THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Marvin H. Dukes, III, Master in Equity

Appellate Case No. 2019-00518

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

v.

Mary J. Burnsed,..... Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Statutes:

Court rule:

Law review article:

Other authority:

STATEMENT OF FACTS

In 2013 the General Assembly amended Section 62-2-507 of the Probate Code to provide that a spouse's designation of his or her spouse as a life insurance beneficiary is revoked upon divorce. The effective date of the amendment was January 1, 2014.

The question presented by this case is whether this amendment reaches back eleven years to destroy the central element of a life insurance policy, without the knowledge of the insured.

* * * * *

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

Mary and William divorced in 2002. William made no change in beneficiary following the divorce but kept the policy in force with Mary as beneficiary until his death in 2017.

The policy's contingent beneficiary, William's brother, brought this action claiming that Act No. 100 of 2013 applies to William's 2002 divorce, thereby revoking his brother's designation of Mary as beneficiary and making him the beneficiary instead.

* * * * *

Mary's affidavits and exhibits show that, as sometimes happens, she and William functioned better as close friends after their marriage than they had as spouses during it.[1] They stayed in constant touch for the next fifteen years, visiting one another frequently. They communicated almost daily over the years by telephone, text, and e-mail. In a sample period from May 2015 to December 2017, texts and e-mails numbered in the hundreds, in addition to the phone calls.

The appellants' contention that Mary was just another of William's friends is specious. For example, on February 2, 2016, fourteen years after their divorce, William

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[1] Burnsed affidavit of May 31, 2018 [R. 133]; Burnsed affidavit of July 2, 2018 [R.140], Exhibits A [R. 141] and B [R. 178].

e-mailed this message to Mary:

> Thank you so much for the conversation we had[.] [I]t made my day. Matter of fact today has been the best day mentally in about 7 months[.] [T]hank you so much. **You do not realize how much I love and respect you. Miss you so much it hurts.**

Burnsed Affidavit of July 2, 2018, Exhibit B, page 51 [R. 229] (emphasis added).

Mary averred that William reminded her frequently that she remained his life insurance beneficiary.[2] During the fifteen years following divorce, William wrote approximately 180 monthly checks of $200.00 each to TransAmerica,[3] totaling about $36,000, knowing each time he wrote a check that Mary continued to be his beneficiary.

Karen Cummings avers that she reminded William fifteen months before his death about the simple step of changing his beneficiary if he meant to do so. Having been reminded, he made no change. Elsewhere, the appellants say (Brief at 7-8) that William probably thought that he could only change his life insurance beneficiary by making a will. Their own Cummings affidavit refutes this notion, which runs counter to experience, as our Supreme Court has noted.[4]

Some friends of William stated their belief that he would have wanted his son Conrad to receive the proceeds of his life insurance. They must not have known that the insured's brother Richard, not his son Conrad, would receive the proceeds if the

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[2] Burnsed Affidavit of May 31, 2018, ¶ 2 [R. 133].

[3] Complaint, Exh. 1, p. 3 [R. 62]:

PLANNED PREMIUM:	$200.00
PAYMENT FREQUENCY:	MONTHLY

[4] *Cf. Duncan v. Investors Diversified Services, Inc.*, 285 S.C. 467, 471, 330 S.E.2d 295, 297 (1985):

> [The insured] had the absolute right to change the beneficiary of his Keogh plan, but did not exercise that power. Five years elapsed between the date of divorce and [the insured's] death. Six days after [his former spouse] left to obtain a Dominican divorce, [the insured] executed a second will completely deleting her, yet he did not procure a new beneficiary designation form from [his Keogh carrier], a much simpler procedure.

appellants prevail. Conrad joins this action in his capacity as personal representative of his father's estate, but the estate has no interest in the disposition of this non-probate asset.

As interesting as these affidavits may be, however, they created no genuine issue of material fact.[5] It makes no difference what other people think an insured meant to do or should have done. Under South Carolina law, a life insurance beneficiary designation can only be changed when the insured substantially complies with the procedure prescribed in the policy. *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375, 382 (1938), and many other cases. The policy in question provided in the usual way that the identity of the beneficiary could only be changed by written notice from the insured, accepted by the insurer with an endorsement signed by the insurer's president or secretary.[6] That was not done. Mary Burnsed is the beneficiary unless the statute in question canceled her status.

In the absence of a genuine issue of material fact, one side or the other was entitled to summary judgment. The circuit court, Honorable Perry M. Buckner, III, presiding, denied Richard Meier's motion for summary judgment by Order dated August 10, 2018 [R. 17]. The circuit court, Honorable Marvin H. Dukes, III, presiding, granted Mary Burnsed's motion for summary judgment by Order dated March 25, 2019 [R. 1].

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[5] Most of what the appellants' affiants say is inadmissible in evidence and therefore could not be considered. Rule 56(e), SCRCivP; *Hall v. Fedor,* 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). In this instance, it is immaterial. As the appellants assured the circuit court: "The operative facts in this case are undisputed." Appellants' Memorandum dated June 25, 2018, in support of their summary judgment motion, p. 2 [R. 116].

[6] Complaint, Exh. 1, p. 6 [R. 67], "GENERAL PROVISIONS – BENEFICIARY".

