



Volume 18

1964

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Recommended Citation

Wallace M. Swanson, *Community Property and Life Insurance - Brown v. Lee: Panacea and Problem*, 18 Sw L.J. 133 (1964)
<http://scholar.smu.edu/smulr/vol18/iss1/9>

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made an insurer of his product only to the extent that the plaintiff was able to establish negligence on the part of the supplier.⁴⁹ However, if the supplier can be found negligent by application of *res ipsa loquitur*, the effect is virtually the same as if the assembler-manufacturer's liability was predicated on implied warranty. Indeed, the Fifth Circuit might even prefer to ground liability in implied warranty based on public policy rather than in negligence.⁵⁰ Should the Texas Supreme Court accept the *Ford Motor Co.*⁵¹ case as persuasive, Texas may soon find itself in the growing number of jurisdictions which accept implied warranty as a theory of recovery for injuries resulting from defects in manufactured products that are likely to cause death or serious bodily harm if they fail in their intended uses.

Scott Morris

Community Property and Life Insurance — Brown v. Lee: Panacea and Problem

I. BACKGROUND

Confusion and uncertainty prevailed in Texas community property law because of a persistent theoretical dilemma as to the legal status of the right to the *proceeds*, or death benefits, from a life insurance policy prior to its maturity.¹ Fortunately, it had been recog-

⁴⁹ "In the beginning, two things are significant. . . . The second is that an identifiable defect in the dimmer switch was established." *Id.* at 271. "On the basic issue, Texas law holds the manufacturer-assembler liable for the negligence of its supplier of a component part." *Id.* at 276. It is most likely, however, that the assembler-manufacturer will not have to bear the loss, as "hold safe" contracts often are required of the supplier. Even without such a contract, the assembler-manufacturer has a cause of action against the supplier. As between joint tortfeasors, a right of indemnity arises in favor of one who satisfies an obligation on which he was liable if the actual wrong or the greater culpability rests on the other joint tortfeasor. *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779 (Tex. Civ. App. 1952) *error ref. n.r.e.*

⁵⁰ See notes 35-47 *supra* and accompanying text. In any event, the measure of damages in negligence and implied warranty cases is, for all practical purposes, the same. Consequential damages, to the person or to property, are recoverable in either instance. 1 Frumer & Friedman, *Products Liability* § 16.01[2] (1960).

⁵¹ 322 F.2d 267 (5th Cir. 1963).

¹ Originally noticed by Professor William O. Huie, this dilemma also has been observed by others. See Hall, *Estate Taxation of Life Insurance and Texas Community Property* 18-30 (unpublished thesis for LL.M., Southern Methodist University, 1959); Huie, *Community Property and Life Insurance—Substantive Aspects—Developments in Texas*, in Texas Institutes, 2 Business & Family Planning 104 (1957); Huie, *Community Property Laws as Applied to Life Insurance* (pts. 1-2), 17 Texas L. Rev. 121 (1939), 18 Texas L. Rev. 121 (1940); Ray, *Life Insurance, Community Property, and Death Taxes in Texas*, 26 Texas B.J. 835 (1963); Stephens, *Life Insurance and Community Property in Texas—Revisited*, 10 Sw. L.J. 343 (1956); Swift, *House Bill 900 and Your Life Insurance Policy*, 20 Texas B.J. 691 (1957).

nized that the various incidents of ownership of a policy prior to maturity, including the *cash surrender value*, are vested property rights.³ But two diametrically opposed theories existed as to the nature of the right to the proceeds from a policy prior to maturity. In at least two significant situations the right to the proceeds from a policy purchased with community funds had been characterized as "property."³ More frequently, however, the proceeds right was held to have been transformed into property only upon the maturing of the policy.⁴ Under the latter, "non-property" theory, before maturity

² "Incidents of ownership" or "policy rights" refer generally to the economic benefits of a life insurance policy other than the right to the proceeds, or death benefits, therefrom. Among such benefits are the rights to change the beneficiary, to surrender the policy, to assign the policy or to revoke an assignment thereof, to pledge the policy for a loan, and to obtain a loan against the surrender value of the policy from the insurer. *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 245-46 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); *Treas. Reg. § 20.2042-1(c)* (1958). A series of divorce cases, holding that the wife has a vested one-half interest in the cash surrender value of a policy purchased with community funds, best illustrate the vested nature of the various incidents of ownership. *Womack v. Womack*, 141 Tex. 299, 172 S.W.2d 307 (1943); *Cox v. Cox*, 304 S.W.2d 175, 177-78 (Tex. Civ. App. 1957); *Berdoll v. Berdoll*, 145 S.W.2d 227 (Tex. Civ. App. 1940) *error disp.*; *Locke v. Locke*, 143 S.W.2d 637 (Tex. Civ. App. 1940); *Russell v. Russell*, 79 S.W.2d 639 (Tex. Civ. App. 1935) *error disp.* See also *San Jacinto Bldg. v. Brown*, 79 S.W.2d 164 (Tex. Civ. App. 1935) *error ref.* (holding in creditors' rights situation that the cash surrender value was a community asset prior to maturity of policy). Certain taxation cases are in accord with the divorce cases. See, e.g., *Thompson v. Calvert*, 301 S.W.2d 496 (Tex. Civ. App. 1957) (policy rights recognized as community asset; one-half of cash surrender value at time of wife's death of community property policies on husband's life included in wife's estate for state inheritance tax purposes).

