SECTION 73 CLPA[1]: ASSURANCE FOR THE SPOUSE AND CHILDREN

I. INTRODUCTION

It is common for an assured who insures his own life to nominate one or more beneficiaries in his policy intending that these nominees or beneficiaries will be entitled to the policy proceeds upon his death. However, the naming of nominees to receive the proceeds in itself may not have the effect intended. The insurer may pay the proceeds upon the death of the life assured to the assured's personal representatives or executor who may use the proceeds to satisfy the debts of the assured. If the policyholder has willed all his property to other beneficiaries, the executor may distribute his estate which will include the proceeds, to the beneficiaries named in the will. Similarly, where the policyholder dies intestate, the personal representatives may distribute the estate according to the Intestate Succession Act[2]. The nominees named in the insurance policy will have no recourse since there is no privity of contract between them and the insurer[3].

Section 73 of the Conveyancing and Law of Property Act[4] (hereafter referred to as the CLPA) protects the position of the spouse and children of the policyholder. It provides that[5]

> (1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or any of them, or by any woman on her own life and expressed to

1 Conveyancing and Law of Property Act, Cap 61, Rev Ed 1994.

2 Cap 146, 1985 Ed.

3 See *Re Engelbach's Estate, Tibbetts* v *Engelbach* [1924] 2 Ch 348; *Anuar bin Ismail* v *Tan Sri Tan Chin Tuan & Anor* [1992] 1 MLJ 155. It may, however, be possible to consider an action in tort. In *White* v *Jones,* [1995] 1 All ER 691, a solicitor was held liable to the intended beneficiaries of a will executed by his client. The testator client had instructed the solicitor to include the names of the two plaintiffs as beneficiaries under his will. The solicitor delayed in doing so. The testator died before his instructions were carried out. The plaintiffs succeeded in their action in negligence against the solicitor. It may be argued that, by analogy, the insurer owes a similar duty of care to the nominees.

4 *Supra*, note 1.

5 The other subsections in section 73 provide that:

> (2) If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.
>
> (3) The insured may, by the policy or any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

> be for the benefit of her husband or of her children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts.

The provision is modeled after the English equivalent in section 11 of the Married Women's Property Act 1882[6] (hereafter called the MWPA). The purpose behind section 11 of the MWPA is to protect the immediate family members from the policyholder's creditors[7]. In *Kishabai* v *Jaikishan*[8], Lee J said of the provision:

> Upon reading the section, it seems clear that the purpose of the section is to protect the interests of the widow and children of a deceased assured who has created a trust in their favour pursuant to its provisions. In other words, the legislature, viewing with sympathy any effort by a man to provide for his wife and family after his death, has provided that a man may insure his life at any time for their benefit and any moneys payable under the policy shall not go to pay his debts, but shall be held in trust for his family.

The section automatically creates a statutory trust in favour of the named beneficiaries whenever a person takes out a policy of assurance on his own life expressed to be for the benefit of his or her spouse and/or children. An obvious advantage of this is that a trust is created without the requisite formalities. Further, these beneficiaries cannot be unilaterally removed by the policyholder[9]. The proceeds of the policy do not form part of the estate of the policyholder and thus the beneficiaries are protected against his creditors.

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(4) In default of any such appointment of a trustee, the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

(5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or trustees may be appointed by the High Court.

(6) The receipt of a trustee or trustees duly appointed or, in default of any such appointment or in default of notice to the insurance office, the receipt of the legal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

6 45 & 46 Vict c 75. The Malaysian equivalent can be found in section 23 of the Malaysian Civil Law Act.

7 See Houseman & Davies, *Law of Life Assurance*, 11th Ed, at 374.

8 [1980] 2 MLJ 289 at 290.

9 They may, under certain circumstances be removed by the Court: see discussion under III.b. See also IV.i for a discussion on the effect of options to remove beneficiaries or otherwise deal with the proceeds.

II. SCOPE OF OPERATION

a. Is invocation of section 73 necessary?

In Singapore, the case of *Eng Li Cheng Dolly* v *Lim Yeo Hua*[10] makes it clear that section 73 need not be mentioned in the policy in order for the section to apply. GP Selvam J thought that invoking the section "is not a requirement of the section". In this case, the substantial assets left by the deceased were two real properties and three insurance policies. The plaintiff Dolly Eng was the ex-wife of the deceased who had been bequeathed "40% of his "real property" and nothing else. She claimed to be entitled to the proceeds of one of the insurance policies which was obtained before the parties were divorced. The policy contained the following provision: "Beneficiary. Mdm Eng Li Cheng, wife of the life assured." without any reference to section 73. Although section 73 had not been mentioned in the policy, the fund generated by the insurance policy went to the ex-wife of the deceased and did not form part of the estate of the deceased policyholder. His honour held that a wife who is named a beneficiary obtains an immediate trust in her favour which is not defeated by divorce, even though section 73 has not been specifically invoked.

