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Louisiana Civil Law as Applied to Life Insurance

*Leon S. Cahn**

Louisiana, alone among the states of the Union, derives its structure of private law from the civil law of France, from the same origins as the French Code Napoleon. Those states which owe their community property systems to their Spanish antecedents nevertheless take the remainder of their precedents largely from the common law.

On the other hand, in Louisiana the French civil law, as embodied in the civil code, is the background of almost every private relationship. Therefore, in treating of the effect of Louisiana law upon the rules of life insurance, it is not sufficient to consider only the community property system. Other civil law doctrines, such as those of forced heirship and other restrictions upon donations, must be taken into parallel account, since the interpretations by the courts involve the entire philosophy of the civil law.¹

And yet, although the civil code, adapted from the Code Napoleon, purports to regulate, all inclusively, the ordinary functions of property rights, nevertheless, the courts have disposed of problems involving life insurance outside the framework of the code more often than within it. Exceptions to the general civil law principles, and exceptions to these exceptions, are not uncommon in the jurisprudence.

COMMUNITY PROPERTY

As in the states tracing their origins from the Spanish law, Louisiana considers as community property everything acquired

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1. See Dart, *The Place of the Civil Law in Louisiana*, 4 *Tulane L. Rev.* 163, 172 (1930). For a historical analysis of the Louisiana sources, see Nabors, *Civil Law Influences Upon the Law of Insurance in Louisiana*, 6 *Tulane L. Rev.* 369 (1932); Nabors, *Life Insurance Problems Under the Community Property System*, 6 *Tulane L. Rev.* 515 (1932).

during marriage, except that received by inheritance or gift to one of the spouses alone.²

And yet, strangely enough, life insurance proceeds are not community property except under certain sets of facts. Seventy-five years ago the Supreme Court of Louisiana made it clear that an insured could name any beneficiary he saw fit or change the beneficiary, if permitted by the insurer.³ The proceeds of life insurance payable to the wife and children of the insured are no part of the matrimonial community.⁴ Where the wife receives proceeds of a policy as beneficiary, she does so only under the terms of the contract, and not because of any marital right.⁵ Nor, unless the policy is made payable to the estate of the insured, do the proceeds fall into his succession in any manner.⁶

The keystone of the jurisprudence holding life insurance no part of the community nor of the estate of the deceased is, oddly enough, based upon an interpretation of a codal provision unconnected with the rules of community property. The civil code prohibits those who have lived together in open concubinage from making to each other gifts or legacies of any real estate, and of personalty beyond ten per cent of their estate.⁷ This limitation applies regardless of the marital status of the donor and

2. Art. 2402, La. Civil Code of 1870: "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

For a discussion at length of the Louisiana community property system, in comparison with that of other states, see Daggett, *The Community Property System of Louisiana* (1945).

3. Succession of Hearing, 26 La. Ann. 326 (1874).

4. Tutorship of Crane, 47 La. Ann. 896 (1895).

5. Kelly v. Kelly, 131 La. 1024, 60 So. 671 (1913); Douglass v. Equitable Life Assurance Society, 150 La. 519, 90 So. 834 (1922); Succession of Crouch, 8 La. App. 86 (1928).

6. Sherwood v. New York Life Ins. Co., 166 La. 829, 118 So. 35 (1928).

7. Art. 1481, La. Civil Code of 1870: "Those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.

"Those who afterwards marry are excepted from this rule."

can be urged by any heir. In *New York Life Insurance Company v. Neal*,⁸ the insured had abandoned his wife, who later divorced him, and lived with a concubine; shortly before his death he took out insurance on his life in favor of his mistress. On his death, his legitimate children attacked the designation of the beneficiary, and the court held that they were entitled to nine-tenths of the proceeds. This decision, contrary to all of the earlier jurisprudence holding insurance payable to a named beneficiary unaffected by the rules of the civil law, remained the last word of the supreme court for twenty-five years, although in the meantime it was criticized in a lower appellate court.⁹ Then, in 1930, the supreme court had occasion to restudy the *Neal* decision in *Sizeler v. Sizeler*.¹⁰ After reviewing the earlier jurisprudence,¹¹ the court specifically overruled the *Neal* holding and reestablished the doctrine as to proceeds payable to a named beneficiary "that the policy or its proceeds never formed any part of the estate of the deceased."

