IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
**Citation:** MacArthur (Re), 2013 NSSC 157

**Date:** May 23, 2013
**Docket:** B- 35050
**Registry:** Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 35050
Estate No. 51-1419880

IN THE MATTER OF THE BANKRUPTCY OF
THE ESTATE OF THE LATE GLENN MACARTHUR

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**D E C I S I O N**

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**Registrar:** Richard W. Cregan, Q.C.

**Heard:** March 18, 2013

**Counsel:** Geoffrey A. Saunders / Jason May, solicitors for the Applicant Rita Christian

Colin D. Piercey / Jessica White, solicitors for the Respondent Trustee in Bankruptcy for the Estate of the Late Glenn MacArthur

[1] This is an application to determine who is entitled to the proceeds of a life insurance policy with Manulife for $300,000 on the life of Glen MacArthur who died on May 18, 2010, the named beneficiary, Rita Christian, or BDO Canada Limited, the Trustee of his estate in bankruptcy.

[2] Mr. MacArthur carried on an investment business called "Barring and Company Limited" (Barring) which dealt with equipment leases. The business is described in the Agreed Statement of Facts as follows:

> 7. After his death, it was discovered that in addition to his legitimate equipment lending business, MacArthur had been running a fraudulent investment scheme, whereby he would solicit and receive funds from investors under the guise of having equipment leasing deals at a discounted rate. He would solicit investors by telling them that when the client paid him for the leased equipment, he would then remit the investment with a higher-than-market rate of interest to the investor. Following his death it was learned that there were no such deals or clients.
>
> 8. All transactions were unsecured. Creditors had promissory notes which reflected that payments were made to Barring & Company or MacArthur, and in exchange, he guaranteed a rate of return, which was on average 10%, payable in full at the end of a designated term, usually 90 days.
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> 9. The promissory notes found among MacArthur's possessions after his death go as far back as June 1, 2005. The attached notes show the types of terms MacArthur provided to his creditors.

[3] Mrs. Christian was an employee of Barring and, as well, one of its investors.

[4] As of January 2009, MacArthur held seven insurance policies on his life, five were with Sun Life, one with Great West Life and one with Manulife. The total coverage was $1,534,882. The policies had been issued between 1998 and 2007. His mother, Romona MacArthur, was the original revocable beneficiary on all seven policies. In addition, in 2000 he had obtained from Manulife another insurance policy for $300,000. His mother was also the beneficiary. This is the policy at issue in this application.

[5] Mrs. Christian was named the beneficiary of this policy on April 1, 2009. By May 1, 2009, with the exception of the Manulife policy for $150,000, he had also changed the beneficiaries of the other policies from his mother to individuals whom he referred to as “friends” and who were investors in Barring.

[6] His mother died on February 4, 2010. MacArthur committed suicide on May 18, 2010.

[7] Shortly thereafter Mrs. Christian took steps to assert her entitlement as beneficiary under this policy. Manulife responded by letter to her dated

April 6, 2011 by which it advised her that it had been put on notice by the Trustee of its intention to make a claim on the policy. Counsel for the Trustee requested by letter dated May 31, 2011 that the insurance money be paid to the Trustee to be held by it in trust pending resolution of the conflicting claims of Mrs. Christian and the Trustee. By letter dated June 14, 2011 Manulife advised Mrs. Christian that it was bound to pay the money to the Trustee.

[8] The money was paid to the Trustee. Mrs. Christian then filed with the Trustee a Form 74, Reclamation of Property, dated June 30, 2011. This was followed by a Notice of Disallowance of Claim, Right to Priority of a Surety, dated July 11, 2011 by which the Trustee disallowed her claim. The insurance money remains with the Trustee in trust pending the outcome of this application.

[9] Mrs. Christian had been an acquaintance of MacArthur since the early 1980's. In 2003 he contacted her with an offer of employment at Barring which she accepted. It was an attractive opportunity as she would be paid the same as her present job but would only be working four rather than five

days a week.

[10] Shortly after taking the employment she began investing in Barring. It was represented to her as a safe and lucrative investment. The investment was evidenced by promissory notes made by Barring and guaranteed by MacArthur. Notes were paid or reissued from time to time to reflect reinvested income, withdrawals, etc.

