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 Respondent American Western Life Insurance Company

Utah Supreme Court

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. HELEN M. MALLARD, a/k/a HELEN MARGURITE HOOKER, Counterclaim Plaintiff and Appellant, v. AMERICAN WESTERN LIFE INSURANCE COMPANY, Counterclaim Defendant and Respondent. HELEN M. MALLARD, a/k/a HELEN MARGURITE HOOKER, Cross Complaint Plaintiff and Appellant, v. VONICE W. HOOKER, Cross Complaint Defendant and Respondent.	Case No. 16596

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BRIEF OF RESPONDENT
AMERICAN WESTERN LIFE INSURANCE COMPANY

Appeal from the Judgment of the
District Court of Cache County
Honorable VeNoy Christoffersen

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AMERICAN WESTERN LIFE INSURANCE COMPANY, Plaintiff and Respondent, v. VONICE W. HOOKER and HELEN M. MALLARD a/k/a HELEN MARGURITE HOOKER, Defendants. HELEN M. MALLARD, a/k/a HELEN MARGURITE HOOKER, Counterclaim Plaintiff and Appellant, v. AMERICAN WESTERN LIFE INSURANCE COMPANY, Counterclaim Defendant and Respondent. HELEN M. MALLARD, a/k/a HELEN MARGURITE HOOKER, Cross Complaint Plaintiff and Appellant, v. VONICE W. HOOKER, Cross Complaint Defendant and Respondent.	Case No. 16596

STATEMENT OF THE KIND OF CASE

This is an action to determine the person lawfully entitled to the proceeds of a life insurance policy on the

life of Ronald Hooker. American Western Life Insurance Company (hereinafter "American Western") paid the proceeds of the policy (Policy #44498) to defendant Vonice Hooker, but brought this action when defendant Helen Mallard later claimed the proceeds.

Defendant Helen Mallard counterclaimed for the proceeds of Policy #44498 and for the proceeds of an additional policy on Ronald Hooker's life as well, Policy #43476. She also cross-claimed against defendant Vonice Hooker individually for the proceeds of Policy #44498 which Vonice had received from American Western, and filed a third-party complaint against Vonice as executrix of Ronald Hooker's estate, claiming the estate was unjustly enriched by receiving the proceeds of Policy #44498.

Defendant Vonice Hooker counterclaimed against American Western, claiming the company had wrongfully garnished the balance of the proceeds of Policy #44498 remaining in her checking account at the commencement of the action.

DISPOSITION IN LOWER COURT

Defendant Helen Mallard moved for summary judgment against American Western on both Policy #44498 and Policy #43476.

Defendant Vonice Hooker moved for partial summary judgment against American Western and Helen Mallard on Policy #44498 and against Helen Mallard on her cross-complaint; and

for summary judgment against Helen Mallard on her third-party complaint.

American Western moved for partial summary judgment against Helen Mallard on her counterclaim.

The court ruled as follows:

1. It granted Vonice Hooker's motion for summary judgment against American Western, dismissed the complaint with prejudice, and released the balance of the proceeds of Policy #44498 to Vonice Hooker.

2. It granted Vonice Hooker's motion for summary judgment against Helen Mallard and dismissed Mallard's cross-claim with prejudice.

3. It granted Vonice Hooker's motion for summary judgment as executrix of Ronald Hooker's estate against Helen Mallard and dismissed Mallard's third-party complaint with prejudice.

4. It denied Helen Mallard's motion for summary judgment against American Western, granted American Western's motion for summary judgment against Helen Mallard, and dismissed Mallard's counterclaim against American Western with prejudice.

Defendant Helen Mallard moved for reconsideration, which the court denied.

RELIEF SOUGHT ON APPEAL

American Western seeks affirmation of the trial court's order and dismissal of Helen Mallard's appeal.

STATEMENT OF FACTS

In 1972, Ronald Hooker insured his life by taking out Policy #43476 issued by American Western. He had just constructed an apartment building and had financed it by mortgaging the house which his wife, Helen, had previously owned free and clear. (Depo. Helen Mallard 40). He bought the insurance to pay off the apartment indebtedness in the event of his death. It was a 20-year decreasing term policy. The face amount was $75,000 and Helen was the beneficiary. (R. 140, 147).

In 1973, Mr. Hooker and Helen built a new store for his appliance business. They borrowed further against both the house and apartments to finance the new store. At Helen's insistence, Mr. Hooker purchased an additional 20-year term life insurance policy, #44498, from American Western to pay off the additional debt on the house. (Depo. Helen Mallard 41-42). The face amount was $75,000, and Helen was the beneficiary. In 1977, Mr. Hooker sold the apartments and paid off the debt on Helen's house.

