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# LIFE POLICIES UNDER A STATUTORY TRUST

Under section 73 of the Conveyancing and Law of Property Act, the insured can easily create a trust of the life policy taken out by him. Unfortunately, however, problems often occur. Such a statutory trust has in many a case been unwittingly created by the life assured without his ever realising the full consequences of what he had done. The present article discusses how this unwarranted situation can arise (including the different kinds of interests thereby constituted) as well as how the resulting trust may drastically restrict the insured's rights and options under the policy.

## I. INTRODUCTION

ONE of the primary factors motivating a person to take up a policy on his life is that he wants to ensure that there will be some funds for his dependents to fall back on after his death. There may be a need to devise safeguards for these provisions as there could, for instance, be a queue of creditors waiting for a share of the estate's pool of assets (of which the insurance proceeds will be a part) – especially where the deceased had been declared a bankrupt and the Official Assignee might be able to utilise the cash value of the policy to pay the creditors. Recognising this, legislature had instituted a mechanism that would allow the insured to set up a separate fund exclusively for his immediate family on which the creditors could not possibly lay their hands. Such was the rationale in England for section 11 of the Married Women's Property Act 1882[1] which has since then been enacted in Singapore as section 73 of the Conveyancing and Law of Property Act.[2]

What the Act essentially does is to create a statutory trust of the 'own life' policy taken out by the insured[3] for the expressed benefit of the spouse

[1] 45 & 46 Vict, c 75. There was an original statute in 1870 (33 & 34 Vict, c 93) which the 1882 Act replaced (with some amendments). The latter statute allowed the insured of either gender to create a trust in favour of the spouse or children whereas the earlier statute allowed only a married man to create such a trust.

[2] Cap 61, Rev Ed 1994. This was first enacted in 1886. There is in Malaysia a similar provision, *viz,* s 23 of the Civil Law Act 1956.

[3] The generic masculine pronoun will be used throughout the article for the insured (either male or female).

or children so as to establish a separate fund which is out of the creditors' reach. According to the general practice of the insurance industry at present, the insured would in this case have to specifically apply for a policy to be issued under section 73 of the Act and fill in special proposal and policy forms with express reference to the said provision. These forms often require the insured to name the beneficiaries as well as to appoint two trustees (with their consent). This is, naturally, the most incontrovertible way of creating a trust by which all uncertainties can be avoided.

In practice, problems arise when the insurance agents selling these policies sometimes assume that this is the only way of attracting the workings of the said provision and they thus fail to advise their clients accordingly. Not having been apprised of the legal implications, the insured may not realise that he has created a statutory trust of his life policy – even in the absence of any reference to the Act – and has in the process unwittingly relinquished all beneficial interest in the policy; indeed, he may have constituted himself a trustee and finds that he henceforth owes fiduciary duties in all his dealings with the policy. Various unhappy scenarios can result if the insured remains totally oblivious of the fact that he no longer has dominion over his life policy and cannot choose to do as he pleases; *eg,* he may suppose that he retains the right to exclude from the list of beneficiaries any who has subsequently fallen out of favour with him or he may still base his retirement plans on the monies to be released upon the maturity of the policy.

Although this statutory device for family financial protection and estate planning has already been in common usage,[4] it would appear that many of those who have purchased life policies – and even some of those working in the insurance industry – do not have a proper understanding of how the provision functions. The recent case of *Eng Li Cheng Dolly* v *Lim Yeo Hua*[5] serves as an appropriate illustration, and the present article will discuss how this unwarranted situation can occur (including the different kinds of interests thereby constituted) and how such a statutory trust may then drastically curtail the various rights and options of the insured under his own life policy.

## II. Creation of Statutory Trust

The first question that needs to be addressed is whether the naming of a spouse as a beneficiary in the life policy creates an immediate trust in the spouse's favour under section 73 of the Conveyancing and Law of Property

4 Known in Australia as family insurance policies.
5 [1995] 3 SLR 363.

Act. This was the main issue in the *Dolly Eng* dispute which centred around the insurance policy taken out by the plaintiff's husband on his own life. Contained in the policy was the following statement: "Beneficiary. Mdm Eng Li Cheng, wife of the assured." Also singled out for special mention by the trial judge, Selvam J, was the following clause in the policy:

> To whom payable: To the life assured or his assigns if he be living at the date of maturity. In the event of the death of the life assured before then, the society shall pay the moneys hereby assured to the beneficiary named below if then living or to [other the] beneficiary appointed by the life insured as hereinafter provided if then living unless prevented by any assignment or other act or thing done or suffered by the life assured during his lifetime and provided there is no statutory or other lawful restriction to the contrary. Provided always that the life assured may at any time by writing signed by him and delivered at the head office of the society at Singapore or at its principal office in Malaysia at Kuala Lumpur revoke the appointment of the beneficiary named below and may appoint another beneficiary with or without reserving the right of revocation or new appointment. Notwithstanding anything hereinbefore contained, it is hereby agreed and declared that the life assured may assign, charge, surrender or otherwise deal with this policy without the consent of the beneficiary whether named in this policy or subsequently appointed by the life assured hereunder.[6]

