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Life Insurance - Change of Beneficiary - Defeasible Vested Interest as Opposed to Mere Expectancy

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Considering these decisions with that of the principal case, the defendant insurance companies have the burden under the statute of proving that the moral or physical hazard of the risk has been increased. What proof will be required will depend on the facts of each particular case. That expert testimony may suffice is evidenced by the principal case.

W. S.

LIFE INSURANCE—CHANGE OF BENEFICIARY—DEFEASIBLE VESTED INTEREST AS OPPOSED TO MERE EXPECTANCY—As collateral for a note, the insured assigned a life insurance policy payable to his wife, in which he had reserved the power to change the beneficiary. At his death the widow claimed the proceeds on the ground that the assignment was never executed and endorsed on the policy as required by the change of beneficiary clause and that, therefore, her interest as beneficiary had never been divested. The insurance company impleaded both the wife and the assignee and deposited the money into court. *Held,* that the interest of the wife was a mere expectancy and the assignment was sufficient to effect a change of beneficiary. *Davis v. Modern Industrial Bank,* 279 N.Y. 405, 18 N.E. (2d) 639 (1939).

It is the rule of every American jurisdiction[1] except Wisconsin[2] that, unless the power to change the beneficiary is reserved by the insured, the beneficiary acquires a vested interest in the policy.[3] That this rule does violence to the actual intent of the

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actually increased. Consequently, acts which *might tend* to increase the moral or physical hazard are not sufficient to justify the insurer's defense of a breach of condition. In this case the fact that a third party was foreclosing a mortgage executed by the insured's vendor did not necessarily increase the moral hazard. The insured would still retain an interest in the improvements to the extent that the latter might have enhanced the value of the property. Cf. Art. 3407, La. Civil Code of 1870; Glass v. Ives, 169 La. 809, 126 So. 69 (1930), noted in (1930) 4 Tulane L. Rev. 633. For all that the evidence showed, the insured's interest may not have been affected by the foreclosure of the mortgage to the extent that the moral hazard of the risk was actually increased.

1. There are many collections of such cases. See Vance, Insurance (2 ed. 1930) 542; Richards, Insurance (4 ed. 1932) 556; Note (1929) 60 A.L.R. 191. See more specifically: Bingham v. United States, 296 U.S. 211, 56 S.Ct. 180, 80 L.Ed. 160 (1935); Succession of Kugler, 23 La. Ann. 455 (1871); Breard v. New York Life Ins. Co., 138 La. 774, 70 So. 799 (1916); Pollock v. Pollock, 164 La. 1077, 115 So. 275 (1928).

2. In re Allis' Will, 174 Wis. 527, 184 N.W. 381 (1921), in which many Wisconsin cases are collected and discussed.

3. The doctrine is of recent origin. For an excellent discussion of its genesis and growth see Vance, The Beneficiary's Interest in a Life Insurance Policy (1922) 31 Yale L. J. 343.

insured is amply indicated by the fact that the great majority of policies now reserve the power to change beneficiaries and also by cases that have arisen wherein the insured has attempted unsuccessfully to change the beneficiary.[4] But even in cases where the change of beneficiary clause was inserted in the policy to circumvent the vested interest rule, some courts have continued to apply the old rule and have yielded only to the strict letter of the reserved power to change.[5] Other courts, however, have repudiated the old rule and have allowed the beneficiary only an inchoate interest in the policy.[6] As a result, there are now two different views regarding the rules applicable to the change of beneficiary clauses—the "defeasible vested interest" rule and the "mere expectancy" rule. According to the first, the beneficiary has an interest in the policy, and while it is subject to defeasance by a change of beneficiary it can be defeated only in the manner prescribed in the policy.[7] The other theory maintains that when the power to change the beneficiary is reserved the beneficiary gets no property right in the policy, and a substantial compliance with the procedure for change outlined in the change of beneficiary clause is sufficient.[8]

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4. Pilcher v. New York Life Ins. Co., 33 La. Ann. 322 (1881); Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N.W. 771, 38 Am. Rep. 289 (1880).

5. Muller v. Penn Mutual Life Ins. Co., 62 Colo. 245, 161 Pac. 148 (1916); Sheppard v. Crowley, 61 Fla. 735, 55 So. 841 (1911); Anderson v. Broad Street Nat. Bank, 90 N.J. Eq. 78, 105 Atl. 599 (1918). For more recent cases see note 7, infra.

