Our Ref: LS/81/07/AC/lcl Your Ref:

27 August 2007

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40 YEARS OF SERVICE & LEADERSHIP 1967 - 200'

Dear Sirs

CONSULTATION PAPER ON INSURANCE (AMENDMENT) BILL 2007 ON NOMINATION OF BENEFICIARIES

We refer to your e-mail request dated 25 July 2007 for the Law Society to provide its comments on the consultation paper on the Insurance (Amendment) Bill 2007 on Nomination of Beneficiaries.

This matter was referred to our Family Law Practice Committee for views.

The Committee had previously given its views on the first MAS consultation paper on review of framework for nomination of beneficiaries on 18 January 2006 and notes the response given by MAS to public feedback on the said framework on 27 April 2006.

This second consultation paper contains the implementation of the said framework through the proposed Insurance (Amendment) Bill 2007. The main changes are to sections 49L and 49M which deal with trust and revocable nominations respectively. Essentially, the statutory trust created by section 73 of the Conveyancing and Law of Property Act is retained. To revoke the trust, consent of the beneficiaries is required. A new provision is proposed in section 49M to allow a spouse and/or child to be nominated as beneficiaries without creating a trust if the nomination is in the prescribed form. Revocation of the nomination is also available.

Some members of the Committee are of the view that while the availability of the trust and revocable nominations is good, they take place at the inception of the policy. In the cases that arise upon divorce under section 112 of the Women's Charter, a statutory trust has been created and the spouse/child would not consent to the revocation of the trust.

The Committee would like to seek clarification if the proposed Bill addresses this position after divorce, given that the purpose of the trust no longer exists since there is no "spouse" to speak of after divorce. As mentioned in the Committee's previous feedback on the first consultation paper, there are difficulties with the position after divorce as the policy holder will either have to terminate the policy and lose the benefits of the policy or continue paying until he/she dies and the proceeds goes to the ex-spouse.

It may be worth considering whether provisions need to be made to address specifically such a situation or to allow the Court the power to make the appropriate orders in view of the intervening act of divorce and the limiting nature of section 73 of the Conveyancing and Law of Property Act. For example, in the interest of the child/children, the Court may order that the policy continues and that the ex-spouse relinquishes her beneficiary status and that the child/children remain the sole beneficiary/beneficiaries. We enclose a copy of the decision in the case of *CH v CI* [2004] SGDC 131 in which the Family Court had the opportunity to address section 73 of the Conveyancing and Law of Property Act.

Thank you for giving the Law Society the opportunity to offer our views on this matter.

Yours faithfully

Alvin Chen
Director, Representation & Law Reform

Enc.

cc. (1) Council
(2) Family Law Practice Committee

Print

CH v CI
[2004] SGDC 131

Suit No: Div P 271/1997
Decision Date: 03 Jun 2004
Court: District Court
Coram: Lim Hui Min
Counsel: Ms Anna Oei (Oei and Charles) for petitioner

Family Law - S. 112 Women's Charter - Life insurance policy under Section 73 of the Conveyancing and Law of Property Act in which wife named as a beneficiary - Whether irrevocable trust created for the wife - whether court in the divorce proceedings may make orders in relation to the policy

[EDITORIAL NOTE: The details of this judgment have been changed to comply with the Children and Young Persons Act and/or the Women's Charter]

3 June 2004

District Judge Lim Hui Min:

The facts and the application

1 This case involves a husband who took out a life insurance policy in times when his marriage with his wife was still reasonably happy. He named the wife as the beneficiary of the policy. He paid the premiums faithfully. Over the years, the relationship between the husband and wife soured, and the husband then applied to the insurance company which issued the life insurance policy to remove the wife as beneficiary of the policy and to nominate a new beneficiary—a woman whom he was close to (and who has now become his wife), one A. He did not tell the wife what he had done. The insurance company did not object to the change of beneficiary at the time. They even let A take out a couple of loans on the insurance policy. Some years later, the husband filed for a divorce against the wife. He got his lawyers to write to the wife's lawyers to tell them that he had changed the beneficiary on the life policy from the wife to A. The wife then got her lawyers to write to A to tell her that she thought the husband's attempt to change the beneficiary was void, and that she would be taking out court proceedings to set the change of beneficiary aside. However, the wife never took out any such court proceedings. After a battle in court, a decree nisi was granted to the husband and wife. Happily, after that, the husband and wife decided to settle the ancillary matters amicably. They entered into a consent order which provided, amongst other things, that the wife would pay the husband the sum of $1,880,000, and that each party would return certain personal and artistic items to the other (for example, "Balinese sculpture of wooden fisherman", "painting of Woman Near Lily Pond with Carved Wooden Frame (Otherwise Known as a Le Mayeur Painting)", "Cast Iron Crest of Christ Church College Oxford" etc). Item 7 of the consent order states: "*Each party shall not have any further claims against the other party.*" Item 8 states "*Parties be at liberty to apply.*"

