

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Marvin H. Dukes, III, Special Circuit Judge

Case No. 2023-000385
Court of Appeals Opinion No. 5947

On 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, Respondents,

v.

Mary J. Burnsed, Petitioner.

BRIEF OF PETITIONER

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

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

Attorneys for Petitioner.

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QUESTION PRESENTED

Does the revocation-of-beneficiary provision of Act No. 100 of 2013 apply in the case of a divorce entered before the act was passed?

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. Mr. Meier died of a heart attack on December 26, 2017, having made no change in beneficiary following divorce.

This interpleader action regarding entitlement to Mr. Meier's life insurance proceeds commenced on February 5, 2018 with a summons and complaint filed in Beaufort County Court of Common Pleas 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.

Both sides moved for summary judgment, stipulating that the operative facts are undisputed.

Richard Meier's motion for summary judgment was heard and denied by the Honorable Perry M. Buckner, III, Presiding Judge of the Fourteenth Judicial Circuit, by Order dated August 10, 2018. [R. 17.]

Mary Burnsed's motion for summary judgment did not appear on the motions roster at Judge Buckner's term. The Burnsed motion for summary judgment was heard at a later term and was granted by the Honorable Marvin H. Dukes, III, Presiding Judge of the Fourteenth Judicial Circuit, 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.

STATEMENT OF FACTS

In Act No. 100 of 2013, the General Assembly extensively revised the probate code and consolidated the trust provisions of the code into a new trust code. Among the non-probate provisions of the act was section 4(B)(5), codified as section 62-2-507, which provides that divorce revokes a spouse's designation of his or her spouse as a life insurance beneficiary. The effective date of Act No. 100 was January 1, 2014.

Mary Burnsed and William Meier divorced in 2002. As sometimes happens, they did better together as ex-spouses than they had as spouses. For example, fourteen years after the divorce, William sent a message to Mary saying:¹

You do not realize how much I love and respect you. Miss you so much it hurts.

These ex-spouses stayed in regular touch during the fifteen years between divorce and William's death, visiting one another frequently.² In a sample period from May 2015 to December 2017, texts and e-mails numbered in the hundreds, in addition to the phone calls.

Sixteen months before his death, William was reminded that he could easily change his beneficiary if he wished to do so. He did not.³

During the fifteen years following divorce, William wrote approximately 180 monthly checks of \$200.00 each to TransAmerica,⁴ knowing each time he wrote a check that Mary continued to be his beneficiary.

* * * * *

The history of these parties' relationship in the fifteen years between divorce and

¹ Burnsed affidavit of July 2, 2018, Exhibit B, page 51 [R. 229].

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

³ *Cf. Duncan v. Investors Diversified Services, Inc.*, 285 S.C. 467, 471, 330 S.E.2d 295, 297 (1985): The policyholder "was acutely aware of the matters he wanted changed and those he wanted to remain unchanged."

⁴ Complaint, Exh. 1, p. 3 [R. 62].

William’s death created no genuine issue of material fact. The parties’ cross-motions for summary judgment signified their agreement that the issue was a matter of law. *Wiegand v. U.S. Auto Ass’n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). As the respondents assured the circuit court: “The operative facts in this case are undisputed.”⁵

It makes no difference what other people think an insured should have done or meant to do or might have been likely to do. A life insurance beneficiary designation can only be changed by substantial compliance 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. Mr. Meier’s policy 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.⁶ That was never done in the fifteen years between divorce and death.

Mary Burnsed is the beneficiary unless Act No. 100 of 2013 nullified her status.

ARGUMENT

I.

Everything in Act No. 100 points to prospective application.

This Court’s cases have proved from the start that a statute’s **words** are the gold standard in the search for legislative intent.⁷

The Legislature may expressly prescribe retroactive application — a rare thing. Applying South Carolina law, the Fourth Circuit observed:

⁵ Respondents’ Memorandum of June 25, 2018, p. 2 [R. 116].

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

⁷ Justice Frankfurter told his law students to search for legislative intent in three steps:

- (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 the Justice’s “threefold imperative to law students,” found in HENRY J. FRIENDLY, BENCHMARKS 202 (1967)).