[11] The second last note given to Mrs. Christian was dated March 20, 2009 in the principal amount of $251,200 with interest of 10% payable by July 20, 2009. A few days later, April 1, 2009, the designation of beneficiary in Mrs. Christian's favour was signed. On July 20, 2009, MacArthur paid Mrs. Christian the interest then due of $25,000 and issued a new note in the same principal amount of $251,200 with interest also of 10% to be paid on November 20, 2009. No payments were ever made on account of this note. The notes were obligations of Barring with MacArthur as guarantor. Each concluded with the following paragraph:

> Should Glenn A. MacArthur not survive the term of this note, then Rita Christian should present this letter to Bruce McLaughlin of Weldon McInnis, 118 Ochterloney Street, Dartmouth, NS (902) 469-2421 who as executor of his estate is directed to honour this note and

repay in full.

[12] There are in evidence several notes of Barring in favour of other investors. Each follows the same format and has the same last paragraph.

[13] As of May 1, 2011 there were 26 Proofs of Claim filed against the estate, totaling approximately $12,000,000. Those who were named beneficiaries of the insurance policies mentioned above including Mrs. Christian are not included in this list. However, Mrs. Christian filed a proof for her unpaid wages in the amount of $11,490.04 on January 27, 2011. The insurers have paid the beneficiaries of the other insurance policies. The Trustee has not taken any steps to contest these payments.

[14] In March 2010 MacArthur made an agreement with Rhonda LeBlanc, another employee of Barring, whereby the leasing portfolio of Barring would be assumed by her company, Barring Commercial Finance Limited, with the exception of the Starwood Hotel matter mentioned below with which she was not comfortable. This followed a meeting between Ms. LeBlanc and Mrs. Christian. They were concerned that he was not being responsible to his business. He had already stopped paying their salaries

and was under stress, something that was apparent from the fall of 2009. Mrs. Christian's employment with Barring ended on February 28, 2010.

[15] As to the reason for MacArthur making her the beneficiary of the insurance policy, Mrs. Christian says in her affidavit of July 25, 2011:

> 5. On April 22, 2009, I was informed by Glenn that he had designated me as beneficiary under an insurance policy insuring his life for $300,000.00 through Manulife Financial. Glenn gave me the designation form at this time, which is attached as Exhibit "A" to this my affidavit. Glenn told me at that time and I do verily believe that the designation was meant to provide me with some financial security in the event that something unforeseen should happen to him causing my employer, Barrington & Company Limited, to cease operations. Glenn expressed concern over my ability to re-enter the workforce if such an event were to occur, and expressed that his designation was in consideration of the work that I did for his company.

[16] An email Mrs. Christian sent to MacArthur on March 21, 2010 is instructive. She expressed concern about the loan, particularly that expected payments were not forthcoming. She noted that she and her husband Paul were paying carry charges of $1,300 per month to cover the money they had invested. She suggested a scenario whereby they might receive a monthly payment. I quote:

> Glenn you are the only one who knows what is reasonable as far as return on our money. When the going is good, everyone is all smiles. Now that the times are challenging, Paul and I and Brian have done our part to allow you room to find solutions. Paul and I came very close to putting our home in jeopardy, I do not have an income and

> my future prospects of an income are hopeful but far from solid. I need you to really think about the possibilities and talk with us truthfully, not what you hope will be the case, but exactly what we are dealing with. Please give some thought to the situation and give us a call so we can make arrangements to get together.

[17] In June 2009 MacArthur had begun promoting an investment opportunity to finance the purchase of computer equipment for the Starwood Hotel group in British Columbia. The plan was for Barring to purchase and pay for the equipment in advance and thereby obtain a 10% discount. The hotels would then acquire the equipment for the full price with financing from Roynat. Michael Mailman, a former investor in Barring and Thomas Rose expressed interest, engaged solicitors to assist and advanced money. It was expected that the financing would be for a period of 60 days after which Roynat would pay them out. In early May 2010 Mr. Mailman was concerned that the transaction was not advancing. No funds were received. Mr. Mailman sought information from MacArthur without success. Finally on May 17, 2010 he spoke with the controller of one of the hotels in question who advised him that they had not bought any new computer equipment in more than three years. The next day, May 18th, he spoke with another officer of the Starwood Hotel group. He indicated that he had not signed any documentation on behalf of the Starwood relating to computer purchases.

Mr. Mailman then learned of MacArthur's suicide.

