STREET V. SKIPPER & *MARTIN V. MORAN*: RESOLVING A SPLIT IN AUTHORITY IN TEXAS REGARDING THE DISPOSITION OF PROCEEDS FROM A COMMUNITY-PROPERTY LIFE INSURANCE POLICY PAYABLE TO THE INSURED SPOUSE'S ESTATE

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I. INTRODUCTION: THE PROBLEM OF ALLOWING PROCEEDS FROM A COMMUNITY-PROPERTY LIFE INSURANCE POLICY TO ENTER PROBATE PROCEEDINGS

A. Hypothetical: Joe Did What?!

Joe and Martha met in their freshman year of high school. They were married in 1976 after finishing college at Oklahoma State University. After graduation, Joe took a job in Texas City as a chemical engineer. Disregarding Joe's intense dislike for any reference to the University of Texas, Joe and Martha packed their bags and moved from Stillwater to Texas. On October 25, 2008, after the University of Texas delivered Oklahoma State's first loss of the season, Joe suddenly stiffened in his armchair. Martha quickly dialed 911, but by the time the ambulance arrived Joe had died of a massive aneurism.

Despite having very few other assets, Joe had purchased a sizable life insurance policy only a few months before his death. After the funeral, Martha called the insurance company to ask about the policy, but was informed that the proceeds were payable to Joe's estate. Martha asked Joe's sister Sue, who had been appointed as executor in Joe's will, when she could expect the proceeds. Martha was shocked when Sue informed her that Joe's will directed that the proceeds be paid to Bobby, Joe's son from an affair! Too upset to cry, Martha called her lawyer to discover her options.

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B. Martha's Dilemma: Can She Recover Any Part of the Life Insurance Proceeds?

Martin v. Moran[1] and *Street v. Skipper*[2] are both Texas Court of Appeals cases addressing the disposition of proceeds from a community-property life insurance policy naming the insured's estate when a beneficiary other than the surviving spouse is named in the decedent's will. The two cases reach different conclusions as to the rights of the surviving spouse to the proceeds. *Martin v. Moran* holds that proceeds from a community-property life insurance policy payable to the estate of a spouse should, as a matter of law, be subject to a partition between the devisees named in the will and the surviving spouse.[3] *Street v. Skipper* holds that when proceeds of a community-property life insurance policy are payable to the insured spouse's estate and the will names a devisee other than the surviving spouse, the surviving spouse may only recover a portion of the proceeds if the transfer results in a fraud on the community.[4] The conflict turns on a power versus right distinction, as well as whether the issue of the surviving spouse's right to a portion of the proceeds should be settled as a matter of law or as a question of fact.

1. *Martin v. Moran*: No Testamentary Power of Disposition

In *Martin v. Moran*, a husband purchased a life insurance policy during marriage with community-property funds.[5] On the beneficiary designation line of the policy, the husband wrote "as directed by will."[6] In his will, the husband directed the executors to use the insurance proceeds to purchase real estate for the benefit of his wife for her life, with the remainder to his son.[7] In essence, the husband treated the life insurance proceeds as a part of his general estate and attempted to dispose of the entirety of the proceeds.[8] The wife filed suit and asserted a right to a portion of the proceeds.[9]

The *Martin v. Moran* court began its analysis with the question of

[1] 11 Tex. Civ. App. 509, 510, 32 S.W. 904, 905 (Fort Worth 1895, no writ).

[2] 887 S.W.2d 78, 79–80 (Tex. App.—Fort Worth 1994, writ denied).

[3] *See* 11 Tex. Civ. App. at 510–11, 32 S.W. at 905–06.

[4] *See* 887 S.W.2d at 81.

[5] 11 Tex. Civ. App. at 510, 32 S.W. at 905.

[6] *Id.*

[7] *See id.* at 512, 32 S.W. at 906.

[8] *Id.*

[9] *Id.* at 510, 32 S.W. at 905.

whether the insurance policy proceeds were community or separate property, and, if community, whether the proceeds should be partitioned between the surviving spouse and the devisees named in the will.[10] The court compared life insurance policies to notes payable and other contractual agreements to pay money.[11] As a general rule, when the contractual right to payment of money in the future is secured through the present payment of community funds, the right to payment of money in the future is community property.[12] Therefore, the *Martin v. Moran* court reasoned that when an insurance policy is acquired during the marriage with community funds, the insurance policy proceeds must also be community property.[13] The court acknowledged that fraud-on-the-community principles should be applied when the husband attempts to transfer all the proceeds via the beneficiary designation to someone other than the wife.[14] The executors argued that naming the beneficiaries in the will was the equivalent of naming the beneficiaries on the insurance contract, and thus the insurance proceeds should be deemed a non-probate asset.[15] If the court accepted this argument, the logical conclusion would be that the wife could only recover one-half of the proceeds if the transfer worked a fraud on the

[10] *Id.*

[11] *Id.*

[12] *See id.*

[13] *Id.* The question of whether life insurance proceeds can be community property was answered by the Texas Supreme Court six years after the *Martin v. Moran* decision. *See* Martin v. McAllister, 94 Tex. 567, 570, 63 S.W. 624, 625 (1901). The proceeds are payable to and belong to the named beneficiary of the policy and are not the community property of the deceased and surviving spouses. *See id.* ("[T]he proceeds of the policy belong to the person named as payee, and it becomes property upon the contingency of the death of the insured in the lifetime of the payee. Therefore, as it could not become the property of the husband or the wife during the lifetime of both of them, it cannot be held to be community property, and is therefore the separate property of the one to whom it is made payable."); *see also* Tex. Ins. Code Ann. § 1103.102 (Vernon 2009). However, the clarification of the issue does not significantly affect the *Martin v. Moran* court's decision. Despite the fact that life insurance proceeds are not community in character, a spouse aggrieved by the insured spouse's choice of beneficiary may still assert a claim for fraud on the community. *See generally* Jackson v. Smith, 703 S.W.2d 791 (Tex. App.—Dallas 1985, no writ) (finding in favor of wife on a fraud on the community claim when husband had designated his sister as beneficiary on a community-property insurance policy); Murphy v. Metro. Life Ins. Co., 498 S.W.2d 278 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.). The *Martin v. Moran* court's rationale rested primarily on the fact that the transfer would result in a fraud on the community. *See Martin*, 11 Tex. Civ. App. at 510–11, 32 S.W. at 905–06.

[14] *Martin*, 11 Tex. Civ. App. at 510–11, 32 S.W. at 905–06.