ARGUMENT

The revocation-of-beneficiary provision of Act No. 100 of 2013 does not apply in the case of a divorce entered before the act was passed.

By Act No. 100 of 2013, the General Assembly amended a section of the Probate Code, S.C. Code Ann. § 62-2-507, adding "insurance policy beneficiary" to the list of things automatically revoked upon divorce. The Act took effect on January 1, 2014, eleven years after the divorce in question.

The issue which controls the outcome of this case is this:

> Does Act No. 100 of 2013 apply to a divorce entered eleven years earlier, revoking the designation of Mary Burnsed as beneficiary at the moment the decree was entered, so that the insured's contingent beneficiary, his brother, was the actual beneficiary for the next fifteen years until the death of the insured?

This is a novel issue in the State courts of South Carolina.

The appellants have oscillated between contending that Mary's designation was revoked when the divorce was entered in 2002,[7] or not until the insured died in 2017.[8] This second version has it that Mary continued to be the beneficiary for fifteen years after the divorce until the moment of William's death on December 26, 2017. Under this theory, Act No.100 would not be retroactive since it did not take effect until the insured breathed his last, three years after the statute was passed.

The appellants cannot have it both ways. Either revocation took place when the divorce was entered or not until the insured died. For the "not-until-death" theory the appellants cite three decisions, *Stillman v. Teachers Insurance,* 343 F.3d 1311 (10th

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[7] Complaint, ¶ 18 [R. 37]; Appellants' Motion for Summary Judgment dated April 20, 2018, ¶ 6 [R. 113]; Appellants' Memorandum dated June 25, 2018, in support of their summary judgment motion, pp. 2-3 [R. 116-17] ("[§ 62-2-507] revokes, upon divorce, the designation of an ex-spouse * * * . * * * Finally, a decree of divorce is an act that revokes the designation of a spouse * * * ."). The same is said in their brief to this Court, p. 8, before articulating the "revocation-on-death" theory.

[8] Appellants' argument to Judge Dukes, transcript of hearing of March 11, 2019, p. 14, lines 5-12 [R. 284]; Appellants' Brief in this Court at pages 13-15.

Cir. 2003); *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002); and *Allstate Life Ins. Co. v. Hanson,* 200 F.Supp.2d 1012 (E.D. Wis. 2002). The rationale of the *Stillman* decision, holding that the insured's designation of beneficiary is not a part of the insurance contract, has been discredited by the U.S. Supreme Court in the case of *Sveen v. Melin*, ___ U.S. ___, 138 S.Ct. 1815, 201 L.Ed.2d 180 (2018). *See below,* pp. 9-11. The *Dewitt* and *Allstate* decisions rest upon statutory provisions with no counterpart in our own statute. Instead of a specific effective date for the act, the Colorado and Wisconsin statutes apply to each individual insured when death occurs, regardless of when the divorce occurred.[9]

The provision of Act No. 100 at issue, Section 62-2-507, applies so as to revoke a beneficiary designation when the divorce decree is entered, not when the insured dies.[10] If Act No. 100 were applied in the case of a divorce entered before the statute was passed, the application would be retroactive, as Judge Buckner and Judge Dukes found.

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[9] § 15-17-102, 5 Colo. Rev. Stats. (2001):

> Effective date — [This statute] shall apply to [beneficiary designations] of decedents dying on or after July 1, 1995.

See: In re Estate of DeWitt, 54 P.3d 849, 856 (Colo. 2002) ("We find that the plain language of the foregoing provision indicates the general assembly's intent that the *death* of an insured-decedent on or after July 1, 1995, triggers application of the statute * * * .").

The same is true of the Wisconsin revocation statute at issue in *Allstate Life Ins. Co. v. Hanson,* 200 F.Supp.2d 1012 (E.D. Wis. 2002). The Wisconsin statute originated in 1997 Wis. Act No. 188. Instead of a specific effective date, the statute provided in § 288: "Initial applicability. (1) This act first applies to deaths occurring on January 1, 1999 * * * ." *Haug v. Greve,* 369 Wis.2d 223, 880 N.W.2d 182 (Table) (Wis. App. 2016).

[10]

> [T]he divorce * * * revokes any * * * beneficiary designation made by a divorced individual to the divorced individual's former spouse * * * .

S.C. Code Ann. § 62-2-507(c)(1)(i).

1. The principles of retroactivity.

In South Carolina, as everywhere, retroactivity analysis begins with one of the strongest presumptions known to the law: a presumption against the retroactive operation of a statute. *Cousar v. New London Engineering Co.,* 306 S.C. 37, 410 S.E.2d 243 (1991). In South Carolina the standard of proof of retroactive intent by the legislature is the same as that which applies in a criminal trial: *retroactive intent must be proved by evidence so compelling that it leaves no reasonable doubt. 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); *Carolina Chemicals, Inc. v. South Carolina Dep't of Health & Environmental Control,* 290 S.C. 498, 351 S.E.2d 575, 578–79 (Ct. App. 1986).

