APPLICABILITY OF COMMUNITY PROPERTY LAWS TO NATIONAL SERVICE LIFE INSURANCE

In California, a commercial life insurance policy, purchased with community funds, is a community asset, the proceeds of which are community property. But in the leading case of Wissner v. Wissner, the United States Supreme Court strongly indicated that proceeds of a National Service Life Insurance policy could not, consonant with congressional intent, be community property. However, any

1 In re Castagnola's Estate, 68 Cal. App. 732, 230 Pac. 188 (1924). Unless otherwise specified all discussion will assume a policy on the life of a husband, the premiums for which have been paid with community funds.

2 When premiums are paid with both separate and community funds, proceeds are separate and community in proportion to the amount of each type used. McBride v. McBride, 11 Cal. App. 2d 521, 54 P.2d 480 (1936). This rule does not obtain in all community jurisdictions. See Succession of Lewis, 192 La. 734, 189 So. 118 (1939). For a review of the life insurance community property laws of these states, see Huie, Community Property Laws as Applied to Life Insurance. 17 Texas L. Rev. 121 (1939), 18 id. 121 (1940).


4 38 U.S.C.A. §§ 701-24 (Supp. 1959) [hereinafter referred to as “NSLI”]. The NSLI Act of 1940, 54 Stat. 1008, as amended, was repealed incident to the consolidation of all laws administered by the Veterans' Administration and re-enacted into positive law as part of Title 38, United States Code, “Veterans' Benefits,” by the Act of September 2, 1958, 72 Stat. 1105, effective January 1, 1959.

This note primarily treats post-war “Participating (dividend-sharing) NSLI” and its wartime ancestor, many aspects of which are similar or identical to other veterans’ insurance schemes, of which there presently are four: (1) Participating NSLI, as of 1936, represented approximately 84% of all veterans' insurance in force, having 5.5 million members with a total of $35.9 billion face value insurance. It had its inception in World War II NSLI. (For specific characteristics of the wartime and post-war forms, see text of notes 15–33 infra). It closed to new issues April 25, 1951. (2) United States Government Life Insurance (USGLI), 38 U.S.C.A. §§ 740–60 (Supp. 1959), had its inception in World War I War Risk Insurance and is participating. It closed to new issues in 1951. (3) Veterans' Special Term Insurance, 38 U.S.C.A. § 723 (Supp. 1959) (old NSLI Act § 621), issued after 1951, had its inception in Servicemen's Free Indemnity Insurance for Korean servicemen and closed to new issues January 1, 1957. It was non-participating, non-convertible five-year renewable NSLI Term insurance; however, by the Act of September 2, 1958, 72 Stat. 1105 (Public Law 85–896) this insurance was made convertible to non-participating permanent NSLI plans. 38 U.S.C.A. § 723(b) (Supp. 1959). (4) Service Disabled Veterans' Insurance, 38 U.S.C.A. § 722 (Supp. 1959) (old NSLI Act § 620), was made available after 1951 and modified slightly in 1958, and is non-participating. A veteran who applies within a certain period after a service-connected disability as established by the Veterans' Administration is eligible; he may apply thereafter for a non-participating permanent NSLI plan.


5 In Wissner, the serviceman had substituted his mother for his wife as NSLI beneficiary shortly before his death. In her action against the mother for one-half of the proceeds, the wife relied upon California community property law relating to life insurance, under which she clearly would have prevailed had this been a commercial policy.

As owner of a commercial policy on her husband's life, a wife in California has a vested right to one-half of its proceeds, even though her insured husband has the contractual power to designate and change beneficiaries. Dixon Lumber Co. v. Peacock, 217 Cal. 415, 19 P.2d 233 (1933). As his named beneficiary she obtains a co-existent but distinguishable "expectancy" as the object of a defeasible gift of his one-half share. This becomes absolute upon his death if she remains his beneficiary. Grimm v. Grimm, 26 Cal. 2d 173, 157 P.2d 841 (1945); Evans, Some Secondary Sources of Acquisition of Community Property, 11 Calif. L. Rev. 156, 157 (1923). For beneficiaries' rights, see generally Vance, Insurance 656–67 (3d ed. 1951). Thus, even where he designates a third party the husband may not give away the wife's one-half, and she
broad implication of Wissner that NSLI proceeds are completely immune from community property law doctrines was rejected in the recent case of Estate of Alle by a unanimous California Supreme Court.

