

# The Murky Position of Life Insurance, Marriages and the Estate



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## FAMILY LAW - MARRIAGES

*In Community of Property = half share*  
*Out of Community of Property with accrual*  
*Exclusions*  
*Effect of Divorce: dissolution of marriage*



## IS IT PART OF ESTATE?

- *proceeds do not exist before death*  
*= cannot be part of joint estate*
- OR
- *rights to the proceeds already existed at conclusion*  
*= is part of the joint estate*

## LAW OF SUCCESSION

*Falling open of the estate (delatio)*  
*Dies credit / dies venit*  
*Administration of Estates/ Estate Duty*  
*Intestate rules*



# LIFE INSURANCE IN ESTATE



## LAW OF CONTRACT

*Agreement on RIGHTS and OBLIGATIONS*  
*Time clause / Conditions*  
*Moment of vesting*  
*Enforcement / Postponed enjoyment*

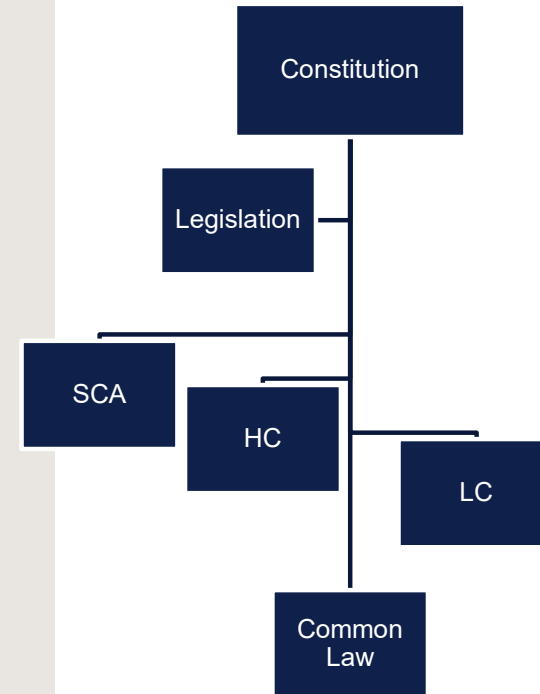


## LAW OF INSURANCE

*Risk of death : Premium : Proceeds*  
*Whole-life/ Risk-only/ Endowments/ Sinking*  
*Surrender value*  
*Nominated Beneficiary (spouse / third party)*  
*Stipulatio alteri*

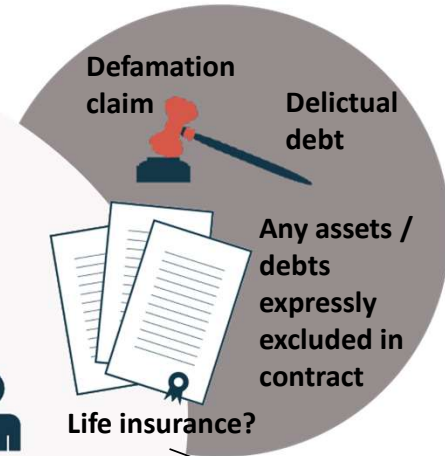
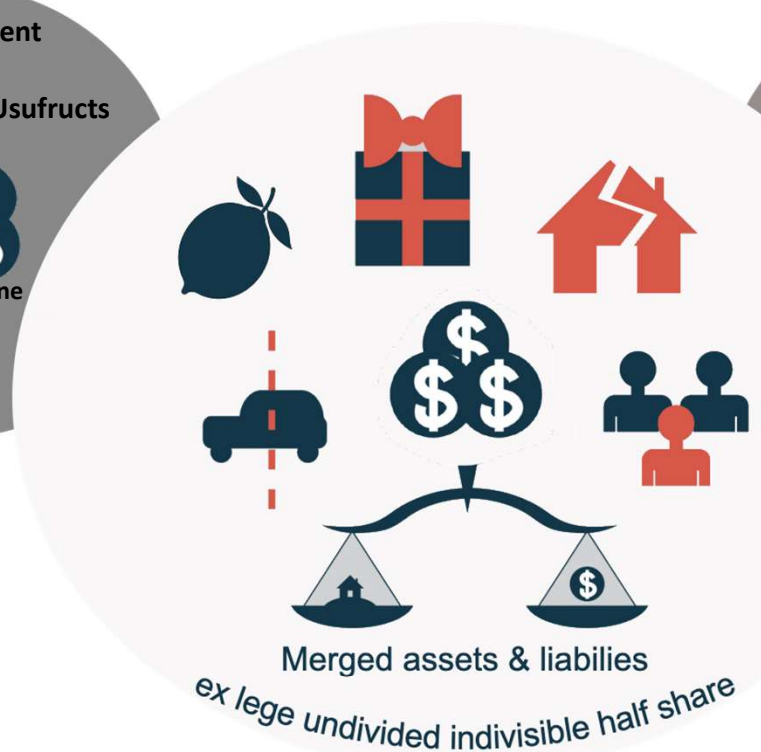
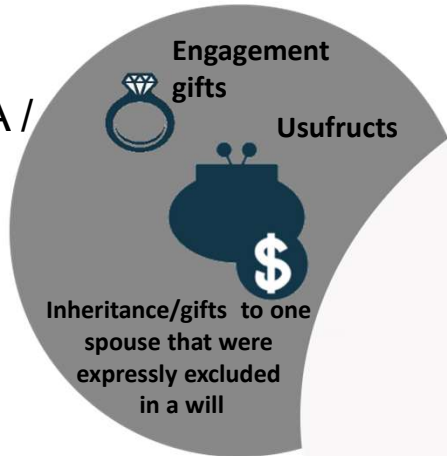


