SCOTTISH LAW COMMISSION

MARRIED WOMEN'S POLICIES OF ASSURANCE (SCOTLAND) ACT 1880

DRAFT WORKING PAPER

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NOTE. This draft Paper has been prepared by Mr. A. M. Johnston for consideration by those who, prior to the Finance Act 1968, proposed amendment of the 1880 Act. It has not been approved by the Scottish Law Commission. The comments and criticisms requested herein will be considered by the Commission in deciding what, if any, action they should take.

A.M.J.

MARRIED WOMEN'S POLICIES OF ASSURANCE (SCOTLAND) ACT 1880.[1]

Introduction.

1. The Scottish Law Commission have received from more than one source proposals that section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (hereinafter referred to as "the Scottish Act") should be amended in order to permit a woman to effect a policy of assurance on her own life for the benefit of her husband or of her children or of her husband and children under this Act. Under the Married Women's Property Act 1882[2] (hereinafter referred to as "the English Act") policies may be taken out by either spouse for the benefit of the other and/or any of their children. Under the Scottish Act only a "married man" may do so[3]. While the Commission were examining these proposals, the Finance Act 1968 (c. 44) was enacted. Section 38 of that Act, which makes the proceeds of life policies effected under *inter alia* the Scottish Act aggregable for estate duty purposes under section 2(1)(c) of the Finance Act 1894 (c. 30), has deprived such policies of much of their attraction; but substantial benefits, which are not restricted to estate duty saving, are still obtainable from such policies. Accordingly, we are issuing this exploratory paper only to those who proposed amendment of the Scottish Act in order to ascertain their views on the following points, viz. -

(1) whether they consider that sufficient future use would be likely to be made of the Scottish Act to/

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1 43 and 44 Vict. c. 26.

2 45 and 46 Vict. c. 75, s. 11.

3 *Coulson's Trs. v. Coulson*, 1901, 3F. 1041.

warrant the extension of its scope at the present time;

(2) if so, whether or not the nature and scope of the amendments suggested herein would be acceptable to them;[4] and

(3) any comments, criticisms or suggestions which they may have to make on the contents of this Paper including suggestions for further amendment of the Scottish Act.

Terms of the Scottish Act.

2. Section 2 of the Scottish Act is in the following terms:- "A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children,[5] or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation,/

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4 See para. 24, infra.

5 "Children" now includes adopted children (7 and 8 Eliz. II, c. 5, s. 14(3)) and illegitimate children (Law Reform (Misc. Provs.) (Sc.) Act 1968, c. 70, ss. 5(1) and 22(5)).

or reducible on any ground of excess or insolvency: And the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: Provided always, that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof."

Terms of the English Act.

3. Section 11 of the English Act is in the following terms:-

"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 insured or be subject to his or her debts: Provided, that if it shall be 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. The insured may by the policy, or by 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 such provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. 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 personal representatives 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."

Common Effect of Scottish and English Acts.

4. The term "policy ... on his own life" includes both "whole life" and endowment policies.[6] The terms of a policy may *per se* bring that policy within the scope of the Act without express reference to the Act,[7] although such policies normally bear *ex facie* to have been effected under the Act. The fact that moneys may be paid under the policy to the assured during his lifetime does not affect the trust. While his receipt discharges the assurance company, he must hold the moneys *qua* trustee for the/

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6 See Dymond's Death Duties, 14th Ed., p. 367.

7 *Chrystal's Trs. v. Chrystal*, 1912 S.C. 1003: *In re Gladitz* [1937] Ch. 588.

ultimate beneficiaries[8]. The assured may exercise option rights under a policy, but he does so as trustee for existing beneficiaries[8].

Historical Background.

5. The Scottish Act was modelled on section 10 of the Married Women's Property Act 1870[9] which was repealed and re-enacted in wider terms by the 1882 English Act; but the provisions of the Scottish Act have never been similarly extended. The purpose of both the Scottish and English Acts was to enable family trusts to be created in simple form in favour of the objects named in policies effected under the Acts without the necessity of separate deeds of trust. We consider that this purpose remains as useful today as it was last century. Prior to the 1870 Act in England third parties did not acquire rights under a contract made between two other parties unless the contract could be construed as establishing a trust in favour of the third party. "The mere fact that the policy moneys are expressed to be paid to somebody other than the assured does not make the assured a trustee of the policy or policy moneys for the person so nominated."[10] The difficult question of whether or not such a trust was established was avoided by effecting a policy expressed to be for the benefit of a wife and/or children, which thus came under the provisions of the 1870 Act creating the required trust. In Scotland, however, it has always been possible to confer a jus quaesitum tertio for policy moneys by drafting the/

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8 In re Fleetwood's Policy [1926] Ch. 48; see also Schumann v. Scottish Widows' Fund Society, 1886, 13 R. 678.

9 33 and 34 Vict. c. 93.