In Alle, NSLI policy premiums were paid with community funds, and the insured husband designated his wife as beneficiary. The husband died in 1956, and upon the wife's death one month later, intestate and without surviving spouse or issue, the proceeds were paid to her estate. Sisters of the husband then sought to establish a right to one-half of the proceeds under California Probate Code section 228. Their claim was contested by the wife's brother who asserted a right to all of the proceeds under Probate Code section 225. The brother contended that since community property status was essential to the operation of section 228, Wissner automatically precluded that section from applying.

The supreme court denied this contention and ordered the proceeds distributed in accordance with section 228. The court determined that Wissner forestalled community property claims only when they would disturb a distribution that had been specifically ordered by the insured. That is, conflict with the NSLI Act arises only when the insured's named beneficiary will not take all of the proceeds under community property laws or where those laws conflict with the named beneficiary's express choice of disposal. Since in Alle the insured's chosen beneficiary did receive all of the proceeds, and since she died without specifically indicating to whom she wished them paid, the court reasoned that it was not compelled by the NSLI Act to insulate the federal funds from community claims in this situation and, therefore, local property laws were applicable.

In reaching its decision, the court did not assign a California marital property classification to the proceeds or to the policy. The court reasoned that since the property character of the traceable initial source of the proceeds during the marriage controls distribution of an estate under section 228 and its separate property companion section 229, and since in this situation the proceeds were traceable...


The Wissner Court, 5-3, held these principles inapplicable to NSLI by finding that Congress intended to confer upon all servicemen the right, limited only by specific provisions of the act, to dispose of the proceeds as they saw fit.

7 CAL. PROB. CODE § 228, as applicable here, reads: “If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest . . . then one-half of such community property goes . . . in equal shares to the [heirs of] . . . the decedent . . . and the other half . . . in equal shares to the [heirs of] . . . said [previously] deceased spouse . . .”
8 CAL. PROB. CODE § 225, applying to intestate distribution of separate property and as applicable here, reads: “If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead, to the survivor, or if both are dead in equal shares to his brothers and sisters . . .”

See text at notes 22–24, 33 infra, for the particular provisions held to be controlling in Wissner, an analysis of which led the court in Alle to delimit the conflict between the NSLI statute and community property laws.

9 Estate of Abdale, 28 Cal. 2d 587, 590–92, 170 P.2d 918, 920–21 (1946). Sections 228 and 229 must be construed together. In the Matter of Estate of Rattray, 13 Cal. 2d 702, 712–15, 91 P.2d 1042, 1048–49 (1939). The theory of these sections is that the decedent's property
back to the community funds used for premiums, section 228 prescribed the proper method of distribution.

It appears that it was unnecessary for the court to have classified the policy or the proceeds as community property. In fact, the particular holding in Allie relating to section 228 seems entirely consistent with a characterization of NSLI policies and proceeds as the husband's "separate property." A husband and wife in California may transmute informally the character of their property inter se.\(^1\)

Where section 228 or 229 may be applicable, however, the "initial source" rule still determines distribution, irrespective of interim transmutations.\(^2\) Thus, if a wife releases to her husband her community ownership rights in a policy, it will be his separate property at his death. If she receives the proceeds as his designated beneficiary, and subsequently dies intestate without surviving issue or spouse, section 228 would apply, the separate property character of the policy at the husband's death being disregarded in favor of the prior community property character of the premiums.\(^3\)

If proceeds of a commercial policy had been involved in Allie, the court doubtless would have classified the policy as having been community property. The court probably would have reasoned that the wife took one-half of the proceeds in her own community right and one-half by virtue of a gift by the husband of his community share, and concluded that this community property nature would be preserved for the purpose of applying section 228.\(^4\) The reason the court did not, and perhaps could not, analyze the issue in this manner hinges upon the apparent impossibility of directly referring to NSLI policies or proceeds as community property. The following review of NSLI enactments and interpretative decisions, with

\(^{\text{1}}\) Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944); Perkins v. Sunset Tel. and Tel. Co., 155 Cal. 712, 719-20, 103 Pac. 190, 194 (1909).