[15] *See id.* at 510, 32 S.W. at 905.

community.[16]

While acknowledging the strength of the executors' argument, the court ultimately rejected the end result the executors were seeking.[17] Instead, the court stated, "The husband can give his interest in the community property to another, but he cannot give his wife's interest to himself."[18] The court reasoned that allowing the decedent spouse to dispose of the surviving spouse's share of the proceeds would work a fraud on the rights of the surviving spouse in the community-property proceeds.[19] Because situations of fraud are generally to be avoided, the *Martin v. Moran* court found the issue should be settled as a matter of law on the grounds that the husband did not have the power to transfer his wife's interest in the proceeds paid from a community-property insurance policy.[20] Therefore, *Martin v. Moran* stands for the proposition that the decedent spouse does not have the power of disposition over the surviving spouse's share of the proceeds paid to the estate of the insured spouse.[21] Under the *Martin v. Moran* approach, the proceeds are partitioned as a matter of law, and the fact issue regarding actual or constructive fraud on the rights of the surviving spouse in the community-property proceeds is never reached.[22]

2. *Street v. Skipper*: Relegation to a Claim For Fraud on the Community

Street v. Skipper revolves around facts similar to those in *Martin v. Moran*. In *Street*, the husband purchased a life insurance policy during marriage and designated his wife as the original beneficiary of the policy.[23] However, the husband later changed the beneficiary designation to name his estate.[24] His will devised the proceeds of the policy to his children from a previous marriage.[25] When the husband died, the wife, who had been

[16] *See Murphy*, 498 S.W.2d at 280 (implying that a claim for fraud on the community is proper when the surviving spouse is not the designated beneficiary on a community-property life insurance policy).

[17] *See Martin*, 11 Tex. Civ. App. at 511, 32 S.W. at 905.

[18] *Id.* at 511, 32 S.W. at 906.

[19] *See id.* at 511, 32 S.W. at 905–06.

[20] *See id.*

[21] *See id.* at 511, 32 S.W. at 906.

[22] *See id.* at 511, 32 S.W. at 905–06.

[23] *See* Street v. Skipper, 887 S.W.2d 78, 80 (Tex. App.—Fort Worth 1994, writ denied).

[24] *Id.*

[25] *See id.* at 79.

named the co-executor in the will, asserted claims to the proceeds.[26] In response, the co-executor and beneficiaries of the proceeds filed suit seeking removal of the wife as co-executor and a declaratory judgment that the wife was not entitled to any part of the insurance proceeds.[27]

The wife presented two main arguments regarding the disposition of the insurance proceeds: first, when the husband named her as the original beneficiary, he made a completed gift to her; and second, the proceeds should be partitioned between the surviving spouse and the decedent spouse's beneficiaries.[28] The court summarily dismissed the wife's first argument on the grounds that the wife had failed to plead the theory at trial and thus had not preserved it for review.[29] Moving to the wife's second argument, the court started its analysis by examining Article 3.49-3 of the Texas Insurance Code.[30] Under the statute, a "spouse shall have management, control and disposition of any contract of life insurance . . . issued in his or her name . . . without the joinder or consent of the other spouse."[31] The court determined that the husband had validly exercised his power to name his estate as the beneficiary of the policies, but there was still a question of whether by doing so the husband had disposed of all or only one-half of the proceeds.[32] The court found that executing a beneficiary designation during marriage is effective as to the entirety of the insurance proceeds.[33] Therefore, the last question to be resolved by the court was one of fact: whether by naming his estate as the beneficiary to the life insurance proceeds the husband had committed a fraud on the rights of the wife in the community-property insurance proceeds.[34] The court found that even without the life insurance proceeds the wife had received slightly more than one-half of the community estate; and therefore, the gift of the

[26] *Id.* at 79.

[27] *Id.* at 79–80.

[28] *See id.*

[29] *See id.* at 80.

[30] *Id.*

[31] *Id.* (citing Tex. Ins. Code Ann. art. 3.49-3 (Vernon 1981)).

[32] *Id.* at 80–81.

[33] *See id.* at 81 (citing Amason v. Franklin Life Ins. Co., 428 F.2d 1144, 1147 (5th Cir. 1970); Prudential Ins. Co. v. Burke, 614 S.W.2d 847, 849 (Tex. Civ. App.—Texarkana), *writ ref'd n.r.e.*, 621 S.W.2d 596 (Tex. 1981) (per curiam); Murphy v. Metro. Life Ins. Co., 498 S.W.2d 278, 280 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); Salvato v. Volunteer State Life Ins. Co., 424 S.W.2d 1, 4 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ)).

[34] *See id.* at 81.

proceeds to the husband's children did not work a fraud on the rights of the wife in the proceeds.[35]

The *Street* court did not mention *Martin v. Moran* and did not directly address the fact that the proceeds were payable to the husband's estate.[36] Instead, the court implicitly assumed that the husband had the power to name a beneficiary to the proceeds within his will, and, unless the transfer rose to the level of a fraud on the community, the proceeds were payable to the beneficiary named in the will.[37] Therefore, under the *Street v. Skipper* view, a spouse has testamentary power, but not necessarily the right, to dispose of the entirety of proceeds from a community-property life insurance policy.[38] Whether the surviving spouse may recover a portion of the proceeds is an issue of fact dependent on whether the devise of the proceeds to the third party works an actual or constructive fraud on the surviving spouse.[39]

C. Resolving the Split in Authority

Two well-settled areas of law in Texas create uncertainty in the specific issue addressed by this comment. First, under Texas community-property laws, spouses only have testamentary power of disposition over their one-half undivided interest in probate community-property assets; the community assets are subject to a community-property partition on the death of the first spouse.[40] The wrinkle is that proceeds of a life insurance policy belong to the named beneficiary and cannot technically be community property.[41] Thus, the proceeds are not technically subject to a community-property partition.[42] The second well-settled area of law deals

[35] *See id.*

[36] *See generally id.*

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See* Langehennig v. Hohmann, 139 Tex. 452, 460, 163 S.W.2d 402, 406 (1942) (stating that a "[husband] could not make testamentary disposition of the half of the community property that belonged to his wife"); Dakan v. Dakan, 125 Tex. 305, 315, 83 S.W.2d 620, 626 (1935) (stating that a husband may not dispose of by will his wife's separate property or her interest in the community property); Wells v. Petree, 39 Tex. 419, 420–21 (1873) (implying that a husband cannot dispose of his wife's share of the community property assets by will without her consent).

[41] *See* Tex. Ins. Code Ann. § 1103.102(a) (Vernon 2009). *See also* Martin v. McAllister, 94 Tex. 567, 570, 63 S.W. 624, 625 (1901).

[42] *See McAllister*, 94 Tex. at 570, 63 S.W.at 625.

with management of community property and fraud-on-the-community principles. While alive, a spouse has clear statutory power to name any beneficiary on life insurance policies owned in the spouse's name without the joinder or consent of the other spouse.[43] When the proceeds are paid to a designated beneficiary who is not the surviving spouse, the surviving spouse may assert a claim for fraud on the community and potentially recover one-half of the proceeds.[44] The wrinkle here is that the proceeds are payable to an estate rather than to a person or entity, and thus are subject to the additional step of probate administration before the devisee may take possession of the proceeds.[45] Because the proceeds are subject to probate administration, there is little reason to apply fraud-on-the-community principles.[46] Therefore, neither of these settled principles of Texas law is clearly and easily applicable to Martha's situation.

This comment addresses the split in authority in Texas regarding the power and right of the insured to dispose of proceeds from community-property insurance policies that are payable to the insured's estate. Part II gives a brief overview of Texas community-property laws as a background for understanding the specific conflicting points of law leading to the split in authority. Part III addresses the approaches of other community-property states to this problem. Part IV examines the precedent in Texas applying both *Martin v. Moran* and *Street v. Skipper*. Part V presents the procedural ramifications and the alternative arguments that should be presented in light of the conflicting authority. Finally, Part VI argues that *Martin v. Moran* presents a more accurate statement of Texas law.