## THE CONCLUSION?



# Married in Community of Property

Exclusions: MPA /  
Case Law /  
Common Law

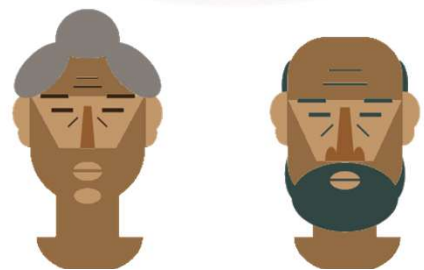


**Matrimonial Property Act**

not an *ex lege* exclusion in terms of legislation

- spouse as nominated beneficiary: excluded
- no beneficiary: joint/ excluded?

Written consent needed (Sec 15(2)(c) MPA) to alienate...insurance policies... held by the joint estate. ✓  
(Sec 15(3) verbal consent for anything in joint estate)



# Law of Succession



- **The communal estate terminates at death.**
  - spouse not automatically and immediately vested with dominium
- The whole of the joint estate falls under the control and admin of the executor
  - who is not obliged to make payments to the spouse until a liquidation account has lain for inspection
  - policies with named beneficiaries are not handled by executor & does not fall into estate
- At *delatio, dies cedit* (**interest has vested**) / *dies venit* (**time of enjoyment**)
  - A must receive R100 upon attaining age of 21.
- part of estate for estate duty purposes- Sec 3(1) Estate Duty Act (all property at date of death + deemed property)
- Sec 3(2) endowment policy = property. (deemed property ito 3(3)(d) right to surrender), Sec 3(3) domestic policy = deemed property
- Claim in favour of the estate – L&D (no nominated beneficiary)



# INSURANCE CONTRACT



**INTENT TO BIND PERSON WITH DUTY TO PERFORMANCE (TO PROCEEDS / PREMIUM) AT CONCLUSION OF CONTRACT**

**OBLIGATIONS**  
 Pay premium  
 Uphold terms of contract

**RIGHTS**  
 Personal right to performance (to the proceeds)

**OBLIGATIONS**  
 Undertakes financial risk  
 Pay the proceeds on death (occurrence of insured event)  
 Uphold terms of contract

**RIGHTS**  
 Personal right to performance (to the premiums)



not a right in rem to an exact amount of money

still vested right

## Other Terms, Conditions, Rights

- On condition that premiums are paid...
- Possible surrender value terms
- Possibly nominate beneficiary for proceeds
- Possible cession or loan terms etc.

they are all attached to the personal right to the proceeds

Enforceability postponed to death...

LAWSA "Insurance" 2012 Part 2 Vol 12(2) 2nd Ed. Authors MFB Reinecke, JP Van Niekerk, PM Nienaber

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marriage in community of property, but the contract itself and the monetary proceeds thereof did not vest in the estate."<sup>3</sup> This analysis cannot be supported.<sup>4</sup> It is submitted that an ordinary life insurance contract does create the right to the proceeds of the policy for the insured. This right vests on conclusion of the contract though it only becomes payable on the death of the insured life, which is nothing other than a time clause, a *dies certus an incertus quando*. Consequently the right is available to creditors of the insured.<sup>5</sup> In this respect there is no difference between

# Case Law: Naidoo v *Discovery Life* 202/2017 ZASCA 88 (31 May 2018)



- Married in COP, took out (“risk-only) policies, named spouse and then changed nomination to others before death without knowledge of spouse.