The marriage unfortunately ended in a divorce. Two years thereafter, the insured died and all his personal and other properties were bequeathed in equal shares to both his fiance and his brother, the latter being the executor who later contended that the said policy formed part of the insured's estate and should be devolved in accordance with the will. As Selvam J had commented after his review of the case's facts, "the issue relating to the insurance policy is of some importance as there is no reported case directly on the point."[7]

The policy in the *Dolly Eng* case was accepted by both plaintiff and defendant to be an 'own life' policy on the life of the insured – one of the necessary requirements for the creation of a trust under section 73 for the policy. If, on the other hand, this was not an 'own life' policy and had been taken out on another life instead (*eg,* of his child), it would then not have attracted the workings of the provision. There is, however, no

[6] *Ibid*, at 365.
[7] *Ibid*.

stipulation by the statute that the person creating the trust must be in a state of marriage at the time and consequently a widower or widow would similarly have been able to create such a trust in favour of the children.[8]

Another point to note is that the policy in question seemed to be an endowment policy since the clause highlighted by Selvam J envisaged a maturity date and provided for payment to the beneficiary only when the death of the life assured occurred prior to the maturity of the policy. The Act does not actually furnish a definition for the term 'policy of assurance on own life' and any policy which has death as one of the contingencies being insured against ought to be able to fit the description. Indeed, the endowment policy has long been accepted as falling within the provision as "it is an ordinary life policy with the benefit of acceleration in a specified event, and ... no doubt it is a policy effected by the husband on his own life."[9] In addition, the term 'policy of assurance' would certainly include whole life policies as well as personal accident policies.[10]

When both of these requisites are present, the insured can then create a trust by simply expressing that the policy is for the benefit of the spouse or children. So long as it is clear that the policy monies are meant to benefit the insured's immediate family, there is neither the necessity to refer to the Act nor the need to employ any special wording. For the present case, the name of Dolly Eng was inserted alongside the terms 'beneficiary' and 'wife' and there could not be any doubt that the policy was intended for her benefit; hence, section 73 was applicable even though there was no hint of it anywhere in the insurance documents. As Selvam J had explained, "The policy ... does not mention section 73 of the Conveyancing Law and Property Act. I do not think that it makes a difference because that is not a requirement of the section."[11] As a result, the court concluded that the proceeds of the policy belonged to Dolly Eng and should not be regarded as being part of her ex-husband's estate – in spite of the glaring fact that the premiums had been dutifully paid by the insured and not by his ex-wife.

The *Dolly Eng* decision has thus affirmed that section 73 provides for a very simple way of creating a trust – in contradistinction to the conventional

8 In England, a bachelor or spinster can create such a policy in favour of his or her child. In Singapore, however, there still exists the concept of illegitimacy and the term 'children' would thus have to refer to legitimate children.

9 *Per* Astbury J in *Re Ioakimidis' Policy Trusts* [1925] Ch 403 at 406.

10 A personal accident policy should still be viewed as a policy on life although payment is made only upon death from certain specified causes; see *Re Gladitz* [1937] 3 Ch 173 at 175.

11 *Supra*, note 5, at 366.

way of creating an express trust *inter vivos* where it is well established (in trust law) that a general intention to benefit someone will on its own not be sufficient for the creation of an express trust.[12] For the said provision, however, it is irrelevant that the insured settlor might not even have evinced with sufficient certainty his intention to create a trust; what the Act has done is to accord to that expression of a general intention to benefit the spouse, the force of a trust declaration (which ordinarily would not have sufficed had it conversely been the creation of an express trust). Furthermore, the Act appropriates the proceeds to the named beneficiary without the need for the execution of a trust deed by the insured. Since such a trust can be so effortlessly created, the insured may not be aware that under the given circumstances he has actually surrendered his beneficial interest to the policy and has by default been constituted a trustee with all the attendant duties foisted on him.

Another important consequence highlighted by Selvam J is that "a wife who is named a beneficiary obtains an immediate trust in her favour which is not defeated by a subsequent divorce."[13] By the term 'immediate trust', the judge conceivably had in mind the immediate creation or imposition of this statutory trust. The exact nature of the beneficiary's interest has to be further clarified for a proper appreciation of the principles involved, and the various possibilities will be looked at in turn under the ensuing sub-headings.

### A. *Immediate Vested Absolute Interest*

There would not be any controversy over the identity of the beneficiaries if the insured had included their names in the policy – be it the wife or the children. Furthermore, if the policy is expressly for the benefit of the named spouse (*ie,* without any qualifications attached to such a provision), no future incident can deprive the beneficiary's rights accorded to the spouse who would have been given an immediate absolute vested interest in the policy. The case of *Cousins* v *Sun Life Assurance Society*[14] illustrates this well: Contained in the policy was a clause specifying that it had been "issued for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women's Property Act 1882". As the wording

12 It has generally been accepted that (a) the person must declare his intention to create the trust clearly and unequivocally, (b) the property must be identified with certainty and (c) the objects and beneficiaries must also be certain. See Underhill and Hayton, *Law of Trusts and Trustees* (14th ed), at 39.

13 *Supra*, note 11.

