Life insurance beneficiaries (part 2)

May the insured lawfully and constitutionally ignore his or her spouse and appoint someone else?

In the first part of this article I concluded that the court in *Mooi v SA Mutual Life Assurance Society & others* [1998] JOL 314 (Tc) was correct in holding that there was nothing unconstitutional in a husband's insuring his own life and then appointing his brother and sister, and not his wife, as beneficiaries. The court also rejected the wife's claim to be paid half the proceeds of the two policies in question, a claim based on sections 41-44 of the Insurance Act 27 of 1943, then still in force.

While constitutionally the decision may well be correct, a kind reader has pointed out that a fundamental statutory provision appears to have been overlooked and that the decision may well be wrong as far as the wife's legal entitlement to the proceeds of her husband's policies was concerned.

Crucially, in this case, the husband and wife were married in community of property. That being the case, the Matrimonial Property Act 88 of 1984, and more specifically its section 15, come into play.

The general rule is stated in section 15(1): 'a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse'. Then come the exceptions. Two appear relevant for present purposes:

- a spouse married in community of property may not, without the written consent of the other spouse, 'alienate, cede or pledge any ... insurance policies ... forming part of the joint estate' (s 15(2)(c)); and
- a spouse may not, without the consent (written or otherwise) of the other spouse, receive any money due or accruing to that other spouse or to the joint estate by way of 'the proceeds of any insurance policy or annuity in favour of the other spouse' (s 15(3)(b)(vi)).

In both cases the consent required may be given by way of subsequent ratification (s 15(4)). And in both cases, too, the required consent is deemed to have been given in the case where the spouse entered into a transaction with another person contrary to the provisions of section 15(2) and (3) and that person 'does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions' (s 15(9)(a)). Thus, 'innocent' third parties are protected, but it may well be assumed that beneficiaries, at least where they are related to the husband as they were in the *Mooi* case, will not qualify as such.
So where a husband married in community of property insures his life, the first question is whether that policy forms part of the joint estate. That will be the case, one assumes, if the insurance was concluded after his marriage and the premiums were paid from the joint estate. The policy, it seems, will not fall within the ambit of section 15(2)(c), and will thus require the wife's written consent for any subsequent dealing with it, if (and to the extent that?) it had been concluded prior to the husband's marriage in community of property. Similarly, it will be excluded if the subsequent dealing with the policy 'is performed by a spouse in the ordinary course of his profession, trade or business' (s 15(6)).

The next issue is whether the appointment of a beneficiary in terms of a life policy amounts to the type of transaction contemplated in section 15(2)(c). Mention is made of the alienation, cession, or pledging of the policy. While it is true that the policy itself is not in some way transferred to the beneficiary (who does not, as the court incorrectly thought, ordinarily become the 'owner' of the policy), the types of transaction envisaged seem sufficiently widely drawn to include the appointment of a beneficiary, even if such appointment is revocable. Thus, while a policy itself cannot be ceded (but at most assigned), the rights in terms of a policy may be ceded so as to entitle another person, the cessionary, to claim on the policy. Such a cession may further not be an out-and-out (that is, irreversible) cession, but may merely be intended to be temporary, such as is the case with a security cession. Similarly, the appointment of a beneficiary, even if not irrevocable, entitles the appointee to claim on the policy, and it may therefore be taken to fall within the types of transaction if not mentioned, then at least presumptively envisaged, in section 15(2)(c). And the same may be said of the cancellation of the appointment of one beneficiary and the appointment of another beneficiary.

In short, then, it appears that in *Mooi v SA Mutual Life Assurance Society & others* the wife may well have been legally entitled to half the proceeds of the husband's policies. The spouses were married in community of property and, it may be assumed, the husband had insured his life and appointed the beneficiaries after the conclusion of their marriage, and, it may be assumed further, the beneficiaries were not innocent third parties nor was their appointment made in the course of the husband's profession, trade, or business.

It appears that in *Mooi* the wife may well have been legally entitled to half the proceeds of the husband's policies.

What about the other half, then? Will the appointed beneficiaries still be entitled to it by virtue of their appointment? It seems not. The performance of the transactions mentioned in section 15(2) and (3) without the consent of the other spouse, while not expressly declared void, will be in contravention of the relevant provisions and for that reason unlawful and void. The beneficiary appointments are therefore void, and the whole of the policy proceeds fall into the joint estate.

The position will be otherwise and the beneficiaries will still be entitled to the proceeds, and the wife to nothing, only if the beneficiaries may be said not to have known and not to have been reasonably able to know that the wife's consent was lacking. In that case the required consent is deemed to have been given, and the transaction (the appointment) is therefore valid. In such a case the wife's only redress would be an adjustment in her favour upon the division of the joint estate, should the joint estate have suffered any loss as a result of the transaction (the appointment). That is provided for in section 15(9)(b), but the adjustment will operate only if the husband knew or reasonably ought to have known that he would probably not obtain the required consent from his wife, a requirement that seems to be met with ease in the type of situation we are concerned with here. Thus, in that case (of a knowing husband
and of innocent third-party beneficiaries where the policy is not part of the joint estate but is available to the beneficiaries), the wife will be entitled to an adjustment in her favour of half the policy proceeds, which half is to be deducted from the husband's half of the joint estate.

Finally, it should be remembered that section 15 of the Matrimonial Property Act applies only to marriages in community of property. Therefore, a husband married out of community of property will still be able to insure his own life and then freely, and without requiring the consent of his wife, appoint someone other than his wife as beneficiary. The beneficiary will be entitled to the proceeds of the policy, and the wife not. And, by analogy with the decision in Moot, the will then legally and constitutionally have no ground for complaint when the beneficiary claims to be entitled to the policy proceeds. However, it should be borne in mind that where the marriage was out of community of property but with the retention of the accrual system which operates on the dissolution of the marriage, the wife may have redress in terms of the Matrimonial Property Act in so far as the insurance policies concerned are to be included in calculating the value of the accrual in a spouse's estate during the subsistence of the marriage.

And, of course, all of the above applies equally where the life-insuring spouse is not the husband but the wife.

Thus, while the measures previously contained in sections 41–44 of the Insurance Act of 1943 have not been repeated in the Long-term Insurance Act 52 of 1998, the provisions of the Matrimonial Property Act continue to protect spouses in appropriate cases against unauthorized transactions performed by the other spouse in connection with insurance policies. (For a valuable, even if now somewhat dated discussion of these issues, see further H Henckert 'The life insurance policy, beneficiary clauses and marriage: a few aspects' 1994 Tydskrif vir die Suid-Afrikaanse Reg 513.)

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