Louisiana Law Review

Volume 17 | Number 4
June 1957

Insurance as Community Property

William L. McLeod Jr.

LOUISIANA LAW REVIEW

LOUISIANA STATE UNIVERSITY LAW SCHOOL
BATON ROUGE 3, LOUISIANA

Subscription per year $5.00 (Foreign $5.50) Single copy $1.25

VOLUME XVII JUNE, 1957 NUMBER 4

COMMENTS

Insurance as Community Property

This discussion concerns itself with community property as it relates to those types of insurance which seek to guarantee subsistence payments while the insured has either temporarily or permanently ceased his normal occupation. These types of insurance are annuity policies, disability policies, workmen's compensation, and unemployment compensation.

A discussion of this nature must begin with the rule laid down for the determination of the separate or community character of the proceeds of life insurance. Announced in the case of *Estate of Moseman,* the rule is that the interest in the insurance contract becomes vested and its character determined at the time of the creation of the contract.[1] From this it follows that if the policy is taken out before marriage, the proceeds are the sep-

1. 38 La. Ann. 219 (1886).

arate property of the insured.[2] If taken out during the marriage, the policy will yield proceeds which are community property.[3] The basis of this rule is Article 2334 of the Louisiana Civil Code, which provides that separate property is "that which either party brings into the marriage," and that common property is "that which is acquired by the husband and wife during marriage." The life insurance rule combines this community property definition with the idea that the interest in a contract vests at the moment of the creation of the contract. It is the property in this interest which is brought into the marriage.[4] Therefore, in practical application if a contract of life insurance is taken out by an unmarried man, the rights represented thereby will be his separate property. If the insured marries, the status of the contract's interest will remain constant, i.e., separate.

Annuity Contracts

The courts have applied the life insurance rule to annuity contracts.[5] It should be recognized, however, that the status of annuities as insurance is questionable, but that this status as insurance vel non has no effect on the problem of the character of the proceeds. Many modern annuity policies take the form of a refund annuity contract.[6] This provides that the annuitant may name a beneficiary to receive the balance of the amount paid for the annuity, should that amount not be paid out to the

2. Succession of Verneuille, 120 La. 605, 45 So. 520 (1908) ; Estate of Moseman, 38 La. Ann. 219 (1886).

3. Succession of LeBlanc, 142 La. 27, 76 So. 223 (1917) ; Succession of Buddig, 108 La. 406, 32 So. 361 (1902).

4. Estate of Moseman, 38 La. Ann. 219, 222 (1886).

5. Messersmith v. Messersmith, 229 La. 495, 510, 86 So.2d 169, 174 (1956). The Louisiana Civil Code has made provision for annuities in articles 2793-2800. This type of annuity contemplates the delivery of a sum of money to another party who agrees to pay a rent to the annuitant. The parties may contract as to time, amount, and redemption. The jurisprudence has decided that these provisions as to definition of annuity are "by no means all-inclusive" (Succession of Cotton, 172 La. 819, 825, 135 So. 368, 370 (1931)), and that "there is nothing in these articles forbidding the making of a contract of annuity on terms different from those mentioned in the articles" (Succession of Rabouin, 201 La. 227, 236, 9 So.2d 529, 531 (1942)).

This has permitted the development of numerous annuity provisions allowing payment of the annuity in a single sum or in installments, redemption of the deposit at any time prior to commencement of payment by the company, and designation of a beneficiary to receive the balance of the unpaid consideration at the death of the annuitant. Another variation has been the group annuity contract, whereby an employer may contract for his employees to receive an annuity at their retirement. This type is paid for primarily by the employer, though the employee may contribute smaller sums.

