

1979

American Western Life Insurance Company v.
Vonice W. Hooker And Helen M. Mallard, A/K/A
Helen Margurite Hooker And Helen Mallard v.
American Western Life Insurance Company, Helen
Mallard Aka Helen Margurite Hooker v. Vonice
Hooker : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

AMERICAN WESTERN LIFE INSURANCE
COMPANY,

Plaintiff and Respondent,

v.

VONICE W. HOOKER and HELEN M. MALLARD,
a/k/a HELEN MARGURITE HOOKER,

Defendants,

and

HELEN M. MALLARD, a/k/a HELEN
MARGURITE HOOKER,

Counterclaim Plaintiff & Appellant,

v.

AMERICAN WESTERN LIFE INSURANCE
COMPANY,

Counterclaim Defendant & Respondent,

HELEN M. MALLARD, a/k/a HELEN
MARGURITE HOOKER,

Cross Complaint Plaintiff & Appellant,

v.

VONICE W. HOOKER,

Cross Complaint Defendants Respondent,

HELEN M. MALLARD, a/k/a HELEN
MARGURITE HOOKER,

Third-Party Plaintiff & Appellant,

v.

VONICE W. HOOKER, Executrix of
Estate of Ronald Dean Hooker,

Third-Party Defendants Respondent.

BRIEF

Appeal from the
District Court,
Honorable Judge

JOSEPH L. HENRIOD
EARL J. PECK
CHARLES L. ALLEN
NIELSEN, HENRIOD, GOTTSCHALK
& PECK

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Defendants and
Respondents)

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IN THE SUPREME COURT OF THE
STATE OF UTAH

AMERICAN WESTERN LIFE INSURANCE)
COMPANY,)
Plaintiff and Respondent,)
v.)
VONICE W. HOOKER and HELEN M. MALLARD,)
a/k/a HELEN MARGURITE HOOKER,)
)
Defendants,)
and)
HELEN M. MALLARD, a/k/a HELEN)
MARGURITE HOOKER,)
Counterclaim Plaintiff & Appellant,)
v.)
AMERICAN WESTERN LIFE INSURANCE)
COMPANY,)
Counterclaim Defendant & Respondent,)
HELEN M. MALLARD, a/k/a HELEN)
MARGURITE HOOKER,)
Cross Complaint Plaintiff & Appellant,)
v.)
VONICE W. HOOKER,)
Cross Complaint Defendant & Respondent,)
HELEN M. MALLARD, a/k/a HELEN)
MARGURITE HOOKER,)
Third-Party Plaintiff & Appellant,)
v.)
VONICE W. HOOKER, Executrix of the)
Estate of Ronald Dean Hooker, Deceased,)
Third-Party Defendant & Respondent.)

CASE NO. 16596

STATEMENT OF THE KIND OF CASE

This is an action brought by American Western Life Insurance Company as Plaintiff and Respondent, for the purpose of having the Court determine which Defendant was lawfully entitled to proceeds from a life insurance policy with the Plaintiff, Policy Number 44498.

The Defendants each filed an Answer and Counterclaim to Plaintiff's Complaint, claiming the benefits of said insurance policy. The Defendant and Appellant, Helen M. Mallard, further counterclaimed for payment on a second policy of life insurance with the Plaintiff, Policy Number 43476, and filed a Cross-Complaint against the Co-defendant Vonice W. Hooker, individually and as administrator of the Estate of Ronald Dean Hooker, deceased, for the proceeds said Co-Defendant and Respondent received from American Western Life Insurance Company on Life Policy Number 44498.

DISPOSITION IN LOWER COURT

The Lower Court upon motions for summary judgment filed by the Defendant, Vonice W. Hooker, and Helen M. Mallard, ruled as a matter of law that the Defendant, Vonice W. Hooker, was entitled to the proceeds from Life Insurance Policy Number 44498 to the exclusion of Helen M. Mallard, and further held as a matter of law that Helen M. Mallard was not entitled to recover any proceeds from the Plaintiff under Life Insurance Policy Number 43476.