There have been three Louisiana cases squarely on this point. The first, New York Life Ins. Co. v. Murtagh, 137 La. 760, 69 So. 165 (1915), held that there was a contract between the insured and the beneficiary to the effect that no change could be made except as provided in the policy. The next case was a somewhat stronger one for the assignee for there the wife joined the husband in pledging the policy for a loan. It was held that the wife's assignment was null because separate property could not be pledged for the husband's debts and the husband's assignment was void because he did not follow the procedure outlined in the policy. Douglass v. Equitable Life Assur. Soc., 150 La. 519, 90 So. 834 (1922). In the latest case, the insurer was holding the policy as security on a loan at the time notice of the change of beneficiary was received. It was held that no recovery could be had because one act was lacking—the endorsement on the policy by the insurer. Guiffria v. Metropolitan Life Ins. Co., 188 La. 837, 178 So. 368 (1937), discussed in Symposium, The Work of the Louisiana Supreme Court for the 1937-1938 Term (1938) 1 LOUISIANA LAW REVIEW 314, 409.

6. See cases cited in note 8, infra.

7. Douglass v. Equitable Life Assur. Soc., 150 La. 519, 90 So. 834 (1922); Neary v. Metropolitan Life Ins. Co., 92 Conn. 488, 103 Atl. 661, L.R.A. 1918F 306 (1918); Clark v. Metropolitan Life Ins. Co., 126 Me. 7, 135 Atl. 357 (1926); Barbin v. Moore, 85 N.H. 362, 159 Atl. 409 (1932), noted in (1932) 32 Col. L. Rev. 1071; Wilkie v. Philadelphia Life Ins. Co., 187 S.C. 382, 197 S.E. 375 (1938).

8. Taylor v. Southern Bank & Trust Co., 227 Ala. 565, 151 So. 357 (1933); Barrett v. Barrett, 173 Ga. 375, 160 S.E. 399, 78 A.L.R. 962 (1931); In re Idaho Mutual Ben. Ass'n, 56 Idaho 272, 53 P. (2d) 1171 (1936); Inter-Southern Life

If the "defeasible vested interest" rule is followed, an assignment does not have the effect of giving the assignee a priority over a beneficiary[9] for the only right that the insured has in the policy is to change the beneficiary. In bankruptcy cases, unless the proceeds and avails of the policy are exempt from seizure by creditors under state law,[10] the trustee can compel the insured to exercise his right to make the change.[11] With this exception, the right to change the beneficiary can only be exercised by the insured.[12] On the other hand, if the "mere expectancy" rule is followed, then the insured retains full property in the policy and the assignment itself is a substantial compliance with the change of beneficiary clause.

A majority of the states that have passed on the question have followed the "mere expectancy" doctrine.[13] The principal case had the effect of putting New York definitely in line with this more liberal view. Despite the strong argument that the "defeasible vested interest" doctrine avoids uncertainty as to the beneficiary, it is submitted that the "mere expectancy" view is the more desirable. It satisfies commercial needs by allowing an increased use of insurance policies as collateral for loans and gives effect to the purpose for which the change of beneficiary clause was inserted in the policy.[14]

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Ins. Co. v. Cochran, 259 Ky. 677, 83 S.W. (2d) 11 (1935); Equitable Life Assur. Soc. v. Hitchcock, 270 Mich. 72, 258 N.W. 214, 106 A.L.R. 591 (1935); Lemley v. McClure, 122 Pa. Super. 225, 185 Atl. 878 (1936), noted in (1936) 85 U. of Pa. L. Rev. 203; Massachusetts Mut. Life Ins. Co. v. Bank of California, 187 Wash. 565, 60 P. (2d) 675 (1936), noted in (1937) 12 Wash. L. Rev. 147; Union Mutual Life Ins. Co. v. Lindamood, 108 W.Va. 594, 152 S.E. 321 (1930).

9. See cases cited in note 7, supra.

10. Holden v. Stratton, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018 (1905); In re Messinger, 29 F. (2d) 158 (C.C.A. 2nd, 1928), noted in (1929) 6 N.Y.U.L.Q. Rev. 481.

11. 11 U.S.C.A. § 110(a) (Supp. 1938). Cohen v. Samuels, 245 U.S. 50, 38 S.Ct. 36, 62 L.Ed. 143 (1917). No change was made in this provision by the Chandler Bankruptcy Act of 1938.

12. The only cases in which that question has arisen have been bankruptcy cases. See cases cited in note 10, supra. There is some indication that such a right could be assigned. Cf. Douglass v. Equitable Life Assur. Soc., 150 La. 519, 534, 90 So. 834, 839 (1922), for the statement on rehearing that: "The insured might assign his rights separately, consisting of the duty of paying the premiums and the privilege of changing the beneficiary without the consent of his wife." It would seem that if such dictum were followed it would undermine the defeasible vested interest rule in Louisiana.

13. See cases cited in note 8, supra.

14. For a full discussion of this point see Note (1936) 85 U. of Pa. L. Rev. 203.