PROCEEDS OF LIFE ASSURANCE POLICIES AND THE ESTATE DUTY ASSESSMENT ACT 1914-1974 (Cth)

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Section 8(4)(f) of the Estate Duty Assessment Act 1914-1974 (Cth) subjects to the charge for federal estate duty certain categories of proceeds of life assurance policies. It has proved to be the most litigated provision in the Act. In this article Professor Lindgren examines the anomalies and uncertainty which characterize the section. He suggests that the comparable provisions in the death duty legislation of the States are to be preferred and concludes that the federal provision should be amended along certain lines.

Introduction

Section 8(4)(f) of the Estate Duty Assessment Act 1914-1974 (Cth) has proved to be the most litigated provision of that Act. So long as the Commonwealth retains legislation providing for the imposition and assessment of estate duty, it would do well to amend the provision and it might use the comparable provision of virtually any one of the Australian States as a model. Section 8(4)(f) provides that:

> Property—. . .
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> (f) being money payable to, or to any person in trust for, the widow, widower, children, grandchildren, parents, brothers, sisters, nephews or nieces of the deceased under a policy of assurance on the life of the deceased where the whole of the premiums has been paid by or on behalf of the deceased, or, where part only of the premiums has been paid by or on behalf of the deceased, such portion of any money so payable as bears to the whole of that money the same proportion as the part of the premiums paid by or on behalf of the deceased bears to the total premiums paid,
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> shall for the purposes of this Act be deemed to be part of the estate of the person so deceased.

The provision has now been passed upon in the following cases: *Williams* v. *Federal Commissioner of Taxation*;[1] *Thurn* v. *Commissioner of Taxation*;[2] *Hill* v. *Commissioner of Taxation*;[3] *17 C.T.B.R. (N.S.) Case 4*; and *Hamra* v. *Federal Commissioner of Taxation*.[4] The purpose of the present article is to examine the judicial interpretation of section 8(4)(f) and in the course of doing so to note some points of comparison

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1 (1950) 81 C.L.R. 359.
2 (1965) 112 C.L.R. 432.
3 (1969) 119 C.L.R. 72.
4 (1973) 1 A.L.R. 539.

and contrast with comparable provisions in the death duty legislation of the various Australian States.[5]

1. *The place of section 8(4)(f) in the federal estate duty scheme.*

The Estate Duty Assessment Act 1914-1974 (Cth), like similar legislation in the States, provides for the levying of duty upon the value of the estates of persons irrespective of where they die domiciled and then proceeds to distinguish between persons who die domiciled in the taxing jurisdiction and those who die domiciled elsewhere. The federal Act does this by providing that for the purposes of the Act, the estate of a deceased person comprises his real and personal property in Australia and in addition, where he dies domiciled in Australia, his personal property situated elsewhere: section 8(3). Section 8(4) provides that various classes of property shall, for the purposes of the Act, be deemed to be part of the estate of a deceased person and such classes of property are commonly referred to as "notional" estate by way of contrast with a deceased's "actual" estate which is covered by section 8(3). Proceeds of a life assurance policy may be part of the deceased's actual estate in which event there will be no scope for the operation of any of the notional estate provisions.[6] Such proceeds will be part of a deceased's actual estate if, for example, as is commonly the case, the proceeds are, by the terms of the policy, made payable to "the life assured, his executors or administrators". In the event that the proceeds of a policy are not part of the deceased's actual estate they may be caught as belonging to one or more of the six categories of notional estate defined in section 8(4). For example they may be "property— (d) being the beneficial interest held by the deceased person, immediately prior to his death, in a joint tenancy or joint ownership with other persons"; or "(e) being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person".[7] In the present article only paragraph (f) and the counterpart provisions in State Acts dealing expressly with life policies will be referred to.[8]

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[5] The State Acts and their life assurance provisions are as follows: N.S.W.: Stamp Duties Act 1920-1974, s.102(2)(h); Vic.: Probate Duty Act 1962, s.8(1)(d), (e); (3)(a), (b); Qld.: Succession and Probate Duties Act 1892-1973, s.10C; W.A.: Death Duty Assessment Act 1973-1974, s.10(2)(e), (1), (m); Tas.: Deceased Persons' Estate Duties Act 1931, s.5(2)(j); S.A.: Succession Duties Act 1929-1970, s.8(1)(j), (k).

[6] *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (1954) 88 C.L.R. 434 (*Thomas's* case (No. 1)).

[7] For a treatment of how the various categories of notional estate in the N.S.W. *Stamp Duties Act* 1920-1974 other than that dealing expressly with the proceeds of life assurance policies (s.102(2)(h) of that Act) may catch the proceeds of life assurance policies, see Hill, *Stamp, Death, Estate and Gift Duties* (1970) 278-280.

[8] For references to the State Acts and provisions see n.5 *supra*.

2. *"Money payable"—a gross or net figure?*

It is common for an insurer to have a contractual right against a proponent-assured to deduct from policy proceeds a sum owing to the insurer, *e.g.* for unpaid premiums or for a debt owed to it by the life assured. If the policy is expressed to be for the benefit of the proponent-assured's spouse and/or children, section 94 of the Life Insurance Act 1945-1973 (Cth) makes the proceeds unavailable for payment of the deceased's debts. However, even under such a policy (*a fortiori* under other policies not affected by the statutory trust), the usual term in a policy authorizing the insurer to deduct outstanding premiums will be effective and any such premiums unpaid will have to be taken into account for the purpose of calculating the "money payable" which is caught by section 8(4)(f) since the policy will provide that no money is payable unless premiums have been paid up.[9] Under all policies, other amounts which the insurer has been authorized by the proponent by an independent arrangement to deduct before paying the beneficiary will not be deductible for the purpose of ascertaining the money payable to the widow etc. for the purpose of section 8(4)(f); it will be the gross amount payable under the policy which the paragraph will catch, and debts, whether secured on the proceeds or unsecured, will feature in the normal way as allowable deductions in the assured's estate.[10]

There remains, however, a possible means of avoiding the application of this principle and therefore of avoiding duty. If a policy in its original form or as varied by the insurer and the proponent, were to define the insurer's obligation towards the beneficiary as one reduced by reference to prior subtraction of authorized deductions, it appears that only the reduced sum would be money payable to the widow etc. "under" the policy and thus caught by the paragraph.[11] This device would not be available under State legislation which catches money payable under a policy to anyone.