The standard for express prescription [of retroactive application] 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 v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 173 (4th Cir. 2010).

Nothing in Act No. 100 suggests — much less, prescribes — an intent to apply the revocation-on-divorce provision retroactively. Every relevant part of this statute points to the usual intention of prospective application.

A. Effective date.

Section 4(A) specifies the effective date of Act 100 — January 1, 2014.

Canvassing South Carolina law, the Fourth Circuit concluded:

[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. Dept. 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: *Schall v. Sturn, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735, 737 (1983); *Hyder v. Jones*, 271 S.C. 85, 245 S.E.2d 123 (1978).

Federal law is the same. 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).

B. Present tense verb.

Section 62-2-507(c) provides:

[T]he divorce . . . revokes any revocable . . . beneficiary designation

(Emphasis added.)

Throughout the South Carolina Code, “all words importing the present tense shall apply to the future” S.C. Code Ann. § 2-7-30. A *future* divorce will revoke. A *past* divorce did not.

Other courts have rejected retroactive intent where the statutory verb is 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. Procnier*, 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 Env'tl. Partners, LLC v. New Jersey Dept. of Env'tl. Protection*, 438 N.J.Super. 125, 102 A.3d 939, 948 (2014).

C. Temporal provisions.

Act No. 100 of 2013 massively revises the probate code and consolidates trust provisions into a new trust code. The revocation-on-divorce provision stands apart from these primary components of the law.

Five provisions of Act 100 specify the temporal application of some parts of the act.

None of them suggest retroactive application of the revocation-on-divorce provision:

- The probate code provisions apply to **estates of decedents dying after January 1, 2014**. Act No. 100, sec. 4(B)(1).

Mr. Meier's insurance policy proceeds are not part of his estate. Act No. 100 defines probate estate to mean "the decedent's property passing under the decedent's will," etc. S.C. Code Ann. § 62-2-202. 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 probate code provisions govern **judicial proceedings concerning estates of decedents** commenced on or after January 1, 2014. Act No. 100, sec. 4(B)(2).

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.⁸

- The probate code provisions govern **judicial proceedings concerning estates of decedents and trusts commenced before January 1, 2014** unless retroactive application would be prejudicial. Act No. 100, sec. 4(B)(3).

This action was commenced in 2018, but does not concern Mr. Meier's estate in any event.

⁸ The estate's personal representative joined his uncle, the alternate beneficiary, as a co-plaintiff to give him litigation support. The p.r.'s participation is nominal. Obtaining his dismissal would only have delayed this litigation and achieved nothing.

- The trust code provisions apply to **trusts created before, on, or after January 1, 2014**. Act No. 100, sec. 4(B)(1).
- “[A]ny rule of construction or presumption provided in this act” applies to the terms of governing instruments executed before January 1, 2014. Act No. 100, sec. 4(B)(4).

Four rules of construction and six presumptions are “provided in this act.” The revocation-on-divorce provision is not one of them. See sections IV(C) and IV(D), pp. 14-15, below.

Thus, the remedial provisions of the act apply to all judicial proceedings concerning estates unless prejudicial when applied to proceedings pending on the effective date of the act. The provisions for construing ambiguous provisions in relevant documents apply to all such documents. The relevant provisions creating presumptions apply only to wills. (See p. 15, below.)

* * * * *

No temporal provision of Act No. 100 suggests retroactive application of the revocation-on-divorce provision.

D. Notice to the insurer.

Section 62-2-507(g)(2) requires that

[w]ritten 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.

This ensures no double payment by an insurer ignorant of the divorce.

The insurer notice requirement could only apply to divorces filed *after* the statute was enacted. It is irreconcilable with retroactive application.

* * * * *

Nothing in Act No. 100 prescribes an intent to apply section 62-2-507 retroactively.

E. No implication of retroactive intent.

Absent an express prescription of retroactive intent, South Carolina courts do not indulge an *implication* of such intent unless the statute would bear no other interpretation. A retroactive intent 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). If not “required by the express

words of the statute, [retroactive intent] must necessarily be implied from such words . . . ”
Curtis v. Renneker, 34 S.C. 468, 491, 13 S.E. 664 (1891).