³ Use of community funds by husband to insure his life for the benefit of his separate estate: *Martin v. Moran*, 11 Tex. Civ. App. 509, 32 S.W. 904 (1895); determination of state inheritance tax: *Blackmon v. Hansen*, 140 Tex. 536, 169 S.W.2d 962 (1943) (proceeds of policy on husband's life purchased with community funds implicitly treated as community property, since only one-half of proceeds included in his estate for taxation purposes). See also *Sherman v. Roe*, 153 Tex. 1, 262 S.W.2d 393 (1953) (in simultaneous death situation occurring before enactment of Texas simultaneous death act, see notes 10, 12 *infra*, proceeds of policy on husband's life equally divided between spouses' estates on theory that proceeds became community property under general presumption of community property in Tex. Rev. Civ. Stat. Ann. art. 4619 (1960)).

⁴ The prototype Texas case supporting this theory is *Martin v. McAllister*, 94 Tex. 567, 63 S.W. 624 (1901) (husband used community funds to take out policy on wife's life and named himself beneficiary; proceeds right held to become property only upon wife's death and to vest at that time in husband in his separate right). See also *Warthan v. Haynes*, 155 Tex. 413, 288 S.W.2d 481 (1956) (see note 7 *infra*); *Volunteer State Life Ins. Co. v. Hardin*, 145 Tex. 245, 197 S.W.2d 105 (1946) (wife predeceased husband, who thereafter designated his sisters as beneficiaries of policies on his life purchased with community funds; after husband's death, wife's heir held to have no vested right to share in policy proceeds to extent of one-half of cash surrender value at date of wife's death); *Jones v. Jones*, 146 S.W. 265 (Tex. Civ. App. 1912) (non-property character of insurance policy recognized in third party beneficiary situation).

Since the death of the insured spouse both dissolves the community and matures the policy and since all effects acquired with community property during marriage are community property, Tex. Rev. Civ. Stat. Ann. art. 4619 (1960), apparently under the non-property theory the insured spouse's death operated to mature the policy at an instant after it terminated the community itself. Only in this way could the proceeds from the policy become the beneficiary's separate property directly, instead of the right thereto initially being community property and thereafter attaining separate ownership status through a completed gift of that right from the community upon the death of the insured.

the policy was only "evidence of a contract."⁵ Presumably this view of life insurance proceeds was grounded in certain pragmatic considerations. A life insurance policy is a unique investment in that its proceeds right matures only upon the death of the insured spouse—an event which dissolves the community. Also the rights to change the beneficiary and to cause the policy to lapse at any time prior to death normally are retained.

This dichotomy in Texas community property-life insurance law had endured for more than a half-century.⁶ The 1956 non-property decision of the Texas Supreme Court in *Warthan v. Haynes*,⁷ however, aroused the Texas legislature to immediate action on this problem. In 1957, the statutory definition of "property" was amended expressly to include "life insurance policies and the effects thereof."⁸ Although this statute by its own terms clearly overruled the non-property theory of life insurance proceeds,⁹ its legal effect had not been judicially determined. In brief, this is the setting out of which the principal case, *Brown v. Lee*, arose.

II. *Brown v. Lee*

Both husband and wife died intestate and childless in the crash of their private airplane, in circumstances giving rise to a conclusive presumption of simultaneous death under the Texas simultaneous death act.¹⁰ Four insurance policies, purchased with community

⁵ Succession of Hearing, 26 La. Ann. 326 (1874), first quoted in *Martin v. McAllister*, 94 Tex. 567, 568, 63 S.W. 624, 625 (1901), and in subsequent cases in accord therewith.

⁶ *Martin v. Moran*, 11 Tex. Civ. App. 509, 32 S.W. 904, was decided in 1895; the decision in *Martin v. McAllister*, 94 Tex. 567, 63 S.W. 624, was rendered in 1901.

⁷ 155 Tex. 413, 288 S.W.2d 481 (1956), noted in 10 Sw. L.J. 326 (1956), 35 Texas L. Rev. 449 (1957). In this case husband and wife perished in a common disaster, although the husband survived the wife by a few minutes. The wife was the beneficiary of three policies on the husband's life that during marriage had been either maintained or purchased with community funds. All of the proceeds were held to become the husband's separate property because the proceeds rights only came into existence as property upon the husband's death, which occurred after the dissolution of the community by the wife's death.

⁸ Tex. Rev. Civ. Stat. Ann. art. 23(1) (1959); see Swift, *supra* note 1.

⁹ This conclusion is particularly inescapable in view of the amendment's avowed purpose, as stated in the statute's emergency clause: "*Warthan v. Haynes* . . . casts some doubt on the status of life insurance policies as property . . ." Huie, *op. cit. supra* note 1, 2 Business & Family Planning at 126.

¹⁰ Tex. Prob. Code Ann. § 47(b) (1956) reads as follows:

When a husband and wife have died, leaving community property, and there is no direct evidence that they have died otherwise than simultaneously, one-half of all community property shall be distributed as if the husband had survived, and the other one-half thereof shall be distributed as if the wife had survived, except as provided in Subsection (e) of this Section.

Consider also Tex. Prob. Code Ann. § 47(a) (1956):

When the title to property or the devolution thereof depends upon priority of death and there is no direct evidence that persons have died otherwise

funds, were in force on the husband's life. The wife was the primary and only beneficiary of each policy. The common administrator divided all policy proceeds equally between the spouses' respective estates. On motion of the husband-insured's heirs, the probate court awarded all of the proceeds to the estate of the husband-insured. On appeal the district court reinstated the common administrator's determination of equal division. The court of civil appeals affirmed.¹¹ The Texas Supreme Court reversed the decision and held that although the proceeds are community property, the husband-insured's estate is entitled to all of the proceeds. The wife-beneficiary is deemed to have predeceased the husband-insured;¹² therefore, one-half of the proceeds, as community property, passes initially to the estate of each spouse. But the wife-beneficiary's one-half of the proceeds then passes to the husband-insured's estate because the husband, as the presumed community survivor, becomes the wife's heir under the applicable statute of descent and distribution.¹³ *Brown v. Lee*, — Tex. —, 371 S.W.2d 694 (1963).