14 [1933] Ch 126.

of this clause did not mention any qualification that would limit the interest of Lilian Cousins to her surviving the insured, the English Court of Appeal decided that she acquired "... a vested absolute beneficial interest in the policy and the moneys thereby assured from the time the policy was effected."[15] Although Lilian Cousins pre-deceased her husband, her interest passed to her personal representatives as part of her estate because the "trust created in her favour ... still remains uncompleted and unperformed until the date shall arrive when she, or, as it is now, her personal representatives, receive the money, and while that state of things continues the Act negatives any interest passing to the husband."[16]

Although immediate trusts had been created for both Lilian Cousins and Dolly Eng, there are, upon closer scrutiny, some differences between these two cases and the discussion will thus turn to look at the second possibility which additionally considers the complications that may arise from the qualifications to the beneficiary's interest.

### B. *Limited or Contingent Beneficiary*

It must be noted, though, that the named beneficiary does not automatically acquire an immediate absolute vested interest except, as has been pointed out in the discussion under the preceding sub-heading, when there are no further words qualifying the interest. Instead, the interest may become limited or contingent when the provision in the policy also contains certain words of qualification (*eg,* that the beneficiary is to survive the insured). In such a case, whether the beneficiary will receive the sum assured will have to depend on whether the stipulated condition has been fulfilled at the death of the insured or the maturity of the policy (whichever of the two occurs earlier). Unfortunately, this dependence on the realisation of some specified event in the future will in the meantime cause the parties involved to be uncertain as to who will eventually be entitled to the benefits.

Of relevance to the present analysis is the case of *Re Fleetwood's Policy*[17] in which the husband took out a policy on his life on the term that the insurance company "... agrees to pay 500*l* sterling to Louisa Ann Fleetwood ... the wife of the insured, or in the event of her prior death, to the insured's executors, administrators or assigns."[18] The husband later chose to exercise one of the options enumerated in the policy which granted him the right to discontinue the cover and obtain the cash value (with accrued profits),

[15] *Ibid*, at 137.
[16] *Ibid*, at 135 and 136.
[17] [1926] Ch 48.
[18] *Ibid*, at 48.

but then the insurance company refused to surrender the amount to him unless his wife was willing to acknowledge jointly with him the receipt of the monies. The couple had already been separated at the time of the dispute and the wife was understandably reluctant to cooperate. Although Tomlin J held that the wife's interest was of a limited or contingent character (as the policy was expressed to be for her benefit only in the event of her surviving her husband), this did not preclude the imposition of the trust under the Act. As such, the husband was deemed to have exercised the option for the benefit of the trust and, in the absence of any agreement between the two, the sum remitted by the insurance company had to be accumulated in court until some later date when it could be ascertained – by the death of either husband or wife – who was entitled to the amount in question. In the meantime, the husband, as the default trustee, was obliged to deal with the policy with fiduciary care since it was clear from Tomlin J's ruling that the contingent interest did not prevent a valid trust from coming into effect.

A closer scrutiny of the policy's provisions in the *Dolly Eng* case reveals that there are two qualifications on the wife's beneficiary interest (which was thus contingent as in the *Re Fleetwood's Policy* case): The sum assured would be made payable to Dolly Eng only if her husband died before the maturity of the policy and if she survived him in this event.[19] As it turned out, both conditions were fulfilled. Had she pre-deceased her husband before the maturity of the policy, the contingency would have failed and, in contrast to the situation in the *Lilian Cousins* case, her estate would not be able to benefit from the policy; one could, on extrapolation, even surmise that a resulting trust in favour of the husband's estate would have been created instead if it could be additionally established that there was nobody else who could rightfully claim entitlement to the proceeds.

An earlier local decision which is also relevant to the *Dolly Eng* dispute (but which curiously was not mentioned in Selvam J's judgment probably because it was not referred to by the counsel for the parties) is that of *Re Choong Chak Choon*.[20] The material provisions in the policies for both these cases were remarkably similar; *eg,* the endowment policy taken out by Choong Chak Choon was also payable "to the assured or his assigns if he be living at the maturity of the policy" but then "in the event of the death of the assured before the maturity of the policy the company shall pay the monies hereby assured to the beneficiary named below [wife and

[19] The relevant clause in the policy of the *Dolly Eng* case has been reproduced in full in the main text at the location marked by note 6.

[20] [1937] MLJ 245.

two sons] if then living ..."[21] The insured died before the policy had matured, leaving a will (which made no mention of the policy) bequeathing all his assets to more than ten named persons. On the question of whether a trust had been created for the policy (which did not form part of the insured's estate), Terrell Ag CJ adopted Tomlin J's line of reasoning in *Re Fleetwood's Policy* and held that "the fact then of the gift being contingent upon the beneficiaries surviving the assured does not prevent the Ordinance from applying."[22] As a result, the wife and two sons (the names of whom were specified in the policy) were entitled to the insurance monies – obviously in concordance with the conclusion reached by Selvam J in *Dolly Eng*.

### C. *Unnamed Wife's Interest*

Another important point in Dolly Eng's favour was that her name had been included in the beneficiary clause of the policy. Had the said clause merely stated that the policy was for the wife and did not refer to Dolly Eng by name, the couple's subsequent divorce might have weakened her position because she was no longer the insured's wife at the time of his death – a particularly thorny issue which ought to be considered before proceeding to the next major heading.

