CLAIM OF NIWAYE KUSUMI

[No. 146-35-17070. Decided September 20, 1954]

FINDINGS OF FACT

This claim, received by the Attorney General on December 30, 1949, is for $1,000, the maturity value of a policy insuring the life of claimant's deceased husband, Mataichiro Kusumi. The claim was originally brought by claimant's daughter, Asako Teresa Kusumi, the beneficiary designated in the policy at the time of loss. It subsequently developing that such designation was revocable at the will of the insured and that claimant, Niwaye Kusumi, widow of the insured, was the real party in interest, Asako Teresa Kusumi waived her rights in the matter and consented to the substitution of her mother as party claimant.

Claimant, Niwaye Kusumi, and her deceased husband, Mataichiro Kusumi, were both born in Japan of Japanese parents. Claimant has not gone to Japan since December 7, 1941, and her deceased husband likewise did not go to Japan at any time after that date. On December 7, 1941, also for some time prior thereto, claimant and her husband actually resided at 1505 Geary Street, San Francisco, California, which residence they continued until May 10, 1942, when they were evacuated, under military orders pursuant to Executive Order 9066, to the Tanforan Assembly Center and from there, later, to the Topaz Relocation Center. At the time their evacuation was impending, claimant's husband was insured for $1,000 under a policy permitting change of beneficiary and on which he had paid all premiums out of his earnings during marriage. The policy, issued by the California Life Insurance Company pursuant to California law, was an annual renewable term policy subject to increase of premiums at attained age, the premiums being payable semiannually and the respective due dates thereof being April 1 and October 1. Because of the uncertainties created by their impending evacuation, claimant and her husband were forced to forego making the premium payment due on April 1, 1942, with the result that the policy was canceled by the company. Since the policy provided current protection only, being of the annual renewable term type, as aforesaid, claimant and her husband received no refund or other benefit at the time of its cancellation. Claimant and her husband acted reasonably, in the circumstances, then confronting them, in defaulting on the premium payment due April 1, 1942. At the time of cancellation of the policy, claimant's husband was no longer insurable. The fair market value of the policy at time of loss was $850. Claimant's husband died intestate in the Topaz Relocation Center on October 23, 1943. The loss involved is uncompensated.

REASONS FOR DECISION

That loss from forced abandonment of a life insurance policy is compensable under the Statute is, of course, now settled. *Noboru Sumi, ante,* p. 225. Likewise settled is the fact that under the law of California, in which jurisdiction the policy was issued and the contract of insurance formed, decedent having reserved the right to change the beneficiary, the latter had no vested interest in the policy but merely an expectancy, similar to that of a legatee under a will, at the time of cancellation. *Blethen* v. *Pacific Mut. Life Ins. Co.,* 198 Cal. 91, 98–99; *Estate of Welfer,* 110 Cal. App. 2d 262, 265. This being the case, and the premiums having been paid with the husband's earnings during marriage, it follows that the policy then represented community property of claimant and her husband. *Grimm* v. *Grimm,* 26 Cal. 2d 173, 175; cf. *Odone* v. *Marzocchi,* 34 Cal. 2d 431, 438–439. The parties both being jurisdictionally eligible, and the husband having died prior to the enactment of the Statute, claimant may properly claim for and receive the entire community loss. *Fumiyo Kojima, ante,* p. 209.

The foregoing preliminary matters being disposed of, we come to the real issues herein posed. In *Noboru Sumi, supra,* the fair market value of a life insurance policy was held to be its hypothetical duplication cost at time of loss, the applicable formula being "reserve" plus the fractional portion of "loading" properly allocable thereto. As appears from the findings of fact, however, the instant case differs from *Noboru Sumi* in two fundamental respects. Thus, first, whereas the policy in the *Sumi* case was of the "level-premium" type, the insured owning an "equity" therein through the reserve accumulations resulting from premium payments in excess of the actual cost of insurance, the policy here involved represents merely annual renewable term insurance subject to increase of premiums at attained age, there being no reserve and the insured having no "equity." Secondly, and more important, while the insured in *Noboru Sumi* was still insurable at the time of cancellation of the policy, as appears from the findings of fact the instant insured was then no longer insurable. Plainly, in light of these factual differences, the valuation principle enunciated in *Noboru Sumi* is here inapplicable and there emerge for original determination two separate and distinct questions. Initially, with respect to the instant case *per se,* there is the problem as to whether, in view of the type of policy involved, statutorily cognizable property loss is shown. Again, if the latter matter be resolved in the affirmative, there is the further and more general inquiry as to the proper method of valuation of a life insurance policy where the insured is no longer insurable at time of loss.