[43] Tex Ins. Code Ann. § 1113.001 (Vernon 2009).

[44] *See* Davis v. Prudential Ins. Co. of Am., 331 F.2d 346, 352 (5th Cir. 1964); Kemp v. Metro. Life Ins. Co., 205 F.2d 857, 864–65 (5th Cir. 1953); Volunteer State Life Ins. Co. v. Hardin, 145 Tex. 245, 249, 197 S.W.2d 105, 106 (1946); *McAllister*, 94 Tex. at 570, 63 S.W. at 625; Givens v. Girard Life Ins. Co. of Am., 480 S.W.2d 421, 426–27 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), *superseded by statute*, Act of June 6,1991, 72d Leg., R.S., ch. 479, § 224, 1991 Tex. Gen. Laws 1043–45, *as recognized in* State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007).

[45] *See* Tex. Prob. Code Ann. § 37 (Vernon 2003); Martin v. Moran, 11 Tex. Civ. App. 509, 510–11, 32 S.W. 904, 905–06 (Fort Worth 1895, no writ).

[46] *See Martin*, 11 Tex. Civ. App. at 510–11, 32 S.W. at 905–06.

II. OVERVIEW OF TEXAS COMMUNITY PROPERTY LAWS IN THE CONTEXT OF LIFE INSURANCE POLICIES

A. General Overview of Texas Community Property Law

In Texas law, all property owned by either spouse is presumed to be the community property of both spouses.[47] Any community property that a spouse would have owned as separate property if it had been acquired outside of marriage is generally subject to the spouse's sole management, control, and disposition.[48] Similarly, any property held solely in the name of one spouse is subject to that spouse's sole management, control, and disposition.[49] Because such property is still community in character, the non-managing spouse in effect holds an equitable one-half interest in the property.[50]

The managing spouse is burdened with a fiduciary duty to manage the other spouse's interest in the property in a suitable manner.[51] This fiduciary duty primarily prohibits the managing spouse from committing a fraud on the community.[52] Fraud on the community consists of two primary elements: (1) a transfer by one spouse of community property to a third party lacking adequate consideration; and (2) a fraud on the other spouse.[53] The fraud element can be satisfied by both actual and constructive fraud.[54] Actual fraud is the classical idea of fraud and, in the context of fraud on the community, requires that the donor spouse have made the transfer with intent to defraud the non-managing spouse.[55] Constructive fraud exists when the transfer of the community property is unfair to the non-managing spouse.[56] The aggrieved spouse has the burden to plead that the transferred

[47] Tex Fam. Code Ann. § 3.003(a) (Vernon 2006).

[48] *Id.* § 3.102(a).

[49] *Id.* § 3.104(a).

[50] *See* Carnes v. Meador, 533 S.W.2d 365, 370 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] *See* Krueger v. Williams, 163 Tex. 545, 548–49, 359 S.W.2d 48, 50 (1962).

[55] *See* Horlock v. Horlock, 533 S.W.2d 52, 55 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd).

[56] *Id.* (stating that the factors to determine if a gift is fair to the spouse include "the size of the gift in relation to the total size of the community estate, the adequacy of the estate remaining to support the wife in spite of the gift, and the relationship of the donor to the donee").

assets were community property, and the transfer lacked adequate consideration.[57] Once the aggrieved spouse has met their pleading burden, a presumption arises that the transfer resulted in a fraud on the community.[58] The burden of persuasion shifts to the donor spouse and the recipient of the assets to show that the donor did not have actual intent to defraud the other spouse, and that the transfer was not unfair to the aggrieved spouse.[59] When a spouse successfully asserts a claim for fraud on the community, the injured spouse may seek legal damages against the managing spouse, or if the spouse's estate is insufficient, may impose a constructive trust on one-half of the transferred assets.[60]

B. Texas Community Property Laws Applied to Insurance Policies

Texas community-property laws are generally applicable to life insurance policies, with some specific rules of application. In Texas, a life insurance policy is property and, therefore, can be characterized as either community or separate property.[61] It is important to distinguish between ownership of the policy itself and the eventual ownership of the proceeds. While the insured is alive, if the policy is held solely in the name of one spouse, the policy is subject to that spouse's sole management, control, and disposition.[62] Under both the Texas Family Code and the Texas Insurance Code, the managing spouse has statutory power to execute and make changes to the beneficiary designation.[63] While the insured is alive, the beneficiary named on the policy does not have a property interest, only a

[57] *See* Murphy v. Metro. Life Ins. Co., 498 S.W.2d 278, 282 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

[58] *Id.*; Wright v. Wright, 280 S.W.3d 901, 911 (Tex. App.—Eastland 2009, no pet.).

[59] *Murphy*, 498 S.W.2d at 282; Greco v. Greco, No. 04-07-00748-CV, 2008 WL 4056328, at *5 (Tex. App—San Antonio Aug. 29, 2008, no pet.).

[60] *See* Carnes v. Meador, 533 S.W.2d 365, 371 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

[61] Womack v. Womack, 141 Tex. 299, 301–02, 172 S.W.2d 307, 308 (1943); Givens v. Girard Life Ins. Co. of Am., 480 S.W.2d 421, 423 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), *superseded by statute*, Act of June 6,1991, 72d Leg., R.S., ch. 479, § 224, 1991 Tex. Gen. Laws 1043–45, *as recognized in* State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007); Wallace v. Wallace, 371 S.W.2d 918, 921 (Tex. Civ. App.—San Antonio 1963, writ dism'd). Keep in mind that the policies at issue in this comment are community in character.

[62] Tex. Ins. Code Ann. § 1113.001 (Vernon 2008).

[63] *See id*.; Tex. Fam. Code Ann. § 3.102 (Vernon 2006).

mere expectancy.[64] Therefore, when a spouse names a beneficiary, the spouse retains the ability to revoke the beneficiary designation and has not actually transferred the proceeds.[65] Until there is a transfer, the managing spouse has not yet committed a fraud on the community.[66] The transfer of proceeds is only completed once the insured spouse dies, and therefore, only on the death of the insured spouse is there a potential claim for fraud on the community.[67]

Texas courts have recognized the applicability of fraud-on-the-community claims in the context of community-property life insurance policies.[68] When there is a valid beneficiary designation on a policy, the insurance company pays the proceeds of the policy to the beneficiary directly.[69] The proceeds are not subject to probate administration or proceedings.[70] Because the proceeds are not subject to probate proceedings and are the separate property of the beneficiary, the funds are also not subject to a typical marital property partition by the probate court.[71] Therefore, when the insured spouse has named a beneficiary other than the surviving spouse, the surviving spouse's only potential recourse is a claim for fraud on the community.[72] At the death of the insured spouse, if the designated beneficiary is not the surviving spouse, then the surviving

[64] Garabrant v. Burns, 130 Tex. 518, 523, 111 S.W.2d 1100, 1103 (1938).

[65] *See* Volunteer State Life Ins. Co. v. Hardin, 145 Tex. 245, 249–50, 197 S.W.2d 105, 107 (1946).

[66] *See id.* at 249–50, 197 S.W.2d at 107.

[67] *See id.* at 249–50, 197 S.W.2d at 106–07.

