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Insurance Payable to a Married Woman--Effect of K.R.S. 297.140

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proper remedy in such a case could be secured by means of a mandatory injunction. As far as can be found, this was the last pronouncement by the Kentucky Court on the matter. The court has stated, by way of dictum in a later case involving an application for a mandatory injunction against a circuit judge, that a mandatory injunction is equivalent in legal effect to a mandamus.[15]

It is submitted that the law in Kentucky on this question is confused because of an unfortunate decision in the *Orr* case. The objections to that case have been previously noted. The main objection to that case is that it does not in any way consider the Code. It would be a strained interpretation, to say the least, to hold that an *executive* or *ministerial officer* and a private corporation charged with not even a quasi public duty are one and the same thing. The latest case on the subject reaches the proper result under the Code and declares the proper remedy to be used. Therefore, it would appear that the court should overrule the *Orr* case to remove this unfortunate decision and its successors as a line of authority. It may well be argued that Kentucky should follow the general rule of other states and the common law. The fact remains, however, that so long as this Code provision with its peculiar wording is retained, that result cannot be reached. The law in Kentucky today is, and should remain, so long as section 477 of the Code remains in its present form, that mandamus will not lie against a private corporation, the proper remedy being by means of the mandatory injunction.

SCOTT REED.

INSURANCE PAYABLE TO A MARRIED WOMAN—EFFECT OF K.R.S. 297.140

K.R.S. 297.140 provides: "A policy of insurance on the life of any person expressed to be for the benefit of . . . any married woman . . . shall inure to her separate use and benefit and that of her children. . . ."

Where the married woman beneficiary survives the insured no difficulty arises. The statute is inoperative and the beneficiary takes the proceeds of the policy under the terms of the contract. No case has been found that questions her right to the entire proceeds, and it is very clear that in such a case the statute neither creates a life estate in the mother with a vested remainder to her children, nor a joint tenancy. A child takes nothing by virtue of the contract.

Where the beneficiary predeceases the insured and leaves no children, the statute is also inoperative. Her personal representative takes the proceeds to be distributed according to her will or the statute of descent and distribution.[1] But where she predeceases

[15] Hargis v. Swope, 272 Ky. 257, 114 S. W. (2d) 75 (1938).

[1] Bradley v. Bradley's Administrators et al, 178 Ky. 239, 198 S. W. 905 (1917); Buckler et al v. Supreme Council Catholic Knights of America et al, 143 Ky. 618, 136 S. W. 1006 (1911); Finn et al v.

the insured and leaves children, the statute operates and the children take the proceeds, not by descent, but under the policy by virtue of the statute[2] thus eliminating any claim of the insured's creditors, and likewise any claim by creditors of the named beneficiary. It has been so held even where the wife died before the policy was issued pursuant to an application made before her death.[3]

At the time of the death of the mother her interest as beneficiary vests in her children then living and a subsequent death of a child, also before the death of the insured, does not divest that interest. In *Conn* v. *White*[4] the wife predeceased the insured, leaving two children, one of whom died intestate before the insured, leaving surviving him his widow. The insured attempted to devise the entire proceeds of the policy to his daughter. After the death of the insured it was held that the statute protected the interest of the widow of the deceased child and she was awarded one-fourth of the proceeds of the policy. However, the statute was held not to operate in favor of one who claimed through a child that predeceased the beneficiary.[5]

The mere reservation of the right to change the beneficiary is not in itself sufficient to prevent the operation of the statute, nor will an attempt to substitute beneficiaries in a manner other than that provided by the policy affect the right of the wife or children.[6] It is agreed that where the privilege to change beneficiaries is reserved, the named beneficiary does not have a vested right during the life of the insured. However, the beneficiary has a right which is more than a mere expectancy, and he may be cut off only by the exercise of the reserved power in the manner provided in the contract. In *Parks' Ex'r* v. *Parks*[7] the court held that a change in the beneficiary of an insurance policy cannot be made by will where the policy prescribes the method of changing beneficiaries. However, it is sufficient if the insured does all in his power to comply with the provision.[8] Where the husband takes out a policy on his own life in

Eminent Household of Columbia Woodmen, 163 Ky. 187, 173 S. W. 349 (1915); Neal's Adm'r. v. Shirley's Adm'r., 137 Ky. 818, 127 S. W. 471 (1910); Hall v. Ayer's Guardian, 32 K. L. R. 291, 105 S. W. 911 (1907).

[2] Conn v. White, 198 Ky. 185, 224 S. W. 764 (1920); Mutual Life Ins. Co. of N. Y. v. Spohn, 170 Ky. 721, 186 S. W. 633 (1916).

[3] Lee v. Murrel, 7 K. L. R. 589 (1886).

[4] 189 Ky. 185, 224 S. W. 764 (1920).

[5] Mutual Life Ins. Co. v. Spohn, 170 Ky. 721, 186 S. W. 633 (1916); Bell v. Kinner, 101 Ky. 271, 40 S. W. 686 (1897).

[6] Parks' Ex'r. v. Parks, 288 Ky. 435, 156 S. W. (2d) 288 (1941); Sturges v. Sturges, 126 Ky. 80, 102 S. W. 884, 31 K. L. R. 537 (1907).

[7] 288 Ky. 435, 156 S. W. (2d) 288 (1941).