Significantly, the instant decision recognizes the plain effect of the 1957 amendment—that the right to the proceeds from a life insurance policy prior to its maturity is property.¹⁴ Otherwise, *Brown v. Lee* on its facts is merely one of simple statutory application. In the comparatively rare situation in which both spouses simultaneously perish intestate and childless and the life of one spouse is insured in favor of the other spouse, section 47(e) of the Texas Probate Code¹⁵

than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this Section.

No explanation has been found, nor can one be given, as to why the existence of this provision does not obviate the necessity for § 47(b). Both provisions appear in the Uniform Simultaneous Death Act, which Texas has adopted virtually verbatim. 9c Unif. Laws Ann. 157-58 (1953). But in Texas, perhaps unlike in some community property states, each spouse has an equal, undivided, vested right in all community property from the moment of its acquisition. *Hopkins v. Bacon*, 282 U.S. 122 (1930); *Rompel v. United States*, 59 F. Supp. 483, 486-87 (W.D. Tex.), *rev'd on other grounds*, 326 U.S. 367 (1945). Therefore, under § 47(a), "the property of each person" (spouse) should include a vested one-half interest in the community estate, in addition to that spouse's separate property. Under this provision, as under § 47(b), the community property of a spouse is disposed of as if he or she survived. Thus, it would seem that the purpose of § 47(b) is already fulfilled by § 47(a).

¹¹ 362 S.W.2d 381 (Tex. Civ. App. 1962), noted in 41 Texas L. Rev. 832 (1963).

¹² Such presumption arises under Tex. Prob. Code Ann. § 47(e) (1956):

When the insured and the beneficiary in a policy of life . . . insurance have died and there is no direct evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

¹³ Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants
Tex. Prob. Code Ann. § 45 (1956).

¹⁴ Tex. Rev. Civ. Stat. Ann. art. 23(1) (1959); see notes 8-9 *supra* and accompanying text.

¹⁵ Quoted in note 12 *supra*.

creates the conclusive presumption that the insured spouse survived the beneficiary spouse. Such presumption of survivorship prevents the completion of an attempted gift by the insured spouse to the beneficiary spouse of his or her undivided one-half community interest in the proceeds.¹⁶ Initially, therefore, the community one-half of each spouse descends to his or her respective estate. But since the same survivorship presumption controls for all purposes,¹⁷ the insured spouse is deemed the heir of the beneficiary spouse under the statute of descent and distribution governing the community estate.¹⁸ Thus, in addition to the insured spouse's community one-half of the proceeds, the beneficiary spouse's community one-half of the proceeds passes to the insured spouse's separate estate. The reasoning and the result of *Brown v. Lee* are consistent with decisions of other community property jurisdictions in which the problem has arisen.¹⁹

In *Brown v. Lee* the court could have reached the same result by other, less sound means. If the right to the proceeds had not been recognized as community property, the husband-insured's estate also would have realized all of the proceeds, but on the now overruled

¹⁶ In an interspousal insurance situation, only the insured spouse's one-half interest in the proceeds is transferred to the beneficiary spouse, whose own one-half interest in the proceeds remains vested. To acquire the insured spouse's one-half interest in addition to his or her own one-half interest, therefore, the beneficiary spouse must survive or be presumed to survive the insured spouse. Tex. Prob. Code Ann. § 47(e) (1956).

¹⁷ The language itself of § 47(e), see note 12 *supra*, extends the purpose of the survivorship presumption beyond merely defeating the beneficiary's rights to take as a beneficiary, for it commands that "the proceeds . . . shall be distributed as if the insured had survived . . ." *Ibid.* (Emphasis added.)

If, contrary to the statutory terms, the court has restricted the application of the survivorship presumption merely to defeating the beneficiary's right, two alternatives would have been available to the court. First, a result of equal division of the proceeds could have been reached by engrafting a judicial amendment upon § 47(b) — contrary to its express terms — so as to extend the scope of its application to insurance proceeds. In 1953 the National Conference on Uniform State Laws proposed such an amendment to the counterpart of § 47(e) in the Uniform Simultaneous Death Act for community property states. 9c Unif. Laws Ann. 167-68 (1957); National Conference of Commissioners on Uniform State Laws, Handbook 251 (1953). Texas has not enacted this amendment, which of itself substantiates the conclusion that the survivorship presumption under § 47(e) controls for all purposes.

Second, if § 47(e) had been construed merely to defeat the right of the beneficiary, the court could have held that § 47(b) is not applicable by its own terms. The heirs then would have been relegated to the common law, which has no survivorship presumptions. *Paden v. Briscoe*, 81 Tex. 563, 17 S.W. 42 (1891); *Hildenbrant v. Ames*, 66 S.W. 128 (Tex. Civ. App. 1901) *error ref.* As a practical matter, therefore, those heirs having the burden of proof of survivorship would lose. See Note, 5 *Baylor L. Rev.* 105 (1952). Such a construction, however, would particularly frustrate the very purpose of the simultaneous death act: to provide presumptions of survivorship in situations in which the devolution of property depends upon the unascertainable priority of death. *Ibid.*

¹⁸ Tex. Prob. Code Ann. § 45 (1956).

