LAW COMMISSION OF INDIA

EIGHTY SECOND REPORT

ON

EFFECT OF NOMINATION UNDER SECTION 39,

INSURANCE ACT, 1938.

January, 1980.

Justice P.V.Dixit

New Delhi-110001.
2nd February, 1980

My dear Minister,

I am herewith forwarding the Eighty-Second Report of the Law Commission stressing the urgent necessity of amendments in certain respects of section 39 of the Insurance Act, 1938.

The primary concern of this Report involves the question of the rights of the nominee, heirs, creditors legatees etc. of the insured, in the money secured by policy of life insurance after it is paid by the insurer to the nominee. The relevant sub-section is sub-section (6) of section 39. This sub-section says:

> "(6) Where the nominee or, if there are more nominees than one, a nominee or nominees surviv[e] the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors."

Naturally this does not provide whether on the money being paid to the nominee he becomes the beneficial owner thereof, or whether money forms part of the estate of the insured person so that his heirs, creditors, legatees all have claims on the money. This is because the object of the sub-section is to enable the insured to obtain a good and valid discharge after payment of the money secured by the policy to the nominee.

There is no agreement in the decisions of the various High Courts on the question whether section 39(6) confers on the nominee merely the right to collect and receive from the insurer money or whether the nominee is not merely a recipient of the money but is also the beneficial owner thereof. It is clearly undesirable

that there should be any uncertainty in regard to this matter which is of vital importance not only to the insured but also to his heirs, creditors, legatees and nominee.

In order to reduce, if not to eliminate, this undertainty, the Commission's recommendation is that a new sub-section should be inserted in section 39 providing that where the holder of the policy of life insurance on his own life nominates his parents, or his spouse or his children, or his spouse and children or any of them, the nominee or nominees shall be beneficially entitled to the amount payable by the insurer to him or them under sub-section (6), unless it is proved that the holder of the policy having regard to the nature of his title to the policy, could not have conferred any such beneficial title on the nominee. The Commission has also recommended the insertion of other two sub-sections in section 39, namely, one providing that nothing in the proposed sub-sections shall operate to destroy or empede the right of any creditors to be paid out of the proceeds of any policy of life insurance and the other saying that the provisions, the addition of which is intended, shall apply to all policies of life insurance maturing after the coming into force of the Amending Act. Elaborate reasons have been given in the Report in support of the modifications suggested by the Commission.

Lastly, the Commission is much indebted to Sri P.M.Bakshi, Member Secretary for help during the course of the Commission's deliberations and in preparation of this Report. Sri Vaze's assistance has also been valuable.

With kind regards,

Shri P.Shiv Shankar,
Minister of Law, Justice & C.A.,
NEW DELHI-1.

(P. V. DIXIT)

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CHAPTER 1

INTRODUCTORY

Scope of the Report.

1.1. The subject matter of this Report concerns a single section - section 39 of the Insurance Act, 1938,[1] which relates to the mode and effect of nomination in regard to a life insurance policy.[2] While the rest of the Insurance Act is mainly of a technical nature and primarily concerns those who carry on the business of insurance, this particular section is of vital interest to every citizen who takes out life insurance.

Certain problems[3] that have arisen in the interpretation of the section and the injustice[4] which seems to result from the present position, constitute the primary justification for taking up this subject, namely, the legal effect of a nomination made in regard to a life insurance policy.

Multiple parties.

1.2. In broad general terms, a life insurance contract is a legally enforceable agreement between the applicant (proposer) and the insurer. Payment the insurer in accordance with the contract (subject to statutory requirements, if any) fulfils the basic

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1. The Act will be hereafter referred to as the "Insurance Act".
2. Para 2.1, *infra*.
3. Chapter 2, *infra*.
4. Chapter 3, *infra*.

promise and discharges the insurer from the contractual obligations.

But such payment does not necessarily close all legal controversies. Where the insured person has dealt with the policy in any one of the modes of dealing with it as permitted by law - or, even where he has not resorted to any of these modes - more than one party may, from the legal point of view, be interested in the money paid or to become payable. In the first place, there is the insured person, now represented by his legal representative. Secondly, the persons entitled to the estate on intestacy or otherwise may be legally interested. Thirdly, there are persons who claim the right conferred by the particular mode of dealing, if any, adopted by the insured person before his death. And finally, there is the insurer.

As to the insurer, payment made by him under the policy is not a matter with which we are concerned in the present Report. The provisions of the Insurance Act as applicable to each mode of dealing with the sum payable under the policy may, for our purpose, be treated as adequately taking care of the matter from the point of view of the insurer. We are primarily concerned with the second and third groups of parties mentioned above.

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1. Para 1.3, *infra*.

The multiplicity of parties so involved leads to the possibility of conflict of interests amongst them, and a desire on the part of the Legislature to avoid such conflicts so far as possible has necessitated the enactment of a set of provisions in the statute law. It is obviously desirable that legislation dealing with the respective rights of the parties should, from time to time, be reviewed, in order to make it conform to the changing needs of society and expectations of its members.

Assignment of benefits - Various modes.

1.3. In order to understand the question in its proper perspective, it may be useful to refer to the various modes of dealing with the benefits that might arise under a life insurance policy.

Assignment under section 38, Insurance Act, 1938.

1.4. In the first place, an assignment of the policy is permissible under section 38 of the Insurance Act.[1] Under that section, the insured person may, if he so chooses, assign all benefits under the policy. Provided the statutory formalities are observed, such an assignment raises no serious problems. The rights under the policy stand transferred to the assignee or assignees. It is not necessary that the assignee must be the spouse or a child of the insured person, although it is usually so. On maturity, payment of the amount due under the policy is made to the assignee.

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1. Section 38, Insurance Act, 1938.

No other person has a right to participate in the proceeds under a title purporting to be derived from the insured after the assignment.

Declaration under section 6, Married Women's Property Act, 1874.

1.5. Secondly, in regard to a person who has or contemplates a family, section 6 of the Married Women's Property Act, 1874, creates another special mode of dealing with the benefits to accrue under a policy. Under that section, the assured can make what may be conveniently called a "declaration" of trust in favour of his wife or children or both. Where that section is utilised, the wife or children or both, as the case may be, become entitled to the benefits under the policy, without an assignment of the nature contemplated[1] by section 38 of the Insurance Act. This mode of dealing with the policy also need not detain us. Section 6 of the Married Women's Property Act has, no doubt, created certain questions of interpretation which the Law Commission has already dealt with in an earlier Report entirely devoted to that Act.[2] For the present purpose, those questions need not be gone into.

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1. Para 1.4, supra.

2. Law Commission of India, 66th Report (Married Women's Property Act, 1874).

Nomination under section 39, Insurance Act, 1938.

1.6. Thirdly, another mode of dealing with the policy of life insurance is by way of nomination under section 39 of the Insurance Act.[1] This mode of dealing with the policy, though less formal than the other two mentioned above, has certain special features. For example - to refer to only one important feature of nomination - if the insured person, having made a nomination, survives the nominee, the nomination becomes ineffective. The nomination under section 39 can also be defeated by a later assignment[2] of the policy made under section 38 of the Insurance Act. In these respects, a nomination may be regarded as a weaker form of dealing with the policy than the other two modes mentioned above.[3]

Problem for consideration relating to the effect of nomination.

1.7. This legal position is well understood, but the problem which arises is this. Assuming that a nomination is valid in form and in substance, and subsisting at the time of death of the insured person, and further assuming that the nominee survives the insured person, and that the insurer makes payment of the amount to the nominee, is the nominee entitled to retain the moneys so paid, or is he merely an "agent"

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1. For text of section 39, see para 2.1, *infra*.
2. Para 1.4, *supra*.
3. Para 1.4 and 1.5, *supra*.

of the insured person, as has been described in some of the judicial decisions,[1] so that he must hold the money for the benefit of the estate of the insured? To put the query in different words, is the nominee entitled to regard himself as the "beneficial owner" of the amount paid, or is he merely the nominal owner of the money? This Report is concerned with that problem, and seeks to examine the present law on the subject and to recommend certain amendments which seem to be desirable in the interests of social justice.

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1. Para 3.4, *infra*.

CHAPTER 2

PRESENT LAW AND EARLIER POSITION

I. The statutory provision.

Section 39, Insurance Act.

2.1. The present law as to nomination in regard to a policy of life insurance and its effect as contained in section 39 of the Insurance Act, 1938 is as under:

"39. (1) The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death:

Provided that, where any nominee is a minor, it shall be lawful for the policy holder to appoint in the prescribed manner any person to receive the money secured by the policy in the event of his death during the minority of the nominee.

(2) Any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records

relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or a will, as the case may be, but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurers shall not be liable for any payment under the policy made bona fide by him to a nominee mentioned in the text of the policy or registered in records of the insurer.