Guided by the doctrine of the *Sizeler* decision, the courts of Louisiana have repeatedly maintained the named beneficiary as entitled to the proceeds, against attacks by the surviving spouse; a widow has no right against the proceeds payable to her husband's mother,¹² to his illegitimate children,¹³ or to his concubine.¹⁴

Where the right to change the beneficiary is reserved in the contract, no beneficiary acquires any vested right in the policy until the death of the insured,¹⁵ and the wife has no greater vested interest than any other beneficiary. When she receives the proceeds as last named beneficiary, she does so by the terms of the policy and for the benefit of her separate estate, but so long as her husband lives, her "interest was defeasible, in that

8. 114 La. 652, 38 So. 485 (1905).

9. *Ticker v. Metropolitan Life Ins. Co.*, 11 Orl. App. 55 (1914).

10. 170 La. 128, 127 So. 388 (1930).

11. See authorities cited at length in *Sherwood v. New York Life Ins. Co.*, 166 La. 829, 118 So. 35 (1928).

12. *Pearce v. National Life & Accident Ins. Co.*, 12 La. App. 608, 125 So. 776 (1930).

13. *Chance v. Grand Lodge, Knights of Pythias*, 13 La. App. 362, 125 So. 894 (1930).

14. *Grayson v. Life Ins. Co. of Virginia*, 144 So. 643 (La. App. 1932).

15. *Succession of Hearing*, 26 La. Ann. 326 (1874); *Alba v. Provident Savings Life Assurance Society*, 118 La. 1021, 43 So. 663 (1907); *Dorsett v. Thomas*, 152 La. 60, 92 So. 734 (1922); *Berry v. Franklin State Bank*, 186 La. 623, 173 So. 126 (1937).

the husband might change the beneficiary and thereby defeat it."¹⁶

INSURANCE PAYABLE TO ESTATE

A different analysis is necessary where the policy is payable to the estate of the insured. The proceeds of such a policy do form part of his estate at death, and whether such proceeds fall into the community property or form part of the separate estate of the insured, depends upon whether the contract was made during the marriage or when the insured was single, and the marital status of the insured at the time of his death is of no consequence. Thus, if the policy is taken out during marriage, payable to the executors, administrators and assigns of the husband, and the wife survives him, the proceeds fall into the community, and the wife is entitled to one-half.¹⁷ Even if the wife predeceases the insured husband, such insurance is held to fall into the community which had existed, and the wife's heirs are entitled to her half of the proceeds.¹⁸ And, if the spouses have become divorced, proceeds of insurance taken out during marriage, payable to the insured's executor, are still part of the dissolved community, of which the divorced wife may claim half.¹⁹

On the other hand, if the policy has been taken out before marriage, payable to the estate of the insured, the proceeds belong to his separate estate and not to the community, even though he was married at the time of his death.²⁰

16. *Douglass v. Equitable Life Assurance Society*, 150 La. 519, 90 So. 834 (1922).

17. *Succession of Buddig*, 108 La. 406, 32 So. 361 (1902).

18. *Succession of LeBlanc*, 142 La. 27, 76 So. 223 (1917).

Here, one policy was originally payable to the wife, and, after her death, changed to insured's estate. Other policies were issued payable to the wife, or, if she did not survive the insured, to his estate, and were left unchanged. The court drew no distinction, treating all proceeds as payable to the estate, by the contracts.

19. *Berry v. Franklin State Bank*, 186 La. 623, 173 So. 126 (1937).

This case illustrates the emphasis which the supreme court places upon the naming of a beneficiary, and the reservation of the right to change. The policy was originally made payable to the wife herself, and later changed to the estate of the insured. Had the husband changed the beneficiary to name a third party, instead of his estate, the wife would have had no claim to the proceeds. See cases cited note 14, *supra*. All cases seem to turn on the question of the beneficiary at the moment of death. If it is a certain person, either originally named or to whom a change is made, that beneficiary takes the proceeds to the exclusion of all others. If the ultimate beneficiary is the insured's estate, the date of issuance of the policy is consulted to determine whether or not the proceeds are community property.