¹⁹ *In re Wedemeyer's Estate*, 109 Cal. App. 2d 67, 240 P.2d 8 (Dist. Ct. App. 1952); *Thigpen v. Thigpen*, 231 La. 206, 91 So. 2d 12, 21-22 (1956); *Succession of Farrell*, 200 La. 29, 7 So. 2d 605 (1942); *In re Miller*, 44 N.M. 214, 100 P.2d 908 (1940); *Saunders v. Majors*, 51 Wash. 2d 274, 317 P.2d 528 (1957).

reasoning of *Warthan v. Haynes*.²⁰ Similarly, an identical result would have resulted if section 47(e) of the Texas Probate Code²¹ had been construed as a statute of descent and distribution—which it clearly is not—instead of as a mere survivorship statute.²²

III. EFFECTS OF THE INSTANT DECISION

In *Brown v. Lee* the Texas Supreme Court resolves the uncertainty as to the property status of life insurance proceeds rights. It is now certain that the 1957 amendment²³ defining life insurance as property overrules the rationale of *Warthan v. Haynes* and its predecessors.²⁴ Henceforth, the right to the proceeds will be recognized as property prior to the maturity of the policy. If a policy insuring the life of a spouse is purchased with community funds, the right to the proceeds therefrom will be community property.²⁵ By designating a revocable beneficiary²⁶ of a life insurance policy, the husband, as

²⁰ 155 Tex. 413, 288 S.W.2d 481 (1956). All of the proceeds would have passed to the husband's separate estate because the proceeds would have come into existence only upon the presumed subsequent death of the husband, after the community had been dissolved by the death of the wife. See notes 7-9 *supra* and accompanying text.

²¹ Quoted in note 12 *supra*.

²² Section 47(e) merely commands that "the proceeds . . . shall be distributed as if . . ." (Emphasis added.) It does not direct the manner in which the proceeds shall actually be distributed, which is the purpose of a statute of descent and distribution. By its own terms, this provision supplies only a presumption of survivorship, which in intestate situations serves as the underpinning for the operation of the applicable statute of descent and distribution—in the instant case, Tex. Prob. Code Ann. § 45 (1956).

Of course, if in the instant case the wife-beneficiary had died testate, her community one-half of the proceeds would have passed to the designated legatees. Similarly, if the wife had died intestate but had been survived by children or their descendants, her community one-half of the proceeds would have passed to those individuals. *Ibid*.

²³ Tex. Rev. Civ. Stat. Ann. art. 23(1) (1959).

²⁴ *Warthan v. Haynes*, 155 Tex. 413, 288 S.W.2d 481 (1956); see notes 4, 7 *supra*.

²⁵ The separate or community character of property acquired during marriage is determined by the character of the consideration given in exchange for it. *Love v. Robertson*, 7 Tex. 6 (1851). Premiums paid for life insurance are considered a single, cumulative asset and not a series of distinct, individual investments, each of which is consumed during its respective premium period. See, e.g., *Stapf v. United States*, 189 F. Supp. 830, 833 (N.D. Tex. 1960), *modified on other grounds*, 309 F.2d 592 (5th Cir. 1962), *rev'd on other grounds*, 375 U.S. 118 (1963); cf. *McCurdy v. McCurdy*, 372 S.W.2d 381, 383 (Tex. Civ. App. 1963). See also Huie, *op. cit. supra* note 1, 2 *Business & Family Planning* at 128.

²⁶ Throughout this Note it is assumed that the community receives no consideration for designating the beneficiary of a community life insurance policy, a situation beyond the scope of this Note. It is also assumed, if not expressly mentioned, that the beneficiary has been revocably designated, as is the usual situation. An irrevocable beneficiary has an absolutely vested right to the proceeds of a life insurance policy from the moment of his designation; neither the community nor its creditors can impair this right without the beneficiary's consent. *Central Bank v. Hume*, 128 U.S. 195 (1888); *Evans v. Opperman*, 76 Tex. 293, 13 S.W. 312 (1890); 2 *Appleman, Insurance Law and Practice* §§ 901-02, 911, 921 (1943); 12 *id.* at § 7007. The same is true if the right to change the beneficiary is not reserved in the policy. *McNeill v. Chinn*, 101 S.W. 465, 467 (Tex. Civ. App. 1907); *Huebner, Life Insurance* 300 (5th ed. 1959). For federal gift taxation purposes, the designation of an irrevocable beneficiary constitutes a taxable gift of the policy proceeds right. See note 45 *infra*.

manager of the community,²⁷ transfers an expectancy in the community right to the proceeds.²⁸ The community retains ownership of the policy, including the right to change the beneficiary and to cause the policy to lapse; thus, the completion of the gift of the proceeds right is dependent upon the nonexercise or limited exercise of the various incidents of ownership prior to the death of the insured spouse.²⁹

To be sure, the implications of *Brown v. Lee* are more significant than its immediate practical effect, which is limited to certain interspousal insurance situations. The beneficiary of a policy on the life

²⁷ Tex. Rev. Civ. Stat. Ann. art. 4619 (1960). Save for the homestead, the managerial power of the husband over the community is virtually unlimited, except that he cannot dispose of community property in such a way as to perpetrate an actual or constructive fraud upon the wife's rights. *Kemp v. Metropolitan Life Ins. Co.*, 205 F.2d 857 (5th Cir. 1953), *remanding to the district court, whose opinion was affirmed in* 220 F.2d 952 (5th Cir. 1955); *Volunteer State Life Ins. Co. v. Hardin*, 145 Tex. 245, 197 S.W.2d 105 (1946); see Huie, *op. cit. supra* note 1, 2 *Business & Family Planning* at 116-17, 136-38. The possible effect of the 1963 amendment to article 4614, with respect to management of the wife's special community, is beyond the scope of this Note. For an analysis of the 1963 amendment, see Smith, *Legislative Note: 1963 Amendments Affecting Married Women's Rights in Texas*, 18 Sw. L.J. 70 (1963). As to certain interspousal problems rooted in the husband's power over the community, see note 46 *infra* and accompanying text.