[68] *See, e.g.*, Givens v. Girard Life Ins. Co. of Am., 480 S.W.2d 421, 425–26 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), *superseded by statute*, Act of June 6,1991, 72d Leg., R.S., ch. 479, § 224, 1991 Tex. Gen. Laws 1043–45, *as recognized in* State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007).

[69] Tex. Ins. Code Ann. § 1103.102(a) (Vernon 2009).

[70] *See id.* The implication of Section 1103.102 is that the proceeds are payable directly to the beneficiary and are not payable to the administrator of the insured's estate.

[71] *Id.* Again, the implication is that because the proceeds are payable to the beneficiary directly, the funds are not subject to the jurisdiction of the probate court. The cases relegating the surviving spouse to a claim for fraud on the community also support this implication; if the funds were subject to a community property partition, there would be no need for the spouse to assert a claim for fraud on the community. *See* Davis v. Prudential Ins. Co. of Am., 331 F.2d 346, 351–52 (5th Cir. 1964); Kemp v. Metro. Life Ins. Co., 205 F.2d 857, 864 (5th Cir. 1953); Volunteer State Life Ins. Co. v. Hardin, 145 Tex. 245, 249, 197 S.W.2d 105, 106–07 (1946); Martin v. McAllister, 94 Tex. 567, 570, 63 S.W. 624, 625 (1901); *Givens*, 480 S.W.2d at 425.

[72] *See* Street v. Skipper, 887 S.W.2d 78, 81 (Tex. App.—Fort Worth 1994, writ denied); *Givens*, 480 S.W.2d at 424–25.

spouse will often be able to successfully assert a claim for fraud on the community.[73] The surviving spouse bears the burden to plead fraud on the community, and the beneficiary bears the burden of persuasion to show that the disposition did not rise to the level of an actual or constructive fraud.[74]

However, a few situations exist where the surviving spouse will not be able to successfully assert a claim for fraud on the community. As a matter of common sense, if the community-property policy was subject to the insured's sole management, control and disposition, but the surviving spouse consented to a third party beneficiary designation, then the surviving spouse cannot claim that the disposition is unfair.[75] Similarly, if the policy on the insured was subject to the surviving spouse's sole management, control and disposition, then the surviving spouse cannot claim that the disposition is unfair. Finally, if the surviving spouse is named as a co-beneficiary, and receives one-half or more of the proceeds, the surviving spouse will be unsuccessful in asserting a fraud-on-the-community claim.[76]

Texas fraud-on-the-community principles have been preempted by federal law in the context of group life insurance policies governed by the Employee Retirement Income Security Act (ERISA).[77] Federal public policy dictates that the plan administrator should be able to rely on the beneficiary designation.[78] Therefore, when the insured spouse has designated a beneficiary who is not the non-insured spouse on a community-property ERISA policy, the non-insured spouse does not have any recourse, unless the spouse can show that the disposition effectuates a common law fraud.[79]

When the insurance proceeds are payable to the estate of the insured, the issue presented by this comment comes into play. The difficulty of this issue centers on the characterization of the proceeds. According to the Texas Insurance Code, the proceeds are the separate property of the beneficiary named on the policy.[80] However, the policies at issue in this

[73] Madrigal v. Madrigal, 115 S.W.3d 32, 35 (Tex. App.—San Antonio 2003, no pet.); *Givens*, 480 S.W.2d at 425–26.

[74] *See Madrigal*, 115 S.W.3d at 35.

[75] *See* Jackson v. Smith, 703 S.W.2d 791, 794–95 (Tex. App.—Dallas 1985, no writ).

[76] *See Givens*, 480 S.W.2d at 426.

[77] Barnett v. Barnett, 67 S.W.3d 107, 126 (Tex. 2001).

[78] *See id.*

[79] *Id.*

[80] *See* Tex. Ins. Code Ann. § 1103.102(a) (Vernon 2009). *See also* Martin v. McAllister, 94 Tex. 567, 570, 63 S.W. 624, 625 (1901).

comment are community in character, and the premiums are likely paid out of community-property funds. Generally, a testator can only dispose of the testator's separate property and the testator's one-half of the community property.[81] Technically, the insurance proceeds are neither community property nor the testator's separate property—they belong to the beneficiary named on the policy.[82] However, the estate of the insured is not an individual or an entity which can own property, so the estate cannot own the proceeds as separate property.[83] None of the usual points of law regarding testator's power of disposition and the ownership of life insurance proceeds have a clear application to these fact situations.

III. APPROACHES OF THE OTHER COMMUNITY PROPERTY STATES TO MARTHA'S PROBLEM

Referring to Texas case law, there are two potential approaches that a court could take to Martha's fact situation discussed in Subpart I.A. A court could follow *Martin v. Moran* and hold that as a matter of law, the proceeds are subject to a marital property partition.[84] Alternatively, a court could follow *Street v. Skipper* and hold that the surviving spouse must plead a fraud on the community and determine whether the surviving spouse has a claim for the proceeds as a question of fact.[85] The other community-property states have very little precedent addressing the issue presented by this comment. Only the State of Washington has directly addressed the issue.[86] The Supreme Court of California, while not directly addressing the fact situations discussed by this comment, has issued a holding broad enough to encompass the issue.[87] Both states have apparently found that as a matter of law, the managing spouse does not have the power to dispose of the non-managing spouse's interest in life insurance by will.[88]

[81] *See* Horlock v. Horlock, 533 S.W.2d 52, 55 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd w.o.j.).

[82] *See* Tex. Ins. Code Ann. § 1103.102(a) (Vernon 2009).

[83] *See* Tex. Prob. Code Ann. § 37 (Vernon 2003).

[84] *See* 11 Tex. Civ. App. 509, 510–11, 32 S.W. 904, 905–06 (Fort Worth 1895, no writ).

[85] *See* 887 S.W.2d 78, 81 (Tex. App.—Fort Worth 1994, writ denied).

[86] *See* Towey v. Seattle First Nat'l Bank (*In re* Towey's Estate), 155 P.2d 273, 275 (Wash. 1945).

[87] *See generally* Tyre v. Aetna Life Ins. Co., 353 P.2d 725 (Cal. 1960).

[88] *See id.* at 728; *Towey*, 155 P.2d at 277.

A. Washington: In re Towey's Estate

In re Towey's Estate[89] revolves around nearly identical facts as those in *Street v. Skipper*. In *In re Towey's Estate*, the husband used community funds to purchase four life insurance policies with a face value totaling $10,000.[90] Originally, the husband designated the wife as the beneficiary of the policies.[91] However, the husband later changed the beneficiary to the executors of his estate.[92] By will, the husband designated that the proceeds be held in trust for his wife and minor son.[93] The terms of the testamentary trust dictated that once the son reached the age of twenty-five, the residue of the trust was payable outright to the son.[94] If the son died before the age of twenty-five, the trust corpus was payable to the husband's brother.[95]

The court held that the beneficiary change itself was valid without the wife's consent because the husband had sufficient power of management to name his estate or his executors as the beneficiary, but that the husband could only dispose of one-half of the proceeds by will.[96] The court stated, "[T]he husband [is clothed] with authority to manage and control community personal property with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half of the community property."[97] The court went on to hold, "The husband may not, as statutory agent or manager of the marital community, change the beneficiary of the insurance policy from his spouse to another person and thereby make a gift of community property to any one against the consent of his wife."[98] Even if the husband reserved the right to change the beneficiary designation, as community manager, the husband was only authorized to change the beneficiary of a community-property life insurance policy to name his estate.[99] Upon designating the estate as the beneficiary, the husband only had testamentary power over his one-half of the

