
Change of Beneficiary Clauses and their Interpretation

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play in the sand piles adjoining the pond. The court held that the defendant would not be held liable even if the pond was an attractive nuisance for the trespass was not induced by the allurements of the pond. The court went on to say that it is necessary that the dangerous condition be so located as to attract children from some place where they may be expected to be, and that the defendant could not be held liable for a dangerous condition which could only be found by children going upon his premises as trespassers.

What then is the conclusion to be reached after a study of the Illinois decisions? It seems that the Illinois courts have been reluctant to follow the negligence theory, which insists that the element of attraction should not be essential in determining liability. The allurements theory of the *Burke* case remains strong today, as evidenced by the holding in *Wood v. Consumers Co.*;³² this theory is consistent with the tendency of the majority of Illinois decisions to limit and to apply cautiously the attractive nuisance doctrine rather than to extend it. The negligence theory of the *Ramsay* case will be kept in reserve by the courts, and will be applied only in extreme factual situations in which the occupier of land has been obviously negligent to the extent almost of willful and wanton conduct.

CHANGE OF BENEFICIARY CLAUSES AND THEIR INTERPRETATION

A common but perplexing problem in the insurance field is the construction of terms and conditions embodied in the change of beneficiary clause within the usual contract of life or accident insurance. Upon first impression, it would seem that the rights and duties of the parties are governed by the terms of the contract. Ordinarily, this assumption would be proper, but in the light of some recent decisions which construe the same or substantially the same language to have different meanings, the assumption weakens considerably.

Generally, the right to change a beneficiary depends on whether the insured has reserved this right in the contract of insurance. Unless such right is reserved, the beneficiary has an absolute, vested interest which cannot be revoked.¹ Today, most contracts of insurance reserve the right to change beneficiary by giving the insured an irrevocable option to change the beneficiary at will.²

²³ *Ibid.*

¹ *Kurgan v. Prudential Ins. Co.*, 340 Ill. App. 178, 91 N.E. 2d 620 (1950); *West v. Pollard*, 202 Ga. 549, 43 S.E. 2d 509 (1947); *Hintz v. Hintz*, 78 F. 2d 432 (C.A. 7th, 1935); *Arnold v. Equitable Life Assurance Soc.*, 228 Fed. 157, (S.D. Iowa, 1915); *Bilbro v. Jones*, 102 Ga. 161, 29 S.E. 118 (1897).

² *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E. 2d 766 (1951); *Kurgan v. Prudential Ins. Co.*, 340 Ill. App. 178, 91 N.E. 2d 620 (1950); *West v. Pollard*, 202 Ga. 549, 43 S.E. 2d 509 (1947); *Parks v. Parks*, 288 Ky. 435, 156 S.W. 2d 480 (1941); *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926).

The usual change of beneficiary clause provides that upon filling out proper company forms, and sending them to the home office together with the policy, the beneficiary may be changed but that no change shall be effective until the policy is endorsed by the company. Courts are divided as to whether these clauses are to be construed strictly or liberally.

Under the strict compliance view, all conditions and terms of the clause must be fulfilled to effect a change. This point of view was originally reinforced by considering the type of interest the beneficiary acquired at the moment of contract. If, as the early cases held, the beneficiary had a vested interest, the interest could not be defeated without strict compliance.³ The majority of courts today say that the interest of the beneficiary is a mere expectancy or a contingent interest which never becomes vested until the death of the insured.⁴ The better holding, today, is that the beneficiary does have a right which may, however, be defeated by an exercise of the reserved power of the insured.⁵

Today, many courts still use the strict compliance theory in name but not always with the effect of presenting an effective change of beneficiary in every case of a failure to complete literally all the formal requirements set out in the change of beneficiary clause. A number of courts hold that since the clause was intended for the convenience and benefit of the insurer, it is unnecessary that it be strictly complied with if the insurer waives its protection.⁶ The insurer may waive by interpleading in an action brought to obtain the proceeds of the policy and paying the funds into court, or by agreeing to pay the substituted beneficiary, or by actually paying such beneficiary.⁷ There is a split of opinion as to when

³ *Freund v. Freund*, 218 Ill. 189, 75 N.E. 925 (1905); *Arnold v. Equitable Life Assurance Soc.*, 228 Fed. 157 (S.D. Iowa, 1915); *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520 (1903); *Bilbro v. Jones*, 102 Ga. 161, 29 S.E. 118 (1897).