(3) The insurer shall furnish to the policy holder a written acknowledgement of having registered a nomination or a cancellation or change thereof, and may charge a fee not exceeding one rupee for registering such cancellation or change.

(4) A transfer or assignment of a policy made in accordance with section 38 shall automatically cancel a nomination:

Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment on repayment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy.

"(5) Where the policy matures for payment during the life time of the person whose life is insured or where the nominee or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy holder or his heirs or legal representatives or the holder of a succession certificate, as the case may be.

(6) Where the nominee or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors.

(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874 applies or has at any time applied:

Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946 in favour of the wife of the person who has insured his life or of his wife and children or any of them is expressed, whether or not on the face of the policy, as being made under this section, the said section 6 shall be deemed not to apply or not to have applied to the policy.

II. The case law.

Section 39(6), Insurance Act.

2.3. For our purpose, it is sub-section (6) of section 39 of the Insurance Act[1] that is material. The effect of that sub-section is that where the nominee, or if there are more nominees than one, a nominee or nominees, survive the person whose life is insured, the amount assured by the policy shall be payable to such survivor or survivors. This provision does not, however, lay down whether, on the money being paid to the nominee thereunder, the nominee becomes the beneficial owner thereof, or whether the money shall form part of the estate of the insured person so that his heirs (or the legatees mentioned in that regard in the will, as the case may be), have any claims thereon.

There is considerable case law on the subject, to which a detailed reference will be made in later paragraphs. For the present, it will be sufficient to say that there is a conflict of decisions - though not very formidable[3] - on the subject. One view is that section 39(6) of the Insurance Act confers on

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1. Para 2.1, supra.
2. Paragraphs 3.5 to 3.8, infra.
3. Paragraphs 3.3 to 3.6, infra.

the nominee merely the right to receive the insurance money as between the insurance company and the nominee, but it does not provide for the title or ownership of the money.[1] The second view regards the nominee not as a mere recipient of the money but also as the beneficial owner thereof.

Andhra view. 2.3. Thus, in an Andhra case of 1957, it was held that the nominee gets the property in the policy subject to all liabilities of the policy holder and the amount is subject to the claims of creditors of the deceased.[2]

Gujarat view. 2.4. The Gujarat High Court[3] has also held that where a policy holder, after making a nomination in the policy, dies intestate, the rightful claimants to the sum assured under the policy of insurance are the legal heirs of the deceased policy holder, and not the nominee in the insurance policy.

The Gujarat decision is based on the theory that the nominee is a collection agent, having only a right to receive and collect the moneys on behalf of

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1. Paragraphs 2.10 and 2.11, infra.
2. M. Brahmamma v. K. Venkataramana Rao, A.I.R. 1957 A.P. 757, 758, para 3.
3. Atmaram v. Gunvantiben, A.I.R. 1977 Guj. 134 (D.P. Desai & M.P. Thakkar JJ.) (reviews case law).

original claimants. If there is a will (made by the policy holder), the legatee under the will would get the amount. If the policy holder has died intestate, his legal heirs would get it, according to the Gujarat judgment.

Calcutta view. 3.5. In a Calcutta case of 1956,[1] it was held that the nominee acquires no title. "The title to receive the money does not necessarily create a title in rem to that money which can be said to be good as against the whole world".

In a later Calcutta case of 1970,[2] the moneys to be due under the policy were payable not on the death of the assured, but on a fixed date. The assured nominated his younger son as the nominee. Soon thereafter, the assured died intestate, before the date so fixed, leaving his widow and two sons as his heirs and legal representatives. Under the policy, the sum was payable on the date mentioned above, but there was a clause under which, after one year from the date of the policy, the policy would acquire a cash surrender value. The question to be considered

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1. Rambalia v. Gangadhar, A.I.R. 1956 Cal. 275, 276, paragraphs 8 to 11.

2. Life Insurance Corporation of India v. United Bank of India Ltd., A.I.R. 1970 Cal. 513, 515, 517, 518, paragraphs 12 and 15.

was whether the nominee could validly assign the claim in respect of the policy, in view of the death of the holder of the policy before the maturity of the policy. There also arose a larger question, namely, whether the nominee could surrender the policy. Both the questions were answered in the negative.

The case actually did not fall within section 39, Insurance Act, since it was not technically a contract of "life insurance".[1] The discussion in the judgment about the position of a nominee is, therefore, obiter.

Karnataka, Kerala and Orissa view.

2.6. According to the Karnataka view,[2] the nominee has no other right except "a bare right to collect the policy money without affecting the title to (of) other claimants, if any".

The Kerala High Court[3] also holds the same view.

This is also, in substance, the Orissa view.[4] According to the Orissa view, the emphasis in section

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1. Page 518 in A.I.R. 1970 Cal. 513.

2. Smt. Saraswathi Bai v. Smt. Malati, A.I.R. 1978 Karn. 8, 10, para 6.

3. Sarojini Amma v. Neelkanta Pillai, A.I.R. 1961 Kerala 136 (F.B.).

4. Malti Devi v. Canchan Prava Devi, A.I.R. 1973 Orissa 83, 84, para 3 (G.K. Misra C.J.).

39(6) is on the expression "payable" and the nominee acquires no title to the amount to the exclusion of all other heirs.

The latest case on the subject is a Punjab one, which also takes the view that the nominee does not get title to the property in the policy or its proceeds.[1] The following observations in the Punjab judgment are pertinent:-

> "A combined reading of sub-sections (5) and (6) of section 39 of the Insurance Act shows that a nominee is in the nature of a trustee who receives the money due under a policy and keeps it for the benefit of the legal heirs of the deceased."

Allahabad view. 2.7. It may, however, be stated that according to the Allahabad High Court (judgment of 1962),[2] the money belongs to the nominee and he is not to be treated as a trustee for the heirs of the insured or as a mere agent on their behalf. In reaching this conclusion, the High Court considered the clause in the policy, the statutory provisions, the English and Indian case law and other relevant aspects.

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1. Smt. Raj v. Devi Dutt Mal, (1979) 81 Punjab Law Reporter 22; 49 Company Cases 361 (1st June, 1979).

2. Kesri Devi v. Dharma Devi, A.I.R. 1962 All. 355, 356, para 4 (Desai C.J. & Ramabhadran J.).

In the first place, as to the clause in the policy, the High Court pointed out that the moneys were payable to the insured or (on his prior death) to "his nominee, executors, administrators, assigns or other representatives, as the case may be", subject to proof being given of the title of the claimants under the policy. It was not, therefore, open to the insurance company to say that it could not pay the money to the nominee's heirs. (In that case, the nominee had died before actually receiving the money). Since a nominee had been nominated, the company must pay the money to him or (if he has died in the meanwhile) to his estate.

Secondly, as to the statutory provisions, the High Court pointed out that section 39(1) of the Insurance Act, 1938[1] empowers the insured to make a nomination and section 39(6) lays down that if the nominee survives the insured, the nominee is entitled to receive the money. The High Court also pointed out that section 39(5), which deals with the situation where the nominee dies <u>before maturity</u>, evidently makes a distinction between (i) death of the nominee before maturity and (ii) death after maturity but before receiving payment. In the former case, the money is payable to the insured or his heirs or legal

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1. Para 2.1, *supra*.

representatives, and it impliedly follows that in the latter case, the money would be payable to the estate of the nominee.

2.8. As regards English cases and those Indian cases which followed the English judicial decisions, the Allahabad High Court observed:

"We do not think it is the universal rule or rule of justice, equity and good conscience[1] which must be said to be binding upon this court that the policy-money that is paid to a nominee under section 39(6) of the Insurance Act is held by him as a trustee for the legal representative of the assured."

The principal reason in the Allahabad judgment is found in the following passage:

"There is nothing in section 39 to suggest that he receives the money merely as a trustee or agent of the assured's legal representatives. Section 39 does not lay down that he is under any liability to account for the money received to any person. The obvious meaning of the language used in sub-sections (1) and (6) is that the insurance company must pay the money

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1. Emphasis supplied.

"to him and he is left free to deal with it in any manner he likes."[1]

Commenting on this, the Gujarat High Court,[2] in its judgment already referred to,[3] has observed:

"With respect, there is no warrant for the conclusion that the nominee is left free to deal with it in any manner he likes. It does not follow from any provision of law or from first principles. It is mere *ipse dixit* of the learned judges. It does not take into account the reasoning unfolded in the discussion hereinbefore."

The Allahabad judgment in the following passage extracted from para 6 gave another reason -

"When the money becomes payable on the death of the assured and on account of the death, we do not understand how it can be said to form part of his estate."