3. *"Payable to . . . under a policy of assurance on the life of the deceased"—the instrument(s) establishing the payee's title.*

In order to be caught, the policy proceeds must be payable to the widow etc. "under" a policy. The most limited interpretation of "under"

[9] In *Executors of the Will of Mackenzie, Forsyth* v. *Commissioner of Stamp Duties* (N.S.W.) (1966) 114 C.L.R. 194 which was decided under s.102(2)(h) of the *Stamp Duties Act* 1920-1959 (N.S.W.), an outstanding premium and interest thereon were deducted by the executors and this was not challenged by the Commissioner or commented upon by the Court.

[10] *Ibid.* In *Forsyth's* case, some support for the decision reached was found in *In re Hodge's Policy* [1957] Ch. 339 affirmed [1958] Ch. 239 where it was held that an unrepaid loan which had been made by the insurer to the deceased was not to be subtracted in a calculation of "money received under a policy of assurance" for the purpose of s.11(1) of the Customs and Inland Revenue Act 1889 (Eng.).

[11] Support for the suggestion is to be found in dicta of Taylor J. in *Forsyth's* case: "The parties were, of course, free to make an arrangement which had the

which might be suggested is that in order to qualify, the payee's title must be found within the four corners of the policy.

Every payee's title will include the policy. If the payee is the assured's spouse and/or children and the policy is expressed to be for their benefit, their title will be the policy strengthened by the statutory trust created by section 94 of the Life Insurance Act 1945-1973 (Cth).[12] But a payee's title may comprise the policy and further documents such as an assignment or a surrender. Will such a composite documentary title ever be a title "under" the policy?[13]

In the first case to be decided on section 8(4)(f), *Williams* v. *Federal Commissioner of Taxation*,[14] the policy made the proceeds payable to the life assured (who was also the proponent) his executors, administrators or assigns. By a separate document called an "Appointment of Beneficiary of Trust Form" he nominated his wife to receive the monies and she promised to pay thereout certain debts and expenses and to hold the residue in trust for the assured's legal personal representative to be distributed in accordance with the terms of the assured's will.[15] The insurer acknowledged by an endorsement on the policy that it had notice of and would act in accordance with the terms of the deed. The High Court had no difficulty in finding that the monies were payable to the widow "under the policy". However, this holding is not very significant since the widow's title may have been regarded as located within the policy with the endorsement and the latter may have been considered as part and parcel of the policy rather than as a distinct document in the payee's title. But in *Thurn* v. *Commissioner of Taxation*[16] the proceeds were, by the policy, made payable to the assured's executors, administrators or assigns and he assigned the policy to his wife by a memorandum of transfer which was registered by the insurer pursuant to section 87 of the Life Insurance Act 1945-1958 (Cth). Kitto J. considered that the word "under" should not be read so narrowly as to prevent a conclusion that the proceeds were, in these circumstances, payable to the widow "under the policy". His Honour said:

> It is not easy to see why the word "under" in this context should be given the narrow meaning . . . suggested, for it is a word commonly used to describe the relation between a right and the root

effect of altering the obligations of the company under the policy but, in my view, they did not do so and, in substance, the position remained the same as if a loan on the security of the policy had been obtained from a third party": (1966) 114 C.L.R. 194, 211.

[12] See the text of that provision *infra* p. 256.

[13] Since the formula "under a policy" is contained in the State provisions (*supra* n.5), the discussion in this section of the article is relevant to those provisions too.

[14] (1950) 81 C.L.R. 359.

[15] The will in fact appointed her as his sole executrix and beneficiary.

[16] (1965) 112 C.L.R. 432.

> of title from which the right is derived even if derived through intervening dispositions. The general sense of the provision favours an interpretation which would extend to a case when policy money becomes payable to a widow or relative (within the designated classes) by the combined operation of the policy and an assignment.[17]

Taylor J. was inclined to the same view and the dissenting judgment of Menzies J. depended upon its correctness. In *Hill* v. *Commissioner of Taxation*[18] Menzies J. implied that the question had strictly not been authoritatively determined, but the view stated has never been challenged and is now accepted doctrine.[19]

4. *"Property . . . being money payable to, or to any person in trust for, the widow, widower, children, grandchildren, parents, brothers, sisters, nephews or nieces of the deceased under a policy . . ."—the capacity in which a person is the person to whom the policy proceeds are payable.*

It is the fact that paragraph (f) catches only "money payable to, or to any person in trust for the widow, widower . . . under a policy of assurance"[20] that has caused most of the interpretive difficulty which has beset the paragraph.[21] Although the courts have had little difficulty in holding that a title arising under a policy and an assignment thereof is a title "under a policy", those three words are only part of an expression of broader import. It will have to be asked whether the documentary title is a title to "money payable to, or to any person in trust for, the widow, widower" etc. Is it only a title somehow qualified by reference to the relationship between the deceased and the payee that the paragraph catches, or does it catch even an unqualified title provided only that in fact the payee finally happens to stand in one of the prescribed relationships to the deceased? Does the reference to the relationship qualify the money payable or only the range of payees whose receipts will be caught?

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[17] *Id.* 437.

[18] (1969) 119 C.L.R. 72.

[19] *E.g. 17 C.T.B.R. (N.S.) Case 4*, 28, 29; *Hamra* v. *Federal Commissioner of Taxation* (1973) 1 A.L.R. 539.

[20] For ease of reference, they will be referred to as "the relatives" and as "the widow etc.".

