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*Feb. 19
June 6

IN THE MATTER OF the Estate of Everett George Kerslake, late of the City of Toronto, in the County of York, Veterinary Surgeon, deceased.

MILDRED LOUISE KERSLAKE (*Applicant*) ..... APPELLANT;

AND

ALISON BRUCE GRAY (otherwise known as Alison Bruce Kerslake) (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Dependants' relief—What constitutes "estate" of testator—Insurance policies payable to ordinary beneficiary—The Dependants' Relief Act, R.S.O. 1950, c. 101, ss. 1(e), (f), 2(1).

Insurance—Life insurance—Ordinary beneficiary—Whether proceeds of policy part of "estate" of insured for purposes of The Dependants' Relief Act, s. 2(1)—The Insurance Act, R.S.O. 1950, c. 183, s. 161.

The proceeds of an insurance policy payable to an ordinary beneficiary do not form part of the "estate" of the insured within the meaning of *The Dependants' Relief Act.* A dependant under that Act is entitled to look only to the estate that the personal representatives of the deceased are entitled to administer, and those representatives have no claim upon such insurance moneys.

Per Cartwright J., *dissenting*: When the definitions of "estate", "testator" and "will" in the Act are properly construed, and read with the relevant provisions of *The Insurance Act,* the result is that insurance in such circumstances is to be deemed part of the estate for purposes of the Act, just as it is available to creditors of the estate. *Dictum* in *Deckert v. The Prudential Insurance Company of America,* [1943] O.R. 448 at 456-7, approved with a reservation; *In re Roddick* (1896), 27 O.R. 537, explained; *Re Benjamin* (1926), 59 O.L.R. 392; *Re Isaacs,* [1954] O.R. 942 at 956, disapproved. The position of an ordinary beneficiary designated in a policy of life insurance is analogous to that of a legatee or of a volunteer in whose favour a general power of appointment is exercised, and while on the death of the insured the beneficiary may enforce payment from the insurer he will hold the proceeds of the policy subject to the possible claims of creditors or dependants in the same way as if he had received them as a specific legacy.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming a judgment of McDonagh J. of the Surrogate Court of the County of York. Appeal dismissed, Cartwright J. dissenting.

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Cartwright JJ.

(1) [1955] O.W.N. 606, [1955] 4 D.L.R. 326.

F. A. Brewin, Q.C., for the applicant, appellant.

Terence Sheard, Q.C., for the respondent.

The judgment of Kerwin C.J. and Rand, Kellock and Locke JJ. was delivered by

KELLOCK J.:—This appeal arises under the provisions of *The Dependants' Relief Act*, R.S.O. 1950, c. 101, the contention of the appellant being that the "estate" of the testator for the purposes of the statute must be taken to include the proceeds of certain policies of insurance upon the life of the deceased Everett George Kerslake, originally payable to the estate of the deceased but subsequently changed by him by declaration under the Ontario *Insurance Act* and made payable to the respondent, an ordinary beneficiary. The appellant is the lawful wife of the deceased.

The provisions of the statute upon which the appellant particularly relies are as follows:

> 1. (*e*) "testator" means a person who by deed or will or by any other instrument or act so disposes of real or personal property, or any interest therein, that the same will pass at his death to some other person;
>
> (*f*) "will" means any deed, will, codicil, instrument or other act by which a testator so disposes of real or personal property that the same will pass at his death to some other person.
>
> 2.—(1) Where it is made to appear to a judge of the surrogate court of the county or district in which a testator was domiciled at the time of death that such testator has by will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them, the judge may make an order charging the whole or any portion of the estate in such proportion and in such manner as to him may seem proper, with payment of an allowance sufficient to provide such maintenance.

The appellant contends that as the result in fact of the declarations is that the deceased has so disposed of his property that adequate provision has not been made for the future maintenance of the appellant as one of his dependants, the "estate", with respect to which the judge is empowered to make an order by virtue of the subsection, must, in the light of the definitions in s. 1, be taken to include the insurance moneys.