10 In re Englebach's Estate [1924] 2 Ch. 348, per Romer J., at p. 353: In re Sinclair's Life Policy [1938] 1 Ch. 799; but see Beswick v. Beswick [1968] A.C. 58, per Lord Upjohn, at pp. 95-6.

contract in appropriate terms; but difficult questions may arise if the policy does not fall under the Scottish Act.[11] A policy falling under the Scottish Act, however, takes effect according to the provisions of the Act and this precludes argument about the delivery, revocability or reducibility of such policies.[12]

6. The reason why the Scottish Act was not also extended to allow women to take out policies under the Act may have been that, whereas the English Act (s. 1) conferred upon married women in England the power to contract on their own behalf, this power was withheld from their Scottish counterparts until the Married Women's Property (Scotland) Act 1920.[13] There is no obvious reason why they have not yet been given the same privilege as that which their English sisters acquired in 1882. It may have been deliberately withheld to protect them from creating, without the benefit of independent legal advice, post-nuptial trusts in favour of their husbands, or it may have been thought that the provisions of the Act would seldom be used by married women in favour of their husbands or children. It seems to be assumed by Lord Wark in his article in Green's Encyclopaedia, Volume 7, at page 690, that the power to contract conferred upon wives by the 1920 Act rendered unnecessary the extension of the Scottish Act to wives. In these days of equal rights the first reason is no longer valid; Lord Wark's assumption is thought to be unwarranted; and the question comes to be whether women would be likely to make use of the right if they were to be given it now.

Value of Right.

7. (a) Moneys payable under policies effected under the Acts may be dutiable on the assured's death under section 2(1)(c)/

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11 See, e.g., Carmichael v. Carmichael's Exix., 1920 S.C. (H.L.) 195.

12 See, e.g., Jarvie's Tr. v. Jarvie's Trs., 1887, 14 R. 411 and Carmichael v. Carmichael's Exix., cit. supra.

13 10 and 11 Geo. V. c. 64.

of the Finance Act 1894.[14] When section 2(1)(d) is repealed by the enactment of the Finance Bill 1969, it is thought that section 2(1)(c) will be the only section charging estate duty on such policies,[15] and there is no liability under section 2(1)(c) if no premiums have been paid by the life assured in the seven years prior to his death. While section 38 of the Finance Act 1968[16] deprives moneys payable under policies effected under the Scottish and English Acts on or after 20th March 1968 of the benefit of non-aggregation for estate duty liability under section 2(1)(c) of the 1894 Act, it does not affect the exclusion from such liability of policy moneys, whatever the date of the policy, on the donor (the assured) surviving payment of the last premium by the statutory period (now seven years)[17] for exemption. Premiums paid by the assured for policies taken out under the Scottish Act are normally "treated as a gift to the donee of rights under the policy"[18] and the value of the gift liable to duty is ascertained by applying to the moneys received under the policy the proportion which the premiums paid within the seven year period bear to the total premiums paid. Accordingly, where the policy has been in force for a long time prior to the death of the assured, there will be a substantial estate duty saving. Moreover, the value of the rights given during the last three years of the seven year period is reduced by 15, 30 and 60 per cent respectively for estate duty purposes.[19] Further, if the premiums formed part of the normal expenditure of the assured,[20] the whole of the proceeds will be free of duty.

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14 57 and 58 Vict. c. 30.

15 See paras. 8 and 17 (b) (ii), <u>infra</u>.

16 c. 44.

17 Finance Act 1968, c. 44, s. 35(1).

18 Finance Act 1959, c. 58, s. 34(2).

19 Finance Act 1968, c. 44, s. 35(2).

20 Finance Act 1968, c. 44, s. 37.

(b) Income tax reduction is also obtainable on the premiums paid under such policies.[21]

(c) Such a policy also places the proceeds beyond the reach of the husband's creditors without any formal declaration of trust.[22]

Effect of the Finance Act 1968 and Finance Bill 1969.

8. All the benefits referred to in paragraph 7 supra were and still are obtainable from nomination or other trust policies. Prior to the 1968 Act the principal attraction of policies effected under the Scottish Act was that the statutory trusts created by the terms of the Act precluded argument as to whether or not the assured had at any time had an interest in the policy and thus ensured that the proceeds would not be aggregable for estate duty under section 2(1)(c).[23] As a result of section 38 of the Finance Act 1968 the proceeds of life policies taken out on or after 20th March 1968 which are liable for duty under section 2(1)(c) of the 1894 Act are aggregated with the deceased's other property. It is thought that that proportion of life policy proceeds exempt from estate duty under section 2(1)(c), which has up to now been caught by section 2(1)(d) in cases where vesting is suspended until the death of the assured, will, as a result of the amendments proposed by the Finance Bill 1969, which include the repeal of section 2(1)(d),[24] no longer be chargeable to duty on the assured's death.[25]

9. It may be that the loss of the benefit of non-aggregability for estate duty liability under section 2(1)(c) of the 1894 Act will effect a radical change in the writing of life policies for the benefit of dependants. Since, for the purposes of section/

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21 Income Tax Act 1952, c. 10, s.219.

22 Stewart v. Hodge (O.H.), 1901, 8 S.L.T. 436.

23 See Finance Act, 1894, c. 30, s. 4.

24 See Clauses 36 and 61(6).

25 See para. 17 (b) (ii) infra.

2(1)(c), the life assured cannot avoid having an interest in the policy, he may now be conditionally instituted to his wife, in the event of her predeceasing him, without affecting the estate duty position. But estate duty liability on the death of a husband may be avoided by a married woman effecting a policy on his life and paying the premiums out of her own funds. Such a policy does not fall under the Scottish Act and, since it remains throughout the personal property of the wife, it is obviously not a policy which the Act might be extended to cover.

