SHERIFF APPEAL COURT

[2018] SAC (Civ) 19
PAI-A31-15

Sheriff Principal D L Murray
Appeal Sheriff A M Cubie
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by Sheriff Principal D L Murray

in Appeal in the cause

JOHN McGLEISH

Pursuer and Appellant

against

GRAHAM CAMERON TOUGH

First Defender and First Respondent

and

MAUREEN LESLIE

Second Defender and Second Respondent

Appellant: McLean, Advocate; Balfour+Manson LLP
Respondents: Jones QC, Solicitor Advocate; BTO Solicitors LLP

31 July 2018

[1] This is an action in which the appellant seeks a declarator that he has right to payment of the sum assured under a policy of life assurance with critical illness cover, entered into between him and his wife, Catherine McGleish and CIS Co-operative Insurance ("CIS"), on 6 February 2001. He appeals against the interlocutors of the sheriff at Paisley,

issued following a debate, dated 23 May 2017 and 21 June 2017. The effect of these interlocutors was that the sheriff dismissed the action and found no expenses due to or by either party.

[2] The following facts are not in dispute: on or about 6 February 2001 the appellant and his wife took out the joint life level term assurance policy with critical illness cover with CIS ("the insurance policy"). The term of the insurance policy was 18 years and the monthly premium £29.95. The sum assured was £42,000 without profits. The pursuer and his wife were sequestrated on 11 July 2008 and the first respondent was appointed as trustee for both of them in terms of section 2 of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act"). Mr McGleish was automatically discharged from his sequestration on 11 July 2009. Mrs McGleish died on 5 February 2010. The proceeds of the policy were paid to the first respondent as trustee. On or about 28 September 2011, the first respondent was discharged as trustee and replaced by the second respondent.

[3] The appellant maintains that his interest in the insurance policy is a non-vested contingent interest within the meaning of section 31(5) and (5A) of the 1985 Act. The respondent submits the insurance policy was moveable property, which vested in the trustee in terms of section 31(1) and (4) of the 1985 Act, as intimation of its assignation would have been required in order for the trustee to complete title to it.

[4] The terms of the 1985 Act which are applicable given the date of the appellant's sequestration are as follows:

> "**31. Vesting of estate at date of sequestration.**
>
> (1) Subject to section 33 of this Act and section 91(3) of the Pensions Act 1995, the whole estate of the debtor shall, by virtue of the trustee's appointment, vest in the trustee as at the date of sequestration for the benefit of the creditors.
>
> (1A) It shall not be competent for—

(a) the trustee; or
(b) any person deriving title from the trustee,
to complete title to any heritable estate in Scotland vested in the trustee by virtue of his appointment before the expiry of the period mentioned in subsection (1B) below.

(1B) That period is the period of 28 days (or such other period as may be prescribed) beginning with the day on which—
(a) the certified copy of the order of the sheriff granting warrant is recorded under subsection (1)(a) of section 14 of this Act; or
(b) the certified copy of the determination of the Accountant in Bankruptcy awarding sequestration is recorded under subsection (1A) of that section,
in the register of inhibitions.

(2) The exercise by the trustee of any power conferred on him by this Act in respect of any heritable estate vested in him by virtue of his appointment shall not be challengeable on the ground of any prior inhibition.

(3) Where the debtor has an uncompleted title to any heritable estate in Scotland, the trustee may complete title thereto either in his own name or in the name of the debtor, but completion of title in the name of the debtor shall not validate by accretion any unperfected right in favour of any person other than the trustee.

(4) Any moveable property, in respect of which but for this subsection—
(a) delivery or possession; or
(b) intimation of its assignation,
would be required in order to complete title to it, shall vest in the trustee by virtue of his appointment as if at the date of sequestration the trustee had taken delivery or possession of the property or had made intimation of its assignation to him, as the case may be.