\(^{\text{2}}\) There are several limitations on an operation of the "initial source" rule: (1) The party asserting application of §§ 228 or 229 has the burden of tracing the estate to the claimed property source (In the Matter of Estate of Harris, 9 Cal. 2d 649, 662, 72 P.2d 873, 880 (1937)); (2) the estate is not traceable beyond a property character transmutation which occurred pursuant to an inter-spouse agreement supported by valuable consideration (Estate of Hobart, 82 Cal. App. 2d 502, 506, 187 P.2d 105, 109 (1947)); (3) a "new title" in decedent—i.e., where the surviving spouse reacquires property transferred to a third party—will bar the operation of §§ 228 and 229 altogether (see Estate of Flood, 55 Cal. App. 2d 410, 130 P.2d 811 (1942)).

\(^{\text{3}}\) Estate of Abdale, 28 Cal. 2d 587, 170 P.2d 918 (1946); In the Matter of Estate of Slack, 13 Cal. 2d 721, 91 P.2d 1052 (1939). No case on these precise facts has been found. Though the Abdale and Slack cases also were concerned with co-tenancy problems, they clearly espouse the proposition that the character of the property upon its initial acquisition, not upon the death of the predeceased spouse, is controlling. See also Estate of Taitmeyer, 60 Cal. App. 2d 699, 141 P.2d 504 (1943).

\(^{\text{4}}\) No case relying for a holding on this precise analysis has been found. Rather, the courts usually speak of the mode by which the wife, as beneficiary, takes the proceeds of a community policy, as a gift of the whole amount from the husband. See e.g., Estate of Perkins, 21 Cal. 2d 561, 571, 134 P.2d 231, 237 (1943). Cf. In the Matter of Estate of Miller, 23 Cal. App. 2d 16, 18, 71 P.2d 1117 (1937), subsequently overruled by In the Matter of Estate of Rattray, 13 Cal. 2d 702, 91 P.2d 1042 (1939), on the broader ground that transmutation by gift does not affect the operation of §§ 228 and 229. Whether the "gift-of-the-whole" analysis also was disapproved is unclear. See id. at 715-16, 91 P.2d at 1049-50. On theory it is difficult to see how the husband can make a gift to his wife of the one-half of the proceeds to which she already has a vested right.
particular emphasis on the Wissner case, should reveal the nature of this difficulty.

A NSLI policy, in form a contract with the Government, is a creature of federal statute. Rights in it are determined solely by federal law interpreting the intent of Congress. NSLI originated in 1940 for World War II servicemen and was radically revised in 1946 to improve its attractiveness to veterans. Decisions construing post-war NSLI are influenced by opinions concerning all veterans' insurance as well as the wartime NSLI form. Accordingly, modern NSLI should be viewed in its historical setting, even though, as will be discussed later, the precedent value of some of the cases is subject to criticism.

The scope of a NSLI insured's choice of beneficiaries, now unrestricted, was narrowly circumscribed during World War II. He has always been given the power to change beneficiaries; this power has been held to be absolutely irrevocable and not subject to waiver by the insured or defeasance from any source. This severe interpretation of an otherwise standard revocable beneficiary provision was the keystone of the Wissner decision. That case, which dealt with a policy...