20. *Succession of Moseman*, 38 La. Ann. 219 (1886); *Succession of Verneuille*, 120 La. 605, 45 So. 520 (1908); *Succession of Lewis*, 192 La. 734, 189 So. 118 (1939). In the latter case, the insurance was payable, originally, to

EFFECT OF PAYMENT OF PREMIUMS

As under any community property system, the premiums on life insurance policies are almost always paid out of community funds. This source of the premiums does not in itself, however, give the surviving spouse or the community any right to the proceeds of the policy as a death claim. The basis of this principle was established in several early cases in which creditors of the husband, who died insolvent, attempted to have proceeds made payable to the wife held to be community property and subject to their claims; the court rejected the theory that the payment of the premiums out of community funds made the sums received on the policies part of the community property, and maintained the proceeds belonged separately to the wife as named beneficiary.²¹ Somewhat later it was held that the wife, as beneficiary under such policy, was not even accountable to the husband's creditors for the premiums paid from community sources.²² The logical development of this theory resulted in the denial to the wife, and to the community, of any interest in the proceeds by reason of premium payments out of the community.²³

However, accountability for the amount of the premiums paid on policies payable to the estate, as distinguished from any interest in the proceeds, has been clearly established. Where the policy was taken out before marriage and made payable to the estate of the insured, the proceeds fall, as has been previously seen, into the separate estate of the insured, but his estate owes the community a refund of any premiums paid during the marriage.²⁴ When the insurance is taken out during the marriage and made payable to the estate of the insured, the prior death of the wife does not take the proceeds out of the community; they belong one-half to the estate of the husband and one-half to the estate of the wife, but the wife's heirs owe the estate of the husband one-half of the premiums paid by the husband subsequent

the insured's father, or, if he did not survive the insured, to the estate. Here, as in *Succession of LeBlanc*, 142 La. 27, 76 So. 223 (1917), the court considered the proceeds payable to the estate, as beneficiary at the moment of death, under the terms of the policy.

21. *Succession of Clark*, 27 La. Ann. 269 (1875); *Succession of Bofenschen*, 29 La. Ann. 711 (1877).

22. *Succession of Brownlee*, 44 La. Ann. 917 (1892).

23. *Succession of Verneuille*, 120 La. 605, 45 So. 520 (1908); *Succession of Lewis*, 192 La. 734, 189 So. 118 (1939).

24. *Ibid.*

to his wife's death and out of his separate estate.²⁵ The same rule applies where the marriage is dissolved, not by the death of the wife, but by divorce; the wife, who is entitled to one-half of the proceeds of the contract taken out during marriage and payable to the husband's estate, must refund to the husband's heirs one-half of the premiums paid subsequent to the divorce.²⁶

The supreme court has not yet had an occasion to fix the accountability for premiums paid out of community funds where the policy is in favor of a named beneficiary, other than the wife. It has been established that where the insurance is payable to the wife and the premiums come from community sources, the amounts so paid are considered as a donation by the husband, in favor of the wife, to the extent of his community half thereof.²⁷ In a situation where the husband takes out insurance on himself and makes it payable to a third party, using community funds for the premiums, it will probably be held that the separate estate of the husband will be indebted to the community for the funds so used. The civil code designates the husband as head and master of the community, but makes him, on the dissolution of the marriage, accountable for any donations of community property made to the disadvantage of the wife.²⁸ It should, therefore, follow that premiums paid on this type of insurance would be construed as donations to her detriment and subject to restitution out of the husband's estate. An exception would probably be recognized in the case of insurance payable to children of the marriage, since the husband may make a donation out of community funds for their benefit.²⁹

25. Succession of LeBlanc, 142 La. 27, 76 So. 223 (1917).

26. *Berry v. Franklin State Bank*, 186 La. 623, 173 So. 126 (1937).

27. *Kelly v. Kelly*, 131 La. 1024, 60 So. 671 (1913).

28. Art. 2404, La. Civil Code of 1870: "The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

"He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article, embraces all titles wherein there is no direct, material advantage to the donor.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud."

29. *Ibid.*

INSURANCE ON WIFE

It has been so far presupposed that the insurance under discussion was upon the life of the husband, taken out by him, and paid for by him out of community money. Whether a different result as to the accountability for premiums would come about where the wife takes out insurance on her life in favor of a third party beneficiary, and uses community property for the premium payments, has not been considered by the courts. One writer³⁰ suggests that it is possible to consider the half of the proceeds representing the wife's community share as an effective gift to the beneficiary but that, if the husband's consent to the use of the community funds could be proved, he would have no claim to the proceeds. It might be more consistent to recognize that the wife has the same right as the husband to contract for insurance upon her life, payable to whom she pleases and that, if she uses community funds for this purpose, she, or her separate estate, is accountable for the amounts paid in premiums, exactly as in the case of insurance by the husband. Of course, if it is shown that the husband participated, expressly or impliedly, in the payment of the premiums, such expenditure would probably be considered as gifts by the husband for the benefit of the wife's separate estate to the extent of his half interest in the funds.