⁴ *Cook v. Cook*, 17 Cal. 2d 639, 111 P. 2d 322 (1941); *Johnson v. Johnson*, 139 F. 2d 930 (C.A. 5th, 1943); *Hintz v. Hintz*, 78 F. 2d 432 (C.A. 7th, 1935); *Glenn v. Stephens*, 92 N.E. 2d 29 (C.A. Ohio, 1950); *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E. 2d 766 (1951); *Young v. American Standard Life Ins. Co.*, 398 Ill. 565, 76 N.E. 2d 501 (1948); *Katz v. Ohio Nat. Bank*, 127 Ohio St. 531, 191 N.E. 782 (1934); *Townsend v. Fidelity and Casualty Co. of New York*, 163 Iowa 713, 144 N.W. 574 (1913); *Pedron v. Olds*, 193 Ark. 1026, 105 S.W. 2d 70 (1937); *Metropolitan Life Ins. Co. v. Dinzik*, 141 N.J. Eq. 336, 57 A. 2d 247 (Ch., 1948); *Foster v. Gile*, 50 Wis. 603, 7 N.W. 555 (1880).

⁵ *West v. Pollard*, 202 Ga. 549, 43 S.E. 2d 509 (1947); *Parks v. Parks*, 288 Ky. 435, 156 S.W. 2d 480 (1941).

⁶ *Kurgan v. Prudential Ins. Co.*, 340 Ill. App. 178, 91 N.E. 2d 620 (1950); *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E. 2d 766 (1951); *Johnson v. Johnson*, 139 F. 2d 930 (C.A. 5th, 1943); *Hintz v. Hintz*, 78 F. 2d 432 (C.A. 7th, 1935); *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926); *Sun Life Assurance Co. v. Williams*, 284 Ill. App. 222, 1 N.E. 2d 247 (1936); *Parks v. Parks*, 288 Ky. 435, 156 S.W. 2d 480 (1941).

⁷ *Young v. American Standard Life Ins. Co.*, 398 Ill. 565, 76 N.E. 2d 501 (1948); *Sun Life Assurance Co. v. Williams*, 284 Ill. App. 222, 1 N.E. 2d 247 (1936); *Hoskins v. Hoskins*, 231 Ky. 5, 20 S.W. 2d 1029 (1929); *White v. White*, 194 N.Y. Supp. 114

the waiver must be made. Generally, the company can waive the benefit intended by interpleading, but a few courts hold that interpleading cannot waive any provision of the clause after the death of the insured since the beneficiary's right is vested.⁸ The reasoning of these courts is that interpleading after death is merely a procedural device to allow the contesting parties to have their rights determined by the court.⁹

In *Young v. American Standard Life Insurance Co.*,¹⁰ the insured requested a change of beneficiary in a writing which ended by stating, "It being understood that such change shall not become effective until endorsement has been made." The insured died three hours before the original request reached the company. The insurance company interpleaded in the case. The court, in holding that a change had not been effected, reasoned that although the conditions could have been waived by the company by interpleading, this was not possible here since the insured himself had set up the condition precedent of endorsement by the company.

The Illinois courts are not quick to allow waiver. In *Kurgan v. Prudential Insurance Co.*,¹¹ the insured, while in a hospital, desired to have her beneficiary changed from her husband to her son. The insurance agent obtained the forms and requested the policy since the terms of the contract required endorsement. The insured signed the forms but did not send them or the policy to the insurer. Upon suit to recover the proceeds of the policy, the insurer insisted that no change in beneficiary had been effected. The court agreed with this contention and held that where the insurer does not waive the conditions, it can insist upon strict compliance.