²⁸ The weight of authority holds that a revocable beneficiary has only an expectancy in a life insurance policy prior to its maturity; upon maturity the beneficiary acquires an absolute, vested right to the proceeds. It follows that until the policy matures, such right remains in the insured in a common-law state or in the community in a community property state. *Supreme Council of the Royal Arcanum v. Behrend*, 247 U.S. 394, 398-99 (1918); *Zolintakis v. Orfanos*, 119 F.2d 571, 575 (10th Cir.), *cert. denied*, 314 U.S. 630 (1941); *General Am. Life Ins. Co. v. Cole*, 195 F. Supp. 867, 870-71 (E.D. Mo. 1961); *United Serv. Life Ins. Co. v. Farr*, 60 F. Supp. 829, 836 (S.D.N.Y. 1945); *Sieroty v. Silver*, 58 Cal. 2d 799, 376 P.2d 563, 566 (1962); *Gurnett v. Mutual Life Ins. Co.*, 268 Ill. App. 518, *aff'd*, 356 Ill. 612, 191 N.E. 250, 253 (1934); *Bourne v. Haynes*, — Misc. 2d —, 235 N.Y.S.2d 332 (Sup. Ct. 1962); *Whitelaw v. Whitelaw*, 65 Ohio L. Abs. 11, 113 N.E.2d 105, 107 (1952). Texas is in accord with the weight of authority. *Fidelity Union Life Ins. Co. v. Methven*, 162 Tex. 319, 346 S.W.2d 797, 799 (1961); *Scherer v. Wahlstrom*, 318 S.W.2d 456, 459 (Tex. Civ. App. 1958) *error ref.*; *but cf. Simmons v. Simmons*, 272 S.W.2d 913, 916 (Tex. Civ. App. 1954) (revocable beneficiary held to have "contingent interest" in policy prior to maturity). It would seem that the instant case reaffirms Texas' adherence to this position: "When purchased with community funds, the ownership of the unmaturing chose logically belongs to the community, unless it has been irrevocably given away. . . . The proceeds at maturity are likewise community in character, except where the named beneficiary is in fact surviving, in which case a gift of the policy rights to such beneficiary is . . . completed by the death of the insured." *Brown v. Lee*, — Tex. —, 371 S.W.2d 694, 696 (1963).

But there is a substantial minority position that a beneficiary has a vested interest subject to divestment by the insured's act before the policy matures. *Phoenix Mut. Life Ins. Co. v. Connelly*, 188 F.2d 462, 464-65 (3d Cir. 1951); *United States v. Burgo*, 175 F.2d 196, 197-98 (3d Cir. 1949) (New Jersey law); *United States v. Massachusetts Mut. Life Ins. Co.*, 127 F.2d 880, 883 (1st Cir. 1942); *Parks' Ex'rs v. Parks*, 288 Ky. 435, 156 S.W.2d 480, 483 (1941); *Taylor v. Sanderson*, 330 Mass. 616, 116 N.E.2d 269, 271 (1953) ("qualified vested interest"); *Strohlsahl v. Equitable Life Assur. Soc. of United States*, 71 N.J. Super. 300, 176 A.2d 814, 816 (Ch. 1962). If the liberty of the insured to change the beneficiary may be considered a power, it would seem that the minority position is well founded, for "a power is . . . an authority which operates upon . . . a vested interest, not being derived out of such . . . interest but . . . superseding it." *Burlington County Trust Co. v. Di Castelicala*, 2 N.J. 214, 66 A.2d 164, 168 (Sup. Ct. 1949).

²⁹ As to the various incidents of ownership of a life insurance policy, see note 2 *supra*.

of a spouse will continue to receive the proceeds therefrom if he or she in fact survives the insured spouse. Henceforth, however, such proceeds will be realized by the beneficiary from an expectancy acquired from the community when that individual is originally designated the beneficiary; the death of the insured spouse will transform the beneficiary's expectancy in the proceeds into an absolute, vested right thereto.³⁰

A. Substantive Law

Only in the rare situation of simultaneous death of the insured spouse and the beneficiary does *Brown v. Lee* effect a change in substantive law.³¹ In that event the expectancy in the proceeds of the beneficiary, whether a third party or the other spouse, is defeated by his or her conclusively presumed predecease.³² Assuming no alternative beneficiary has been named, the proceeds right, therefore, vests absolutely in the community. Upon the maturity of this right by the insured spouse's death, the proceeds themselves go to the community estate. At least initially, the proceeds then pass equally to the estate of the insured spouse and to the other spouse or his or her estate.³³ However, if the insured spouse dies intestate and childless in a third party beneficiary situation,³⁴ the surviving spouse, as an heir,

³⁰ See note 28 *supra*.

³¹ Previously, in an interspousal-simultaneous death situation in which no alternative beneficiary had been named, all of the proceeds would have passed to the insured spouse's estate on the ground that the proceeds right became property only upon the insured spouse's death, which would be deemed to occur after the dissolution of the community under the survivorship presumption of Tex. Prob. Code Ann. § 47(e) (1956). See *Warthan v. Haynes*, 155 Tex. 413, 288 S.W.2d 481 (1956); see note 7 *supra*. Presumably, the same result also would have been reached under the non-property theory in a situation in which the insured spouse and a third-party beneficiary perished simultaneously. See note 4 *supra* and accompanying text.

It must be emphasized that in the instant case the estate of the insured spouse acquired all of the proceeds only because the beneficiary spouse died intestate and childless; otherwise the proceeds would have been equally divided between the spouses' respective estates.