[21] The primary "catching" provisions in the State Acts (*supra* n.5) are not so limited and so have not given rise to this difficulty. Some of the State Acts proceed to confer exemption or concession where relatives are entitled to the proceeds. S.5(2)(d) of the Tasmanian Act and s.8(3)(a) of the Victorian Act exclude from the primary catching provision money payable under a policy effected by the deceased on his own life for the benefit of his spouse and/or children. S.10C of the Queensland Act excludes the monies payable under a policy where it is proved to the satisfaction of the Commissioner that the assured's wife is the person beneficially entitled upon his death *and* that she *bona fide* paid out of her own proper monies all the premiums.

A literalist construction would have the advantages of certainty and simplicity but it would have the consequence that where a beneficiary happened to come within one of the prescribed relationships after being designated as beneficiary in the policy or assignment, the proceeds would be caught by reason of that fortuitous circumstance. But if such a construction is not adopted the question is, what qualification is to be implied? In *Williams* v. *Federal Commissioner of Taxation*[22] it was held to be implicit in the words now under consideration that the money be payable to the widow as beneficiary and not to be held by her in trust. But that holding still left open two possibilities: it might suffice that the money be payable beneficially to a person who happened to stand in one of the prescribed relationships to the deceased at the date of death;[23] alternatively, it might be required additionally that the existence of that relationship at death be somehow made a condition of or otherwise germane to the payee's entitlement.

This issue arose in *Thurn* v. *Commissioner of Taxation.*[24] The former literalist construction was adopted by Menzies J. (and adhered to by him later in *Hill* v. *Commissioner of Taxation*[25]) but was rejected by the majority of Kitto and Taylor JJ., though for different reasons. In *Thurn's* case the terms of the policy made the sum assured payable to the life assured's executors or administrators. The proponent-assured assigned the policy to his wife. In the assignment she was referred to simply as "Olive May Thurn". For the assignment the wife paid to the assured a sum equal to the aggregate of all the premiums (four) which he had paid and she paid all premiums which fell due after the assignment (a further three). Section 87 of the Life Insurance Act 1945-1958 (Cth) operated on the assignment so as to confer on the assignee all the rights and duties of the assignor and to entitle her, after the death of the life assured, to sue on the policy in her own name. Kitto J. said that the payee's title did not make the money payable to her *qua* widow:

> On the death of the deceased the policy money became payable—under the policy, one may concede—to a person who in fact was the widow of the deceased; but the instruments by the operation of which it became so payable did not make it payable to that person as the widow. She would have been entitled to receive it even if her marriage to the deceased had been dissolved in his lifetime. The legal nature of the money which became payable upon the death of the deceased is fully stated by saying that it was money payable under the policy to the assignee of the policy.[26]

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[22] (1950) 81 C.L.R. 359.

[23] It is clear from the references in the paragraph to "widow" and "widower" that the date of death rather than the date of the policy is the relevant date at which the existence of the relationship is to be tested.

[24] (1965) 112 C.L.R. 432.

[25] (1969) 119 C.L.R. 72.

[26] (1965) 112 C.L.R. 432, 438-439.

Taylor J. took an interesting view of the requirement inherent in the section. His Honour directed attention to the words occurring in the later part of the paragraph, "where the whole of the premiums has been paid by or on behalf of the deceased, or, where part only of the premiums has been paid by or on behalf of the deceased . . ." and considered that it is at the time when premiums are paid by or on behalf of the deceased that the policy proceeds must be prospectively payable to the widow. In other words, it must be in respect of a policy which is already of the character described in the preceding part of the paragraph that the deceased pays premiums. In the instant case there was no such temporal coincidence between payment of premiums by or on behalf of the deceased and prospective entitlement of the wife.

There is an obvious relationship between the question whether paragraph (f) restricts inquiry to the policy document and the question of the capacity in which the payee has a title to the money. Once it is conceded that a title which depends upon an assignment might nonetheless be a title "under" a policy, it may appear to involve no further step to hold that the title of an assignee who in fact falls within one of the prescribed relationships is caught by the paragraph. This doubtless explains why, in *Thurn's* case, counsel's arguments centred around the question whether an assignee's title might ever be caught, and why Kitto J. was concerned to distinguish between the title of an assignee who took *qua* purchaser and an assignee who took *qua* relative.

Although the payee in *Thurn's* case was held not to have been entitled as relative, the possibility that an assignee might be so entitled demonstrated that a contrast between a person entitled as assignee and a person entitled as relative would be a false contrast. The former is a reference to the conveyancing instruments by which title is derived; the latter is a reference to facts which explain a selection of a person as beneficiary. A better contrast with "as assignee" is "as beneficiary designated in the policy itself"; a better contrast with "as relative" is "as purchaser". Once it is accepted, as Latham C.J. said in *Williams's* case,[27] that the purpose of the paragraph is to catch gratuitous provision

[27] The judgment of Latham C.J. contains the classical and oft-quoted explanation of the supposed policy of the paragraph: "In my opinion par. (f) of s.8(4) is effectual to impose duty in respect of moneys paid under a policy of insurance in a case where a policy serves the same purpose as a will, namely the giving of a benefit to certain relatives of a deceased person upon the death of the person who has paid (in whole or in part) for the policy. That person might have kept the policy in his own name and have left the policy money specifically to one of his relatives mentioned in par. (f). In such a case duty would have been payable under s.8(3)(b) and not under s.8(4)(f). Such a person might have made no specific provision in his will relating to such a policy, but have left it to be dealt with as part of his estate under provisions not specifically referring to it. In such a case it would be treated as part of his estate and would be dutiable under s.8(3)(b) and not under s.8(4)(f)—whoever his beneficiaries might be. If, however, he took out a policy and paid the premiums in whole or in part but procured the policy to be put in the name of, e.g., his wife, in such a

for certain classes of relative by means of a policy which might be used as a substitute for testamentary provision for them and thus as a means of avoiding duty, it can be seen that a voluntary assignment might be caught whilst a *bona fide* assignment for full consideration which is part of a normal "commercial" transaction might not be.