The majority of courts follow a more liberal view, also known as the substantial compliance theory, and allow recovery to the substituted beneficiary even though the express conditions in the contract are not literally fulfilled.

Under this view the insured may change the beneficiary of his insurance policy even though he has not complied strictly with the terms of the contract: (1) if the insured has manifested an intent and desire to change, and (2) if the insured has done all that is reasonably within his power to effect such a change.¹² A further refinement of this rule, made by some

(S. Ct., 1922); cf. *Rumsey v. New York Life Ins. Co.*, 59 Colo. 71, 147 Pac. 337 (1915) in which the court refused to allow waiver where the company had continuously insisted upon strict compliance.

⁸ *Johnson v. Johnson*, 139 F. 2d 930 (C.A. 5th, 1943); *Wannamaker v. Stroman*, 167 S.C. 484, 166 S.E. 621 (1932).

⁹ *Johnson v. Johnson*, 139 F. 2d 930 (C.A. 5th, 1943).

¹⁰ 398 Ill. 565, 76 N.E. 2d 501 (1948).

¹¹ 340 Ill. App. 178, 91 N.E. 2d 620 (1950).

¹² *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926); *Cook v. Cook*, 17 Cal. 2d 639, 111 P. 2d 322 (1941); *Bradley v. United States*, 143 F. 2d 573 (C.A. 10th, 1944).

courts, is that not only must the insured have done all that he reasonably could, but that only a ministerial act remains to be done by the insured.¹³ On the other hand, where only a ministerial act remains, as for example the endorsement of the policy, some courts insist that the insurer *cannot refuse* to change the beneficiary.¹⁴ Even the most liberal courts agree that mere expressed purpose or intent alone is not sufficient to be regarded as coming within the theory of substantial compliance.¹⁵

The substantial compliance theory has allowed recovery also where physical impossibility prevented the insured from complying with the terms of the contract.¹⁶ However, where the insured had claimed his wife would not return his insurance policy, the court held that substantial compliance was not present because there was no showing, by evidence, of a demand and refusal, and that, therefore, the insured had not done everything reasonably within his power.¹⁷

Also under this physical impossibility view of substantial compliance, fall the "war risk" cases.¹⁸ In *Finnerty v. Cook*,¹⁹ the insured, a prisoner of war in Japan, sent two postcards to his mother asking her to have his beneficiary changed. The contract of insurance contained the usual provisions which could not be carried out because no business correspondence was allowed by the Japanese authorities. The court held sufficient substantial compliance.

Another perplexing problem is caused by an attempted change of beneficiary by a valid will. If the contract provides for a change by the last will and testament, the courts obviously give effect to that intent.²⁰ All courts also allow a disposition of the proceeds of a policy by will where the insured's estate is the beneficiary of the insurance.²¹ This type

¹³ *Young v. American Standard Life Ins. Co.*, 398 Ill. 565, 76 N.E. 2d 501 (1948); *Metropolitan Life Ins. Co. v. Cooney*, 339 Ill. App. 575, 90 N.E. 2d 567 (1950); *Equitable Life Assurance Soc. v. McClelland*, 85 F. Supp. 688 (W.D. Mich., 1949).

¹⁴ *Boehne v. Guardian Life Ins. Co. of America*, 224 Minn. 57, 28 N.W. 2d 54 (1947).

¹⁵ *Spurlock v. Spurlock*, 271 Ky. 70, 111 S.W. 2d 443 (1937); *Donahey v. Sweigart*, 336 Ill. App. 366, 84 N.E. 2d 170 (1949); *West v. Pollard*, 202 Ga. 549, 43 S.E. 2d 509 (1947).

¹⁶ *Harris v. Metropolitan Life Ins. Co.*, 330 Mich. 24, 46 N.W. 2d 448 (1951) where insured was sick in bed and near death; *O'Connell v. Brody*, 136 Conn. 475, 72 A. 2d 493 (1950) where wife refused to return policy; *Imler v. Williams*, 196 Ark. 287, 117 S.W. 2d 1053 (1938) where policy was in safety deposit box.