10. Since, for the purposes of estate duty liability under section 2(1)(c) of the 1894 Act, a life assured now has an interest in a policy effected for the benefit of third parties, the Scottish Act has lost its special attraction for the reduction of estate duty liability, and all such policies, whether written under the Act or not, now stand on an equal footing _quoad_ estate duty and income tax. While policies under the Scottish Act still seem to us to afford an attractive method of making protected provision for a widow and/or children in a simple manner designed to reduce estate duty liability, it has been suggested to us that future policies will henceforth not be written under the Scottish Act and that there is now no need to extend its scope. At the risk, however, of over-simplifying the problem, we suggest that the real choice may lie between repealing the Scottish Act or extending its scope. If it is likely to continue to be used in its present form by married men, then it would seem to follow that it ought to be extended for use by married women. If the effect of the 1968 Finance Act has been to reduce the value of the Scottish Act to a notional level, there is a case for repeal.

Information Required.

11. There is no radical reason at the present time for restricting the Scottish Act to married men. The old concept of the husband as the only bread winner in the family is obsolescent. Mothers, like fathers, should be able to provide for their children by means of life policies under the Act, and wives should be able to

make provision for their husbands by this simple method, which is available to husbands in providing for their wives. But equally there is no point in utilising Parliamentary time for amendment of this Act for theoretical reasons. Before making recommendations for amendment, we would have to be satisfied that there is a practical need for it. There may be two aspects of this matter, viz. -

(1) The use which solicitors would be likely to make of the extended scope of the Scottish Act, and

(2) The use which assurance companies would be likely to make of it. We would be grateful for information as to the proportion of life policies which assurance companies issue

(a) through legal firms, in which the destination is framed or revised by those firms, and

(b) otherwise, i.e., the destination being framed by the companies' own employees without extrinsic revision.

It may be that there is now no strong demand from the legal profession for amendment of the Act, whereas amendment is still important to life offices to enable them to sell more policies. Comments on this speculation are especially requested. We should also like to have some indication of the proportion of past policies written under the Act in which estate duty saving was of importance, and the extent to which life companies enquire into and advise on estate duty where they are dealing directly with prospective clients.

Amendment.

12. It would be unreasonable for us to seek information as to the probable future use of the Scottish Act without reference to the amendments which we have considered might usefully be made to it. A first and obvious amendment is that which has been proposed to us, namely, that it should be extended to enable married women to effect policies under the Act; but that does not seem to us to go far enough. Upon the assumption, therefore, that extension of/

the Act will serve a useful purpose, we set out below further amendments, some of which seem to speak for themselves while others may be controversial.

Further Amendments.

13. Should the Act be confined to married persons only?

The original English Act[26] was confined to married men, but the 1882 Act[27] extended the benefits of the Act to policies effected by "any man" or "any woman" on his or her own life, and we consider that the Scottish Act should be similarly extended. Prospective spouses may wish to take out policies under the Act when putting their affairs in order immediately prior to marriage.[28] While a trust thus constituted will be revocable by the assured if he does not marry, there is no obvious reason why this simple method of creating matrimonial provisions should be available only after marriage.

14. Power of Appointment.

One difference between the terminology used in the Scottish and English Acts is that the latter contains at the end of the recital of potential beneficiaries the phrase "or any of them", whereas the Scottish Act does not. While the power to select specific beneficiaries from those authorised by the Act may be implied in the Scottish Act, an argument against this may be founded on the fact that this power is given expressly by the English Act and is omitted from the Scottish Act. If the Scottish Act is to be amended, the opportunity should be taken to add the phrase "or any of them" in order to preclude this argument and to make it clear that policies may be taken out for the benefit of specific beneficiaries selected from those authorised by the Act or for the benefit of such as the assured may later appoint[29].

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26 33 and 34 Vict. c. 93, s. 10.

27 See para. 3, *supra*.

28 See e.g., *Coulson's Trs. v. Coulson*, 1901, 3 F 1041.

29 See e.g., *In re Parker's Policies* [1906] 1 Ch. 526.

15. Extension of Act to "Issue" of Assured.

(a) Under the Scottish and English Acts the beneficiaries are restricted to the wife and/or children of the assured[30]. As the effect of these Acts is to create a statutory *inter vivos* trust for the benefit of a wife and/or children, as the case may be, and the *conditio si institutus sine liberis decesserit* has been held not to apply to *inter vivos* deeds,[31] issue of the assured remoter than children cannot acquire rights under these policies. If, therefore, it was thought desirable that grandchildren should be entitled to acquire such rights, there would seem to be two alternative methods of extending the Act to include descendants remoter than children. The first method would be to amend the Act by expressly stating therein that the *conditio* should apply to policies affected by the Act. The second method would be to substitute "issue" for "children" throughout the Act.

(b) We reject the first method for the following reasons:-

(i) It would result in policies under the Act being the only *inter vivos* deeds, apart from marriage contracts,[32] to which the *conditio* would apply.