It is understood that in practice, some insurance companies in Singapore encourage policyholders to use a form which specifically invokes section 73 of the CLPA. Although it is not necessary to do so, this is probably good practice, since it may help solve conflict of laws problems. For example, if the policyholder is domiciled in a foreign country and the insurance office is established in Singapore, invocation of the section will make it clear that the parties intend section 73 of the Singapore CLPA to govern their contract and not the law of the place in which the policyholder is domiciled.[11]

b. Are endowment policies excluded from the Act?

Section 73 only applies to "a policy of assurance effected by any man (or woman) on his own life". Suppose a policy provides that moneys are payable in other events such as on disablement of the policyholder or that at maturity date the surviving policyholder may receive a substantial sum of money, are these policies excluded from the Act? *Dolly Eng* has reinforced the old local position[12] and the English position[13] that as long as one of the

10 [1995] 3 SLR 363.

11 The Conflict of Laws applies the "proper law of the contract" as the choice of law rule. The parlies may choose the governing law with little restriction on their right to choose. See Cheshire and North's *Private International Law,* Twelfth edition (1992), at 458–459.

12 *Re Choong Chak Choon* [1937] MLJ 258. See *Re Man bin Mihat, Decd.* [1965] 2 MLJ 14 for a similar view taken by the Malaysian court.

13 *Re Gladitz* [1937] Ch 588, *Re Ioakimidis' Policy Trusts* [1925] Ch 403.

contingencies upon which the moneys is payable is death, the fact that it is also an endowment policy will not bring it outside the Act. The policy in question in *Dolly Eng* attracted the operation of section 73 despite the provision that the moneys were payable to the policyholder at a maturity date[14].

c. Naming of the beneficiaries

If the policy is expressed to be for the benefit of persons other than the spouse and children of the assured, section 73 does not come into operation. However, it is unclear whether section 73 will apply where the policy is expressed to be for the benefit of one or more persons listed in the section *as well as* for other persons not falling within the categories listed. MacGillivray & Parkington[15], using *Re Parker's Policies*[16] as authority, suggest that the English section 11 of the MWPA will not apply at all and consequently even those persons falling within the categories will not be afforded protection. In that case, Swinfen Eady J said

> If the second wife is not within the terms of the Act, what is the alternative? The only alternative is that the settlor has introduced into the policies a stranger — a person who is not a wife within the meaning of the Act — and has attempted to make provision for that stranger. That is not authorized by the Act... as soon as you introduce as an object of the trust a person not a member of the limited class, then the policy is not within the Act.[17]

Houseman & Davies[18] reject such an interpretation of the case and prefer instead the position taken by *Re Clay's Policy*[19]. It was suggested there that a trust for the protected categories will be created by the statute. The policy in *Re Clay's* was stated to be for the benefit of the wife and if she were dead, for the benefit of the named "adopted" daughter of the assured. As the daughter was not legally adopted under the Adoption Act 1926, she did not fall within the class to be protected by section 11 of the MWPA. The court held that the assured and the wife were entitled to deal with the policy without reference to the daughter.

The position suggested in *Re Clay's* is more consistent with the purpose of the section. If protection for the spouse and children is intended, the mere naming of a person or persons outside the protected class ought not to

14 The policy in *Dolly Ng* had this clause: "To whom payable: To the life assured or his assigns if he be living at the date of maturity..."
15 MacGillivray & Parkington on *Insurance Law relating to all risks other than marine,* 8th Ed (1988).
16 [1906] 1 Ch 526.
17 *Ibid.*, at 529–530.
18 *Supra,* note 7 at 378.
19 [1937] 2 All ER 548.

deprive the spouse and children the statutory protection. It is noted that the effect of *Re Clay's Policy* is to disregard totally the other beneficiaries not within the protected class. For example, if the policy is expressed to be for the benefit of the wife and sister of the policyholder in equal shares, then if the policy is affected by the Act, the wife is wholly entitled to the policy. The estate cannot argue that the wife is entitled to half the interest while the other half, not being affected by any trust, reverts to the estate. It is submitted that a similar position should be taken in our local section 73 situation; *Re Clay's Policies* is consistent with the words of section 73 and there is nothing in the section that justifies the interpretation suggested in *Re Parker's Policies.*

III. PROTECTING THE "WIFE", "HUSBAND" AND "CHILDREN"

a. Improving the protection in section 73

1. "Wife" and "Husband"

i. Present law

Where the spouse and children are named in the policy, the identity of the beneficiaries is clear. A policy expressed to be for the benefit of named beneficiaries without further limitation will give the beneficiaries an immediate vested interest in the policy. Death and divorce do not in themselves destroy the interest created for an identified spouse. In *Cousins v Sun Life Assurance Society*[20], the policy was issued "for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Woman's Property Act 1882". The named wife died during the lifetime of the policyholder. The widower life assured brought an action for a declaration that the sole beneficial interest in the policy be vested in him. The court found that there was nothing in the policy which introduced a contingency to negative the creation of a vested interest in favour of the named wife. In consequence, the trust created in her favour remains unperformed until the date when she or her personal representatives receive the money. The policyholder therefore failed to obtain any interest in the policy.