Helen was the bookkeeper for the store, and her duties included payment of insurance, including the two life insurance policies. (Depo. Helen Mallard 10, 11, 15, 24). According to her testimony, she handled all contact with the agents, processed all paperwork, with Ronald's aid where necessary, and made sure the premiums were paid.

According to Helen's testimony, in 1974, acting under the belief that the proceeds of the policies would be paid into Ronald's estate unless she was named owner as well as beneficiary, Helen had Ronald sign change of ownership designations on both policies naming her as owner. (Depo. Helen Mallard 9, 10, 12; R. 105-106). American Western received the forms in July of 1974. The form for Policy #43476 was properly attached as a rider to that policy. (Depo. Elspeth Forbes 13-14; Depo. Helen Mallard, Exhibits P-1, P-2). The form for Policy #44498 was not attached as a rider to that policy, but was apparently misfiled in the folder for Policy #43476. (Depo. Elspeth Forbes 13-14; Depo. Helen Mallard, Exhibit P-3). American Western sent a letter to Ronald confirming that the requested change of ownership on Policy #43476 had been recorded and enclosing a copy to be filed with his policy. No such letter was ever sent on Policy #44498. (Depo. Elspeth Forbes 14-15; Depo. Helen Mallard, Exhibits P-1, P-2, P-3). Although Helen claims she handled all such matters, she made no inquiry why she received notice of change on one policy but not on the other. (Depo. Helen Mallard 17-18). After the change, American Western continued to address all correspondence and premium notices to Ronald (Depo. Helen Mallard 45-46), although Helen contends she continued to handle payment. (Depo. Helen Mallard 24).

In December 1975, Ronald and Helen were divorced. Ronald's company, Hooker's Appliance, had paid the annual life insurance premiums current to December 1976. (Depo. Helen Mallard 24). No provision was made in the divorce decree about life insurance, and the parties did not discuss the matter at the time of the divorce. (Depo. Helen Mallard 46; R. 133-134). Helen remarried in the spring of 1976. After her remarriage, she came to an oral agreement with Ronald that he would keep the premiums paid and would inform her before letting them lapse. (Depo. Helen Mallard 46-47). She made no further inquiries of Ronald or American Western about the policies during Ronald's lifetime. When she moved from the parties' prior address, she made no effort to inform American Western of her new address. (Depo. Helen Mallard 25).

Shortly before Ronald sold the apartments and paid off the debt on Helen's house, he allowed Policy #43476 to lapse. He did not make the annual premium payment due December 1976 on the policy, and it lapsed for nonpayment at the end of the policy's grace period 31 days later. He kept Policy #44498 current but, representing himself to be the owner of the policy, submitted a request in December 1976 to change the beneficiary to Vonice Hooker, whom he had married in October of that year. American Western recorded the change of beneficiary by attaching a copy of the form to Policy #44498. (Depo. Elspeth Forbes, Exhibit D-1).

Ronald died September 17, 1977. Vonice filed a claim on Policy #44498, which American Western promptly paid by a check in the sum of $67,500 dated September 27, 1977. On October 19, 1977, Helen's counsel demanded payment to Helen on Policy #43476. (Depo. Helen Mallard, Exhibit P-4). Upon checking that file, American Western found the misfiled change of ownership designation on Policy #44498. American Western then filed this action to determine the person entitled to payment on Policy #44498 and attached the balance of the proceeds of the policy still remaining in Vonice's checking account, about $20,000.

ARGUMENT

At the time American Western commenced this action, it did not know sufficient facts to determine the proper beneficiary of Policy #44498. It therefore sought a declaration by the court of which defendant was entitled to the proceeds. The undisputed facts later developed by discovery demonstrate, however, that the court below ruled correctly that Vonice Hooker was the policy beneficiary. This argument is accordingly submitted in support of the trial court's ruling.

POINT I

THE PROCEEDS OF POLICY #44498 WERE PROPERLY PAID TO VONICE HOOKER AS BENEFICIARY

The trial court ruled properly that Vonice Hooker was the beneficiary of Policy #44498 at the time of Ronald Hooker's

death. Ronald, as the insured, had the right by the explicit terms of the policy to designate Vonice as beneficiary and to agree to any other changes or amendments. He made Vonice the beneficiary by proper form executed December 17, 1976, which American Western attached as a rider to the policy. American Western properly paid Vonice the proceeds of the policy and is not obligated to Helen, the prior beneficiary.

Ronald's assignment to Helen of rights of ownership in July of 1974 did not divest him of the right to change the beneficiary for two reasons. First, under the explicit terms of the policy, he retained the right as the insured to agree to changes or amendments to the policy. Second, the intent of the parties, as disclosed by Helen's own testimony, was that the assignment to Helen was not absolute, but was for the purposes of avoiding probate and securing payment of the mortgage on Helen's house. Once Ronald had removed the mortgage by payment of the debt, he was free to dispose of the policy proceeds as he chose.

