

1981

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 : Reply To Respondents' Petition For
Rehearing

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *American Western Life Insurance v. Hooker*, No. 16596 (Utah Supreme Court, 1981).
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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, Defendant,))
Third-Party Defendant & Respondent,))

APPELLANT'S PETITION
RESPONDENTS' PETITION

Third-Party Plaintiff and
To Respondents' Petition
From a Previous Decision of the

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TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN SUPREME COURT 2

RELIEF SOUGHT ON PETITION FOR REHEARING 2

STATEMENT OF FACTS 2

ARGUMENT 6

 POINT I. 7

 POINT II 9

CONCLUSION 15

TABLE OF AUTHORITIES

CASE CITATIONS:

Kjar v. Brimley
27 Utah2d 411
497 P.2d 23 (1972) 14

IN THE SUPREME COURT OF THE
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AMERICAN WESTERN LIFE INSURANCE COMPANY,))
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Third-Party Plaintiff & Appellant,))
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VONICE W. HOOKER, Executrix of the))
Estate of Ronald Dean Hooker, Deceased,))
Third-Party Defendant & Respondent.))
-----))

NO. 16596

REPLY TO RESPONDENTS' PETITION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE

Appellant adopts the statement of Appellant as set forth in the original Brief of Appellant, Helen M. Mallard, a/k/a Helen Margurite Hooker.

DISPOSITION IN SUPREME COURT

In a hearing held before the Supreme Court, the Court reversed the findings of the Lower Court and awarded Judgment to the Appellant, Helen M. Mallard, a/k/a Helen Margurite Hooker, as against the Respondent American Western Life Insurance Company, awarding to said Appellant Judgment for the proceeds from two (2) life insurance policies, issued by Respondent.

RELIEF SOUGHT ON PETITION FOR REHEARING

Appellant seeks reaffirmation of the Judgment of the Supreme Court in its previous decision, wherein the Court held that the Appellant was entitled to payment of two (2) policies issued by Respondent on the life of the decedent, and wherein the Appellant was the owner.

STATEMENT OF FACTS

RESPONDENT CONTENDS: - That the mailing of premium notices set forth in Paragraph 12 of the Application, is a part of the contract and requires premium notices to be sent, but then alleges that the Court overlooked the alternative designation of persons to receive the notice set forth in the Application, and that there was a box marked "owner" on the Application, and that same was not checked as per the Exhibit "A" attached to the Respondents' Petition

for Rehearing, and makes other allegations of alleged fact in support of this contention.

APPELLANT RESPONDS: - (All references to Appellant in this Reply by Appellant is to Helen M. Mallard, a/k/a Helen Margurite Hooker.) That at the time of the making up of Respondents' Exhibit "A", evidenced that the insured decedent resided together with the Appellant as husband and wife, both residing at the address set forth as the home of the husband and wife, and also evidence that the first beneficiary of the policy was the Appellant.

RESPONDENT CONTENTS: - American Western contends that of significance of American Western's Motion for Reconsideration, is the fact "Helen was a bookkeeper for the store, and handled the payments of insurance, including the two policies in dispute herein." (Pet. Br. p. 4)

APPELLANT RESPONDS: - There is no factual relationship set forth in the Brief of American Western that shows that subsequent to the divorce and remarriage of the decedent, that the Appellant continued to handle the insurance payments, and was bookkeeper for the store.

RESPONDENT CONTENTS: - American Western contends "both policies were required as mortgage insurance to pay off loans secured by property owned by Helen Mallard". (American Western Pet. p. 4)

APPELLANT RESPONDS: - Appellant responds that at the time the assignment of the insurance policies to the Appel-

lant, the Appellant had made loans against her own property, which property was solely in her own name to obtain loans for funds needed by husband; that she was the wife of the decedent for more than two (2) decades, and borne and raised a family, the issue of both the decedent and the Appellant; that Appellant was the named beneficiary in both policies; that it was the intent of the decedent that his wife would be the beneficiary and owner of the policies, and that same were taken out on the basis of a husband protecting his spouse and family against his demise. That nowhere in the record does it evidence that it was the intent of the decedent at the time of purchasing the policies to change the Appellant (the wife) as the lawful and sole owner of the policies based upon the marital relationship then existing as between the decedent and his spouse.