[89] *See generally Towey*, 155 P.2d 273.
[90] *Id.* at 274.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 275.
[97] *Id.*
[98] *Id.*
[99] *See id.*

community-property proceeds, and the wife was entitled to the other half of the proceeds.[100]

Therefore, Washington courts follow the *Martin v. Moran* approach; as a matter of law the insured spouse does not have the power or right to dispose of the surviving spouse's interest in community-property life insurance proceeds.[101] Such proceeds passing through probate should be partitioned by reason of death.[102]

B. California: Tyre v. Aetna Life Insurance Co.

In *Tyre v. Aetna Life Insurance Co.*, the California Supreme Court interpreted the California Probate Code.[103] Although the fact situation of *Tyre* is distinguishable from the fact situations in both *Martin v. Moran* and *Street v. Skipper*, the California Supreme Court's holding is extremely broad and logically encompasses the fact situations presented by this comment.

In *Tyre*, the husband changed the payout method of a life insurance policy on the husband's life from a lump sum payout to an annuity for the wife's life, with a minimum payout period of ten years.[104] If the wife died within the guaranteed term of the annuity, then the payments continued to the husband's daughters.[105] The wife did not discover the change in payout method until after the husband's death.[106] The wife was in ill health at the time of the husband's death, and expert witnesses testified that she did not have the average life expectancy on which the life annuity amounts were calculated.[107] She filed suit to avoid the husband's election of annuity as the form of payout as to her one-half share of the community-property insurance policy proceeds.[108]

The court acknowledged that during his lifetime the husband had the sole power of management over the policy, but held that changing the payout method to the specified annuity was in reality an attempt to dispose

[100] *See id.* at 277.
[101] *See id.* at 275.
[102] *See id.* at 277.
[103] 353 P.2d 725, 729 (Cal. 1960).
[104] *Id.* at 727.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *See id.* at 727.

of proceeds after his death:[109]

> [A]lthough the payment of insurance proceeds is a matter of contract between the insured and the insurer, the insured's exercise of his unilateral right under the contract to select the beneficiary is testamentary in character. Similarly, the insured's exercise of his unilateral right under the terms of the policy to determine whether the proceeds shall be paid as a lump sum or in the form of an annuity is testamentary in character. Section 201 of the Probate Code gives the husband testamentary control over only one-half of the community property, and the word "testamentary" as used in that section is not limited to formal testaments.[110]

The court analogized to cases in which the managing spouse had changed the beneficiary designation from the non-managing spouse to a third party, and such change was held to be an attempted testamentary disposition.[111] In California, such transfers of the non-managing spouse's interest in the proceeds from a community-property life insurance policy are voidable at the option of the surviving spouse.[112] Also, the surviving spouse may maintain an action for one-half of the proceeds.[113] The change in beneficiary is effective only as to the managing spouse's interest in the community-property insurance proceeds.[114]

While *Tyre* does not have analogous facts with *Martin v. Moran* or *Street v. Skipper*, the California Supreme Court's interpretation of the California Probate Code is clear. In essence, in California, the managing spouse never has the power to dispose of the non-managing spouse's community-property interest in life insurance proceeds without the non-managing spouse's consent.[115] Therefore, in a situation where insurance proceeds are payable to the estate of the insured, California courts will likely follow the *Martin v. Moran* approach.

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[109] *See id.* at 727–28.

[110] *Id.* at 729.

[111] *Id.* at 728–29.

[112] *Id.* at 728.

[113] *Id.*

[114] *Id.* at 729.

[115] *See id.*

IV. PRECEDENT APPLYING *MARTIN V. MORAN* AND *STREET V. SKIPPER* IN TEXAS

A. The Texas Supreme Court Has Never Adopted the Martin v. Moran *Approach*

The Texas Supreme Court has cited *Martin v. Moran* with approval in a few different cases.[116] However, the court has not directly addressed the specific question presented in this comment. Further, none of the cases in which the court cited *Martin v. Moran* with approval appear to make the case binding precedent for the lower Texas courts.[117] The Texas Legislature has also not directly addressed or approved the holding of *Martin v. Moran*.

In *Warthan v. Haynes*, the court discussed survivorship requirements in the context of life insurance policies.[118] A husband and wife suffered fatal injuries in an automobile accident; the wife predeceased the husband by a matter of a few minutes.[119] There were three life insurance policies on the husband's life that named the wife as the beneficiary, two of which were community property and one of which was the husband's separate property.[120] The two community-property policies listed the husband's estate as the alternate beneficiary.[121] Both husband and wife had children from prior marriages, and their children disputed the disposition of the proceeds.[122] The court recognized the power of the insured spouse to change the beneficiary designation:

> [T]he wife, the beneficiary in a policy insuring her husband, with the right reserved to the husband to change the beneficiary, has prior to the death of the insured no vested interest in the policy or in the proceeds of it, even though the policy is taken out during marriage and all

[116] *See, e.g.*, Warthan v. Haynes, 155 Tex. 413, 419, 288 S.W.2d 481, 484 (1956); Blackmon v. Hansen, 140 Tex. 536, 541, 169 S.W.2d 962, 965 (1943); Lee v. Lee, 112 Tex. 392, 399–400, 247 S.W. 828, 831 (1923).

[117] *See, e.g.*, *Warthan*, 155 Tex. at 419, 288 S.W.2d at 484; *Blackmon*, 140 Tex. at 541, 169 S.W.2d at 965; *Lee*, 112 Tex. at 400, 247 S.W. at 831.

[118] *See* 155 Tex. at 415–16, 288 S.W.2d at 482.

[119] *Id.* at 415, 288 S.W.2d at 482.

[120] *Id.* at 415–16, 288 S.W.2d at 482.

[121] *Id.* at 416, 288 S.W.2d 482.

[122] *Id.*

> premiums are paid out of community funds and that the insured may at will change the beneficiary and thereby divest a prior beneficiary of all interest in the proceeds of the policy.[123]

The court mentioned *Martin v. Moran* with approval, stating that in some circumstances to allow the husband to make proceeds payable to his estate would work a fraud on the community against the wife.[124] However, the court factually distinguished the case on the grounds that the wife in *Martin v. Moran* in fact survived the husband.[125] The court instead found that the proceeds were part of the separate estate of the husband because the wife's interest, if any, in the life insurance policies terminated on her death because of the revocable status of the beneficiary designation and the husband's power of control over the beneficiary designation.[126] Therefore, the text supporting *Martin v. Moran's* holding in *Warthan v. Haynes* is dicta.[127]

In *Lee v. Lee*, the husband had been previously married and thought he had been legally divorced, but in fact was not.[128] The husband attempted to marry his second wife, and the couple held themselves out as husband and wife.[129] The court held that the husband and his second wife had a putative marriage, and thus the death benefit which was acquired during the putative marriage was the community property of the husband and his second wife unless the husband's executors could satisfactorily prove that the death benefits were separate property.[130] The husband did not designate a beneficiary to the death benefit, so under the terms of the benefit plan, the death benefit was payable to his estate.[131] The court stated that if the death benefit were construed to be life insurance, because the funds were community, they would follow *Martin v. Moran* and partition the funds as a

[123] *Id.* at 417, 288 S.W.2d at 483 (quoting Sherman v. Roe, 153 Tex. 1, 5–6, 262 S.W.2d 393, 396 (1953)).