Commenting on this the Gujarat High Court observed:

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1. *Kesari Devi* v. *Dharma Devi*, A.I.R. 1962 All. 355.
2. *Atmaram* v. *Gunvantiben*, A.I.R. 1977 Guj. 134, 137, 138.
3. Para 2.4, *supra*.

"The Division Bench has assumed that the amount does not form an estate of the policy holder. If the benefit arising under the contract of insurance formed a part of the estate of the policy holder during his life time for the reasons discussed earlier, namely, that he could have transferred it, assigned it or raised a loan on it, how does it cease to be a part of his estate on his death and become a part of an estate of the nominee? By virtue of operation of which principle of law and by what process of ratiocination?"

Further, the Allahabad High Court had also placed reliance on paragraph 1157 of 46 Corpus Juris Secundum for buttressing the conclusion reached by them. The passage in question reads as under:[1]

"1157. Policy payable to third person. The proceeds of a policy naming a third person as beneficiary belong exclusively to such beneficiary as an individual, they are not the property of the heirs or next of kin of insured, are not subject to administration or the laws of descent governing the distribution of insured's personal property, and generally do not constitute any part, or an asset of his estate.

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1. Vol. 44, Corpus Juris Secundum, paragraph 1157.

"If the proceeds are collected by the administrator, he holds them in trust for the beneficiary.

Commenting on this, the Gujarat High Court observed:

"On a bare perusal of the aforesaid passage it leaps to the eye that the aforesaid proposition of law has been stated in the context of a life insurance policy in which a third person is named as a 'beneficiary'. We are concerned with a policy where a person has been named as a 'nominee' under section 39 of the Insurance Act. A proposition of law stated in the context of the foreign law and in the light of a different insurance policy wherein the person was named as beneficiary (and not nominee) cannot buttress the view which found favour with the Allahabad High Court."

Later Allahabad case.

2.9. Besides the Allahabad case of 1962 mentioned above, the Allahabad High Court had in 1972[1] occasion to deal with the effect of nomination vis-a-vis the creditors of the deceased. After considering the provisions of sections 38 and 39 of the Insurance Act, the High Court held:

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1. Raja Ram v. Mata Prasad, A.I.R. 1972 All. 167, 169, para 15 (F.B.).

"The result of our survey of the material provisions is:

(1) The policy holder continues to hold (an) interest in the policy till the moment of his death;

(2) The nominee under section 39 acquires no interest in the policy in the lifetime of the policy holder.

(3) The benefit secured by the policy forms part of the estate of the deceased policy holder, so as to be available to the creditors. As it is part of his estate, his creditors can realise their loans from the money paid to the nominee. He will be the 'legal representative' of the deceased policy holder."

Rights of nominee according to Allahabad view.

2.10. It may be added that the Allahabad judgment of 1972 does not expressly overrule the judgment of 1962. It would appear that the present position in the Allahabad High Court is that vis-a-vis the heirs, the nominee is absolutely entitled[1] to the proceeds of the policy, but the creditors can enforce against the nominee their claim against the estate.[2]

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1. Judgment of 1962, para 2.8, supra.
2. Judgment of 1972, para 2.9, supra.

2.11. The current Madras trend also represents the second view. In an earlier Madras case,[1] it was held that nomination (unlike an assignment) does not involve a transfer of the rights under a policy. In another Madras case,[2] relating to the rights of the nominee with reference to the Estate Duty Act, it was held that nomination does not involve a transfer of the rights.

2.12. In a later Madras case,[3] however, a different view was taken. The tie in that case was between the wife who was the nominee of the deceased (i.e. of the life assured), the daughter of the deceased and the mother-in-law of the deceased. It was held that the wife, being the nominee, was alone entitled to the insurance amount. This ruling, being a later decision, must prevail as against the earlier rulings[4] noted above.[5]

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1. D.M. Mudaliar v. Indian Insurance and Banking Corporation Ltd., Salem, A.I.R. 1957 Mad. 115 (D.B.).

2. Seethalaxmi v. Collector of Estate Duty, Madras, (1968) 61 I.T.R. 317 (Mad.), quoted in Atma Ram v. Gunvantiben, A.I.R. 1977 Guj. 134, 139, para 6.

3. Karuppa Gounder v. Palaniammal, A.I.R. 1963 Mad. 245 (D.B.).

4. D.M. Mudaliar v. Indian Insurance and Banking Corporation, A.I.R. 1957 Mad. 115 (D.B.).

5. Para 2.11, supra.

2.13. It may be noted that of the cases cited in the earlier Madras judgment,[1] many relate to assignments and not to nominations.

III. The conflict.

2.14. The above brief resume of the case law shows the conflict of views on the question of the rights of the nominee vis-a-vis the rival heirs of the insured person. The Allahabad judgment of 1969 and the later Madras case[2] are in direct conflict with the view taken by the Andhra, Gujarat, Karnataka, Kerala and Orissa High Courts. The Calcutta view takes a midway position.

Position in England.

2.15. We shall in due course discuss English cases relating to the effect of nomination.[3] But at the present stage it is legitimate to state that in England, there is no general statutory provision of the nature contained in section 39(6) of the Insurance Act, and the matter is to be discussed on the basis[4]

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1. D. M. Mudaliar v. Indian Insurance and Banking Corporation, A.I.R. 1957 Mad. 115. (See Ramaswami J.'s judgment).
2. Karuppa Gounder v. Palaniammal, A.I.R. 1963 Mad. 245 (D.B.).
3. Paragraphs 5.1 to 5.6, infra.
4. See In re Schebsman, (1943) 2 All E.R. 387, 390 (Uthwatt J.) (Tie between widow and trustee in

of the presence or absence of evidence of a trust legally created or other legal obligation. Moreover, what is relevant for our purpose is not what is the correct view of the present statutory provisions, but what ought to be the law[1] from the point of view of social justice and the expectations of ordinary persons.

IV. Earlier position.

Position before 1938.

3.16. Before we deal with the aspect of social justice, we may note that the statutory law before 1938 did not contain a general provision for nomination in regard to policies of insurance. The legislation in force did not specifically provide for nomination, though an assignment was legally valid[2] (and was at that time governed by the Transfer of Property Act).[3] Before 1938, the question whether the person mentioned in the policy (as one for whose benefit the policy was obtained) was beneficially entitled to the proceeds or whether the amount formed part of the estate of the deceased was approached by the Courts in India with reference to the question whether the person ~~xxxx~~ designated could

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1. See para 5.1, infra.
2. In re Aryan Life Association, A.I.R. 1938 Bom. 182.
3. Section 130, Transfer of Property Act, 1882.

sue the insurer. The latter question itself was determined on the basis of the still more general question pertaining to the law of contracts, namely, when can a person not party to a contract sue thereon?[1]

2.17. (a) Some High Courts (before 1938) took the view that the person so designated in the policy, not being a party to the contract, could not sue, apart from statutory provisions such as those contained in the Married Women's Property Act, 1874, and if there was no evidence of an intention to create a trust.

If the person designated was entitled to sue the insurer, then there was no doubt that the money belonged to that person and formed no part of the estate of the deceased.[2]

In a Rangoon case,[3] holding that the wife obtained no rights under the policy of insurance, on the death of her husband (by reason of the fact that her name was mentioned in the policy as the person to whom it should be paid), it was observed:

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1. For case law as to third parties' rights, see Khirod Bihari v. Man Gobinda, A.I.R. 1934 Cal. 683 (reviews cases).

2. Krishna Lal v. Pramila Bala Dasi, A.I.R. 1928 Cal. 518. (See infra).

3. Daw Yu v. Sun Life Assurance Co., Canada, A.I.R. 1935 Rangoon 211, 212.

The leading case on this subject is (1892) 1 Q.B.D. 147,[1] in which it was held that, apart from the provisions of the Married Women's Property Act, the right to sue on such a policy would pass to the legal personal representatives of the deceased, and the debt would be a debt due to them as representatives of the deceased; that as between them and the insurers a nomination in the policy of a person to whom the amount should be payable would have no effect because <u>such a person was not a party to the contract of insurance</u>; and that the insurers would be bound to pay the legal representatives of the deceased and no one else.

"Consequently, unless and until some person has established his title to represent the deceased, no debt becomes due from the insurers under the policy.

"To the same effect is an earlier Bombay case,[2] where, in the case of a policy of insurance effected by the assured upon his own life and expressed to be for the benefit

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1. <u>Cleaver</u> v. <u>Mutual Reserve Fund Life Association</u>, (1892) 1 Q.B.D. 147.
2. <u>Shankar Vishwanath</u> v. <u>Umabai Sadashiv</u>, (1913) I.L.R. 37 Bom. 471.

"of his wife, it was held that the policy on his death formed part of his estate, the right of action against the insurance company being in his executors or other representatives untrammelled by any trust in favour of his wife."