The contention for the respondent, on the other hand, is that there is no sufficient basis in the statute for such a view and that "estate" means such assets only as the personal representatives of the deceased are entitled to administer.

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In support of her position, the appellant points out, in the first place, that while s. 164 of *The Insurance Act,* R.S.O. 1950, c. 183, contains an express declaration that insurance moneys payable to preferred beneficiaries do not form part of the estate of the insured, there is no similar expression in s. 161. While that is so, I am of opinion that s. 161 operates to the same effect as regards ordinary beneficiaries as s. 164 does in the case of preferred.

By subs. (1) of s. 161, it is provided that the insured may designate the beneficiary by the contract or by declaration and may subsequently change the beneficiary, and subs. (2) enables the beneficiary, at the maturity of the contract, to enforce for his own benefit payment of the insurance moneys. It is significant that it is specifically provided by the subsection that "the insurer shall be entitled to set up any defence which it could have set up against the insured or his personal representatives". This provision emphasizes the status of the beneficiary in relation to his claim for payment.

It has for a long time been uniformly held in Ontario that insurance moneys payable to an ordinary beneficiary do not form part of the estate of the insured. Whatever criticism might have been directed at the decisions in *In re Roddick* (1); *Re Benjamin* (2), and *Re Jones* (3) (and I am not suggesting that the appellant is well founded in his criticisms of them), there is no basis for criticism since the enactment of subs. (2) of s. 161 by 1946, c. 42, s. 6.

In considering the meaning of the word "estate" in *The Dependants' Relief Act,* it is of some relevance to refer to certain provisions of *The Surrogate Courts Act,* R.S.O. 1950, c. 380. By s. 55 the Court is concerned only with "the property which belonged to the deceased at the time of his death". Further, by s. 77(1), it is provided that the fees payable upon the value of "the estate" of the deceased shall be calculated upon the value of "the whole estate". It has been held in *Re Farnsworth* (4) that insurance moneys payable to an ordinary beneficiary do not enter into the valuation of the estate under this section.

(1) (1896), 27 O.R. 537.
(2) (1926), 59 O.L.R. 392.
(3) [1933] O.W.N. 243.
(4) [1936] O.W.N. 48.

Whatever bearing the above statute may or may not have upon the issue here in question, I am, in any event, of opinion that there is in *The Dependants' Relief Act* itself clear indication that the contention of the appellant is erroneous. Section 10 is as follows:

> Subject to section 8, the amount or value of any allowance ordered to be paid, together with the value of any benefits given under the will of the testator, *shall not exceed the amount to which the person in whose favour the order is made would have been entitled if the testator had died intestate.*

(The italics are mine.)

Counsel for the appellant contends that the word "intestate" must be interpreted in the light of the definitions of "testator" and "will" in s. 1, and that by so doing the result for which he contends is attained. I am unable to agree. In my opinion the word "intestate" is not to have read into it other than its ordinary meaning, and when so regarded it is perfectly clear that a dependant is entitled to look only to the estate which the personal representatives of the deceased are entitled to administer. They, of course, have no claim upon moneys payable to an ordinary beneficiary under a policy of insurance except where there may exist some ground upon which the designation of the beneficiary may be set aside. It is not suggested that any such ground exists in the present case.

Again, by s. 8, it is provided that where a dependant has given personal assistance or the gift or loan of money or real or personal property toward the advancement of the testator in any business or occupation, the judge may place a money value upon the same and may direct that

> the applicant shall rank as a creditor upon the estate therefor, in the same manner and to the *same extent* as a judgment creditor upon a simple contract debt . . .

The section goes on to provide that

> . . . except as to the amount so fixed as the value of such assistance or as the amount or value in money of such gift or loan *an allowance payable under this Act shall be postponed to the claims of creditors of the estate.*

(The italics are mine.)