2 After this consent order was made, the husband and wife then proceeded to get on with their own lives, which, for the husband, involved marrying A. He continued to pay the premiums on the life insurance policy, believing that A would be the beneficiary in the event of his death. For her part, A took out a loan against the life insurance policy to which she had been named a beneficiary. This was all approved by the insurance company. Then in July last year,

the insurance company dropped a bombshell on the husband. It informed him that it was of the view that under the law, a trust had been created for the wife when he named her as beneficiary of the life insurance policy. Therefore, in the event of his death, the wife would benefit, not A. In the meantime, A would not be able to alter, surrender or take a loan on the life insurance policy without the wife's written consent.

3 Alarmed by this unexpected turn of events, the husband took out an application, summons-in-chambers no. 650393 of 2004 ("**the SIC**") filed on 27 February 2004, which came up before me for hearing on 22 March 2004. The SIC prays, *inter alia*, that:

> *(a) The Insurance Policy No. [xxx] to be declared to be part of the matrimonial assets which belong to the Petitioner solely; and*
>
> *(b) The assignment which the Petitioner executed on the 9th October 1985 to A be declared as valid and binding.*

4 At the hearing before me, the husband's counsel informed me that the SIC had been served on the wife's solicitors and also on the insurance company which issued the life insurance policy in question. The husband's counsel further informed me that the wife's solicitors had told her that they had informed the wife of the proceedings, but they had no instructions from the wife in the matter. The husband's counsel had also spoken to the solicitors for the insurance company, who had told her that they would not be attending the hearing. In the circumstances, I proceeded to hear the SIC, with only the husband's counsel in attendance.

5 I made the following orders on the SIC (extracted in an order of court filed on 2 April 2004):

> *(a) The Insurance Policy No. [xxx] be and is hereby declared to be part of the matrimonial assets which belong to the Petitioner solely.*
>
> *(b) The Petitioner may remove the Respondent as the beneficiary of the said policy if the insurance company takes the position that the previous assignment of the said policy was invalid.*

6 None of the parties appealed against my decision, but I have decided to write a judgment in the matter as it involves matters of some importance to the insurance industry, as well as to divorcing policyholders who have named their ex-spouses as beneficiaries in life insurance policies which they have taken out (and of course, to the ex-spouses themselves).

7 The facts which I have recounted in paragraphs 1-6 above are set out for easy reference in the table below, together with the relevant dates.

S/No.	Event	Date
1	Parties got married	31.12.55
2	Husband acquired life insurance policy [xxx] ("**the policy**") and nominated the wife as the beneficiary.	01.06.79
3	Husband signed the necessary papers to change the beneficiary of the policy from the wife to A. This was acknowledged by the insurance company. ("**the 1985 assignment to A**")	15.07.85

4	A took out a loan on the policy, for $24,366	15.04.86
5	A took out a loan on the policy for the sum of $34,300	1.06.94
6	Divorce petition filed by husband	28.01.97
7	Decree Nisi granted	14.01.98
8	Letter from wife's solicitors to A informing her that the 1985 assignment to A was void and the wife would be taking out court proceedings to set it aside.	22.08.98
9	Consent order entered into between husband and wife in respect of the ancillary matters. ("**the consent order**")	20.07.00
10	A repaid a loan she took out on the policy for the sum of $73,225.40 to the insurance company.	24.10.01
11	Insurance company wrote to the husband to inform him, *inter alia*, that the wife would be the beneficiary of the policy in the event of his death and that A could not alter, surrender or take a loan on the policy without her consent.	3.07.03

Section 73 Trust—Undefeated by Divorce

8 This is what the insurance company wrote in its letter to the husband dated 3 July 2003: "..we would like to inform you that given the law as it stands today, naming CI as the beneficiary in the Application Form creates a section 73 trust on this policy."

9 The insurance company was referring to Section 73 (Moneys payable under policy of assurance not to form part of the estate of the policyholder.) of the Conveyancing and Law of Property Act (Cap. 61) ("**Section 73**"), the material provision of which states:

> **73.** —(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 of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and 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 policyholder or be subject to his or her debts.