(5) Any non-vested contingent interest which the debtor has shall vest in the trustee as if an assignation of that interest had been executed by the debtor and intimation thereof made at the date of sequestration.

(5A) Any non-vested contingent interest vested in the trustee by virtue of subsection (5) above shall, where it remains so vested in the trustee on the date on which the debtor's discharge becomes effective, be reinvested in the debtor as if an assignation of that interest had been executed by the trustee and intimation thereof made at that date….

(8) In subsection (1) above, subject to section 31A of this Act, the "whole estate of the debtor" means, subject to subsection (9) below and to sections 71(10B), 78(3B) his whole estate at the date of sequestration, wherever situated, including—
(a) any income or estate vesting in the debtor on that date;

> (aa) any property of the debtor, title to which has not been completed by another person deriving right from the debtor; and
> (b) the capacity to exercise and to take proceedings for exercising, all such powers in, over, or in respect of any property as might have been exercised by the debtor for his own benefit as at, or on, the date of sequestration or might be exercised on a relevant date (within the meaning of section 32(10) of this Act)….."

[5] It was not in dispute either before the sheriff or in this court that the right in the insurance policy vested in the trustee on 11 July 2008. The issue in dispute is whether it vested by virtue of section 31(4) or 31(5) of the 1985 Act and as a consequence what is the impact of the appellant being discharged from his sequestration.

[6] The sheriff accepted the respondents' submissions that the appellant's interest in the insurance policy was a right in incorporeal moveable property. As such a right requires an assignation to compete title, the appellant's right vested in the first respondent by virtue of section 31(4) of the 1985 Act. The sheriff considered it to be unlikely that Parliament would have intended the right was also dealt with under section 31(5). He therefore determined that the appellant's interest in the life policy was not a non-vested contingent interest falling under the terms of section 31(5). The sheriff found that the insurance policy vested in the first respondent, as trustee for the appellant (not the appellant's wife, although there is an averment by the respondents that the sums collected from CIS were paid to the creditors of Mrs McGleish). The sheriff also accepted the criticisms made of the appellant's averments in article 8 of Condescendence to the effect that, if the proceeds of the insurance policy should not have been paid to the first defender, it could not have formed any part of any interest in the appellant's sequestrated estate. In the light of the appellant's submission we did not hear argument on these subsidiary aspects of the sheriff's decision.

Submissions for the appellant

[7] The appellant in his written submissions invited the court to recall the interlocutors of the sheriff of 23 May and 21 June 2017, and thereafter either to grant decree *de plano* in terms of the first and third craves of the initial writ, or alternatively to allow parties, before answer, a proof of their respective averments. At the conclusion of his oral submissions counsel for the appellant invited the court only to determine the question of whether the benefit payable under the policy was a non-vested contingent interest, reserving the question of expenses and the other aspects of the appeal. He accepted that if the court rejected the appellant's submission that it was a non-vested contingent interest that would be the end of the matter for the appellant and there would be no need to hear further submissions on the other aspects of the appeal. We therefore only consider the appellant's primary submission.

[8] The key issue was the proper characterisation of the appellant's right under the insurance policy. The primary position for the appellant was that the sheriff was in error in concluding the appellant's interest in the insurance policy was not a non-vested contingent interest within the meaning of section 31(5) and (5A) of the 1985 Act. The appellant associated the prospective right under the life policy with a *spes successionis* citing *Trappes* v *Meredith* (1871) 10 M 38 and *Reid* v *Morison* (1893) 20 R 510. It was noted that these cases related to trusts or wills and the court had determined that, as the rights were not subject to diligence by creditors, they did not pass to the trustee. The law had subsequently been changed by section 2 and section 97(4) of the Bankruptcy (Scotland) Act 1913.