Similarly, a former spouse who is named in the policy will remain entitled to the policy proceeds despite a divorce. In the local case of *Dolly Eng*[21], the ex-wife of the deceased policyholder took an immediate vested interest

20 [1933] Ch 126.
21 *Supra*, note 10.

in the policy since she was named as beneficiary of the policy. GP Selvam J cited the case of *Cousins* v *Sun Life Assurance* and said

> In my judgment there can be no difference between death and divorce of the wife...a wife who is named a beneficiary obtains an immediate trust in her favour which is not defeated by a subsequent divorce.[22]

In contrast, where the policy merely makes a reference to relationship only, such as "to his wife", the court may construe the policy to find that the surviving widow is referred to instead of the wife existing at the time the policy was taken up. In *Re Browne's Policy*[23] the policy was expressed to be "for the benefit of his wife and children". The wife died and the assured married a second wife and also had children by the second marriage. Kekewich J in construing the words, observed:

> Regarding the case apart from the language of the Married Women's Property Act, 1882, one is met by the 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 whom he may marry after her death, ... But in construing an instrument intending 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. A similar line of reasoning points to the conclusion that he intended to benefit all the children, which is strengthened by the reflection that he cannot reasonably be expected to benefit only the children living at the date of the policy to the exclusion of after-born children by the then existing wife.[24]

The court held that the surviving wife and all his surviving children were entitled to the policy.

In *Re Collier*[25], the policy contained the words "for the benefit of his wife". The wife predeceased the assured who died about ten years later without having married again. The trustee in bankruptcy asked for a declaration that the proceeds formed part of the property of the bankrupt. The court drew support from *Cousins* and held that no interest was conferred by the policy upon the estate of the deceased wife of the assured:

> The object of the Act of 1870 being to enable a husband to provide for his widow on his death, ... the words "for the benefit of his wife" mean for the benefit of his wife who should survive the assured and become his widow"

22 *Supra*, note 10, at 365I–366C.
23 [1903] 1 Ch 188.
24 *Ibid*, at 190.
25 [1930] 2 Ch 37.

As the assured left no widow upon his death, the policy moneys were payable to the trustee in bankruptcy of the assured.

However, even where a wife is not named, the description used may refer to a specific wife. In *Re Griffiths' Policy*[26] the surviving second wife of the policyholder was not entitled since the words "for the benefit of his wife or if she be dead between his children in equal proportions" pointed to the first wife living at the time of the policy.

The position of the law set out here may be summarized as follows. The court must construe each policy to determine the persons intended to benefit under the policy. Where the beneficiaries are referred to by relationship only, then in construing the policy, the court will have regard to the purpose of the statute which is to provide for the surviving spouse and children. Taking the purpose of section 73 into account, the court is likely to reach the conclusion that the surviving spouse and children are intended to benefit from the policy. However, where the beneficiaries are named or described in specific terms, the court may be inclined to hold that those beneficiaries are the only ones entitled to the policy, to the exclusion of all others who may subsequently become the spouse and children of the assured.

ii. Proposed changes

If what has been described represents the current position of the law, it is submitted that there is room to enhance the protection afforded by section 73. The section contemplates protection to the policyholder's "wife", "husband" or "children"; it is concerned with providing for the financial needs of the policyholder's existing spouse and children whom he leaves behind upon his death (the policy concerned being a life assurance policy). The rationale for the section is to protect the financial state of the deceased's present immediate family against the deceased's creditors. *Re Browne, Re Collier* and *Kishabai* v *Jaikishan*[27] have all acknowledged that the purpose is to protect the interests of the surviving *widow* or *widower* and children of the deceased. It is unlikely to be intended to benefit the estate of a dead spouse; in this respect, the result in *Cousins* v *Sun Life Assurance Society*[28] does not further the purpose of the statute. Similarly, a former spouse who has been divorced from the policyholder is no longer the spouse of the policyholder at the material time which is upon his or her death; he or she stands in the same position as any other beneficiary outside the class of protected persons. The surviving spouse and children are probably the most dependent on the deceased for financial support; having lived together as a family unit as well as a financial unit at the time of the deceased's death.

26 [1903] 1 Ch 739.

27 *Supra*, notes 23, 25 and 8 respectively.

28 *Supra*, note 20.