In a Calcutta case reported in 1938,[1] it was observed:

"The question *depends on whether the plaintiff was entitled to enforce her claim against the Insurance Society. If she was, then there could be no question that the money due under the policy belonged to her and did not form part of the assets of the estate of the deceased*.[2] The plaintiff was, no doubt, *the nominee of the deceased; but she was no party to the contract between the deceased and Insurance Society*.[2] Under the English law, if A contracts with B for a benefit to be given to C, although that was the object and purpose of the contract, C may not sue on that contract unless in certain excepted cases. The excepted cases are these:

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1. *Krishna Lal* v. *Mt. Promila Bala Dasi*, A.I.R. 1938 Cal. 518, 519-520.
2. Emphasis added.

"where you can read on the whole of the deed or contract that the contracting party really was a trustee for a third person, then the third person may sue."

(b) At the same time, there were High Courts which reached a different conclusion, either because they considered that in such cases the nominee was really intended to be a beneficiary,[1] or because they were of the view that a near relative had a right to sue and that the rule that a stranger to the contract cannot sue would not apply in such cases.

Approach adopted by each High Court.

3.18. The first group of High Courts[3] viewed the matter by starting the inquiry with some such question as this - Is the person designated entitled to sue the insurer? If he was entitled to sue, there was no doubt that he would get title to the assets. If not, then he would not get title.[4]

The second group of High Courts[5] took the view that a person for whose benefit the policy was

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1. Matin v. Mahomed Matin, A.I.R. 1923 Lah. 145.
2. Balamba v. Krishnayya, (1913) I.L.R. 37 Mad. 483, 491, 498, 500.
3. Para 3.17(a), supra.
4. Krishna Lal v. Promila Bala, A.I.R. 1928 Cal. 518.
5. Para 3.17(b), supra.

expressed to be taken could claim title to the amount.

Nature of the pre-1938 approach.

2.19. Thus, the controversy related to the right of the nominee to sue the insurer. It is somewhat curious that though this very question (right of the nominee to claim payment) was settled by the Act of 1938, the position of the nominee <u>vis-a-vis the rival claimants</u> remained the subject matter of debate even after that Act.

Views of Shri Sen.

2.20. We have not been able, in spite of the best efforts, to get the Legislative Department proceedings relating to the Bill.[1] One writer who published a book on the Act in 1938, had this to say on the point under discussion:

> "<u>Rights of nomination - By section 39</u> every policy holder has been given the right to nominate the person or persons to whom the moneys payable under the policy will be paid in the event of his death. The effect of this will be to avoid the expense and trouble on the part of

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1. Susil C. Sen, "Indian Insurance Act, with a synopsis", page XIV. Shri Sen was placed on special duty to examine the material which was collected by Government concerning the amendment of company law in general and insurance law in particular.

"the nominee to procure a representation from a Court of Law. The policy holder has also been given the right to change the nomination at any time before the policy matures by endorsement or by a will, thereby giving him a free hand till the end."

He does not, however, specifically deal with the position of the nominee vis-a-vis others on which there had been a controversy.

Material in the Debates.

2.21. As regards material in the debates, it appears that the thrust of Legislative Assembly Debates was directed towards regulation of the foreign insurance companies which then held the field.[1] Points discussed concerning rights of policy holders and persons deriving title from them were very few. In any case, the effect of nomination was not discussed. A European Member from Madras (F.E. James) - who was primarily concerned with safeguarding interests of the foreign companies - insisted upon the addition of the words "named in the notice" after the word "assignee" in what is now section 38(5) (assignment and transfer of insurance policies). The object was to make it clear that the insurer's liability is to the person from whom he had received notice, whether

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1. Legislative Assembly Debates, Vol. 6, 31st September, 1937, page 2157.

he was the person named in the endorsement or instrument or not.[1]

The Bill as introduced contained no definition of the expression "policy holder" and Mr. M. Ananthasayanam Ayyangar proposed a definition on the lines of section 2(7) of the Indian Life Assurance Companies Act, 1912. Mr. Ayyangar thought that there should be no confusion as to whether an assignee would be deemed to be a policy holder. The Law Member, Sir Nripendra Nath Sircar, first opposed the amendment on the ground that persons who had become assignees after advancing to the insured small loans of, say, Rs.50 or Rs.100 might start claiming to be the policy holders' representatives. However, Mr. Bhulabhai J. Desai pleaded[2] with the Law Member that he might at least consider the inclusion of an absolute assignee in the definition of "policy holder". The Law Member ultimately agreed. That is how section 2(2), defining a policy holder came to have a provision including an absolute assignee.

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1. Legislative Assembly Debates, Vol. 6, 7th September, 1937, page 1263.
2. Legislative Assembly Debates, 7th September, 1937, page 1263.

CHAPTER 3

THE ASPECT OF SOCIAL JUSTICE

Fulfilment of legitimate expectations and position of near relatives.

3.1. We have so far discussed the present law as to the effect of nomination in regard to a policy of life insurance and evolution of that law. That there is a conflict of decisions under the present Act is obvious.[1] But we are not, in this Report, concerned with the question of merely suggesting a solution that would put an end to the conflict of decisions. Rather, we approach the matter from a different and a broader angle - what ought to be the law as to the effect of a nomination? Should the nominee be regarded as a mere agent, or should he be regarded as having title?

It appears to us that in dealing with this question, one can legitimately make a distinction between cases where the nominee is a near relative of the policy holder and cases where the nominee is a distant relative or a stranger to the family. This distinction is of relevance for the basic reason that the ordinary person, when he makes a nomination in favour of a near relative, may be taken as intending to make a beneficial provision for him and would not contemplate his being a mere agent. Although the statute uses the expression "nominee", that expression

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1. Paragraphs 2.14 and 2.15, *supra*.

does not, in regard to near relatives, adequately sum up all that the ordinary person has in mind. When he makes the nomination, he does not view the near relatives so "nominated" as a "nominal owner". He looks far ahead and, bearing in mind the future needs of his near relative, sets out to adopt a device which, while not divesting him of his own rights in case he survives the "nominee", would be adequate enough to make an effective financial provision for the person designated by him.

Viewed in this light, the present law fails to fulfil the legitimate expectations of the citizen, and needs amendment.

Social justice.

7.3. Apart from the above approach - the approach of realism - there is the consideration of social justice that would seem to justify an amendment. Where a nomination is in favour of a near relative, and the Legislature is faced with the question of choosing between (i) a strictly legal approach of regarding the nominee as a person who collects the money on behalf of others (and therefore only a nominal owner), and (ii) a beneficial approach which would regard the nominee of such a class as beneficially entitled, we think that the latter course ought, as a matter of social justice, to be preferred. We

shall presently deal[1] in somewhat greater detail with the position of women and the need for affording them financial protection after the death of the person insured, and much of what we are going to say will apply to other near relatives as well.

Scope of "near relatives".

2.2. The next question to be considered, then, is - who are the persons who can be appropriately regarded as within the range of those deserving special protection under the category of "near relatives"? It appears to us that having regard to conditions in India, the law ought to recognise the special position of parents and children as well as of spouses. By and large, they are the persons who would expect to be provided for. Life insurance, in its essence, is designed to be a cushion against unexpected financial disasters. A contract of insurance is a contract to pay on the happening of some event and is generally intended to cover a risk. The risk in this case is of death, - though the contract carries the euphemistic appellation of "life insurance". In the case of parents, spouses and children, the risk factor is the most prominent, and death is likely to have the deepest impact on their personal lives.

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1. Para 3.4, *infra*.

All this tends to go in favour of adopting a different approach as to the effect of nomination from that adopted by the majority of the High Courts under the present law, as regards the relatives mentioned above.

Position of married women.

2.4. We would also like to state that in deciding what ought to be the law, the position of women is of particular importance. Married women as a class are not so well endowed with capital as their husbands. Men tend to be the capital makers, while women tend to acquire it as their successors. The question which gives anxious thought to many a husband is how to provide for the widow so that on his (husband's) death, the loss of his earned income or pension rights shall not lead to a drastic reduction in the widow's standard of living. Married women for the most part are not faced with a similar problem regarding <u>their spouses</u>; they have less to leave, and, on death, their income has probably not contributed to the maintenance of the family home to an appreciable extent. However, in those cases where they are faced with that problem, the answers which apply to men apply equally to them.

Provisions for widow.

2.5. Provisions for a widow may be made either during her husband's lifetime by means of gifts and policies of insurance on his life, or, so as to take effect after his death, by his will. What most men

wish to secure is a roof over the widow's head and an adequate income for its upkeep and her maintenance. If nothing is done during the husband's life to provide for the widow, and she is left to take under his will, the result will be that the husband's available estate which should ultimately devolve on the heirs may be substantially reduced by estate duty.