6. For examples, see Succession of Pedrick, 207 La. 640, 21 So.2d 859 (1945), Succession of Rabouin, 201 La. 227, 9 So.2d 529 (1942).

annuitant himself by the time of his death. Because of this provision the courts have held the refund annuity to be an investment pure and simple.[7] "From the viewpoint of risk, the difference between a life insurance policy and an annuity contract is diametric."[8] However, it is conceivable that an annuity contract, like life insurance, would involve the shifting of risk of a single policyholder onto a much larger group of policyholders. This would occur if the annuitant paid the insurer premiums in contemplation of the insurer's repaying a set sum beginning at a certain age and lasting for the insured's life. In this situation the annuitant hopes to pay less to the insurer than he will receive during his retirement period, but the insurer gambles on the financially ideal situation of the annuitant's demise after paying all the premiums but before the retirement payments begin. Apparently this type of annuity which is insurance has never met with a popularity equal to that of the refund annuity contract.[9] The reason lies in the return to the annuitant's beneficiary of the amount paid in to the insurer. It is this lack of risk which enables the court to characterize the annuity as an investment rather than as insurance. Nevertheless, the Louisiana statute classifies annuities under life insurance,[10] probably because administration is simplified since both annuity and life insurance provisions are often in the same policy. In this Comment, annuity contracts will be referred to as insurance, although this is not to say that annuities are invariably insurance.

The case of *Messersmith v. Messersmith*[11] involved the determination of the ownership of an annuity policy acquired by the husband during the community. The spouses, separated from bed and board, were trying to determine the separate or community character of the contract. The court decided that the contract of annuity was an incorporeal, movable thing which had been acquired by the husband during the community. By applying the life insurance rule to these facts, the court decided that the interest in the annuity contract was community property.[12]

It must be borne in mind that the rationale in the *Messersmith* case is only a general rule. There are a number of compli-

7. Succession of Pedrick, 207 La. 640, 645, 21 So.2d 859, 860 (1945).
8. *Id.* at 647, 21 So.2d at 861.
9. Hagy v. Kelly, 135 N.J. Eq. 436, 438, 39 A.2d 386, 388 (1944).
10. LA. R.S. 22:6(1) (1950).
11. 229 La. 495, 86 So.2d 169 (1956).
12. *Ibid.*

cating factors which may affect the community or separate character of the proceeds of an annuity contract. The first complicating factor is the payment with community funds of the premiums of a policy the proceeds of which will be separate property according to the general rule. The question[13] is whether the payment with community funds should make the proceeds community in the same proportion as the community premiums are to the separate premiums,[14] or whether the proceeds of the policy should remain separate. The Louisiana courts have not been faced with this problem in regard to annuity payments. However, an analogy can be drawn to life insurance in connection with which the problem has on two occasions been litigated. The decision of the courts has been that the proceeds remain separate, but that the separate estate which has been enriched by funds from the community must reimburse the community for the amount taken from it.[15] In *Succession of Verneuille* the court, in discussing reimbursement for premiums paid with community funds on a policy the interest in which was separate, said, "the community is unquestionably entitled to the amount. The separate estate cannot be benefited by payments for its benefit and not be indebted for them. This was not disputed at bar."[16] There is no apparent reason why this same conclusion would not be reached in the case of an annuity contract purchased before marriage.

A second question concerns the possibility of purchasing during the community an annuity policy the proceeds of which will be separate. One of the basic rules in determining the character

---

13. The question is not faced in disability insurance because the nature of the proceeds is determined at the time the policy attains value, i.e., disability of the insured. If the policy is paid for with community funds, and then the spouses divorce before the occurrence of disability, there would logically be no reimbursement of the community required. This is because reimbursement is required only when community funds are diverted to separate property, but in Easterling v. Succession of Lamkin, 211 La. 1089, 31 So.2d 220 (1947), the court held that a disability policy before disability is not even property.

The problem does not arise in workmen's or unemployment compensation because these types of insurance require no payments by the insured.

14. This rule has been adopted in California and Washington in connection with life insurance. For a discussion of this point see 1 DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 79, n. 43 (1943).

15. Succession of Verneuille, 120 La. 605, 45 So. 520 (1908); Estate v. Moseman, 38 La. Ann. 219 (1886).

16. 120 La. 605, 609, 45 So. 520, 522 (1908). In the case of immovable property the same rule holds, *viz.*, that the improvements retain their separate character, but that the community must be reimbursed. Succession of Burke, 107 La. 82, 31 So. 391 (1902); Succession of Webre, 49 La. Ann. 1491, 22 So. 390 (1897). It is suggested in 1 DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 79 (1943), that the rule applied to life insurance was derived by analogy from the rule relative to immovables.

