive application is often appropriate.

The revocation provision of Act 100 is not remedial. It nullifies the key provision of a life insurance contract. As the Pennsylvania court said 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

---

[9] *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").

[10] *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).

[11] *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.").

> 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.

Parsonese v. Midland Nat'l Ins. Co., 550 Pa. 423, 432, 706 A.2d 814, 818 (1998).

The U.S. Supreme Court remarked of the Minnesota revocation statute:

> [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.

Sveen v. Melin, 138 S.Ct. 1815, 1822 (2018).

As the South Carolina Supreme Court once said:

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

Bartley v. Bartley Logging Co., 293 S.C. 88, 359 S.E.2d 55, 56–57 (1987).

The revocation provision of Act 100 is substantive, not remedial.

Nor is section 62-2-507 a *procedural* statute. In the Colorado case relied upon by the Court of Appeals,[12] the court decided that the revocation statute of that state is not only remedial but *procedural* because revocation is "a procedure." That strange holding may be the law of Colorado, but it surely is not the law of South Carolina. Procedural statutes change litigation procedures. They are not substantive acts. *Merchants Mutual Ins. Co. v. South Carolina Second Injury Fund,* 277 S.C. 604, 291 S.E.2d 667 (1982); *Kerr v. Richland Memorial Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (2009) (statute of limitations is a procedural statute).

The Colorado court appears to have been the only one to characterize a revocation statute as "procedural" until our Court of Appeals did as well.

---

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

IV.

Professor Waggoner's "donative transfer/rule of construction" theory was accepted by the Court of Appeals and in the cases relied upon by the Court. That theory was rejected by the U.S. Supreme Court in *Sveen v. Melin.*

A. *Professor Waggoner's theory.*

Professor Lawrence Waggoner, draftsman of the Uniform Probate Code revision which contained the revocation-upon-divorce provision, anticipated an abridgement challenge under the Contracts Clause. He devised a two-pronged theory which he hoped would shield the statute from such an attack.

First, Professor Waggoner theorized that the designation of beneficiary 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) (cited with approval by the Court of Appeals). Professor Waggoner theorized that the insurance policy is a contract between insured and insurer—except for the designation of beneficiary. This is not part of the contract but is a "donative transfer."

Second, Professor Waggoner argued that the revocation statute was merely one of the Probate Code's "rules of construction," no different from rules construing ambiguous terms in a will. The court would be "construing" the forgetful policyholder's true intention.

Hence, went the theory, the revocation-upon-divorce statute is not an unconstitutional abridgement of contract.

The Contracts Clause challenge came in *Sveen v. Melin*, 138 S.Ct. 1815 (2018).[13] In its *amicus* brief, Professor Waggoner's academy told the U.S. Supreme Court ***twenty times*** that Minnesota's revocation-upon-divorce statute was a mere rule of construction which did not abridge the life insurance contract but only construed it.

---

[13] The *Sveen* case involved no issue of retroactive application of Minnesota's revocation statute to a pre-statute divorce. The statute had been on the books for years when Sveen and Melin divorced.

The Supreme Court began its analysis by recognizing that the choice of beneficiary is not a donative transfer but a key term of the contract. "[A]n insurance policy is a contract under the Contracts Clause, and a will is not." A statute nullifying the choice of beneficiary in an insurance contract purchased before the statute was enacted is indeed an abridgement of the key term of the contract—but not an unconstitutional abridgement. The insured can reinstate the ex-spouse as beneficiary "with the stroke of a pen."

The decision in *Sveen v. Melin* put finished on the theory that the beneficiary designation is a donative transfer and the revocation statute is a mere rule of construction.[14]

B. The Court of Appeals relied upon the four pre-Sveen cases which accepted the "donative transfer/rule of construction" rationale.

Before the *Sveen* decision, four courts had accepted the "donative transfer/rule of construction" theory to shield the statute from Contracts Clause challenge. These are the same four revocation-upon-death cases heavily relied upon by our Court of Appeals.[15]

1. The Tenth Circuit case.

Predicting Utah law, the *Stillman* court adopted both of Professor Waggoner's devices. Said the *Stillman* panel:

> [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. Second, the *Stillman* court found that the Utah statute identifies its

---

[14] Professor Waggoner's fear was misplaced, in any event. The Supreme Court turned aside the constitutional attack, 8-1. Only Justice Gorsuch believes with the founders that *all* abridgements of preexisting contracts are unconstitutional.

[15] *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).

revocation-upon-divorce provision as a mere "rule of construction." On the contrary, as the Supreme Court found in *Sveen,* a revocation statute "changes the key contractual obligation—who gets the insurance proceeds." 138 S.Ct. at 1830.