Nothing in the statute implies a retroactive intent.

II.

The court of appeals lost sight of the rules against retroactive application and mistakenly viewed section 62-2-507 as remedial.

Retroactivity analysis begins with perhaps the oldest and strongest presumption known to the civil law: a presumption against the retroactive operation of a statute. The standard of proof of retroactive intent by the legislature is the same as that which applies in a criminal case: 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, 289–90 (1864).⁹

South Carolina’s retroactivity principles are identical to those of federal law. Retroactivity decisions of the U.S. Supreme Court and the Fourth Circuit Court of Appeals have often been cited by the South Carolina Supreme Court.¹⁰

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). The Fourth Circuit concluded:

South Carolina courts have been, if anything, even more insistent than federal courts in demanding an unambiguous

⁹ *Accord: South Carolina Dept. 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).

¹⁰ *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).

expression of legislative intent before applying a statute retroactively

Ward, 595 F.3d at 179.

Although only a presumption, “the 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). 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.

Our court of appeals lost sight of the presumption against retroactive application by mistakenly turning to cases from other states treating a revocation statute as remedial.

A remedial statute grants, expands, or contracts a remedy for the enforcement of an existing right.¹¹ A statute altering a remedy can be and often is meant to apply to pending litigation.

The revocation provision of Act No. 100 is the furthest thing from remedial. It nullifies the key provision of a life insurance contract. The Pennsylvania 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). The

¹¹ See, e.g., *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”). *Bradley v. School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) (adjustment of the amount of an attorney fee award is remedial).

U.S. Supreme Court made similar remarks about Minnesota’s 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).

In rejecting a claim that a substantive change was merely remedial, 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). *Accord: Southeastern Site Prep., LLC v. Atlantic Coast Builders*, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011).

As in *Bartley*, if the revocation-on-divorce provision is not substantive in nature, it is difficult to envision one which would be.

* * * * *

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 *procedural* because revocation is “a procedure”! That curious turn of phrase may be the law of Colorado but it surely is not the law of South Carolina. A statute is procedural if it changes a litigation procedure. See, e.g., *Kerr v. Richland Memorial Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (2009); *Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982). Section 62-2-507 does not change litigation procedure.

The Colorado court appears to have been the only one to call a revocation statute “procedural” until our court of appeals did as well.

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

III.

In the cases from other states 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 No. 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 No. 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 until the insured dies.¹³ Although never explained, apparently the idea is that the ex-spouse remains nominally the beneficiary until the moment when it would actually take effect — the policyholder's death.

In South Carolina as in the majority of states with revocation statutes, it is the insured's *divorce* which revokes the designation, not his death. Section 62-2-507(c).

IV.

Professor Waggoner's "donative transfer/rule of construction" theory was accepted by the court of appeals. That theory has no basis in Act No. 100 and was rejected by the U.S. Supreme Court in *Sveen v. Melin*.

The cases from other states relied upon by the court of appeals accepted an academic theory proposed by Professor Lawrence Waggoner, draftsman of the revised Uniform Probate Code, who included the revocation-on-divorce provision in his draft. These cases cannot be understood apart from the draftman's theory, cited with approval

¹³ *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).

by our court of appeals.

A. Professor Waggoner's theory.

Professor Waggoner foresaw that statutory cancellation of beneficiary in a life insurance policy purchased before the statute was passed would provoke a claim of impairment forbidden by the Contracts Clause. To shield the statute from constitutional challenge, he coined two theoretical devices.

The first he fashioned from whole cloth. Professor Waggoner posited that the designation of beneficiary is not really part of the life insurance contract at all. Rather, it is what he labeled a “donative transfer.” It is a kind of miniature will embedded in — but not a part of — the life insurance contract.¹⁴ Hence, its statutory nullification is not an abridgement of contract.