of property is that the character of the funds used in purchasing will determine the character of that which is purchased.[17] In the Louisiana jurisprudence no case was found which litigated this point in relation to insurance, but there are cases in connection with immovables. If a wife buys an immovable with her paraphernal property, the courts allow her to prove that the property was so purchased, thereby giving to the immovable the character of separate property.[18] In other words, by evidence the wife is allowed to overcome the presumption that that which is bought during the existence of the community is community property. In the case of the husband the courts have allowed the rule of separate funds buying separate property to prevail, but have subjected the husband to definite restrictions. In buying an immovable the husband must declare in the act of purchase (1) that the funds used to purchase were his separate property, and (2) that the purchase is made for his individual account.[19] The use of only one of these two declarations is insufficient.[20] The reason behind this restriction is to bind the husband irrevocably, so that he will be unable subsequently to abandon the property to the community in order to exercise upon it, as a creditor, a right of priority for the replacement of the sum expended for the purchase. The reason that this does not apply to property purchased by the wife is that third parties are put on guard as to the possibility of the title's being separate when they see it in the wife's name, but such is not the case when the property is in the husband's name.[21]

When these ideas are applied to annuity insurance, there appears to be no reason why the husband cannot purchase a separate policy during the community, providing there is in the policy adequate notice of the irrevocably separate nature. A question arises as to whether such notification of the separate funds is required at the payment of each premium. No law has been found on this point. Consider, however, that if the annuitant makes such a statement of separateness at the payment of each premium, there is compliance with the letter of the law and, therefore, no problem. If the annuitant simply makes the

17. This is the necessary implication from cases such as Succession of Hemenway, 228 La. 572, 83 So.2d 377 (1955); Succession of Franek, 224 La. 747, 70 So.2d 670 (1953).

18. Krokroskia v. Martin, 61 So.2d 630 (La. App. 1952).

19. Sharp v. Zeller, 110 La. 61, 34 So. 129 (1902).

20. *Ibid.*

21. *Id.* at 72, 34 So. at 134. For a discussion of this, see DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 28 (1931).

statement of separateness at the purchase of the contract but not at each premium payment thereafter, a way is opened for him to pay the premiums with community funds. Should this happen, however, it would seem to be only a matter of evidence to prove how much the community was entitled to receive from the separate estate which had been enriched with community funds. The opinion that an annuity contract bought during community can be separate providing adequate notice is given requires an addition to the annuity status rule, namely, that the annuity's status is linked to the annuitant's status at purchase, *providing* the annuitant makes no stipulation to the contrary.

Disability Insurance

The rationale applicable to life insurance and annuity insurance, that the interest in the contract vests at the formation of the contract, has not been applied to disability insurance. This is demonstrated by the case of *Easterling v. Succession of Lamkin*,[22] the only case found on the community status of disability insurance. Here the insured, prior to his marriage, bought a life insurance policy with a disability provision. During the existence of the community the insured was disabled and thereby became eligible for disability payments. The insurer did not make disability payment until after the insured's death. The question arose as to the community or separate status of the proceeds. Since the policy was bought before the insured's marriage, the collateral heirs maintained that by virtue of the life insurance rule the proceeds were part of the deceased's separate estate. The court answered that life insurance and disability insurance are to be distinguished on the basis of the pecuniary value of the policy. Life insurance has a reserve or cash surrender value during the entire lifetime of the insured. Therefore, since it has value from the formation of the contract, it is property from that time. On the other hand, disability insurance has no value until such time as the disability which authorized the payment of benefits arises. This means, according to the court's rationale, that there is no value in the contract itself, and without value there can be no such thing as property. The court applied this conclusion to Article 2334 of the Civil Code and reasoned that this could not be separate property as mentioned in paragraph two,[23] because there was no property which

22. 211 La. 1089, 31 So.2d 220 (1947).
23. "Separate property is that which either party brings into the marriage, or

was brought into the marriage. The court said that, since the provisions defining separate property were not applicable, the property was community.[24]