RELIEF SOUGHT ON APPEAL

The Appellant, Helen M. Mallard, seeks reversal of the Judgment and Final Order of the Lower Court which denied the

the Appellant as a matter of law the right to receive the proceeds from Life Insurance Policy Numbers 44498 and 43476.

The Appellant seeks a declaratory order from the Supreme Court of the State of Utah that the Appellant is entitled to the proceeds from Life Insurance Policy Number 44498 as a matter of law, and that the Appellant is entitled to a trial in the Lower Court with respect to Life Insurance Policy Number 43476.

STATEMENT OF FACTS

On or about December 22, 1972, Plaintiff, American Western Life Insurance Company (hereinafter American Western), issued a policy of decreasing term insurance on the life of Ronald Dean Hooker, Policy Number 43476, wherein Helen M. Mallard, wife of Ronald Dean Hooker at such time, was named as beneficiary. (R 140-148)

That on or about December 1, 1973, American Western issued a second life insurance policy Number 44498 to Ronald Dean Hooker, wherein the Defendant and Appellant, Helen M. Mallard, was named the beneficiary. (R 149-157)

On July 23, 1974, Ronald Dean Hooker, as owner of Policy Number 44498 and Policy Number 43476, signed a change of policy ownership designation naming Helen M. Hooker (n/k/a Helen M. Mallard) as the non-revocable beneficiary and owner of Policy Number 44498 and Policy Number 43476. (R 181-182)

That the Appellant, Helen M. Mallard, intermarried the decedent, Ronald Dean Hooker, on May 7, 1954, and bore seven (7) children of the decedent during this marriage of over twenty (20) years. (Mallard Dep. p.3-4)

Said change of policy ownership designation also bears the stamp of American Western dated July 5, 1974, and in addition thereto, the form provides as follows:

FOR HOME OFFICE USE ONLY

Change recorded and copy attached as endorsement on policy.

By: Tonya Johnson Date: 7/9/74

(R 181-182).

Pursuant to such request to change the ownership of Policy Number 43476 and Policy Number 44498, American Western sent a letter to Ronald Dean Hooker, dated July 9, 1974, indicating that the requested change of ownership had been properly recorded as to Policy Number 43476, and enclosed a copy of the change of ownership designation which had been submitted to American Western. No such notice was given to Appellant. (R 183)

Elsbeth Forbes, who had been employed approximately fifteen (15) years with American Western and has been the Home Office Manager and Assistant Secretary since 1974 (R 3, 7), in her deposition testified the change of policy ownership designation referring to Policy Number 44498 is contained within the files of American Western, but had been

placed in the file of Policy Number 43476 file. (Forbes Dep. p.14)

Mrs. Forbes further testified that a letter relating to Policy Number 44498 should have been sent to the Appellant at the same time as the letter relating to Policy Number 43476, but unfortunately no letter was sent by American Western to either the decedent or the Appellant. (Forbes Dep. p.13)

In addition, Mrs. Forbes stated that the July 9, 1974 letters are always sent to the new owner and addressed to the new owner, except the young lady who sent the letter relating to Policy Number 43476 erroneously entered the name "Ronald" and mailed the letter to the decedent, when in fact the letter should have been addressed and mailed to the Appellant, Helen M. Mallard. (Forbes Dep. pp.15-16)

On or about December 9, 1976, Ronald Dean Hooker, submitted to American Western, a change of beneficiary request, naming his second wife, Vonice W. Hooker, as a beneficiary to Policy No. 44498. (R 161) The decedent having married Vonice W. Hooker a few months earlier in October of 1976. (Hooker Dep. p.8)

In signing said change of beneficiary agreement, Ronald Dean Hooker signed his name in the space provided for signature by the owner of the policy. The change of beneficiary was approved by American Western on December 17, 1976. (R-161)

The customary procedure of American Western is to mail premium-due notices, to the new policy owner, after change of policy ownership designation have been received by American Western and Forbes stated:

It is our custom to send it to the owner of the policy unless previously notified to send it to someone else.