(ii) It would create difficulties for assured persons who wish to confine the benefit of policies to their children. The *conditio* assumes that a testator has overlooked the contingency of the institute dying without having acquired a vested right and survived by issue[33]. Where this presumption applies, it may be rebutted either expressly or impliedly by the terms of the deed[34]. The statutory

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30 See paras. 2 and 3, *supra*.

31 *Trs. of Thomson Trust, Petrs.*, 1963 S.C. 141.

32 See Henderson on Vesting, 2nd. ed., p. 354.

33 See McLaren, Wills and Succession, Vol. 1, para. 788; Henderson on Vesting, p. 359.

34 Henderson, *cit. supra*, pp. 359-362; *Pattinson's Trs. v. McKellar*, 1941 S.L.T. 295.

application of the *conditio* to such policies would, therefore, necessitate the destination in the policy being specifically framed in order to exclude its application in appropriate cases.

(iii) As one of the objects of the Act was to enable a husband to make provision for his children by taking out a policy on his life without the formal execution of a trust deed, there may be many cases in which policies are effected without revision of their terms by solicitors. If the *conditio* were to apply to such policies, it would be advisable in every case for the assured to consult solicitors to ensure that the destination was so drafted as to give effect to his intention, thereby defeating the original purpose of the Act, namely, to afford a simple and inexpensive procedure for making protected financial provision for dependants.

(iv) In any event, if the class of permitted beneficiaries is to be extended to "issue", it would be simpler to draft a destination in which issue remoter than children were specifically included than to draft one in which they had to be excluded in order to displace the *conditio* presumption.

(c) Our first impression was that the adoption of the second alternative, namely to substitute "issue" for "children" throughout the Act, might unduly complicate the drafting of clear destinations and lead to litigation over questions of construction. For example, a destination expressed to be "for the benefit of the wife of the assured, whom failing, for his issue" raises *inter alia* the question of whether the policy moneys are to be distributed among issue stirpitally or *per capita*[35]. This, and other possible/

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35 See *Boyd's Tr. v. Shaw*, 1958 S.C. 115.

questions of construction to which we refer later,[36] could, however, be resolved by the inclusion in the amending Act of certain basic rules governing the construction of destinations framed in general terms. The rule applicable to a destination to "issue" might be expressed in the terms suggested in paragraph 24(e)(iv), infra. The opening saving clause of the rule would enable "issue" to be construed in the limited sense of "immediate issue" if the context so required;[37] otherwise the rule affirms the existing law[38] and is consistent with the new statutory rule for the division of legitim among issue.[39] It may be thought unnecessary to include any such rule in an amending Act, but, if the Act is to be extended to include as beneficiaries "issue" of assured persons, we suggest that the inclusion of the above rule will save draftsmen time and trouble by providing a printed reminder of the effect of a destination to "issue".

(d) We consider the existing limitation of descendant beneficiaries to "children" as too restrictive. It seems to us to be desirable to permit policies of assurance to be taken out for the benefit not only of children of the assured but also of remoter issue, e.g., issue of predeceasing children. We believe that this extension would be welcomed and widely used. We, therefore, recommend that the Act be extended to include as beneficiaries "issue" of assured persons and that the amending Act include the rule above mentioned.[40] It is to be noted that assured persons who wish to exclude their illegitimate issue from benefit under policies effected on or after 25th November 1968 must expressly exclude them.[41]

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36 See para. 17 (b) (iii) and (iv), infra.

37 See Henderson, cit. supra, p. 181: Bailey's Trs. v. Bailey, 1954 S.L.T. 282, per L.P. (Cooper), at p. 287: Stirling's Trs. v. Legal and Gen. Assce. Co. (O.H.), 1957 S.L.T. 73.

38 See Boyd's Tr. v. Shaw, 1958 S.C. 115, at pp. 120 and 123-4.

39 Succession (Scotland) Act 1964, c.41, s. 11, as amended by Law Reform (Misc. Provs.)(Sc.) Act 1968, c.70, s.3 and Sch. 1, paras. 3-5.

40 See para. 24(d) and (e) (iv), infra.

41 Law Reform (Misc. Provs.)(Sc.) Act 1968, c.70, ss.5(1) and 22(5).

16. Further Extension of Beneficiaries under the Act.

It has been suggested to us that the protective provisions of the Act should be applied to policies taken out for the benefit of "any other person". One argument in favour of such application is that, if it is considered that the statutory protection should be extended to cover the interests of descendants, it should logically be further extended for the protection of all dependants of the assured. "Issue" would not include step-children dependent upon the assured. The unmarried sister who is keeping house for her brother is another example of a person with a prima facie good claim to the protective benefit of the statutory trust. But to limit the statutory beneficiaries to "dependants" of the assured would create uncertainty, and probably litigation, on the question of whether or not beneficiaries qualified as such "dependants".[42] There is, moveover, another reason why we consider that the statutory beneficiaries should not be extended beyond "issue" of the assured. The irrevocability of a reasonable post-nuptial provision made by a husband and father for his wife and children on his death is based upon legal recognition of the natural obligation of the man to make such provision.[43] No such obligation is owed to other dependants. In restricting the objects of the assured's bounty to his wife and children, the Act recognises the natural obligation owed by the assured to such persons. But life policies taken in favour of persons other than wives or children are, in the eyes of the law, purely gratuitous and do not fall within the purview of the Act. The introduction of representation in legitim claims by the Succession (Scotland) Act 1964 founds an argument that legal recognition of the natural obligation of a man to make/

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42 See Robertson's J.F. v. Robertson, 1968 S.L.T. 32.