[9] The sheriff should not have concluded the appellant's interest in the insurance policy as a matter of construction vests in the first respondent by virtue of section 31(4), simply because the right under the insurance policy could be assigned. The appellant's interest in

the insurance policy was covered by sub-section (5) as being a non-vested contingent interest. The appellant conceded that if the right was not a "non-vested contingent interest" then the first respondent was entitled to ingather such proceeds of the insurance policy as were realisable and distribute them amongst the creditors.

[10] The appellant also criticised the sheriff's approach in seeking to construe the meaning of the phrase "non-vested contingent interest" with reference to and by deconstructing the individual elements: looking at "non-vested" and "contingent" separately rather than having regard to the meaning of the phrase as a whole, and the underlying intention.

[11] The phrase "non-vested contingent interest" was not a term of art in Scots law and originated in the Bankruptcy (Scotland) Act 1913 which followed on the Cullen Committee recommendations (Report of the Committee on Bankruptcy Law of Scotland and its Administration (Cd 5201, 1910)). Section 2 provided:

> ""property" and "estate" shall, when not expressly restricted, include every kind of property, heritable or moveable, wherever situated, and all rights, powers and interests therein capable of legal or voluntary alienation, or of being affected by diligence or attached for debt, and any non-vested contingent right of succession or interest in property conceived in favour of the bankrupt under the will or settlement of any person deceased, or under marriage contract, or under any other deed, instrument, or writing of an irrevocable nature".

That definition in substance being repeated in section 97(4) (with regard to the extent of the trustee's right). In Goudy *The Law of Bankruptcy in Scotland* (fourth edition) this development in the law is explained at page 248:

> "[p]rior to 1st January 1914 [when the 1913 Act came into force] the definition did not include a right which was not vested in the bankrupt, such as a mere *spes successionis*, or non-ascertained eventual interest, or a possibility which might never become a beneficial interest, although money might have been raised upon it by the bankrupt by sale or assignation, but the 1913 Act broadened the meaning of 'property and estate' to include also 'any non-vested contingent right of succession or interest in property conceived in favour of the bankrupt under the will or

> settlement of any person deceased or under marriage contract or any other deed, instrument, or writing of an irrevocable nature.'"

It was submitted that it was reasonably clear the change was driven by the decision of the First Division in *Trappes* v *Meredith* and the decision of the seven judges in *Reid* v *Morison* in which *Trappes* v *Meredith* was approved. When section 31(5) of the 1985 Act came into effect concerns were expressed about the possible consequences of rights only becoming of any benefit to the creditors years after the sequestration (see Professor McBryde's comments in *Bankruptcy*, paragraph 9-150 to 9-151). Sub-section (5A) was added to section 31 of the 1985 Act by section 29 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2007 Act"). This took effect on 1 April 2008 and applied to petitions presented on or after 1 April 2008 (the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 3, Savings and Transitionals) Order 2008).

[12] The appellant argued that a historical analysis of the way in which the law developed demonstrated that in subsection (5) a non-vested contingent interest will include a life policy such as the insurance policy, which is the subject of this case.

Submissions for the Defenders and Respondents

[13] The respondents adhered to the argument presented to the sheriff that the appellant's interest in the policy was a right of ownership in incorporeal or moveable property and that such property would require an assignation in order to complete title to it. They submit that the sheriff correctly found that such property falls within section 31(4) of the Bankruptcy (Scotland) Act, under reference to *Bennion on Statutory Interpretation* (seventh edition) page 509:

> "An Act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument."

It was appropriate to consider the whole of section 31 and the scheme it introduced. Sub-section (1) set out what may be described as a general vesting provision in relation to all of the debtor's estate. Sub-sections 1A, 1B, 2 and 3 pertain to the completion of a trustee's title to heritable estate with Parliament making specific provision for the completion of title to heritage. This was necessary because heritage can ordinarily only be conveyed in a prescribed manner; thus the right to the property vests in the trustee consequent upon the general vesting provision of sub-section (1) and the following sub-sections prescribe how the trustee can complete title. In terms of sub-section (4) Parliament made specific provision for the completion of title to items of moveable property that require delivery, possession or intimation of an assignation in order to complete title. Sub-section (1), read alongside the deeming provisions of sub-section (4), has the effect of completing the trustee's title to the insurance policy. Support for that approach was found in McBryde *Bankruptcy* 9-104 where the learned professor refers to the trustee acquiring right to a contract of life insurance. Sub-section (5) deals particularly with a non-vested contingent interest which it was submitted can only be relevant to ownership other than of moveable property which would otherwise be covered by sub-section (4). Thus a non-vested contingent interest is limited to a *spes successionis*.