A. Ronald Hooker had the right as the insured to designate Vonice the beneficiary.

The clear and unambiguous terms of the policy control the various rights and obligations of the insured, the owner, the beneficiary, and the insurer. Under the terms of Policy #44498, Ronald Hooker had full authority as the insured to make changes in or amendments to the policy. The policy provides:

> 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. (emphasis added) (Depo. Helen Mallard, Exhibit P-6).

Appellant Helen Mallard argues that the change of ownership form executed by Ronald Hooker in 1974 operated to divest Ronald of all such rights and vest them exclusively in Helen. What Appellant ignores is that the form transferred only the rights of the owner, not of the insured. As between the owner and the insured, the explicit language quoted above allocates to the insured the right to amend the policy. So long as Ronald, not Helen, was the insured under the policy, the right to change the policy remained vested in Ronald.

Twice in her Statement of Facts, Appellant states that the change of policy ownership designation named her as "irrevocable beneficiary." (Appellant's Brief 3, 6). That is factually false and legally wrong. No such words, nor indeed any mention whatever of "revocability" of beneficiary appears on the documents. As to the legal conclusion that Helen was thereby "named" irrevocable beneficiary, the policy terms quoted above clearly reserve to the insured the right to change or amend the policy, notwithstanding the rights of the owner.

B. The 1974 change of ownership was not absolute and did not divest Ronald Hooker of ownership.

When Ronald assigned ownership of the policy to Helen in 1974, he did it in an attempt to avoid probate, and as security for repayment of the mortgage he had placed on Helen's house. When he repaid the loan and removed the mortgage in 1977, the assignment of the policy terminated, and Ronald could designate Vonice as beneficiary.

Parol evidence is admissible to show that an assignment of a life insurance policy, although absolute on its face, was intended only conditionally. In Moser v. Moser, 117 Ariz. 312, 572 P.2d 446 (1977), a divorce action, a husband had assigned life insurance policies to his wife by assignments absolute on their face. The court stated:

> Appellant [the wife] contends that the assignment of the policies was conclusive and that appellee cannot contend that she [the wife] was not the absolute owner. We do not agree. As we remarked in Neely v. Neely, 115 App. 47, 563 P.2d 302 (1977), a case also involving the transfer of ownership of insurance policies, the mere form of a life insurance policy is not conclusive as to either ownership or whether a gift has been made. Donative intent must be ascertained in light of all the circumstances. 572 P.2d at 448.

Examining the intent of the parties as demonstrated by their conduct, the court found that the husband, as here, intended merely to gain certain probate and estate tax benefits, and had no intent to give up the incidents of ownership and control of the policy.

The court in Neely, cited above, came to the same conclusion under similar facts. Just as in the present case, the wife contended that:

> [W]hen one spouse has turned over ownership of an insurance policy to another spouse in order to avoid estate taxes it is conclusive and incontrovertible that a gift has been created.
> 563 P.2d at 305.

The court disposed of the wife's argument in two words: "We disagree." Id. The court found that although the language of the assignment was absolute, the intent of the parties was to bypass the husband's estate in avoidance of estate taxes, and the husband had therefore not divested himself of ownership or control of the policies. The assignment of ownership in the present case was for a similar, although mistaken, purpose: an attempt to avoid probate. Appellant's testimony is:

> Shortly after the policies were taken out, the insurance agent was in the store one day talking about ownerships of the policies. He advised me that if I was not the owner and anything should happen to the Decedent, Ronald Hooker, that the insurance would have to go into probate, and in order to stop this, I would have to be the owner. It was at this time that the policies were changed, naming me as owner, and this was the understanding that I had.
> (R. 106).

Her testimony in her deposition is the same. After apparently coming to a misunderstanding that unless the beneficiary is also the owner, the proceeds will be paid into

the estate and not be available to pay bills, she requested the agent to prepare the change of ownership papers,

> "because if this is the case, I would like the insurance policies put as me as the owner." And so this was done at that time. Depo. Helen Mallard 9, 10.

Appellant reiterates the same testimony at page 12 of her deposition.

By Appellant's repeated admission, then, it is undisputed that the sole purpose of the change of ownership was to attempt to avoid probate. Under the reasoning of the Moser and Neely cases, such an assignment does not divest the insured of his rights as owner.