10 What these words mean is that when a person who takes out a life insurance policy ("**the policyholder**") names his spouse and/or his children as beneficiaries of the life insurance policy, a statutory trust is automatically created on the policy ("**the Section 73 trust**"). This means that if the policyholder dies, the monies payable on the policy will go to the spouse and/or the children who have been named as beneficiaries to the policy. The monies will not go to the estate of the policyholder, so they will not be liable to death tax. Neither can his creditors get any share of the monies. This means that without having to go through the usual expense and formalities of creating a trust (i.e. drawing up a trust deed and getting it signed and sealed), a policyholder can provide for his wife and children after his death, and the monies due to them

will be protected both from the taxman and from his creditors. As stated in *Kishabai v. Jaikishan* [1980] 2 MLJ 289:

> "...it seems clear that the purpose of the section [the English equivalent of Section 73] 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." (per Lee J, at page 190)

11 Will a wife who is divorced still be able to benefit from the Section 73 trust?

12 It could be argued that the phrases "wife" and "husband" in Section 73 should be interpreted to refer to the person who is the wife or husband of the policyholder *at the time of the policyholder's death.* Thus, even though a Section 73 trust had arisen in favour of a former wife who was named as a beneficiary of the husband's life insurance policy, she would automatically be removed as beneficiary by the effect of a divorce. The policyholder may then do as he likes with the policy—either surrender the policy and keep the proceeds for himself, or name a new beneficiary. (See the discussion on this issue in *Section 73 CLPA: Assurance for the Spouse and Children* (1997) 9 S.Ac.L.J. 82, at pages 88-89 by Debbie Ong)

13 However, it is clear from both local and English authorities that this is not the law. The law is that if the policyholder's wife was originally named as a beneficiary to the life insurance policy, being granted a divorce from the policyholder would not deprive her of her rights to the policy monies in the event of the policyholder's death. This is clear from the High Court case of *Eng Li Cheng Dolly v Lim Yeo Hua* [1995] 3 SLR 363. In this case, the husband had taken out a life insurance policy in which the wife had been specifically named as a beneficiary. Subsequently, the couple divorced. The husband died about 2 years later. The wife then claimed for a declaration that she was entitled to the proceeds of the life insurance policy. The court allowed her application on the basis that the wife had obtained an immediate trust in her favour under Section 73, which was not defeated by the subsequent divorce.

14 Section 73 is modelled after the English Section 11 of the Married Women's Property Act 1882. The judge in *Eng Li Cheng Dolly,* supra, (GP Selvam J), cited the English cases of *Cousins v. Sun Life Assurance Society* [1933] 1 Ch 127 and *Lort-Williams v. Lort Williams* [1951] P 395 in support of his interpretation of the law. In *Cousins*, the wife (who was named as a beneficiary in a life insurance policy taken out by the husband) died before the husband. The English Court of Appeal held that the husband held the policy on trust for the personal representatives of the wife's estate. An immediate trust had been created in her favour under the English equivalent of Section 73. Justice Selvam stated that there can be no difference, in this regard, between the death and divorce of the wife. In *Lort-Williams*, during the marriage, the husband took out a life insurance policy "*for the benefit of the widow or children or any of them*". The wife was, however, not specifically named as a beneficiary. The husband had not remarried at the time of the wife's application. The English Court of Appeal held that the divorced wife had a beneficial interest in the fund as the policy was taken out during marriage and undoubtedly with the object of creating a fund from which she might benefit. Justice Selvam concluded from this that a wife who is actually named as a beneficiary to the life insurance policy will obtain an immediate trust in her favour which will not be defeated by a subsequent divorce.

Does it make a difference if the spouse is not specifically named as a beneficiary in the life insurance policy?

15 In *Lort-Williams*, the court noted that the use of the word "*widow*" in the life insurance

policy also provided for other contingencies, such as the possibility of a second marriage. This suggests that a person other than the wife of the marriage which was existing at the time the life insurance policy was taken out may benefit from the policy monies. In the case of *In Re Browne's Policy* [1903] 1 Ch 188, the life insurance policy taken out by the deceased husband was expressed to be "*for the benefit of his wife and children...*" He was married to one Alice Maud at the time, with whom he had 7 children (5 of whom survived him). After Alice Maud died, the husband then remarried one Florence Browne, with whom he had 2 children (1 of whom survived him). Upon the husband's death, the question arose of whether the second wife and her child were entitled to the policy monies. The court held that the surviving wife and all the surviving children from both the first and second marriages were entitled to share in the policy monies:

> "..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, and the observation holds good respecting allusions by another to a given man's wife. But, 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. A similar line of reasoning points to the conclusion that he intended to benefit all the children...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." (per Kekewich J, at page190)

16 Thus, if the wife is not specifically named as a beneficiary in the life insurance policy, but the beneficiary is only stated to be the "wife" of the policyholder, and the policyholder subsequently remarries, it seems that it is the wife at the time of the policyholder's death who will benefit from the policy, and not the former wife (who may have died or been divorced from the husband). This is not applicable in the present case, however, as the wife had been specifically named in the policy as a beneficiary.