³² See note 12 *supra* and accompanying text. Today virtually all life insurance contracts contain a "reverter clause," which provides for the vesting of the beneficiary's interest (whether revocable or irrevocable) in the insured if the beneficiary predeceases the insured. *Huebner, op. cit. supra* note 26, at 306. It follows, therefore, that the beneficiary must either survive or be presumed to survive the insured in order to take under the policy.

³³ This result follows from the general principle of equal division of the community upon its dissolution since each spouse owns an undivided one-half of the community. *Forrest v. Moreno*, 161 S.W.2d 364 (Tex. Civ. App. 1942) *error ref.*; *Kreis v. Kreis*, 36 S.W.2d 821 (Tex. Civ. App. 1931) *error disp.*

³⁴ Technically speaking, every beneficiary of a life insurance policy is a "third party beneficiary" in ordinary contract law, for the parties to the contract are the insurer and the insured or the original owner; by their actions a benefit may be conferred upon the beneficiary. *Shaw v. John Hancock Mut. Life Ins. Co.*, 120 Conn. 633, 182 Atl. 472 (1936); 2 *Williston, Contracts* §§ 356, 369 (3d ed. 1959); *Dechert, Beneficiary Clauses and Their Legal Implications*, in *The Life Insurance Policy Contract* 83 (*Waggoner & Krueger eds. 1953*). In the interest of clarity, however, "third party beneficiary" is used here to refer to a beneficiary other than either spouse or his or her estate.

will take the insured spouse's community one-half of the proceeds.³⁵ Similarly, if the beneficiary spouse dies intestate and childless in an interspousal insurance situation, the beneficiary spouse's community one-half will pass to the estate of the insured spouse as the heir of the beneficiary spouse.³⁶

B. Federal Estate Taxation

In addition *Brown v. Lee* buttresses the current federal estate taxation policy of including in the estate of a deceased insured spouse only one-half of the value of the proceeds from a policy purchased with community funds.³⁷ As a result of *Warthan v. Haynes*,³⁸ the Commissioner could have logically argued for the inclusion of all of the proceeds in the estate of the deceased insured spouse, for under the non-property rationale of that case, all of the proceeds directly became the property of the insured spouse's separate estate if the insured spouse survived or was presumed to survive the beneficiary.³⁹ Since the right to the proceeds is now definitely established to be community property, Texas property law will be entirely consonant with federal revenue practice, the operation of which is based upon local law.⁴⁰

In all other taxation aspects, the recognition that the proceeds right of a community life insurance policy is property prior to maturity does not prejudice the position of a taxpayer in a community property state; the revenue law remains the same. By designating

³⁵ Since an attempted gift of the community proceeds fails by the presumed predecease of the third party beneficiary, the proceeds remain in the community estate. One-half of the community estate goes to the surviving spouse because the death of the insured spouse dissolves the community. As the insured spouse's heir, the surviving spouse in addition takes the insured spouse's one-half of the community estate. Tex. Prob. Code Ann. § 45 (1956).

³⁶ Because the beneficiary spouse is presumed to have predeceased the insured spouse under § 47(e), the insured spouse becomes the beneficiary spouse's heir under § 45. As such, both the insured spouse's one-half of the community estate and the beneficiary spouse's one-half pass to the separate estate of the insured spouse.

³⁷ *Lang v. Commissioner*, 304 U.S. 264 (1938); *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 239 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); *De Lappe v. Commissioner*, 113 F.2d 48 (5th Cir. 1940); *Doyle v. Thomas*, 30 A.F.T.R. 1591 (N.D. Tex. 1942); *Townsend v. Thomas*, 30 A.F.T.R. 1534 (N.D. Tex. 1942); *Estate of Moody*, 42 B.T.A. 987 (1940); *Treas. Reg. § 20.2042-1(b)* (1958); *Rev. Rul. 48, 1953-1 Cum. Bull. 392*; *CCH Fed. Est. & Gift Tax Rep. ¶ 1310*.

³⁸ 155 Tex. 413, 288 S.W.2d 481 (1956). See note 7 *supra*.

³⁹ See note 7 *supra*. It follows, therefore, that the wife has no vested interest in the proceeds under this theory. See note 4 *supra* and accompanying text. Property in which the wife has no vested interest under state law is considered to be the husband's separate property for estate taxation purposes. *Talcott v. United States*, 23 F.2d 897 (9th Cir.), *cert. denied*, 277 U.S. 604 (1928); *Hall, op. cit. supra* note 1, at 68; see *Swift, op. cit. supra* note 1, at 692, 721.

⁴⁰ *Commissioner v. Harmon*, 323 U.S. 44, 46-47, 52-53, 56-57 (1944); *Hopkins v. Bacon*, 282 U.S. 122 (1930); *Poe v. Seaborn*, 282 U.S. 101, 110-11 (1930); *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 249 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); *Treas. Reg. § 20.2042-1(b)(2)* (1958); see *Morrison, Life Insurance—Tax Aspects*, in *Texas Institutes*, 2 *Business & Family Planning* 142, 143-48 (1957).

a revocable beneficiary, the husband, as manager of the community,⁴¹ parts with no control over the proceeds right, which remains in the community; at any subsequent time he is free to name another beneficiary. For gift taxation purposes, therefore, such designation of a beneficiary is an incomplete transfer of the proceeds right and hence not taxable.⁴² Only upon the death of the insured spouse is the transfer completed. At that time one-half of the proceeds is included in the insured spouse's estate.⁴³ If the surviving spouse is the beneficiary, there are no additional taxation consequences because a completed transfer of only the insured spouse's one-half interest in the proceeds is effected by his or her death.⁴⁴ If the beneficiary is a third party, however, the insured spouse's death also completes a transfer of the surviving spouse's one-half interest in the proceeds, which transfer constitutes a taxable gift as to the surviving spouse.⁴⁵

C. Problems

At least two major problems may arise in the operation of the theory of *Brown v. Lee*. First, inherent in the recognition of the proceeds right as property is the necessity in certain interspousal situations of implying a gift of one spouse's community proceeds interest in order to effectuate completely a designation of the other spouse as beneficiary.⁴⁶ The recent decision of *Moss v. Gibbs*⁴⁷ has emasculated the theory of an implied gift of community property between spouses, albeit in a creditors' rights situation. That case must be restricted to its facts or otherwise reconciled with the import of the instant decision.