RESPONDENT CONTENTS: - American Western contends "Helen required Ronald to change the owner of the beneficiary mistakenly believing the proceeds of the policy to be paid into Ronald's estate unless she was named as owner". (American Western Pet. pp. 4 & 5)

APPELLANT RESPONDS: - That both of the parties believed that proceeds from insurance to a named beneficiary, namely the Appellant, might become involved in an estate distribution, when in fact the Appellant as named beneficiary would be entitled to recover on the proceeds of the policy without necessity of probate, and is therefore

evident of a lack of knowledge of the payment of proceeds of the policy to a beneficiary upon the demise of the insured and has no materiality as to the basis of the naming of the Appellant as the true owner of both of the policies of life insurance.

RESPONDENT CONTENTS: - American Western contends "after the change in ownership, Helen was aware that American Western continued to address all correspondence and premiums notices to Ronald Hooker". (Pet. Br. p. 5)

APPELLANT RESPONDS: - That Appellant and the decedent were husband and wife, and residing at the same address as husband and wife, and that the correspondence and premium notices addressed to Ronald Hooker would be under the notice and scrutiny of the Appellant as long as the decedent and Appellant were husband and wife, and following the dissolution of the marriage and including the remarriage of the decedent to Vonice W. Hooker, the Appellant relied upon the agreement as between the decedent and the Appellant that the decedent continued to make payments, and did not disaffirm or negate the responsibility and liability of American Western to keep the Appellant advised of any notices or premiums or lapse or cancellation of policy relying upon the full knowledge of American Western that Appellant was a true owner of both policies and would be given notice of premiums due, late notices or cancellation

following termination of relationship of the decedent and Appellant as husband and wife.

ARGUMENT

AMERICAN WESTERN CONTENDS: That with respect to Policy Number 43, that the Court based its judgment upon the finding of fact which is clearly contrary to the record and the admissions of the parties. (Pet.Br. p. 5)

APPELLANT RESPONDS: That the Supreme Court had before it the full record of all testimony and facts concerning the matter before the Court, and that the Court in its adjudication and findings rendered its judgment of reversal with full knowledge of the record and admissions of the parties and all facts pertinent thereto.

AMERICAN WESTERN CONTENDS: That the Supreme Court acted on incorrect principles of law, finding liability without legal basis as to Policy Number 43. (American Western Pet. p. "

APPELLANT RESPONDS: That the principles of law established by the Supreme Court of the State of Utah in its final judgment, adjudicated the principles of law with finding of fact, and the Supreme Court's interpretation of the law of the State of Utah, in accordance with the Court's interpretation of the law, and the allegation that the Supreme Court of Utah rendered judgment without any legal basis is presumptuous.

AMERICAN WESTERN CONTENDS: "With respect to Helen's entitlement to the proceeds of Policy Number 44, that the Supreme Court of the State of Utah, misconstrued the factual setting before it, and decided certain disputed facts on the basis of a record which cannot support such a summary resolution of the claim." (Pet. Br. pp. 5 & 6)

APPELLANT RESPONDS: That the Supreme Court of the State of Utah could not and did not render its judgment without knowledge of the factual setting, and that it may be presumed that the Court did not make a summary resolution of the claim, but rendered its judgment based upon the record and upon the interpretation of law of the majority opinion with full knowledge of the contentions by a majority of this Court of the minority opinion of the Court.

POINT I.

AMERICAN WESTERN CONTENDS: That while this Court held that the terms of the American Western's Application required premium notices to be sent prior to a lapse of the effective date of termination of a policy, that the Application of American Western's insurance application required checking as to whether or not notices would be sent to the home, business, owner or other, and that the box marked "home" was checked. (See Exhibit "A" attached to Respondents' Petition for Rehearing.) That therefore the finding of the Lower Court that the assignment to the Appellant as

owner did not require American Western to give notice to the owner, and therefore, that American Western had no duty to send notice of lapse or default to the Appellant, in that notice to the decedent (insured), was adequate notice. (Pet.Br., pp. 6 & 7)

APPELLANT RESPONDS That the application set forth as Exhibit "A" was not filled out by either the decedent (insured), nor the Appellant, and that at the time of the making of the application, the decedent and the Appellant were husband and wife residing in the same household, and the application was prior to the assignment of ownership of the policy to the Appellant, and prior to any severing of the relationship of husband and wife, and did not constitute a true election as to whether or not the notice should be sent to the home, business, owner, or other, in that there was not knowledge or contemplation between the decedent and the Appellant of divorce or demise of the insured, that any such selection was based upon the immediate facts then existing, wherein there was one household and that the Appellant could be presumed to not have made an election as to where a notice of premium or cancellation of policy would be sent upon the severance of the marital relationship between the parties, and was in any event an adhesion clause without any significant meaning or implication to either the decedent or the Appellant at the time of application for change of ownership of the policies, and further that the

application was prior to the assignment of the policy by the decedent of the full and true ownership of the said policies made prior to the demise of the decedent and during a period of time in which the parties were husband and wife.