Hill v. *Commissioner of Taxation*[28] occupies a somewhat unusual position amongst the cases decided under section 8(4)(f). In that case the policy was expressed to have been "effected by the assured in pursuance of section 94 of the Life Insurance Act 1945-1961 for the benefit of his wife, Shirley Hilda Hill, should she be living at the date when the sum assured becomes due". Section 94(1) provides as follows:

> Subject to the Bankruptcy Act 1966-1973, a policy effected (whether before or after the commencement of this Act) by any man upon 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 upon 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 named in the policy, 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 person whose life is insured, or be subject to his or her debts.

There could not be any doubt that without more, the proceeds of the policy would be caught by paragraph (f). The deceased paid the premiums on the policy for some years then in consideration of £525 paid by his wife, released and renounced in her favour all his right title benefit and interest in the policy so that the policy should be read and construed as if the words "should she be living at the date when the sum assured shall become due" were deleted from the policy. The sum of £525 was the valuation of that "right title benefit and interest" made actuarially with regard to the ages of the parties but without regard to the state of health of either of them. The deceased died before any further premiums fell due for payment.

The literalist interpretation again urged by the Commissioner was again rejected by all but Menzies J. Kitto J. explained that the reason for the assignment was apparently that the deceased had wished to ensure that the widow would receive the proceeds as purchaser but that

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way that the money was payable under the policy to his widow for her own benefit or in trust for her, then the same result would be achieved as if he had given the policy to the widow by his will. In that case the money would not be part of his personal property so as to be dutiable under s.8(3)(b), but would be "deemed to be" part of his estate under s.8(4)(f) and would be dutiable accordingly": (1950) 81 C.L.R. 359, 375-376.

28 (1969) 119 C.L.R. 72.

he had failed to appreciate the true nature of the legal operation of such a policy. It had apparently been assumed by the deceased and his advisers that the terms of the policy operated upon by section 94 gave the wife no more than a contingent interest which would become vested only upon the wife's surviving the assured and that as a corollary the assured had a vested interest which would become divested upon the happening of that contingency. However, it was established law[29] that a policy in the terms here in question was for the wife's benefit within the meaning of section 94 of the Life Insurance Act 1945-1961 (Cth). Accordingly that section operated to create in her favour an immediate trust giving her a vested interest which the term in the policy made liable to be divested if she predeceased the assured. It followed, the wife having in fact survived the assured, that she took *qua* widow under the policy itself fortified by section 94 and that the assignment of the husband's contingent interest formed no part of her title. Barwick C.J. (with whom McTiernan J. agreed) took a similar view.

The remaining two cases which have been decided under paragraph (f) maintain the importance attributed in *Thurn's* case to the character or capacity in which the payee of the money must have been selected to become entitled. In *17 C.T.B.R. (N.S.) Case 4*, the Commonwealth Taxation Board of Review No. 2 acknowledged that in order to be caught by the paragraph, policy proceeds must be payable to a person "by reason of" and "by virtue of" his being a member of one of the specified classes of relative. Finally in *Hamra* v. *Federal Commissioner of Taxation*[30] Stephen J. expressed the conclusion to be drawn from the cases as being that "the paragraph is inapplicable where the payability of the proceeds does not depend upon the relationship between life assured and beneficiary but upon the mere character of the latter as assignee by purchase".[31]

5. *Proof of the capacity in which a person is the person to whom the proceeds of the policy are payable.*

It is clear that in order for paragraph (f) to apply the payee must in fact be the widow etc. of the deceased. Further, it must be possible to predicate before the assured's death that the payee has been selected as beneficiary by reason of the prospect that the payee will bear that relationship to the deceased. But is it only to the instrument(s) of the payee's title that regard may be had in order to identify the capacity in which the payee has been selected? And whatever the answer to that question may be, how strong must the evidence be?

[29] His Honour cited *Commissioner for Probate Duties* v. *Mitchell* (1960) 105 C.L.R. 126.

[30] (1973) 1 A.L.R. 539.

[31] *Id.* 543.

In *Thurn's* case, Kitto J. had referred only to the instrument(s) of title as the means of identifying the capacity in which the beneficiary was to receive the proceeds. This was used in *Hill's* case as the basis of an argument that the paragraph does not catch policy proceeds unless the instrument(s) of title[32] make it a condition of entitlement that the payee be the deceased's widow etc. But Kitto J. indicated that his judgment in *Thurn's* case should not be taken to support such a proposition. Barwick C.J. also held that it was not necessary in order for section 8(4)(f) to apply that the beneficiary should be described in the policy as widow, child, grandchild, etc. Certainly it suffices that a policy refers to section 94 (as the policy in *Hill's* case did) even though it merely names the wife individually, since "the statutory trust in her favour must have depended for its creation upon the fact of her being the wife of the assured".[33]

The judgment of Barwick C.J. in *Hill's* case opened up the possibility that evidence of the basis of selection of the beneficiary might be found outside her documentary title. He referred to a finding of the basis of selection in "the terms *or the circumstances*" of the issue of the policy,[34] "by its terms *or by its evident circumstances*",[35] and "from the terms *or circumstances*".[36] It is submitted that the immediate reason for the addition in *Hill's* case of the words italicized was the reference in the policy to section 94 and all that that entailed. It remained to be seen whether and if so what other circumstances might be admissible as evidence of the capacity in which the payee was entitled.

In *17 C.T.B.R. (N.S.) Case 4*, three policies made their proceeds payable to the proponent-assured's executors, administrators or assigns. The assured assigned all three to his son in consideration of a payment by him of the sum of their surrender values. Following the assignments the deceased continued to pay all premiums as they fell due. The Commissioner included the proceeds[37] in the assured's estate under section 8(4)(f). The administrators urged simply that this was a *Thurn* case; *i.e.*, that the son took as purchaser and that there was no analogy with a testamentary disposition. The Commissioner submitted that there were several circumstances which led to a conclusion "that the transaction occurred only because of the relationship of father and son and simply effected what could have been effected in substance by a will".[38] They pointed out that (1) the consideration paid, although equal to the surrender value, was less than the aggregate of premiums paid up to

[32] Actually in *Hill* the argument referred to the policy alone.
[33] (1969) 119 C.L.R. 72, 82 *per* Kitto J.
[34] *Id.* 76 (Italics added).
[35] *Id.* 78 (Italics added).
[36] *Id.* 79 (Italics added).
[37] Less a s.8(4A) deduction since the policies had been in force at the time when s.8(4)(f) commenced to operate.
[38] *17 C.T.B.R. (N.S.)* 28, 30.

the time of transfer; (2) that at about the time of the assignment of the policy the deceased gave to his son certain land and to the son's children certain monies and that these gifts formed "a pattern of benefaction"[39] with the deceased's will under which they were the beneficiaries; and (3) that the deceased continued to pay the premiums after the assignments.