FEDERAL ESTATE TAX

Other than liability for restitution of premiums, as above discussed, the only effect that payment of premiums out of community funds appears to have produced is in connection with the proportion of the proceeds of the policy subject to the Federal Estate Tax. In *deLappe v. Commissioner*,³¹ it was held that only one-half of the proceeds of policies payable to named beneficiaries was taxable under the Internal Revenue Code³² where the premiums had been paid out of community funds, since the spouse of the insured was held to have paid half of the premiums. The effect of this decision was nullified by the Revenue Act of 1942, taxing the entirety of all community interests.³³ The Revenue Act of 1948,³⁴ reinstating the community property division for estate tax purposes, has undoubtedly revived the effect of the *deLappe* decision.

30. Nabors, *supra* note 2, at 546.

31. 113 F. 2d 48 (5th Cir., 1940).

32. 26 U.S.C.A. § 811(g) (1948).

33. 56 Stat. 941, 942, 944, 26 U.S.C.A. §§ 811(d), (e), (f), (g) (1948).

34. 62 Stat. 116, 123, 26 U.S.C.A. § 811(d)(5), (e)(2), (g)(4), (j) (1948).

CASH SURRENDER VALUE

One question which has not had the attention of the Louisiana courts is the disposition of the cash surrender value of policies taken out during the marriage and paid for with community funds. If the husband is the owner of policies issued during the marriage, regardless of to whom payable, it would seem that all values received upon surrender during the existence of the marriage would fall into the community, as the surrendered policies would then lose their sui generis character, and the values received would become part "of the estate which they might acquire during the marriage."³⁵ A different problem arises when the community is dissolved by the death of the wife before that of the insured husband, or by divorce. Is the cash surrender value of the policies to be treated as a community asset at the moment of such dissolution? In the only recorded case where such a question might have arisen, the issue was not raised nor was it considered by the Louisiana Supreme Court. Following a divorce, the wife was ordered to deliver to the husband policies in which she was named as beneficiary, but in which the right to change the beneficiary was reserved to him. The court based its holding solely upon the theory that the beneficiary of a life insurance policy has no vested interest in the contract where the right of change is reserved. No contention was raised as to accountability for the cash surrender value.³⁶ In the light of what has been hereinabove considered, it is probable that the cash surrender value would belong to the owner of the policy who had the right to change the beneficiary, subject to accountability for the premiums paid during the marriage in accordance with the decisions previously discussed.

For federal estate tax purposes, however, the cash surrender values of policies on the life of the husband are treated as part of the community property. Thus, when the insurance was payable to the husband's estate, and the wife died before him, the board of tax appeals has held that the cash surrender value at the time of her death was a fund, realizable in cash at the will of the insured, created by premiums paid during marriage, and, therefore, community property, one-half of which was taxable in her estate.³⁷

35. Art. 2404, La. Civil Code of 1870.

36. *Pollock v. Pollock*, 164 La. 1077, 115 So. 275 (1928).

37. *Estate of Louisa M. Carroll v. Commissioner*, 29 B.T.A. 11 (1933). See 26 U.S.C.A. § 811 (1948).

The Bureau of Internal Revenue takes the further position, in practice, that, even where the policy is made payable to a named beneficiary, one-half of the cash surrender value falls into the wife's estate when she predeceases her insured husband, on the theory that one-half the premiums were paid out of her share of the community, relying on the holding in *deLappe v. Commissioner*.³⁸

The Bureau of Internal Revenue does, nevertheless, recognize one factor of deduction, after taxing half of the cash surrender value in the wife's estate. If the insured husband dies within five years after the death of his wife, this one-half of the cash surrender value is deductible from the proceeds includible in his estate, as property previously taxed.³⁹

FORCED HEIRSHIP AND COLLATION

Turning now from the community property problems, the Louisiana underwriter and practitioner must consider other principles inherited from French sources. Among these are the doctrines of forced heirship and of collation, which affect part, although not all, of the scope of insurance. These rules limit, to certain degrees, the flexibility of life and annuity contracts.