⁴¹ See note 27 *supra*.

⁴² CCH Fed. Est. & Gift Tax Rep. ¶ 3200.50.

⁴³ See note 37 *supra* and accompanying text.

⁴⁴ Since the surviving beneficiary spouse retains his or her vested community interest in the proceeds, there can be no taxable transfer as to that one-half. *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 252-55 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); see also *Stapf v. United States*, 189 F. Supp. 830, 833 (N.D. Tex. 1960), *modified on other grounds*, 309 F.2d 592 (5th Cir. 1962), *rev'd on other grounds*, 375 U.S. 118 (1963); *J.J. Perkins*, 1 T.C. 982 (1943); Rev. Rul. 48, 1953-1 Cum. Bull. 392.

⁴⁵ *Commissioner v. Chase Manhattan Bank*, *supra* note 44, at 255; Treas. Reg. § 25.2511-1 (h) (9) (1958). However, the designation of an irrevocable beneficiary is a completed transfer from its inception and is taxable to the donor at that time. Treas. Reg. § 25.2511-1 (h) (8) (1958).

⁴⁶ This problem will arise, for example, if the husband uses community funds to purchase a policy on the wife's life and names himself the beneficiary (assuming the wife is not thereby defrauded, see note 27 *supra*); or if the wife, lacking community managerial capacity, purchases or names herself the beneficiary of a community policy on the husband's life. To say that in these situations the wife acts either as an agent of the husband or as a subagent of the community will not do, for the essence of an agency relationship, at least as to its inception, is its consensual character.

⁴⁷ ___ Tex. ___, 370 S.W.2d 452 (1963), noted in 15 *Baylor L. Rev.* 193 (1963) (mere noninterference by the husband with the wife's business activities cannot establish a gift of the husband's community interest in profits realized therefrom).

Second, in certain insurance transactions in which the spouses are found to have exchanged their property interests,⁴⁸ the recognition of the proceeds right as property prior to maturity may conflict with the rule of *Hilley v. Hilley*.⁴⁹ Although its full impact is not presently known, *Hilley v. Hilley* at least holds that community property cannot be transformed into a joint tenancy with right of survivorship without first complying with the applicable partition statutes.⁵⁰ According to the Texas Supreme Court, in a situation in which such a transformation is attempted, "there is no gift but an attempted transfer of a survivorship right or interest from each spouse to the other for a valuable consideration";⁵¹ thus, the community property retains its character because under the Texas Constitution⁵² and the applicable community property statutes,⁵³ the spouses lack the power to change community property into the separate property of one spouse by a contract attempting to create a joint tenancy with right of survivorship. A subsequent amendment to section 46 of the Texas Probate Code⁵⁴ by its own terms overrules the *Hilley* case, but its constitutionality is questionable if literally construed.⁵⁵

Although *Hilley v. Hilley* involved corporate stock, the decision therein is written in such broad language that certain interspousal life insurance transactions supported by consideration almost certainly will fall within its ban. Usually, the receipt by a beneficiary other than the insured's estate of the proceeds from a life insurance policy consummates a gift transaction, *i.e.*, a voluntary transfer of

⁴⁸ That is, in situations in which a valuable consideration is found to have been given.

⁴⁹ 161 Tex. 569, 342 S.W.2d 565 (1961).

⁵⁰ Tex. Rev. Civ. Stat. Ann. arts. 4624a (1960), 881a-23 (1953).

⁵¹ *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 569 (1961).

⁵² Tex. Const. art. 16, § 15.

⁵³ Tex. Rev. Civ. Stat. Ann. arts. 4610 (1960), 4613 (1960), 4614 (1960), 4619 (1960), 4624a (1960), 881a-23 (1953).

⁵⁴ Where two . . . or more persons hold an estate . . . jointly, and one . . . joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner . . . but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained. Provided, however, that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner . . . , but no such agreement shall be inferred from the mere fact that the property is held in joint ownership. *It is specifically provided that any husband and his wife may, by written agreement, create a joint estate out of their community property, with rights of survivorship.* Tex. Prob. Code Ann. § 46 (Supp. 1961) (Emphasis on 1961 amendment added.)

⁵⁵ See Wren, *Recent Texas Statutes Affecting Estate Planning*, 15 Sw. L.J. 479 (1961); Comment, *Hailey, Hilley, and House Bill 670—A Study in Partition and Survivorship in Texas Community Property*, 15 Sw. L.J. 613 (1961).

property free of any consideration.⁵⁶ But, for example, if (1) community property is used to insure a third party's life in which the community has an insurable interest, (2) one spouse is named primary beneficiary, and (3) the other spouse is designated alternative beneficiary—undoubtedly a consideration-supported attempt to create a joint tenancy with right of survivorship between the spouses will be found; in that event the proceeds will become community property unless the spouses previously effect a statutory partition of the community property with which the policy is purchased and maintained.⁵⁷ It is even possible that consideration will be held to exist and that the same result will be reached if (1) insurance on one spouse's life is purchased with community property, (2) the other spouse is named primary beneficiary, and (3) the insured spouse's estate is designated alternative beneficiary. The *Hilley* rule in general can be criticized heavily and with good reason. More importantly, its application to community property-life insurance situations certainly would produce ludicrous results.