Appellant further contends that the testimony of the agent of American Western, who was involved in the initial contract for issuance and sale of the policies of insurance, and the change of ownership by reason of the assignment of the policies by the decedent to the Appellant, testified fully as to the policy and customs of American Western in seeking out an owner or beneficiary of a policy prior to allowing a lapse or a notice of premium due for a policy of insurance as set forth in Brief of Appellant in Point 4 of Appellant's Brief, pp. 17-22.

Further testimony as to the ordinary and regular custom and procedure of American Western in seeking out the owner or beneficiary for returned notices of premiums due, and notices for lapse of policy was testified to in the Deposition of the seller of the policy on behalf of American Western. (Forbes Dep., p. 16)

POINT II.

AMERICAN WESTERN CONTENDS: That claim on Policy Number 43 must be made against the estate of the decedent and not against the insurer. (Pet. Br. p. 9-17)

APPELLANT RESPONDS: That American Western's reallegation that the original application for insurance on Policy Number 43, required sending premiums to insured's home, in attempts to advise this Court that the Court did not make a distinction as to whether it was ruling on a basis of contract or tort, would be determinative as to whether the liability was that of the decedent's estate, rather than that of American Western. (Appellant's Pet. pp. 9-10)

APPELLANT FURTHER RESPONDS: That the Complaint of American Western named only Vonice W. Hooker, and the Appellant personally, and not the estate of the decedent, and that the introduction of a new issue not contained in the Complaint for declaratory judgment by American Western involves an issue raised for the first time in the Petition for Rehearing of the insurer, and is not an issue before the Court in that the Lower Court and the Supreme Court had a duty to render a Declaratory Judgment only upon the issues before it, and that the Brief of the Appellant in answer to the Brief of the Respondent did not and could not take issue as to the estate of the decedent, and further that this Court found the element of equitable estoppel in allowing a retention of the proceeds of the policy paid to the successor spouse of the decedent, and further that the negligence of American Western, have admittedly received notice of the assignment of all rights Policy Number 43 and Policy Number 44 to the Appellant, and still allowing payment

of the proceeds of one of the policies to Vonice W. Hooker by reason of the negligence and misconduct of American Western negates any issue of any liability of the estate of the decedent to the Appellant.

AMERICAN WESTERN CONTENTS: That under the theory of breach of contract, the promise of the decedent to pay the insurance premiums on the policies owned by the Appellant, and the failure of the decedent to make such payments, give rise to a valid contractual claim as against the estate of the decedent, and therefore cause to apply the doctrine of equitable estoppel as against the Appellant. (Respondents' Pet., pp. 11-13)

APPELLANT RESPONDS: That the Supreme Court considered the principles of equitable estoppel and found that the assignment of the two policies did, as a matter of law, vest title in the Appellant and required notice to be sent to the Appellant prior to any cancellation or termination of ownership of the policy or lapse of policy without first giving notice to the owner of the policies, namely the Appellant herein, and did not find any basis of equitable estoppel as against the Appellant, but did find an element of equitable estoppel in denying American Western judgment as against the new spouse, Vonice W. Hooker.

AMERICAN WESTERN CONTENTS: That judgment should have been rendered in favor of the insurer on the theory of tortious conduct, should render judgment to American Western on

the basis of the allegation that the promise of the decedent to make payments of premiums on behalf of the Appellant was a gratuitous act and nullified any liability of American Western to pay the proceeds of the life insurance policies to the Appellant. (Respondents' Pet., pp. 13-15)

APPELLANT RESPONDS: That the citations and conclusions of American Western in the cases cited in support of American Western's contentions as to the rights of a bailee in the case citing the gratuitous undertaking of an insurance carrier to provide insurance as to insuring separate structures has no nexus as to the findings of this Court that the Appellant had a right to the proceeds of the two (2) insurance policies on the assignment of ownership of the policies by the decedent to the Appellant, and is not supported in any way by the citations of American Western.