[14] It was said to be contrary to Parliament's intention to seek to separate out from moveable property the insurance policy and to characterise it as a non-vested contingent interest. The appellant's position was inherently and logically inconsistent in asserting that sub-section (5) vests something in a trustee which is vested consequent to sub-sections (1) to (4). A non-vested contingent interest cannot be property or a right in property that was

vested in the debtor at the time of sequestration. The insurance policy was property which could vest and it was wrong to seek to characterise it only as being an interest in property. It was wrong to seek to separate, as the appellant did, the ownership of property from the incident of ownership. The sheriff's key finding that the insurance policy vested in the trustee by virtue of section 31(4) was correct and should be adhered to by this court.

[15] The sheriff had correctly analysed the ordinary meaning of the component parts of the words used to assist and construct the meaning of the phrase as a whole which is a perfectly legitimate and ordinary way of approaching construction. The appellant's analysis required the separation of ownership of property from the instance of ownership, such as the rights and obligations that flow from ownership.

Discussion and Decision

[16] By virtue of the terms of the 1985 Act applicable when the petition for the appellant's sequestration was presented, he was automatically discharged from his sequestration on 11 July 2009, – one year after his sequestration. As a result of his discharge, if his interest in the insurance policy was a non-vested contingent interest in terms of section 31(5) he would benefit from the policy proceeds as he would become reinvested in his rights under the insurance policy by virtue of section 31(5)(A). If it was not then the policy proceeds were correctly ingathered by the first respondent. In *MacGillivray on Insurance Law* (thirteenth edition), (which was one of the authorities submitted to the court) at paragraph 26-069 reference is made to an action of multiplepoinding as being the remedy available to a company where there are competing claims on its policy. No explanation was given to the court why payment was made absent a multiplepoinding; however the consequence was that these proceedings were commenced. We would observe that it is surprising given the

apparent dispute that the insurance company did not raise a multiplepoinding to ensure they were making payment to the entitled party. We were given no information that the insurance company attempted to satisfy themselves that the insured accepted that he had no claim on the policy, or that the first respondent sought directions in relation to this novel point.

[17] In bankruptcy legislation Parliament is seeking to strike a balance between the competing aims of the creditors having rights to make recovery from the bankrupt's estate and the bankrupt being free to move on following his discharge from bankruptcy. This has seen an ebb and flow of policy over the balance to be struck between these competing objectives. It is instructive to consider how the law has developed. The story begins with *Trappes* v *Meredith*, a case remitted by the Court of Chancery in England for the opinion of the Court of Session where the court concluded at page 40 that a:

> "right or estate in expectancy or *spes successionis* may be sold and assigned so as to give the purchaser a good title in a question with the seller to the right, estate or succession, when it comes to be vested in the seller. But such right or estate in expectancy, or *spes successionis*, is not attachable by the diligence of creditors of the person in expectancy or entitled to succeed, and would not be carried to the trustee in his sequestration if he should be discharged before such right, estate, or succession was vested in him."

As Professor McBryde notes in *Bankruptcy* at 9.151 English law was different and Scots law changed following the Cullen Commission recommendations by the Bankruptcy (Scotland) Act 1913. See also the reference to Goudy p248 quoted above. No information was provided to the court to explain the modification in the 1985 Act of the words contained in section 97(4) of the 1913 Act:

> "Any non-vested contingent right of succession or interest in property conceived in favour of the bankrupt under the will or settlement of any person deceased, or under marriage contract, or under any other deed, instrument, or writing of an irrevocable nature."