No need to specifically invoke Section 73

17 In this case, the policy did not make a specific reference to Section 73. However, it is not necessary to specifically invoke Section 73 in the life insurance policy documents in order for a Section 73 trust to be created. This is what the court held in *Eng Li Cheng Dolly*. (See first paragraph of the "Held" section in that case.) Other cases cited in this judgment, both English and local authorities, such as *Cousins*, supra, and *Re Man Bin Mihat, deceased* [1965] 2 MLJ 1, also dealt with life insurance policies where Section 73 (or its English equivalent) was not specifically invoked, but the courts held that Section 73 trusts had nevertheless been created. (It would be good practice, though, I would have thought, for the life insurance policy to make specific reference to Section 73, to prevent future disputes on the matter.)

When, if at all, the policy holder may remove or change the spouse beneficiary of the life insurance policy—the irrevocable nature of Section 73

18 Interestingly, nothing in Section 73 or anywhere else in the Conveyancing and Law of Property Act appears to deal with how the Section 73 trust is to be revoked or reconstituted. This means that the policyholder may not be able to remove or change the beneficiaries to the life insurance policy to which Section 73 is applicable. This is the position which seems to have been taken by the insurance company in its letter of 3 July 2003.

19 It appears that if the beneficiary of the Section 73 trust consents, however, the policy holder can remove him or her as the beneficiary to the life insurance policy. (See the dicta in *Saniah bte Ali & Ors v. Abdullah bin Ali* [1990] SLR 584 by Justice LP Thean, commenting on the nature of a Section 73 trust: "*..it is not revocable by the settlor* ***except with the consent of***

***the beneficiary thereof**, if he or she is sui juris.*" (emphasis added)). However, I do not have to decide this issue as the wife in the present case had never consented to being removed as a beneficiary and for A to be nominated instead.

20 Is it at all possible for the policyholder to remove or change the beneficiary without the beneficiary's consent?

21 In the case of *Re Yeo Hock Hoe's Policy* [1938] 1 MLJ 33, the policyholder reserved to himself in the life insurance policy (in respect of which he had named the wife as a beneficiary) "*the right without the consent of the beneficiary to revoke the appointment of such beneficiary and substitute my own or any other name therefore, and also without such consent to receive every benefit, exercise every right and enjoy every privilege conferred upon the insured by such policy*". The policyholder subsequently died. The court held that by virtue of the presence in the policy of the clause quoted above, the policyholder did not make a complete and absolute gift to his wife, since he never parted with the right to dispose of the policy monies. As he died possessed of such a right, such monies must pass to his personal representatives for the benefit of his creditors. This case opens the possibility that the life insurance policy can be drafted to ensure that the Section 73 trust does not come into being in the first place. The weight of authority is against this position, however.

22 The later cases of *Re Choong Chak Choon, deceased* [1937] SSLR 281 and *Re Man Bin Mihat, deceased,* supra, also dealt with life insurance policies which contained clauses stating that the policyholder could revoke the appointment of the beneficiary and appoint another, and deal with the policy without the beneficiary's consent (the wording of these clauses being similar to the clause contained in the life insurance policy in the *Eng Li Cheng Dolly* case, which I have set out below). In neither case did the court hold that the presence of such clauses prevented a Section 73 trust from arising. In the *Eng Li Cheng Dolly* case, the policy contained a provision that the policyholder could "*revoke the appointment of the beneficiary and appoint another with or without reserving the right of revocation or new appointment..and 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...*". Similarly, the court did not hold that this clause prevented the Section 73 trust from arising.

23 If the position in *Re Yeo Hock Hoe's Policy*, supra, were right, the protection afforded to the spouse and children under Section 73 could be side-stepped by the simple addition of a phrase in the life insurance policy similar to the one from that case, or from *Eng Li Cheng Dolly*, which I have quoted above. I am therefore of the view that the position in *Re Yeo Hock Hoe's Policy* cannot be right.

24 In the case of *Re Choong Chak Choon,* supra, the court held that as the policyholder had not revoked the named beneficiaries or appointed new ones, the Section 73 trust created still subsisted in favour of the named beneficiaries. The implication behind the court's judgment is that if the policyholder had revoked the named beneficiaries and appointed new ones, the Section 73 trust in favour of the named beneficiaries would be extinguished. The case leaves open the possibility that it would be possible to draft the insurance policy such that the beneficiaries can be unilaterally removed or changed by the policyholder.