does not mean no  
personal right if  
enjoyment is  
postponed

## DEATH

policy proceeds cannot be paid/  
claimed

policy payable

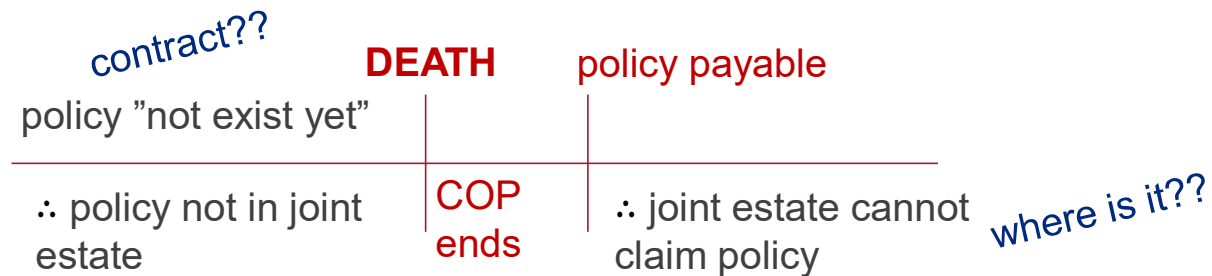
∴ policy not in **deceased** *where is it??*  
**estate**, never in **joint estate**

∴ no consent from  
spouse needed  
15(2)(c)

[12] As the policy in issue was a risk-only policy which could not be an asset in the estate of the deceased, on the strength of the authorities referred to above, it follows that it could never be an asset in the joint estate. During the deceased's lifetime the appellant had no right to receive the proceeds of the policy and therefore viewed from this perspective, the policy was also not an asset in the joint estate.

# Maqubela v The Master 2022 (6) SA 408 (GJ)

- Husband (married in COP) named his “individual estate” as beneficiary of policy
- The executor excluded it from joint estate in L&D
- Master directed executor to reflect as part of joint estate
- Court:
- [29] the proceeds of the policy never formed part of the joint estate and the [spouse] never became entitled to one-half of the proceeds by virtue of the marriage in community of property.”



# Authority against inclusion

- *Ex parte McIntosh in re Estate Barton* 1963 (3) SA 51 (N)
- *Ex parte Calderwood NO: In re Estate Wixley* 1981 (3) SA 727 (Z)
- *Hees no v Southern Life Association Ltd* 2000 (1) SA 943 (W)
- *Chetty v Investec Employee Benefits* [2005] JOL 14183 (D)
- *Danielz NO v De Wet* 2009 (6) SA 42 (C)
- *Oshry v Feldman* 2010 (6) SA 19 (SCA)
- *Naidoo v Discovery Life Ltd* 2018 ZASCA 88
- *Maqubela v The Master* 2022 (6) SA 408 (GJ)

**Policies nominated BEFORE MARRIAGE:** “Prior to its maturity date, the **proceeds** of the policy do not become assets in the joint estate.

The insured does, however, have certain rights under the policy, for example to surrender it or to obtain a loan upon it. Those rights would have formed part of his assets and would therefore have fallen into the joint estate.

But the policy itself and the monetary proceeds thereof did not vest in his estate.”

Danielz: (bloedige hand could not benefit as nominated beneficiary or in terms of will...)

Court: Joint estate terminates at death.

Policies only payable after death.

= Does not fall into joint estate – cannot share in half.

# Naidoo v Discovery Life 2018 ZASCA 88: lost in translation?

- par 11: quotes Bornman
- “ ‘where a person has paid the premiums but has no corresponding claim during his or her lifetime, it can be said that as asset has been separated or withdrawn from his estate.’ (My translation)
- This court affirmed that approach in Pieterse v Shrosbree 2005 (SCA) and said that in the ordinary course the proceeds of an insurance policy will go directly to a nominated beneficiary”
- Bornman en De Vos: 29
- In die gemelde gewysdes het 'n mens die posisie dat die persoon wat ... die premies ... betaal het, tydens sy lewe afstand gedoen het van alle aanspraak op die geld wat hy betaal het, en in daardie gevalle kan dus gesê word dat 'n bate van die persoon wat betaal het tydens sy lewe "afgesonder" en aan sy boedel onttrek is.