It is submitted that the approach used in construing the beneficiaries in *Re Browne* and *Re Collier* should be taken even in cases where the beneficiaries are specifically named. It has been acknowledged in these cases that there is a presumption that a man referring to his wife in his policy intends the existing wife to benefit and does not contemplate a future wife. Yet the court took into account the purpose of the statute in construing the intention of the policyholder. This almost amounts to overriding the true intention of the parties in order to carry out the purpose of the statute. In the attempt to carry out the purpose of the statute, the courts have strained the rules of construction. This somewhat awkward position has arisen because the statute fails to qualify the status of a "wife" or "husband" in the provision. If it had provided that the spouse's interest under the trust shall be contingent upon him or her remaining the spouse of the assured at the time of death, the court could have found that the wife existing at the time of the policy was the one referred to in the policyholder but she fails to obtain any interest because she does not fulfill the contingency at the time of the policyholder's death. The new wife will then have the opportunity of taking a share of the policy proceeds according to the law of succession.

Bearing in mind the rationale for the protection in section 73, our focus in construing section 73 must be to see that the present family members of the deceased are looked after. Just as the Inheritance (Family Provision) Act[29] (hereafter called the IFPA) is concerned with allowing the dependents of the deceased to apply for maintenance out of the deceased's estate, section 73 ought to protect the same class of family members. The IFPA lists as eligible applicants a wife, husband, daughter and son[30]. These dependents can apply for an order that "reasonable provision" be made for their maintenance. The IFPA is concerned with the needs of the present immediate family left behind by the deceased at the time of death. Former spouses cannot make such applications under the IFPA since they are not the "wife" or "husband" of the deceased at the time of death[31].

It is possible to argue that the words of section 73 can support a different reading which may lead to an alternative result in cases similar to *Dolly Eng* and *Cousins* v *Sun Life Assurance*. It is submitted that the words "husband" and "wife" in section 73 should be construed to refer to the *present* husband or wife only. Thus a husband or wife will only have a vested *contingent* interest; the contingency being that he or she must remain the present (and surviving) wife or husband of the policyholder at the time of the policyholder's death. Upon death or divorce, the contingency will

29 Cap 138, 1985 Ed.
30 *Ibid.*, s 3.
31 The position has changed in England. The English Inheritance (Provision for Family and Dependents) Act 1975 has broadened the class of applicants to include former spouses.

never arise and such former spouses will no longer possess any interest under the policy. Thus, instead of considering the purpose of the statute in the task of construing the insurance policy (which is the approach taken in *Re Browne*), the purpose of the statute is used to construe the words of the section in the statute itself.

The effect of this construction is that section 73 will apply when the policy is effected on a present spouse on the condition that the spouse remains married to the policyholder at the time of death. Therefore, even though a trust had previously arisen in the favour of an ex-husband or ex-wife, he or she will be automatically removed as beneficiary by the effect of his or her own death or a divorce. Where the policyholder has remarried, the new spouse will be entitled if reference is made to "wife" or "husband" in the policy. If the former spouse was the only named beneficiary in the policy, then the policy will be released from the statutory trust created under section 73. The new spouse may obtain a share of these proceeds as beneficiary to the estate under a will, the Intestate Succession Act or the Inheritance (Family Provision) Act. If the policyholder wishes to surrender his policy, he may enjoy the policy proceeds since they are not subjected to any trust. He is free to use the moneys to provide for his new family in any manner he likes. If the policy had been expressed to be for the benefit of the spouse and children, then by removing the former spouse, the children become the only beneficiaries and will be entitled to a greater share.

This construction will also avoid the result reached in *Cousins* v *Sun Life Assurance Society*[32]. Where a spouse dies during the lifetime of the policyholder, the interest in the policy will not pass on to the wife's estate. As death terminates a marriage, the spouse who has pre-deceased the policyholder will not be a "wife" or "husband" of the policyholder at the time of his death or surrender of the policy. Where divorce terminates a marriage, the result in *Dolly Eng* will not arise either.

Unfortunately, section 73 has already been given the construction in *Cousins* and *Dolly Eng*. But it may still be possible for the court to distinguish these cases since the cases concerned the construction of specific policies. Each policy must be construed on its own, since it is all a question of construction. Alternatively but more drastically, the change proposed may be achieved by amending section 73 to provide by way of an additional subsection that the interest of such "wife" and "husband" shall be contingent upon he or she remaining the surviving husband or wife of the policyholder at the time of the policyholder's death. Section 73 will then have the fluid nature which is necessary for coping with the changing family conditions of the policyholder in order to better carry out the purpose of the provision.

32 *Supra*, note 20.

Another way of avoiding the result in *Dolly Eng* under the present law is to invoke the court's powers to remove an ex-spouse from the policy. This is discussed below[33]. It is noted that the court's powers in this respect is limited and does not extend to removing a named deceased spouse from the policy (*Cousins*' situation).

