Saskatchewan Judgments

PATERSON V. REMEDIOS

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D.I.V. A.D. 1997
No. 425 J.C. S.

IN THE QUEEN`S BENCH

(FAMILY LAW DIVISION)

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

IAN ALICK PATERSON

PETITIONER

- and -

AUDREY MARGARET REMEDIOS

RESPONDENT

R. Wiebe for the petitioner

D.L. Kingsbury for the respondent

JUDGMENT HUNTER J.
August 6, 1999

[1] This is an action by the Executor of the petitioner for the division of Matrimonial property pursuant to The Matrimonial Property Act, 1997, S.S. 1997, c. M-6.11 ("MPA"). The petitioner, Ian Alick Paterson ("Alick"), died September 6, 1998. The respondent is his former wife Audrey Margaret Remedios ("Audrey").

[2] The following is the agreed statement of facts on which this action is to be determined.

1. The parties were married on July 20,

1988.

2. There is 1 child of the marriage, namely:
SERIN LEAH PATERSON, born June 10, 1990

3. The parties separated on March 4, 1997.

4. The Petitioner commenced this action on July 18, 1997.

5. A Judgment of Divorce was granted August 5, 1998.

6. The Petitioner died on September 16, 1998.

7. Letters Probate issued to The Canada Trust Company on March 3, 1999. The Application for Letters Probate and a Notarial Copy of Letters Probate are annexed as Schedule A.

8. As at the date of commencement of these proceedings the assets consisted of the following:
Matrimonial Home $209,000.00
Audrey's Honda Civic 9,850.00
Alick's Van 9,200.00
Audrey's Truck & Tractor 4,100.00
Furnishings
His 1,100.00
Hers 3,885.00
Bank Accounts
His 13,016.76
Hers 8,698.00
Pensions
His 51,261.42
His Research Pension Plan 28,000.00
Hers 62,017.24
RRSP's
His 14,833.14
Hers 11,407.14
Money Market Funds
His 1,004.35
Total Assets $427,373.05
Debts

Royal Bank Mortgage $91,916.32
Line of Credit 12,000.00
Elizabeth Remedios 5,000.00
Fencing Contract 3,119.11
$112,035.49

Total Net Property $315,337.56

9. Of the $12,000.00 amount owing under the line of credit of the Petitioner, $10,000.00 was paid to the Petitioner's girlfriend, Tangyne Taylor, on May 21,

1997. Ms. Taylor repaid $9,000.00 to the Petitioner on July 24, 1997.

10. In May but before May 20, 1998, the Petitioner was diagnosed with Metastatic cancer and was aware that he was terminally ill.

11. At the time an insured becomes aware that he or she suffers from a terminal illness, life insurance policies held by the insured may be marketable in many ways and the value of such policies depends on the nature of the policy and the imminence of death. For term insurance policies, the insured may obtain cash advances, living benefits, secure a bank loan, transfer a beneficiary designation irrevocably, or sell the policy outright, in order to potentially liquidate up to 100% of the face value of the policy. However, the voluntary group life insurance policy of the Petitioner has not been specifically evaluated in this respect.

12. Term life insurance is a contract of insurance under which the holder accumulates no equity. If the premiums are not paid the insurance is cancelled. Term life insurance can only be maintained up to a certain age. The Petitioner paid the premiums of the voluntary group life insurance policy as and when they came due and the face value of the policy was paid to the designated beneficiary following his death.

13. On May 20, 1998, the Petitioner changed the designations on his Insurance Policies from having previously named the Respondent, Audrey Remedios, to naming his daughter Serin in the case of his Academic Basic Group Life Insurance Policy, and naming his girlfriend, Tangyne Taylor, in the case of the Voluntary Group Life Insurance Policy, which was a term life insurance policy that permitted revocation of the beneficiary designation. On August 28, 1998, the Petitioner changed the beneficiary designation on his two pensions to his daughter, Serin. The proceeds payable under these policies are as follows:
Group Life $ 40,000.00 (Payable in Trust for Serin)
Voluntary Group Life $314,000.00 (Paid to Tangyne Taylor)
The amounts payable under the pensions are as follows:

Academic Pension Plan $67,700.00 (Payable in Trust for Serin)
Research Pension Plan $28,000.00 (Payable in Trust for Serin)
Each of the parties carried voluntary term life insurance, Audrey, in the amount of $360,000.00 and Alick in the amount of $314,000.00. The parties had no other insurance on their indebtedness. The premiums for this insurance were paid by voluntary deductions made from the salary of each party, respectively.