AMERICAN WESTERN CONTENDS: That in accordance with liability of the insurer American Western, based upon the principles of agency, nullifies any liability of American Western as to the Appellant. (Appellant's Pet. pp. 15-17)

APPELLANT RESPONDS: That the case citation of an instance wherein the office manager of a real estate firm making a gratuitous promise to procure insurance for a third party and the functions of an insurance agent agreeing to provide insurance for another and failing to do so, have relevancy to the actual assignment by a husband to his wife of ownership of insurance policies by written assignment of

all right, title and interest to policies during the period of a marital relationship as between the assignor and assignee is not relevant to the current matter before the Court, nor in derogation to the Judgment by this Court in the rendering of its previous judgment in favor of the Appellant.

AMERICAN WESTERN CONTENDS: That this Court made a summary determination as to material facts, with respect to Policy Number 44, which are disputed in the record is not supported by the record before the Court. (Pet. Br. pp. 17-21)

APPELLANT RESPONDS: That the Court, in its judgment and findings, was cognizant of the argument of minority of the Supreme Court in regards to whether or not the assignment of full ownership of the policy by the decedent to his then spouse at the time of the existence of the marital relationship between the parties, and wherein the decedent made an assignment of the full ownership of the life insurance policies to his spouse, the Appellant herein, was a valid assignment based upon the relationship of husband and wife, and was not for purposes of any arrangement for collateral in a secured transaction, and that the application of the principles of such assignment was based upon the right of an owner to expedite the payment of insurance premiums to his beneficiary and lawful wife in the event of his demise, and was not of such a nature as to constitute an assignment given for security of collateral.

The citation contributed to Chief Justice Maughan in the case of Kjar v. Brimley, 27 Utah 2d 411, 497 P.2d 23 (1972), wherein the citation alleges that Justice Maughan has specifically noted that the intent of the parties is crucial to the determination of whether a purported transfer is absolute or conditional, has no relevance to the instant matter before the Court in that the action before the Court in the cited case was a matter wherein the plaintiff initiated an action to recover a statutory penalty for an alleged usurious rate of interest, and dealt with an alleged default on a mortgage on the home wherein the plaintiff contended that the transaction was a loan secured by a mortgage on the plaintiff's home, and the defendant claimed that the transaction was a conditional sale with an option to repurchase at an advanced price, and therefore did not constitute usury, and this Court held as a controlling question, was as to the intention of the parties as it existed at the time of the execution and delivery of the instrument, and the Court held that there was a material issue of fact as to what the intent of the parties was, and that the Lower Court erred in granting summary judgment without testimony as to the facts relating to the transaction between the parties.

In the instant matter before the Court, the transaction involved is one between a husband and wife, and consists of the husband transferring to his wife by written application for change of ownership as to both policies with full know-

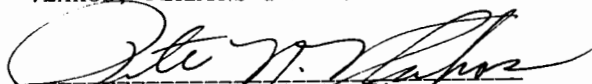
ledge by the decedent that the decedent was assigning to his spouse, who was also the beneficiary of said policies, the true and lawful ownership of both policies in that no consideration other than the relationship of husband and wife had any materiality to this transaction, and further that the facts relating to the assignment and transfer of the decedent's intent and purpose for assignment of the ownership of the policies to his then wife was testified to in depositions of the agents of the insurer, as well as by deposition of the Appellant, and that this Court reversed the decision of the Lower Court based upon the knowledge of the facts before the Court.

CONCLUSION

It is submitted to this Honorable Court that the judgment of this Court in its previous judgment and decision in favor of the Appellant was rendered with knowledge by the Court of all of the material elements of fact and law having been considered by the majority opinion of the Court and that the Judgment of the Supreme Court was knowledgeably rendered.

RESPECTFULLY SUBMITTED this 2 day of February, 1981.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2 day of February, 1981, I mailed a true and correct copy of the above and foregoing Reply Brief of the Appellant, Helen M. Mallard, a/k/a Helen Margurite Hooker to the Brief of American Western Life Insurance Company in Support of Rehearing, by placing same in the United States Mail, postage prepaid and addressed to the following:

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