16 United States v. Foulger, 249 F.2d 237, 240 (10th Cir. 1957); Simmons v. United States, 120 F. Supp. 641, 646 (M.D. Pa. 1954). Ordinary principles respecting commercial insurance are said to be not controlling. See United States v. Law, 299 Fed. 61, 65 (9th Cir. 1924), rev'd on other grounds, 266 U.S. 494 (1925) (construing earlier veterans' insurance). But cf. United States v. Morrell, 204 F.2d 490, 493-94 (4th Cir. 1953) (questioning whether veterans' insurance should be treated as completely sui generis).
17 The Act of August 1, 1946, 60 Stat. 781, amending the NSLI Act of 1940, 54 Stat. 1008. The effect of this amendment, with a few minor changes to date, is reflected in 38 U.S.C.A. §§ 716-17 (Supp. 1959). Where used, "post-war NSLI" will refer to after-service participating NSLI dating from this amendment.
19 Compare 38 U.S.C.A. § 716(b) (Supp. 1959), with 38 U.S.C.A. § 717(a) (Supp. 1959). The Government pays for all war-hazard liabilities incurred. Inasmuch as this was the predominant type of risk during the war, the Government essentially underwrote the entire program. Congress accordingly restricted the class of permissible beneficiaries to those to whom it felt the insured owed a moral duty of protection. Upon cessation of hostilities this reason for restricting his choice vanished. See Hearings on H.R. 4965 (rev. and later H.R. 5773) and H.R. 2379 (rev. and later H.R. 5772) Before the House Committee on World War Veterans' Legislation, 79th Cong., 2d Sess. 6 (1946) [hereinafter cited as the 1946 NSLI Hearings], testimony of General Omar N. Bradley, the then Administrator of Veterans' Affairs.
20 Compare 38 U.S.C.A. § 717(a) (Supp. 1959), with the NSLI Act of 1940, ch. 757, § 602(g), 54 Stat. 1010.
21 See Heifner v. Soderstrom, 134 F. Supp. 174 (N.D. Iowa 1955), where a California divorce decree awarding the wife of a veteran all of the community property, which purportedly included a NSLI policy of which the wife previously had been beneficiary, was held to be ineffectual to support her claim to any of the proceeds as against her deceased husband's mother, whom he had substituted as a beneficiary after commencement of the wife's divorce action. The federal court, in fact, treats the California award as though it had been one for permanent alimony rather than pursuant to a property division. See id. at 176, 179.

More extreme are holdings that a promise by the husband, incident to a voluntary property settlement agreement, to designate a certain person and waive his right to change designation, is void ab initio. Eldin v. United States, 157 F. Supp. 34 (S.D. Ill. 1957); Kaufman v. Kaufman, 93 Cal. App. 2d 808, 210 P.2d 29 (1949).
22 338 U.S. 655, 658-59 (1950). The Court reasoned that if the insured designates his mother he obviously wishes to exclude his wife completely. The right to name and change beneficiaries, conferred upon him by the act, was felt to be a mandate from Congress that the soldier's manifested wish must be protected. The wife's claim was regarded as being tantamount to an attempt by her to be interposed as a beneficiary, contrary to her husband's wishes.
maturing in 1945, has been followed by post-war cases involving a community property-NSLI issue.23

While no property rights could "vest" in a wartime NSLI policy or its proceeds, this restriction was removed in 1946.24 Proceeds were payable during the war only to living persons,25 but are now payable to estates,20 including that of an insured.27 Assignment of the policy by the insured has always been prohibited.28

NSLI was originally issued as five-year term insurance. It was convertible to several standard plans, but allowed only installment settlements.29 After the war more commercial-type permanent plans were made available30 and the insured was empowered to provide his beneficiary with the option of selecting a lump sum settlement.31

NSLI avails, like most veterans' benefits, have always been exempt from taxa-

23 See e.g., Heifner v. Soderstrom, 134 F. Supp. 174, 179 (N.D. Iowa 1955). See also Eldin v. United States, 157 F. Supp. 34, 37 (S.D. Ill. 1957). An adherence to Wissner on this point is understandable since this provision was carried over unchanged from the wartime act. Its impact in the changed context should be re-examined, however. See text at notes 51-52 infra.

24 Prior to 1946: The NSLI Act of 1940, ch. 757, §§ 602 (i)-(j), 54 Stat. 1010 (now 38 U.S.C.A. §§ 716 (d)-(e) (Supp. 1959)). The 1946 Amendment: The Act of August 1, 1946, ch. 728, § 5(b), 60 Stat. 783. See Lynch v. United States, 292 U.S. 571 (1934) (construing earlier veterans' after-service insurance act), where it was held that the insured had a vested property right such that Congress, in contemplation of the fifth amendment, could not deny previously conferred policy rights without also denying the attendant remedy. The Wissner case, passing on World War II NSLI, held, as a ground for its decision, that the lack of vested rights in that insurance precluded the wife from developing a due process issue. (338 U.S. at 661). It would seem that the provision prohibiting vested rights presented the only persuasive ground for holding against the wife in Wissner. If the insured husband was denied "vested rights"—he could not assign the policy or designate his estate—a fortiori, the wife should be prohibited from claiming as an "owner." Quaere, whether the converse of the argument in Wissner is true: i.e., whether the fact of the "vesting" of rights by the 1946 amendment affords a good ground for a due process argument regarding denial of community property rights in post-war NSLI?