These two decisions create in the jurisprudence of Louisiana two conflicting means of determining the character of the proceeds of insurance. The annuity rule depends on the time of the creation of the contract, but the disability rule depends on the time of the creation of value. The situation is all the more perplexing when it is realized that either rationale is applicable to both types of insurance, and that the divergence is therefore unnecessary. For instance, the criterion of value could be applied to the contract of annuity. Some annuity insurance contracts have been held to create a fund continually belonging to the annuitant, even though for a period the fund is under the direct control of the insurer.[25] The first payment by the annuitant into his fund would create value in the contract, and it could be said that the community or separate character of the annuity vested at this time. Since the first payment probably would be made at the time of entry into the contract, this would have the same effect as the rule which depends on the time of the contract. The type of annuity dealt with in the *Messersmith* case, however, was a group annuity, with the annuitant holding an individual certificate which in itself was valueless, according to the court. It was simply a contract which could have no actual value until the annuitant's retirement, resignation from the company, or death. In the case of an annuity such as this, the community or separate character would be determined only when the value actually arose.

An application of the annuity rationale to the disability policy would mean that the character would vest at the time of the creation of the disability contract. It is to be noted that there was a dissent in the *Easterling* case which, if followed, would have applied to disability policies the same rule as applied in life insurance and annuities.[26]

The basis of this diversity of reasoning may be in Chief Jus-

acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly."

24. Easterling v. Succession of Lamkin, 211 La. 1089, 1096, 31 So.2d 220, 223 (1947).

25. Commissioner of Internal Revenue v. Wilder's Estate, 118 F.2d 281 (5th Cir. 1941); Succession of Pedrick, 207 La. 640, 21 So.2d 859 (1945); Succession of Rabouin, 201 La. 227, 9 So.2d 529 (1942).

26. 211 La. 1089, 1099, 31 So.2d 220, 224 (1947).

tice O'Niell's statement in the *Easterling* case that the disability payment was "in lieu of or as compensation for the loss of earning capacity of the insured."[27] Of course, the husband's wages had he not been injured would have been part of the community.[28] Since the disability payment was meant to substitute for wages, the court may simply have thought it proper to analogize wages and disability payments in this respect, in order to afford a measure of protection for the wife. Because of the facility with which the rule applied to life insurance contracts could have been used, it seems probable that the *Easterling* rationale was developed to fit the policy of protection for the wife. Though this policy reason may be commendable, there appears to be no means of distinguishing the cases of disability and annuity, because annuity may well be viewed as a substitute for wages at a time when the annuitant is too old to work.

Workmen's Compensation

Workmen's compensation payments present a third way of looking at the problem of distributing subsistence payments. Based on statute, the workman's recovery is predicated on the notion that all of the users of the commodity made by the industry in which the accident occurred should bear the expenses of the injury. In this sense of shifting the burden to a large group, the workmen's compensation statute is similar to insurance. However, the worker himself pays no premiums, and looks to statute and not contract to recover for his injury. Therefore, there is a basic difference between workmen's compensation and annuity and disability insurance. Because of the statutory basis of compensation, the court in *Brownfield v. Southern Amusement Company*[29] held that workmen's compensation was not a contract to the extent that all the law relative to contracts would apply, in spite of the fact that one statutory requirement was that there be a contract of employment between employer and employee. The court held that the workmen's compensation statute had within itself a definite statement of who was to be allowed to bring suit. Because of this the Justices refused to apply the rationale relating to the time of the contract as determining the character of the property, and also declined to go along with the rationale that because compensation was a sub-

27. *Ibid.*
28. LA. CIVIL CODE art. 2334 (1870).
29. 196 La. 73, 198 So. 656 (1940).

stitute for wages it was community property. Instead, the court followed another line of reasoning which led to holding that the right to sue in compensation was the separate property of the person injured.[30] The reason for this separate treatment of workmen's compensation seems to lie in the fact that the act is complete in itself. Without going outside the workmen's compensation statute there can be found the types of injuries for which recovery will be allowed, the party who will be required to compensate for the injury, and the person who can recover. Because a complete remedy for injury has been afforded by the legislature in a single statute, the court felt justified in treating the statute as self-contained.[31]

It will be noticed that the *Brownfield* case decided that that which was separate property was the right to sue, not necessarily the compensation payments themselves. It has been argued that when the cause of action is separate property, the judgment recovered on it will be separate also.[32] However, no case in point has been found in the Louisiana jurisprudence. It seems fair to assume that the courts, when faced with the problem of the character of compensation payments, will resort to an analogy to wages.