(Forbes Dep. p.16)

However, relative to Policy Number 43476 and Policy Number 44498, the premium notices were being sent to Ronald Dean Hooker, notwithstanding American Western's stated custom and procedure. (Forbes Dep. p.15)

On or about December 22, 1976, Policy Number 43476 lapsed for nonpayment of premiums, said premium notices having been addressed to the decedent, not the Appellant.

That Vonice W. Hooker submitted a Lost Policy Affidavit to American Western even though she was never in the possession of either of the policies and the policies were at all times in the possession of the Appellant. (R 248)

On or about September 16, 1977, the insured Ronald Dean Hooker became demised, and American Western made payment to Vonice W. Hooker, of the proceeds of Policy Number 44498. (R 11(b))

After demand was made by the Appellant for the proceeds of Policy Number 43476, American Western searched its records and discovered the change of ownership designation naming Appellant the owner and irrevocable beneficiary of Policy Number 43476 and Policy Number 44498. (R 12)

American Western then sent a letter to the Co-Defendant, Vonice W. Hooker, stating the proceeds of Policy Number 44498 had been paid to her erroneously, as a result of a clerical error, wherein the change of Beneficiary requested by the decedent was accepted without Appellant's signature and such change was considered null and void by American Western. (R 184)

Thereafter American Western commenced this action on or about October 25, 1977, requesting the court to adjudicate the rights of the respective defendants to the insurance proceeds.

ARGUMENT

POINT I.

APPELLANT IS THE OWNER OF POLICY NUMBER 43476 AND POLICY NUMBER 44498 BY VIRTUE OF A WRITTEN ASSIGNMENT EXECUTED BY THE INSURED.

Policy Number 43476 and Policy Number 44498 provide as follows:

Contract Defined - This policy and the application wherefore, a copy of which is attached and made a part hereof, shall constitute the entire contract of insurance between the parties hereto. All statements made and applying to this policy shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall void the policy or be used in defense of a claim hereon unless it is contained in the application and a copy thereof attached to the policy when issued. No

alteration of this policy and no waiver of any other provisions shall be valid unless made in writing by the company and signed by an officer of the company. (R 141, 150).

The general provisions of the policy therefor must be contained within the policy, and the relevant considerations and provisions are as follows:

Control of Policy - During the minority of the insured the right to exercise all privileges under this policy and to agree with the company as to any change in or amendment to this policy, shall vest successively, during their respective lifetimes, in the owner, the beneficiary, the contingent beneficiary, if any, and the insured. After the insured has attained his majority, such rights shall vest solely in the insured unless otherwise provided in the policy.

* * * *

Assignment - No assignment of this policy shall be binding upon the company until it is filed with the company at its home office. The company will assume no responsibility for the validity or sufficiency of any assignment and any claim thereunder shall be subject to proof of interest and extent thereof. (R 141, 150)

The Lower Court, in granting summary judgment to Vonice W. Hooker, relied on the control of policy provisions of the policy, and particularly the clause that stated, "after the insured has attained his majority, such rights shall vest in the insured. . ." (R 248)

The Lower Court, in holding that the decedent had the sole right to control the policy, ignored the fact that the

decedent had obtained the policy during the course of the marriage to the Appellant and had assigned his ownership interest to the Appellant in the manner required by the terms of the policy binding American Western to honor the assignment.

American Western has admitted in its verified Complaint and in its First Amended Complaint that the decedent, Ronald Dean Hooker, was the original owner of Policy Number 44498, and had requested that Helen M. Hooker, n/k/a Helen M. Mallard, (Appellant), be named as the new owner of the policy, and that through the mistake and inadvertence of American Western such request was mistakenly placed in the file of Policy Number 43476.

(R 1-2, 49-50)

There can be no doubt as to the fault and negligence of American Western in failing to properly file the change of policy ownership designation of Policy Number 44498, in that the records of American Western evidence a recording of the change of ownership of such policy, naming the Appellant the owner of such policy. (R 181-182)

A document is said to be filed when it is delivered to the proper officer and by him received to be kept on file.