26 38 U.S.C.A. § 717(d) (Supp. 1959). Funds are payable to the estate of a beneficiary only if the insured has provided that lie may select a lump-sum settlement. See Kimbrough & Glen, American Law of Veterans § 489 (2d ed. 1954).

27 Proceeds are payable to the insured's estate when: (1) The insured has so designated; (2) no beneficiary is designated, or the designated beneficiary does not survive the insured; (3) a designated beneficiary entitled only to an installment settlement survives the insured, but dies before receiving all sums due and payable. 38 U.S.C.A. § 717(d) (Supp. 1959). If a contingent beneficiary is named, his rights cut across the above provisions. United States v. Short, 240 F.2d 292 (9th Cir. 1956).


29 The NSLI Act of 1940, ch. 757, § 602(f), (h), 54 Stat. 1009. The plans included ordinary, twenty-payment and thirty-payment life, with provisions for loan, cash, paid-up and extended insurance values. These features carried over after 1946. See 38 U.S.C.A. § 704 (Supp. 1959).

30 The 1946 amendment added the following permanent plans: (1) twenty-year endowment; (2) endowment at age 60; (3) endowment at age 65. See 38 U.S.C.A. § 704 (Supp. 1959).

tion, the claims of creditors and other similar demands.\textsuperscript{32} The \textit{Wissner} Court, by analogizing the wife's community property claim to a lienor's "seizure," relied upon this provision to protect the proceeds from an insured's wife after they had been paid to the beneficiary.\textsuperscript{33}

On the basis of the federal statute and interpretative decisional law prior to the \textit{Allie} case, the conclusion seems irresistible that a post-war NSLI policy, which on its face has most of the characteristics of a commercial policy, should nevertheless be regarded as having been the insured husband's separate property.\textsuperscript{34} In contemplation of the insured husband's absolute power to divest his wife of any interest by merely naming as a recipient a stranger to the community, it would appear that the wife may acquire an ownership right in the proceeds only by surviving her husband as his designated beneficiary.

As noted above, the holding in \textit{Allie}, limited to its special section 228 intestacy situation, is not inconsistent with this apparent "separate property" character, since a classification of proceeds was unnecessary to the decision. The \textit{Allie} case, however, portends intestacy situations in which it will be necessary to a proper distribution to assign to NSLI monies a property classification. For example, assume that the insured husband designates his own estate as beneficiary and thereafter predeceases his wife intestate. If the wife is to receive the proceeds as community property she must take under Probate Code section 201.\textsuperscript{36} Section 228 and the "initial source" rule would be inapposite. Under section 201 the surviving spouse takes one-half of the community property as owner and one-half as her husband's heir. It could be argued, therefore, that since the wife could not have claimed a community ownership interest in the NSLI policy prior to her husband's death, or in the proceeds if he had left a will\textsuperscript{37} or otherwise expressly disposed of