Second, he characterized the revocation provision as merely one of the Probate Code’s “rules of construction.” As a “rule of construction,” it was said to be no different from rules construing ambiguous terms in a will. There seems nothing to construe since the beneficiary’s identify is unambiguous. But Professor Waggoner explained that the court would be “construing” the forgetful policyholder’s likely *true* intention, which was to revoke.

The Contracts Clause challenge came in *Sveen v. Melin*, 138 S.Ct. 1815 (2018). In *Sveen*, Minnesota’s revocation statute was **not** being applied retroactively to a divorce which preceded the statute. The statute had been on the books for years when the parties divorced. Rather, the issue was whether statutory abridgement of a life insurance policy purchased before the statute was enacted violated the Contracts Clause.

The Supreme Court began its analysis by recognizing that the choice of beneficiary is not some sort of mini-will — Professor Waggoner’s “donative transfer.” It is the key term of the contract. “[A]n insurance policy is a contract under the Contracts Clause, and a will

¹⁴ L. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROPERTY PROBATE & TRUSTS J. 683, 699-700 (1992) (cited with approval by our court of appeals).

is not.” The Court found that Minnesota’s statute nullifying the choice of beneficiary in an insurance contract purchased before the statute was enacted is indeed an abridgement of the insurance contract. It is not an unconstitutional abridgement, however. The divorce court could prevent revocation, or the insured could reinstate the revoked beneficiary instantly “with the stroke of a pen.” An easily avoidable or easily reinstated revocation is not an unconstitutional impairment.

In its amicus brief in *Sveen*, 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.¹⁵ The Supreme Court ignored this contention, finding instead that a revocation statute “changes the key contractual obligation — who gets the insurance proceeds.” 138 S.Ct. at 1830. There is nothing to construe.

The decision in *Sveen v. Melin* put finished on both of Professor Waggoner’s devices, which would have been ineffective in any event. Only Justice Gorsuch dissented, believing with the founders that *no* abridgement is ever constitutional.

* * * * *

It may not have occurred to Professor Waggoner that the revocation statute might be applied to a divorce which *preceded* the statute. He criticized a pre-*Sveen* case¹⁶ holding that revocation unconstitutionally impaired an insurance contract purchased before the statute was passed. Reciting the facts of that case, he 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).

¹⁵ Brief of Amicus Curiae American College of Trust & Estate Counsel, *Sveen v. Melin*.

¹⁶ *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991).

B. The court of appeals relied upon four pre-Sveen cases which accepted the “donative transfer/rule of construction” theory.

Before the *Sveen* decision, four courts had accepted Professor Waggoner’s “donative transfer/rule of construction” devices. All four cases were cited with approval by our court of appeals. These are the same four cases holding that death, not divorce, is the triggering event for revocation.¹⁷

1. The Tenth Circuit case.

Predicting Utah law, the Tenth Circuit panel in *Stillman* began by stating:

[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. Moreover, said the court, the revocation statute is a mere rule of construction, not a substantive change in the law.

The Utah Supreme Court has yet to reach this question of Utah law, but when it does so it is sure to reject the Tenth Circuit’s acceptance of these discredited devices.

2. The Colorado case.

The *DeWitt* court labeled the beneficiary designation as a donative transfer, not a part of the contract. 54 P.3d at 856.

3. The Montana case.

The Montana court accepted both Waggoner devices without analysis.

4. The South Dakota case.

Reasoning backward, the South Dakota court realized that its revocation statute would not operate retroactively unless it were found to be a mere rule of construction. (This was true.) The court did not try to answer that question by reading the statute. It simply adopted the Tenth Circuit’s *Stillman* rationale that revocation statutes are rules of construction, and that rules of construction apply retroactively.

¹⁷ *Stillman v. Teachers Ins. & Annuity Ass’n*, 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); *Buchholz v. Storsve*, 2007 S.D. 101, 740 N.W.2d 107 (2007).

* * * * *

The court of appeals erred in relying upon cases from other states accepting the discredited donative transfer/rule of construction devices.

C. Act No. 100's revocation provision is not 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). There is nothing obscure or ambiguous about the identity of a life insurance beneficiary — nothing to construe.