Therefore, the recommendation which we propose to make is eminently needed for the protection of married women - though it is not confined to them.[1]

Speech of Mr. Hobhouse.

3.6. While on this point, we would like to quote a passage from the speech of Mr. Hobhouse on the Married Women's Property Bill[2] (which led to the Act of 1874) -

"We must remember that a wife's contribution to the family wealth did not usually consist in payments of money. She may bring to her husband no money at all and yet may be a very treasure to him even if measured by a mere pecuniary standard. If the wife kept the household together, brought up the children, governed his servants, conducted all his petty dealings with tradesmen, and performed other similar domestic

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1. Para 3.3, supra.

2. Gazette of India, Extra supplement, dated 6th September, 1873, page 12.

"duties, the husband might be a far richer man for her services, although he might provide all the actual money that comes into the family. Then, if he chose that his wife should take every year so much out of the common stock, or out of his stock, and spend it in an insurance for herself or her children, why should she not do so. If the husband chose that that should be done with his property from time to time, Mr. Hobhouse did not see it was a matter for legal question, or that there should be any legal difficulty placed in the way of the wife's enforcing the contracts. It might be the most prudent, the most wise, and the most beneficial arrangement for the whole family, the very best mode of making a provision for them, and it also might be, and often was, <u>a matter of absolute justice, as between husband and wife,</u> which he or his creditors ought not to dispute at any future time."

Will substitute.

3.7. The aspect which we have stressed is also dealt with in a fairly recent publication.[1] It has

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1. Kimball, "The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.", in Hellner & G. Nord (Editors), Life Insurance: An International Perspective (1969) 74, 76, cited in Langbein, "Substantial Compliance with the Will" (1975) 88 Harvard Law Review 489, 508.

been pointed out that the dominant "will substitute" in modern practice is life insurance, and it has been observed as follows in that publication:-

> "The only significant assets of the estates of most people are the proceeds of one or more life insurance policies. For such people, constituting a majority of the population, determination of the distribution of that 'property' through the designation of a beneficiary under the insurance contract not only has precisely the same function as a will, but constitutes a much more important 'testament' than the will. In view of the numbers of people involved, the life insurance beneficiary designation is the principal 'last will and testament' of our legal system....... A properly designated beneficiary will receive the proceeds of the insurance without regard to compliance with the formalities required in the law of wills."

Reform suggested in one article.

3.8. We may also mention that one writer,[1] in an article published on the subject, has discussed in detail the realistic position concerned with the intention of the policy holder (who makes a nomination) and has highlighted the difficulties felt

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1. T.A. Vardharajan, "Justice to the Policy-holder" (1978) Vol. 1, M.L.J. (Journal) 41, 43, 45.

at present. He has pointed out that it is too far-fetched and impossible of acceptance that when a life assured enters into a contract with the insurer (the Life Insurance Corporation of India), and exercises his choice of nomination under section 39, by making a "most endearing" person of his, he does it with the sole idea of making that person a trustee or collection agent with no personal or beneficial interest for him (nominee), but only with the onerous liability to account to the heirs, etc. for the said money, and hand it over to them.

Need for change in the law.

3.9. Having regard to the various considerations set out in this Chapter, there seems to be enough justification for considering the need for a change in the law so as to provide that the nominee, when belonging to the class mentioned above,[1] shall be beneficially entitled to the amount that may fall due under the policy. Before, however, making our precise recommendations on the subject, we consider it proper to take note of certain legislative precedents which might be useful.

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1. Para 3.3, supra.

CHAPTER 4

LEGISLATIVE PRECEDENTS

Legislative precedents.

4.1. It may be of interest to note that there are legislative precedents containing provisions substantially giving a beneficial right to a nominee in analogous situations.

Provident Funds Act.

4.2. Section 5, Provident Funds Act (19 of 1925) reads as follows[1] :-

"5. Rights of nominees. - (1) Notwithstanding anything contained in any law for the time being in force or in any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, where any nomination, duly made in accordance with the rules of the Fund, purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor, occurring before the sum has become payable or before the sum, having become payable, has been paid, the said person

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1. Section 5, Provident Funds Act, 1925.

"shall, on the death as aforesaid of the subscriber or depositor, <u>become entitled to the exclusion of all other persons</u>,[1] to receive such sum or part thereof, as the case may be unless -

(a) such nomination is at any time varied by another nomination made in like manner or expressly cancelled by notice given in the manner and to the authority prescribed by those rules, or,

(b) such nomination at any time becomes invalid by reason of the happening of some contingency specified therein, -

and if the said person predeceases the subscriber or depositor, the nomination shall, so far as it relates to the right conferred upon the said person, become void and of no effect:

<u>Provided that where provision has been duly made in the nomination in accordance with the rules of the Fund, conferring upon some other person such right in the stead of the</u>

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1. See -

(a) <u>Talupulu</u> v. <u>Narasamma</u>, A.I.R. 1967 A.P. 10.

(b) <u>Man Singh</u> v. <u>Mothi Bai</u>, A.I.R. 1936 Mad. 477, 479.

(c) <u>In the goods of Stanby</u>, A.I.R. 1939 Cal. 642.

[illegible]

"person, deceased, such right shall, upon the decease as aforesaid of the said person, pass to such other person.

(2) Notwithstanding anything contained in the Indian Succession Act, 1925 or the Bombay Regulation VIII of 1827, any person who becomes entitled as aforesaid may be granted a certificate under that Act, or that Regulation, as the case may be, entitling him to receive payment of such sum or part, and such certificate shall not be deemed to be invalidated or superseded by any grant to any other person of probate or letters of administration to the estate of the deceased.

(3) The provisions of this section as amended by sub-section (1) of section 2 of the Provident Funds (Amendment) Act, 1940, shall apply also to all such nominations made before the date of the commencement of that Act:

Provided that the provisions of this section as so amended shall not operate to affect any case, in which before the said date any sum has been paid, or has under the rules of the Fund become payable in pursuance of any nomination duly made in accordance with those rules."

Case law on Provident Funds Act.

4.3. A few rulings under the Provident Funds Act, 1925 may be cited.[1] In a Calcutta case,[2] a subscriber had nominated his wife as the sole nominee. Subsequently, he took a second wife who bore him two sons. No fresh nominations were made. It was held that as between the first wife and sons of the second wife, the former was absolutely entitled to the money standing to the subscriber at his death.

In a Madras case, it was held that the Provident Fund Rules make no restriction with regard to persons in whose favour a declaration of nomination may be made. The depositor had made a declaration nominating a lady as his nominee. The lady claimed the deposit on his death as the widow of the depositor. It was held that she was entitled to it in preference to the son of the depositor, even though it was found that she was not legally married to the depositor.

Case law on Provident Funds Act.

4.4. It should also be stated that section 5 of the Provident Funds Act, even at a time when it did not contain the words "become <u>entitled to the exclusion of all other persons</u>", but merely provided that the

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1. For the text of section 5, Provident Funds Act, see para 4.2, *supra*.
2. *Keshab Lal* v. *Lyrani Rudra*, A.I.R. 1947 Cal. 176.
3. *Lakshmamma* v. *Subramanayam*, A.I.R. 1939 Mad. 489.

nominee shall "become absolutely entitled", had been construed in many rulings[1-5] to the effect that the nominee was beneficially entitled to the amount in the Provident Fund.

Government Savings Bank Act.

4.5. Then, the Government Savings Bank Act[6] provides that ~~mark~~ notwithstanding anything contained in any law for the time being in force, or in any disposition, whether testamentary or otherwise, by a depositor in respect of his deposit, where any nomination made in the prescribed manner purports to confer on any person the right to receive the deposit on death of the depositor, the nominee shall,

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1. Mt. Amna Khatoon v. Abdul Karim, A.I.R. 1937 All. 563 (Sulaiman C.J. & Bennet J.).

2. Ahmad Abdul Razzak v. Jamal Bint Mehdi, A.I.R. 1935 Bom. 334 (nephew).

3. Keshab Lal v. Amarani Sudhra, A.I.R. 1947 Cal. 176, 178, 179, paragraphs 8, 9, 10 (F.B.), dissenting from A.I.R. 1940 Cal. 396.

4. Hardial v. Janki Dass, A.I.R. 1928 Lah. 773.

5. (a) Ma Ky May v. Mi Lay, A.I.R. 1919 Rang. 54 (sister as nominee, defeated title of widow).
   (b) Ma Mi Lay v. Mi Lay, A.I.R. 1919 Rang. 54.

6. The Government Savings Bank Act, 1873.

on the death of the depositor become entitled, to the exclusion of all other persons, to the amount deposited.

Other precedents.