\begin{itemize}
\item \textsuperscript{32} Compare the NSLI Act of 1940, ch. 757, § 616, 54 Stat. 1014 (incorporating by reference the Act of August 12, 1935, ch. 510, § 3, 49 Stat. 609 (exemption amendment to the World War Veterans' Relief Act of 1924)), with 38 U.S.C.A. § 3101 (Supp. 1959). This provision generally exempts all monies paid to veterans. The exemption section (§ 3101) now is not specifically referred to in the insurance chapter of 38 U.S.C.
\item \textsuperscript{33} 338 U.S. 655, 659 (1950). Though some early cases left the point open, this section has been held to preclude the imposition of a constructive trust on the proceeds in the hands of the beneficiary. Heliner v. Soderstrom, 134 F. Supp. 174, 181-83 (N.D. Iowa 1955). But see Voelkel v. Tohulka, 236 Ind. 588, 141 N.E.2d 344, \textit{cert. denied}, 355 U.S. 891 (1957) (constructive trust impressed to effect intent of insured).
\item \textsuperscript{34} 1 ARMSTRONG, \textit{CALIFORNIA FAMILY LAW} 523 (1953), where the author reaches this result in a comment on \textit{Wissner}. Professor Armstrong was later persuaded by Estate of Perryman, 133 Cal. App. 2d 1, 283 P.2d 298 (1955), that the sounder view was that NSLI proceeds followed normal community property rules except as otherwise required by the federal enactment. 1 ARMSTRONG, \textit{op. cit. supra} at 523 (Supp. 1956). Perryman is discussed at notes 42-43 infra.
\item \textsuperscript{35} See note 27 \textit{ supra} and accompanying text.
\item \textsuperscript{36} \textit{CAL. PROB. CODE} § 201, as applicable here, reads: "Upon the death of either husband or wife, one-half of the community property \textit{belongs to} the surviving spouse; the other half is subject to the testamentary disposition of the decedent and in the absence thereof goes to the surviving spouse. . . . (Emphasis added).
\item \textsuperscript{37} It seems clear that a testate insured's specific legatees of NSLI proceeds would receive protection under \textit{Wissner} from community property claims just as though they had been named policy beneficiaries. However, here the argument is weaker than in \textit{Wissner}. The revocable beneficiary provision would not necessarily be thwarted since the wife would not object to payment of the proceeds to her husband's estate by the Government and would not be "substituting herself" as a named policy beneficiary. However, proceeds in the insured's estate were held exempt from taxation under the provision discussed at note 32 \textit{ supra}. \textit{In re} Estate of Bell, 384 Pa. 14, 119 A.2d 216 (1956). By analogy, the \textit{Wissner} reasoning would protect the specific legatees if the wife's assertion of community property ownership is still regarded as tantamount to a creditor's claim. Cf. Haley v. United States, 46 F. Supp. 4 (D. Mont. 1942), \textit{modified}, 145 F.2d 235 (9th Cir. 1944) (earlier veterans' insurance).\end{itemize}
them, a totally incongruous result of allowing the wife a windfall because of the
fortuity of intestacy would follow the allowance of her claim under section 201.88
The complementary argument is that since the husband possessed all the indicia of
separate ownership, the proceeds which he ordered paid to his estate perforce
should retain that character.39

Although this line of reasoning is not inconsistent with the holding in Allie,
it overlooks the fact that the court’s reasoning there was based on an initial deter-
nmination that Wissner should not be read as holding that the federal law governing
NSLI had completely superseded local laws.40 The significance of Allie, it is sub-
mitted, lies in the implication of the broader proposition that a NSLI policy
will be treated like an ordinary commercial policy, to the extent that it may be
controlled fully by local laws, in any situation in which the governing federal law
does not specifically direct otherwise. Thus, in the suppositious situation under
consideration, it would seem that the requirements of federal law are met by pay-
ment to the insured’s estate, for he has expressed no other distributive intent
needful of federal protection. The better argument, it seems, is that the NSLI pol-
icy may be treated as having been community property all along, except for the
specific conditions imposed by federal law. These conditions have been satisfied
and no obstacle remains for the wife to surmount in her effort to take the proceeds
as community property under section 201.

A similar, and more probable, situation would arise where the insured desig-
nates his wife as beneficiary of a NSLI policy but does not give her the option of
selecting a lump sum settlement. If he predeceases her intestate and she subse-
sequently dies before receiving all of the installments due and payable, the remainder
will be paid in a lump sum to the husband’s estate, regardless of the circumstances
of the wife’s death.41 Could the wife’s estate then claim the “after-acquired”
residue of the proceeds as community property? Again, the wife survived the
husband so her estate must take under section 201. The same arguments regarding
classification considered above could be urged here. In addition, substantial
analytical support for the contention that the NSLI policy and proceeds are com-
munity property except for federal law limitations may be found in Estate of
Perryman.42 There the California district court of appeal considered a case which,
though it involved Civil Service Retirement funds, presented nearly identical
facts. There it was urged that Wissner compelled the conclusion that the remainder