The most that can be said for the assignment is that it was made to assure Helen that the original purpose of the policy would be carried out: the mortgage on her house would be paid. Such assignments to assure payment of debt are quite common, and can be shown by parol evidence. In Price v. First Nat'l Bank of Atchison, 60 Kan. 743, 64 P. 639 (1901), a husband, as insured, and wife, as owner and beneficiary, made an assignment to a creditor bank absolute on its face. The court held:

> Parol evidence was admissible for the purpose of showing that, although such assignment was absolute on its face, the real intent of the parties was that the insurance policy should be turned over to the bank under such assignment for the purpose of collateral security merely. 64 P. at 641.

See also Albrent v. Spencer, 275 Wis. 127, 81 N.W.2d 555 1957); Boyle v. Crimm, 363 Mo. 731, 253 S.W.2d 149 (1952).

In the present case, Helen's own testimony shows unequivocally that Policy #44498 was taken out to assure payment of the mortgage Ronald had placed on her house to secure his business debts. In her deposition, she states:

> Q The second policy [#44498] was taken out to basically cover obligations for the new store; that is correct, isn't it?
>
> A I took it out because I figured it would cover the loan I had on my home.
>
> Q It was not taken out for the new store?
>
> A Well, I borrowed--my parents built my home, and my home was free and clear, and I borrowed money against my home to build the store. So it was to pay for it if something happened, so I would have my home.
>
> Depo. Helen Mallard 24.

At most, then, Ronald's assignment of the policies to her must be construed as being made in an attempt to avoid probate and to secure payment of the debt.

The effect of an assignment of a life insurance policy as security for a debt is not to divest the insured of his interest in the policy but merely to create a lien in favor of the assignee to the extent of the debt. Once the debt is paid, the policy continues in effect as if there had been no assignment. Males v. New York Life Ins. Co., 367 N.Y.S.2d 575, 48 A.D.2d 50 (N.Y.A.D. 1975). In Green v. American Nat'l Ins. Co., 452 S.W.2d 1 (Tex. Civ. App. 1970), the court held that a creditor transferree of a life insurance policy acquires no greater interest than will pay the debt. No matter what

form the instrument of transfer assumes, the court stated, it must be construed either as a mortgage to secure the debt or a pledge of enough of the proceeds to pay the debt. See also Albrent v. Spencer, cited above; Parramore v. Williams, 215 Ga. 179, 109 S.E.2d 745 (1937).

In the present case, the assignment to Helen, although absolute in form, conveyed at most only an interest sufficient to discharge the debt on her house. Once Ronald had discharged that debt, which he did in 1977, the policies continued in effect as if there had been no assignment.

Moreover, the conduct of the parties after the assignment demonstrates unequivocally that neither Ronald, Helen nor American Western ever construed the 1974 change of ownership document on Policy #44498 to vest absolute ownership rights in Helen. Under universally accepted canons of construction of insurance policies, the construction placed upon the policy by the parties themselves, as demonstrated by their conduct, will be applied by the court.

In Fire Ass'n of Philadelphia v. Taylor, 76 Kan. 392, 91 P. 1070 (1907), a dispute about the coverage of a fire insurance policy, the court stated:

> If the parties acted upon a contract ambiguous in any way, and such action indicates their mutual understanding as to its ambiguous provisions, the courts will usually adopt such interpretation as most likely to accord with the original intent.
> 91 P. at 1072.

In Continental Cas. Co. v. Goodnature, 170 Okla. 477, 41 P.2d 77 (1935), construing the extent of coverage under a workman's compensation policy, the court stated:

> When a policy of insurance is susceptible of a construction placed thereon by the parties thereto, such construction should ordinarily be adopted by the courts as controlling.
> 41 P.2d at 80.

In Candelaria v. Columbian Nat'l Life Ins. Co., 60 Colo. 340, 153 P. 447 (1915), the court found that the parties had agreed to a construction of a life insurance policy that it would lapse at the due date of the next premium if not paid, and a loan on the policy would be extinguished. Although no language in the policy so provided, the court stated:

> This construction not being in conflict with any language in the policy, nor in violation of any statute, authorized regulation, nor against public policy, the court ought not to be called upon later to put to it a different meaning than agreed to and acted upon by the parties to it and those interested therein.
> 153 P. at 448.

In Chemtec Midwest Services, Inc. v. Insurance Co. of North America, 290 F. Supp. 106 (W.D.Wis. 1968), the court considered whether a liability policy covering injuries arising by "accident" covered breach of warranty as well as negligence claims. The court stated:

> Where an insurance contract is uncertain and the intention of the parties is not clearly ascertainable from the policy itself, the courts will take into consideration the apparent object or purpose of the insurance and, in the context of the policy, the subject matter of the insurance, the situation of the parties, and the circumstances surrounding the making of the contract.
> 290 F. Supp. at 109.