14. In January of 1997, the Petitioner received monies as an inheritance from his grandfather's estate. He received a total of $90,000.00. Of this, $50,000.00 was used to pay down the mortgage on the matrimonial home shortly before the parties separated on March 4, 1997. The remainder of these funds were deposited into the Petitioner's Money Market Fund account. On June 1, 1997, the Petitioner entered into an agreement for the purchase of 820 - 12th Street East, Saskatoon, Saskatchewan, a copy of which Offer to Purchase is attached hereto as Schedule B. On April 28, 1997, $10,000.00 was transferred by the Petitioner from the Money Market Funds account to his personal chequing account. $29,341.00 was then transferred by the Petitioner from the Money Market Funds account to his personal chequing account on June 2, 1997. A $5,000.00 deposit on the above property was paid to Re/Max from these funds on June 1, 1997. On July 29, 1997, $26,706.43 was paid to Gauley & Co. to pay the balance of a down payment on the property. A copy of a true translation of the Will of the Petitioner's grandfather, Dr. Erik Johann Schwarze, is attached hereto as Schedule C.

15. Between April 1997 and the Date of Commencement, the Petitioner used funds in his bank account, including monies obtained through the inheritance from his grandfather, for such expenses as paying the matrimonial home mortgage, paying for the child's dance lessons and photographs, and paying for marriage counseling[sic] and mediation services.

16. Shortly after purchasing the property at 820 - 12th Street East, Saskatoon, the Petitioner received $67,000.00 from his mother, Edwarda Thalia Reichardt Verkade, which funds were used to pay out the Royal Bank Mortgage he had obtained to finance the purchase of this property and a new mortgage was granted to his mother in this amount. A copy of the Certificate of Title covering

this property is annexed as Schedule D.

17. The assets which make up the estate are listed in Part I of the Schedule of Assets annexed as part of Schedule A and total $34,895.31. The assets falling outside of the estate are listed in Part II of the said Schedule of Assets and total $674,700.00. The debts of the estate are listed and annexed as Schedule E. The amounts shown for Executor's Fees and Legal Fees are as of March 15, 1999. The amount owing to Revenue Canada for the "to date of death" Tax Return is $2,289.60.

18. The property located at 820 - 12th Street East, Saskatoon has been listed for sale at a listing price of $117,000.00. This property was purchased by the Petitioner in July of 1998 for $97,000.00. It is anticipated that the actual sale price will be in the neighborhood of the price paid by the Petitioner when the property was purchased, or perhaps lower.

19. The assets remaining in the possession and control of the Respondent at present are:
Matrimonial Home $225,000.00
Honda Civic 8,500.00
Tractor 4,000.00
Truck Proceeds 100.00
Chequing Account 8,698.00
Pension 84,562.70
RRSPs 11,407.14
Household Goods and Effects 3,610.00
Subtotal $345,877.84

20. The Debts of the Respondent are:
Fencing Contract 3,119.11
Elizabeth Remedios 5,000.00
Mortgage as at Sept/98 90,689.87
Subtotal $98,808.98
Net Assets of the Respondent$247,068.86

[3] The assets of Alick's estate approximate $35,000.00. The estimated debt and liabilities of Alick's estate as at March 26, 1999, is $60,000.00. In excess of $15,000.00 of the debts consists of an estimate for work in progress for legal fees and fees anticipated to be charged by the Executor, Canada Trust Company. The Executor is pursuing the matrimonial property claim so that funds will be payable to the estate to pay the debts of the estate.

[4] The estate assets as shown in Part I of the probate documents are as follows:

PART I - PROPERTY VALUE

Real Property - 820 - 12th Street E. $18,000.00
(Equity Value)

Savings bank account 126.21

Stocks and Shares of Alviva 1.00
Biopharmaceuticals Inc.