The interest of an unnamed wife would generally have to be contingent although under section 73 a statutory trust would nevertheless have been created. Problems often arise after the insured re-marries should there be a divorce or should she pre-decease her husband. The main difficulty posed in such cases is whether a beneficiary clause which does not specify the name of the wife is referring to the woman married to the insured at the time of death or at the time of the policy's commencement. This is ordinarily a question of construction. Sadly, however, the matter is less than straightforward because some of the authorities appear to be in conflict with each other. The problem is partly due to, in accordance with Kekewich J's analysis in the related case of *Re Browne's Policy*,[23] two presumptions that are pulling in diametrically opposite directions:

> ... one is met by the [prevailing] presumption, which is rather one of common parlance and common sense than of law, though it has been recognised by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one

[21] *Ibid*, at 245. This should be compared with the corresponding clause in the policy of the *Dolly Eng* case (*supra*, note 19).

[22] *Ibid*, at 246.

[23] [1903] Ch 188.

> whom he may marry after her death, and the observation holds good respecting allusions by another to a given man's wife. [However,] in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision.[24]

In this particular case, Browne took out a policy on his own life "for the benefit of his wife and children in conformity with the provisions of the Married Women's Property Act 1882",[25] but his wife subsequently died and he re-married a year or so thereafter. There were children from both marriages. Since the wording of the policy did not shed light on whether the insured had intended to benefit his first or second wife, Kekewich J had to approach the matter from a point of principle. This was in essence a family protection policy and the judge reasoned that the countervailing consideration appeared to be more relevant, *ie,* the insured must have intended to benefit his children who stood in need of the provision and this must include the children from the second marriage too "... since he cannot reasonably be supposed to have intended to benefit only the children living at the date of the policy to the exclusion of after-born children by the then existing wife."[26] Having thus accepted that the children who were born after the policy had been effected were entitled to the proceeds as well, the judge additionally proceeded to include the second wife among the beneficiaries: "The claim of the children by the second wife is, I think, unanswerable; and if they are let in, I fail to see any good reason for excluding their mother."[27]

If, however, there is on construction some indication as to whom the insured had in mind, then that particular inference ought to prevail; *eg,* in the case of *Re Griffith's Policy*[28] which revolved around a policy "for the benefit of his [the assured's] wife, or if she be dead between his children in equal proportions",[29] Joyce J decided that "those words ['if she be dead'] seem to point to the wife who was living when the policy was effected"[30]

[24] *Ibid*, at 190.
[25] *Ibid*, at 188.
[26] *Ibid*, at 190. See also Denbow, *Life Insurance Law in the Commonwealth Caribbean*, at 126, and Wickens, *The Law of Life Insurance in Australia* (5th ed), at 37.
[27] *Ibid*, at 190.
[28] [1903] 1 Ch 739.
[29] *Ibid*, at 739.
[30] *Ibid*, at 742.

and not to the second woman whom the insured had married a few years after the death of the first wife. Although the conclusion reached by Joyce J was at variance with that expounded by Kekewich J (based on the countervailing presumption in *Re Browne's Policy*), it is submitted that there is no inconsistency in approach between the two decisions because the wording of the beneficiary clause in Griffith's policy was less ambiguous than in Browne's policy.

It would appear that these presumptions should be resorted to on a last-recourse basis only when the drafting of the insurance documents has not been unequivocal. If the wording is indeed clear and fortifies Kekewich J's first presumption (based on "common parlance and common sense"),[31] the countervailing presumption subsequently raised and adopted in the *Re Browne's Policy* judgment will thus have no role to play. This has also been reflected in the West Australian *Wood* v *James*[32] case in which the husband took out a policy pursuant to the statute[33] on his own life "for the absolute benefit of the wife of the assured should the amount of assurance become payable during her lifetime, failing which for the absolute benefit of such of the children of the assured as shall survive the assured."[34] The husband re-married after his wife had passed away. The death of the husband came some ten years later and he was survived by his second wife and three children from the first marriage. The High Court of Australia upheld (by a majority) the decision of the first-instance court that the first wife was the intended beneficiary "... since the probability that the assured intended to provide for the wife to whom he was married at the date of the policy is greatly strengthened by the fact that the nomination of 'the wife of the assured' as the beneficiary of the policy is made conditional by the addition of the words 'should the amount of the assurance become payable during her lifetime' ... for they plainly imply that the wife who is intended is one who may in fact fail to survive the assured."[35]

Recognising that some might find it difficult trying to reconcile the different decisions involving unnamed wives (since in general each case turned on the wording employed in the policy), the High Court of Australia also proffered in *Wood* v *James* some helpful pointers on the appropriate presumptions to employ when faced with a similar predicament:[36]

[31] *Supra*, note 24.
[32] [1954] 92 CLR 142.
[33] The corresponding provision for this case is s 11 of Married Women's Property Act, Australia.
[34] *Supra*, note 32, at 143.
[35] *Ibid*, at 147.
[36] *Ibid*, at 148. See also, *supra*, note 26, Denbow at 127 and Wickens at 39.

(i) where the wife alone is designated as the primary object of the provisions made by the policy and the children are given nothing unless the wife happens to die before the maturity of the policy, the presumption is that reference is to the wife of the assured at the time of effecting the policy

(ii) where the policy is for the collective benefit of the "wife and children", this indicates that the insured was not thinking in terms of identified individuals but in terms of the family group who after his death will be likely to have a common need of financial provision.