South Carolina's retroactivity principles are identical to those of the U.S. Supreme Court and the Fourth Circuit Court of Appeals, whose decisions the South Carolina Supreme Court often cites on this subject.[11]

> Both federal and South Carolina courts employ a robust presumption against statutory retroactivity. *See, e.g., Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *Jenkins v. Meares,* 302 S.C. 142, 394 S.E.2d 317, 319 (1990).

Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 172 (4th Cir. 2010) (applying South Carolina law).

From the beginning, the United States Supreme Court has followed the same presumption against retroactive interpretation as do the courts of South Carolina.

> Although only a presumption, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older

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[11] *See, e.g., South Carolina Nat'l Bank v. South Carolina Tax Comm'n,* 297 S.C. 279, 376 S.E.2d 512, 523 (1989); *William C. Logan & Assoc. v. Leatherman,* 290 S.C. 400, 351 S.E.2d 146, 148 (1986); *Hercules, Inc. v. South Carolina Tax Comm'n,* 274 S.C. 137, 262 S.E.2d 45, 48 (1980).

> than our Republic." *Landgraf* [*v. USI Film Products, Inc.*], 511 U.S. at 265, 114 S.Ct. 1483 (1994). It has been described as "[a]mong the most venerable of the[ ] [judicial] default rules," *Tasios v. Reno,* 204 F.3d 544, 549 (4th Cir. 2000), a "timehonored presumption," *Hughes Aircraft Co. v. U.S. ex rel. Schumer,* 520 U.S. 939, 946, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), and a "rule of general application." *Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 37, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006) (citation and internal quotations omitted).

Ward, 595 F.3d at 172. "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,* 595 F.3d at 179.

2. The intention of the General Assembly.

a. The express terms of Act No. 100 contain no suggestion of retroactive intent.

The Legislature may end the inquiry into retroactive intent at the threshold by expressly providing that the statute must be applied retroactively.

> The standard for express prescription is "a demanding one," requiring prescription that is truly express and unequivocal. *See INS v. St. Cyr,* 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

Ward, 595 F.3d at 173.

Act No. 100 contains the usual recitation of its effective date — January 1, 2014. "[A] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf v. USI Film Products, Inc.,* 511 U.S. 244, 257, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

> 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, 595 F.3d at 175. *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).

In the case of *Pulliam v. Doe,* 246 S.C. 106, 142 S.E.2d 861, 863 (1965), our

Supreme Court stated:

> The amendment became effective, by its terms, on June 14, 1963, and there is nothing in its provisions to indicate a legislative intent that it operate retroactively so as to apply to [insurance] policies issued prior to its adoption.

The appellants rely upon Section 4(B)(4) of the act, which provides that the act applies to all life insurance policies, regardless of when purchased. Of course it does, **in cases where the act applies.** The question is not: ***Which policies?*** When the statute applies, it applies to all life insurance policies — all "governing instruments" — no matter when purchased. Rather, the question is: ***Which divorces?*** The statute applies to divorces filed **after** the effective date of the statute — January 1, 2014 — and then covers all policies, regardless of when purchased.

The appellants rely further upon Section 4(B)(1) of the act, which reads:

> (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 [after January 1, 2014] * * * .

This action has nothing to do with the estate of a decedent. Life insurance is a non-probate asset passing outside the estate. *Spence v. Wingate,* 395 S.C. 148, 716 S.E.2d 920, 925 n.11 (2011). "[P]robate estate means the decedent's property passing under the decedent's will," *etc.* S.C. Code Ann. § 62–2–202 (2009).

Further positive evidence of the General Assembly's intention that this statute apply prospectively is found in subsection (g)(2):

> Written notice of the divorce * * * must be mailed to the [insurer's] * * * main office * * * by registered or certified mail, return receipt requested, or served upon the [insurer] * * * in the same manner as a summons in a civil action.

Section 62-2-507(g)(2). The duty to give notice could only apply in the case of divorces entered after the effective date of the act. No such requirement could have applied to the many divorces entered before that date where an ex-spouse was left as beneficiary. A statute cannot require a person to have performed a duty in the past, when no such duty then existed.

The statute states that the divorce *revokes* the designation — present tense. "[A]ll words [in a statute] importing the present tense shall apply to the future * * * ." S.C. Code Ann. § 2-7-30. The future, not the past.

> [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).

If the General Assembly's intent included retroactive application, the statute would have been worded something like this (emphasis added):

> A divorce entered before the effective date of this act * * * **revoked** any * * * beneficiary designation made by a divorced individual to the divorced individual's former spouse * * * . A divorce entered on or after the effective date of this act * * * **revokes** any * * * beneficiary designation made by a divorced individual to the divorced individual's former spouse * * * .

The respondent does not contend that the General Assembly expressly ***disclaimed*** any intention that Act No. 100 be applied retroactively, although language in the Act might be construed to support that view.[12]

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[12] **Time effective and applicability**

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:

* * * * *

(5) an act done and any right acquired or accrued before the effective date of the act is not affected by this act.

Nothing in the text of Act No. 100 expresses any intention of retroactive application. Everything points to prospective application.

b. No retroactive intent is implied from the terms of Act No. 100.