Putting aside Professor Waggoner’s ideas, Act No. 100 itself refutes any claim that the revocation provision is a “rule of construction.” Our General Assembly did what many other states have done in adopting some version of the Uniform Probate Code. It *positively enumerated* the provisions of the act which constitute rules of construction. Section 62-2-507 is not one of them.

Section 4(B)(4) states that any rule of construction or presumption “*provided in this act*” — Act No. 100 — “applies to governing instruments executed before the effective date of the act”. All rules of construction *provided in the act* apply to the construction of ambiguous language in every governing instrument owned at divorce, no matter the date.

The court of appeals asked the wrong question. The question is not: *Which governing instruments?* The question is: *Which rules of construction?* The statute answers the question plainly: rules of construction *provided in this act* apply to all governing instruments.

Four rules of construction are provided in Act No. 100. All four concern the construction of ambiguous terms in wills.¹⁸

¹⁸ **SECTION 62-2-601(A). Rules of construction and intention; reformation of will:**

(continued...)

Act No. 100 creates no rule of construction touching contracts or an insured's designation of beneficiary.

D. Act No. 100 creates no presumption of revocation.

Our court of appeals was influenced by what it called the "presumption" that a divorcing policyholder wants a new beneficiary.

Used in this sense, "presumption" means a commonly held belief, not a legal device. A legal presumption is not a commonly held belief but is a litigation device which establishes 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).

Most divorcing policyholders wish to name a new beneficiary, but for a number of reasons many do not. "A sizable — and maybe growing — number of people *do* want to

¹⁸(...continued)

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.

keep their former spouses as beneficiaries.” *Sveen v. Melin*, 138 S.Ct. at 1829 (Gorsuch, J., dissenting).¹⁹

The General Assembly positively identified the legal presumptions “provided in this act”. Act No. 100 creates six presumptions, three of which apply to governing instruments. Those three apply only to wills.²⁰

Act No. 100 creates no presumption touching contracts or an insured’s designation of beneficiary.

William Meier did not wish to name a new beneficiary. There is no presumption that he did.

V.

Trial court decisions are against retroactive application.

Our court of appeals mistakenly thought that U.S. District Judge David Norton was making an “educated guess” about whether the General Assembly meant for section 62-2-507 to apply retroactively.²¹ He was not. Neither Judge Norton nor anyone else in his courtroom thought that the statute might ever apply retroactively. Both sides agreed that if the parties’ pre-January 1, 2014 settlement agreement qualified as a “divorce or

¹⁹ See the amici brief in *Sveen v. Melin* of The Women’s Law Project, American Association of University Women, Atlanta Women for Equality, A Better Balance, California Women’s Law Center, Feminist Majority Foundation, Gender Justice, Legal Momentum, Legal Voice, National Partnership for Women & Families, National Women’s Law Center, and Women’s Institute for a Secure Retirement. As this brief demonstrates, it is almost always the wife whose beneficiary status is cancelled by operation of these revocation-on-divorce laws.

²⁰ **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 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.

²¹ *State Farm Ins. Co. v. Murphy*, Case No. 2:15-cv-04793-DCN, 2017 WL 4551489 (D.S.C. 10/12/2017).

annulment” under section 4(B), the statute would **not** apply retroactively. Judge Norton’s “educated guess” concerned whether the parties’ pre-statute settlement agreement “qualified as a ‘divorce or annulment’ as contemplated by the plain language of . . . § 62-2-507(a)(2).” Judge Norton decided that the settlement agreement did qualify as a pre-statute “divorce or annulment.” Hence, the revocation statute did **not** apply to it retroactively.

In separately reasoned orders, three of our circuit judges have concluded that our revocation statute does not apply to divorces entered before the act was passed.²²

The court of appeals relied upon a single contrary decision of the district court.²³ The ex-spouse in that case did not contest retroactive application generally, if constitutional. Her “central issue,” Order at p. 9, was that hers was an *irrevocable* designation to which the statute would never apply.²⁴ Without briefing on the issue, the district court decided *sua sponte* that the insurance interpleader action was a “judicial proceeding concerning [the] estate” of the insured. This ruling was simply incorrect since life insurance litigation does not concern the estate of the policyholder.²⁵

Every properly briefed state and federal trial judge has rejected retroactive application of the revocation statute.