Beebe v. Morrell, 42 N.W. 1119.

POINT II.

DECEDENT'S ASSIGNMENT OF POLICY NUMBER 43476 AND POLICY NUMBER 44498, TO THE APPELLANT VESTED ALL RIGHT, TITLE AND INTEREST IN SAID POLICIES IN THE APPELLANT.

The California Supreme Court in Morrison v. Mutual Life Insurance Company of New York, 103 P.2d 963 (1940), held in essence where there is no power reserved by the insured to change the beneficiary, the naming of the beneficiary in a life policy has the effect of giving such beneficiary a vested right in the policy so that the beneficiary becomes in fact the owner of the contract and is protected against the interference of his rights thereunder by the later acts of both the insured and the insurer, and in such cases, the insured is precluded from changing the beneficiary, from reassigning the policy, and from surrendering or cancelling the policy.

The California Court further stated in the Morrison case:

In other words, once the true ownership of the policy is brought home to the insurance company, whether the ownership is established by the taking out the policy in name of the owner, or by assignment, or by contract or gift, the company is bound to recognize the rights of the lawful owner.

Similarly, the Florida Supreme Court in Pendas v. Equitable Life Assurance Society of U.S., 176 So. 104 (1937), in considering an assignment of an annuity policy, held:

The effect of an assignment of a life insurance policy, which assignment is made in accordance with the terms of the policy, is to place the assignee in the same status with respect to all rights and liabilities under it that the insured occupied before the transfer. It may be said to amount to the substitution for the insured of the assignee as a party to the policy.

The District Court of New York, in Robinson v. United States, 12 F.Supp. 550 (1935), held where an insured did not reserve the right to change the beneficiary of a life insurance policy, the designated beneficiary obtained a vested interest superior to the rights and privileges of the insured under the contract, and the insured could not use the policy so as to materially change the property right vested in the beneficiary and could not change the beneficiary without the consent of the vested beneficiary.

The Pennsylvania Court in Pashuck v. Metropolitan Life Insurance Company, 188 A.614 (1936) held where the insured did not reserve the right to change the beneficiary, that the subsequent naming of a beneficiary by the insured constituted a nullity.

The Pennsylvania court in Pashuck further held where the designation of the beneficiary is absolute and unconditional because the right to change the beneficiary is not expressly reserved to the insured, the beneficiary has a vested interest in the policy and cannot be deprived of its proceeds by anything the insured may do without the consent of the beneficiary.

The District Court of New York in Trowbridge v. Prudential Insurance Company of America, 322 F. Supp. 190 (1971), considered virtually identical facts as those in the present instant matter before the court.

In the Trowbridge case, the policy provided that the beneficiary could be changed only upon the written consent of all of the beneficiaries under the policy. Approximately thirty (30) years later, the decedent requested that the insurer change the beneficiary so as to name the insured's then wife the beneficiary, and said change of beneficiary was approved by the insurer, contrary to the conditions and terms set forth thirty years earlier requiring the consent of all of the beneficiaries.

The court further found, and it was conceded by the parties that the insurer, in permitting the insured to change the beneficiary was an error under the terms of the policy in that all rights regarding the change of beneficiary were reserved to the named beneficiaries and such consent to the change could not be made unilaterally by the insured.

The court further held in the Trowbridge case, supra, as follows:

The additional defendants (original beneficiary) base their claim for relief directly on the insurance policy itself. That they are justified in their request for recovery appears to have been all but admitted by Prudential in its answering papers. There, Prudential admits

that it had no right to change beneficiaries in the manner done, and refers to this change as "the result of an unintentional mistake and inadvertent clerical error."

In the instant case, before this Court, American Western in its first Amended Complaint stated as follows:

On December 9, 1976, Ronald Dean Hooker, requested a change of beneficiary on Policy Number 44498, and requested Vonice W. Hooker be named as the beneficiary under the said policy. Hooker executed the request and represented himself to be the owner of said policy. A copy of said change of beneficiary request is attached hereto and incorporated herein as Exhibit "D". In fact, Hooker failed to obtain the signature of the then owner of the policy, Mrs. Helen M. Hooker (R 50).