The formulation of section 31(5) of the 1985 Act, as it applies in the instant case, is repeated in section 78(9) of the Bankruptcy (Scotland) Act 2016:

> "Any non-vested contingent interest which the debtor has vests in the trustee as if an assignation of that interest had been executed by the debtor (and intimation of assignation made) at the date of sequestration."

This modification has raised questions as to whether rights arising *ex lege* or under a revocable deed should be regarded as vesting in the trustee.

[18] The explanatory notes to the Bankruptcy and Diligence etc. (Scotland) Act 2007 state:

> "**Non-vested contingent interest reinvested in debtor**
>
> 95. This section inserts new section 31(5A) into the 1985 Act. Section 31(5) of that Act gives the trustee the right to non-vested contingent interests (potential assets) as if an assignation (transferring rights to those assets) of the interest had been executed by the debtor and intimation of the assignation made at the date of sequestration. This meant that the trustee continued to hold the right to these interests even after the debtor was discharged. The most common example would be where the debtor was the beneficiary under a will at sequestration, and the testator was still alive when the debtor was discharged. In such a case, if the debtor subsequently inherited an asset under the will, it would vest in the trustee.
>
> 96. This was not the case prior to section 97(4) of the Bankruptcy (Scotland) Act 1913. New section 31(5A) returns the law to the position as it was prior to the 1913 Act; non-vested contingent interests will no longer remain vested in the trustee after the debtor is discharged."

[19] We note in passing that, in the context of the current legislative regime in terms of the 2016 Act, if the interest in the insurance policy is a "non-vested contingent interest" the outcome would be that the trustee would become entitled to the benefit of the monies payable under the policy unless death occurred more than four years after the date of discharge. Thus, had the 2016 Act applied the respondent would have been entitled to collect the sum insured. However, if death had occurred more than four years after the date of sequestration, the opposite result would ensue and the appellant would be entitled to the proceeds of the policy.

[20] We consider the respondent sought to read too much into the impact of para 9-104 of *McBryde on Bankruptcy* which does not address whether it is a policy on the debtor's own life or a joint policy as in the instant case. Neither does it make clear whether the trustee taking over the debtor interest is doing so by virtue of subsection (4) or (5). Perhaps the more important point is that the learned professor proceeds on the basis that the trustee gains an interest in a life insurance contract.

[21] The question of what other rights or interests beyond rights in succession may be held to be non-vested contingent interests has not been authoritatively determined. Dr McKenzie Skene in *Bankruptcy* at 11-47 observes that the other rights or interests which a debtor may have beyond the rights or interests in succession which are to be regarded as vesting in the trustee under this provision remain uncertain. It seems surprising that the application of section 31(4) or 31(5) to such an insurance policy has not been authoritatively decided, but no authority was cited to us and we have been unable to identify any such authority.

[22] The most similar case on its facts to which we were referred was *Stuart's Trustee* v *HJ Banks & Co Ltd* 1998 SCLR 1109. This involved the payment of commission to a debtor for the introduction of purchasers of land where the level of commission payable was dependent on the final sum paid for the purchase and would only become payable after missives for the sale had been concluded. It was agreed in that case that the debtor's right to receive payment was contingent on *inter alia* the debtor performing the service of introducing the purchaser to the defenders and the defenders thereafter concluding a sale with the person so introduced. It was also a matter of concession that the debtor's right to receive commission from the defenders was non-vested and section 31(5) applied. Thus although it was conceded rather than decided the payment of commission, which was

contingent on a sale being completed, was treated as being a non-vested contingent interest, Temporary Sheriff Principal Wheatley noting that: "There is no doubt that such an interest is capable of assignation and intimation."