[124] *Id.* at 419, 288 S.W.2d at 484 (citing Martin v. Moran, 11 Tex. Civ. App. 509, 32 S.W. 904 (Fort Worth 1895, no writ)).

[125] *See id.*

[126] *Id.* at 418–19, 288 S.W.2d at 483–84.

[127] *See id.* at 419, 288 S.W.2d at 484.

[128] *See* 112 Tex. 392, 396, 247 S.W. 828, 829 (1923).

[129] *Id.* at 397, 247 S.W. at 830.

[130] *See id.* at 398–99, 401, 247 S.W. at 830, 832.

[131] *See id.* at 399, 247 S.W. at 831.

matter of law.[132] However, the court held that the death benefit was actually deferred compensation for continuous service and was therefore income.[133] Thus, the death benefit was partitioned as income at the death of the husband, and the second wife retained her one-half interest.[134] Because the death benefit was held to be income and the partition did not deal with the proceeds of a life insurance policy that were payable to the insured's estate, *Lee* also skirts the exact issue presented in *Martin v. Moran*.[135] Therefore, the court's approval of *Martin v. Moran* was dicta.[136]

Blackmon v. Hansen is an estate tax case that revolves around the interpretation of a now repealed Texas estate tax statute.[137] The Texas statute was adopted directly from the IRS estate tax statutes, and as the court stated, the interpretations of the IRS statute were presumed to be adopted along with the statute.[138] The court held that for purposes of calculating the taxable estate, only one-half of the insurance proceeds from a policy on the husband's life naming the wife as beneficiary were includable in the husband's taxable estate.[139] While the court cited *Martin v. Moran* with approval, the approval again is dicta because it is not necessary to the holding of the case.[140] Further, *Blackmon* is factually distinguishable: unlike in *Martin v. Moran*, the wife in *Blackmon* was the named beneficiary.[141] While *Blackmon* arguably provides the strongest support for adopting *Martin v. Moran* as the statement of Texas law on this issue, because the Texas Supreme Court has never directly addressed a situation like Martha's it is still unclear if *Martin v. Moran* is the definitive statement of Texas law.

B. Street v. Skipper: *Standing Alone in Texas Case Law*

There is very little case law following the fraud-on-the-community

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[132] *See id.* at 399–400, 247 S.W. at 831.

[133] *See id.* at 403–04, 247 S.W. at 833.

[134] *Id.* at 404, 247 S.W. at 833.

[135] *See* Martin v. Moran, 11 Tex. Civ. App. 509, 510, 32 S.W. 904, 905 (Fort Worth 1895, no writ).

[136] *See Lee*, 112 Tex. at 399–400, 247 S.W. at 831.

[137] *See* 140 Tex. 536, 537, 169 S.W.2d 962, 963 (1943).

[138] *Id.* at 540, 169 S.W.2d at 964–65.

[139] *Id.* at 541, 169 S.W.2d at 965.

[140] *Id.*

[141] *Id.* at 538, 169 S.W.2d at 963; Martin v. Moran, 11 Tex. Civ. App. 509, 510, 32 S.W. 904, 905 (Fort Worth 1895, no writ).

portion of the *Street v. Skipper* opinion, and the Texas Legislature has not approved the *Street v. Skipper* approach by statute. The majority of case citations to *Street v. Skipper* cite to a portion of the opinion which contains a concise statement of Texas law regarding court-ordered removal of an administrator.[142] Unlike *Martin v. Moran*, the Texas Supreme Court has never cited to *Street v. Skipper*. Two Texas Court of Appeals cases cite to *Street v. Skipper* for a statement of the law regarding fraud on the community in the context of life insurance policies.[143] However, both cases are factually distinguishable because there was a valid third-party beneficiary designation.[144] In Texas case law, *Street v. Skipper* stands alone for the proposition that when community-property life insurance proceeds are payable to the estate of the insured, the surviving spouse must prove a fraud on the community in order to recover a portion of the proceeds.[145]

V. THE PROCEDURAL AND PLEADING RAMIFICATIONS OF THE AUTHORITY SPLIT

If *Martin v. Moran* contains the correct statement of Texas law, then a testator may only dispose of one-half the insurance proceeds by will.[146] As a matter of law, the surviving spouse will retain their surviving spouse's interest in any proceeds from a community-property insurance policy passing through probate.[147] The surviving spouse has no burden of pleading or persuasion—the partition of community-property assets passing through probate procedures is automatic.[148] Instead, the burden of pleading and persuasion is on the executor and donee to show that the policy was the separate property of the deceased spouse.[149] However, this situation will often raise the issue of a widow's election.[150] If the decedent spouse is

[142] *See In re* Roy, 249 S.W.3d 592, 597 (Tex. App.—Waco 2008, pet. denied); Ayala v. Brittingham, 131 S.W.3d 3, 9 (Tex. App.—San Antonio 2003), *appeal dismissed*, 193 S.W.3d 575 (Tex. 2006); Sammons v. Elder, 940 S.W.2d 276, 283 (Tex. App.—Waco 1997, writ denied).

[143] *See* Madrigal v. Madrigal, 115 S.W.3d 32, 35 (Tex. App.—San Antonio 2003, no pet.); Barnett v. Barnett, 985 S.W.2d 520, 530 (Tex. App.—Houston [1st Dist.] 1998), *rev'd on other grounds*, 67 S.W.3d 107 (Tex. 2001).

[144] *See Madrigal*, 115 S.W.3d at 34; *Barnett*, 985 S.W.2d at 523.

[145] *See* 887 S.W.2d 78, 81 (Tex. App.—Fort Worth 1994, writ denied).

[146] *See Martin*, 11 Tex. Civ. App. at 511, 32 S.W. at 905–06.

[147] *See id.*

[148] *See* Tex. Prob. Code Ann. § 37 (Vernon 2003).

[149] *See* Tex. Fam. Code Ann. § 3.003 (Vernon 2006).

[150] *See* Dakan v. Dakan, 125 Tex. 305, 315, 83 S.W.2d 620, 626 (1935).

attempting either impliedly or expressly to make the surviving spouse give up his or her rights in the insurance proceeds in exchange for receiving a different asset that the surviving spouse is not otherwise entitled to, then the surviving spouse will likely be put to an election.[151]

Under *Street v. Skipper*, even though the policy is community in character, the testator in effect has the power of disposition over the entirety of the insurance proceeds.[152] The surviving spouse must assert a fraud-on-the-community claim and plead that the decedent spouse is attempting to transfer the surviving spouse's interest in the proceeds without adequate consideration.[153] Upon meeting this pleading burden, a presumption arises that the transfer is a fraud on the surviving spouse's rights in the community-property proceeds.[154] Constructive fraud is presumed and is sufficient to establish a fraud on the community.[155] Once the surviving spouse meets the burden of pleading, the burden of persuasion then shifts to the donee of the property to show that the transfer was fair and does not rise to the level of an actual or constructive fraud.[156]

The beneficiary under the will generally should argue for the *Street v. Skipper* statement of the law. Unless the surviving spouse meets his or her admittedly simple pleading burden, the beneficiary will take the proceeds free and clear. Even when the surviving spouse adequately pleads a fraud-on-the-community claim, the beneficiary of the proceeds has a chance to show that the transfer was fair.[157] In contrast, it is generally going to be to the surviving spouse's advantage to argue that *Martin v. Moran* is the proper statement of Texas law. The result of *Martin v. Moran* is an automatic partition of the community-property proceeds.[158] The surviving spouse would have no need to show actual or constructive fraud to retain

[151] *Id.* (quoting Dunn v. Vinyard, 251 S.W. 1043, 1046 (Tex. Comm'n App. 1923, judgm't adopted)).