²² As well as Judges Buckner and Dukes in the case at bar, a third circuit judge reached the same conclusion in 2015. *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/>). There was no appeal. Also of note, a federal district court in Alabama cited Judge Dukes’ order with approval. *State Farm Life Ins. Co. v. Benham*, No. 2:21-CV-00695AKK, 2021 WL 5989081 (N.D. Ala. Dec. 17, 2021).

²³ *Protective Life Ins. Co. v. LeClaire*, No. 7:17-CV-000628-AMQ, 2018 WL 3222796 (D.S.C. 7/2/2018).

²⁴ Defendant’s memorandum, pp. 13-23, *Protective Life*, Entry No. 35-5.

²⁵ Even if an interpleader were a “judicial proceeding involving the estate,” this would tell us nothing about whether revocation was caused by a divorce filed sixteen years before this interpleader.

VI.

The Illinois Court of Appeals immediately rejected our court of appeals decision. The Pennsylvania and Massachusetts decisions are instructive.

Rejecting our court of appeals' decision seven weeks after it was filed, 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 [divorce decree]. In the instant case, where the date of the [divorce decree] preceded the effective date of the statute, the statute does not apply.

Shaw v. U.S. Financial Life Ins. Co., 2022 IL App (1st) 211533 (2022).

The Illinois court rejected not only the Waggoner “rule of construction” device accepted by our court of appeals but singled out and rejected the Tenth Circuit decision in *Stillman*, already effectively discredited in *Sveen v. Melin*.

The Pennsylvania Supreme 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).

Compelled by statutory language unlike ours, the Supreme Judicial Court of Massachusetts applied its revocation statute retroactively. *American Family Life Assur. Company v. Parker*, No. SJC-13090 (Mass. 2022).

Mass. St. 2008, c. 521 § 43(1):
[T]his act shall apply to preexisting governing instruments

South Carolina section 4(B):
[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, including its revocation provision. Hence, the revocation provision had to be applied — like all the act — to pre-statute life insurance policies.

By contrast, our section 4(B) limits application of rules of construction and

presumptions to those *provided in this act*, none of which apply to the revocation provision.

As did the Illinois court, the Massachusetts court singled out for criticism the Tenth Circuit's *Stillman* adoption of the Waggoner theory that the revocation statute is a "rule of construction." The court concluded:

[Massachusetts section] § 43(5) is limited to those sections expressly defined as rules of construction or presumptions . . . and thus does not apply to [the revocation provision], which is not described as a rule of construction or presumption

VII.

The court of appeals failed to apply the principle that a statute must be construed if possible to avoid a serious constitutional question.

The policyholder has a vested contractual right to maintain the chosen beneficiary. *Sveen v. Melin*, 138 S.Ct. 1815, 1822.²⁶ This right is protected by the Constitutions of the United States²⁷ and South Carolina,²⁸ and may not be abridged except under limited circumstances.²⁹

This Court has rejected a claim of retroactive application where it would "affect[] vested or substantial rights," *Goff v. Mills*, 279 S.C. 382, 308 S.E.2d 778 (1983), including statutes where 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

²⁶ See also: *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"); *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).

²⁷ Art. 1, Sec. 10, cl. 1: No State shall. . . pass any . . . Law impairing the Obligation of Contracts

²⁸ Sec. 4. No . . . law impairing the obligation of contracts . . . shall be passed

²⁹ *Sveen v. Melin*, 136 S.Ct. 1815, 1822 (2018).

S.E.2d 926 (1965). If applied retroactively, Act No. 100 would nullify the vested right of a life insurance policyholder to maintain the chosen beneficiary. *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).

The Fourth Circuit refused to attribute retroactive intent where a South Carolina statute would abrogate the rights of parties to insurance contracts. *Allstate Ins. Co. v. Skeeters*, 846 F.2d 932, 934–35 (4th Cir. 1988), 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).³⁰

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).³¹ As does the U.S. Supreme Court, the South Carolina Supreme Court has always followed the 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).