Royal Bank RRSP Savings Plan 11,736.19

University of Saskatchewan Royalty 1.00
Payment

Canada Pension Plan death benefit 2,419.14

University of Saskatchewan long term
disability benefit and vacation pay 2,111.77

Personal effects, furniture and 500.00
household goods

TOTAL $34,895.31

[5] The assets in which Alick had an interest at death but are not included in the estate assets Part I but appear in Part II are the following:

PART II - PROPERTY VALUE

The matrimonial home as joint tenant
with right of survivorship to Audrey $225,000.00
Remedios

University of Saskatchewan Research
Pension Plan 28,000.00
Designated beneficiary - daughter
Serin Paterson

University of Saskatchewan Academic
Pension Plan 67,700.00
Designated beneficiary - daughter
Serin Paterson

University of Saskatchewan Basic Group
Life Insurance 40,000.00
Designated beneficiary - daughter
Serin Paterson

University of Saskatchewan Voluntary
Group Life Insurance 314,000.00
Designated beneficiary - Tangyne R.
Taylor

[6] Central to the issues between the Executor and Audrey is whether the term voluntary group life insurance in the amount of $314,000.00 has a value for the purpose of the matrimonial property action, and, if so, in what amount. Blended with this issue is the question of whether the date of the petition or the date of adjudication is the appropriate valuation day in this action? Secondly, should the $90,000.00 inheritance funds received by Alick have an impact on whether

there should be an unequal division of the matrimonial property in Alick's favour?

[7] Alick received an inheritance of $90,000.00 in January, 1997. From this inheritance, Alick used $50,000.00 to pay down the mortgage on the matrimonial home. This left the balance of the inheritance at $40,000.00.

[8] Alick and Audrey separated approximately two months after Alick received the inheritance. Following the cases in Barry v. Barry (1995), 136 Sask. R. 227 (Sask. Q.B.); Singer v. Singer (1986), 54 Sask. R. 241 (Sask. Q.B.) and Seaberly v. Seaberly (1985), 37 Sask. R. 219 (Sask. C.A.) the Executor takes the position that there should be an unequal division of the $40,000.00 balance of the inheritance because it was not spent on a matrimonial asset. The Executor is not requesting an exemption, merely an unequal division.

[9] In Alick's grandfather's will (which was prepared in the Netherlands in September, 1990) each of the ten grandchildren who were to share equally in the grandfather's estate were individually named. The clause in the will stated

> ... irrespective of the time of my death, I direct that all assets to be acquired out of my estate shall not form part of any community property which, at the time of my death, may exist through their marriage, or which may at any time exist in respect of them.

[10] Audrey opposes the claim for unequal division of the $40,000.00 balance. She submits that the $40,000.00 in funds were utilized by Alick for many family purposes. In addition to the $50,000.00 applied to the mortgage on the matrimonial home, Alick used these funds to pay for mediation and counselling services post-separation. As well, Alick paid for dance lessons for Serin.

[11] It appears that Alick initially deposited the $40,000.00 in his money market account. Later, Alick transferred funds to his personal checking account and the inheritance monies were intermingled with funds in his account. Cheques drawn on this same personal account were utilized by Alick to pay for the down payment on the 12th Street East house which Alick purchased in the summer of 1997.

[12] By July 18, 1997, (ie. the date of commencement of this petition) only $12,000.00 remained in Alick's bank account.

[13] Audrey argues that the inheritance funds are matrimonial property and there should be no unequal division pursuant to s. 21(2)(e) of the MPA because in spite of what Alick's grandfather said in the will, the inheritance was received while she and Alick were together. Additionally, Audrey submits that the inheritance funds were used primarily for joint family purposes. Further, the funds were not kept segregated and the bulk of the funds were spent prior to the date the petition was issued.

[14] No information was provided as to how much Alick spent on Serin's dance lessons or the post-separation mediation and counselling services. Some of the funds in Alick's account were used as the down payment on the 12th Street house. However, the Executor predicts that while at the time the 12th Street house was purchased Alick's equity approximated $30,000.00, this equity is reduced to $18,000.00 because of the anticipated low selling price.