This section would seem in the clearest terms to indicate that the sole source from which any allowance granted under the Act is to be satisfied is the assets to which creditors are entitled to look. The assets to which creditors

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are entitled to look are the assets which the personal representative of a testator is entitled to administer. Instead of containing any provision that a dependant is entitled to a higher right than creditors, as is here contended by the appellant, the statute is express in placing the dependant in a less favourable position.

In my opinion the appeal fails and must be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The question raised on this appeal is as to whether the proceeds of two policies of insurance on the life of the late Everett George Kerslake, hereinafter referred to as "the deceased", form part of his estate within the meaning of s. 2(1) of *The Dependants' Relief Act*, R.S.O. 1950, c. 101.

The facts are not in controversy. The appellant is the widow of the deceased. In 1949 the deceased obtained, in the State of Idaho, what purported to be a decree of divorce and on July 25, 1950, went through a form of marriage with the respondent; but it is conceded, for the purposes of this appeal, that the domicile of the deceased was at all times in Ontario and that his marriage to the respondent was not valid by the laws of that Province.

The policies in question were issued under contracts of group life insurance. In each case the certificate issued to the deceased bore the date July 1, 1946, and stated that the moneys to become payable on his death were to be paid to his estate.

On November 16, 1950, the deceased executed declarations naming the respondent as beneficiary in each of the policies and reserving his right to change the beneficiary.

On November 10, 1950, the deceased made a will reading, so far as is relevant, as follows:

> I GIVE, DEVISE AND BEQUEATH the whole of my estate of whatsoever nature and kind and wheresoever situate and over which I have any power of appointment to my second wife Alison Bruce Kerslake (formerly Alison Bruce Gray) for her own use absolutely, and I appoint her the sole executrix of this my Will.

The deceased died on July 22, 1953, and probate of his will was granted to the respondent on February 5, 1954.

Apart from the policies in question, certain other policies payable to the appellant and another policy as to which other litigation is pending, the deceased died insolvent.

The appellant's application for an allowance under the provisions of *The Dependants' Relief Act* was heard by His Honour Judge McDonagh in the Surrogate Court of the County of York. That learned judge was of the opinion that in the circumstances outlined above the proceeds of the policies in question did not form any part of the estate of the deceased and dismissed the application. His judgment was affirmed by the Court of Appeal.

The appellant contends that the proceeds of the policies in question form part of the "estate" of the deceased within the meaning of that term as used in *The Dependants' Relief Act*. The argument proceeds in this way: Apart from the declarations executed by the deceased on November 16, 1950, the proceeds of the policies would have formed part of his estate. Each declaration was a "will" as defined by s. 1(*f*) of *The Dependants' Relief Act,* being an "instrument by which a testator so disposes of . . . personal property that the same will pass at his death to some other person". The deceased in executing the declaration was a "testator" as defined by s. 1(*e*) of *The Dependants' Relief Act,* being a "person who by . . . instrument . . . so disposes of . . . personal property, or any interest therein, that the same will pass at his death to some other person". Up to this point the appellant's argument appears to be sound; it continues, the purpose of the Act is to make available for the maintenance of dependants such part of the estate of the testator as he has disposed of by "will" as defined in the Act; this purpose appears from the wording of s. 2(1):

> 2.—(1) Where it is made to appear to a judge of the surrogate court of the county or district in which a testator was domiciled at the time of death that such testator has by will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them, the judge may make an order charging the whole or any portion of the estate in such proportion and in such manner as to him may seem proper, with payment of an allowance sufficient to provide such maintenance.

which must be considered with s. 10:

> 10. Subject to section 8, the amount or value of any allowance ordered to be paid, together with the value of any benefits given under the will of the testator, shall not exceed the amount to which the person in whose favour the order is made would have been entitled if the testator had died intestate.