## III. Consequences of the Statutory Trust

Having determined the nature of the interest, one must thus proceed to examine the various implications arising from the creation of statutory trusts for these life policies. As had already been noted in the discussion under the preceding heading, the insured ought to realise that he is no longer at liberty to deal howsoever he wishes with his own policy since it has become impressed with a trust and the insured, being constituted the default trustee, will then be foisted with the normal functions and duties of a trustee acting in relation to the trust property. Of particular importance is the need for the trustee to obey the direction of the settlement;[37] in this regard, the insured will be required to safeguard the trust property for the good of all those beneficiaries who have an interest in the policy. Some of the more common transactions that may be so affected will be looked at in turn under the ensuing sub-headings.

### A. *Exercise of Options*

It is fairly common for a life policy to contain a variety of provisions granting certain powers or options to the insured (*eg,* to surrender the policy, to receive the cash value, or to convert the policy into a paid-up policy). One such clause could also be found in the policy under dispute in the *Dolly Eng* case:

> ... Notwithstanding anything hereinbefore contained, it is hereby agreed and declared that the life assured may assign, charge, surrender or otherwise deal with this policy without the consent of the beneficiary

[37] Underhill and Hayton, *Law of Trusts and Trustees* (14 ed), at 410 and 412.

> whether named in this policy or subsequently appointed by the life assured hereunder.[38]

Despite the fact that the insured had expressly reserved for himself specific powers to exercise certain options, it would appear that all these powers and options must be exercised by him as trustee for the benefit of those entitled under the policy (whether the interest be absolute or contingent). The English position on this could be traced to the case of *Re Fleetwood's Policy* in which the insured had already exercised the option to surrender the policy but, in view of the impasse between him and his wife, the court did not allow him to collect the cash value directly from the insurance company (even though it had also been established that the wife's interest was only of a contingent nature) since "the presence in the policy of powers which the insured may or may not be entitled as against the beneficiary to exercise, does not enable me [Tomlin J] to construe this policy as one which, in respect of these options, gives the insured the right to destroy the rights of the beneficiary."[39] Equally relevant was the earlier decision of *Re A Policy of the Equitable Life Assurance Society of the United States and Mitchell*[40] in which Swinfen Eady J emphasised that "... the options under the policy could only be exercised for the benefit of the persons for whom the trust was created ... So long as any objects of the trust remained unperformed the trusts could not be defeated, and the options must be exercised in the best manner for the benefit of those entitled."[41]

The position in Singapore and Malaysia, however, appears to be less certain. In the local pre-war case of *Re Choong Chak Choon*[42] (which dealt with an option clause identical to the one in the *Dolly Eng* dispute), Terrell Ag CJ curiously regarded the reservation by the insured of his right to assign, charge or surrender the policy without the beneficiary's consent as being tantamount to a contingency; even more puzzling was his perception that the insured could by exercising the option at any time defeat and divest the interest of the beneficiary.[43] It is respectfully submitted that Terrell Ag CJ's view is open to objections. First, the right of the trustee insured to exercise certain options (*eg,* the right to surrender and obtain cash value as in *Re Choong Chak Choon*) is not an issue which goes to contingency;

[38] *Supra*, note 6.
[39] *Supra*, note 17, at 55; see also discussion in main text under Heading II(b).
[40] 27 TLR 213.
[41] *Ibid*, at 214.
[42] *Supra*, note 20.
[43] See, *supra*, discussion in main text under Heading II(b).

rather, this is an issue of the insured granting himself the liberty and power to deal with the policy as has been spelt out by its terms without having to obtain the prior consent of the beneficiary.[44] If, on the other hand, the policy has been expressed in absolute terms for the benefit of the insured's wife, the interest would then become absolute irrespective of whether the insured had already reserved for himself specific powers to exercise certain options. Secondly, it is, in principle, not right that the beneficiary's rights should be so easily defeasible by an option; the correct perspective ought to be that whatever gain or value that had been derived from the exercise of an option should be deemed as forming part of the trust's assets and thus held for the benefit of the trust as in *Re Fleetwood's Policy*. In actual fact, this English approach had already been wholly endorsed by Suffian J in the Malaysian case of *Re Man Bin Mihat*[45] (which revolved around an endowment policy similar to that in the *Dolly Eng* dispute, with the insured once again reserving the liberty to assign, charge or surrender the policy without the beneficiary's consent) where it was affirmed that "while under the policy certain options were to belong to the insured, yet as there was a beneficiary [insured's wife] under the policy in addition to the insured, all the options of the insured under the policy must be treated as exercised by him as trustee or as absolute owner, according as he or the beneficiary ultimately became entitled to the benefit of the policy."[46] Hence, it is suggested that the appropriate position would be for the options to be exercised for the benefit of the trust,[47] that the interest of the beneficiary (be it the spouse or children) should not be destroyed in the process, and that the statutory trust ought to continue to attach to the benefit derived from the exercise of the option.[48]

44 Even if the insured had not reserved the right to exercise his options, surrenders and other dealings with policies are possible provided that all the beneficiaries (of full age and capacity) consent to the dealing. This is based on the general trust principle that the beneficiaries (all of whom must at the time be of full age and capacity) can by agreement among themselves put an end to the trust or alter the trust as they please; see *Saunders* v *Vautier* (1841) 4 Beav 115.

45 [1965] 2 MLJ 1.

46 *Ibid*, at 3.