[15] The wishes expressed in the grandfather's will are not determinative of the issue (see Seaberly v. Seaberly). In the instant case, the receipt of the inheritance shortly before separation weighs in favour of an unequal distribution. The use of the funds toward various joint matrimonial uses weighs in favour of an equal distribution.

[16] However, the circumstance which should be given some weight is the fact that no child support was ever paid by Alick. Even though Serin is the residuary beneficiary under the will, for all practical purposes she will receive nothing in that capacity and the burden of child support will fall squarely on Audrey.

[17] I find that, in all of the circumstances, the presumption of equal sharing of the inheritance during the period of cohabitation of the marriage has not been displaced by the equitable considerations in s. 21(1)(e) of the MPA. Accordingly, no portion of the inheritance will be divided unequally in this action.

[18] The issues with respect to the appropriate valuation date of the matrimonial property and the value, if any, of the voluntary group life insurance policy blend together. The Executor's position is that on July 17, 1997, (ie. the date the petition was issued) Alick's group voluntary term life insurance policy had no value.

[19] There is no paid up value of a term life insurance policy. The policy can be cancelled at any time. The beneficiary designation may be changed at any time.

[20] The Executor says that Alick's decision to change the beneficiary designation on his life insurance policy does not constitute a dissipation of assets within the meaning of the MPA and it cannot affect the outcome of the distribution of matrimonial property in this action. Likewise, the Executor argues that Alick's death cannot be considered when determining the appropriate distribution of the matrimonial property insofar as making that division more favourable to the surviving spouse and that it must be done in the identical manner as if Alick were still alive.

[21] In Olsen v. Olsen Estate and Herbach (1990), 88 Sask. R. 251 (Sask. Q.B.) the relevant events occurred in 1989. The wife and husband separated in May, the petition was issued in July, and in August, the husband changed the beneficiary designation on his life insurance policy naming another woman ("Herbach"). In November, the husband died, intestate. In December, Herbach filed a claim for the proceeds of the husband's insurance policy as the designated beneficiary. The

wife filed a claim for the proceeds, claiming entitlement pursuant to the MPA.

[22] The question involved the proceeds of the insurance. Armstrong J. noted

[3] ... This is not the same thing exactly as asking whether the proceeds are matrimonial property. It may be, for example, that one could become entitled to the proceeds through rights distinct from the proceeds. It is possible that the plaintiff[wife], because of the Act[MPA], might have prevented the change of beneficiary taking place when it did.

[23] In Olsen, the proceeds, not payable until death, did not exist on the date of application. Therefore, it was not matrimonial property on the date of application. At the date of the MPA application, the husband owned the policy; the wife had an interest in the policy and a right, on the husband's death, to the proceeds. The right to the proceeds was conditional on three things, namely, there being no change in beneficiary; the policy being in force at the time of the husband's death; and there being no grounds for the insurer refusing payment. Armstrong J. stated:

[6] .... The policy of insurance gives the owner of the policy the right to appoint a beneficiary to receive the proceeds. So does the Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 152(1). Both the policy and The Saskatchewan Insurance Act give the owner the right to change the beneficiary....
[8] ...[Husband] was free to deal with the insurance policy and rights thereunder which he did by changing the beneficiary. Having changed the beneficiary, the moment he died and the proceeds of the insurance came to be a fact, they became payable to the designated beneficiary... The proceeds were never [the husband's] and would not become part of his estate....

[24] As well, Armstrong J. held that it is not a dissipation of assets under the MPA for the owner of an insurance policy to change beneficiary designation. This right to change the beneficiary designation could be exercised again and again right up to the time of death of the insured.

[25] Based on the decision in Olsen the Executor submits that the proceeds of the insurance policy are not the property of the deceased or his estate at the date of the application under the MPA. The proceeds only became payable on Alick's death. The proceeds are to be paid to the beneficiary designated by Alick. The proceeds are exempt for the purposes of the division of the MPA (See: Ferguson v. Ferguson (1984), 42 R.F.L. (2d) 305 (Sask. Q.B.)). The Executor asserts that if an unequal division of matrimonial assets occurs because of

Alick's change in the beneficiary designation of his voluntary group life insurance policy that the Executor's obligation to pay Alick's estate debts will be impaired.