"Forced heirs" are those relatives who may not be deprived of certain portions of one's estate reserved for them by law.⁴⁰ Children must receive a minimum share of their ancestors' prop-

38. There is considerable doubt as to the soundness of this treatment of such values for estate tax purposes, particularly when the policy is payable to other beneficiaries than the estate of the husband. For example, since the wife has no vested interest in the insurance as long as the husband lives and reserves the right of change, she could have no power to dispose of any of the cash surrender value by will, nor could her intestate heirs claim it was part of her estate. The conflict between the approach of the Louisiana courts, in applying the principles of community property rights at civil law, and that of the federal courts, in enforcing tax liability, is not unusual. Compare *Succession of Wiener*, 203 La. 649, 14 So. 2d 475 (1943) and *Fernandez v. Wiener*, 326 U.S. 340 (1945).

39. 26 U.S.C.A. § 812(c) (1948). The amendment of this section by the Revenue Act of 1948 disallows the deduction on property received from a prior decedent who was the decedent's spouse. However, unless the insured husband was the heir of his predeceased wife's share in the community, he would not have received anything from her estate, and this amendment ought not to operate against his estate except when he had been such heir.

40. Art. 1495, La. Civil Code of 1870: "In the cases prescribed by the two last preceding articles, the heirs are called forced heirs, because the donor can not deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them."

(Disinherison, Articles 1617-1624, is restricted to limited causes, and is so difficult to enforce that, for the purposes of this discussion, it can be excluded from consideration.)

erty.⁴¹ If a person leaves no children, but his parents survive him, they become forced heirs for a portion of the estate.⁴² The share reserved to the forced heir is known as his "legitime."⁴³

Collation is the exercise of the doctrine that equality should be naturally observed between children and other lawful descendants in the estate of an ancestor;⁴⁴ those who have received gifts inter vivos in advance of their share must account for the value thereof in the division of the estate,⁴⁵ unless the donor has expressed his intention that the gift was an extra portion.⁴⁶ Even such declared extra portion may not encroach upon the legitime of the other forced heirs.⁴⁷

True, it has been held that neither of these two doctrines, forced heirship nor collation, applies to the *proceeds of life insurance policies*.⁴⁸ The naming of a life insurance beneficiary, and the exclusive right of such beneficiary to the proceeds, is thus not interfered with by these rules. But there are other problems raised by these aspects of the civil law; by the same token, opportunities for the intelligent use of life insurance for special purposes are afforded.

41. Art. 1493, La. Civil Code of 1870: "Donations inter vivos or mortis causa can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number.

"Under the name of children are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent."

Forced heirship is so embedded in Louisiana legal philosophy that the legislature, which otherwise has power to amend the civil code, may not pass any law abolishing forced heirship. La. Const. of 1921, Art. IV, § 16.

42. Art. 1494, La. Civil Code of 1870: "Donations inter vivos or mortis causa can not exceed two-thirds of the property, if the disposer, having no children, leave a father, mother or both."

For a discussion of the historical background of both forced heirship and collation, see Nabors, *supra* note 2, at 387.

43. *Cox v. Von Ahlefeldt*, 50 La. Ann. 1266, 23 So. 959 (1898).

44. Art. 1229, La. Civil Code of 1870.

45. Art. 1227, La. Civil Code of 1870.

46. Art. 1231, La. Civil Code of 1870.

47. *Ibid.*

48. *Sherwood v. New York Life Ins. Co.*, 166 La. 829, 118 So. 35 (1928), where it was said: "It is the settled jurisprudence of this court that life insurance policies are neither donations inter vivos nor mortis causa, and that the provisions of the Civil Code relative to donations and collation will not be applied to such policies." Citing numerous earlier cases. The Louisiana legislature, by Act 292 of 1940, enacted this doctrine into statutory law, declaring that donations inter vivos of life insurance policies, and the naming of beneficiaries therein, whether revocably or irrevocably, are not governed by any of the provisions of the civil code relative to the form of donations. This provision was carried, verbatim, into the 1950 Revised Statutes as Title 22, Section 1521.