The court in *Barr v. Davis Brothers Lumber Company* held that the main object of workmen's compensation is to provide the employee with wages for subsistence until he can return to work.[33] Therefore, it would be no change of rationale from the disability cases to hold that the compensation payments are in lieu of wages, and are therefore community property. This would lead to the conclusion that the community or separate character of workmen's compensation payments depend on the marital status of the insured at the time of injury.

The death benefits under workmen's compensation arise for the designated survivors on the death of the worker.[34] Therefore, the community having been terminated by death, and the

30. *Ibid.* The *Brownfield* case dealt specifically with a married woman's separate right to sue. However, the court used language so strong that it is likely that a husband's right to sue would be his separate property also. See *id.* at 80, 198 So. at 659.

31. Note that this is not making the separate character of the property depend on Louisiana Civil Code Article 2334, which makes the action for damages the separate property of the wife. Neither does it appear that Article 2334 would be used to declare the husband's action for damages to be community property.

32. McKAY, COMMUNITY PROPERTY § 343 (2d ed. 1925).

33. 183 La. 1013, 1023, 165 So. 185, 188 (1935).

34. LA. R.S. 23:1231 (1950).

action being allowed only to the survivor, the death benefit would seem to be the separate property of the survivor.

Unemployment Compensation

Unemployment compensation is another variety of insurance providing subsistence payments, but the jurisprudence has not yet determined the community or separate character of the payments. The payments, provided for by statute, are made by the state government to the unemployed worker.[35] By its statutory nature, this compensation insurance is not on the basis of contract. The unemployed worker is primarily required to state the fact of his unemployment and be able to work; for this he gets his compensation pending employment.[36] Thus there is no contract, there are merely statutory requirements which must be complied with in order that the benefits be paid. The lack of contract renders impossible the application of the rule used in annuity policies.

The Louisiana statute provides that compensation for unemployment is a type of insurance which affords "benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance."[37] This seems to be a clear indication that the legislative intent was to provide a substitute for wages. This intent, combined with the absence of the contractual factor, would seem to require the consideration of unemployment compensation as community property if the unemployment arose during marriage. In other words, the status of the compensation would be determined as of the time the unemployment occurs.

Conclusion

When one takes cognizance of the various ways in which the present law treats insurance subsistence payments in determining the community character of the proceeds, it becomes obvious that greater simplicity would be desirable in that it would tend to reduce the possibility of error springing from varied treatment of kindred problems. Annuity and disability insurance, both of which are founded on contract, are so closely connected that they could easily and beneficially be subjected to

35. *Id.* 23:1471-1713.
36. *Id.* 23:1600.
37. *Id.* 23:1471.

the same rationale. The rationale most in accord with insurance jurisprudence, and one easily and logically applied, is that which declares the interest to vest at the time of the formation of the contract. This is the life insurance rule, which, since it is well settled and understood by the bench and bar, would minimize error in application. Because workmen's compensation and unemployment compensation are founded on statute, and not contract, another rule can logically be maintained.

The writer is of the opinion that these two types of insurance are so obviously a substitute for wages that they should be treated as such, and their character be determined as of the time the right to benefits arises.

William L. McLeod, Jr.

Real Estate Brokerage in Louisiana

The frequency with which real estate brokers must resort to the courts for enforcement of compensative claims has created a major source of litigation. The purpose of this Comment is to make a short survey of the jurisprudence and operative legal principles involved in that litigation in Louisiana. The writer does not purport to survey all of the various exceptions and contradictions which have been created, but rather to afford a general discussion of the more important developments in this area of the law. There are various types of transactions which the broker might effect for his principal. However, for convenience, where the rules and principles are general this discussion will be in terms of sale.

Statutory Regulations

A real estate broker is statutorily defined as any person who, for compensation, "sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers to rent, any real estate or the improvements thereon for others as a vocation."[1] Real estate salesmen[2] are merely employees of brokers and are prohibited by statute from accepting commissions for the per-

1. LA. R.S. 37:1431(3) (1950).
2. *Id.* 37:1431(4).