[26] The Executor referred to the situation in Ontario which differs from Saskatchewan because of the legislative difference provided in Ontario's Succession Law Reform Act, R.S.O. 1990, c. S-26. In particular s. 10 of that act allows that one could claw back the insurance proceeds for dependents who are not adequately provided for. There is no such comparable legislation in Saskatchewan.

[27] In Saskatchewan the only applications for dependents not adequately provided for are made under The Dependants' Relief Act, 1996, S.S. 1996, c. D-25.01. In the instant case the proceeds of the term insurance policy are governed by the provisions of The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26. Because of the beneficiary designation, the proceeds do not form part of the estate. Pursuant to the provisions of The Saskatchewan Insurance Act the proceeds of the insurance policy are free from creditors and are not subject to seizure. The Executor's position is that the $314,000.00 of insurance proceeds is not part of the estate; it was never a matrimonial property asset; and it is not subject to division under the MPA. For all of these reasons it should not be considered in this application for division of matrimonial property.

[28] The position of the Executor is identical whether the valuation date is the date of commencement of the petition or the date of adjudication because arguably, term insurance is only a contractual right, not a proprietary right and it is governed solely under the provisions of The Saskatchewan Insurance Act.

[29] Adjudicating on the issue of the voluntary life insurance proceeds is the most contentious issue for Audrey. Audrey argues that when Alick learned that he had a terminal illness, the term insurance in fact did have a value. When one looks at the financial planning utilized by Alick and Audrey, it is readily apparent that none of the debts were life insured and that the only protection for payments of debt in the event of death was the term life insurance of similar value that both Alick and Audrey had purchased.

[30] Audrey also relies on the Olsen decision where at p. 254 Armstrong J. left open the possibility that a term life insurance policy could be valued and dealt with as matrimonial property:

> [12]Insurance policies on the life of one or another spouse are often dealt with as matrimonial property. A value is placed on them. I do not know that it has ever been done, but the right to designate a beneficiary and even the right to proceeds of a designated beneficiary could be valued. The value would depend on the facts in each case. Both rights would be valuable in relation to the face value of insurance if it is known that the insured is about to die and that the insurance is valid and in force. The point

is, however, academic in the present case. So is the fact that the Act, if it entitled her at all, would not, except on proof of special circumstances, entitle the plaintiff to more than one half of the proceeds.

[31] In the instant case, it is clear that both Alick and Audrey had substantial term life insurance policies at the time of separation and at the date of commencement of the petition. It was in the early spring of 1998 that Alick became ill with cancer. In the brief of law submitted on behalf of Audrey, the following information is provided:

> ... He[Alick] underwent surgery on May 13, 1998. On May 14, 1998 the Respondent took her daughter to visit the Petitioner in the hospital....The Respondent thought the Petitioner was dying, and, given that the Petitioner worked in the field of oncology, the Respondent felt that the Petitioner knew he was terminally ill.
> On May 15, 1998 the Petitioner confirmed to the Respondent that he had cancer and that the outlook was not good. On May 20, 1998 the Petitioner changed the beneficiary designation on the life insurance policy from the Respondent to his girlfriend. The Petitioner died of cancer on September 16, 1998.

[32] As can be seen from the above, Alick had a very quick and untimely death. Arguably, by May 20, 1998, Alick knew that the funds would be paid under his life insurance policy. Given that he changed the beneficiary designation on the policy he must have been aware that without such a change in the beneficiary designation, Audrey would have received the proceeds of insurance. In this respect, Alick must have realized the value of the policy. The financial repercussions of the change in beneficiary is significant to Audrey and to their daughter, Serin.

[33] Audrey submits that Alick must have realized that the value of the insurance policy was nearly 100% of its face value at the date that the beneficiary designation change occurred. On learning that he had a terminal illness which was about to result in a very speedy death, the term voluntary life insurance policy suddenly had a "spontaneous" increase in value between the date of commencement of the petition and the date of adjudication.