43 Ersk., I, 6, 30: Bell, Com., I, 687-8; Galloway v. Craig (1861) 4 Macq. 267.)

reasonable post-nuptial provision for his family now extends to the issue of such of his children as pre-decease him. The inclusion of "issue" as beneficiaries under the Act may, therefore, be justified as a natural corollary of representation in legitim; but the admission as statutory beneficiaries of all persons whom the assured may wish to benefit would involve a radical departure from the original purposes of the Act, since the element of onerosity is wholly absent.

17. Construction of Destinations.

(a) There are no reported Scottish cases relating to the construction of destinations in policies covered by the Act[44]. There are, however, a number of reported English decisions, to some of which we later refer, which demonstrate the kind of problems which can arise in deciding who are entitled to take under such policies. There is one unreported Outer House decision in Scotland,[45] and it seems reasonable to assume that the same constructional problems have arisen in Scotland as in England but that ours have generally been settled by agreement or arbitration. Our first impression was that it was not a practical proposition to legislate for the purpose of clarifying ab ante points of construction, and that it should continue to be left to parties to see that the terms of policies effected by them under the Act adequately expressed their intentions. On reflection, however, we are inclined to think that the inclusion in an amending Act of certain basic rules for the guidance of draftsmen in framing destinations would serve a useful purpose. There may be many policies effected by assured persons without the intervention of solicitors. The enactment of rules of/

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44 Note. The question in Chrystal's Tr. v. Chrystal, 1912 S.C. 1003, and in Dickie's Trs. V. Dickie (1892) 29S.L.R. 908, was whether or not the policy was covered by the Act.

45 Watson and Ors., Petrs., (1944), referred to in MacGillivray on Insurance Law, 5th ed., para. 1442.

construction would bring them to the attention of the representatives of assurance companies who draft the terms of policies under the Act and would enable them to inform each assured of the legal effect of the destination and to redraft it to comply with his instructions if required.

(b) The normal rule, that vesting in the institute is suspended until the death of the assured (in the case of a "whole life" policy) by the presence of a survivorship clause[46] or destination-over,[47] does not require statutory authority; but the following destinations, which are in common use, do require consideration:-

(i) For the benefit of his wife, A.B.

An English decision,[48] in which a destination in these terms (i.e., to a named wife and to no other person) was construed as conferring upon the named wife an absolute vested interest in the policy as at the date thereof, accords, in our opinion, with Scots law. If a wife is referred to by name in a policy, there can be no room for doubt as to her identity. Accordingly, a wife other than the named wife cannot acquire rights under that policy.

(ii) For the benefit of his wife (un-named).

Two points arise under such a destination viz.,-

(1) Is the wife's interest in the policy contingent upon her being alive when the policy matures?

(2) Should "wife" be construed as referring only to the assured's wife at the date of issue of the policy?/

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46 In re Fleetwood's Policy [1926] Ch. 48.

47 Dickie's Trs. v. Dickie (1892) 29S.L.R. 908: In re Griffiths' Policy [1903] 1 Ch. 739.

48 Cousins v. Sun Life Assce. Soc. [1933] 1 Ch. 126.

It has been held in England that the wife's right under such a destination in a "whole life" policy was contingent upon her survival of her husband[49]. This decision was doubted in Cousins' case;[50] but the assured had married once only and his wife had predeceased him. Accordingly, in Cousins' the competing claims were those of the wife's executors and the assured himself. The court was not concerned with the claim of a second wife who had survived her husband. The addition of a name to the description "wife" in a policy may be purely fortuitous but, if named, it seems unreasonable to adject to her right a condition of survivance which is not expressed. On the other hand, we think it reasonable to imply survivorship if the wife is not named. The primary purpose of effecting a "whole life" policy under the Act must be to make some financial provision for one or more of the dependants of the assured after his death. In a destination to "his wife and children" we favour a construction which will restrict the children who take to those who survive the date when the policy matures.[51] It seems only logical to imply the same condition in the case of an un-named wife. The result of such an implication is to preserve the whole proceeds of the policy for surviving beneficiaries. Turning to the second question as to the meaning of "wife", we approve an English decision that a destination "for the benefit of his wife and children" referred to any wife and children who survived the assured.[52] The effect of this decision is to substitute "widow" for "wife" in all simple destinations/

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49 In re Collier [1930] 2 Ch. 37.

50 [1933] 1 Ch. 126, at pp. 135, 137 and 140.

51 See sub-para. (b)(iv), infra.

52 In re Browne's Policy [1903] 1 Ch. 188.

to an un-named wife.[53] In Cousins' case[54] Lord Hanworth referred to In re Browne as having been "decided upon the construction of that policy", but examination of Browne's case demonstrates that Kekewich J. received no assistance from the rest of the policy in deciding whether or not "his wife" meant "his wife at the date of the policy" or "such wife as may survive him". After referring to a presumption 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", the judge went on to say that "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."[55] This question of construction has no doubt arisen many times in Scotland. In policies under the Act, unlike testamentary deeds,[56] assistance in construing the destination clause cannot generally be obtained from other parts of the policy. We do not think that it would be reasonable, in the absence of other indicia, to construe a destination to an un-named wife with a destination-over to children or issue as including a second wife who survived the assured. We have found no reported decisions in which a second wife has been held to be the object of such a destination and there are several in which the second wife has been excluded.[57]

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53 See In re Parker's Policies [1906] 1 Ch. 526.
54 [1933] 1 Ch. 126, at p. 135.