2. The Colorado case.

The *DeWitt* court, like the *Stillman* court, accepted the 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*, urging the Court to adopt the rule-of-construction device, the Supreme Court did not even acknowledge.

3. The Montana case.

The Montana court accepted both halves of the Waggoner theory.

4. The South Dakota case.

The South Dakota court reasoned backward that its revocation statute would not operate retroactively unless it were found to be a rule of construction. (This was true.) Without reading the statute to answer that question, the court accepted the Tenth Circuit panel's rationale in *Stillman* that revocation statutes are rules of construction, and that rules of construction apply retroactively.

V.

Act 100's revocation provision is neither a rule of construction nor a presumption.

A. *Act 100 creates four rules of construction. They all apply only to wills.*

The Court of Appeals 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.) Of course it does. The statute applies to all policies held at divorce, no matter when purchased. The section 4(B)(4) question is not: *Which policies?* The question is: *Which rules of construction and which presumptions?* By focusing on the wrong phrase of the

sentence, the Court of Appeals asked the wrong question. At issue are rules of construction and presumptions *provided in this act.*

Four rules of construction are "provided in this act," Act 100. All four concern the construction of ambiguous terms in wills.[16] Act 100 creates no rule of construction touching an insured's designation of beneficiary.

B. Act 100 creates six presumptions, three of which apply to governing instruments. Those three apply only to wills.

Act 100 prescribes six presumptions, only three of which apply to governing instruments. These three apply only to wills.[17] Act 100 creates no presumption

---

[16] **SECTION 62-2-601(A). Rules of construction and intention; reformation of will:**

> The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

SECTION 62-2-602. Construction that will passes all property; after-acquired property:

> A will is construed to pass all property which the testator owns at the testator's death including property acquired after the execution of the will and all property acquired by the testator's estate after the testator's death.

SECTION 62-2-609. Construction of generic terms to accord with relationships as defined for intestate succession:

> Half bloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.

SECTION 62-2-611. Construction that devise passes fee simple:

> A devise of land is construed to pass an estate in fee simple, regardless of the absence of words of limitation in the devise.

[17] **1.** Section 62-2-506(b)(1): Testator is presumed to have intended a substitute will to replace 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

(continued...)

touching an insured's designation of beneficiary.

Moreover, a legal presumption is a device used in litigation to establish a fact initially, shifting the burden of going forward with the evidence. 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). Several of the cases cited by the Court of Appeals speak in terms of a "presumption" that the policyholder wished to change beneficiary. The word there is used not to mean a legal device but rather a commonly held belief. Most divorcing policyholders do wish to name a new beneficiary, but for a number of reasons some do not and William Meier did not.

* * * * *

No rules of construction or presumptions provided in Act 100 apply to insurance policies generally or to the revocation provision specifically.

VI.

Trial court decisions are against retroactive application

Our Court of Appeals quoted District Judge David Norton as saying that he was making "an educated guess as to the intent of South Carolina's legislature in drafting . . . § 62-2-507."[18] The intended implication is that Judge Norton was guessing about whether the statute applies retroactively.

Neither Judge Norton nor anyone else in his courtroom thought that the statute might apply retroactively. Both sides agreed that if the parties' pre-July 1, 2014 settlement agreement qualified as a divorce under section 4(B), the statute would not apply retroactively. Judge Norton's "educated guess" concerned whether the settlement agreement "qualified as a 'divorce or annulment' as contemplated by the

---

[17](...continued)
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.

[18] *State Farm Ins. Co. v. Murphy*, Case No. 2:15-cv-04793-DCN, 2017 WL 4551489 (D.S.C. 10/12/2017).

plain language of . . . § 62-2-507(a)(2)." Judge Norton ruled that the settlement agreement did qualify as a pre-statute divorce. Hence, the revocation statute did not apply to it retroactively.

The separately reasoned decisions of Judge Buckner and Judge Dukes in the case at bar mirror Judge Norton's decision that the revocation statute does not apply to divorces entered before the act was passed.[19]

The Court of Appeals relied upon a single contrary decision of the District Court.[20] Without the benefit of briefing on this issue, the court relied upon section 4(B)(2)'s provision that "the act applies to all judicial proceedings concerning estates of decedents . . . ." As noted above, an insurance interpleader action does not concern the estate of the decedent. This provision is inapplicable.

VIII.

Pennsylvania, Indiana, and Massachusetts decisions

Illinois. Recently rejecting our Court of Appeals decision in the case at bar, the Illinois Court of Appeals held as follows:

> [W]e find it notable that our legislature chose *not* to use the same language as contained in the Uniform Probate Code, including the language about the effect of a "rule of construction or presumption," which several other states have found vital in applying their statutes in similar contexts. . . . We therefore conclude that the most reasonable reading of the statute is that the operative act which triggers its application is the entry of the dissolution judgment [*i.e.,* divorce decree]. In the instant case, where the date of the dissolution judgment preceded the effective date of the statute, the statute does not apply.