[34] By analogy to those cases where the date of adjudication is often chosen as the appropriate date for valuation of matrimonial property when there is a spontaneous increase in the value due to forces beyond the control and management of the parties, Audrey submits that the value of this policy should be examined at the date of adjudication rather than at the date of commencement of the petition. Accordingly, Audrey argues that Alick's share of matrimonial property should be credited with the full face value

($314,000.00) of the life insurance policy which Alick chose to give away on the day he made the change in beneficiary designation (ie. May 20, 1998). Therefore, Audrey argues this amount should be considered as part of the share of the property in the hands of Alick as at the date of adjudication. This, of course, has a significant impact on the distribution of the matrimonial property.

[35] As well, Audrey points to ss. 21(2)(l) of the MPA. A factor to be considered in determining whether an unequal division of property is justified is "any benefit received or receivable by the surviving spouse as a result of the death of his spouse". Counsel on behalf of Audrey states her argument at p. 11 of her brief as follows:

> Here, the Petitioner . . . one year following the Date of Commencement and one month prior to his death, to make application for, and be granted, a Certificate of Divorce. . .
> In Kaye v. Pohl (1995), 138 Sask. R. 298, Matheson J., a husband refused to waive his right to appeal a divorce judgment. As a result, he, instead of the children, was eligible for C.P.P. benefits as his wife passed away before the 31 days appeal period expired. The court considered section 21(2)(1) of The Matrimonial Property Act in awarding the wife an unequal division of property.
> In the instant case, the divorce judgment became final 8 days before the Petitioner's death. As a result, the Respondent is not entitled to any C.P.P. survivor benefits.
> The lack of any benefits for the Respondent upon the Petitioner's death, in conjunction with the change in beneficiary of the life insurance policy during the tenure of the litigation, has put the Respondent in a very unfortunate financial position. There is little for the daughter to inherit from her father, considering she is only eight years old and considering what the Petitioner had to offer. As a result, the Respondent will bear the majority of the expenses associated with her daughter's upbringing.
> . . .
> While the Petitioner has not done anything contrary to law in this situation, the Respondent submits that, morally, the petitioner has done great harm. He has placed the Respondent in a position where her ability to support their daughter will be compromised unless the court exercises its discretion to divide the matrimonial property such that no equalization payment is required from the Respondent.

[36] In my view, the Olsen decision does not preclude a finding that the voluntary term group life insurance policy had a value for the purposes of the MPA. In fact, Armstrong J.

acknowledges the probability that it has a value and that any effort to value the policy will depend on the facts of each case.

[37] Generally it is true that term policies do not have a value. However, persons who are terminally ill may in fact receive some or all of the proceeds of the term insurance prior to their death. Alick could have made such an application prior to his death. Alick did not change the beneficiary designation until he knew that his death was imminent.

[38] Audrey proposes that the insurance policy be valued in excess of $300,000.00 and that this sum be credited for the purposes of the MPA as being in the possession of Alick. Even if it is valued at $150,000.00, this would still require that Alick make a small equalization payment to Audrey.

[39] Given the poor financial condition of Alick's estate, Audrey is prepared to forego any payment. She is content if each party be allocated the assets and liabilities in the possession of each and that no equalization payments are required.

[40] Through the provisions of designating beneficiaries for all his insurance and pension proceeds, Alick has disposed of the majority of the assets in his possession. This is why that there is so little property of value remaining in estate. The appropriate date to value the assets for the purpose of the MPA is the date of adjudication.

[41] It is fair to assume that Alick would have received at a minium, one-half the value of his term life insurance policy if he had applied and given that he died shortly after becoming aware he was terminally ill, it is fair to assume that most of the funds would still be available. Accordingly, I value the term insurance at $150,000.00 for the purposes of the MPA.

[42] Accordingly, there will be no payment to be made by Audrey to Alick's estate. Since Audrey is prepared to forgo the equalization payment owing to her, it is unnecessary to calculate the specific amount that would otherwise be payable.

[43] Lastly, Audrey makes a further claim that the house which Alick purchased days before the commencement of the petition should be considered matrimonial property as well because some of the funds used for the down payment on that home were funds which could be considered to be matrimonial property. While it is true that the purchase was made in the summer of 1997 in and around the date of commencement of the petition, this occurred some three months beyond the date of separation. I find that the 12th Street property is not matrimonial property within the meaning of the MPA.

[44] There will be no order as to costs.

J.