47 As Tomlin J had indicated in *Re Fleetwood's Policy*, if the insured trustee "had done his duty to the full, he would have exercised the option conferred upon him by electing to have the policy converted into a paid-up insurance payable at his death ..." (*supra*, note 17, at 55). Hence, if the life assured is unable or unwilling to continue paying premiums, it might behove him as trustee to adopt this approach. This is also the view expressed by the editors in MacGillivray and Parkington, *Insurance Law* (8th ed), at para 1405.

48 Denbow, *supra*, note 26, at 129.

### B. *Assignment of Policy*

Life policies can be readily used as security for loan applications and have commonly been assigned to banks and other financial institutions. The power of the insured to assign allows him to deal with the policy without any prior consent from the beneficiaries. For the case of a policy that has been impressed with a statutory trust, however, there are a number of issues that need to be taken into consideration when the insured trustee seeks to exercise the option of assignment.

In the *Dolly Eng* case, the insured trustee had reserved for himself the option to assign without the beneficiary's consent. Under the terms of the policy, he indeed had the right to do so but then the exercise of this power in a trust situation entails certain responsibilities. Following Tomlin J's line of reasoning in *Re Fleetwood's Policy*, there would have to be the attendant requirement to ensure that the exercise of the option is for the benefit of the trust; for instance, if the policy is to be assigned to the bank as security for a loan application, the loan must be for the benefit of the trust.[49] There will, by inference, be an inconsistency with the purposes of the trust if the assignment is intended to raise security for the insured's own benefit (*eg,* overdraft facility for his personal bank account) and the insured may therefore be regarded as acting in breach of the trust.

It may be perilous for the lending institution to accept such an assignment without the prior consent of all the beneficiaries (who are required to be of full capacity and age).[50] In the absence of the beneficiaries' prior consent, the position of the assignee bank will depend on whether they had knowledge of the intended breach of trust. If this is so, they will acquire no title and hence no interest in the policy.[51] Conversely, if the bank has no notice of the breach, it is conceivably possible for them to argue that they had acted under the assumption that the borrowing was consistent with the purposes of the trust; and if ever this argument is validated by the court, the concomitant question of priority will then have to be decided in accordance with the rules developed by equity for equitable distribution and in general they should rank in the order in which notice is given to the insurance

[49] One example of how it can be used for the benefit of the trust is when there is a need to raise a loan in order to pay the premiums (especially if the policy is in danger of lapsing).

[50] Consent should be obtained by the beneficiaries under the policy joining in the assignment of the policy to the lending institution.

[51] In *Twaddle* v *New Oriental Bank Corp* (1895) VLR 171, the court held that the policy could not be pledged by way of security by the insured trustee to the bank for an overdraft facility that was to be applied at the trustee's (and not the bank's) discretion. The bank acquired no title through the assignment. See also MacGillivray, *supra*, note 47, at para 1462, and *Pedder* v *Moseley* 31 Beav 159.

company.[52] If, as is likely to be the case in the *Dolly Eng* dispute, the insurance company has (or is deemed to have) knowledge of the trust[53] and is consequently in a position to determine whether section 73 has been automatically invoked, the title of the beneficiary will necessarily have to prevail against the subsequent assignment that is in breach of trust (even after having been transacted to a *bona fide* purchaser for value).[54] Suffian J must have had implicitly taken these general principles into account when he articulated in *Re Man Bin Mihat* that "even if the policy had been assigned by the husband to a third party, not the wife, because the statutory trust created by the policy in favour of the wife still remains unperformed the trust cannot be defeated and the policy money cannot form part of the husband's estate."[55]

### C. *Right to Replace Beneficiaries*

At common law the position of a beneficiary (named or unnamed) is fairly weak: He is considered to be a third party and has in fact been described by Fry LJ as "a stranger to the contract";[56] he is precluded from instituting any action even when there has been a breach of the contract; he is generally deemed as lacking vested interest which is liable to be varied or even destroyed by the contracting parties – both insurer and insured – without his consent. As Lord Upjohn has already pointed out, "the name of the beneficiary can be deleted at any time by agreement between the assured and the insurer and a new name substituted therefor without the original beneficiary having any right to complain or any cause of action against any one."[57]

Contained in the disputed policy of the *Dolly Eng* case is the following revocation-of-beneficiary clause (which is a fairly common provision in standard policies):

> Provided always that the life assured may at any time by writing signed by him and delivered at the head office of the society at Singapore

52 See Hamilton, *Life Assurance Law and Practice*, at A4.16, and MacGillivray, *supra*, note 47, at para 1463.

53 This arises because the insurance company is in possession of either the beneficiary nomination form or a copy of the policy which states who the beneficiaries are.

54 Whether the assignment is legal or equitable, all priorities against assignees and encumbrancers of a policy are determined as if all are equitable assignees; see MacGillivray, *supra*, note 47, at paras 1304 and 1305.

55 *Supra*, note 45, at 3.

56 *Cleaver* v *Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 157.

57 *Beswick* v *Beswick* [1968] AC 58 at 96.