[152] *See* 887 S.W.2d 78, 81 (Tex. App.—Fort Worth 1994, writ denied).

[153] *See* Givens v. Girard Life Ins. Co. of Am., 480 S.W.2d 421, 425 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), *superseded by statute*, Act of June 6,1991, 72d Leg., R.S., ch. 479, § 224, 1991 Tex. Gen. Laws 1043–45, *as recognized in* State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007).

[154] *Id.* at 426.

[155] *See id.* at 425–26.

[156] *Id.* at 426.

[157] *See* Murphy v. Metro. Life Ins. Co., 498 S.W.2d 278, 282 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

[158] *See* 11 Tex. Civ. App. 509, 511, 32 S.W. 904, 905–06 (Fort Worth 1895, no writ).

his or her one-half interest.[159] However, because of the danger that a Texas court will use the *Street v. Skipper* formulation, the surviving spouse should plead in the alternative a *Street v. Skipper* style fraud-on-the-community claim. The surviving spouse will also need to consider the doctrine of election, and determine whether or not the surviving spouse will be put to an election. If an election is the probable outcome, the spouse needs to consider whether he or she should elect to take under the decedent spouse's will.

VI. CORRECT RESOLUTION TO THE SPLIT IN AUTHORITY: *MARTIN V. MORAN* IS THE CORRECT STATEMENT OF TEXAS LAW

The issue presented by this comment is simple on its face, but it becomes much more complex upon closer examination of the underlying points of Texas law. Both *Street v. Skipper* and *Martin v. Moran* resolved the issue using different points of Texas law that do not wholly mesh with the underlying fact situations. The typical marital property partition that the Texas Legislature has articulated does not fit because the proceeds are not truly community property.[160] On the other hand, using fraud-on-the-community principles doesn't truly make sense because the proceeds are already subject to the probate court's jurisdiction in the course of administration. In light of the purpose of Texas marital property law and the Texas Supreme Court's denial of review of *Street v. Skipper*, *Martin v. Moran* provides the correct resolution.

The implication of Section 37 of the Texas Probate Code is that the decedent spouse only has testamentary power of disposition over the decedent spouse's one-half of the probate community property.[161] Courts have consistently determined that the definition of estate as used in Section 37 means the decedent's separate property and the decedents one-half interest in the community property.[162] The surviving spouse's interest in the community property is not a part of the decedent spouse's estate.[163] As a general rule, death works a partition on the community-property assets

[159] *See id.*

[160] *See* Tex. Ins. Code Ann. § 1103.102(a) (Vernon 2009). *See also* Martin v. McAllister, 94 Tex. 567, 570, 63 S.W. 624, 625 (1901).

[161] *See* Tex. Prob. Code Ann. § 37 (Vernon 2003).

[162] *See* Dakan v. Dakan, 125 Tex. 305, 315, 83 S.W.2d 620, 626 (1935) ("The law does not permit the husband to devise either separate property or community property of the wife . . . .").

[163] *See id.*

passing through probate, and the surviving spouse retains one-half of the community-property assets.[164] This is an elegant and efficient solution to an issue with many potential social and emotional tangles. It ensures that both spouses essentially get one-half of all assets acquired during the course of the marriage. The solution recognizes the equality of both spouses, and the equality of the effort that they have ideally provided to the family's overall well-being.

Under the Texas approach, a community life insurance policy is one of the assets gained due to the community effort.[165] Once life insurance proceeds have been paid into the estate, they are effectively probate assets.[166] The only hurdle to the direct application of a community-property partition is the fact that the proceeds from the community-property policy are not technically community property.[167] However, when the disposition of life insurance proceeds to a third-party beneficiary is unfair to the surviving spouse (which it usually will be when the proceeds are a major asset of the decedent's estate), Texas courts have consistently recognized the surviving spouse's right to at least one-half of the proceeds from a community-property life insurance policy.[168] Therefore, because the surviving spouse usually has a right to one-half of the proceeds and the proceeds are subject to the probate court's administration, the most elegant solution is to simply partition the proceeds as a matter of law. This solution viewed in isolation could potentially frustrate the testator's intent and result in overcompensation of the surviving spouse to the detriment of the testator's other devisees. However, the doctrine of election provides adequate protection to the testator's devisees.

On the other hand, when a community-property insurance policy contains a valid third-party beneficiary designation, a fraud-on-the-community claim is appropriate. The Texas Insurance Code governs the

[164] *See id.*

[165] *See* Martin v. McAllister, 94 Tex. 567, 570, 63 S.W. 624, 625 (1901).

[166] *Id.*

[167] *See id.*; Tex. Ins. Code Ann. § 1103.102 (Vernon 2009).

[168] *See* Davis v. Prudential Ins. Co. of Am., 331 F.2d 346, 352 (5th Cir. 1964); Kemp v. Metro. Life Ins. Co., 205 F.2d 857, 865 (5th Cir. 1953); Volunteer State Life Ins. Co. v. Hardin, 145 Tex. 245, 249, 197 S.W.2d 105, 106 (1946); *McAllister*, 94 Tex. at 570, 63 S.W. at 625; Givens v. Girard Life Ins. Co., 480 S.W.2d 421, 426–27 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), *superseded by statute*, Act of June 6,1991, 72d Leg., R.S., ch. 479, § 224, 1991 Tex. Gen. Laws 1043–45, *as recognized in* State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007).

disposition of such proceeds and relegating the surviving spouse to a claim for fraud on the community makes a harsh kind of sense in such situations. The insured spouse had statutory power while alive to name any beneficiary.[169] The Insurance Code dictates that the named beneficiary on the policy should receive the proceeds.[170] Because such proceeds are not subject to the jurisdiction of the probate court, the aggrieved spouse must institute an additional proceeding to assert a claim for part of the proceeds.[171] The proper claim recognized by Texas courts is a fraud-on-the-community claim.[172] The minimum requirement of constructive fraud protects the beneficiary in such cases where the doctrine of election is unavailable. However, when the proceeds have been paid to the decedent's estate, the probate court already has jurisdiction over the proceeds.[173] No need exists for the surviving spouse to bring an additional claim for the court to assert its jurisdiction, and because of the doctrine of election, there is no need for the added protective requirement of constructive fraud.