[23] In the instant case it is accepted that the interest is assignable, but there is a dispute as to whether it is a non-vested contingent interest; and, if so, what consequences follow. Standing the outcome in *Stuart's Trustee* v *HJ Banks & Co Ltd* where the debtor acquired an interest which was to result in a right to payment on completion of the work and contingent on a sale being completed, a parallel may be drawn with the situation here where the right to payment only arises on the first death or a qualifying illness occurring and is contingent on a death or a qualifying illness occurring.

[24] We do not accept the respondent's position, which was accepted by the sheriff, that because the right was assignable, it could not be a non-vested contingent interest. Accordingly we find the sheriff to have been in error to find the assignability of a life policy excluded the application of section 31(5) of the 1985 Act. The fact of assignability is non-determinative, assignability does not *per se* exclude subsection (5). As the First Division identified in *Trappes* v *Meredith* at page 40:

> "By the law of Scotland a right or estate in expectancy or *spes successionis* may be sold and assigned so as to give the purchaser a good title in a question with the seller to the right, estate, or succession, when it comes to be vested in the seller. But such right or estate in expectancy, or *spes successionis* is not attachable by the diligence of creditors of the person in expectancy or entitled to succeed, and would not be carried to the trustee in his sequestration if he should be discharged before such right, estate or succession was vested in him."

Thus it was clearly recognised that a beneficiary may assign the right under a will and under a *spes successionis*. The approach in *Reid* v *Morison* was to associate the interest in expectancy, and it being attached in a sequestration, with whether it could be attached by diligence. Both *Trappes* v *Meredith* and *Reid* v *Morison* related to *spes successionis*. Following

the majority decision in the seven bench case of *Reid* v *Morison* the law was changed and a non-vested contingent interest became part of the estate vesting in the trustee as a result of section 97(4) of the 1913 Act. However, the terms of the statute go wider and, as noted in *Goudy*, section 97(4) of the 1913 Act expanded beyond a *spes successionis* to rights under a marriage contract, or under any other deed, instrument or writing of an irrevocable nature, all of which may be assigned. The formulation of section 31(5) of the 1985 Act replicated in section of the 2016 Act with the use of the expression "non-vested contingent interest" avoids the restriction which may have applied by virtue of the *ejusdem generis* rule and the reference to "will or settlement", "marriage contract, or "any other deed instrument or writing of an irrevocable nature," in the 1913 Act.

[25] The appellant asserts the right to the proceeds arising from the policy was a "non-vested contingent interest" within the meaning of Section 31(5) and (5A) of the Bankruptcy (Scotland) Act 1985; as such the appellant's right vested in the first defender on the basis of the pursuer's sequestration as if it were assigned by the appellant and an intimation of that assignation was made to CIS on that date, and that right re-invested in the appellant on 11 July 2009 being the effective date of his discharge from sequestration as if it were reassigned to the pursuer and an intimation of that assignation had been made to CIS. Given the particular iteration of the development of the law applicable to this case, if the interest in the policy is a non-vested contingent interest which did not belong to the trustee and the contingency was only purified after the discharge of the debtor it follows that the appellant is entitled to the policy proceeds.

[26] We accept the submission on behalf of the appellant that the direction of travel of the bankruptcy legislation has been to bring more elements into the control of the trustee. Policy considerations have also sought to control the period until the bankrupt's rights are

returned. Our conclusion is that the phrase "non-vested contingent interest" should not be given a restricted interpretation. We consider that that the wording of the 1913 Act as exemplified by the reference to "other rights, such as under a marriage contract, or under any other deed, instrument or writing of an irrevocable nature," demonstrates that the intention was more expansive and take the view that the formulation of section 31(5) should be viewed as further expanding categories included even if the phrase "non-vested contingent interest" is not a term of art. That in our view accords with the direction of travel of the bankruptcy legislation – to attach more of the debtor's estate and to see a return of the bankrupt's rights.

