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## Community Property—Life Insurance

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## RECENT CASES

**Community Property—Life Insurance.** The insurer interpleaded the insured's daughter as named beneficiary and the insured's wife to determine which was entitled to the proceeds of a group life insurance contract paid from wages. The jury found that the deceased and his wife had agreed that the earnings of each should be separate property. Thus the verdict was for the daughter because the insured had complete ownership of the policy and could select any beneficiary he saw fit. *Held* on Appeal, reversed and remanded with instructions to enter judgment in favor of the wife. There was insufficient evidence to establish the alleged separate property agreement. The trial court should have ruled as a matter of law that the premiums were paid with community funds and that the daughter had no right to the proceeds as beneficiary. *Aetna Life Ins. Co. v. Brock*; 41 Wn.2d 369, 249 P.2d 383 (1952).

The brief *per curiam* decision states that the court divided 4-4 on whether or not to follow the rule laid down in *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27, 114 A.L.R. 531 (1937). There the husband changed the beneficiary on a policy paid out of community funds from his wife to his mother and his secretary. The court in a 5-4 decision held the entire change of beneficiary void because the wife did not consent. In *Small v. Bartysel*, 27 Wn.2d 176, 177 P.2d 391 (1947) the wife as representative of the state was awarded proceeds proportional to the amount of premiums that were paid out of community funds, even though the insured's daughter had always been the designated beneficiary and the wife knew that community wages were being used to pay such a policy. These cases are in turn based upon a similar Washington rule applied to gifts of community property in general. "No part of those savings [community] can he make gifts of against her consent, even to his own relatives, though mere trifles to the latter no doubt might be sustained under the rule of *de minimis*." *Marsten v. Rue*, 92 Wash. 129, 131, 159 Pac. 111, 112 (1916).

The body of law that has developed in these and similar decisions [see Recent Cases, 26 WASH. L. REV. 223 (1951)] is now very much in doubt. Its future may be determined by the vote of Justice Finley who disqualified himself in the 4-4 *Brock* case. This was the first case on the issue since Justice Finley joined the court in 1951 so no opinion indicates how he might vote when confronted with the problem.

Since no dissenting opinions were written in the *Brock* case, past dissents and cases from other jurisdictions furnish the only indications of what alternatives might be accepted if the court should overturn its present position. Justice Beals, dissenting in the *Powers* case, felt that a husband should be permitted to maintain a reasonable amount of insurance upon his life with community funds in favor of a parent, child, dependent relative or faithful employee without his wife's consent. Providing for these beneficiaries, the dissent stated, would not be adverse to or a fraud upon the community. This alternative is in accord with the Texas view. *Volunteer State Life Ins. Co. v. Hardin*, 145 Tex. 245, 197 S.W.2d 105, 168 A.L.R. 337 (1946). This view is based upon the general Texas gift rule that moderate gifts are valid in their entire amount if they are not a fraud upon the wife. *Shaw v. Shaw*, 28 S.W.2d 173 (Tex. Civ. App. 1930).

Justice Mallery dissenting in the *Small* case maintained that the husband, by designating a beneficiary without his wife's consent, should be allowed to dispose of his

one-half share of the community property after his death, leaving the wife one-half of the proceeds as her share of the community property. This is the California rule. *Beemer v. Roher*, 137 Cal. App. 293, 30 P.2d 547 (1934). Senate Bill No. 176 in the 1953 session of the Washington Legislature provided this solution as an amendment to RCW 26.16.030 [RRS §6891]. The bill passed the Senate but died in the House Judiciary Committee as the session ended. LEG. REC. No. 8, 33rd Sess. 25 (1953).

RCW 26.16.030 [RRS §6891] provides that a husband may devise by will one-half of the personal community property. Allowing the spouse to designate a beneficiary that will take one-half of the insurance payments would seem to be the most just workable and logically consistent solution to present unsettled state of Washington law.

DALE RIVELAND

**Evidence—Patient Physician Privilege—Waiver of Privilege to One Physician as Waiver to other Physician — Waiver by Patient's own Testimony.** *P* sought recovery for injuries arising out of an automobile accident. During trial *P* introduced three physicians who testified that *P* had suffered disability in his right arm involving weakness, numbness, and difficulty of movement. *P* himself took the stand and testified that the injuries described by his doctors resulted from the accident and that, prior to the accident, he had not consulted a doctor for "years." The jury returned a verdict for *P* for \$21,000. The trial court granted *D* a new trial on the issue of damages because of newly discovered evidence consisting of another physician who would testify that during the four years preceeding the accident he treated the *P* a total of twenty times for such ailments as contusions, rheumatic condition, and neuritis all in the right shoulder. **Held:** Waiver of privileges as to one physician is a waiver to all other physicians; order for new trial affirmed. *McUne v. Fuqua*, 142 Wash. Dec. 60, 253 P.2d 632 (1953).

The problem presented by this case is the extent of the patient-physician privilege under RCW 5.60.060 (4) [RRS 1214 (4)] in civil actions involving as a material issue the physical condition of a party to the action. The statute as presently construed by the Washington court presents a blanket prohibition unless by some action express or implied the court finds that there is a waiver. *Williams v. Spokane Falls & Northern Ry. Co.*, 42 Wash. 597, 84 Pac. 1129 (1906); *In re Quick's Estate*, 161 Wash. 537, 297 Pac. 198 (1931). The holding of the principal case adopts what is probably the numerical minority position as to the extent of a waiver in a case involving the testimony of physicians who acquired their information independently of one another, not in consultation nor at the same time. In following the minority position the Washington Court has clearly arrived at the better reasoned rule. If the patient wishes to keep his secret from the ears of his neighbors he should not have brought in the first doctor. The first testimony presumably having brought out the complete medical history of the patient as regards the injuries in controversy the patient should have nothing to fear from the testimony of the second physician.

The facts of the principal case are distinguishable from the case of *In re Quick's Estate, supra*, because the *Quick* opinion does not disclose whether or not the two doctors attended the patient in consultation. If so, the testimony would almost universally be admissible.

The language used by the court in the principal case is much broader than the actual holding. Quoting from the case of *Roeser v. Pease*, 37 Okla. 222, 228; 131 Pac. 534, 537 (1913) the court said. ". . . If she [plaintiff] can go upon the witness stand and