> or at its principal office in Malaysia at Kuala Lumpur revoke the appointment of the beneficiary named below and may appoint another beneficiary with or without reserving the right of revocation or new appointment.[58]

This provision is actually a reflection of the beneficiary's weak position at common law. It has to be noted that the position of the insured may well be different in a case falling within the ambit of section 73 since, unlike the common law situation, the beneficiary here is viewed as possessing a vested interest (whether it be immediate or contingent). Adopting the tenor of the English judgments in *Re Fleetwood's Policy* and *Re A Policy of the Equitable Life Assurance Society of the United States and Mitchell*, one may readily contend that the insured should similarly be unable to revoke the interest of the beneficiary by the mere exercise of the revocation-of-beneficiary clause because it would otherwise be tantamount to destroying the beneficiary's rights and certainly inconsistent with the purposes of the trust. Furthermore, it would seem odd that the donor could retract after having divested himself of his interest since the object of the statute (*viz,* to protect the insured's immediate family from the claims of the creditors as well as from the whims and powers of the insured to unilaterally destroy their interest) might once again be compromised.

A parallel line of reasoning was employed by Suffian J in the *Re Man Bin Mihat* case (which also had a revocation-of-beneficiary clause identical to that in the *Dolly Eng* dispute) when he rejected the notion that there could be an assignment by the insured in spite of the reservation in the policy of such a clause to defeat the interest of the trust.[59] One could, in addition, infer from the judge's analysis that the insured should likewise not be accorded the right to replace the beneficiary as that would then destroy the latter's interest. Perhaps some *obiter* support for this proposition could also be found in the recent local case of *Saniah Bte Ali* v *Abdullah Bin Ali*[60] (which dealt, instead, with the nomination of a beneficiary for the savings held at the Central Provident Fund [CPF]) where Thean J had to painstakingly reject the analogy put forward by counsel that the CPF-nomination process embodied a trust-creation mechanism similar to that specified by the section 73 provision: "First, section 24(1) [of the CPF Act] by itself does not in any way, whether expressly or by implication, enable a member to create a trust of his moneys in the Fund ... Secondly, where a trust is created, it is not revocable by the settlor except with the consent

[58] *Supra*, note 6.
[59] *Supra*, note 45.
[60] [1990] 3 MLJ 135.

of the beneficiary thereof, if he or she is *sui juris*. A nomination made by a member in accordance with section 24(1) of the CPF Act may be revoked or varied at any time during the lifetime of the member."[61] Hence, once the benefit of a life policy has already been expressed to be for the spouse or children, the trust is impressed and the insured is no longer able to revoke the beneficiary's rights.[62]

Unfortunately, the matter appears to have been somewhat muddied by the two local decisions in *Re Choong Chak Choon* and *Re Yeo Hock Hoe's Policy*[63] which seem to have adopted a different tenor and the picture provided thus far will not be complete without an examination of both these other views. As for the *Re Choong Chak Choon* case (which has already been looked at in some detail in the discussions of the preceding two sub-headings), Terrell Ag CJ made the *obiter* comment that with the revocation-of-beneficiary clause in the policy the interest of the beneficiaries was liable to be defeated since the insured could at any time revoke their appointment and nominate other beneficiaries instead: "... this would only result in an interest, otherwise vested, becoming divested ..."[64] In other words, Terrell Ag CJ was of the opinion that the appointment of a beneficiary in a trust situation could be treated no differently from that for the common law position where there was no intervention of a trust. One must, with respect, take exception to the judge's opinion. In many a dispute of this nature, the problem arises because the insured was probably not contemplating the creation of a statutory trust when he took out the standard policy (which had no reference to section 73) and in any event the revocation-of-beneficiary clause (which granted him the option to change the beneficiaries at will if the insurance company so agreed) would have been a fairly common term in these policies; but then if the insured happened to have specified the spouse or children rather than anybody else (*eg,* brother or nephew) as the beneficiaries, the policy would become impressed with a trust – even if the insured had truly been oblivious of the implications – and the common law contractual approach has therefore to be modified.

An alternative analysis could perhaps help to shed more light. By having included this contractual stipulation for the revocation of beneficiary in a statutory trust, it can be argued that the insured (who, in trust terms, must be deemed a settlor) had apparently attempted to render the power of

[61] *Ibid*, at 138.

[62] However, the judge did not mention whether his proposition applied only to a situation where no such right of revocation was reserved in the trust agreement (or insurance policy) or that this was a general principle regardless of any specific reservation clause.

[63] [1938] MLJ 33.

[64] *Supra*, note 20, at 246.

appointment revocable; in such a situation, however, the position in trust law would appear to be that it could only be revoked prior to an appointment having actually been effected.[65] When the beneficiary appointment had been made in favour of, say, X (who would henceforth acquire a vested interest in the property, albeit vested only in interest and not in possession), the property would become X's and the appointment could not be revoked. Applying this principle, it would seem[66] that the insured, through the expression of his own life policy for the benefit of his wife or children, should in fact be regarded as having created a trust (although, admittedly, unwittingly in many instances) and additionally be deemed to have made an appointment of his beneficiaries (in whom is thereafter vested the immediate interest in the trust property whether absolutely or contingently), with the consequence being that the power of revocation could, accordingly, be no longer invoked. Hence, adopting this kind of analogy, one finds that the *obiter* comment made by Terrell Ag CJ on the liberty of the insured in a statutory trust situation to re-appoint another beneficiary to defeat the interest of the original beneficiary, may not be supportable. It is also inconsistent with the more well-reasoned views of other judges like Suffian J in *Re Man Bin Mihat* and should thus not be accepted.