25 I am of the view that this cannot be the position, however. This position seems to go against the spirit of Section 73—or, at least, against how the majority of the authorities have seemed to interpret Section 73. The analogy that came to my mind from reading the authorities is that of a gift. A Section 73 trust seems to be akin to a gift to the wife. The husband makes the wife the beneficiary of his life insurance policy in the same way that he would make her the gift of a car. Just as you cannot take back a gift and give it to someone else, so you cannot remove the wife's name from the policy once she has been named as a beneficiary.

26 Thus, even if the husband subsequently decides to surrender or discontinue the life insurance policy, any monies payable on the policy by the insurance company in that event should accrue to the benefit of the trust in the wife's favour and not to the benefit of the husband—though whether the wife may be immediately entitled to the policy monies would depend on the terms of trust, i.e. the terms of the policy. This was the case in *In Re Fleetwood's Policy* [1926] 1 Ch 48. In this case, the policyholder had various options that he could exercise (after a certain period) in respect of the life insurance policy (to which his wife was named as a beneficiary). One of the options (which was exercised by the policyholder) was to receive the cash value of the policy and discontinue the policy. The insurance company paid the proceeds of the policy into court, as it was not sure whether to pay the same to the husband, to the wife, or both. The court held that (the English equivalent of) a Section 73 trust had arisen in the wife's favour, and the policyholder would be taken to have exercised the option for the benefit of the trust—thus the policyholder could not take the cash proceeds for himself. But neither could the wife take the cash proceeds immediately, as the policy created a trust in her favour, but "*only in the terms of the trust*" (per Tomlin J, at page 54). Under the policy, the proceeds would belong to the wife if she survived the policyholder, but otherwise to the policyholder. The court therefore ordered that the policy monies which had been paid into court by the insurance company should remain in court and be accumulated until the parties could come to an agreement on the matter, or until the death of either party.

27 In *Saniah*, supra, the court specifically stated (see dicta by Justice LP Thean, in paragraph 19 above) that a Section 73 trust is not revocable by the policyholder except with the beneficiary's consent. Similarly, in *Re Man Bin Mihat*, supra, the court held that even if the policyholder assigned the benefit of the monies payable under the life insurance policy (to which the wife had been named a beneficiary) to a third person, that person could only receive the policy monies subject to the Section 73 trust in favour of the wife.

28 In the case of *Twaddle v. New Oriental Bank Corporation Limited* (1895) 21 VLR 171, the court said, referring to concept of the life insurance policy creating a trust under the English equivalent of Section 73 that "*..the contract and the document containing the contract shall vest in the assured as trustee, and that the beneficial interest in the contract is in his wife and children, and that he holds the document and the beneficial interest in the contract in trust for the persons mentioned in the policy, and cannot dispose of the trust property for his own purposes.*" (per Hodges J, at page 176) (emphasis added) This case also held that the husband will not be able to claim any of the premiums which he has paid on the policy from the wife—just as you cannot give a gift and then demand the purchase price from the beneficiary of your gift.

29 The apparently irrevocable nature of the Section 73 trust, as illustrated in the cases I have set out in paragraphs 26-28 above, appears to go far beyond the purpose stated in *Kishabai*, supra, i.e. of protecting the monies due to the surviving spouse and children (who have been named as beneficiaries under the life insurance policy) from the policyholder's creditors. The irrevocable nature of the Section 73 trust ensures that the monies will *always be due* to the spouse and children—so long as the policyholder has made payment of the requisite premiums to the insurance company. It is, as stated earlier (in paragraph 25 above) like a gift to them, which can never be taken back.

30 I surmise that the reason for the irrevocable nature of the Section 73 trust is to protect the spouse and children who have been named as beneficiaries in the life insurance policy from being cut out by a capricious policyholder and thus left in the lurch upon his death. For example, a case where the husband walks out on the family to live with his mistress, many years after taking out a life insurance policy naming the wife and children as beneficiaries. For all the years when the husband was living with his family, he paid the premiums on this policy, spending money on the premiums which he could otherwise have spent in acquiring assets for the wife

and children, or enabling them to have a higher standard of living. He then removes the wife and children as beneficiaries to the policy and nominates his mistress as beneficiary instead. He dies a year afterwards. In such a case, if the mistress receives the monies on the life insurance policy, it would, in a sense be a windfall for her—which has been made possible by some sacrifices on the part of the wife and children. The wife and children, on the other hand, are not compensated for the sacrifices which they have made in respect of the insurance premiums paid by the husband. Section 73 would protect the wife and children in such a situation.