2. *"Children"*

i. *Present law*

Where the policy makes reference to the children of the policyholder without naming them, the court must construe whether only the children existing at the time the policy was effected are included or whether future children are included as well. Using a clause which refers to all his "children, present and future" will ensure that all his children will be included as beneficiaries. In *Re Browne's Policy*[34], which has been discussed above, the children from the assured's two marriages were entitled to the policy although the policy was taken up before the second marriage. But where a man names his present children as beneficiaries in the policy, then under the present law (which has been discussed in relation to the naming of a wife as beneficiary), his future children will be excluded from the policy.

Another issue which arises is whether "children" in section 73 includes illegitimate children. In England, section 19(1) of the Family Law Reform Act 1969[35] provides that the expression "children" in section 11 of the MWPA shall include illegitimate children. Section 19(3) provides that policies effected before the coming into force of section 19(1) which is 1 January 1970, will not be affected by the subsection. Singapore does not have an equivalent provision for the inclusion of illegitimate children. Hence it appears that only legitimate children will be identified as beneficiaries where the policy makes reference to the policyholder's "children".

Where the children are named, they will obtain an immediate vested interest in the policy. Future children will be excluded from the policy. However even if an illegitimate child of the policyholder is named in the policy, he may not fall within the class of persons protected by section 73 since "children" in section 73 probably excludes illegitimate children. It is not surprising that illegitimate children are placed in a different position from legitimate ones. Even the Intestate Succession Act adopts the same position; only legitimate children of the deceased intestate may obtain a share in the estate[36]. In fact, illegitimate children continue to have inferior rights in many areas of the law[37].

33 See III.b below.
34 *Supra*, note 23.
35 1969 c 46.
36 Section 3 of the Act defines a child as a "legitimate child...".
37 See Leong Wai Kum, *Family Law in Singapore* (1990), chapter 15.

ii. Proposed changes

The main suggestion made here is to remove the discrimination in rights between a legitimate and illegitimate child. In England the Family (Law Reform) Act 1969 has removed many of the harsh effects of illegitimacy but Singapore has not followed suit. However, in section 61 of the Women's Charter, our law provides that a parent is liable for the maintenance of his or her child, whether legitimate or illegitimate. It would be consistent and humane for section 73 to extend the same rights given to illegitimate children in s 61 of the Charter. If an illegitimate child is equally entitled to be maintained by his parent as a legitimate child, there is little justification for not similarly giving the illegitimate child financial provision where it arises in the form of a trust of policy proceeds. Such a change requires statutory amendment to section 73 similar to 19(1) of the Family Law Reform Act 1969. As it is hoped that the same rights be given to illegitimate children in other areas of the law, the way to improve section 73 is to take the position under the Women's Charter and not the discriminatory positions taken under the Intestate Succession Act and Inheritance (Family Provision) Act[38].

It has been proposed above that a spouse who may be protected under section 73 while married to the policyholder should subsequently be removed from the policy after divorce. In the case of a child however, unless he is given up for adoption, he will always remain a child of the policyholder whether or not there is a divorce and no matter which parent has custody over him. As such, whenever a policy is expressed to be for the benefit of the policyholder's children, these children will be protected at all times since they will always remain the children of the policyholder (save in cases of adoption). Where the policy has named specific children as beneficiaries, the future children are likely to be excluded. To minimize any injustice that may arise in the exclusion of future children, it is probably easier to alter the insurance practice rather than the law. Insurers should properly advise the policyholder that the naming of specific children will exclude future children.

However, where children predecease the policyholder, the same issue discussed above arises. If the children obtain immediate vested interests, then upon their deaths, the interests will be passed on to their respective estates. As with the cases involving spouses who predecease the policyholder, it is submitted here that the amendment providing that the beneficiaries in section 73 shall only obtain contingent interests ought to apply to children as well.

38 The Inheritance (Family Provision) Act is silent on whether "son" and "daughter" include illegitimate children. Since the Act was modeled on the old 1938 family provision Act of England which would have excluded illegitimate children, it is likely that illegitimate children will be excluded under our Act. See also [1995] 7 SAcLJ 379 at 390–391 where it has been argued that illegitimate children should be permitted to obtain provision under the IFPA.

b. Removing the spouse after divorce

It has been said above that under the present law, the protection in section 73 is so tight that a first spouse who is the beneficiary of a policy will remain entitled to an interest in the policy even after a divorce. If the policyholder marries a second spouse after a divorce, he or she may not be able to unilaterally remove the former spouse from the policy. It is argued here that even without any amendment to section 73, it is possible today under the present law to remove a divorced spouse from the statutory trust.

In England the Court has powers[39] to vary any ante-nuptial and post-nuptial settlement made on the parties to the marriage. Interests in life assurance policies are included in the definition of "settlement"; the court will therefore be able to reduce or extinguish any such interests. In *Gunner* v *Gunner and Stirling*[40], the policy was effected for the benefit of a named wife. The court held that the policy could be varied on the policyholder's application for a variation when he divorced the wife.