It is noteworthy that the lastmentioned fact meant that the circumstances satisfied the test which had been used by Taylor J. in *Thurn's* case and which had been supported as *one* of several cumulative tests to be applied by Barwick C.J. in *Hill's* case. The Board did not apply or even advert to this suggested test. Whilst it cannot be suggested that this test is a sufficient one to be applied universally, its application in the present case would, it is submitted, have revealed a fallacy in the Board's conclusion. For the Board decided the case against the Commissioner on the singular ground that paragraph (f), if it applied, would not permit the Board to take into account the purchase money paid by the son. Whether this is so will be considered later[40] but all that need be said at this point is that if the wording of the paragraph works such an injustice then this is a matter for legislative amendment. If the Board's view were to prevail, it would seem that in all cases where a relative had paid a *bona fide* consideration, no matter how early in the term of the policy, he would be considered to take as purchaser, even though, as here, the assured paid all premiums falling due after the assignment.

The Board's judgment as reported, does not touch on the points made on behalf of the Commissioner. It may at least be accepted however, that the Board considered them relevant to the issue of the capacity in which the payee was entitled. Apparently there was no objection to their being considered. The ground of the Board's decision, like that of the High Court decision in *Thurn's* case, involved taking note of the payment of consideration by the assignee and of its adequacy. To this extent the decision against the Commissioner was based on no more surrounding circumstances (in fact it was based on less[41]) than those which were present in *Thurn's* case, but the payment of adequate consideration was elevated to the status of a factor of universal and apparently conclusive significance.

In *Hamra* v. *Federal Commissioner of Taxation*[42] the deceased gratuitously assigned two policies on his life, one to each of his two sons. There was no reference in the assignment (nor of course in the antecedent policies) to each assignee's status as "son". After and notwithstanding the assignments, the deceased kept up the premiums.[43] Since no reference to relationship was to be found in the instruments of title

[39] *Ibid.*

[40] *Infra* p. 256.

[41] In *Thurn,* none of the points numbered (1), (2) and (3) (referred to *infra* pp. 258-259) could have been made against the estate.

[42] (1973) 1 A.L.R. 539.

[43] In fact only one half-yearly premium had fallen due between the issue of the

there was again an opportunity to take up the dicta of Barwick C.J. in *Hill's* case by adverting to surrounding circumstances. Stephen J. did so in these terms:

> The circumstances of the present policy, although not its terms, appear to me to disclose the existence of a relevant relationship as the reason for the payability of policy proceeds to the sons of the deceased. The circumstance of a voluntary assignment, coupled with continued payment of premiums by the assignor, in each case lends colour to the otherwise colourless description of the assignee; if to those circumstances be added the fact not of one isolated transaction, which might be explained on other idiosyncratic grounds, but of two simultaneous transactions, each involving a son and if, as in the present case, no other facts emerge, it seems to me to appear clearly enough that the policy proceeds became payable to each son because of his status as a son of the deceased and not in any other capacity.[44]

In Part 3 of this article it was seen that title *under a policy* has been held to include a title arising under a policy and a supplementary instrument such as an assignment; the present Part 5 has shown that such a title *as relative* may be found to exist by reference as well to circumstances other than the terms of the instrument(s).

Do the decided cases give any guidance as to those circumstances which are likely to be held to denote a selection of the payee by reason of his prospective relationship to the deceased? Three points may be made at the outset. First, there can be no hard and fast rule; the finding in any case will depend upon the weight of *all* the circumstances in that case. Second, in every case the payee will *ex hypothesi* stand in one of the prescribed relationships to the deceased at the date of death and so one must be careful not to be unduly influenced by this fact. Third, in almost every case, at the earlier time when the beneficiary acquires title there will have been a relationship between him and the life assured which will have played some part in his selection: persons unrelated to the assured will hardly ever be the designated beneficiary whether as donee or as purchaser.[45] Subject to these reservations the cases seem to establish that where the relative is so designated by virtue of something in the policy[46] or presumably in a subsequent assignment, or where he takes by virtue of a gratuitous assignment[47] then provided he is to take as such designated person or gratuitous assignee beneficially[48] the policy proceeds will be caught regardless of whether the

policies and the assignment and only one further half-yearly premium fell due between the assignment and the assured's death.

[44] *Id.* 544.

[45] A business partner of the life assured is an exception which comes to mind.

[46] *Hill's* case.

[47] *Hamra's* case.

[48] *Williams's* case.

assured or the beneficiary keeps up the premiums subsequently. On the other hand, where the assignee has paid a *bona fide* consideration then certainly if he subsequently keeps up the premiums,[49] and on questionable authority even if the assured does so,[50] the assignee will be deemed to have taken as purchaser and the proceeds will not be caught.

6. *"Payable" under a "policy of assurance"—the legal status and implications of a policy of assurance.*

Once it is accepted that, in order to be caught, policy proceeds must, in anticipation of the assured's death, be affected by the character that they will be payable to a relative falling within one of the classes specified, there is yet a further question. Must that obligation be enforceable by the relative or is it sufficient that it is enforceable by someone? This question calls for a consideration of the legal nature of a policy of assurance.

The expression "policy of assurance" is not defined in the Act. In *National Mutual Life Association* v. *Federal Commissioner of Taxation*,[51] a case decided in the context of income tax legislation, there is a full and interesting discussion of the expression. As a result of that case it can be said that a policy of life assurance is a contract by which an assurance company promises, in consideration of payment of a premium or premiums, to pay benefits upon death of the life assured or upon the happening of an event dependent upon the termination or continuance of the life assured.