See also Kraus v. Allstate Ins. Co., 258 F. Supp. 407 (W.D. Pa. 1966) at 411, aff'd 379 F.2d 443 (3d Cir. 1967); 12 Couch on Insurance 2d 45:5; 7 Appleman, Insurance Law and Practice, § 4317.

In the present situation, the conduct of the parties unequivocally demonstrates none of them ever had the intent to transfer to Helen the ownership of Policy #44498. First, the sole reason that Helen requested the change of ownership was a mistake of law: she thought that unless she was both owner and beneficiary, the proceeds would be paid to Ronald's estate, not directly to her as beneficiary. Thus, at the time of transfer, the parties had no intent to transfer the right to designate the beneficiary but merely to avoid probate of the proceeds.

Second, American Western never recorded the proposed change in the file of Policy #44498. The company never sent notice of change of ownership to either Helen or Ronald on Policy #44498, in contrast to the notice of change sent on Policy #43476. Third, Helen never objected to receiving notice of change on one policy but not the other, although according to her testimony she was in full charge of all insurance matters. Had she really intended that both policies be changed, she could have been expected to take some action upon being told that only Policy #43476 had been changed.

Fourth, American Western continued to treat Ronald as retaining all incidents of ownership of the policy. It addressed all notices to him, including the notice of change

of ownership and all premium notices. From July 1974 through December 1975, Helen knew that American Western was for all practical purposes treating Ronald as the owner. She acquiesced in this arrangement, paying from appliance company funds the premiums addressed to Ronald. She never took a single step to assert any right of ownership herself.

Fifth, after the divorce, Helen did nothing whatever about the insurance, leaving all decisions and actions to Ronald. She never even inquired whether the premiums had been paid. She made no provision in the divorce decree for maintaining insurance. She did not even bother to inform the company of her whereabouts when she moved. Had she really considered herself the owner of the policies, with full rights of control, she could have been expected to exercise, protect or at least inquire about the policies.

Sixth, when she did make a claim, through her counsel, she claimed only under Policy #43476. Clearly, she never considered herself the owner of Policy #44498 or she would have claimed under that policy as well.

According to the undisputed facts in the record, then, it is apparent that the original purpose of the policy was to secure repayment of the loan on Helen's house, which Ronald later discharged; that the sole purpose of the assignment was a mistaken attempt to avoid probate; that Ronald continued to exercise all rights of ownership of the policy after the

assignment; and that Helen acquiesced in that understanding and never herself evidenced any intent to exercise any ownership rights. This court should not allow Helen now to come forward for the first time and, contrary to the manifest intent of the parties, claim absolute ownership of the policy.

POINT II

POLICY #43476 LAPSED FOR NONPAYMENT

Appellant does not dispute that the premium on Policy #43476 due December 1976 has never been paid or tendered. She admits that American Western sent notice of lapse of the policy to Ronald Hooker at the address all previous correspondence and notices had borne. (Appellant's Brief 17-18; Depo. Helen Mallard 45, 46). She contends, however, that the policy could not lapse because she herself never received notice of lapse. The foolishness of this contention is obvious when it is examined in light of the explicit terms of the policy, the case law, and the statutory scheme regulating lapse of life insurance.

Policy #43476 provides unequivocally that it lapses automatically 31 days after any premium remains unpaid:

> If any premium is not paid when due, such premium shall be in default, and at the expiration of the grace period hereinafter provided, this Policy shall lapse as of the date to which premiums have been paid and shall become of no value.

* * *

> A grace period of thirty-one days without interest will be allowed for the payment of each premium after the first during which period of grace the Policy will continue in force. If death occurs within the grace period, the premium, if unpaid, will be deducted from the amount payable hereunder.

The policy also provides for reinstatement during the lifetime of the insured:

> (a) within fifteen days after the expiration of the grace period for the premium in default, without evidence of insurability; or (b) thereafter but within five years from the due date of the premium in default, upon production of evidence of insurability satisfactory to the Company. The reinstatement of this Policy shall be subject to the payment of all overdue premiums with interest on such premiums of 5% per annum compounded annually.

Unless some statutory or common law doctrine to the contrary prevails, then, the policy lapsed even without the notice that American Western sent.