4.6. It is needless to multiply legislative precedents, which can be looked for in legislation[1-3] relating to certain schemes of national savings and analogous matters.[4]

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1. Section 3, P.O. Cash Certificates Act, 1917.
2. Section 9B, Public Debt Act, 1944.
3. Section 6, Government Savings Certificates Act (46 of 1959).
4. Contrast section 39A(1)(a), Unit Trust of India Act (52 of 1963).

CHAPTER 5

ENGLISH AND AMERICAN LAW

I. English law - general position.

Assumption as to position in England and observations relating thereto.

5.1. It will be convenient to refer now to the English law and the American law as to the effect of nomination under a policy of life insurance.

At the outset, a preliminary observation may be made. In England, there is no general system of nomination in regard to ordinary life insurance policies[1] of the nature provided in section 39 of our Act. There are systems of nomination applicable only in regard to policies under (i) Married Women's Property Act, and (ii) Friendly Societies Act.[2]

A nomination under the Married Women's Property Act stands on a special footing,[3] and need not be considered in detail.[4]

We shall presently deal with nominations under the Friendly Societies Act.[5]

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1. Halsbury, 4th Edition, Vol. 25 (Insurance), deals only with assignments.
2. See para 5.6, infra.
3. Section 11, Married Women's Property Act, 1882.
4. See Law Commission of India, 66th Report (Married Women's Property Act), pages 37-38, paragraphs 8.7 and 8.8.

Statutory framework and its background.

5.?. A helpful discussion of the background may be quoted[1] -

"30. Nomination under life policies. The primary intention of life policies is to provide for dependants. This overriding purpose is protected by the ability to arrange life policies so that when payment is due the policy moneys are considered separate from the assured's estate. The moneys are then available for the dependants and not for any creditors; in addition, certain tax or estate duty may be avoided in respect of the proceeds of policies so arranged.

"The procedure for such policies is for the assured to nominate a beneficiary (or nominee) when effecting the assurance. Such beneficiary, who need not be the legal representative of the assured, alone has the right to enforce any claim in due course. The regulating legislation for nominations consists of:

(a) The Married Women's Property Act, 1882, with the earlier Married Women's Policies of Assurance (Scotland) Act, 1880.

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1. Hansell, Elements of Insurance (1974), page 142, para 30.

"(b) The Friendly Societies Act, 1955, which limited the total amount for nominations to £200."[1]

II. Friendly Societies in English law.

Friendly societies.

5.3. In the system of limited insurance taken out with friendly societies (as regulated by the Friendly Societies Act, 1974)[2], nomination has a wider effect. The friendly society must, on receiving satisfactory proof of the death of the nominator, pay to the nominee the amount due to the deceased member, subject to a certain prescribed limit. "There is a prima facie presumption that the nominee is intended to take benefit, but, it is a question dependent on evidence, and the members' personal representative may, in a proper case, demand repayment from the nominee, subject to sums expended by the nominee for medical fees and funeral expenses in respect of the nominator."[3]

Case law on Friendly Societies Act in England.

5.4. This legislation has now a history of more than a century. Under the Friendly Societies Act, 1875 (as amended by the Act of 1887), a member of a

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1. See now the Friendly Societies Act, 1974.
2. Section 66(1) and section 67, Friendly Societies Act, 1974 (Ch. 6); Halsbury, 4th Ed., Vol. 19, page 143, para 266 and pages 145-146, para 273.
3. Halsbury, 4th Ed., Vol. 19, page 146, para 273.

society could nominate any person to receive a sum not exceeding £100, out of the money payable at his death.[1] It has been held that such a nomination cannot be revoked by will, but can be revoked only in the manner laid down in the Act, and that the sum so made payable is not part of the residuary estate of the deceased.[2] And in a case reported in 1901, when the nominee died before the nominator and his (nominee's) representative claimed the money, the decision of Kekewich, J., is:

> "I cannot see why the estate of a nominee who dies before the nominator should be deprived of the benefit intended to be conferred, even although his death may be unknown to the nominator........ I do not see anything in the wording of the rule to prevent the policy money being due to the legal representative of the nominee."

The observations of A.L. Smith, L.J. in an earlier English case,[3] may also be compared -

> "I may in the first place remark that where there has been a nomination, as in the

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1. Bennet v. Slater, (1899) 1 K.B. 45.
2. Redman, In re Norton v. Redman, (1901) 2 Ch. 471.
3. Bennet v. Slater, (1899) 1 Q.B. 451.

"present case, until that nomination has been revoked, I think that the nominee and not the nominator is the person beneficially interested[1] in the money."

Effect of nomination.

5.5. In fact, with reference to nominations under the Friendly Societies Act, 1875, it was specifically held[2] that the property carried by a nomination passes directly to the nominee by force of the nomination and does not form part of the estate of the nominator.

English case of purchase in the name of another.

5.6. In some of the judgments of the High Courts in India, reference is made to the English case of Baron Kensington[4]. In that case a policy of insurance was taken out by one Sanderson on his own life on behalf of his wife's sister, Miss Stiles, and the policy provided that Miss Stiles, her executors, administrators and assigns, should be entitled to receive the policy moneys on his death. Sanderson, who survived Miss Stiles, retained the policy, and

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1. Note the words "beneficially interested".

2. Bennett v. Slater, (1899) 1 Q.B. 451, referred to in Re Danish Bacon's Staff Pension Fund, (1971) 1 All E.R. 486, 491.

3. D.M. Mudaliar v. Indian Insurance and Banking Corporation, A.I.R. 1957 Mad. 115, 116, para 7.

4. In re Baron Kensington; Earl of Longford v. Baron Kensington, (1902) 1 Ch.D. 203.

paid the premiums till his death; and the question for decision was whether the legal personal representatives of Miss Stiles were trustees for the policy moneys for the legal personal representatives of Sanderson.

Joyce, J., quoted the following statement of Lord Romily in Garrick v. Taylor[1]:-

"If a purchase be made by one in the name of another, the presumption is that the latter is a trustee for the person who pays the money, unless the parties stand in the relation of parent and child.

"Now, in the present case a policy was taken out by Mr. Sanderson a great many years ago, and the name of Miss Stiles appears in the policy as the person to whom the money is to be paid. The policy was never handed to her, and she is now dead, and the premiums were always paid, and were paid for many years after her death, by Sanderson. That, really is a case of a man taking the policy out in the name of another, that other person being a sister of his wife, and therefore, not standing in any relation to him, 'that would meet the presumption', as Lord Eldon expressed it.

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1. Garrick v. Taylor, (1860) 29 Beav. 79, 83.

"It comes really to this: a purchase by one in the name of <u>another with no other circumstances at all proved</u>. Therefore, in my opinion, although the legal personal representative of the lady in this case would be the person entitled to receive the money at law and to give a receipt for it, in equity the money belongs to the legal personal representative of Mr. Sanderson, who took out the policy."

It may be noted that the nominee was not standing in such a relationship as to raise a presumption of an intention to benefit the nominee.[1]

III. <u>American law - position in general</u>.

Position in U.S.A.

5.7. The practice in the United States seems to be to allow the insured person (in life insurance) to "designate" a beneficiary.[2] Assignment of the policy is also permissible.[3] The expression "nomination" is not, however, generally used in legal parlance in this context in the U.S.[4]

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1. See cases in para 6.4, <u>infra</u>.
2. Paragraphs 5.8 to 5.14, <u>infra</u>.
3. Para 5.15, <u>infra</u>.
4. For general discussion, see Encyclopaedia of the Social Sciences (1967), Vol. 7, pages 107-108; "Insurance".

Position of beneficiary.

5.8. The position of the beneficiary under a life insurance policy in the U.S.A. may be thus stated in brief:[1]

The beneficiary is the person named in a life insurance policy to receive the benefit payable on the death of the insured. That person is not a contracting party and ordinarily cannot exercise any contractual rights prior to the death of the insured. Nevertheless, the policy is applied for and kept in force primarily for the benefit of the beneficiary. Naming the beneficiary, therefore, is one of the most important actions the applicant takes, and his right to change the designation later if he wishes, and as often as he wishes, is one of the most significant rights he acquires under the contract.

Classes of beneficiaries - The Primary Beneficiary.

5.9. There are two main classes of beneficiaries - primary and contingent[2] - in the U.S.A.

The applicant designates the beneficiary simply by stating in the application the name or names of the persons to whom he wishes the company to pay the benefit due at his death. He may specify that it be paid to one person alone, or that it be shared by several persons in proportions as he may

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1. Greider & Beadles, Law and the Life Insurance Contract (1968), page 140.

2. Para 5.11, *infra*.

indicate.[1] These are the primary beneficiaries.