A life assurance policy, like any other contract, is *prima facie* actionable only by the parties to it, *i.e.* by the proponent, his executors and administrators on the one hand and by the insurance company on the other.[52] The person to whom the proceeds are made payable has, as such, no right of action. An exception exists where the proponent has made himself trustee in respect of the right of action for the beneficiary.

The Life Insurance Act 1945-1973 (Cth) has modified these general law principles in two ways. First, section 87 provides that upon registration by an insurer of an assignment by way of a memorandum of transfer in accordance with or substantially in accordance with the Fifth Schedule to the Act, the transferee "shall have all the powers and be subject to all the liabilities of the transferor under the policy, and may sue in his own name on the policy".[53] Secondly, section 94 provides

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[49] *Thurn's* case.

[50] *17 C.T.B.R. (N.S.) Case 4.*

[51] (1959) 102 C.L.R. 29.

[52] Where the proponent is two persons jointly, there is authority for saying that the policy is enforceable by the survivor, even though the premiums have been furnished by the deceased alone: *Coulls* v. *Bagot's Executor and Trustee Co. Ltd.* (1967) 119 C.L.R. 460.

[53] The legal effect of an assignment otherwise than under the Act will fall to be determined in accordance with the general law and statutes affecting assignments of choses in action.

that subject to the Bankruptcy Act 1966-1973 (Cth) a policy effected by any person upon his or her own life and expressed to be for the benefit of his or her spouse and/or children or any of them "shall create a trust in favour of the objects named in the policy, 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 person whose life is insured, or be subject to his or her debts."[54]

Where policy proceeds are payable to a relative falling within one of the classes listed in section 8(4)(f) but not to the widow, widower or children by virtue of terms of the policy itself falling within section 94, and not to a relative of any class by virtue of a transfer registered under section 87, that relative's rights will not be enforceable by him: he will have to rely upon the proponent or his legal personal representatives to enforce them for him. Does this fact involve the consequence that the proceeds are not "payable" to that relative? No. So long as there is a legal obligation upon the insurer to pay to the relative that is enough.

7. *"Money payable to, or to any person in trust for the widow . . ."—payability.*

Does the word "payable" in this expression denote (1) "which legally must be paid"; (2) "which may lawfully be paid"; or (3) "which may lawfully be paid and is in fact paid". This question has not arisen in any decided case: in no decided case has there been provision for an election by the insurer or for that matter by anyone else as to who shall receive the policy proceeds.[55] It is the person to whom the policy proceeds are payable as at the moment after death who is to be identified. This follows from the general principle that in the absence of a contrary intention to be found in a particular Act, "death duty" and "estate duty" legislation presupposes that a death has occurred and that an estate exists.[56] The applicability of this general principle in the context of section 8(4)(f) is fortified by the use of the words "widow" and "widower" in that paragraph.

Regard may be had to the construction of similar expressions in other legislation. A good example is section 102(1)(b) of the Income Tax Assessment Act 1936-1974 (Cth). Section 102(1)(b) provides for

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[54] There is no inconsistency between this section and death or estate duty legislation which brings the proceeds of such a policy to charge as part of the deceased's notional estate (*e.g.* s.8(4)(f)), the word "estate" being used in different senses in the two classes of legislation: *Re Estate of Black; Thomas* v. *Commissioner of Stamp Duties* (1965) 66 S.R. (N.S.W.) 348; and *Re Estate of Mackenzie, Forsyth* v. *Commissioner of Stamp Duties* (1965) 66 S.R. (N.S.W.) 359; on appeal at (1966) 114 C.L.R. 194, following Crisp J. in *In re Perry* (1963) 5 F.L.R. 116.

[55] Where, as under much State legislation, what is caught is "money payable to any person" the present question cannot arise since the proceeds must be paid to someone: they cannot be kept by the insurer.

[56] *Robertson* v. *Federal Commissioner of Taxation* (1952) 86 C.L.R. 463.

a special method of taxing income where a person has created a trust and income thereunder is, in the relevant year, "payable to or accumulated for, or applicable for the benefit of" a child or children of that person who is or are under the age of twenty-one years and unmarried. It was held in *Hobbs* v. *Federal Commissioner of Taxation*[57] that income was not caught by this formula merely on the basis that it was lawful under the terms of the trust for it to be applied for such a child's benefit if the trustee chose to exercise a discretion vested in him so to apply it. Dixon C.J. said:

> . . . the fate of the income must be determined under one or other of those expressions. To state it otherwise, the trust must be of such a character that the income must be payable to or accumulated for or applicable for the benefit of the child or children in the year of income. That is to say, it cannot be dealt with otherwise than under these alternatives.[58]

His Honour went on to say:

> To fulfil the condition it must be possible to say of the income that under the trust it must in the year of income be payable to or accumulated for or applicable for the child or children, and to deal with it otherwise is not within the trust. The fact that the infant is only contingently entitled makes this impossible.[59]

In *Hobbs's* case the income was not in fact paid to, accumulated for or applied for the benefit of the child. But in a later Board of Review decision[60] under a trust which was similar to that in *Hobbs's* case, it was so paid or applied. Relying on dicta in *Hobbs's* case, that "if you have a case of payment to the child authorized by the trust deed, that of course satisfies the provision"[61] the Board held that the income was "payable to" the child. Although a literal reading of the sentence taken in isolation leads to this decision, it is submitted that in the light of the other passages from *Hobbs's* case quoted earlier and of the total passage in which the sentence occurs[62] the dictum cannot be taken as authority