The problems should be first considered. It can be anticipated that, before long, it will be contended that the *premiums* paid on life contracts, as distinguished from the *proceeds* of the policies, are gifts in favor of the beneficiary and, accordingly, subject to the rules of forced heirship and of collation. Simple illustrations will demonstrate the problem. Suppose a father, having three children, takes out life insurance payable to a third person and uses all of his resources to pay the premiums, so that he leaves no estate at his death. Since, as previously pointed out,⁴⁹ premiums paid are considered as gifts *inter vivos*, it could be argued by the children that these gifts exceeded the one-third of his property of which the father had the free disposition, and that the beneficiary must return to the forced heirs two-thirds of the premiums paid.⁵⁰ Or, assume that this father makes this insurance payable to one favored child, again leaving nothing else at his death. It could be contended by the unfavored children that the premiums paid were gifts to the favored child in advance of his share, and that the amount of the premiums should be returned by him to the estate for collation, that is, for equal division among the three children.⁵¹

Even though no case might arise where all the father's means were consumed in premium payments under the circumstances as described, it might very well be that a sufficiently substantial portion of his resources could be involved to justify the proportionate reduction called for by the civil code. While it will be interesting to observe the development of the jurisprudence if and when an appropriate case reaches the courts, the careful estate planner will use caution to avoid supplying the test case.

INSURANCE FOR SPECIAL PURPOSE

An opportunity for the use of life insurance to meet a special purpose is presented by the obligation upon a Louisiana citizen to observe the rules of forced heirship in disposing of his estate by gift or by will; examples of this application of insurance occur fairly frequently in the experience of lawyers and underwriters. Let it be imagined that a small merchant or manufacturer has practically everything he owns in his business, as is so

49. *Kelly v. Kelly*, 131 La. 1024, 60 So. 671 (1913).

50. Gifts that exceed the portion which the donor may give freely, the "disposable portion," are not null, but merely reducible. Art. 1502, La. Civil Code of 1870.

51. Art. 1227, La. Civil Code of 1870.

often the case. He has two children, a son who works with him and a daughter of marriageable age. He is anxious that his son inherit the business, as he is best fitted to continue it successfully, provided he is not interfered with by some future brother-in-law. The father could not bequeath the business to the son alone as he would thereby leave nothing for the daughter, who is entitled to her legitime. Life insurance can solve the problem; if sufficient insurance is taken by the father, made payable to his estate, he can, by his will, leave the business to the son and the proceeds of the insurance to the daughter. It would not suffice to make the insurance payable directly to the daughter; proceeds of insurance in favor of a child would not be counted a part of the child's legitime.⁵² But insurance payable to the estate forms part of the estate;⁵³ the proceeds can be disposed of by will and the child receiving a legacy thereof must apply it on his legitime. In making the insurance payable to the estate, there is necessarily sacrificed the exemption from Louisiana inheritance tax on policies payable to named beneficiaries⁵⁴ and the exclusion of one-half of such insurance from the federal estate tax where the premiums are paid from community funds, under *deLappe v. Commissioner*. But the careful attorney or underwriter, who is making the estate plan, will point out the tax factor to the prospective insured, so that it can be determined whether the advantage of the entire program outweighs the added tax cost.

One caution must be observed in ascertaining the amount of insurance needed for such a purpose as has been described. Since insurance payable to the estate, when taken out during marriage, falls into the community,⁵⁵ it must be remembered that one-half of the proceeds will be the property of the wife and not subject to the testamentary disposition of the father's will. Therefore, the plan would require that twice the amount of insurance needed to furnish any child's legitime must be purchased, if the insured is married when the policy is issued. If the father in

52. *Sherwood v. New York Life Ins. Co.*, 166 La. 829, 118 So. 35 (1928).

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

54. Life insurance payable to a designated beneficiary is not an inheritance, and, therefore, not subject to tax. *Succession of Hedden*, 140 So. 851 (La. App. 1932). But insurance payable to the estate is part of the estate, inherited as such, and subject to inheritance tax. *State v. Succession of Brewer*, 190 La. 810, 182 So. 820 (1938).

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

question is divorced or is a widower at the time, the single amount of insurance needed would suffice.