In the days when the policy was applied for and issued to the beneficiary, his rights under it were of such a nature that they became an asset in his estate in the event of his death prior to the death of the insured. In fact, even where the insured himself applied for and owned the policy, the beneficiary was often considered to have a vested interest subject to being divested. This created practical problems, particularly where the insured survived the beneficiary by many years, for the estate of the beneficiary might have been closed long before the insurance became payable.[2] Yet the proceeds would still be payable to the estate.

Death of beneficiary.

5.10. For that reason, about the beginning of this century, companies began providing in their policies that if the beneficiary died before the insured, the death benefit would be payable to the estate of the insured. This eliminated the possibility that the death benefit could become payable to the estate of someone who had died many years before, and it is the general practice today.[3]

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1. Greider & Beadles, Law and the Life Insurance Contract (1968), pages 144-145.
2. Greider & Beadles, Law and the Life Insurance Contract (1968), pages 144-145.
3. Greider and Beadles, Law and the Life Insurance

Contingent beneficiary.

5.11. At the same time, the new policy provision created a new contingency that might be provided against - the possibility that the first-named beneficiary might die before the insured and the death benefit become payable to the estate of the insured. Now it became possible for the insured to name a contingent beneficiary, who would have the right to receive the death benefit if the primary beneficiary did not survive the insured. And since the contingent beneficiary might also predecease the insured, most companies today permit the insured to name a second contingent beneficiary. Settlement will be made to this person if there is no surviving primary or first contingent beneficiary at the death of the insured.

Settlement agreement - successor payee.

5.12. A special procedure available in the U.S.A. under "settlement agreement" should also be noted. The applicant for a policy will ordinarily name a contingent or successor payee under a settlement agreement, whose rights correspond to, but are ordinarily considerably more extensive than, those of the contingent or successor beneficiary in a one-sum designation.

The rights of the contingent beneficiary in a one-sum designation are determined as of the moment the insured dies. If, at that time, the first-named

or primary beneficiary is living, the rights of the contingent or successor beneficiary are automatically extinguished. The primary beneficiary takes all. If the primary beneficiary dies immediately thereafter, payment will be made to the personal representatives[1] of the primary beneficiary.

Under a settlement agreement, on the other hand, the contingent payee may also be made a successor payee. His rights are not necessarily extinguished by the death of the insured while the primary beneficiary is living. Often, by the provisions of the settlement agreement, such a successor payee is entitled to take any unpaid amounts or instalments remaining unpaid at the death of the primary beneficiary or payee. Thus, if the primary beneficiary lives to receive all the payments provided for (or to withdraw the total proceeds if the rights of withdrawal is granted), the successor payee's rights will be x terminated. However, if the primary beneficiary does not exhaust the proceeds during her lifetime, the successor payee or payees "succeed" (as their name suggests), to any funds remaining at her death.[2]

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1. Greider & Beadles, Law and the Life Insurance Contract (1968), page 151.

2. Greider & Beadles, Law and the Life Insurance Contract (1968), page 151.

IV. American law - position under statutory schemes.

Statutory scheme - National Service Life Insurance.

5.13. To have a more concrete picture of the American law, it would also be useful to refer, by way of illustration, to one of the statutory schemes of life insurance in force in the U.S.A. - the National Service Life Insurance (primarily meant for members of the armed forces and veterans). We quote the material statutory provisions from the U.S. Code[1] -

> "Section 717. Insurance maturing on or after August 1, 1946.
>
> (a) The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries.
>
> (b) Insurance maturing on or after August 1, 1946, shall be payable in accordance with the following optional modes of settlement:
>
> ....

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1. United States Code Annotated, Title 38 (197[illegible]), page 357: National Service Life Insurance, section 717.

"[Portion relating to optional modes of settlement not quoted]."

(c) Unless the insured elects some other mode of settlement, such insurance shall be payable to the designated beneficiary or beneficiaries in thirty-six equal monthly instalments. The first beneficiary may elect to receive payment under any option which provides for payment over a longer period of time than the option elected by the insured, or if no option has been elected by the insured in excess of thirty-six months.

....

(d) If the beneficiary of such insurance is entitled to lumpsum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable under such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary. If no beneficiary is designated by the insured, or if a designated beneficiary does not survive the insured, or if a designated beneficiary not entitled to a lumpsum settlement survives the insured, and dies before receiving all the benefits due and payable, then the commuted value of the remaining unpaid insurance

"(whether accrued or not) shall be paid in one sum to the estate of the insured. In no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sum paid will not escheat.

....

Right of designated beneficiary.

5.14. The right of the designated beneficiary in U.S.A. is regarded as a vested property right. In view of the fact that the law reserves to the insured the right to change the beneficiary of a National Service Life Insurance Policy,[1] the beneficiary named has no vested right in policies prior to the death of the insured, but, when the insured dies without having changed the beneficiary, the rights of the named beneficiary becomes vested.

Assignment.

5.15. So much as regards a "designated" beneficiary. As to assignment in U.S.A., the following statutory provision applicable to national service life insurance policies[3] would be of interest:-

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1. Para 5.13, *supra*.

2. *McCollum v. Bishop*, (C.A. Minn.) (1954), 211, F.2d 708, cited in U.S.C.A. (1979), Title 38, page 361, under "National Service Life Insurance".

3. U.S.C.A. (1979), Vol. 38, section 718, page 384.

"Section 718. Assignments.

(a) Assignments of all or any part of the beneficiary's interest may be made by a designated beneficiary to a widow, widower, child, father, mother, grandfather, grandmother, brother, or sister of the insured, when the designated contingent beneficiary, if any, joins the beneficiary in the assignment, and if the assignment is delivered to the Veterans' Administration before any payments of the insurance shall have been made to the beneficiary. However, an interest in any annuity, when assigned, shall be payable in equal monthly instalments in such multiple of twelve as most nearly equals the number of instalments certain under such annuity, or in two hundred and forty instalments, whichever is the lesser. The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of this sentence.[1]

(b) Except as to insurance granted under the provisions of section 722(b) of this title, any person to whom insurance maturing on or after

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1. 38 U.S.C.A. (1979), section 718.

"the date of enactment of this sentence is payable may assign all or any portion of his interest in such insurance to a widow, widower, child, father, mother, grandfather, grandmother, brother or sister of the insured when the designated contingent beneficiary, if any, join the beneficiary in the assignment. Such joinder shall not be required in any case in which the insurance proceeds are payable in a lump sum.

CHAPTER 6

RECOMMENDATION

Desirability of amendment.

6.1. In view of what we have stated in the earlier Chapters, we recommend that the nominee (if he survives the insured at the date of maturity of the policy and if he is a parent, spouse or child of the holder of the policy of life insurance), should be beneficially entitled to the amount secured by the policy.[1] The reasons justifying such an amendment have been already mentioned earlier, but may be recapitulated for convenience -

(a) Such an amendment would carry out the real intention of the parties.[2]

(b) It would be desirable from the point of view of social justice.[3]

(c) The Legislature has, in several enactments connected with provident funds[4] and the like,[5] accepted the principle of social justice referred to above and has made provisions conferring beneficial rights on the nominee. There is no need to treat amounts due

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1. This is subject to para 6.7, *infra*.
2. Para 3.6, *supra*.
3. Para 3.6, *supra*.
4. Para 4.2, *supra*.
5. Chapter 4, *supra*.

under a life insurance policy differently from, say, amounts placed in a provident fund in this respect in the case of relatives belonging to the class mentioned above.

Considerations of social justice.

6.2. We are not unaware that our recommendation[1] to treat certain nominees as beneficially entitled amounts to changing the legal position as understood in many High Courts.[2] But we venture to point out that in terms of human needs and expectations, and in the context of social justice,[3] what we are recommending should be more acceptable than the present position.

Assignment not a satisfactory mode in all cases.

6.3. By way of anticipating a possible counter-argument, we may state that it is true that the insured person can always make an assignment under section 38 of the Insurance Act.[4] However, in our opinion, this would not be a satisfactory method in every case. A person who makes a nomination might desire to retain the benefit of the policy, in case he survives the nominee. If he makes an assignment of the policy, he loses this facility. Moreover, an assignment cannot be revoked, while a nomination

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1. Para 6.1, *supra*.
2. See Chapter 2, *supra*.
3. See Chapter 3, *supra*.
4. Para 1.4, *supra*.

can. We do not, therefore, see any reason why a person should be driven to making an assignment, when he does not intend that the transfer should be operative as an assignment which is irrevocable and divestitive.

Near relatives - The English approach as to near relatives.