South Carolina courts do not indulge an *implication* of retroactive intent unless the statute would bear no other interpretation, since an intention for retrospection must be "clearly apparent from the terms" of the statute. *Neel v. Shealy,* 261 S.C. 266, 273, 199 S.E.2d 542, 545 (1973). A retroactive application must be "required by the express words of the statute, or must **necessarily be implied** from such words * * * ." *Curtis v. Renneker,* 34 S.C. 468, 491, 13 S.E. 664 (1891) (emphasis added).

The appellants say that remedial and procedural statutes may have retroactive application. To call our revocation-on-divorce statute "remedial" or "procedural" is to stand these concepts on their heads.[13]

Nothing in the text of Act No. 100 implies any intention of retroactive application.

3. Cases from other jurisdictions.

The Supreme Court of Ohio refused to give retroactive effect to an insurance beneficiary revocation statute enacted *after* entry of a divorce decree. *Aetna Life Ins. Co. v. Schilling,* 67 Ohio St.3d 164, 616 N.E.2d 893 (1993).

The appellants rely upon three appellate cases and one trial court order from other States to support their contention that Act No. 100 was intended to abrogate beneficiary designations in the case of a divorce entered *before* the law was enacted.[14]

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[13] This contention comes for the first time on appeal. The circuit court would have disposed of it easily, had it been timely raised. Even if this contention were meritorious, which plainly it is not, it comes too late. *Cricket Store 17 v. City of Columbia Bd. of Zoning Appeals,* Op. No. 5673 (S.C. Ct. App. filed August 7, 2019), and many other cases.

[14] These are:

- *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002);
- *Matter of Estate of Dobert,* 192 Ariz. 248, 963 P.2d 327 (Ct. App. 1998);
- *Stillman v. Teachers Insurance,* 343 F.3d 1311 (10th Cir. 2003);

(continued...)

Judge Buckner distinguished each of these cases. Order of Judge Buckner, August 10, 2018, pp. 5–10 [R. 21-26]. Judge Dukes concurred in Judge Buckner's analysis. Order of Judge Dukes, March 25, 2019, p. 7 [R. 7]. Rather than taking up the Court's time by covering the same ground again, the respondent respectfully invites the Court's attention to Judge Buckner's thorough analysis of these cases.

In regard to one of these cases, however, the Tenth Circuit's decision in *Stillman v. Teachers Insurance,* 343 F.3d 1311 (10th Cir. 2003), we would like to add a further note. The Tenth Circuit found that Utah's revocation-upon-divorce statute is not a *substantive* act at all but a mere "rule of construction," and that another Utah statute states that "rules of construction" apply retroactively.

By no remote stretch of the imagination is Section 62-2-507 a "rule of construction". "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). Rules of construction are principles, axioms, and the like which may aid the court, where appropriate, in construing ambiguous statutes and documents. Construction presupposes doubt, obscurity, or ambiguity. There is nothing doubtful, obscure, or ambiguous about the meaning of Section 62-2-507 or in the identity of the beneficiary — nothing to ***construe***. This statute reaches into the heart of the life insurance policy and destroys 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.

See: Parsonese v. Midland Nat'l Ins. Co., 550 Pa. 423, 706 A.2d 814 (1998), where the Pennsylvania Supreme Court said this about a similar revocation statute:

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[14](...continued)
- *Allstate Life Ins. Co. v. Hanson,* 200 F.Supp.2d 1012 (E.D. Wis. 2002).

> [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.

Id. at 432, 706 A.2d at 818.

The *Stillman* court accepted the theory of Professor Lawrence Waggoner, the author of the model act, that the insured's designation of beneficiary is not a part of his contract with his insurer. Following Professor Waggoner, the court theorized that a life insurance policy is in two parts: (1) the contract between the insurer and its insured; and (2) the beneficiary designation, which is not a part of the contract but is "donative" in nature, like a will. This concept allowed the court to "construe" the beneficiary designation with "rules of construction" as a court might construe a will.

The model act and its progeny eviscerate the central term of any life insurance policy: the choice of beneficiary. For this reason Professor Waggoner foresaw a Contracts Clause challenge to the model act which he authored.[15] Labeling this statute as a mere "rule of construction," not a substantive act, was an effort to clothe this wolf as a sheep. *See below,* pp. 16-18. By arguing that the beneficiary designation is not part of the life insurance contract but only a donation — a will substitute — the draftsman tried to insulate the act from Contracts Clause challenge. This failed.

In the case of *Sveen v. Melin*, ___ U.S. ___, 138 S.Ct. 1815, 201 L.Ed.2d 180 (2018), all nine members of the United States Supreme Court rejected the theory that the beneficiary designation is not part of the insurance contract. In the words of the majority: "'[A]n insurance policy is a contract under the Contracts Clause, and a will is not.'" 138 S.Ct. at 1823. "[I]n revoking a beneficiary designation, the law makes a significant change [in the insurance contract]. * * * [T]he 'whole point' of buying life

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[15] *See: Halbech & Waggoner, The UPC's New Survivorship and Antilapse Provisions,* 55 Alb.L.Rev.1091, 1128-30 (1992).

insurance is to provide the proceeds to the named beneficiary. * * * The [revocation statute] no doubt changes how the insurance contract operates." *Sveen v. Melin*, 138 S.Ct. 1815, 1822-23 (emphasis added).