The revocation provision of Act No. 100 must be construed if possible to avoid a serious question of its constitutionality. This is a simple matter.

There is nothing in the Act whatsoever to intimate that the Legislature meant for this amendment to be retroactive.

³⁰ *Accord: Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164 (4th Cir. 2010) (applying South Carolina law); *Bray v. Insurance Co. of the State of Penn.*, 917 F.2d 130 (4th Cir. 1990).

³¹ *Citing: Casey v. S.C. State Housing Authority*, 264 S.C. 303, 215 S.E.2d 184 (1975); *Thompson v. Hofmann*, 263 S.C. 314, 210 S.E.2d 461 (1974); and *Peoples National Bank v. South Carolina Tax Comm'n*, 250 S.C. 187, 156 S.E.2d 769 (1967). *Accord: In re Care & Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001); *Fairway Ford, Inc. v. County of Greenville*, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996); *Curtis v. Renneker*, 34 S.C. 468, 493, 13 S.E. 664 (1891).

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).

Construing the revocation provision to apply prospectively in the usual way, the constitutional question does not arise.

VIII.

Retroactive application would bring into question other rights and relations predating the statute.

Insurance beneficiary designations are not the only thing changed by divorce in Act No. 100. One change affects title to real estate.³² Retroactive application would throw into question other “acts done” and “rights acquired” before January 1, 2014 — acts and rights which the General Assembly expressed its intention to protect. Section 4(B)(5).

This court of appeals decision opens the door to questions about Act No. 100's retroactive reach in cases not yet thought of.

IX.

Many affected policyholders are sure to be ignorant of the effect of this decision.

Judge Buckner tried to imagine what a policyholder would have to do to preserve his ex-spouse as beneficiary if the statute were applied retroactively.³³

³² Divorces filed after January 1, 2014 convert joint tenancies in real estate into tenancies in common. Section 62-2-804.

³³ Judge Buckner expressed it this way in his Order of August 10, 2018, at p.10 [R. 26]:

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,

(continued...)

It is hard to believe that a well-educated individual, making substantial monthly payments on a large life insurance policy for fifteen years, undoubtedly knowing how to change the beneficiary, simply forgot to do so. What must Mr. Meier have done to assure himself that our General Assembly did not nullify his decision during the next fifteen years?

Never in the history of South Carolina until this law was passed had the General Assembly interfered with the right of a life insurance policyholder to choose and keep a 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 this unprecedented law and could be depended upon to counsel their clients accordingly. William Meier's lawyer did not know and could not know, since Act No. 100 lay twelve years in the future.

Retroactive application would mean that an insured who intended to keep the 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. If the policyholder discovered the passage of such a law, his lawyer would then have to foresee that a court might apply it retroactively. If such a law were discovered and such a possibility foreseen, the client would then have to counter the law by re-naming the desired beneficiary — unless death came first.

Only a small nucleus of family court lawyers and judges know about this statute and know that it has now been held to apply retroactively. If the revocation provision applies retroactively, an unknown number of South Carolina citizens will have had their beneficiary

³³(...continued)

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.

designation revoked by operation of law without their knowledge.

The General Assembly could not have intended such a thing.

CONCLUSION

William Meier died believing that Mary Burnsed was his life insurance beneficiary.

The decision of the court of appeals defeats this person's intent by holding something extraordinary in the world of statutory interpretation: that the General Assembly *implicitly* intended for the most basic change in the life insurance policies of many South Carolinians to reach back many years before the statute was enacted.

Everything that points to the usual prospective application of a statute is here. Not a word in this statute suggests an intent to depart from this fundamental rule of governance.

The court of appeals was misled in its reliance upon criticized cases from other states based upon statutes unlike ours, spurious academic theories since rejected, statutes dealing with remedies, and the like.

For these reasons the petitioner urges the Court to reinstate the decision of the circuit court.

Respectfully submitted,

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

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

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

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