¹⁷ *O'Connell v. Brody*, 136 Conn. 475, 72 A. 2d 493 (1950).

¹⁸ *Finnerty v. Cook*, 118 Colo. 310, 195 P. 2d 973 (1948); *United Services Life Ins. Co. v. Farr*, 60 F. Supp. 829 (S.D.N.Y., 1945); *Woods v. United States*, 69 F. Supp. 760 (S.D. Ala., 1947); *Benson v. Benson*, 125 Okla. 151, 256 Pac. 912 (1927).

¹⁹ 118 Colo. 310, 195 P. 2d 973 (1948).

²⁰ *Cook v. Cook*, 17 Cal. 2d 639, 111 P. 2d 322 (1941); *Baldwin v. Begley*, 185 Ill. 180, 56 N.E. 1065 (1900); *High Court Catholic Order of Foresters v. Malloy*, 169 Ill. 58, 48 N.E. 392 (1897); *Consult* 62 A.L.R. 940, 943 (1929).

²¹ *Eickelkamp v. Carl*, 193 Ark. 1155, 104 S.W. 2d 814 (1937); *Cook v. Cook*, 17 Cal. 2d 639, 111 P. 2d 322 (1941); *Modern Woodmen of America v. Scott*, 201 Ill. App. 144 (1916).

of situation is not truly a change of beneficiary, but merely a designation of how the proceeds of the insured's estate are to be disposed of after his death.

Most courts which recognize the substantial compliance theory will not allow change of beneficiary by a valid will if such right is not given by the policy.²² The courts reason that the right to change the beneficiary is a personal one which must be exercised during insured's lifetime, and thus cannot be exercised by a will, which speaks from the time of testator's death.²³ The same reasoning also accounts for the strict attitude of the courts in determining that once the beneficiary's interest is vested, it cannot be revoked unless in strict compliance with the terms of the contract.²⁴ Other bases for holding a will ineffective are the uncertainty created for insurance companies who might subject themselves to double liability,²⁵ and the belief that if a will was effective for this purpose, the companies might delay paying the claim until either the matter was litigated or the will probated.²⁶

However, there are cases which hold a will effective to change a beneficiary even though the contract does not so expressly provide.²⁷ *Townsend v. Fidelity and Casualty Co. of New York*²⁸ held that if the clause did not prohibit change of beneficiary by a valid will, then such method was impliedly authorized. Some courts hold that a valid will alone, although not communicated or directed to insurer, is effective to change the beneficiary.²⁹

An important distinction which may have a bearing in the future is

²² *Quinlan v. Quinlan*, 293 Ky. 565, 169 S.W. 2d 617 (1943); *Aetna Life Ins. Co. v. Mallory*, 291 Mich. 701, 289 N.W. 302 (1939); *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520 (1903).

²³ *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E. 2d 766 (1951); *Cook v. Cook*, 17 Cal. 2d 639, 111 P. 2d 322 (1941).

²⁴ *Metropolitan Life Ins. Co. v. Dinzik*, 141 N.J. Eq. 336, 57 A. 2d 247 (Ch., 1948); *Johnson v. Johnson*, 139 F. 2d 930 (C.A. 5th, 1943).

²⁵ *Wannamaker v. Stroman*, 167 S.C. 484, 166 S.E. 621 (1932); *Parks v. Parks*, 288 Ky. 435, 156 S.W. 2d 480 (1941).

²⁶ *Dogariu v. Dogariu*, 306 Mich. 392, 11 N.W. 2d 1 (1943); *Parks v. Parks*, 288 Ky. 435, 156 S.W. 2d 480 (1941).