The dissenter in *Sveen*, Justice Gorsuch, said the same thing: "But what we do know is the retroactive removal of Ms. Melin undid the central term of the contract Mr. Sveen signed and left in place for years, even after his divorce, until the day he died." *Id.* at 1829 (Gorsuch, J., dissenting).

The choice of beneficiary is always the central term of the insurer's contract with the insured, as it was between William Meier and Transamerica.[16]

Professor Waggoner's concern was unfounded in regard to the challenge which he foresaw, where the sequence was: enactment first, divorce second.[17] In the end, the challenge was easily turned aside, eight to one, in a case where not only did the Court make no mention of Professor Waggoner's theory but refuted it unanimously.

It may never even have occurred to Professor Waggoner that the model act might be applied *retroactively*. In his criticism of the *Whirlpool* decision 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). What is remarkable is that the Tenth Circuit used Professor Waggoner's discredited theory in a divorce first, statute second, case, *Stillman v. Teachers Insurance*.

Section 62-2-507 is the furthest thing from a rule of construction.

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[16] IF YOU DIE before the Maturity Date and while this Policy is in Force, WE WILL PAY the Death Benefit Proceeds to the Beneficiary upon receipt of due proof of Your death.

Complaint, Exh. 1, p. 1 [R. 60].

[17] Even then, the issue was not entirely free of doubt. *Cf. Whirlpool Corp. v. Ritter,* 929 F.2d 1318 (8th Cir. 1991), and Justice Gorsuch's dissent in *Sveen v. Melin.*

4. Trial court decisions.

In a case decided in the United States District Court for the District of South Carolina, Judge Norton presiding, the court held that Act No. 100 of 2013 did not apply so as to revoke a beneficiary designation where divorce occurred before the statute was enacted. It apparently did not even occur to the contingent beneficiary to contend that the statute might have retroactive application. Rather, the only issue was whether the divorce was entered before or after the effective date of the statute. *State Farm Ins. Co. v. Murphy,* Case No. 2:15-cv-04793-DCN (D.S.C. 10/12/17).

In a second case decided by that trial court, *Protective Life Ins. Co. v. LeClaire,* Case No. 7:17-cv-00628-AMQ (D.S.C. 7/2/2018), Judge Quattlebaum presiding, the ex-spouse beneficiary did not even contend that the statute does not apply retroactively. In effect, she conceded retroactive application, if constitutional.[18] Her "central issue," as the court described it, was that her beneficiary designation was irrevocable. Order at p. 9.

Lacking any argument against retroactive application, Judge Quattlebaum found that Section 4(B)(2) of Act No. 100 requires retroactive application.[19] Judge Quattlebaum concluded:

> The statute applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after the effective date of January 1, 2014. As the Decedent passed away after the effective date, the instant matter must be considered within the purview of the statute.

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[18] *See:* Defendant Leclaire's Memorandum January 16, 2018, pp. 13-23.

[19] That section provides:

> SECTION 4. (A) This act [amending Articles 1, 2, 3, 4, 6, and 7] takes effect on January 1, 2014.
>
> (B) Except as otherwise provided in this act, on the effective date of this act:
>
> * * * * *
>
> (2) the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date; * * * .

Although the error is perhaps understandable in the absence of any argument to the contrary, this trial court decision is plainly wrong. 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.* None of the ***appellate*** cases cited by the appellants make any reference to the provision of the Model Probate Code from which Section 4(B)(2) of Act No. 100, relied upon by Judge Quattlebaum, was taken.

Even if an insurance interpleader were a judicial proceeding concerning an estate — which it is not — Section 4(B)(2) of the act does not address the question of whether the General Assembly intended the revocation-on-divorce provision to apply retroactively.

* * * * *

The Court is now acquainted with the decisions of four trial judges on the issue presented here. Judge Buckner and Judge Dukes, both with full briefing, decided against retroactive application. Judge Norton ruled against retroactive application in a case where it apparently did not even occur to counsel to contend that the statute might apply retroactively. Judge Quattlebaum ruled in favor of retroactive application in a case where counsel failed to argue that the statute was not intended to apply retroactively.

As much as we may respect the orders of our able trial judges, these officers can seldom delve deeper into an issue than did the lawyers who appear before them. They generally lack the time and resources to plumb the depths of an arcane issue such as the one at bar here. Most importantly, they lack the benefit of collaboration with others of equal rank. For these reasons the decisions of appellate tribunals, not the orders of trial judges, are precedential.

5. The views of the Joint Editorial Board for the Uniform Probate Code.

The appellants imply, but do not outright claim, that those who wrote and promulgated the model act upon which our statute is based intended retroactive application to divorces which preceded enactment.[20] This is not true. At no time have those who wrote and sponsored the model act given any indication that the statute should be applied retroactively in the case of divorces entered before the law was passed. The academic comments cited by the appellants only criticize the Eighth Circuit's decision in *Whirlpool Corp. v. Ritter,* 929 F.2d 1318 (8th Cir. 1991), where the statute was enacted before the divorce. The sequence of events in *Whirlpool,* the same as in *Sveen v. Melin,* was: (1) purchase of policy; (2) enactment of statute; (3) divorce. The *Whirlpool* court, like Justice Gorsuch, dissenting in *Sveen,* found a violation of the Contracts Clause. The majority in *Sveen* overruled *Whirlpool* in a case where the statute had been on the books for years before the divorce, and the insured could have undone the revocation with the stroke of a pen.