In Singapore, the Court may be able to remove the former spouse from the policy when it is exercising its powers under section 106 of the Women's Charter[41]. The court can adjust the proprietary interests of the parties as long as these interests are acquired during the marriage. Upon granting a divorce between the policyholder and the first spouse, the Court has powers to divide up the parties' matrimonial assets[42]. It should have the power to interfere with either parties' interests in all the matrimonial assets, including the spouse's interest in the policy[43]. However, if the divorce has already been granted and the ancillary matters dealt with, can the court subsequently exercise its powers under section 106 to interfere with the interests under a life assurance policy?

It is clear that where the Court has never granted the divorce, it does not have any powers to give the reliefs under sections 106 and 107. In *Ng Sui Wah Novina* v *Chandra Michael Setiawan*[44], the court was unable to make any orders for maintenance of the wife since an Indonesian court had earlier granted a divorce which was recognized in Singapore. In that case, the husband obtained a divorce in Indonesia in 1987 and subsequently married and settled down with his second wife in Singapore in 1990. In 1991, the former wife applied for maintenance for herself and the child in Singapore. Lai Siu Chiu JC (as she then was) held that the court had no

39 Matrimonial Causes Act 1973, s24.

40 [19491 P 77. See also *Lort-Williams* v *Lort-Williams* [1951] P 395. Also see *Gutbenkian* v *Gulbenkum* [1927] P 237.

41 Cap 353, 1985 Ed.

42 The old s 106 refers to assets acquired by the parties; the amended s 106 uses the term "matrimonial assets".

43 In *Cheng Kwee Eng* v *Hoong Khai Soong*, Divorce No. 1911 of 1989, the court divided assets which included an insurance policy.

44 [1992] 2 SLR 839.

jurisdiction to grant maintenance. The Indonesian decree was recognized in Singapore because the former husband had been domiciled in Indonesia at the time of the divorce. As the parties were no longer married, the former wife could only apply for maintenance under section 107; and since the powers under s 107 were ancillary, they could not be invoked in a case where the court did not previously dissolve the marriage.

In similar vein, Lim JC in *Asha Maudgil* v *Suresh Kumar Gosain*[45] held that the Singapore court could not order the defendant to pay maintenance to his former wife since the parties had been previously divorced in the Secunderabad Court.

However, the court will continue to have the powers if it had earlier granted the divorce. This position is made clear by the Women's Charter (Amendment) Act[46]. The amended s106 provides that the court shall have the power "when granting or subsequent to the grant of a decree..." to order division of assets. The present section 106 is slightly ambiguous on this; it only provides that the court shall have power to order division of assets "when granting" any of the decrees sought in the main proceedings. Even so, the courts has been willing to exercise the powers under the present section 106 subsequent to the grant of a decree.

In *Lim Tiang Hock Vincent* v *Lee Siew Kim Virginia*[47], the court deferred the exercise of its powers under the old section 106. In that case, the parties obtained a divorce in 1987. The wife was given custody of the two daughters. The learned judge had ordered that the matrimonial home not be sold until the younger daughter, who was about five years old then, reaches the age of 21 years. This order meant that the wife and children would have exclusive possession of the home until 2003. The husband appealed, arguing that the judge was wrong in making the order because section 106 of the Women's Charter read together with section 27 of the Interpretation Act[48] requires the court to order a sale of matrimonial property and to divide the proceeds of sale between the parties, or alternatively to dismiss an application. He argued that the section imposed on the court a duty to exercise the power as occasion required it, and there could therefore not be postponement of sale until 2003. Rejecting these arguments, Yong Pung How CJ said:

> there is nothing in that subsection which makes it mandatory that the power shall be exercised on the making of the appropriate decree. That being so, and by virtue of s 27(1) of the Interpretation Act, the court may exercise that power 'from time to time as the occasion requires'. Plainly, the court may defer the exercise of such power to a later date, if the circumstances warrant it.

45 [1994] 2 SLR 709.
46 Cap 30/96.
47 [1991] 1 ML.1 274.
48 Cap 1, 1985 Ed.

Thus the powers in section 106 are vested in the court upon a grant of a matrimonial decree. Once these powers, which are ancillary to the granting of a decree of divorce, nullity or separation, arise, they may be exercised by the court at any time, and not necessarily at the time when the main relief is granted.

In *Lim Beng Choo* v *Tan Pan Soon*[49], Warren Khoo J was of the view that

> under the terms of s 106, a court can entertain an application for the division of matrimonial assets within a reasonable time after the grant of a decree of divorce... what is reasonable time varies according to the facts and circumstances of a particular case.