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The Dependants' Relief Act is, in the appellant's submission, a remedial statute and under s. 10 of *The Interpretation Act*, R.S.O. 1950, c. 184, "shall . . . receive such fair, large and liberal construction and interpretation as will best attain the object of the Act according to the true intent, meaning and spirit thereof"; this requires that the word "estate" as used in s. 2(1) and elsewhere in the Act be interpreted as including the property disposed of by the testator by any instrument falling within the definition of "will" in s. 1(*f*) which but for such disposition would have formed part of his estate, and that the word "intestate" as used in s. 10 be interpreted as "without having disposed of any property by any instrument falling within the definition of 'will' in s. 1(*f*)".

To this it is objected that such an interpretation involves adding to clauses (*e*) and (*f*) of s. 1 some such words as "and the words 'estate' and 'intestate' shall have corresponding meanings". As long ago as 1865, in *The Local Board of Health for the District of Wakefield v. The West Riding and Grimsby Railway Company* (1), Cockburn C.J. said:

> I hope the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion.

The hope of the learned Chief Justice has not been realized, and we must do our best not to be led into confusion.

With some hesitation, I have reached the conclusion that up to this point the appellant's argument is sound and that when *The Dependants' Relief Act* is read as a whole it becomes necessary to give to the words "estate" and "intestate" the meanings for which Mr. Brewin contends. To do otherwise would, in the case at bar and in many cases, make the application of the Act depend upon the form used by a testator to dispose of his assets. If, for example, in the case at bar, the deceased instead of naming the respondent as beneficiary in the declarations he attached to his certificates had simply stated in his will that everything of which he could dispose by will was to be given to her it would, I think, be clear that the proceeds of the policies would have been subject to s. 2(1) of the Act. "Estate" is not a word of single and precise meaning and in the context of this Act, read as a whole, it appears to me to mean "that

(1) (1865), 6 B. & S. 794 at 801, 122 E.R. 1386.

which would have formed the property of the deceased at the time of his death if he had made no 'will' as defined in the Act". "Intestate" on the other hand is a word of plain and definite meaning, that is "not having made a will"; but it also must be interpreted in context and the whole Act proceeds on the basis that "will" includes all those methods of disposition set out in s. 1(*f*). To construe the word "intestate" in s. 10 in the narrow sense of "not having made a will executed in accordance with the provisions of *The Wills Act*" would be to nullify the purpose, which appears from the Act as a whole, to reach all property of the deceased so disposed of by him that it will pass on his death to some other person.

Up to this point I have been considering only the wording of *The Dependants' Relief Act,* read as a whole, and it is now necessary to turn to an argument of the respondent which may be summarized as follows: It is said that, in the law of Ontario, it is well settled that the proceeds of a policy of life insurance made payable, either in the policy as originally issued or by declaration, to a named ordinary beneficiary do not form part of the estate of the insured and are not subject to the claims of his creditors; that when enacting *The Dependants' Relief Act* the Legislature must be assumed to have known this to be the law; and that the intention to alter the law in this respect should not be imputed when express words are not used and indeed insurance is nowhere mentioned in the Act. To this the appellant replies that the law of Ontario is not as stated and that such cases as appear to have so held were wrongly decided.

In approaching the problem posed by these conflicting arguments it is necessary to bear in mind the particular facts with which we are concerned. Nothing seems to turn on the fact that the policies in question were contracts of group life insurance. Section 137(2) of *The Insurance Act,* R.S.O. 1950, c. 183, is as follows:

> (2) In the case of group life insurance the term "insured", in the provisions of this Part relating to the designation or appointment of beneficiaries and the rights and status of beneficiaries, means the person whose life is insured.

It is conceded that the respondent is an "ordinary beneficiary". Section 158(3) of *The Insurance Act* is as follows:

> (3) Ordinary beneficiaries are beneficiaries who are not preferred beneficiaries, beneficiaries for value or assignees for value.

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Section 161(1) of *The Insurance Act* reads:

> 161.—(1) Subject to the rights of beneficiaries for value and assignees for value and to the provisions of this Act relating to preferred beneficiaries, the insured may designate the beneficiary by the contract or by a declaration, and may from time to time by any declaration appoint, appropriate or apportion the insurance money, or alter or revoke any prior designation, appointment, appropriation or apportionment, or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, and may surrender the contract to the insurer, borrow from the insurer upon the security of the contract, receive the surplus or profits for his own benefit, and otherwise deal with the contract as may be agreed upon between him and the insurer.