Although the Joint Editorial Board and its reporter were right to criticize *Whirlpool,* they did so for the wrong reasons. Professor Waggoner explained the Board's four reasons for criticizing *Whirlpool.*[21] None are valid. First, "that the beneficiary-designation of a life-insurance policy is a donative transfer. The statute did not impair the contractual component of the policy * * * . The statute only affected the identify of the donee." All nine members of the United States Supreme Court rejected this theory in *Sveen.* "Second, the statute merely established a rule of construction."

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[20] Judge Dukes thought that the appellants were making that claim, Order of Judge Dukes, March 25, 2019, p. 8 [R. 8], and the appellants did not correct him with a post-judgment motion.

[21] *Halbech & Waggoner, The UPC's New Survivorship and Antilapse Provisions,* 55 Alb.L.Rev.1091, 1128-30 (1992). This law review article is where the Tenth Circuit in *Stillman* came up with the idea, discredited in *Sveen*, that the beneficiary designation is not part of the insurance contract but some sort of "donative add-on". *Stillman,* 343 F.3d at 1319. The Colorado court in *DeWitt* likewise bought into this notion that the beneficiary designation floats near the contract but is not part of it. *DeWitt*, 54 P.3d at 859-860.

Id. at 1130. This is another way of saying that the beneficiary designation is not part of the insurance contract, discredited in *Sveen*. Section 62-2-507 is the furthest thing from a rule of construction. "Third, the 'Contracts Clause has never been [applied to devices] that have no **contractual component**.'" (Emphasis added.) This statement is correct but irrelevant since the beneficiary designation is the central **contractual component** of the life insurance contract. *Sveen v. Melin*. Fourth, there is no authority for applying the Contracts Clause to "legislative default rules." *Id.* The model act is not a "legislative default rule" but a substantive act which guts the central term of a life insurance contract. The Contracts Clause applies to any statute which alters a contract, as the Court made clear in *Sveen,* and Section 62-2-507 is one such. The question is not whether the Clause applies. The question is whether the Clause has been violated. It is not violated where the sequence is: statute first, divorce second. The opposite is true where the sequence is: divorce first, statute second. *Aetna Life Ins. Co. v. Schilling,* 67 Ohio St.3d 164, 616 N.E.2d 893 (1993).

In any event, nothing said by the Editorial Board or its reporter implies any intent that this model act be applied in the case of a divorce entered before the act was passed. It is inconceivable that the Commissioners on Uniform Laws — lawyers preeminent in their fields[22] — did not know that nowhere will a statute be given retroactive effect unless the legislature announces that intention in a voice so loud and clear that no other reasonable conclusion is possible. The Commissioners would surely have included a plain direction for retroactive application to pre-enactment divorces if that was their intent. They did not.

The Commissioners did not intend this model act to apply to divorces entered before enactment, nor would it matter if they did, since the one-and-only place for a retroactivity command is in the unmistakable wording of the statute.

Our General Assembly probably would have rejected a retroactivity proposal, in

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[22] Professor Coleman Karesh, a lawyer of the highest esteem, was South Carolina's member of the Commission for many years.

any event. *See, e.g., Ward*, 595 F.3d at 178 (4th Cir. 2010) (draft bill submitted by S.C. Department of Insurance called for retroactive application; General Assembly enacted bill after *striking* provision calling for retroactive application). Seldom has the General Assembly enacted model legislation with no change, and never has it attempted to nullify a provision in an insurance policy issued *before* the enactment.

6. Avoiding a serious constitutional question.

South Carolina follows the universal rule that "[c]onstitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." *Henderson v. Evans,* 268 S.C. 127, 232 S.E.2d 331, 333 (1977) (*citing Casey v. South Carolina State Housing Authority,* 264 S.C. 303, 215 S.E.2d 184 (1975)). *Accord: Thompson v. Hoffmann,* 263 S.C. 314, 210 S.E.2d 461 (1974); *Peoples Nat'l Bank v. South Carolina Tax Comm'n,* 250 S.C. 187, 156 S.E.2d 769 (1967); *Curtis v. Renneker,* 34 S.C. 468, 493, 13 S.E. 664 (1891). The U.S. Supreme Court has called it a "cardinal principle" that "this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.'" *United States v. Security Industrial Bank,* 459 U.S. 70, 78, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982).

It is unnecessary to decide whether retroactive application of Act No. 100 in the case of divorces entered before the statute was enacted would make it unconstitutional as applied. In order to decide whether the above-cited rule of construction has a place here, it is necessary only to determine whether a serious question of constitutionality would arise. *Assuredly it would.*

In 2002, William Meier possessed a vested contractual right with his insurer to maintain the beneficiary of his choice, unaffected by a divorce, and to continue that designation in force unless and until he chose to change it by the procedure called for in the policy. This was the central element of the contract. *Sveen v. Melin.* That is what he did. The right to maintain the beneficiary of his choice is a vested right of the owner of the policy. *Lynch v. United States,* 292 U.S. 571, 577–79, 54 S.Ct. 840, 78

L.Ed. 1434 (1934) ("[Insurance] policies, being contracts, are property and create vested rights * * * . Valid contracts are property * * * ."); *United States Trust Co. v. New Jersey,* 431 U.S. 1, 19 n.16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977); *Contributors to Pennsylvania Hospital v. Philadelphia,* 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124 (1917).