55 [1903] 1 Ch., at p. 190.
56 See, e.g., Burns's Trs., 1961 S.C.17.
57 See MacGillivray on Insurance Law, 5th ed., para. 1434, footnotes 80, 81 and 82.

But, when an un-named wife is instituted simpliciter or jointly with children or issue,[58] we consider that a construction which (a) makes vesting in the wife contingent upon her being alive at the date when the policy matures, and (b) permits any wife who is alive at that date to take under the policy, would more often coincide with the intention of the assured than one which (a) benefits the estate of a predeceasing wife to the prejudice of surviving children or issue, if jointly instituted with her, and (b) restricts the benefit to the wife who answers that description at the date when the policy is issued. Upon that view we suggest, for the removal of doubt, the inclusion in the recommended amending Act of express provision to that effect.[59] We do not consider that the suggested rule at paragraph 24(e)(ii) would result in the proceeds of such a policy being liable for estate duty under the new section 2(1)(g)(i) of the 1894 Act,[60] as "property of which the deceased was not at the time of his death competent to dispose and which on his death devolves in accordance with the terms of a special destination contained in any deed." We read this sub-section as applicable to a joint destination of a contractual nature, and therefore irrevocable, which operates to pass the deceased's share of the property on his death to the other surviving party or parties named in the destination. If a rule to cover a named beneficiary were also to be included in the Act,[61] it would then be clear that the assured must name any beneficiary/

58 See sub-para. (b)(iv), infra.
59 See para. 24(e)(ii), infra.
60 See Clause 36(3) of the Finance Bill, 1969.
61 See para. 24(e)(i), infra.

upon whom he wishes to confer an immediate indefeasible interest, whether for the purpose of avoiding estate duty liability or otherwise.

(iii) For the benefit of his "children" (alternatively, "issue").

Although it seems to be settled in England that, when children are instituted as a class, only those who are alive when the policy matures are entitled to share in the proceeds,[62] we think that it is at least arguable that an unconditional destination to "children" or "issue" in such a policy operates the vesting of rights under the policy in the class of beneficiaries on the birth of the assured's first child and that, in the absence of a clause of surivorship or of destination-over, rights vested in "children" or "issue" will not be extinguished by the death of such beneficiaries before the policy matures. This would result in division of the policy proceeds among surviving issue and the heirs of other issue who died before the policy matured without themselves leaving issue. We believe that persons who effect whole life policies under the Act for the benefit of their "children" or "issue" will generally wish to benefit only the children or issue who survive them. If they wish to confer indefeasible vested rights under such policies during their lifetime, the terms thereof are easily expanded to achieve that object. We, therefore, consider that in the ordinary case a simple destination to "children" or "issue" should be construed as if it contained a condition of survivorship.[63] This is consistent/

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62 See In re Seyton (1887) 34 Ch.D. 511, per North J., at pp. 515-6: In re Griffiths' Policy [1903] 1 Ch. 739, per Joyce J., at p. 743.

63 See para. 24(e) (iii), infra.

with our recommendation in the immediately preceding sub-paragraph that "wife" per se should mean any wife who survives the assured. The effect of the suggested rule of construction would be to suspend vesting in the class until the policy matures, unless the terms of the destination to "children" or "issue" were extended to indicate earlier vesting. If our interpretation of the Finance Bill 1969 is correct,[64] suspension of vesting would not affect liability for estate duty. We believe that it is preferable that "children" or "issue" in a simple destination should exclude all issue who die before the policy matures, rather than include such issue and thereby benefit their heirs to the prejudice of surviving issue of the assured. If our belief is ill-founded, the terminolgy of Clause (e)(iii) in paragraph 24 supra would require to be altered to cover "all children or issue of the assured, born before the date when the policy matures or is earlier surrendered, whether or not they survived that date". By parity of reasoning Clause (e)(ii) should also be altered to vest an interest in the policy absolutely in that un-named individual who answers the description of "wife" or "husband" at the date when the policy is executed.

(iv) For the benefit of his wife "and children" (alternatively, "and issue").

This destination may be used by an assured who intends that the policy proceeds should be distributed/

64 See paras. 8 and 17 (b) (ii), supra.

equally among his widow and surviving children[65] (or issue). A destination to "his wife and his issue" should result in the widow and surviving children taking equal shares, with the issue of predeceasing children inheriting per stirpes the shares of their respective parents. There is, however, a number of cases in which the word "and" in testamentary dispositions has been construed in the sense of "whom failing" on the ground that a testator is unlikely to intend to institute children equally with a parent.[66] But policies under the Act are not testamentary deeds and a husband or wife may well wish the proceeds of such a policy to be distributed equally among the surviving spouse and children as his surviving dependants. The shortest method of producing that result is to conjoin the different beneficiaries with the word "and". In our opinion that method should be encouraged by enacting a rule that will ensure that in such a case the proceeds are shared equally.[67] An assured who intends to institute his children or issue conditionally to his wife has then fair warning that he must use "whom failing" or words to that effect.