Therefore, it is submitted American Western has all but admitted it had no right to change the beneficiary and did so only as the result of its mistake, inadvertence, and negligence. (R 50)

The court in the Trowbridge case, supra, granted summary judgment against the insurer and in favor of the original beneficiaries under facts virtually identical to the facts present in the instant matter before this Court.

That Elspeth Forbes, in her deposition, further indicated that the money was paid to the wrong party, after a determination was made as to who should have received the proceeds of Policy Number 44498. (Forbes Dep. p.21)

Mrs. Forbes, in discussing the determination made by American Western stated as follows:

It was a determination made by the documents that we actually had in our files in regards to who we were responsible, you know, from the documents we had after we got it from the -- the file had lapsed; it appeared that the money should have gone to Helen, according to the documentation that we had, and this is what Hildy meant when she said that, because of our accepting -- we apparently accepted a change of beneficiary form under the name of Ronald Hooker as being the owner of that particular policy, and, in essence, according to the documentation we did have, Helen was the owner. So, in effect, the change of the beneficiary should not have been accepted without Helen's signature. (Forbes Dep. pp.21-22)

Therefore, it is respectfully submitted by the very terms of the contract itself, and the admissions of American Western, the only person entitled to receive the proceeds of Policy Number 44498 is the Appellant.

That is not to say that the Defendant Vonice W. Hooker may not recover from American Western under a theory of negligent misrepresentation and/or contract estoppel as being grounded in the acts committed by American Western.

The Court in Trowbridge, supra, stated that such causes of action were independent from one another, and not adverse to one another, and rely on separate and distinct elements and that it was surely possible that more than a single obligation was owed and that the possibility of a double recovery justified by law was very real.

Therefore, it is respectfully submitted that this Honorable Court should hold that the Appellant is as a matter of law entitled to the proceeds from Policy Number 44498.

POINT III.

IN THE ABSENCE OF RECOVERY FROM AMERICAN WESTERN, THE APPELLANT SHOULD BE ENTITLED TO THE PROCEEDS RECEIVED BY THE DEFENDANT, VONICE W. HOOKER, UNDER THE THEORY OF EQUITABLE ASSIGNMENT.

The Supreme Court of Washington, in Seattle Ass'n of Credit Men v. Bank of California, Nat. Ass'n, 30 P.2d 972 (1934), held in considering an assignment of a life insurance policy where said policy required any assignment to be in writing and the insured shall not be deemed to have waived knowledge of such assignment unless the original or duplicate thereof is filed at the home office of the insured that the company would not assume any responsibility for the validity of the assignment.

The Washington further held in Seattle Ass'n of Credit Men, as follows:

Such provision does not prevent an assignment valid in equity. The provision is for the benefit of the insurer, who is not questioning the validity of the assignment, and third persons cannot take advantage of a failure to comply therewith. Further, that only the insurer can question the validity of the assignment and that a parol assignment, accompanied by delivery, is valid even though the assignee has no insurable interest.

The Washington Supreme Court extended its ruling in Sundstrom v. Sundstrom, 129 P. 2d 783 (1942), holding that the insurer waived the right to question the validity of an assignment where the insurer has interpleaded the parties claiming the fund.

The Washington court in Sundstrom, supra, set forth the criteria for establishing an equitable assignment and stated as follows:

In our consideration and determination of that question we proceed upon the accepted principle that in order to work an equitable assignment, the assignor must have intended to transfer a present interest in the debt or fund or subject matter and, pursuant to such intention, must have made an absolute appropriation of the thing assigned, relinquished all control or power of revocation over it, to the use of the assignee. . . What amounts to a present appropriation constituting an equitable assignment is thus a question of intention to be gathered from a consideration of the language used, in the light of all of the attendant facts and circumstances.