Yes, through the lens  
of estate duty / admin  
of estates

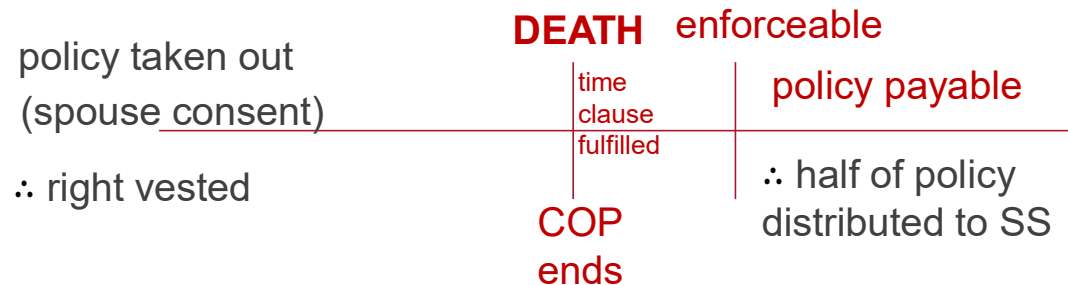
# Authority for inclusion

CASE LAW: no nominated benefic, then part of joint estate

- *Wilcocks No v Visser and New York Life Insurance Co* 1910 OPD 99
- *Warricker v Liberty Life Association of Africa* 2003 (6) SA 272 (W)
- *Flint v Die Meester* 1978 (3) SA 1079 (O)
- *Nodada Funeral Services CC v The Master* 2003 (4) SA 422 (TKH)
- *Van den Berg v Van den Berg* 2003 (6) SA 229 (T)
- *Chetty v Investec Employee Benefits* [2005] JOL 14183 (D)
- *Oshry v Feldman* 2010 SCA: 45
- *Pieterse v Shrosbree ; Shrosbree v Love* 2005 (1) SA 309 SCA: 8 -11 (goes directly to nominated beneficiary yes)

TEXTBOOKS/ ARTICLES:

- Van Huyssteen e.a Law of Contract textbook
- Reinecke & Sonnekus articles on the topic 2021, 2023
- Wood-Bodley 2010 on Danielz case
- Botha & Oosthuizen Insurance and Tax p35
- Meyerowitz: p521, 242
- De Clercq e.a 2017 *Deceased Estates* p 139.
- Nienaber & Reinecke 2009 *Life Insurance in South Africa* p195
- LAWSA "Insurance" 2012 Vol 12(1)&(2) 2nd Ed. Authors MFB Reinecke, JP Van Niekerk, PM Nienaber



# Result for policy in estate In COP based on legal principles

- Life insurance is an certain agreement to perform proceeds to estate at death – always had personal right to performance (delayed by time clause)
- There is no *ex lege* exclusions of life policies from joint estate
- It is the “ethos of marriage in community of proper” to conflate assets for each other’s benefit.
- The personal right to claim performance of proceeds therefore DOES fall into JOINT ESTATE.
- Caveat: should get written consent to alienate or name beneficiary on policy
- Ask your clients about their intentions of policies taken out before / during marriage. Expressly exclude if that is the intention.
- Should beneficiaries receive the entire policy or is it the party’s obvious thinking that half is spouse’s share?

Sec 3(1) MPA

# Married Out of COP with accrual

Half the difference between smaller estate and bigger estate



## DEATH

vested right on conclusion

policy in estate  
policy payable  
time clause enforceable  
fulfilled



The claim is a deduction in the estate of the other.

# Muller: "The treatment of life insurance policies in deceased estates..." 2006 THRHR

- Policy payable to beneficiary

Not form part of deceased estate and the surviving spouse will **not be entitled to take such proceeds into account in the calculation of an accrual claim.**

(If spouse was beneficiary: excluded from accrual)

- Policy payable to deceased estate

A policy payable to the estate of the deceased life insured will fall into the deceased estate and may be **used in the calculation of any claim for accrual** by the surviving spouse.

# What about Divorce?

- Life insurance proceeds payable at death. At divorce, policy thus not payable (enforceable) yet. But rights have vested at conclusion of the contract.
- Muller: the surrender value of the policy will be taken into account for policy payable to estate.
- Clean break approach? Will depend on court order.



# Summary

## Married In COP:

- policy to the estate should be included in joint estate at death (surrender value included at divorce) (thus shared)
- policy with a named beneficiary bypasses estate (should have consent of spouse)

## Married Out COP:

- policy to the estate should be included for accrual calculation at death (surrender value at divorce)
- policy to a named beneficiary not included for accrual

“The study of law is sublime, and its practice vulgar.”

– *Oscar Wilde*



“Sometimes the law is not enough. And when the law fails you, you fight for justice.”

– *Daredevil*

THANK YOU