(c) We emphasize that our recommended rules of construction[68] only apply to the simple destinations referred to in sub-paragraphs (b) (i) to (iv), supra, and do not affect destinations which include survivorship clauses or destinations-over, which must speak for themselves. In/

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65 See, e.g., In re Davies' Policy Trusts [1892] 1 Ch. 90.

66 See Black's Trs. v. Nixon, 1931 S.C. 590, and Henderson on Vesting, 2nd. ed., pp. 50-2; also Munro v. Munro (O.H.), 1962 S.C. 599.

67 See para. 24(e) (v), infra.

68 See para. 24(e), infra.

the Griffiths' case[69] a man, who had a wife and four children, effected a policy under the English Act "for the benefit of his wife, or if she be dead between his children in equal proportions". The wife died, having had four more children after the policy was issued. The assured remarried and had one child by his second wife. On his death, survived by his second wife and his nine children, the court held that the policy moneys fell to be distributed equally among the nine children, the widow being excluded. Prima facie a construction which allowed the child of the second marriage to participate, while excluding his mother, may seem odd; but the child of the second marriage qualified as a "child" of the assured and the existence of four children by his first wife at the date of the policy indicated that the children's right was contingent only upon the death of the first wife. In the case of Watson[70] Lord Patrick also held a second wife to be excluded by the fact that the assured's "wife" was expressly instituted "in the event of her surviving" the assured, and "failing her", the assured's children were to take. Our proposed rules are confined to unconditional destinations and will not, therefore, affect such cases, so that an assured, who prefers any wife who may survive him to his children, must use language indicative of that purpose.

Termination of Trust Provisions.

18. The Scottish Act, unlike the English, expressly declares that "such policy .... shall not .... be revocable as a donation". It is doubtful whether this implies that the trust/

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69 [1903] 1 Ch. 739.

70 See MacGillivray, cit. supra, para. 1442.

cannot be brought to an end during the life-time of the assured by all possible beneficiaries discharging their rights under the policy. Policies effected under the Scottish Act constitute post-nuptial provisions for dependants. In old cases, decided before the First Division in Beith's Trs.[71] cast out the Menzies v. Murray[72] doctrine of the irrevocability stante matrimonio of ante-nuptial marriage contract provisions, post-nuptial provisions were held to be irrevocable stante matrimonio[73]. In Gillon's Trustees v. Gillon[74] Lord M'Laren reserved his opinion on the irrevocability of post-nuptial provisions; but, on the principle of irrevocability of post-nuptial provisions, it has been decided in the Outer House that a wife may not assign her rights under a policy effected under the Scottish Act.[75] In a much later case[76] it was conceded that a wife could not assign or charge her interest under a trust created by a policy falling under the Scottish Act, whereas she could do so under the English Act. In all these cases the purpose of the assignation was to secure the husband's debts, but this is not the ratio decidendi. As the law stands, while the trustee holding such a policy may surrender it in the interest of the beneficiaries thereunder,[77] he cannot otherwise deal with it, even with the consent of all beneficiaries. The concept of the irrevocability of the contract as the counterpart for the protection afforded against creditors of the assured has been regarded as precluding termination of the trust purposes by agreement between the beneficiaries and the assured.[78]

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71 Beith's Trs. v. Beith, 1950 S.C. 66.
72 1875, 2 R. 507.
73 Low v. Low's Trs., 1877, 5 R 185: Peddie v. Peddie's Trs., 1891, 18 R. 491: Barras v. Scottish Widows' Fund Society, 1900, 2F. 1094.
74 1903, 5 F. 533, at p. 539.
75 Scottish Life Assce. Co. Ltd. v. John Donald Ltd. (O.H.), 1901, 9 S.L.T. 200: The Edinburgh Life Assce. Co., v. Balderston (O.H.), 1909, 2 S.L.T. 323.
76 Pender v. Commercial Bank of Scotland Ltd., 1940 S.L.T.306.
77 Schumann v. Scottish Widows' Fund Soc., 1886, 13 R. 678.
78 See Barras v. Scottish Widows' Fund Society, cit. supra.

19. The question now is whether the law should be left in this state, whereby a beneficiary cannot during the lifetime of the assured deal in any way with his interest under such a policy, even if the interest is vested absolutely in the beneficiary. The old principle of matrimonial trust protection has been so eroded that probably the only matrimonial provision, which cannot in any circumstances be terminated stante matrimonio by consent of all parties interested, is a subsisting alimentary liferent created by ante-nuptial marriage contract.[79] The ratio decidendi of Beith's Trs.[71] is inconsistent with the older decisions that a wife may not stante matrimonio discharge matrimonial provisions in a post-nuptial settlement in her favour.[73] The evolution of the status of the married woman to one of complete independence quoad property rights has eliminated the old concept of the need to protect her from the machinations of her husband and from the demands of his creditors. Since she now has an unfettered right to deal with her own property, we can find no justification for limiting her right to deal with her interest in a policy falling under the Act. Moreover, assignation of rights under such a policy in security for an immediate loan of money to the assured may prevent his sequestration and ultimately produce greater financial benefit to a wife than payment of the surrender value.