It is clear that the deceased up to the moment of his death had power to change the beneficiary named in the declarations and to make the policies payable to anyone else he pleased or to his estate.

It will, I think, be helpful to first consider what, in these circumstances, the legal position would have been prior to the amendment of the Ontario *Insurance Act* by c. 42, s. 6, of the statutes of Ontario of 1946 whereby subs. (2) was added to s. 161. After considering all the cases referred to by counsel it is my opinion, subject to a reservation to be mentioned shortly, that that position was correctly stated by Plaxton J. in *Deckert v. The Prudential Insurance Company of America* (1). While it did not become necessary for the learned judge to express a final opinion on the question, he examined with care a number of English and Canadian authorities including most of those which were discussed on the argument before us and having done so continued as follows, at pp. 456-7:

> It follows, on the authority of these decisions, (1) that the mere fact that the policy moneys are expressed to be payable to somebody other than the assured does not make the assured a trustee of the policy for the person nominated, and (2) that apart from statute and in the absence of the creation of any trust in his favour in respect of the policy moneys, an ordinary beneficiary under a life insurance policy, being a stranger to the contract, does not acquire any interest at law or in equity in the policy or the policy moneys, merely by reason of the fact that the policy moneys are expressed to be payable to him. He cannot, therefore, maintain any action against the insurer for the recovery of the policy moneys. The cause of action passes to the personal representative of the deceased insured, and the policy moneys, if and when recovered, fall into his estate.
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> This conclusion is, I realize, at variance with the decisions in *In re Roddick, supra* (2), and *Re Benjamin, supra* (3). I cannot, after a most attentive consideration of the matter, reconcile those decisions with the

(1) [1943] O.R. 448, 10 I.L.R. 158, 211, [1943] 3 D.L.R. 747.

(2) (1896), 27 O.R. 537.

(3) (1926), 59 O.L.R. 392.

decisions of the English Courts to which I have referred and which appear to me, in light of the scheme of the life insurance legislation, to control the determination of the question under discussion . . . For the reasons I have indicated, I am disposed to think that the plaintiff has no right of action on the policies in her personal capacity, and can maintain the present action only in her representative capacity, *i.e.*, as sole executrix under the last will of the deceased insured, and for the benefit of his estate.

The Court of Appeal while affirming the judgment of Plaxton J. did not find it necessary to express an opinion on this point.

The view expressed in this dictum of Plaxton J. is in accordance with the law of England on the point which is, in my opinion, accurately stated in the following passages in Preston and Colinvaux on Insurance (1950) at pp. 337-8:

> As we have already seen the legal property in a life policy normally belongs to the person taking it out, subject to any assignment by him. If it is his own life that he insures, unless he has made a specific disposition of the policy by will, it will, on his death, subject to any equitable interests and the claims of his creditors, fall into residue and pass to the residuary legatee, or, if there is no will, to those entitled on intestacy.
>
> * * *
>
> It is common in the case of insurances on the assured's own life, for the assured to nominate a beneficiary at the time of taking out a policy. Such a nomination does not, however, by itself, constitute the assured a trustee, nor, since the person nominated is a stranger to the contract, has he any remedy at law. The property in such a policy will therefore pass, notwithstanding the nomination, to the personal representative of the assured on his death and the nominee has no rights whatsoever, unless—
>
> (i) the nomination amounts to a declaration of trust, or the person taking out the policy is merely the agent of the nominee, or . . . [the remaining exceptions refer to special statutory provisions].