²⁷ *Eickelkamp v. Carl*, 193 Ark. 1155, 104 S.W. 2d 814 (1937); *Pedron v. Olds*, 193 Ark. 1026, 105 S.W. 2d 70 (1937); *Imler v. Williams*, 196 Ark. 287, 117 S.W. 2d 1053 (1938); *Townsend v. Fidelity and Casualty Co. of New York*, 163 Iowa 713, 144 N.W. 574 (1913); *Benson v. Benson*, 125 Okla. 151, 256 Pac. 912 (1927); *Hunter v. Hunter*, 100 S.C. 517, 84 S.E. 180 (1915); cf. *Equitable Life Ins. Co. of Iowa v. Dinoff*, 72 F. Supp. 723 (Kan., 1947) where attested instrument, which was not a will, was held sufficient.

²⁸ 163 Iowa 713, 144 N.W. 574 (1913).

²⁹ *Pedron v. Olds*, 193 Ark. 1026, 105 S.W. 2d 70 (1937); *Hunter v. Hunter*, 100 S.C. 517, 84 S.E. 180 (1915); *Townsend v. Fidelity and Casualty Co. of New York*, 163 Iowa 713, 144 N.W. 574 (1913).

that most cases which have held a will ineffective do so not because the change was attempted by will, but because the will was not in substantial compliance with the terms of the contract.³⁰

The early Illinois decisions followed the strict compliance theory,³¹ but have accepted substantial compliance when the insured has done all that was reasonably within his power, and only a ministerial act remains.³² However, since the Illinois courts hold that the terms and conditions of the clause are for the protection and convenience of the insurer, the company, if it does not waive such right by interpleading, can insist upon strict compliance.³³ As to a will effecting a change, Illinois courts have allowed the change where the policy expressly provides,³⁴ but where the contract said a change other than by provisions in the contract was null and void, the will was held ineffective.³⁵

THE NOTARY PUBLIC—A FORGOTTEN POWER

The duties of the notary public are numerous¹ and well known in our society, and the exercise of these functions a common occurrence. Yet the careless and unconcerned way in which these acts are often performed indicates that many fail to appreciate the seriousness of the notary's function. It is the purpose of this comment to examine some of the legal results which flow from the proper or improper performance of the function of a notary public.

The most common act which the notary performs, and out of which

³⁰ *Smith v. Smith*, 172 F. 2d 399 (C.A. 8th, 1949); *Quinlan v. Quinlan*, 293 Ky. 565, 169 S.W. 2d 617 (1943); *Bennett v. Bennett*, 70 Ohio App. 187, 45 N.E. 2d 614 (1942); *Aetna Life Ins. Co. v. Mallory*, 291 Mich. 701, 289 N.W. 302 (1939); *Nance v. Hilliard*, 101 F. 2d 957 (C.A. 8th, 1939); cf. *Metropolitan Life Ins. Co. v. Dinzik*, 141 N.J. Eq. 336, 57 A. 2d 287 (Ch., 1948) where a change was attempted by a certified instrument.

³¹ *Sun Life Assurance Co. v. Williams*, 284 Ill. App. 222, 1 N.E. 2d 247 (1936); *Equitable Life Assurance Society v. Stilley*, 271 Ill. App. 283 (1933); *Freund v. Freund*, 218 Ill. 189, 75 N.E. 925 (1905); *McEldowney v. Metropolitan Life Ins. Co.*, 347 Ill. 66, 179 N.E. 520 (1931).

³² *Young v. American Standard Life Ins. Co.*, 398 Ill. 565, 76 N.E. 2d 501 (1948); *Kavanagh v. New England M.L. Ins. Co.*, 238 Ill. App. 72 (1925).

³³ *Kurgan v. Prudential Ins. Co.*, 340 Ill. App. 178, 91 N.E. 2d 620 (1950); *Young v. American Standard Life Ins. Co.*, 398 Ill. 565, 76 N.E. 2d 501 (1948).

³⁴ *Baldwin v. Begley*, 185 Ill. 180, 56 N.E. 1065 (1900).

³⁵ *Modern Woodmen of America v. Scott*, 201 Ill. App. 144 (1916).

¹ The notary public is "a public officer whose function is to administer oaths; to attest and certify, by his hand and official seal, certain classes of documents in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgements of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and waive protests in cases of loss or damage." *Black's Law Dictionary*, p. 1257 (3d ed., 1933).