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88 Were this argument valid she would take as an heir only that share of her husband’s
39 It could be urged that the insured’s designation of his estate is tantamount to a desig-
nation of his separate property heirs as named NSLI policy beneficiaries, and, as such, should
receive similar protection under the Wissner doctrine from community property claims. It
would seem that such a construction, though perhaps reflecting the insured’s true intention in
some instances, would be based on grounds too conjectural to be persuasive against treating
proceeds as community property whenever federal law does not directly specify otherwise.
40 The decedent’s heir in Allie, claiming all under § 225, contended that the predeceased
husband’s heirs could not stand on § 228 since they had not sustained the burden of proving a
prior community nature of the proceeds (see note 12 supra, item (1)). He urged that Wissner
precluded the wife from ever acquiring NSLI proceeds as community property, so the husband’s
heirs should have no greater rights now than she had during marriage. Respondent’s Petition
for a Hearing, p. 8. An implied premise of this argument, however, is that Wissner makes a
NSLI policy the husband’s separate property. Since proceeds are traceable to this property
character, a logical conclusion of his reasoning is that § 229 is applicable and he should take
none instead of at least one-half of the proceeds. That such an absurd result is not unlikely
demonstrates the practical unsoundness of arbitrarily relying on Wissner when local laws do
not directly conflict with the specific mandate of that case.
41 See note 27 supra, item (3).
of the fund paid to his estate was the husband's separate property and must be so
distributed. The court noted that nothing in the act indicated a congressional
intent to restrict distribution by the husband's administrator, and therefore an
application of community property laws would not conflict with federal law. The
court concluded by distributing the fund to the wife's executrix under section 201
pursuant to the California rule that retirement funds are community property.\textsuperscript{43}

It is submitted that the theory of the \textit{Perryman} case is implicit in \textit{Allie}; the
pervasive theme in each case seems to be that the property rights of California
citizens ought to be determined by California community property laws whenever
possible.\textsuperscript{44} This theory leads to the conclusion that NSLI should be regarded as
being sui generis only when federal law expressly requires.\textsuperscript{45}

Furthermore, it appears that there is a real question whether \textit{Wissner}, which
constituted the pre-1946 NSLI Act to deny the wife a direct community property
interest, now accurately reflects the intent of Congress as to the statute enacting
post-war NSLI. It will be recalled that the act underwent a substantial meta-
morphosis after World War II. It was then intended that NSLI for veterans
should be brought in line, in most respects, with commercial insurance.\textsuperscript{46} Though
a bargain, NSLI is by no means a gratuity as are some non-contributing
"pensions."\textsuperscript{47} The cost of annual premiums on permanent plans is sufficiently
high to deny to the wife the value of a community investment in other insurance.\textsuperscript{48}

\textsuperscript{43} It seems that the similarity between \textit{Wissner} and \textit{Perryman} ends here. It is questionable
whether \textit{Wissner} necessarily compels the conclusion that in every case where a federal statute
confers upon her husband the right to designate and change beneficiaries, a priori a wife must
be denied community property rights. The dominant feature of the \textit{Wissner} case was the
paternal relationship between the Government and its fightingman, with respect to which the
need for a uniform application of the federal enactments outweighed the vagaries of local law.
See 338 U.S. 655, 658 (1950). It seems that each federal statute pursuant to which funds are
disbursed ought to be analyzed thoroughly for congressional intent before a purpose to fore-
stall community property interests is divined from the letter of the law. Military pay was held

\textsuperscript{44} The foundation of the marital property system of California lies in the residual nature of
\textit{Cal. Civ. Code} § 164. The basic presumption is that if property is not otherwise specifically classifiable, it is community property.

\textsuperscript{45} The marital property nature of cash surrender, dividend (see 38 U.S.C.A. § 706 (Supp.
1959)) and Total Disability Income receipts (38 U.S.C.A. § 715 (Supp. 1959) (benefits of
$10.00/mo./$1,000.00 of insurance payable on disability at added premium cost)) is still in
doubt. It has been suggested that a wife always could recoup her community interest in pre-
she might acquire a right to a portion of cash surrender funds, irrespective of the husband's
wish or attempt to deny it, since surrender value normally represents premiuim reserve plus
accrued dividends.

\textit{NSLI} dividends are not gratuities but are shares in the surplus of the participating funds,
representing, in a sense, a return on invested capital. See \textit{1950 VA Report, op. cit. supra} no 4,
at 130. However, \textit{NSLI} dividends have been held exempt from taxation and creditors' claims.
(The exemption section is discussed at note 32 \textit{supra.}) \textit{See In re Walker,} 94 F. Supp. 49, 51-52
(N.D. Ohio 1950). If the wife still is held to come within the prohibition of the exemption sec-
tion her claim to dividends also might be defeated.