The reasoning of the court in *Martin v. Moran* is particularly relevant to resolve the conflicting points of law: a fraud-on-the-community situation should generally be avoided.[174] To avoid a fraud on the community, the insurance proceeds which are subject to probate administration should be partitioned.[175] To relegate the surviving spouse to a claim for fraud on the community will result in Texas probate judges potentially enforcing transfers that will result in a fraud on the surviving spouse's right in community property. To retain judicial integrity, the *Martin v. Moran* approach is more appropriate.

Further, the doctrine of election, which will usually be applicable in *Street v. Skipper* style fact scenarios, acts to protect the testator's devisees. The doctrine of election is applicable in situations where a devisee under a will is given both a detriment and a benefit under the terms of a will.[176] In order for a beneficiary to take any benefit under a will, the beneficiary must

[169] Tex. Ins. Code Ann. § 1103.055 (Vernon 2009).

[170] *Id.* § 1103.102(a).

[171] *See Kemp*, 205 F.2d at 864.

[172] *See Davis*, 331 F.2d at 352; *Kemp*, 205 F.2d at 864; *McAllister*, 94 Tex. at 570, 63 S.W. at 625; *Givens*, 480 S.W.2d at 426–27.

[173] *See* Tex. Prob. Code Ann. § 37 (Vernon 2003).

[174] *See* 11 Tex. Civ. App. 509, 511, 32 S.W. 904, 906 (Fort Worth 1895, no writ).

[175] *Id.* at 511, 32 S.W. at 905–06.

[176] Dakan v. Dakan, 125 Tex. 305, 315, 83 S.W.2d 620, 626 (1935) (quoting Dunn v. Vinyard, 251 S.W. 1043, 1046 (Tex. Comm'n App. 1923, judgm't adopted)).

also take any detriment in the will.[177] If the *Martin v. Moran* approach is recognized, the surviving spouse automatically has a right to one-half of any life insurance proceeds paid to the decedent spouse's estate.[178] If the testator attempts to devise all of the proceeds to a third-party devisee, then, assuming the surviving spouse receives other property to which the surviving spouse is not entitled as a matter of law, the surviving spouse will be put to an election.[179] The doctrine of election helps to protect both the testator's intended devisee and the surviving spouse. If the proceeds paid to the estate are a major part of the testator's estate, the disposition of the proceeds to the intended beneficiary would likely have resulted in a fraud on the community, and the surviving spouse would have been successful asserting to one-half of the proceeds.[180] Allowing the surviving spouse to elect out of the will entitles the surviving spouse to retain the one-half of the proceeds to which the surviving spouse is entitled.[181] If the testator's will gives the surviving spouse more than one-half of the estate, then the surviving spouse will likely elect to take under the will and forego the proceeds.[182] Such a situation would likely not amount to a constructive fraud, and the spouse could not have successfully stated a claim for fraud on the community.[183] The doctrine of election provides essentially the same protection to both third-party devisees and the surviving spouse as the fraud-on-the-community doctrine, while offering increased judicial and attorney efficiency.

The writ history of *Street v. Skipper* further supports this conclusion. The Texas Supreme Court denied the writ of error filed by the *Street* attorneys.[184] When a petition or writ of error is denied, the "[Texas] Supreme Court is not satisfied that the opinion of the court of appeals has

[177] *Id*.

[178] *See Martin*, 11 Tex. Civ. App. at 511, 32 S.W. at 905–06.

[179] *Dakan*, 125 Tex. at 315, 83 S.W.2d at 626.

[180] *See* Davis v. Prudential Ins. Co. of Am., 331 F.2d 346, 352 (5th Cir. 1964); Kemp v. Metro. Life Ins. Co., 480 F.2d 857, 865 (5th Cir. 1953); Givens v. Girard Life Ins. Co. of Am., 480 S.W.2d 421, 425 (Tex. Civ. App.—Dallas, 1972, writ ref'd n.r.e.) *superseded by statute*, Act of June 6,1991, 72d Leg., R.S., ch. 479, § 224, 1991 Tex. Gen. Laws 1043–45, *as recognized in* State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007).

[181] *See Dakan*, 125 Tex. at 314–15, 83 S.W.2d at 625–26.

[182] *See id.*

[183] *See id.* at 315, 83 S.W.2d at 626.

[184] *See generally* Street v. Skipper, 887 S.W.2d 78 (Tex. App.—Fort Worth 1994, writ denied).

correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction."[185] Therefore, the Texas Supreme Court was satisfied with the result of *Street v. Skipper* but did not believe that the Fort Worth Court of Appeals applied the correct legal analysis. The result in *Street v. Skipper* is easily reconciled with the law presented in *Martin v. Moran* by applying the doctrine of election. In *Street v. Skipper*, the wife received more than one-half of the community property, but did not receive an interest in the life insurance proceeds.[186] Under the *Martin v. Moran* approach, the wife was entitled to demand a partition of the insurance proceeds between herself and the husband's devisees.[187] However, under the husband's will, she was impliedly required to give up her interest in the proceeds in order to gain the other benefits which she received under the will.[188] This is a classic widow's election situation.[189] Because the wife accepted a benefit under the will, she had impliedly elected to take under the will and was required to accept any detriments under the will.[190] *Street v. Skipper* could have been decided using the doctrine of election and the *Martin v. Moran* approach, and reached the exact same result. Therefore, the Texas Supreme Court likely thought that *Martin v. Moran* was the correct statement of law.

VII. CONCLUSION

The *Street v. Skipper* opinion appears to be a deviant in Texas case law. No other Texas appellate cases have followed the *Street v. Skipper* approach, while many have followed the *Martin v. Moran* approach. Further, the Texas Supreme Court has explicitly stated approval of *Martin v. Moran* in dicta on at least three occasions.[191] The *Martin v. Moran* approach is consistent with the underlying purposes of Texas community-property law, and the doctrine of election provides adequate protection to

[185] James Hambleton, *Notations for Subsequent Histories in Civil Cases*, 65 Tex. B.J. 694, 699 (2002).

[186] *Street*, 887 S.W.2d at 81.

[187] *See* 11 Tex. Civ. App. 509, 511, 32 S.W. 904, 905 (Fort Worth 1895, no writ).

[188] *See Street*, 887 S.W.2d at 81.

[189] *See* Dakan v. Dakan, 125 Tex. 305, 315, 83 S.W.2d 620, 626 (1935).

[190] *See Street*, 887 S.W.2d at 81.

[191] Warthan v. Haynes, 155 Tex. 413, 419, 288 S.W.2d 481, 484 (1956); Blackmon v. Hansen, 140 Tex. 536, 541, 169 S.W.2d 962, 965 (1943); Lee v. Lee, 112 Tex. 392, 400, 247 S.W. 828, 831 (1923).

both the surviving spouse and the devisees named in a deceased spouse's will.

In Martha's situation, a Texas court should follow the *Martin v. Moran* approach and hold that Joe had the power of disposition only over his one-half of the proceeds passing through probate proceedings. Additionally, Martha and her lawyer will want to determine whether Martha has been given a benefit under the will, and if so they will probably want to elect against the will. However, because of *Street v. Skipper*, Martha's lawyer should also be sure to plead a fraud-on-the-community claim. In the facts given in Subpart I.A, because the insurance policy is the major asset of the marriage, it is likely that that transfer of the proceeds to Joe's son would at least amount to constructive fraud, and even under the *Street v. Skipper* approach, Martha will be able to recover one-half of the proceeds.