It is therefore respectfully submitted that American Western has waived its right to question the validity of the assignment and that it is further submitted that the Sundstrom case, cited, supra, sets forth the proposition that the ex-wife of the decedent, the party to whom the equitable assignment had been made, was entitled to recover the proceeds received by the second wife of the decedent because the decedent had failed to comply with the requirements for making an assignment of the proceeds in accordance with the contract terms.

Therefore, the Appellant in the instant matter, in the absence of finding a valid contractual assignment of all rights to the Appellant, is entitled to recover all proceeds received by the Co-Defendant and Respondent, Vonice W.

Hooker, by virtue of the equitable assignment made by the decedent to the Appellant.

Consequently, the Lower Court committed error in granting summary judgment to the Co-Defendant and Respondent, Vonice W. Hooker, on Appellant's Cross-Complaint and Third-Party Complaint.

POINT IV.

THERE CAN BE NO FORFEITURE OF POLICY NUMBER 43476 BY AMERICAN WESTERN WITHOUT NOTICE OF PREMIUMS DUE TO THE APPELLANT WHERE IT IS THE CUSTOM OF AMERICAN WESTERN TO PROVIDE SUCH NOTICE.

The Delaware court in Minnick v. State Farm Mutual Automobile Insurance Company, 174 A.2d 706 (1961), held before a regularly, renewable mutual policy could be declared forfeited, lapsed or cancelled, or in default for nonpayment of premiums, the insurer must have given notice to the insured of the amount of premium assessed for the period in question. Such is true where the insurer, though not contractually obligated to do so, has adopted the practice of sending out notices of premium due and sent notices to the insured for a period of several years.

In the instant case, American Western has submitted an affidavit that the original copy of the notice of lapse was addressed to Ronald Dean Hooker of 1055 North 20th North, Logan, Utah, and that said notice was returned with the

notation "Return to Sender, Undeliverable as Addressed, K Forwarding Order". (R 234)

The Co-Defendant and Respondent, Vonice W. Hooker, the then wife of the decedent, testified following her marriage to the decedent, no notices of premiums due to American Western were received by the decedent, nor was notice of possible lapse as to either of the policies of American Western received. (Hooker Dep. p.17)

The Appellant first became aware for the first time that Policy Number 43476 with American Western had lapsed for nonpayment of premiums after the death of the named insured. (Mallard Dep. p.37)

Martin C. Reeder, the insurance agent of American Western who was involved in the initial contracts of insurance, the change of ownerships of such policies and the purported change of beneficiary in respect to Policy Number 44498 indicated it was American Western's procedure to attempt to locate the owners of the policies if they had moved or premium notice was returned, by stating:

A: Well, as a general rule, now, like -- I had this happen fairly frequently -- and if they sent a premium notice to a client and if it was returned, "No longer at this address" or something like that, they would send a copy of that and the bill to the agent to see if the agent could locate, you know, the owner or whoever. (Reeder Dep. p.37)

Reeder further indicated after the initial premium notices were sent and if the premium is not paid within fifteen (15) days of the thirty-day grace period, that a late notice offer is sent out, and if it still isn't paid, and it goes beyond any grace period, there is a notice which is termed a reinstatement offer that is sent within sixty days of the original due date, and the client can still pay the premium and keep the policy in force without proof of insurability. (Reeder Dep. p.30)

American Western's agent, Reeder, further indicated where a policy does lapse for nonpayment of premiums and there is a problem finding the owner of the policy, the agent is contacted and forwarded the premium notice to track down the individual and see what has happened. (Reeder Dep. p.59-60)

It is further the custom of American Western to send the premium notices to the owner of the policy unless notified to send such notice to someone else. (Forbes Dep. p.16)

The New Jersey court in Carfagnini v. Service Life Insurance Company of Omaha, 274 A.2d 303 (1971), held summary judgment was improperly granted to the insurer where it is the insurer's custom of giving regular notices of the time for payment of the premiums to the insured and where such notice was sent to the insured's prior address and was returned to the insurer by the post office bearing the

notation "Address unknown" and additionally the courtesy reminder notice was returned to the insurer by the post office with the notation "moved, not forwardable", and the insured by affidavit claimed to have sent to the insurer a change of address notification.