The reservation to which I made reference above is as to that part of the dictum of Plaxton J. which negatives any right in an ordinary beneficiary to the proceeds of the policy in which he is so named. If those proceeds belong to the estate of the insured and pass under his will if he dies testate and otherwise as on an intestacy, then the provisions in *The Insurance Act* dealing with the appointment and change of ordinary beneficiaries would have no practical effect. The provisions of s. 161(1) have formed part of the Ontario *Insurance Act* in substantially their present form since 60 Vic., c. 36, s. 151, and it is difficult to suppose that they were not intended to serve some useful purpose. It may be that even prior to the 1946 amendment, the intention of the Legislature was to give to the designation

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of an ordinary beneficiary in accordance with the terms of the Act the equivalent of testamentary effect. On the other hand the purpose of s. 161(1) may have been to make it clear that the proposition stated, in, I venture to think, much too wide terms, in Bliss on Life Insurance, 2nd ed. 1874, p. 554, had no application in Ontario. The passage to which I refer is as follows:

> Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the moneys.

However, I do not pursue this line of inquiry as the position has been to some extent clarified by the enactment by Statutes of Ontario, 1946, c. 42, s. 6, of subs. (2) of s. 161, which reads:

> (2) Subject to subsection 1, a beneficiary or a trustee appointed pursuant to section 186 may, at the maturity of the contract, enforce for his own benefit or as such trustee the payment of insurance money appointed, appropriated or apportioned to him by the contract or a declaration and in accordance with the terms thereof, but the insurer shall be entitled to set up any defence which it could have set up against the insured or his personal representatives; and payment made to the beneficiary or trustee shall discharge the insurer.

It is noteworthy that a similar amendment was made in each of the other common law Provinces in 1945.

Before proceeding to a consideration of the effect of the legislation in its present form it will be convenient to refer to one of the more recent cases which support the position of counsel for the respondent.

In *Re Isaacs* (1), Roach J.A. delivered the unanimous judgment of the Court of Appeal. Having decided that the beneficiary designated in a policy of life insurance was, in the unusual circumstances of that case, an ordinary beneficiary, he continued at p. 956:

> Mr. Brewin then argued that if the appellant should be held entitled to the insurance moneys they should be declared subject to the payment of the debts of the estate. They cannot be liable for those debts unless they form part of the estate and they are not part of it: see *In re Roddick* (1896), 27 O.R. 537, and *Re Benjamin* (1926), 59 O.L.R. 392.

It will be observed that in the report of the argument the following appears at p. 950:

> The insurance moneys never formed part of the estate, and are therefore not subject to the debts of the deceased. They are never part of the estate when the insurance is in favour of a named beneficiary. [ROACH J.A.: We need not hear you further on that point.]

(1) [1954] O.R. 942, [1954] I.L.R. 1-164, [1955] 1 D.L.R. 327.

There are statements to the same effect in a number of judgments of the Ontario Courts but I think I am right in saying that they are all founded on the authority of *In re Roddick, supra.* In my respectful view the judgment in *In re Roddick* did not purport to lay down any general rule having application to a case in which both by contract and statute the insured has power, up to the last moment of his life, to dispose of the proceeds of a policy as he sees fit. The contract between the insured William Roddick and the insurer "the Supreme Tent of the Knights of the Maccabees of the World" contained the following provisions, set out at pp. 538-9 of the report:

> Section 10. "No beneficiary or endowment certificate shall be made payable to any person other than the wife, children, dependents, mother, father, sister or brother of the member, nor can any such certificate be transferred or assigned by a member to any other person than above**." Section 11. "In the event of the death of all the beneficiaries named by the member before the decease of such member, if no other disposition be made thereof, the benefit shall be paid to the beneficiaries of the deceased member first in the order named in the preceding section; and if no person or persons shall be found entitled to receive the same by the laws of the order, then it shall revert to the endowment fund of the association."

The certificate issued to William Roddick named his mother as beneficiary; she predeceased him and the only persons falling within the class set out in s. 10 who survived him were his two sisters. The sisters did not bring an action; a case was stated for the opinion of the Court as to whether they or the administrator of William Roddick were entitled to receive the proceeds of the policy. I find it difficult to infer a general rule from a decision on a policy which by its terms precluded the insurance moneys from falling into the estate of the insured.