His honour gave the former wife leave to apply for a division of the proceeds of sale of the matrimonial flat nine years after the marriage had ended.

The proposed amendment to section 106 includes a subsection which provides that

> The Court may, at any lime it thinks fit, extend, vary, revoke or discharge any order made under this section, and may vary any term or condition upon or subject to which any such order has been made.[50]

This subsection further reinforces the position already taken by our courts exercising the powers under the present section 106. It is submitted that the court will have the power to interfere with insurance policies held on trust for former spouses. If, after considering all the circumstances, the court thinks it just and equitable that a former spouse should be removed from the policy, it may do so pursuant to its wide powers under section 106.

IV. PAYMENTS MADE BY INSURERS

IV. i Payment to Policyholder

Once a trust arises under section 73, the normal incidents of trust law follow. Section 73(4) provides that in default of appointment of a trustee, the policy on being effected will vest in the insured and his personal representatives in trust for the purposes in section 73(1). Thus unless a trustee is appointed, the policyholder who is the insured becomes the trustee. Where the policy makes provision giving the policyholder the options to deal with the policy in any manner without the consent of the beneficiaries, can a policyholder exercise the option and obtain the moneys for his own use? It is submitted that in both cases, he ought to receive the proceeds as

49 [1196]3 SLR 177. There is an appeal against this decision which report is unavailable at the time this article is written.

50 Women's Charter (Amendment) Act, Cap 30/96, s28.

trustee under the section 73 trust[51]. In *Re Fleetwood's Policy*[52], it was held that by exercising the option the assured could not defeat the beneficial interest of his wife, and that the proceeds must remain in court and be accumulated to await the event determining who should be entitled to it. In contrast, *Re Choong Chak Choon*[53] suggests that the insured could defeat the beneficiary's interest by exercising the options. It is submitted that the better and more established view[54] is that the statutory trust cannot be defeated by the mere exercise of options.

IV. ii Payment to "proper claimant" upon policyholder's death

Section 63 of the Insurance Act[55] provides that

> (1) In any case where the policy owner of any life policy or personal accident policy of an insurer dies, and the policy moneys are payable thereunder on his death, the insurer may make payment to any proper claimant a prescribed amount of the policy moneys of all such policies issued by the insurer on the deceased's life without the production of any probate or letters of administration; and the insurer shall be discharged from all liability in respect of the amount paid.
>
> (6) In this section, "policy owner" includes a part owner of a policy, and "proper claimant" means a person who claims to be entitled to the sums in question as executor of the deceased, or who claims to be entitled to that sum (whether for his own benefit or not) and is the widower, widow, parent, child, brother, sister, nephew or niece of the deceased; and in deducing any relationship for the purposes of this subsection an illegitimate person shall be treated as the legitimate child of his actual parents.

The Malaysian equivalent is found in section 44 of the Malaysian Insurance Act 1963. In *Manonmani* v *Great Eastern Life Assurance Co Ltd*[56], in a suit by a beneficiary (the mother of the assured) against the insurer for the policy proceeds, the court held that the insurer was liable to the beneficiary to pay the moneys. It has been pointed out that this case has failed to make a distinction between the right of an insurer to make payment to a

51 See Yeo Hwee Ying, "Life policies under a Statutory Trust" [1996] SJLS 342 for a discussion on whether the insured is constituted a trustee in such circumstances. See also Tan Lee Meng, *Insurance Law in Singapore* (1988) at 315–322.

52 [1926] Ch 48.

53 [1937] MLJ 245. Terrel Ag CJ expressed the view that the interests of the beneficiaries were subject to the contingencies reserved by the policyholder.

54 Other authorities include *Re A Policy of the Equitable Life Assurance Society of the United States and Mitchell*, 27 TLR 213, and *Re Man Bin Mihat* [1965] 2 MLJ 1. These are discussed in the article in note 51, *supra*.

55 Cap 142, 1994 Rev Ed.

56 [1995] 1 MLJ 364.

nominee named in a policy and the right of a nominee to sue[57]. A beneficiary appointed by the assured who is not within the class of persons protected by section 73 may not sue the insurer in contract since there is no privity of contract between them[58]. However, where beneficiaries have been named, the insurer may pay the moneys to these beneficiaries and in doing so, obtain a discharge. Thus, if the widow and children of the deceased policyholder claim to be entitled to the proceeds of a policy in which they are named as beneficiaries, the insurer may pay the proceeds to them without the production of any probate or letters of administration. Such payments will give the insurer a good discharge. In any case, these are persons protected by the section 73 trust and are entitled to the proceeds which do not form part of the estate of the deceased.

Suppose an insurer pays the policy moneys to a claimant who is not the spouse and children of the policyholder despite the fact that the policy has been expressed to be for the benefit of the assured's spouse and children. Can there be circumstances in which such a payment constitutes a discharge to the insurer *vis a vis* the beneficiaries under the section 73 trust?