31 The irrevocable nature of the Section 73 trust may do injustice, however, by preventing the policyholder from removing or changing the beneficiaries even if he has good reasons to do so. For example, the policyholder's only child may be involved in a car accident, and becomes handicapped as a result of the accident and unable to work. The policyholder may wish to remove the wife (who has significant assets of her own and who is earning a decent income), who is named as the only beneficiary in the life insurance policy, as the beneficiary, and nominate their handicapped child as the beneficiary instead, so that he may then receive all the monies due under the policy, in the event of the policyholder's death. The wife may, however, out of greed, spite or dislike for the handicapped child refuse to consent to this. There must surely be a way out for the policyholder in such a situation. But the irrevocable nature of the Section 73 trust seems to indicate that he can only surrender the policy or let it lapse, and then take out a fresh one, naming the handicapped child as the sole beneficiary—but this may mean that years of premiums paid by him on the policy may go to waste, and any monies paid by the insurance company will benefit the trust in favour of the wife only, and may even be frozen for years (see paragraph 26 above). In this regard it may be desirable for Section 73 to be reformed, in order to allow the policyholder some flexibility in unilaterally removing or changing the beneficiaries, but at the same time finding a way to give some protection to the interests of the spouse and children who have originally been named as beneficiaries. However, I am obviously not in a position to comment further on what sort of reforms should be done. (For some suggestions, see pages 88-91 of Debbie Ong's article, which I have cited in paragraph 12 above)

Section 73 trust in the present case

32 In the present case, a Section 73 trust has been created, for the benefit of the wife, since she was specifically named as the beneficiary to the policy.

33 The policy contains the following clause "*The Insured shall have the right...to revoke any such nomination and to name another Beneficiary.*" This is not enough to prevent the Section 73 trust from arising. (See paragraphs 25-29 above) The husband had attempted to remove the wife as a beneficiary and to nominate A as beneficiary instead. However, in accordance with paragraphs 25-29 above, I am of the view that he could not do so. This is one of the two reasons I did not grant the husband's application for a declaration that the 1985 assignment to A was valid and binding. (For the other reason, see paragraph 48 below.)

Can the court dealing with the ancillary matters on a divorce between the policyholder and his spouse remove the spouse beneficiary named in the life insurance policy?

34 As stated earlier in paragraph 13, divorce will not deprive a spouse named as a beneficiary in the life insurance policy from his or her rights under the policy. However, in a situation where the policyholder has divorced the spouse, can the ancillary matters court make orders which will, in effect, deprive that spouse of such rights?

35 I am of the view that it can, under Section 112 (Power of court to order division of matrimonial assets) of the Women's Charter (Cap. 353) ("**WC**"). This section gives the court the power to deal with the matrimonial assets upon divorce. These powers are very wide. Section 112 states:

(1) The court shall have power, when granting or subsequent to the grant of a decree of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

...

(3) The court may make all such other orders and give such directions as may be necessary or expedient to give effect to any order made under this section.

...

(5) In particular, but without limiting the generality of subsections (3) and (4), the court may make any one or more of the following orders:

(a) an order for the sale of any matrimonial asset or any part thereof, and for the division, vesting or settlement of the proceeds;

(b) an order vesting any matrimonial asset owned by both parties jointly in both the parties in common in such shares as the court considers just and equitable;

(c) an order vesting any matrimonial asset or any part thereof in either party;

(d) an order for any matrimonial asset, or the sale proceeds thereof, to be vested in any person (including either party) to be held on trust for such period and on such terms as may be specified in the order;

(e) an order postponing the sale or vesting of any share in any matrimonial asset, or any part of such share, until such future date or until the occurrence of such future event or until the fulfilment of such condition as may be specified in the order;

(f) an order granting to either party, for such period and on such terms as the court thinks fit, the right personally to occupy the matrimonial home to the exclusion of the other party; and

(g) an order for the payment of a sum of money by one party to the other party. (emphasis added)

36 Essentially, the court can make any order which it thinks fair and just in relation to any matrimonial asset when it carries out the task of dividing the matrimonial assets between the divorcing parties.

37 Would a life insurance policy be considered a "matrimonial asset" within the meaning of Section 112(10) of the Women's Charter? Section 112(10) includes in the definition of "matrimonial asset" any asset *"of any nature acquired during the marriage by one party or both parties to the marriage"*. Thus, if a life insurance policy (to which the wife is named as a beneficiary) is purchased by the husband after the date of the marriage, and the premiums have been paid during the marriage, the policy should be a matrimonial asset—though it would be the wife's asset, rather than the husband's asset, as she has the beneficial interest in the policy. It is like a property or a car which the husband has purchased and put into the wife's name after the marriage, or a piece of jewellery which he has given her after the marriage. Such assets would be put into the pool of matrimonial assets to be divided by the court. (Gifts between spouses, if the gift was acquired after the date of the marriage by one spouse and given to the other, are considered to be matrimonial assets available for division—see *Yow Mee Lan v. Chen Kai Buan*

[2000] 4 SLR 466 and *Yeo Gim Tong Michael v. Tianzon* [1996] 2 SLR 1) Certainly, if the wife bought herself a property, with her own money, after the marriage, it would be put into the pool of matrimonial assets to be divided between the parties. There seems to be greater justification for putting into the pool of assets to be divided an asset (i.e. the life insurance policy) which has been paid for by the husband (in the form of the insurance premiums) for the wife's benefit.