Of the two problems thus presented, the first—whether compensable loss is here shown—is essentially parenthetical and requires but limited discussion. Annual renewable term insurance subject to increase of premiums at attained age being involved, the issue of property loss perforce narrows itself down to the matter of the significance of the incident of renewability. That this incident would have no significance where the insured is still insurable at time of cancellation is, we believe, scarcely open to doubt. As appears from the authorities cited in *Noboru Sumi, supra,* and as specifically stated in *Ryerson* v. *United States,* 28 Fed. Supp. 265, 267, property valuation of life insurance policies which are still in force is effected entirely in terms of duplication cost, the rule being "the [same] price that any person of the same age, sex, and condition of health as the insured would have to pay for a similar policy in the same insurance company on the date [of loss]." Cf. *Noboru Sumi, ante,* pp. 8–9, and note, also, *United States* v. *Ryerson,* 312 U. S. 260. This being the case, and the policy involved being subject to increase of premiums at attained age, it follows that where the insured is still insurable at time of cancellation the incident of renewability is without significance and no loss is shown, since the cost of duplicating the policy would merely be payment of the attained age premium called for in the original. Manifestly, however, these considerations cannot apply where the insured is no longer insurable. That the incident of renewability has profound significance in the latter situation, clearly rendering the policy valuable property, is patent from the fact that in consequence of its presence the insured is able to continue to own insurance protection, i. e., insurance *per se* (cf. *Sumi, supra,* pp. 3–4), even though he is no longer insurable. Plainly, then, decedent-insured having been no longer insurable at time of cancellation of the subject policy, property loss is established.

Statutorily cognizable loss being shown, there remains for consideration the general question of valuation of a life insurance policy where the insured is no longer insurable at time of loss. As appears from the authorities cited in *Noboru Sumi, ubi supra,* pp. 4–5, in cases of wrongful cancellation, the principle applied by the courts in such a situation is maturity value of the policy less anticipated premiums determined on the basis of the insured's reduced expectancy, both amounts being duly discounted as of the time of cancellation. As pointed out in *Noboru Sumi,* however, the instant Act being a "property statute," contract principles are inapplicable and "fair market value at time of loss" necessarily is the test. Cf. *George M. Kawaguchi, ante,* p. 14. The issue presented, therefore, is property adaptation of the contract principle. That such adaptation is not specially difficult is readily seen. "Fair market value at time of loss" being the applicable standard, it is clear that the precise question involved necessarily is the price a willing buyer would have paid for the policy on the date of cancellation if the insured were then willing to sell, and the parties were dealing in a normal free market and without compulsion. Equally clear are the factors which would determine that price. Since the buyer would have to wait until the insured's death before receiving the maturity value of the policy and pay the premiums pending such event, it is plain that the bargaining elements would be the insured's estimated life expectancy, on the one hand, and a fair return to the buyer on his investment, on the other.

Viewing the situation here involved in the light of the foregoing, determination of the fair market value of the instant policy at time of loss becomes relatively simple. As appears from the findings of fact, the insured died on October 23, 1943. This being the actual fact, the element of speculation with respect to his life expectancy on April 1, 1942, the date of loss, is eliminated and the period of such expectancy may reasonably be presumed to have been 1 year 6 months 23 days. *Mutual Reserve Fund Life Ass'n* v. *Ferrenbach,* 144 Fed. 342, 347; cf. *Capital City Ben. Soc.* v. *Travers,* 4 F. (2d) 290, 291. Information provided by the insurer discloses that the amount of the unpaid semiannual premium due on April 1, 1942, was $14; furthermore, that under the terms of the policy the insured would have been required to pay an additional $42 in premiums subsequent to that date and prior to his death. This being the case, it is clear that a buyer purchasing claimant's policy on April 1, 1942, would receive the $1,000 maturity value only after the expenditure of $56 in premium payments. The "gross net" which he would ultimately realize, i. e., the amount before deduction of interest on premium payments, would accordingly be $944. Before such buyer could receive the $944, however, he would have to wait more than 18 months for his money. In view of this fact, also the not insignificant amount of capital which he would have tied up, such buyer presumably would want a substantial return on his investment, namely, not less than 6%–7% per annum or a total of 10%–11% for the entire period involved. Applying these principles and bearing in mind that marketplace transactions customarily are in round figures, to the eschewal of mathematical nicety, a valuation of the subject policy in the sum of $850 is fair and reasonable. Claimant's loss is accordingly found to be in said amount.