It may be argued that since the section uses the phrase "who claims to be entitled" in contrast to "who is entitled", as long as the claimant is either the executor or related to the deceased in the ways listed in the section, the insurer is discharged from liability if these persons claim to be entitled. In *Perumal a/l Manickam* v *Malaysian Co-operative Insurance Society Ltd*[59], the court considered section 44 of the Malaysian Insurance Act 1963 (equivalent of section 63 in Singapore), and noted that

> The insurers are absolved from further liabilities under the policies once the policy moneys are paid to proper claimants...the position of the insurers still remains unaffected so long as payments are made to proper claimants or any of the proper claimants. This is because the role of a proper claimant as contemplated by s 44 is to receive the moneys on behalf of the estate of the deceased. Subsection (5) of the said section does not confer any authority on a proper claimant to utilize the moneys for his or her own use

The case may support the argument that the insurer will not be liable even though he has paid the moneys to claimants who are not beneficially entitled to the moneys. In such cases where a claimant is not beneficially entitled

57 See Poh Chu Chai, *Law of Insurance: Life, Motor & Workmen's Compensation Insurance*, Vol 2 (4th Ed), at 88–90.

58 See *supra*, note 3. But where the beneficiaries appointed fall within the class protected by the section 73 trust, these beneficiaries may sue for breach of trust. Sec *Candy* v *Candy* (1885) 30 Ch D 57 which held that a third person not named as party to a contract could sue if he or she possesses an actual beneficial right which places him in the position of *cestui que trust* under the contract.

59 [1995] 2 MLJ 144.

to the moneys, the claimant may be constituted a trustee of the moneys for the benefit of those beneficially entitled to them. Such a claimant will be liable for any breaches of trust. Thus, the statutory trustees must look to the claimant who had received the money for a remedy, and not the insurer who is discharged form further liability by the statute.

It is submitted that this argument will reduce the protection intended by section 73. The insurer should remain liable unless he had reasonable ground to believe that the claimants are entitled to the moneys. Insurers must exercise some care not to cause loss to the statutory beneficiary. For example, a policy may be expressed to be for the benefit of the assured's "wife". The wife existing at the time the policy was effected is subsequently divorced from the assured. The assured policyholder marries a second wife before his death. Applying *Re Browne*[60] and *Re Collier*[61], the second surviving wife obtains the interest under the statutory trust. Suppose the former wife makes a claim and produces an old copy of her marriage certificate when claiming as a proper claimant. The insurer may have to ask for an original copy of the marriage certificate or at least be satisfied that there are valid reasons why it cannot be produced. Only when he has exercised reasonable care in ascertaining that she is a proper claimant would the insurer be discharged. The requirement of "reasonable care" should therefore be read into section 63. For this reason, where there are beneficiaries appointed in the policy, the insurer is unlikely to be discharged where he pays to other persons not named as beneficiaries. It is submitted that section 63 ought not to operate in such situations involving section 73 trusts to discharge the insurer from liability. In fact, the discharge given by section 63 is probably meant to cover situations where there are no beneficiaries named in the policy. In those circumstances, it becomes less clear to the insurer who he should pay the moneys to. In *Manonmani* v *Great Eastern Life Assurance Co Ltd*[62] the High Court was of the view that

> The purpose of s 44 of the Insurance Act 1963 is no doubt to facilitate and expedite payment by an insurer of any money due under a life policy to a proper 'claimant' without the need for the claimant to first obtain any letters of administration. This section would...apply where the deceased policy owner either had not appointed and named any beneficiary in the policy to receive the policy money upon his death in which case the policy money would go to his estate when he died. In that event, the insurer is nevertheless authorized by this section to pay out the policy money to a 'proper claimant' as described under s 44(5) of the Insurance Act.

60 *Supra*, note 23.
61 *Supra*, note 25.
62 *Supra*, note 5.

V. CONCLUSION

Life assurance policies are effected everyday, but few policyholders understand the legal implications of section 73. The problems arising from the lack of understanding of the effects of section 73 have also been described elsewhere[63]. The policyholder may not be aware that his or her named spouse cannot unilaterally be removed by him or her, even after divorcing the beneficiary spouse. Or he may think, contrary to the position held in *Re Fleetwood's Policy*, that by reserving the right to remove or replace beneficiaries as an option in the policy, he will retain control of the policy. Another erroneous view the policyholder may hold is that section 73 will not come into operation if his policy does not invoke the section. A policyholder may wish to adjust the provisions he has made under his will after receiving informed advice regarding the financial interests affected by section 73, or he may prefer not to name any beneficiary in his policy and choose instead to deal with all his personal property (which includes the policy interest) by will. Section 73 may operate to further or defeat the intentions of the policyholder.

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63 See article in note 51, *supra*.

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