[8] Parks' Ex'r. v. Parks, 288 Ky. 435, 156 S. W. (2d) 288 (1941); Pikeville Nat. Bank and Trust Co. v. Shirley, 281 Ky. 158, 135 S. W. (2d) 431 (1939); Farley v. First Nat. Bank, 250 Ky. 150, 61 S. W. (2d) 1059 (1933); Hoskins v. Hoskins, 231 Ky. 5, 20 S. W. (2d) 1029 (1929); Twyman v. Twyman, 201 Ky. 102, 255 S. W. 884 (1907).

favor of his wife a subsequent divorce will divest her of all rights under the policy.[9] But where the wife is the moving party, secures the insurance on the husband's life, and pays the premiums, the contract is her personal property and a subsequent divorce will not disturb her right to the proceeds.[10]

Some very interesting results have been reached in cases involving fraternal and mutual benefit insurance where the statute was held applicable and the proceeds of the policies ordered paid to the deceased beneficiaries, even where the right to change the beneficiary was reserved and there was a further provision that in case the named beneficiary predeceased the insured the proceeds were to be paid to the insurer or to the estate of the insured.[11] However, these decisions have not been followed in later cases involving other types of life insurance, and the courts will give effect to a provision in the contract providing for payment to the beneficiary only upon receipt of due proof of the *prior* death of the insured or to a clause providing for a reversion to the estate of the insured in event of her prior death.[12] This protects the creditors of the insured rather than the children of the deceased beneficiary.

There has been but one reported case in Kentucky involving the distribution of the proceeds of a life insurance policy where the insured and the beneficiary perished in a common disaster. In *Colvos' Administrator et al* v *Mary Gouvas et al,*[13] the policies provided that the proceeds should be paid to the beneficiary upon receipt of due proof of the *prior* death of the insured, and that if any beneficiary died before the insured, the interest of such beneficiary should vest in the insured. The court applied the common law rule that there is no presumption of survivorship and one who claims through the beneficiary has the burden of proving that the beneficiary survived the insured. The evidence was deemed insufficient to establish the survival and the proceeds of the policy were distributed as property of the insured. The Kentucky Legislature in 1942, by statute,[14] provided that in case of simultaneous death where there is no proof of survivorship the proceeds will be distributed as though

[9] Flimin v. Flimin's Adm'x., 250 Ky. 827, 64 S. W. (2d) 820 (1933).

[10] Bradley v. Bradley's Admr., 178 Ky. 239, 198 S. W. 633 (1917).

[11] Colvos' Adm'rs, et al v. Mary Gouvas et al, 269 Ky. 752, 108 S. W. (2d) 820, 113 A. L. R. 871 (1937); Hunt Public Adm'r., et al. v. Mut. Life Ins. Co. of N. Y., 243 Ky. 511, 49 S. W. (2d) 322 (1932); Hamblin's Adm'x. v. Hamblin's Adm'r., 241 Ky. 447, 44 S. W. (2d) 299 (1931); Wigram v. Miller, 98 Ky. 220, 33 S. W. 637 (1896).

[12] Buckley v. Supreme Council Catholic Knights of America, 143 Ky. 618, 136 S. W. 1006 (1911); Neal's Adm'r. v. Shirley's Adm'r., 137 Ky. 818, 127 S. W. 152 (1910); Hall v. Ayre's Guardian, 32 Ky. Law Rep., 288, 105 S. W. 911 (1907); Supreme Council Catholic Knights of America v. Densford, 21 K. L. R. 1574, 56 S. W. 173, 49 L. R. A. 776 (1900).

[13] 269 Ky. 752, 108 S. W. (2d) 820, 113 A. L. R. 371 (1937).

[14] K. R. S. 397.040.

the insured survived. This changes the common law by establishing a presumption that the beneficiary died first.

The statute raises an additional problem which should be mentioned. The general rule seems to be that one person has no legal right to effect life insurance upon the life of another without his consent, but K.R.S. 297.140 provides that a married woman may, without the consent of her husband, contract, pay for, take out and hold a policy of insurance upon the life of her husband. The Kentucky Court, however, has held in a number of cases that a policy effected on the husband's life without his consent is against public policy and void. It is also held that, where the wife pays for the premiums on such policies from household funds or from his money, he may recover the sums so paid from the insurance company.[15]

IRA G. STEPHENSON

THE EFFECT OF THE MARRIED WOMAN'S SURETYSHIP STATUTE IN KENTUCKY

Under the common law a married woman's contract of suretyship was void[1] and a mortgage or other conveyance given by her as security for the debt of another was likewise void.[2] K. R. S. 404.010 (2), which replaced a narrower statute,[3] provides: "No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability on a contract made after marriage to answer for the debt of another, including her husband, unless the estate has been set apart for that purpose by mortgage or other conveyance." It will be seen that the statute, instead of restricting the power of married women to enter into contracts of suretyship, actually extends it by providing a method by which she can set aside her property as security for the debt of another.

The statute, seemingly clear, has not always proved easy of application. The difficulty is in determining in what situations the married woman is a surety, especially in the cases where she signs a note as a principal either as the sole principal or as a co-maker. The Court of Appeals has laid down two principles for guidance:

[15] Metropolitan Life Insurance Co. v. Smith, 22 K. L. R. 868, 59 S. W. 24, 53 L. R. A. 817 (1900); Metropolitan Life Insurance Co. v. Blesch, 22 K. L. R. 530, 58 S. W. 436 (1900); Metropolitan Life Insurance Co. v. Selhorst, 21 K. L. R. 912, 53 S. W. 524 (1899); Metropolitan Life Insurance Co. v. Trende, 21 K. L. R. 909, 53 S. W. 412 (1899); Metropolitan Life Insurance Co. v. Monohan, 102 Ky. 13, 42 S. W. 924 (1897).

[1] Underhill v. Meyer, 174 Ky. 229, 192 S. W. 14 (1917).

[2] Merchant's and Mechanic's Bldg. and Loan Assoc. v. Jarvis. Adm'r, 92 Ky. 566 (1892); Hirshman v. Brashears, Etc., 79 Ky. 258 (1881).

[3] Kentucky General Statutes (1888), c. 52, art. 2, sec. 2.