38 Does it make a difference, however, if the beneficiary of the policy is a third party, and not the wife? For example, if the policyholder named his nephew as a beneficiary to his life insurance policy, is it still a matrimonial asset? This depends on whether the policyholder had created a Section 73-type trust in the nephew's favour. Whether this has happened would depend on the construction of the particular policy. In the case of *Kishabai*, supra, for example, the court held that a Section 73-type trust had been created by the policyholder in his nephew's favour, and that he was not entitled to revoke the trust and re-assign the benefit of it to himself or any other party.

39 If a Section 73-type trust had indeed been created by the policyholder in favour of his nephew, then the nephew cannot be removed as a beneficiary to the policy—and the policy is therefore not a matrimonial asset. Only the nephew has rights under the policy. It would be as if the husband had made a gift of a car to the nephew after the date of the marriage. Unless the court finds that the gift has been made with the intention of dissipating the pool of matrimonial assets, it will not and cannot order the car to be returned by the nephew. But the fact that the husband had expended resources in acquiring the car, which would otherwise have been put into the pool of matrimonial assets, can be taken into account by the court in deciding how to divide the pool of matrimonial assets. Similarly with a life insurance policy to which a third party has been named as beneficiary, and in respect of which a Section 73-type trust has been created in favour of the third party.

40 If a Section 73-type trust has not been created in favour of the third party beneficiary, then the life insurance policy is a matrimonial asset. The policyholder may remove the third party as beneficiary to the life insurance policy, and nominate a new beneficiary, or surrender the policy and collect the cash proceeds for himself.

41 If a life insurance policy is held by the ancillary matters court to be a matrimonial asset within the meaning of Section 112(10), then, in my view, the wide powers granted to the court under Section 112 mean that the court may make such orders in relation to that life insurance policy as it sees fit, including ordering the removal or change of named beneficiaries.

42 This is the position in England. In England, upon granting a decree of divorce, the court may make an order varying any "post-nuptial settlement" (under section 24 of the Matrimonial Causes Act 1973 and its earlier equivalents). The English courts have interpreted the phrase "post-nuptial settlement" to include interests in life insurance policies (See *Gunner v. Gunner and Stirling* [1949] P 77 and *Lort-Williams*, supra). Pursuant to this, they have extinguished the interest of a divorced wife in life insurance policies taken out by the husband in which the wife was named as a beneficiary. (See *Gulbenkian v. Gulbenkian* [1927] P 237)

43 A similar position seems to have been taken by the High Court in Singapore in the case of *Chee Im Suan v Lee Seh Kim* (Divorce Petition 602010/2002, unreported). In this case, the husband had bought 3 life insurance policies naming the wife as a beneficiary. The total surrender value of all the policies was $51,126.24. The court ordered that the husband assign one of the life insurance policies to the wife as her share of the matrimonial assets (not including the matrimonial home). The surrender value of the policy ordered to be assigned was about $26,800. (See the district court judgment at [2003] SGDC 46.) This decision was upheld by the High Court on appeal. The High Court proceeded to order that the wife's name be removed as a beneficiary on the two remaining life insurance policies which were held by the husband.

44 I would respectfully adopt this approach. It makes a sensible and just result possible. If the court took the view that it could not make any orders in relation to a life insurance policy in which the wife, for example, was named as a beneficiary, the divorcing parties would be left with a policy which the husband would have no incentive to keep paying the premiums for (since he would normally have no desire to benefit the ex-wife). The policy would then lapse or be surrendered by the husband, and the monies paid out on the policy in this event (if any) would probably not justify the years of premiums which the husband has paid on the policy. Although the rights which the wife had under the Section 73 trust would probably not be preserved by the ancillary matters court, for practical reasons, (i.e. it would not be realistic to expect the husband to keep faithfully paying the premiums on the policy) the court would take into account all the circumstances of the case (in particular, all the factors under Section 112(2) WC) in deciding how to divide the pool of all the matrimonial assets, including the life insurance policy. In this way, the interests of the wife are still protected—and in a more comprehensive way—than under Section 73. The court could also order that the spouse be removed as beneficiary, and for the children of the marriage to be nominated as beneficiaries instead (though not the other way round, as, if only the children were nominated as beneficiaries, there would be a Section 73 trust in their favour, and the policy would not be a matrimonial asset)—thus looking after the interests of the children (in respect of their maintenance) as well.