ANNUITY CONTRACTS

The discussion, up to this point, has been directed solely to life insurance. Recent developments in the Louisiana jurisprudence have laid down an entirely different treatment for annuity contracts. Until 1942 it had been assumed in ordinary practice that annuities, whether originally purchased as such or as the result of conversions of life policies, were subject to the same rules of interpretation as those pertaining to life insurance. However, a decision of the supreme court in *Succession of Rabouin*,⁵⁶ completely differentiated the treatment of annuities. The deceased carried a number of annuity contracts providing that any unpaid balance of the consideration at his death was payable to one of his children. His will also left to this child the portion of his estate of which he was permitted to dispose, in addition to her legitime as forced heir. The other children attacked the designation of the favored child as beneficiary to receive the terminal refund, contending that this value formed part of their father's estate, and that they were entitled to their legitime therein. The court rejected the beneficiary's contention that the proceeds of the annuity contract were similar to those of life policies. It was pointed out that while the proceeds of insurance to a named beneficiary does not come into existence during the lifetime of the insured and thus form no part of his estate, payment under an annuity contract, on the contrary, is of a fund which "belonged to the annuitant during his lifetime." The court, therefore, held that the unpaid value in the contracts was part of the estate of the insured for the purpose of computing the legitime of his forced heirs.

As a logical consequence of the *Rabouin* holding, the supreme court in 1945 decided, in *Succession of Pedrick*,⁵⁷ that the balance due under a refund annuity contract was also part of the decedent's estate for the purpose of inheritance taxation, even though payable to a designated beneficiary.

In a per curiam following the opinion in the *Pedrick* case, the court emphasizes that these two decisions do not propose to hold anything beyond the two issues presented for decision, that

56. 201 La. 227, 9 So. 2d 529 (1942).

57. 207 La. 640, 21 So. 2d 859 (1945).

the balance due under the annuity contract was part of the annuitant's estate subject to the rules of forced heirship and subject to inheritance tax. However, it can be anticipated that the doctrines announced in the two opinions may be extended, when the cases arise, to cover other situations. For instance, the rules of community property might easily be applied to the balance due on a refund annuity contract when the contract was taken out during the marriage. Since the fund "belonged to the annuitant during his lifetime," it would have been, as to the spouses, part "of the estate which they may acquire during the marriage."⁵⁸ Thus, if the beneficiary named to receive the unpaid balance of the consideration at the annuitant's death was anyone other than his estate or his wife, the wife would probably be able to claim half of the refund as part of her community interest.

The rules of collation might also be applied to the designation of one of the annuitant's children to receive the terminal refund, even where such designation does not represent a gift in excess of the disposable portion as was the situation in the *Rabouin* case. If the annuitant's estate, outside of the annuity refund, is sufficiently large, it might very well be that the children not participating in the contract would receive their legitime out of other assets. But the designation of one child as the beneficiary of the contract refund would be an advantage in his favor over his brothers and sisters, and unless such designation was interpreted by the court as an expression of the parent's intention that this child receive the amount as an extra portion, he might be required to collate the proceeds with his co-heirs, that is, to return it to the mass of the estate for equal division. Of course, the parent could, by his will or otherwise, express his intention that the fund is not to be collated.⁵⁹

PENSION TRUSTS

Problems similar to those arising from the designation of beneficiaries to receive the unpaid balances of annuity contracts will undoubtedly affect the settlement of amounts due under pension plans and pension trusts, on the death or the divorce of an employee. To the extent that the benefits under such programs can be considered as life insurance, strictly speaking, the rules applicable to life contracts, considered hereinabove, would

58. Art. 2402, La. Civil Code of 1870.

59. Art. 1231, La. Civil Code of 1870.

probably govern. Thus the designation of a beneficiary of proceeds definable as life insurance would not be affected by any of the rules of the civil code pertaining to community property, forced heirship, collation and other restrictions upon the insured. But, to the extent that the benefits represent the equivalent of an annuity, it is likely that the doctrines laid down in *Succession of Rabouin* and *Succession of Pedrick*, and the probable extensions thereof, would apply with full force. And it is likely that no distinction would be drawn between funds created by the employee's contributions and those arising from payments by the employer. In the latter case, since the employer's share of the cost is assumed in consideration of the employee's services, it ought to follow that the employee thereby is receiving additional earned compensation for his efforts, representing "produce of the reciprocal industry and labor of both husband and wife,"⁶⁰ and, therefore, community property. The pension amount, or other benefit, paid to the employee during his lifetime would be clearly community; any unpaid balance to his credit at his death should, by the same token, form part of the community property of which his wife would be entitled to half, and the other half, falling into his estate, would most likely be subject to the rules of collation and forced heirship, as well as inheritance tax.