\textsuperscript{46} \textit{See 1956 NSLI Hearings, passim. Op. cit. supra} note 19. See particularly the testimony
of Mr. Harold W. Breining, Assistant Administrator in charge of Insurance, \textit{id}. at 73-74: "But
now, for practical purposes, [NSLI] . . . will be on a self-sustaining basis, no different from
any other mutual company, and we feel we should follow their practices."

\textsuperscript{47} Some servicemen's pensions are considered gratuities in which no rights "vest." \textit{Turner v. United States}, 237 F.2d 700, 703 (5th Cir. 1956) (constituting Korean War Free Indemnity

\textsuperscript{48} The annual premium for a $10,000 \textit{NSLI} Ordinary Life policy, begun at age 25, and
authorized to issue prior to April 25, 1951, is $162.20 (less dividends). \textit{Kanbrough & Glenn,
NSLI is below commercial rates principally because the Government pays the administration costs and costs incurred due to war-hazard liabilities, the latter being negligible during peacetime. The participating fund is otherwise self-sustaining for all peacetime risks in a manner similar to that of any commercial mutual fund.

Two of the three NSLI provisions deemed controlling in Wissner are still in the act, but are not in themselves unique or expressly exclusive of the wife's rights. A similar revocable beneficiary provision is to be found in nearly every modern commercial policy. That the husband is given this right or power seems irrelevant to the issue of the wife's rights. Since a wife claims an interest only as an owner of community property, not as a holder of a beneficiary's "expectancy," it follows that if her husband designates a third party, she must take either notwithstanding this provision or not at all.

Every state has a statute exempting insurance avails from execution or similar "seizure." Moreover, the analogy drawn in Wissner between a wife's assertion of a community property ownership right and a creditor's claim seems to have little to commend it. The allowance in 1946 of "vested rights," while perhaps also enhancing her standing to raise a due process issue, is more significant as a removal of one important impediment to the wife's claim as an owner. On balance, it appears that Congress would include these provisions as a matter of course in any commercial-type life insurance scheme adopted for veterans, irrespective of an intent to rule out community property rights.

These considerations are more significant when viewed in a peacetime setting removed from the emergency of war and respecting the veteran-civilian rather than the serviceman. Doubtless a uniform and paternalistic application of laws was essential to the relationship of the Sovereign and its fighting man during the war. It would seem equally clear that the importance of those aspects is greatly diminished in the context of the Sovereign and the average veteran, to the extent, at least, that the latter's morale and well-being are today so needful of protection against his own state's basic property system. However, aside from whether it ought to be Congress's policy to preclude community property rights in NSLI, it is submitted that such a purpose does not in fact exist with regard to post-war NSLI, and that Wissner ultimately should be limited to its original fact situation.

Richard Alexander Burt*

op. cit. supra note 26, § 548, at 421. Total Disability coverage would add $24.90 per year. Id. § 548, at 425.


Each of the four veterans' insurance schemes has its own fund which is administered like a "separate insurance company." Ibid. See note 4 supra.

VANCE, INSURANCE 674-75 (3d ed. 1951).

See note 5 supra and accompanying text.

VANCE, op. cit. supra note 51, at 741. See CAL. CODE CIV. PROC. §§ 690, 690.19. Alimony claims have been held to transcend the public policy respecting the exemption statutes. Schlaef v. Schlaef, 112 F.2d 177 (D.C. Cir. 1940); In re Bagnall's Guardianship, 238 Iowa 905, 29 N.W.2d 597 (1947). Wissner distinguished these cases on the ground that a property claim does not involve the transcendant moral obligation associated with alimony. 338 U.S. 655, 659-60 (1950). On the other hand, Heifner v. Soderstrom, 134 F. Supp. 174 (N.D. Iowa 1955), purporting to deal with an alimony award of a California court, distinguished the Schlaef v. Schlaef and Bagnall cases on the grounds that Wissner had distinguished them and that they had not involved NSLI but other federal funds. It seems this circular reasoning demonstrates the unsoundness of basing a line of reasoning leading to a preclusion of community property rights on a mere creditor exemption section.


* Member, Second-Year Class.