[57] (1957) 98 C.L.R. 151.
[58] *Id.* 161.
[59] *Ibid.*
[60] *17 C.T.B.R. (N.S.) Case 66.*
[61] (1957) 98 C.L.R. 151, 161 *per* Dixon C.J.
[62] "Considerable discussion has taken place as to the possibility of the word 'applicable' bearing the meaning of 'may be applied' or the meaning of 'must be applied'. The view which we take of the clause is hardly expressed by a choice between those two alternatives. We think that the whole clause requires that the disposal of the income in the year in question must be by payment to, accumulation for or application for the benefit of, the child. If you have a case of payment to the child authorized by the trust deed, that of course satisfies the provision. If you have the case of an accumulation for a child that in turn satisfies the provision; if you have neither of these things and a case where the money must be applied for that child, that in turn satisfies the provision. But they are alternatives together covering the ground which the legislature has selected as the

for a proposition that the expression "payable to" either in section 102(2)(b) of the Income Tax Assessment Act 1936-1974 or standing alone as it does in section 8(4)(f) of the Estate Duty Assessment Act 1914-1974 (Cth) catches money "which may lawfully be paid and is in fact paid to" a person. Rather, it is suggested that the sentence quoted taken in the context of the surrounding passages and of section 102(2)(b) means that payment to a child authorized by the trust is caught by section 102(1)(b) when it can be said that if the income had not been so paid, it would, by the terms of the trust, have been required to be applied for his benefit, or if not, and as a last resort, it would by the terms of the trust, have been required to be accumulated for him.

It is suggested that if a policy provided for a choice to be made upon the death of the life assured from amongst persons including at least one person outside the prescribed classes of relative, then even though a relative were in fact chosen to be the recipient of the policy proceeds, the proceeds would not be caught by the paragraph. This seems to follow from several factors. First, the policy underlying the paragraph is that the paragraph is intended to catch those assurance policies which fulfil the function of a will made in favour of a relative. A second factor, and one related to the first, is the construction adopted in the decided cases that the payee must have been chosen on the basis that he is expected to stand in a prescribed relationship to the life assured upon his death. This test cannot be satisfied where the payee's title depends upon a *post*-death exercise of a power of selection by the insurer or by someone else. Thirdly, although it is a relationship premised upon a death which the paragraph predicates, the cases establish that the money payable must have borne the relevant character prior to death and in anticipation of death. This could not be so where the money might be payable to a non-relative if he were selected after the assured's death and this is not altered by the fact that a non-relative is not in fact chosen and that a relative is.

8. *". . . where the whole of the premiums has been paid by or on behalf of the deceased, or, where part only of the premiums has been paid by or on behalf of the deceased, such portion of any money so payable as bears to the whole of that money the same proportion as the part of the premiums paid by or on behalf of the deceased bears to the total premiums paid . . ."*

Is the test whether the whole or a part of the premiums has been paid by the deceased to be applied strictly as at the time of each payment of premium? If so, then payment to the deceased of a consideration for

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test of the special liability. The alternatives together state an entire condition which must be fulfilled in one way or another before the provision is applied to expose the settlor, who has created the trust, to the consequence of having imposed upon his trustee the tax which stated in sub-s.(2)." *Ibid.*

an assignment of the policy by him or even a precise reimbursement of the deceased for premiums paid by him would not be relevant to the question whether the premiums previously paid had been paid "by or on behalf of the deceased". The use of the singular "whole of" in preference to the plural "all of" and the singular "part only of" in preference to the plural "some only of" may seem to direct attention away from individual payments and to a total and ultimate position. But the expression "has been paid by or on behalf of" insists that the moment and act of each payment be looked to. Moreover it can be suggested that if the legislature had intended a payment to the deceased by an assignee to be equated with payment of premiums by the assignee, nothing would have been simpler than for Parliament to have said so expressly. Reimbursement has been dealt with expressly by the N.S.W. and Tasmanian legislatures in section 102(2)(h) of the Stamp Duties Act, 1920-1974 (N.S.W.) and section 5(2)(j) of the Deceased Persons' Estate Duties Act 1931 (Tas.) respectively.[63] Finally, this construction is consistent with the cases on the expression "paid by the deceased" in section 102(2)(h) of the N.S.W. Act shortly to be noted.

It seems clear that the test is to be applied at the time of the payment of each premium. But it is surely an injustice that a payment to or reimbursement of the deceased cannot be taken into account for the purpose of apportionment. The only way in which the rigour of the paragraph in this respect can be mitigated is by a finding that reimbursement or payment of consideration has caused an assignee to be entitled as purchaser and not as relative at all. This approach was taken by the Board of Review in *17 C.T.B.R. (N.S.) Case 4*. But this device is quite unsatisfactory from the Revenue's point of view since it can have the consequence that the deceased may pay all premiums after the assignment yet no part of the proceeds will be caught by the paragraph.[64] This was the situation in the Board of Review case referred to. From the Revenue's point of view the position is exacerbated the earlier during the term of the policy the purchase occurs.

If the principle is adopted that it is the premiums over the full term of the policy which are to be apportioned[65] rather than, say, only those paid during the period of three years before death[66] it seems just and equitable that a reimbursement of the deceased by an assignee or a payment of consideration to the deceased by an assignee should, for the

[63] These provisions are however also deficient in that they deal only with a full reimbursement. They should be extended to cover partial reimbursements. Further, they leave untouched payment of purchase money other than one amounting to a reimbursement.

[64] Any premiums so paid by the deceased within the period of three years before his death will be caught by s.8(4)(a).

[65] As in the Commonwealth and N.S.W. Acts.

[66] As in Victoria and Western Australia.

purpose of apportionment, be equated with payment of premiums by the assignee to the extent of the amount of the reimbursement or payment. After all, theoretically the monies received from the assignee will swell the deceased's estate. Of course premiums paid by the deceased after the assignment would remain to be counted as such and would cause a larger proportion of the amount payable under the policy to be caught.