IV. CONCLUSION

In *Brown v. Lee* the court correctly applied the relevant statutes, including the 1957 amendment defining life insurance as property,⁵⁸ to reach a correct result on legally sound reasoning. Although the instant case must be reconciled with *Moss v. Gibbs*⁵⁹ and *Hilley v. Hilley*,⁶⁰ it now makes solid the underpinning of Texas property law for the application of the federal estate tax.⁶¹ But particularly desirable is the holding that the right to the proceeds from a life

⁵⁶ In *Hilley*, the court does not quarrel with the observation in *Edds v. Mitchell*, 143 Tex. 307, 184 S.W.2d 823 (1945), that "a life insurance policy is perhaps the best illustration of a contract for the benefit of a donee beneficiary. . . ." *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 569-70 (1961). Rather it merely overrules *Smith v. Ricks*, 159 Tex. 280, 318 S.W.2d 439 (1958), and rejects the analogy therein of the usual life insurance policy to bonds purchased with community property in joint tenancy with right of survivorship. "The 'contract' which a purchaser of bonds makes with the government does not simply provide that the securities shall become the property of the other co-owner at the purchaser's death. It stipulates that if either co-owner dies, the surviving co-owner shall be recognized as sole and absolute owner. This is nothing more than a survivorship agreement. . . . Such an agreement when made is for the mutual benefit of the contracting parties, and there is no semblance of a gift even though some third party may also agree to recognize the survivor as absolute owner." *Hilley v. Hilley*, *supra* at 570. Hence, when the problematical language of *Hilley* is reasonably construed, it is apparent that the normal life insurance situation falls outside of the scope of that decision. Here, as in other areas, the wife's lack of capacity to manage the community may present problems. See note 46 *supra* and accompanying text.

⁵⁷ See note 50 *supra* and accompanying text.

⁵⁸ Tex. Rev. Civ. Stat. Ann. art. 23(1) (1959).

⁵⁹ ___ Tex. ___, 370 S.W.2d 452 (1963); see note 47 *supra* and accompanying text.

⁶⁰ 161 Tex. 569, 342 S.W.2d 565 (1961); see note 49 *supra* and accompanying text.

⁶¹ See notes 37-40 *supra* and accompanying text.

insurance policy prior to maturity is property. Logically, it cannot be deemed anything else.⁶³ The proceeds right is inherent in and the overriding purpose of the life insurance contract. Just as the right to the principal of a promissory note at some future time, it is unequivocally the present right to a sum certain payable in the future under a contract; it is, therefore, in the nature of a chose in action. But similar to a contingent remainder, the acquisition by the beneficiary of the proceeds under such right is both indefinite in time and uncertain in occurrence. So long as the policy is maintained, however, the proceeds right must exist somewhere. In this regard, it is essential to distinguish between the property right to the proceeds itself and the nature of the beneficiary's interest in the proceeds prior to the maturity of a policy purchased with community funds. If the beneficiary has a mere expectancy—as apparently he or she has in Texas⁶³—then of necessity the proceeds right must remain in the community as the owner of the policy. However, if the beneficiary's interest is a vested property right subject to divestment,⁶⁴ the community will retain only a reversionary interest in the proceeds. Perhaps the latter will prove to be the better view of the beneficiary's interest in the proceeds because after designating a beneficiary the community⁶⁵ must take subsequent action in some form to prevent the beneficiary from receiving the proceeds. Regardless of whether held by the beneficiary or the community prior to its maturity, certainly the proceeds right itself is a present property right and not a mere expectancy.

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⁶² There is virtual unanimity of authority in characterizing a life insurance policy in its entirety as personal property in the nature of a chose in action arising out of a contract. *Burnet v. Wells*, 289 U.S. 670, 679-80 (1933); *Grigsby v. Russell*, 222 U.S. 149, 156 (1911); *Griffin v. McCoach*, 116 F.2d 261, 264 (5th Cir.), *rev'd on other grounds*, 313 U.S. 498 (1940); *Densby v. Acacia Mut. Life Ass'n*, 78 F.2d 203, 204 (D.C. Cir. 1935); *Frick v. Lewellyn*, 298 Fed. 803, 808-09 (W.D. Pa. 1924), *aff'd*, 268 U.S. 238 (1925); *In re Hamilton's Estate*, 113 Colo. 141, 154 P.2d 1008, 1010-11 (1945); *Milam v. Davis*, 97 Fla. 916, 123 So. 668, 688, *cert. denied sub nom.*, *Tiffany & Co. v. Davis*, 280 U.S. 601 (1929); *Elliott v. Metropolitan Life Ins. Co.*, 116 Ind. App. 404, 64 N.E.2d 911, 917 (1946); *Metropolitan Life Ins. Co. v. Woolf*, 138 N.J. Eq. 450, 47 A.2d 340, 342 (Ct. Err. & App. 1946); *Mondin v. Mondin*, 274 App. Div. 69, 80 N.Y.S.2d 176, 180 (Sup. Ct. 1948); *Cutter v. American Trust Co.*, 213 N.C. 686, 197 S.E. 542, 548 (1938); 12 *Appelman*, *op. cit. supra* note 26, at § 7007. Indeed, in the modern era it would seem that, prior to *Brown v. Lee*, only Texas courts failed to recognize the proceeds right of a life insurance policy as property prior to maturity.

⁶³ See note 28 *supra*.

⁶⁴ *Ibid.*

⁶⁵ Acting through its manager, the husband; see note 27 *supra*.