The Supreme Court in *Sveen* began by recognizing the vested right of the insured to maintain his choice of beneficiary. The issue was whether that vested right was unconstitutionally impaired by a statute enacted five years before the divorce, where revocation of beneficiary could have been quashed with the stroke of a pen.

If applied retroactively, Act No. 100 would 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). *Cf. Hyder v. Jones,* 271 S.C. 85, 245 S.E.2d 123 (1978); *Farish v. Courion Industries, Inc.,* 754 F.2d 1111, 1116–17 (4th Cir. 1985) (*en banc*). *See also: Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003).

Our Supreme Court refuses to find a retroactive intent where to do so might violate the Contract Clause:

> Inasmuch as the obligation to pay is contractual in nature, to require one to pay other than in keeping with the contract itself would violate the constitutional provisions of both the state and federal government to the effect that contracts may not be impaired * * * . If this amendment is not substantive in nature, it is difficult to envision an amendment which would be * * * . There is nothing in the Act whatsoever to intimate that the Legislature meant for this amendment to be retroactive. Indeed it could not be retroactive without impairing contractual rights.

Bartley v. Bartley Logging Co., 293 S.C. 88, 359 S.E.2d 55, 56–57 (1987). The *Bartley* case is one of several where the courts of South Carolina have disapproved the retroactive application of a statute where it would "affect[] vested or substantial rights." *Goff v. Mills,* 279 S.C. 382, 308 S.E.2d 778 (1983). South Carolina courts invoke this principle most emphatically when retroactive application would alter interests vested under an insurance policy. *See*: *American Nat'l Fire Ins. Co. v. Smith Grading &*

Paving, Inc., 317 S.C. 445, 454 S.E.2d 897, 899 (1994). *Accord: Hudson v. Reserve Life Ins. Co.,* 245 S.C. 615, 141 S.E.2d 926 (1965).

In *Allstate Ins. Co. v. Skeeters,* 846 F.2d 932, 934–35 (4th Cir. 1988), the Fourth Circuit refused to attribute retroactive intent to a South Carolina statute which would abrogate the rights of parties to insurance contracts, citing *Hooks v. Southern Bell Tel. & Tel.,* 291 S.C. 41, 351 S.E.2d 900, 902 (Ct. App.1986), and *Smith v. Eagle Constr. Co.,* 282 S.C. 140, 143-44, 318 S.E.2d 8, 9-10 (1984). *Accord: Ward v. Dixie Nat'l Life Ins. Co.,* 595 F.3d 164 (4th Cir. 2010); *Bray v. Insurance Co. of the State of Penn.,* 917 F.2d 130 (4th Cir. 1990).

In the case of *Sveen v. Melin,* ___ U.S. ___, 138 S.Ct. 1815, 201 L.Ed.2d 180 (2018), the United States Supreme Court rejected a Contracts Clause challenge in a revocation case. As Judge Buckner noted, no issue of retroactive application of Minnesota's revocation-upon-divorce statute was involved in *Sveen.* The statute was enacted in 2002. The parties divorced in 2007. The statute had been on the books for five years when the parties divorced. Minnesota's revocation-upon-divorce statute had been part of the fabric of that State's divorce law for five years, alongside equitable distribution,[23] alimony and child support,[24] custody,[25] legal fees and costs,[26] and all the rest. Not only was every divorcing party in Minnesota presumed to know this law,[27] as in South Carolina,[28] but their lawyers certainly ***did*** know it and would have explained it

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[23] Minn. Stat. § 518.58 & 518.65.

[24] Minn. Stat. §§ 518.17, 518.552 & 518.619.

[25] Minn. Stat. §§ 518.155 & 518.619.

[26] Minn. Stat. §§ 518.005 & 518.14.

[27] *Briggs v. Rasicot,* 867 N.W.2d 217, 221 (Minn. Ct. App. 2015).

[28] *American Legion Post 15 v. Horry County,* 381 S.C. 576, 674 S.E.2d 181, 185 (Ct. App. 2009).

to them.

The issue in *Sveen* was whether the revocation statute abridged the contract of the policyholder with respect to a policy ***purchased*** before the statute was enacted, where the statute was enacted and the divorce occurred years afterwards. Four times in the majority opinion, Justice Kagan emphasized that the insured could easily defeat the revocation-on-divorce statute by the simple expedient of signing a paper re-designating his ex-spouse as beneficiary.[29] This "simple expedient" was not available to William Meier since he had no way of knowing that the General Assembly would pass Section 62-2-507, eleven years later.

One would scarcely think that an abridgement argument could be made where the statute *preceded* the divorce and had been on the books for years, yet Justice Gorsuch, dissenting, made a strong case that it did. The other members of the Court would surely join Justice Gorsuch in finding an unconstitutional abridgement in the radically different case where the divorce *preceded* the statute, and the statute was applied retroactively.