Although the Acts of the Australian States[67] do not contain the expression "or on behalf of", it seems that the inclusion of those words in paragraph (f) adds nothing to the meaning of "paid by" and that cases decided under the Australian State Acts on the meaning of "paid by" will be applicable to section 8(4)(f). The situation which has most commonly given rise to difficulty is the position where the deceased has settled a fund upon trust in accordance with whose terms the trustees have paid the premiums out of the trust fund.[68] In *Barclays Bank Ltd.* v. *Attorney-General*[69] the deceased had assigned two policies on his life and established a fund for the benefit of his son and others from which the trustees were directed to pay the premiums on the policies. It was held that after the date of the settlement the policies were not "wholly kept up" by the deceased.[70] It was reasoned that the person who "keeps up" a policy is he who pays the premiums on it as they fall due and that the trustees had paid the premiums not as agents of and at the direction of the assured, but as a result of their rights and duties as trustees which were self-sustaining rights and duties in that the assured had no right to control the trustees in respect of the decision to pay or not to pay the premiums. Indeed the settlor was not even entitled to enforce observance of the trust since he had no beneficial interest whatever in the fund.

This decision was held to be applicable to the different wording of section 102(2)(h) of the N.S.W. Act in two superannuation cases.[71] In *Wayne* v. *Commissioner of Stamp Duties* (*N.S.W.*)[72] the deceased

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[67] *Cf.* N.S.W.: s.102(2)(h); Vic.: s.8(1)(d), (e); (3)(b) ("Paid or provided"); Qld.: s.10C ("paid out of [his/her] own proper moneys"); S.A.: s.8(1)(j), (k) ("kept up" and "paid by" are used); W.A.: s.10(2)(e), (1), (m) ("kept up" and "paid by" are used); Tas.: s.5(2)(j).

[68] This situation is dealt with expressly under the Tasmanian Act, s.5(2)(j) of which includes the words, "where the whole of the premiums were paid by the deceased person, or by the trustee of a settlement made by the deceased person, or by the trustee of a fund to which the deceased person had made contributions for the purpose of obtaining from the fund a benefit for himself or any other person, or, where part of the premiums were paid by some other person, such proportion of that money as the premiums paid by the deceased person or trustee bear to the total premiums paid in respect of that policy . . ."

[69] [1944] A.C. 372.

[70] The notion of "keeping up" a policy is found in the S.A. and W.A. Acts.

[71] Decided prior to the enactment by the Stamp Duties (Amendment) Act 1972 (N.S.W.) of provisions dealing expressly with superannuation.

[72] [1966] 2 N.S.W.R. 309.

was a member of a compulsory contributory superannuation scheme whose trustees took out policies of assurance on the life of the deceased using scheme monies to pay the premiums, a deduction being made from the deceased's wages each week and paid to the trustees as the deceased's contributions to the scheme fund. Although there was a close correspondence between the amount of the deceased's contributions and the amount of the premiums, the N.S.W. Court of Appeal held that the premiums had not been "paid by" the deceased. The Court's reasoning is adequately shown in the following passage from the judgment of Jacobs J.A.:

> . . . the employee handed over the moneys not under any revocable mandate to spend it on his behalf so that when they paid a premium it might be said that he himself was paying it nor was it a payment by the employee which under some contract which he had made was actually carried out by the trustees. As was stressed in *Barclays Bank Ltd.* v. *Attorney-General* . . . regard must be had to the legal character of a trustee. In the circumstances which existed in that case and, I think, in the circumstances of the present case, the payment was by the trustees only. There was no payment by the deceased of any of the premiums.[73]

The second case referred to, *Commissioner of Stamp Duties* v. *Jones*,[74] differed from *Wayne's* case in that the assured had a contractual right to compel the trustees to pay the premiums since each person becoming a member of the scheme was, by the terms of the trust deed, deemed to be a party to that deed. But this was held not to be a sufficient ground on which to distinguish the case from *Wayne's* case. Menzies J. considered that the relationship between trustee and beneficiary goes beyond the scope of contract and therefore that no weight could be given to the contractual right. Moreover, the Court emphasized the "group" nature of the scheme (it involved a "group" premium and a "group" policy).[75]

There has not yet been a case where a policy or policies were taken out on the deceased's life specifically (as in *Wayne*), he having a contractual right to compel the trustees to pay the premiums (as in *Lloyd-Jones*). The test in any case seems to be whether the deceased has legal power to direct the trustees as to what to do with the monies which he provides. Presumably he would in the case hypothesized by Jacobs J.A. in *Wayne's* case:

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[73] *Id.* 317.

[74] (1971) 125 C.L.R. 511 affirming *Lloyd-Jones* v. *Commissioner of Stamp Duties* (*N.S.W.*) [1971] 1 N.S.W.L.R. 106.

[75] Because the proceeds were payable under a Group Endowment Scheme Policy taken out by the trustees over many lives including that of the deceased it was even questioned whether the money was payable "under a policy of assurance on the life of the deceased".

> . . . I do not thereby adopt the submission which was made that any payment by a trustee will always be an independent payment never made by the settlor. If there is no beneficial interest in any other person than the settlor who creates the trust then generally speaking the existence of the trust will not be relevant because the settlor could at any stage revoke the trust. In other words the trustee, although he may be in as a trustee of the money, is at the same time the agent of the settlor and the settlor may at any stage revoke the trust and the agency. The position then is no different from a revocable mandate to pay. However, I do not think that this is the present case. The deceased had no right or power when he had suffered a deduction from his salary to require the trustees of the superannuation fund to pay that deduction over to him instead of applying it under the superannuation scheme. They received it as independent trustees of the fund even though the deceased had a contingent interest in the proceeds of the policies and in other moneys in the fund. This contingent interest of the deceased does not in my view bear any relation to the question whether the premiums were paid by the deceased. It is not a relevant factor sufficient to distinguish the authority to which I have referred.[76]

Conclusion

As Professor Ford has said of section 8(4)(f), perhaps with a degree of understatement, "It is a strange provision and the courts have had difficulty in interpreting it".[77] It is submitted that it should be amended first, so as to catch policy proceeds payable to *any person* (it is hard to conceive of any legislative policy which would require relatives to be singled out for unfavourable treatment), and second, so that reimbursement and consideration received by the deceased upon assignment of the policy will be reflected in the computation of the proportion of the policy proceeds to be included in his estate.

[76] [1966] 2 N.S.W.R. 309, 317.
[77] Ford, *Principles of the Law of Death Duty* (1971) 194.