This court has already examined and rejected Appellant's proposed doctrine that an insurer must send notice before lapse. In Emery v. Prudential Ins. Co. of America, 89 Utah 430, 57 P.2d 747 (1936), the insured had borrowed against the full loan value of a 20-year endowment policy, and therefore no loan value was available to apply against premiums coming due. The trial court found that premiums had not been paid when due, and that the policy had been forfeited according to its terms. The appellant there argued that the insurer was precluded from forfeiting the policy because it had

not taken certain steps required by the explicit terms of the policy for forfeiture for failure to repay a policy loan. This court emphatically rejected that contention, however, on the ground that the policy was forfeited automatically and without any action by the insurer for failure to pay premiums, regardless of the status of the loan. The court stated:

> The policy comes into existence and continues to remain a binding contract only upon the consideration of the payment of the monthly premiums of $4.22 payable on delivery of the policy and a like amount on or before the 8th day of each month thereafter. Failure to pay as thus provided would work a lapse of the policy.
>
> * * *
>
> The loan against the policy having substantially consumed the cash surrender value, and there being no dividend accumulations, the insured having applied the full amount of the loan to the payment of premiums, of necessity the policy lapsed upon default of payment of premiums.

57 P.2d at 748-749.

In the present case, Appellant cannot even point to any explicit policy terms upon which she could rely to impose a duty on American Western to take overt steps before forfeiting the policy. She alleges only a "custom" of sending premium notices. American Western is under no such duty, and the policy lapsed automatically upon nonpayment of the premium.

The ruling in Emery is in complete accord with the universally accepted rule that in the absence of special

provisions which deal with lapse, the operation of provisions suspending or forfeiting insurance contracts is not affected by the failure of the insurer to take some affirmative action or to declare a suspension or forfeiture before lapse. Beeman v. Farmers Pioneer Mut. Ins. Ass'n, 104 Iowa 83, 73 N.W. 597 (1897); Continental Ins. Co. v. Stratton, 185 Ky. 523, 215 S.W. 416, 8 A.L.R. 391 (1919); Gifford v. Workmen's Benefit Ass'n, 105 Me. 17, 72 A. 680 (1908); Robinson v. Continental Ins. Co., 76 Mich. 641, 43 N.W. 647 (1889); Phenix Ins. Co. v. Bachelder, 32 Neb. 490, 49 N.W. 217 (1891); Davis v. Home Ins. Co., 127 Tenn. 330, 155 S.W. 131 (1913). See also 8 A.L.R. 395 and cases cited thereunder. Where the continuance of the policy is dependent upon payment and no contract provisions extend coverage absent notice of lapse, no notice is necessary for coverage to lapse. Hensley v. Aetna Casualty & Surety Co., 200 N.W.2d 552 (Iowa 1972); Wisniewski v. Prudential Ins. Corp., 422 F.2d 154 (3d Cir. 1970); Miner v. Standard Life & Accident Ins. Co., 451 F.2d 1273 (10th Cir. 1976).

A survey of the present Utah statutory scheme regulating lapse of life insurance policies also reveals no requirement of notice. Pursuant to Utah Code Ann. § 31-22-2 (Repl. 1966), the instant policy has a grace period wherein the policy shall continue in force, during which period of grace the payment may be made. A policy may be reinstated at any time within

three years from the date of premium default provided insurability can be shown under Utah Code Ann. § 31-22-9 (Repl. 1966). Utah Code Ann. § 31-22-3 (Repl. 1966) allows the insurer to contest the payment of benefits under the policy for nonpayment of premiums and recognizes the ability of the insurer to terminate the policy for nonpayment of premiums. Nowhere in the nonforfeiture provisions (Utah Code Ann. § 31-22-13, et seq. (Repl. 1966)) is there any notice requirement.

Implicit in the statutory scheme is the right of an insurer to cancel, terminate or otherwise forfeit the policy upon a party's failure to pay premium payments as due. As the Utah Supreme Court noted in Decker v. New York Life Ins. Co., 94 Utah 166, 76 P.2d 568 (1938), the very purpose of the automatic nonforfeiture provisions is to give the insured the net value of his policy upon cancellation or lapse. Where, as here, a term policy has no cash surrender value or net value, no amount is due the insured upon the automatic termination of the policy for failure to pay premium payments. In short, nowhere in the insurance provisions of the Utah Code is there any provision that notice is required for a life insurance policy to be cancelled. American Western was under no statutory obligation to send notice to Helen Mallard as a condition of lapse.

Notwithstanding the lack of any contractual, statutory or common law duty, however, Appellant contends that American Western is estopped from declaring the policy lapsed according to its terms because the company failed to send her notice of lapse. Under familiar principles of estoppel, where an insurance company misleads an insured by a long-established custom at variance with the terms of the policy (such as accepting late payments or sending notice of premiums due) and the insured comes to rely upon that custom, the insurer cannot suddenly discontinue the custom without warning and insist on strict compliance with the policy to the detriment of the insured. In Pester v. Family Mut. Ins. Co., 186 Neb. 793, 186 N.W.2d 711 (1971), quoted by Appellant (Appellant's Brief 21), the elements of estoppel in these circumstances are laid out. They are

1. An established custom, followed continuously for many years, of sending notice of premiums due;
2. Reliance by the insured on the practice, so that the insured made no other effort to keep track;
3. Sudden and unexplained termination of the long-established custom to the detriment of the insured.