At common law the policies in question would, in my opinion, have been treated as contracts made between the deceased and the insurers whereby the latter agreed to pay the proceeds of the policies on the death of the deceased to the respondent, who, being a stranger to the contracts, would have had no right to enforce them. While authority is scarcely needed for this elementary proposition it is succinctly stated in Anson on Contract, 20th ed. 1952, at pp. 254-5 as follows:

> *A man cannot acquire rights under a contract to which he is not a party.*

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It is contrary to the common sense of mankind that *M* should be bound by a contract made between *X* and *A*. But if *A* and *X* make a contract in which *X* promises to do something for the benefit of *M*, all three may be willing that *M* should have all the rights of an actual contracting party; and there would be nothing startling if the law should give effect to this desire. In many systems of law, indeed, this is the rule. It is not, however, the rule of the English Common Law.

By statute (s. 161(2)) the respondent has now been given a right of action against the insurer, and it is necessary to consider the nature of the right so created. Section 161(2), quoted above, must be read in the light of the other provisions in the Act dealing with life insurance and particularly those already quoted and the following:

131. 8. "declaration" means an instrument in writing signed by the insured, attached to or endorsed on a policy, or an instrument in writing, signed by the insured in any way identifying the policy or describing the subject of the declaration as the insurance or insurance fund or a part thereof or as the policy or policies of the insured or using language of like import, by which the insured designates or appoints a beneficiary or beneficiaries, or alters or revokes the designation or appointment of a beneficiary or beneficiaries, or apportions or reapportions, or appropriates or reappropriates, insurance money between or among beneficiaries;

158.—(1) Beneficiaries for value are beneficiaries who have given valuable consideration other than marriage and who are expressly stated to be, or described as, beneficiaries for value in the policy or in an endorsement thereon or in a subsequent declaration signed by the insured.

(2) Subject to section 167, preferred beneficiaries are the husband, wife, children, adopted children, grandchildren, children of adopted children, father, mother and adopting parents of the person whose life is insured.

(3) Ordinary beneficiaries are beneficiaries who are not preferred beneficiaries, beneficiaries for value or assignees for value.

159. A beneficiary for value and an assignee for value of a policy shall have a vested interest in the policy; but except as regards beneficiaries for value who are expressely stated to be or described as beneficiaries for value in the policy, a beneficiary for value or assignee for value who gives notice in writing of his interest in the policy to the insured at the head or principal office of the insurer in Canada prior to any other beneficiary for value or assignee for value shall have priority of interest as against such last-mentioned beneficiary or assignee.

161.—(4) A declaration, whether contained in a will or other instrument in writing, shall, subject to subsection 1, have effect from the time of its execution, but a declaration shall not affect the interest or rights of a beneficiary for value or assignee for value unless the declaration has been filed with the insurer at its head or principal office in Canada prior to the time when the beneficiary for value or assignee for value acquired such interest or rights and if not so filed the interest or rights of the beneficiary for value or assignee for value shall be as if the declaration had not been made.

(5) In the case of a declaration contained in a will it shall be sufficient for the purposes of subsection 4 to file a copy thereof or of the material part thereof verified by statutory declaration.

(6) A declaration contained in an instrument purporting to be a will which has not been revoked otherwise than by operation of law shall be effective as a declaration, notwithstanding that the instrument is invalid as a testamentary instrument.

164.—(1) Where the insured, in pursuance of the provisions of section 161, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured.

When these provisions are considered together, it appears to me that the intention of the Legislature, in enacting the 1946 amendment, was to alter the rule of the common law to the extent of giving testamentary effect or an effect analogous thereto to the designation of an ordinary beneficiary so that the position of such beneficiary is assimilated to that of a legatee of the proceeds of the policy, and to give to the beneficiary a right of action against the insurer in substitution for, or in addition to, the procedure ordinarily available to a legatee to obtain payment of a legacy.