[27] We are fortified in our view that a more expansive approach should be taken following our analysis of the opinion of Lord Adam (albeit dissenting), but which was in essence reflected in the change in the law introduced by the 1913 Act. It appears to us that the legislative intention of the 1913 Act which carries forward into the 1985 Act and indeed now into the 2016 Act is that the insurance policy here should fall under subsection (5). That being the case it may also be said that his observations on the positon of *acquirenda* carry some weight and are informative. Where Lord Adam's positon becomes out of step with more modern policy considerations is that he considers that the trustee and creditors are entitled to benefit from the expectancy when the contingency is purified and discounts any right on the part of the bankrupt to have the benefit of the expectancy, if the contingency is purified after he has been discharged. Current policy considerations seek to balance the rights of the creditors to have access to the bankrupt's estate to make recovery with the objective that after a suitable period that rights should return to the bankrupt. There is logic to a life policy being treated in a similar manner: namely, that if the contingency occurred during the period when the trustee is administering the assets of the debtor, the right to the

policy proceeds should form part of the sequestrated estate, but if the contingency occurs after the debtor is discharged from the sequestration or at some later date determined by statute, the debtor should be free to benefit from the proceeds.

[28] As Dr McKenzie Skene comments in *Bankruptcy* at paragraph 11.14:

> "in pursuance of the "can pay, should pay" policy which underlay the Bankruptcy and Debt Advice (Scotland) Act 2014, that Act subsequently amended the provisions on *acquirenda* to provide that *acquirenda* become part of the sequestrated estate where acquired by the debtor on a date after the date of sequestration and before the date which is four years after the date of sequestration, which ……is the current position".

This chimes with the policy objective to bring property into the hands of the trustee for the benefit of creditors and reflects the current policy as to the point at which the debtor's rights return.

[29] We did not find a dissection of the phrase non-vested contingent interest to be particularly helpful. Although we do note the definition of vesting provided by Professor DM Walker in *Principles* (4th edition vol 4) at page 218:

> "An interest, whether on intestacy or under a will, vests when the person entitled thereto acquires full legal right of property in the share of estate or subjects of bequest, so that they become part of his estate, disposable by him *inter vivos* or *mortis causa*, attachable by his creditors, and passing on his death to his executor."

We consider the phrase should be looked at as a whole. An event is required to trigger the right of the beneficiary to dispose of the property, in this case the proceeds of the insurance policy. The right under the policy remains as a "non-vested contingent" right until such time as that contingency is purified. On purification of the contingency the party so vested will be able to dispose of or intromit with the property concerned (in this case the proceeds of the insurance policy), but in the absence of such trigger, in this case by purification of one of the contingencies, the interest would not vest.

[30] The insurance policy here has no value until any of the specified events occur – either the appellant or his late wife being diagnosed with an illness which falls in terms of the insurance policy to trigger payment under the critical illness provisions or the appellant or his wife die. The positon may well be different for a policy which has a surrender value. That the insurance policy has only a potential value with no enforceable right existing until the condition is purified accords with the right under the insurance policy being contingent, particularly where the appellant has no control over the purification of the contingency. The appellant's interest in payment was contingent upon certain things happening (his critical illness, his wife's death) and certain things not happening (his death, his wife's critical illness, the end of the policy term); his interest was, to adopt the phrase used in *Goudy*, "A possibility which might never become a beneficial interest" or to use the phrase from the explanatory note "a potential asset". The range of contingencies and the fact that a contingency triggering payment to the appellant had not been purified and might never become purified support the analysis that the right under the insurance policy is a "non-vested contingent interest covered by subsection (5).

[31] For the foregoing reasons we find that the right under the insurance policy in this case is a non-vested contingent interest. We shall therefore allow the appeal in this regard. A date shall be fixed shortly for the case to call before the court by order in relation to the matter of expenses and the other outstanding aspects of the appeal.