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[29] "[J]ust as important, the policyholder himself may step in to override the revocation. * * * [H]e could notify his insurance company at any time that he wishes to restore Ann to that position." 138 S.Ct. at 1820-21. "[T]he statute supplies a mere default rule, which the policyholder can undo in a moment." *Id.* at 1821.

> [A] policyholder can reverse the effect of the Minnesota statute with the stroke of a pen. The law puts in place a presumption about what an insured wants after divorcing. But if the presumption is wrong, the insured may overthrow it. And he may do so by the simple act of sending a change-of-beneficiary form to his insurer.

Id. at 1825. "The statute thus reduces to a paperwork requirement (and a fairly painless one, at that): File a form and the statutory default rule gives way to the original beneficiary designation." *Id.* at 1823.

> [F]iling a change-of-beneficiary form with an insurance company is as "easy" as, say, providing a landowner with notice or recording a deed. *Curtis,* 13 Wall., at 71. Here too, with only "minimal" effort, a person can "safeguard" his contractual preferences.

Id. at 1824-25.

Unconstitutional abridgment is not an issue at this point. Interpreting the statute so as to avoid a serious constitutional issue is the goal. A deadly constitutional question would arise if this statute were to be applied retroactively, easily avoided by rejecting the claim of retroactivity.

7. The implications of retroactivity.

Setting aside for a moment the legal principles which control this case, it is useful to put oneself in the shoes of William Meier.

It is possible, of course, that Mr. Meier simply forgot for fifteen years to change his beneficiary designation after he and Mary divorced. It is hard to believe that a well-educated individual, making substantial monthly payments on a large life insurance policy for fifteen years, and undoubtedly knowing how to change the beneficiary, simply forgot. As unlikely as that seems, we cannot know the truth of it.

If we suppose that he did ***not*** forget, but intentionally kept Mary as beneficiary, as she avers that he often told her, what must he have done to assure himself that our General Assembly did not attempt to nullify his decision eleven years later?

So far as the undersigned are aware, prior to the enactment of Act No. 100 in 2013, the General Assembly had never interfered with the right of a life insurance policyholder to choose the beneficiary. Even the usual limitation confining insurance to those with an insurable interest in the life of the insured does not apply when a person insures himself. *Chapman v. Scott,* 234 S.C. 469, 109 S.E.2d 1, 2 (1959), and many other cases.

After Act No. 100 took effect on January 1, 2014, divorce lawyers knew of it and could be depended upon to counsel their clients accordingly. Act No. 100 lay eleven years in the future when William Meier divorced. Retroactive application of this law would mean that those insureds who intended to keep their beneficiary designation unchanged would have to continually monitor the doings of our General Assembly in order to learn if such a law as this was passed with retroactive effect, and, if it were, then to counter the law by re-naming the desired beneficiary — unless death intervened

first.[30]

If the appealed order were to be reversed and the statute found to apply retroactively, a large number of citizens — those intending to leave the ex-spouse as beneficiary (and there are a number of reasons to do that) — would have had their beneficiary designation revoked by operation of law *without their knowledge*.[31]

The General Assembly could not possibly have intended such a result.

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[30] Judge Buckner expressed this concern in a similar way:

> Meier divorced in 2002, twelve years before S.C. Code § 62-2-507 was enacted. The average person generally does not monitor the law for twelve years just in case an amendment is added to the probate code that retroactively nullifies a beneficiary designation he made over a decade before. While one could argue that this is precisely the reason people retain attorneys, it is uncommon to retain your divorce attorney in perpetuity to annually check the law to determine whether there have been any changes that might affect your life insurance policy. Given the fact that there is no clear intent in the South Carolina statutes that this revocability provision should be applied retroactively under these facts, the court should feel free to develop an opinion about the pragmatic and public policy reasons behind this law, even if they differ from higher courts.

Order of August 10, 2018, at p.10 [R. 26].

[31] "A sizable — and maybe growing — number of people *do* want to keep their former spouses as beneficiaries." *Sveen,* 138 S.Ct. at 1829 (Gorsuch, J., dissenting). The number of people affected by retroactive application here can only be guessed. Federal data (which the Court may notice) show that something like 125,000 divorces were entered from 2002 — the date of the divorce involved here — until the effective date of Act No. 100. If only one percent of divorcing spouses intended to leave the ex-spouse as beneficiary, then designations numbering in the four figures would have been revoked during these years *without the insured's knowledge* if this statute were applied retroactively.

CONCLUSION

The law of South Carolina on November 26, 2002 was that divorce did not affect William Meier's life insurance beneficiary designation. Not being clairvoyant, Mr. Meier could not peer eleven years into the future to see that this would change on January 1, 2014, nor need he have tried to.

This change in the law, like all but a very few changes in the law, was prospective, not retroactive.

The respondent therefore urges the Court to affirm the judgment.

Respectfully submitted,

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October 15, 2019.

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

Appellate 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 COUNSEL

I certify that respondent's final brief complies with Rule 211(b), SCACR.

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October 16, 2016.