In the present case, Appellant has raised no factual question whatever about the existence of even one of these

elements, let alone all three. Not only is there no evidence of a long-established custom, there is no evidence that American Western ever sent any notice whatever addressed to Helen. Helen could not come to rely upon receiving premium notices, because she herself had never received one, and relied on her ex-husband to take care of them. American Western did not depart from its prior practice, it followed it exactly: it sent notice to Ronald at his address on the books of the company, just as it had always done before.

Appellant has no evidence of the first and most critical element above, establishment of a custom or practice for many years of sending notice of premiums. In Okamura v. Time Ins. Co., 24 Utah 2d 209, 468 P.2d 958 (1970), the trial court ruled that the insurer had accepted one premium payment after expiration of the policy's 31-day grace period and was therefore estopped from terminating the policy when the next premium was tendered six days past the expiration of the grace period. The Supreme Court reversed, holding that:

> We are of the opinion that the acceptance of one prior premium after the due date is insufficient to constitute a custom or usage waiving a requirement of prompt payment. A custom or usage exists only when followed for a substantial period of time. 468 P.2d at 959.

In the present case, the record is uncontroverted that Appellant never received even a single notice of premium due addressed to her. If American Western can be said to have established any custom or usage over such a short period of

time this policy existed, that custom was to do exactly what the company did here: send notice addressed to Ronald at his address on the books of the company.

There is likewise no factual issue about the second element of estoppel, that Helen relied upon any custom established by American Western. Her testimony is unequivocal that she relied not on her own efforts but on Ronald to take care of the insurance after the divorce. She states:

> Q. Did your husband Ron indicate that he would forward to you any requests for payment of premiums on the policies?
>
> A. He said he would handle it. I said, "Are you sure, because if you don't, then I'll take care of it."
>
> He said, "No, don't worry, I'll take care of it." And that was it.
>
> Depo. Helen Mallard 25.

Later, she clarifies her understanding with her ex-husband:

> Q. And in the summer of 1976, you asked him whether he was going to handle the insurance?
>
> A. I asked him if he was going to keep up the insurance policies, and he said he'd handle them. I said, "Well, if you decide not to, let me know." And he said he would.
>
> Q. He would let you know if he didn't handle them; is that right?
>
> A. Right.
>
> Depo. Helen Mallard 47.

She expected American Western to deal directly with Ronald about payment of premiums, obviously, because she expected him to pay them. She acquiesced in the arrangement for American Western to send notices to Ronald, with full knowledge of it, even after the divorce. She did not require a provision about the insurance in the divorce decree. She cannot now be heard to complain that American Western continued to send notices, including notice of lapse, to Ronald in accordance with the custom she had agreed to.

Moreover, whatever custom American Western had followed during Ronald and Helen's marriage, it could hardly be expected to know what Helen wanted in the changed circumstances following the divorce unless she disclosed her wishes to the company. The last annual policy notice before the 1976 lapse was in December 1975, while Helen was still married to Ronald. At that time, notice to Ronald was sufficient to notify Helen. Yet Helen made no effort to make a different arrangement with American Western after the divorce to meet the changed circumstances. Requiring separate notice to her in 1976 would be asking American Western to read her mind.

Nor has Appellant any evidence of the third element of estoppel, that American Western suddenly and without warning departed from a prior custom. Appellant's objection is instead that American Western continued to do exactly what it had always done about sending policy notices: it sent them to

Ronald at the same address that they had always gone to. The evidence is uncontroverted that in December 1976 American Western sent notice of lapse to the insured at the address he and Helen had lived at in Logan (Depo. Helen Mallard 45, 46), as Appellant admits in her brief. (Appellant's Brief 17-18). The notice was returned marked "Return to Sender, Undeliverable as Addressed, No Forwarding Order." (R. 234). Thus, even if a custom had been established and Helen had come to rely upon it, American Western did not depart from it.

Appellant argues that it is a question of fact whether American Western's duty extended beyond sending notice of lapse, once it was returned by the post office, and whether they were required to send someone to try to find her. (Appellant's Brief 20). The scope of such a duty, of course, is a question of law, not fact. Not only does Appellant propose to stretch American Western's duty far beyond what is reasonable, the record contains no facts which would sustain a holding of estoppel even if the duty did extend so far. Appellant cites the testimony of Martin Reeder, Ronald's insurance agent, that "as a general rule" American Western would notify the agent when notices were returned without forwarding address and ask the agent to locate the client. (Appellant's Brief 18). "As a general rule" does not demonstrate anything like a custom universally followed for a substantial period of time. More important, Appellant has no evidence whatever that she even knew American Western had such a "general rule", let alone that she came to

rely upon it. This was obviously the first time that she had even encountered the problem with the company.