The New Jersey court in Carfagnini, supra, held as follows:

Also relevant to the issue of negligence was the return of the letters containing the last premium notices to the company by the postal authorities, when with the notation on the envelope "address unknown" and the other with the words "moved, not forwardable." The question arises as to whether the company was negligent in checking its records or in failing to make further investigation to ascertain if its files disclosed any other address for this policy holder.

Consequently, it is submitted from the facts available to this Court that summary judgment should not have been granted to American Western relative to Policy Number 43476, in that there are genuine issues of fact which must be determined by trial and not upon motion for summary judgment. These issues include the duty of American Western to check its files which would have shown Appellant to be the owner of Policy Number 43476, and a change of ownership designation had been made as to Policy Number 44498, and requisitioned Reeder to "track down the individual and see why the premium was not paid."

The Nebraska Supreme Court in Pester v. American Family Mutual Insurance Company, 186 N.W.2d 711 (1971), held the policy in question by its terms did not require the insurer to notify the insured of the pendency of the premium due date or make demand for the premium. The Nebraska court in considering the custom of the insurer further held:

Defendant had the right to require the plaintiffs to assume the burden of keeping track of premium due dates. Notwithstanding this situation, defendant elected to give notice to the plaintiff's of the amount of each premium and the due date. This practice was followed over a period of many years. It is a common practice followed by insurance companies with a view to retaining and furthering their business. It is likewise a practice with which the general public is familiar and upon which it has come to depend.

In the Pester case, supra, the insured was no different from other owners. The insured was familiar with the long established practice, and had come to rely on it. The necessity for issuance of a notice of premium due is particularly apparent where, as here, there has been a change in the amount due. Until the insured received word of the sum due, she was not in a position to pay it and we can only conclude that the insurer knowingly and intentionally waived the right to require the insured to ascertain the premium due dates and make payments without any notice or demand from the insured.

It is respectfully submitted that American Western has a custom and procedure relative to the payment of premiums and the existence thereof precludes summary judgment and entitled the Appellant to a trial in that genuine issues of fact.

CONCLUSION

Appellant respectfully submits to the Court that by virtue of the assignment, without reservation of any right of revocation by the insured, (the decedent) that the Appellant was the sole beneficial owner of both insurance policies issued by American Western.

The change of beneficiary by the decedent making his new wife, the Respondent Voncie W. Hooker, as the beneficiary of said policy by notice to change of beneficiary to American Western, must be a nullity as to the Appellant herein, in that the negligence of American Western in not indexing and filing the change of ownership designation notices properly cannot in any way deprive the Appellant of her vested ownership in Policy Number 44498.

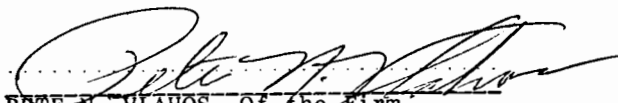
The failure of American Western to give any notice of default in premium payments concerning Policy Number 43476 to the Appellant by reason of its negligent mailing to the prior owner of the premium notices, together with American Western's failing to use due diligence to determine why notice of premium payments were returned undelivered, cannot

estop the Appellant from having the right to make payments of the premiums due or the right by lack of such notice to reinstate the policy which had lapsed because of lack of notice from American Western.

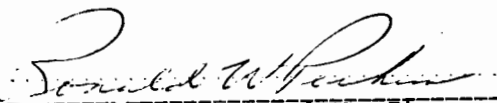
It is respectfully submitted that the Appellant was entitled to the proceeds from Policy Number 44498 as the true owner thereof, and that the Appellant was denied due process of law by the granting of summary judgment to American Western as to Policy Number 43476, which was allowed to lapse by reason of the negligence and lack of due diligence of American Western.

Respectfully Submitted this 18 day of October, 1979.

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CERTIFICATE OF MAILING

A copy of the above and foregoing Brief of Appellant was this 18 day of October, 1979, posted in the U. S. Mail, postage prepaid and addressed to the following counsel of record:

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SECRETARY