It would, therefore, well behoove attorneys and underwriters setting up pension plans, whether by pension trusts or otherwise, carefully to scrutinize the designation of any beneficiary other than the employee's wife or estate, and to inquire into the marital and family status of any employee proposing to designate any other beneficiary, unless the fund in question is clearly identifiable as nothing other than the life insurance, payable only at death and based on some accepted mortality expectation. Group insurance, for example, providing nothing beyond death benefits, would be free of any of the limitations of the civil code.

INSURER PROTECTED

As to all of the various problems which have been discussed, the insurance company, whether under life policies or annuity contracts, could hardly find itself involved in any controversy that might arise, because of recent Louisiana legislation establishing facility of payment rules. Payment by the insurer, whether

60. Art. 2402, La. Civil Code of 1870.

on life or endowment policy of annuity contract, to the person designated therein, fully discharges the insurer, unless, before payment is made, the insurer has received at its home office written notice of an adverse claim.⁶¹ If notice of such adverse claim is received before payment under the terms of the contract is made, the insurer's only safe course would then be to interplead the claimants and deposit the disputed fund in the registry of the court.

It is thus seen that the underwriter can hardly be in jeopardy by reason of the conflicts which may arise under the various circumstances discussed in this article.⁶²

SUMMARY

1. Life insurance *proceeds* payable to a designated beneficiary are no part of the estate, do not constitute community property, and are subject to no restrictions (assuming an insurable interest) except the provisions of the policy. If the right to change the beneficiary is reserved, no beneficiary has any vested interest in the policy during the insured's life.

2. Life insurance *proceeds* payable to the estate, whether by reason of such designation or of the prior death of the named beneficiary, fall into the estate of the insured. If such policy is issued during the marriage, the proceeds are community; if the policy is taken out when the insured is unmarried, the proceeds are part of his separate estate, notwithstanding a subsequent marriage.

3. Payment of premiums out of separate or community funds does not affect the right to the *proceeds* of life insurance.

4. Where the *proceeds* of life insurance do not go to the wife or to the community, the wife has a claim for reimbursement of one-half of the premiums paid from community funds.

5. The ownership of the cash surrender value, whether separate or community property, upon the prior death of the

61. La. R.S. (1950) 22:643, re-enacting the Insurance Code of 1948, La. Act 195 of 1948.

62. The facility of payment statute (*supra* note 61) does not purport to relieve the insurer of its responsibilities under the Louisiana inheritance tax laws, where the proceeds are taxable, as in the case of life insurance payable to the estate, and the refund values in annuity contracts. See Purvis, *The Louisiana Insurance Code and Life Insurance*, 24 *Tulane L. Rev.* 168, 175 (1949). The procedural steps to comply with the requirements of the inheritance tax law, La. R.S. (1950) 47:2416, are probably familiar to all home office counsel.

insured's wife, or upon divorce, has not been established by the courts of Louisiana. The federal taxing authorities hold such cash surrender value to be community property, for estate tax purposes.

6. Children and other forced heirs have no right to the *proceeds* of life insurance, except as they form part of the estate when payable to the estate. Forced heirs probably are entitled to recover from a beneficiary that proportion of the premium paid which represents gifts by the insured in excess of the disposable portion of his estate, and children may have the right to demand collation of such premiums among themselves when one of them is favored over the other by designation as the beneficiary.

7. Life insurance can be utilized to advantage, in estate planning, to provide an addition to the insured's estate to satisfy the shares of forced heirs, and permit the bequest of other property as the insured might think best.

8. Refund values in annuity contracts form part of the estate of the annuitant, at least insofar as the rights of forced heirs and liability for inheritance tax are concerned. It is probable that such refund values would also be declared community property when the annuity is taken out during marriage.

9. Benefits under pension plans and pension trusts would probably follow the respective rules applicable to life insurance and to annuities, to the extent that they partake of the characteristics of the one or the other.

10. The facility of payment statute will protect the insurer against adverse claimants when no notice of such claims is received before payment. The estate planner, therefore, need not concern himself with safeguarding the insurer, but should guide the insured in planning his program so as to achieve the best possible results and avoid the occasion for litigation within his family after his death.