Even if all the elements of an estoppel had been established, the Appellant's argument still falls short of showing that American Western's failure to track down its insured was the proximate cause of Helen not knowing the policy had lapsed. Helen had agreed both explicitly with her ex-husband and by her conduct that American Western should send all premium notices to Ronald, not to her. If American Western had a duty to locate the insured upon receiving the notice back without forwarding address, such a duty extended only so far as to locate Ronald, the insured. It is sheerest speculation by Appellant whether Ronald would have notified her or not, had American Western made a special effort to contact him. Ronald did not tell Helen about the change of beneficiary on Policy #44498. There is no reason to believe he would have notified her of the lapse of Policy #43476, had American Western made a special effort to contact him. Thus any failure of American Western cannot be the proximate cause of her lack of notice.

What is apparent, of course, is that Appellant's failure to receive the notice was her own fault. She knew that American Western had sent all notices of premiums addressed in exactly the same manner as the notice of lapse, even after Ronald had submitted the change of ownership document in July 1974. If Appellant now contends that American Western had a

duty to send notice of premiums due and policy lapse to her as owner by virtue of the 1974 document, she had a reciprocal duty to object or to inform the company when it sent the premium notice to Ronald in 1974 and 1975. Yet she did nothing to object to these premium notices being addressed to Ronald. In fact, she herself paid the premiums with appliance company funds. Moreover, if she expected American Western to send notice to her, she had a duty to inform the company of her change of address when she moved. She admits she made no effort to do so. (Depo. Helen Mallard 25).

One other factually uncontested matter precludes Appellant from recovery on Policy #43476: she has failed to tender payment of the premiums due as a prerequisite to reinstatement of the policy. In Wickes v. State Farm Mut. Ins. Co., 27 Utah 2d 350, 496 P.2d 267 (1972), the insurer had a standing offer to reinstate an auto insurance policy if a past due premium was paid within ten days of its due date, even though the policy itself had no grace period. The insured was killed within two days after the last premium was due, yet the beneficiary made no tender of the premium within the ten-day grace period established by custom. The court held that the insurer would have been bound by its standing offer, but the failure to tender payment within the ten-day grace period absolutely precluded recovery. In the present case, the record is devoid of any evidence Appellant

ever tendered the premium due December 1976. Even if American Western could not declare the policy lapsed until Helen Mallard had actual notice thereof, any reinstatement of the policy after the 31-day grace period is expressly conditioned upon payment of the past due premium with interest. Appellant has failed to satisfy this condition after having actual knowledge of lapse, and is therefore precluded from recovery.

CONCLUSION

Helen Mallard knew that the insurance Ronald Hooker purchased during their marriage was to pay off the mortgage on Helen's house. Ronald paid that mortgage in 1977, after their divorce. Knowing that, he allowed one policy to lapse, and changed the beneficiary on the other to his new wife, Vonice. Helen now insists that she is entitled not only to have her house paid off, as the policies were intended to do, but also to more than $140,000 in insurance proceeds besides: $75,000 on Policy #43476, which Ronald allowed to lapse knowing Helen's house would be paid off, and $67,500 on Policy #44498, which Ronald left to Vonice.

All Helen's claims are based on the "change of ownership" forms Ronald executed in 1974. Helen contends they divested Ronald absolutely and forever of the right to change or amend them. Yet by the terms of the policies themselves, Ronald retained that right, as the insured, to change or amend the policies. Moreover, there is no factual dispute that

the policies, including the "change of ownership" forms, were intended as security for the mortgage on Helen's house. Upon either rationale, Ronald had the right to change the beneficiary after he had paid off the mortgage on the house.

Helen's overreaching is demonstrated further in her claim that Policy #43476 could not lapse unless American Western had first given her actual notice thereof. Neither the policy terms nor any statute require such notice. Helen had approved and ratified American Western's procedure of sending all notices to Ronald. Helen made no contact with American Western to let the company know where she was, how she could be contacted, or that she had any continuing interest in the policy after the divorce. Yet she asserts that American Western must go beyond sending notice of lapse to Ronald, as it did, and make special efforts to locate her and inquire whether she wanted the policy to lapse. She is not entitled to the proceeds of either policy.

RESPECTFULLY SUBMITTED this 19th day of November, 1979.

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CERTIFICATE OF MAILING

I hereby certify that on this 19th day of November, 1979, I caused to be mailed by first-class mail, postage prepaid, two true and correct copies of the foregoing Brief to the following:

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