20. While it may be that the judical decisions which affirmed the limitation on assignation would now be overruled if the question were to be tested, we consider that advantage should be taken to include in the amending legislation, which we recommend, a subsection in terms which will affirm the right/

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79 Kennedy v. Kennedy's Trs., 1953 S.C. 60; cf., Beith's Trs., cit. supra: Findlay's Petitioner, 1962 S.C. 210.

of inter alios married women to renounce, discharge or assign their interest under such policies.[80] If all adults with an interest in such a policy discharge or renounce their interests, there will be no trust purposes left to be fulfilled and no beneficiaries for whom the trustee is bound to continue to hold the policy. The assured is then free to hold it as his own property, to surrender it at will, or to assign it in his own interests.

Variation of Settlement on Divorce.

21. There is no doubt that a policy within the Act is a "settlement made .... during the marriage", which the court has power to vary on divorce.[81] The English courts have similar powers.[82] If the Act were to be amended to permit a policy to be taken out before marriage, it would be a question of fact in each divorce case whether or not the policy was a "settlement made in contemplation of .... the marriage"[81] (the underlining is ours.)

Trustees.

22. Another difference between the Scottish and English Acts is that the former in limine vests the policy in trust in the assured and his legal representatives for the purposes of the policy, whereas the English Act only does so in default of the appointment of another trustee.[83] Since the Scottish Act also permits the appointment of a third party trustee along with, or in lieu of, the assured, the difference in approach is unimportant.

23. There is express provision in the English Act for the appointment of a new trustee or trustees after the death of "the insured", but the terms of Section 22 of the Trusts (Scotland) Act 1921[84] render such provision unnecessary in Scotland./

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80 See para. 24(f), infra.

81 Succession (Scotland) Act 1964, c. 41. s. 26(1) (b).

82 Matrimonial Causes Act, 1965, c. 72, s. 17(1): Lort-Williams v. Lort-Williams [1951] P.395.

83 See paras. 2 and 3, supra.

84 11 and 12 Geo. V. c.58.

Recommendations

24. Our recommendations, which will be reconsidered in the light of any comments received, are that the Scottish Act should be amended to the following effect:-

(a) To permit women to effect policies under the Act. (*vide* para. 12, *supra*.)

(b) To permit any man or woman, whether married or not, to effect policies under the Act. (*vide* para. 13, *supra*.)

(c) By adding the phrase "or any of them" after the recital of the authorised beneficiaries, in order to emphasize that an assured may select specific beneficiaries, either initially by naming them in the policy or subsequently by the exercise of a power of appointment reserved by him in the policy. (*vide* para. 14, *supra*.)

(d) By substituting the word "issue" for "children" throughout the Act. (*vide* para. 15, *supra*.)

(e) By enacting the following rules of construction for destinations in policies under the Act (*vide* para. 17, *supra*):-
"Subject to any express or implied provision to the contrary in a policy of assurance to which this Act applies, -

(i) where a policy is expressed to be wholly or partly and unconditionally for the benefit of a beneficiary who is specified by name therein, an interest in the policy shall vest absolutely in that beneficiary at the date of its execution;

(ii) where a policy is expressed to be wholly or partly and unconditionally for the benefit of a "wife" or "husband" of the assured, without further identification, "wife" or "husband" shall mean the wife or husband of the assured, if any, who is living and in that degree of relationship to the assured at the time when the policy matures or is earlier surrendered;

(iii) where a policy is expressed to be wholly or partly and unconditionally for the benefit of "children" or "issue" of the assured, "children" or "issue" shall mean respectively the children or issue of the assured, if any, who are living at the time when the policy matures or is earlier surrendered;

(iv) where a policy is expressed to be wholly or partly for the benefit of "issue" of the assured and two or more of his issue have rights under the policy at the time when the policy matures or is earlier surrendered, then -

(a) where all the issue then alive are in the same degree of relationship to the assured, they shall take equal shares of the moneys due under the policy to the issue; and

(b) in any other case, the moneys due under the policy to the issue shall be divided among them in the manner provided for the division of legitim by section 11(2)(b) of the Succession (Scotland) Act 1964;

(v) where a policy is expressed to be unconditionally for the benefit of more than one beneficiary or class of beneficiary and the different beneficiaries or classes of beneficiaries are conjoined in the policy by the word "and", the policy moneys shall be divided equally among all the beneficiaries who have rights under the policy at the time when it matures or is earlier surrendered."

(f) By adding a subsection along the following lines:-

"Any adult beneficiary may discharge, renounce or assign the interest, whether vested or contingent, which he or she has under a policy to which this Act relates, notwithstanding that the trust/

purposes may be exhausted as a result thereof."
(*vide* para. 20, *supra*.)

25. We invite comments on and criticisms of our tentative proposals particularly on the necessity or desirability of including rules of construction in amending legislation. We believe that something on the lines of our Rule (iv), *supra*,[85] is essential if "issue" are to be included as statutory beneficiaries, but it may well be thought that the other rules in paragraph 24(e), *supra*, are unnecessary or undesirable.

28th July 1969.

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85 See para. 24(e), *supra*.