In my opinion an ordinary beneficiary has no vested interest in the policy or the proceeds thereof until the maturity of the contract, which in the case at bar is at the death of the deceased; to hold otherwise would be to disregard the sharp difference between the wording of s. 161(2) on the one hand and that of ss. 159 and 164(1) on the other. Up to the moment of his death the policies and their proceeds were the sole property of the deceased who had full power to dispose of them by will as he saw fit. The legislation gives to the declarations although not in testamentary form the same effect as if they had been made in that form; but I cannot find words in the legislation or discern reasons in principle to justify imputing to the Legislature the intention of placing a designated ordinary beneficiary in a position so different from, and superior to, that of a legatee of the proceeds of the policies that those proceeds should be held free from the claims of creditors of the deceased or from the liability to be made subject to the provisions of s. 2(1) of *The Dependants' Relief Act*. Such an interpretation would in effect, on the death of the insured, place an ordinary beneficiary in the same position as a preferred beneficiary, a result which the Act read as a whole does not appear to me to contemplate.

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There appears to me to be a close analogy between the position of an insured who, as in the case at bar, having an unfettered power to dispose at his death of the proceeds of a policy to anyone he pleases including his personal representatives designates an ordinary beneficiary, and that of an appointor having a general power of appointment over a fund which he exercises in favour of a volunteer. In the latter case the applicable rule is stated as follows in Farwell on Powers, 3rd ed. 1916, at p. 286:

> Both real and personal estate, subject to general powers of appointment, become assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers; and it makes no difference whether the power is exerciseable by deed or by will, or by will only.

A simple example will serve to illustrate the anomalous result of holding that a policy of insurance payable to a designated ordinary beneficiary forms no part of the estate of the insured. Suppose A dies leaving as his only assets policies of life insurance totalling $500,000, all of which are stated to be payable to his personal representatives. He leaves a widow, B, with no means of support, and he owes debts totalling $10,000. If (i) he leaves a will made the day before his death leaving everything of which he can dispose by will to C, a stranger, his creditors will be paid, the Court will have power to make provision for B under *The Dependants' Relief Act* and the remainder of the $500,000 will go to C; but if (ii) he leaves a will made the day before his death in which he designates C as the beneficiary of all his insurance policies, C will take the $500,000 and neither the creditors nor B can get anything, since under the combined effect of ss. 131(8) and 161(4) the will is a declaration and C a designated ordinary beneficiary. I do not think the words of the statute require such a result and I would respectfully decline to follow a decision that so held unless it were binding upon me.

In my opinion, the proceeds of a policy payable to an ordinary beneficiary can be resorted to by creditors of the insured and, consequently, I do not need to consider the argument of the respondent based on s. 8 of *The Dependants' Relief Act* as that argument rests on the assumption that the proceeds would be free from the claims of creditors.

For the above reasons I have reached the conclusion that the position of an ordinary beneficiary designated in a life insurance policy is analogous to that of a legatee to whom a legacy of an amount equal to the proceeds of the policy is given; and that while on the death of the insured the beneficiary may enforce payment from the insurer he will hold the proceeds of the policy subject to the possible claims of creditors or of dependants under *The Dependants' Relief Act* in the same manner as if he had received them as a specific legacy.

In the result I would allow the appeal, set aside the judgments below and direct that the application be referred back to the learned Surrogate Court Judge to be dealt with on the basis that the proceeds of the policies in question should be treated for the purposes of s. 2(1) of *The Dependants' Relief Act* as forming part of the estate of the late Everett George Kerslake specifically bequeathed to the respondent. The costs of both parties in all courts should be paid out of the proceeds of the policies in question, the costs of the further proceedings hereby directed should be disposed of by the learned Surrogate Court Judge.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: Cameron, Weldon, Brewin & McCallum, Toronto.

Solicitor for the respondent: David J. Walker, Toronto.

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*PRESENT: Rand, Locke, Cartwright, Fauteux and Abbott JJ.