---

[19] In 2015 a third circuit judge reached the same conclusion in an unreported decision. *Crocker v. Golden Rule Ins. Co.,* 2015-CP-46-01465 (York County Court of Common Pleas, 08/07/15) (available on the Court's web page, https://www.sccourts.org/CaseSearch/). A federal district court in Alabama cited Judge Dukes' order with approval. *State Farm Life Ins. Co. v. Benham*, No. 2:21-CV-00695-AKK, 2021 WL 5989081 (N.D. Ala. Dec. 17, 2021).

[20] *Protective Life Ins. Co. v. LeClaire,* No. 7:17-CV-000628-AMQ, 2018 WL 3222796 (D.S.C. 7/2/2018).

The Illinois court rejected not only the holding of our Court of Appeals but also those of the Tenth Circuit in *Stillman* and the South Dakota court in *Buchholz*.

Pennsylvania. The Pennsylvania court rejected retroactive application of that state's revocation-upon-divorce statute in *Parsonese v. Midland Nat'l Ins. Co.,* 550 Pa. 423, 432, 706 A.2d 814, 818 (1998).

Massachusetts. Relying upon statutory language unlike ours, the Massachusetts court applied its revocation statute retroactively.

Mass. St. 2008, c. 521 § 43(1):	**South Carolina section 4(B):**
[T]his act shall apply to preexisting governing instruments	[A]ny rule of construction or presumption provided in this act applies to [preexisting] governing instruments . . .

The Massachusetts court interpreted "this act" to mean the entire act. Every provision of the statute, including its revocation provision, was given retroactive application. By contrast, our section 4(B) limits its application to rules of construction and presumptions provided in the act, none of which apply to the revocation provision.

This is another example of the fact that few if any of the statutes are identical in the states which have adopted some version of the Uniform Probate Code.

The Massachusetts court not only rejected but criticized the *Stillman* court's result-oriented holding that the revocation statute is a "rule of construction." The court concluded:

> [Massachusetts 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 . . . .

VIII.

The Court of Appeals failed to apply the principle that a statute should be construed if possible to avoid a serious constitutional question.

The policyholder has a contractual right to maintain the selected beneficiary. This right is protected by the Contracts Clause of the United States and South Carolina

Constitutions and may not be abridged except under limited circumstances.[21]

The vested right of the insured to choose and keep the beneficiary would be divested without the insured's knowledge if a statute enacted many years later were to nullify the choice. *Aetna Life Ins. Co. v. Schilling,* 67 Ohio St.3d 164, 616 N.E.2d 893 (1993).

South Carolina courts strive to construe a statute where possible to avoid a serious constitutional question. When the revocation provision of Act 100 is construed in the usual way to apply prospectively, no constitutional question arises.

IX.

Retroactive application of the revocation provision would affect other rights and relations.

A. *Other pre-January 1, 2014 transactions are now open to question.*

Act 100 made revocation upon divorce applicable in many new ways, including at least one which affects title to real estate.[22]

Retroactive application of the revocation provision of Act 100 could affect a myriad of "acts done" and "rights acquired" before January 1, 2014. The Court of Appeals decision opens the door to case-by-case questions about its retroactive reach.

This is an invitation to confusion. The matter should be resolved.

B. *Many policyholders are certain to be ignorant of the fact that their choice of beneficiary has been revoked because of this decision.*

If only one percent of spouses divorcing prior to January 1, 2014 intended to keep the ex-spouse as life insurance beneficiary, then very many existing beneficiary designations have been revoked under this decision without the insured's knowledge, nor would their carriers know.

---

[21] *Sveen v. Melin*, 138 S.Ct. 1815, 1822 (2018).

[22] Divorces filed after January 1, 2014 convert joint tenancies in real estate into tenancies in common.

This cannot have been the intention of the General Assembly.

CONCLUSION

Your petitioner submits that the Court of Appeals was misled in its reliance upon cases from other states based upon statutes fundamentally unlike ours, academic ideas since rejected, statutes dealing with remedies or litigation procedures, and the like.

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

For these reasons the petitioner urges the Court to grant the writ.

Respectfully submitted,

Peggy McMillan Infinger
Belk Cobb Infinger & Goldstein
P. O. Box 71121
Charleston, SC 29415
(843) 554-4291
pinfinger@cobblaw.net

James B. Richardson, Jr.
1620 Gervais Street
Columbia, SC 29201
(803) 600-6375
jbrcolumbia@gmail.com

by: James B. Richardson, Jr.
Attorneys for Petitioner.

March 8, 2023.