As for the other decision in *Re Yeo Hock Hoe's Policy*, the beneficiary was relegated to an even less favourable status. The insured in this case took out an endowment policy for the benefit of his wife (who was referred to by name in the beneficiary clause). Included in the policy was the following reservation:

> ... and I reserve the right without the consent of the beneficiary to revoke the appointment of such beneficiary and substitute my own or any other name therefor, and also without such consent to receive every benefit, exercise every right and enjoy every privilege conferred upon the insured by such Policy.[67]

In the light of this important reservation, Deane J held that the gift was incomplete and not absolute since "the man has not made a gift to his wife, he has as it were put something into her hands, at the same time keeping himself a tight grip of the thing and never letting it go."[68] Although there was as a matter of fact no revocation of the insured's wife as beneficiary, it could be detected from the judge's slant that the insured would have been fully entitled to do so and the court arrived at the conclusion that

[65] Riddall, *The Law of Trusts* (4th ed), at 217.
[66] *Ibid*.
[67] *Supra*, note 63, at 33.
[68] *Ibid*, at 34.

"he really keeps in his own hands complete control over the policy monies and never parts with the right to dispose of them ... and such a right I take it must pass to his personal representatives for the benefit of his creditors".[69] In effect, the judge was asserting that the reservation clause nullified any intention on the part of the insured to create a trust for the benefit of his wife; by this reckoning, the matter fell outside the ambit of section 73 and no trust was actually formed. One must, with respect, disagree with Deane J's line of reasoning and stress that a valid statutory trust had in point of fact been created when the insured nominated his wife as the policy's beneficiary. There was a proper constitution of the trust upon the effective transfer of the said policy through an automatic vesting of the *chose in action* in the default trustee (*ie,* insured himself).[70] The transfer to the default trustee, being complete, satisfied the rules on gifts to donees.[71] Furthermore, the beneficiary's interest, even if revocable, should not have been defeated since the insured in this case did not exercise any of the rights he had reserved and there was therefore no need to revoke the trust for the life policy. As such, the proceeds should have been made available to the beneficiary after the death of the insured and it is respectfully submitted that Deane J's decision is highly unsatisfactory and ought even to be disregarded altogether.

There is, on the other hand, another consideration that may deserve further discussion. It can be argued that what the settlor insured had done in *Re Yeo Hock Hoe's Policy* through the revocation clause was to reserve unto himself the power of revocation over the settlement in that he could subtract from or diminish the trust property (although in actual fact he did not revoke it). Provided that from the very outset of the trust being created the insured had already reserved certain rights and privileges for his own personal enjoyment under the policy, in principle there is apparently no objection as to why he should not be permitted to elect for a revocable trust. Such a concept, it should be noted, does not flout the letter of section 73. In addition, Denbow has furnished some support for the creation of a revocable trust, citing as authority the interesting Trinidadian case of *Etta Verselles* v *New York Life Assurance*[72] which "illustrates that there is nothing to stop the assured from revoking the statutory trust of a life policy provided that those powers are expressly reserved at the time that the trust is created."[73] Naturally, due care must be exercised during the drafting of such clauses since whether the settlor has really reserved for himself the

[69] *Ibid.*
[70] *Supra*, note 37, at 106-107.
[71] *Ibid.*
[72] (1919-1922) 4 T & T LR 161.
[73] Denbow, *supra*, note 26, at 128.

power to revoke the policy is essentially a matter of construction. The main apprehension is that, if permitted, this easy circumvention can lead to an emasculation of the protection afforded by the statute and the greater question of public policy interest must be taken into account as well.

## IV. Conclusion

The *Dolly Eng* case has highlighted the potency of the statutory trust as a protective weapon for the immediate family of the insured. It is obvious that the insured should never assume a cavalier attitude when nominating the beneficiaries for his life policy. If any of the beneficiaries happens to fall within the protected category (*viz,* wife or children), the insured may have unwittingly relinquished his beneficial rights to his property and a random survey of past cases readily reveals that this speciously innocuous act can prove to be painful to him or his estate (especially if a deterioration should subsequently develop in his relationship with the beneficiaries).

If one is convinced that the statute is intended to protect the immediate family of the insured from his power to unilaterally destroy their beneficial rights, there will then be public interest to ensure that the courts adopt a more stringent attitude and disallow the revocation of a statutory trust (except with the consent of all the beneficiaries). The countervailing side to the argument is that the insured may under certain circumstances be unwilling to divest his full dominion over his property since nobody can ever presume that there will be no future occurrence of contingencies which require him to have ready access to his reserves. He should thus be allowed to retain certain rights for himself. However, the use of various devices to reserve certain rights and privileges for the insured has been demonstrated to be of little use and it is time for the insurance industry to rationalise those provisions in the policies – with regard, in particular, to options or revocation clauses – that may prove to be inconsistent with the existence of a trust. The insured should not be misled into supposing otherwise, and hence insurance agents ought to be more properly instructed so as to be in a position to advise their clients on the scope of the policies and the operation of this statutory trust. It is hoped that the opportunity will arise for the Singapore courts to resolve in a more conclusive manner the issue of whether the statutory trust imposed on life policies for the benefit of the insured's wife or children can possibly be revoked.

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