6.4. We may add that our approach, which favours special provisions for nominations made in favour of certain near relatives, while supported by modern social notions, is not a total innovation. Very early judicial decisions dealing with analogous situations have shown substantially the same approach. In this context, we may refer to one of the leading English cases,[1] decided in the 18th century on the subject of resulting trusts. After making the statement that a resulting trust may be rebutted by circumstances in evidence (in the case of a legal estate taken in the name of another person), the judgment of Eyre C.B. observes:

> "The cases go one step further, and prove that the circumstance of one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting

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1. Dyer v. Dyer, (1788) 2 Cox, Eq. Cas. 92, 93, 94, (Eyre C.B.), quoted in Pettitt v. Pettitt, (1969) 2 Weekly Law Reports 966, 990 (H.L.).

"trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence."

6.5. In a recent judgment of House of Lords,[1] Lord Upjohn, after reproducing the passage from the judgment of Eyre C.B. quoted above,[2] observed as follows:-

"The remarks of Eyre C.B. in relation to a child being a nominee are equally applicable to the case where a wife is the nominee. Though normally referred to as a presumption of advancement, it is no more than a circumstance of evidence which may rebut the presumption of resulting trust, and the learned editors of White and Tudor were careful to remind their readers at p. 763 that 'all resulting trusts which arise simply from equitable presumptions,

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1. _Pettitt_ v. _Pettitt_, (1969) 2 Weekly Law Reports 966, 990.

2. _Dyer_ v. _Dyer_, para 6.4, _supra_.

"may be rebutted by parol evidence.......'.
This doctrine applies equally to personalty."

Rights of survivors of nominees.

6.6. So much as regards the merits of the proposed amendment. Let us now address ourselves to some matters of detail. Strictly speaking, the amendment that we have recommended is enough to lead to the further position that if, after the maturity of the policy and before the actual payment, the nominee or nominees die, then the heirs of the nominee shall be entitled to the proportionate amount. However, in order to avoid doubts in future, it should also be further provided that the heirs of the nominee will in such a situation be entitled to the amount.

Rights of nominee not to be higher than those of the person making nomination.

6.7. It is obvious that where a person makes a nomination, he cannot confer on the nominee any right higher than what he himself has. For example, in the case of a policy which would form part of the property of a coparcenary, the nomination (or any other mode of conferring derivative title) cannot change the coparcenary character of the policy.[1] As is often said, the stream cannot rise higher than the source. This position is implicit. However, to avoid doubts in this regard, we have considered it proper, by way

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1. Mahadeo Nath v. Meena Devi, A.I.R. 1976 All. 64 (Joint family).

of abundant caution, to make it clear in the amendment recommended by us that the nominee will be beneficially entitled unless it is proved that the holder of the policy, having regard to the nature of his title to the policy, could not have conferred any such beneficial title on the nominee.

Testamentary disposition.

6.8. The right flowing from the amended provision (whether it be a right of the nominee or of his heirs) should be subject to any testamentary disposition of the amount to which the nomination relates, validly made by the person making the nomination, subsequent to the nomination. This qualification (though not found in the enactments relating to the Provident Fund and the like)[1] is already contained in the Act,[2] and may be retained, at least until the working of the proposed amendment is seen.

Rights of nominees *inter se*.

6.9. We may mention that the subject of the respective rights *inter se* of various persons who become beneficially entitled under a policy is one outside the scope of the limited question to which we address ourselves, and we need not express any opinion in the matter. The question is a general one, not confined to nominees only and could (for example) arise as

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1. Chapter 4, *supra*.
2. Section 39(2), Insurance Act, 1938; para 3.1, *supra*.

between assignees also, or as between any other persons having a derivative title.

Recommendation to revise section 39, Insurance Act, 1938 by inserting new sub-sections.

6.10. In the light of the above discussion, we recommend that in section 39 of the Insurance Act,[1] the following new sub-sections should be inserted after sub-section (6):-

"(6A) *Subject to the other provisions of this section, where the holder of a policy of life insurance on his own life nominates his parents, or his spouse, or his children, or his spouse and children, or any of them, the nominee or nominees shall be beneficially entitled to the amount payable by the insurer to him or them under sub-section (6), unless it is proved that the holder of the policy, having regard to the nature of his title to the policy, could not have conferred any such beneficial title on the nominee*.

(6B) *Subject as aforesaid, where the nominee, or if there are more nominees than one, a nominee or nominees, to whom sub-section (6A) applies, die after the person whose life is insured but before the amount secured by the*

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1. For the present section 39, see para [illegible].1, *supra*.

"policy is paid, the amount secured by the policy, or so much of the amount secured by the policy as represents the share of the nominee or nominees so dying (as the case may be), shall be payable to the heirs or legal representatives of the nominee or nominees or the holder of a succession certificate, as the case may be, and they shall be beneficially entitled to such amount.[1]

(6C) Nothing in sub-sections (6A) and (6B) shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of life insurance.[2-3]

(6D) The provisions of sub-sections (6A), (6B) and (6C) shall apply to all policies of life insurance maturing for payment after the commencement of the Insurance (Amendment) Act ...."

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1. Cf. the wording of section 39(5), Insurance Act, 1938.
2. Contrast Married Women's Property Act, 1874, section 6(1), last paragraph.
3. As to testamentary dispositions, see section 39(2), Insurance Act, 1938.

Section 39(7), Insurance Act, 1938 - Nomination and Trust.

6.11. In order to complete the discussion, we may, at this stage, also refer to the Report of the Law Commission on the Married Women's Property Act, 1874,[1] by which a few changes were recommended in the Insurance Act, 1938.[2] The first[3] point dealt with in that Report concerned section 39(7) of the Insurance Act which, at present, excludes the application of the provisions of section 39 to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874 applies, or has, at any time, applied.

The Law Commission pointed out that a person who decides to create a trust under section 6 of the Married Women's Property Act, 1874, may, by a misunderstanding of the law or through slip or ignorance, enter also a nomination in the policy. In such a case, what should prevail is the trust under section 6, and not the nomination. The Commission noted that as the proviso to section 39(7) of the Insurance Act,

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1. Law Commission of India, 66th Report (Married Women's Property Act, 1882), Chapter 8.
2. Law Commission of India, 66th Report (Married Women's Property Act, 1882), paragraphs 15.15, 15.16 and 15.17.
3. Law Commission of India, 66th Report (Married Women's Property Act, 1882), paragraph 8.54.

1938 now stands, it is possible to take the view that the nomination overrides the trust. It was desirable to prevent such a situation from arising. An amendment to section 39(7), proviso, Insurance Act, on this point was accordingly recommended by the Commission.

Section 39(7) - Position of children.

6.12. In the same Report,[1] a recommendation has been made to add, in section 39(7) of the Insurance Act, a mention of 'children'. This change was consequential on the recommendation to expand the scope of section 6 of the Act of 1874 so as to authorise a trust for children.

Section 39A - Insertion of note in every policy.

6.13. A recommendation[2] was also made to insert, in every policy of life insurance, a specific note impressing it upon the insured that if he creates a trust under section 6 of the Married Women's Property Act, he shall not make a nomination under section 39 of the Insurance Act. For this purpose, the insertion in the Insurance Act of a new section - section 39A - was recommended.

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1. Law Commission of India, 66th Report (Married Women's Property Act, 1874).
2. Law Commission of India, 66th Report (Married Women's Property Act, 1874), para 15.7.

xpression "beneficially entitled" and analogous expressions.

6.14. Since the amendment recommended by us uses the expression "beneficially entitled", we give in an Appendix a list of statutory and other references using the expression "beneficially entitled" or comparable phraseology.[1]

P.V. Dixit	Chairman
S.N. Shankar	Member
Gangeshwar Prasad	Member
P.M. Bakshi	Member-Secretary

January, 1980.

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1. See Appendix.

APPENDIX

Select List of statutory and other references using the expression "beneficially entitled" or comparable phraseology.

1. Section 15(c), Specific Relief Act, 1963.

2. _A.G._ v. _Sefton (Earl)_, (1865) 11 H.L. Cas. 257, 271 (Lord Wensleydale).

3. _Re Jackson's Will_, (1879) 49 L.J. Ch. 82, 85 (Jessel M.R.).

4. _Bennet_ v. _Slater_, (1899) 1 Q.B. 451.

5. _Wirth_ v. _Wirth_, (1956) 98 C.L.R. 228, 247, 248.

6. _Pettitt_ v. _Pettitt_, (1969) 2 W.L.R. 966, 971. (Lord Reid), 980 (Lord Morris), 982 (Lord Morris), on appeal from (1968) 1 W.L.R. 443.

7. _Pettitt_ v. _Pettitt_, (1968) 1 W.L.R. 443, 448 (C.A.) (Wilmer L.J.).

8. Case law on section 5, Provident Funds Act, 1925.

9. Case law on partition.

"The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition."[1]

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1. _Shankar Baksh_ v. _Karjan_, (1888) I.L.R. 16 Cal. [illegible], 405 (P.C.).