In the event that parties did not deal with the life insurance policy issue at the ancillary matters hearing

45 In this case, if parties had raised the issue of the life insurance policy at the ancillary matters stage, the ancillary matters court would have had to decide whether it was a matrimonial asset or not, and make orders to dispose of it accordingly. This issue was not raised or dealt with at the time the consent order was recorded. Does the court now have the jurisdiction to deal with it?

46 I am of the view that it does, under Section 112(4), which states:

> The court may, at any time 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.

This is a very widely drafted section. The court will not, of course, lightly re-open orders made in the ancillary matters, particularly those made by consent. However, in my view, parties would be able to apply to the court under this section in situations where they have omitted to deal with an asset because they forgot about it, did not realise it existed, or thought it was not a matrimonial asset. According to the husband in his affidavit filed on 27 February 2004, he did not ask the court to make any orders in relation to the policy, as he had the impression that it was not a matrimonial asset, pursuant to the 1985 assignment to A. He now admits that he was mistaken and would like the court to deal with the matter.

47 The husband has prayed for a declaration that "*The assignment which the Petitioner executed on the 9th October 1985 to A etc. be declared as valid and binding.*" I am of the view that I have no jurisdiction to make this declaration. (Even if I had, though, I would not make this declaration, for the reasons set out in paragraph 25-29 above.)

48 My reasons are as follows: the ancillary matters court can decide what is a matrimonial asset for the purposes of deciding what constitutes the pool of matrimonial assets—this is necessary in order to decide how to divide the assets between the husband and wife under Section 112(1) (or in varying an ancillary matters order under Section 112(4)). But the sole purpose of deciding what is a matrimonial asset is to be able to decide on the division of the

assets between the parties. The court has no power under Section 112(1) or (4) to make declarations in respect of third party rights or third party assets, which is what the husband is asking the court to do. Thus, I can make a *finding* (but *not* a declaration) that A is or is not the rightful beneficiary of the policy. If she is not, the policy is a matrimonial asset which I have power to deal with under Section 112. If she is, I then have to examine whether she can be removed as a beneficiary without her consent. If she can, then the policy is still a matrimonial asset and I can proceed to deal with it under Section 112. If she cannot, then the policy is not a matrimonial asset—in which case I will have no more jurisdiction to deal with the matter under Section 112.

49 The policy in this case is clearly a matrimonial asset. The husband purchased it after the date of the marriage, and paid the premiums during the marriage. The wife was named as the beneficiary. It was therefore her asset. I have held that she did not cease to be a beneficiary, despite the 1985 assignment to A. This asset would have been part of the pool of matrimonial assets the ancillary matters court would have dealt with, when the consent order was made. However, it was not dealt with at that time, and I have to deal with it now.

50 I have decided to order that this asset be given to the husband, to do with as he likes. (In this regard, I should clarify that my order that "*the policy be declared to be part of the matrimonial assets which belong to the Petitioner solely*" is prospective (i.e. from the date of my order), not retrospective (i.e. from the date of the 1985 assignment to A).) This order means that the husband should be able to remove the wife's name as the beneficiary to the policy, and I have, accordingly, ordered that he be allowed to do that. As the insurance company did not attend the hearing, I could not confirm the position it was taking on the 1985 assignment to A. If the insurance company had attended the hearing and given the husband the assurance that it would honour the 1985 assignment to A—whatever the merits of this position—then I need have (and would have) made no order on the SIC. In case this option was still a possibility, I added the words "*if the insurance company takes the position that the previous assignment of the said policy was invalid*" to my order allowing the husband to remove the wife as the beneficiary of the policy. I have decided to give the policy to the husband as the wife had been aware of the existence of the policy and the 1985 assignment to A before the consent order was recorded. She had in fact threatened to take steps to set aside the 1985 assignment to A, but never carried out her threat. The consent order was recorded instead, and the wife did not request the court for any orders in respect of the policy at that time. As she did not attend the hearing before me, although she was aware of it, I can only assume that she was of the view either that the terms of the consent order were either to include the policy, or that a reasonable division of the assets had been achieved by the consent order without factoring in any interest she might have in the policy.

Conclusion

51 The irrevocable nature of a Section 73 trust may be justifiable—to some extent—when the husband and wife are still married. But as this case has illustrated, a Section 73 trust for the benefit of a spouse is much more difficult to justify in a divorce situation, and creates potential pitfalls for the parties. There would be no incentive for any person to incur additional expenses to benefit his or her ex-spouse. In my view, the ancillary matters court has the power to accommodate and cater for this reality upon the breakdown of the marriage. It has done so in the past, both in England and in Singapore. I am of the view that it should continue to do so.

Petitioner's application allowed in part.