[18] This scheme was typical of the investment schemes referred to in the quotation from the Agreed Statement of Facts in paragraph [2]. Clearly this was a Ponzi scheme.

[19] The position of the Trustee is that the change of beneficiary of the insurance policy in favour of Mrs. Christian was a transfer of property contrary to the *Statute of Elizabeth* and to the *Assignments and Preferences Act*, R.S.N.S. 1989, c.25 (APA) and therefore should be set aside.

[20] The application of the *Statute of Elizabeth* was described by Justice Hallett in paragraphs 32-38 of *Bank of Montreal v. Crowell* (1980), 37 N.S.R. (2d) 292 (N.S.T.D.):

> 32. To succeed under the Statute of Elizabeth, the plaintiff need only prove three facts:
>
> 33. 1. The conveyance was without valuable consideration.
>
> 34. It may not be sufficient if the plaintiff proves only that the consideration was somewhat inadequate: *Leighton v. Muir, supra*, In that case, there was inadequate consideration and although the court held that the conveyance could not be set aside under the Statute of Elizabeth, it was set aside under the Assignments and Preferences Act. The consideration must be "good consideration"; so-called meritorious consideration, that is, love and

affection, is not valuable consideration and therefore not consideration within the meaning of the Statue of Elizabeth (*Cromwell v. Comeau* (1957), 39 M.P.R. 347, 8 D.L.R. (2d) 676 at 684 (N.S.C.A.).)

35. 2. The grantor had the intention to delay or defeat his creditors.

36. It is not necessary that the creditor exist at the time of the conveyance (*Traders Group Ltd. V. Mason, supra*). However, the court will impute the intention if the creditor exists at the time of the conveyance provided the conveyance is without consideration and denudes the grantor debtor of substantially all his property that would otherwise be available to satisfy the debt (*Sun Life Assur. Co. v. Elliott,* supra). Apart from that situation, intention to delay or defeat creditors is a question of fact. The court must look at all the circumstances surrounding the conveyance. The court is entitled to draw reasonable inferences from the proven facts to ascertain the intention of the grantor in making the conveyance. Suspicious circumstances surrounding the conveyance require an explanation by the grantor.

37. 3. That the conveyance had the *effect* of delaying or defeating the creditors.

38. This, too, is a question of fact. The plaintiff must first obtain a judgment against the debtor prior to commencement of proceedings to set aside the conveyance under the Statute of Elizabeth and must, on the application to set aside, adduce sufficient evidence to enable the court to make a finding that the conveyance had the effect of delaying or defeating the creditors.

[21] The relevant portions of the APA are:

2 In this Act,

( c ) "property" means goods, chattels or effects, bills, notes, or securities, shares, dividends, premiums or bonus in any bank, company or corporation, and every other description of property, real and personal;

4 (1) Every transfer of property made by an insolvent person

(a) with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them; or

> (b) to or for a creditor with intent to give such creditor an unjust preference over other creditors of such insolvent person, or over any one or more of such creditors,
>
> shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.
>
> 5 Nothing in Section 4 shall apply to
>
> (a) any assignment made to an official assignee for the country in which the debtor resides or carries on business for the purpose of paying rateably and proportionately, and without preference or priority, all the creditors of the debtor their just debts;
>
> (b) any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties;
>
> ( c ) any payment of money to a creditor; or
>
> (d) to any *bona fide* gift, conveyance, assignment, transfer or delivery over any property which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of property; provided that the money paid, or the property sold or delivered, bears a fair and reasonable relative value to the consideration therefor. R.S., c.25, s. 5.

[22] In *Kent Building Supplies v. Cumberland Builders Ltd.* (1997), 163 N.S.R. (2d) 289, at paragraph 28, Justice Nathanson applied the test in the APA as follows:

> 28. Determination of the issue depends upon whether Cumberland Builders transferred property, whether it was then an insolvent person, and whether it did so within intent to defeat, hinder, delay or prejudice its creditors, or any one or more of them. If all three questions are answered in the affirmative, then the transaction is utterly void against a creditor or creditors injured, delayed, prejudiced or postponed. This Court has concluded that all three questions must

> be answered in the affirmative.

[23] Essentially the tests in each statute are the same except that the *Statute of Elizabeth* does not require proof of the transferor's insolvency.

[24] In order to invoke the *Statute of Elizabeth* or the APA counsel for the Trustee submits that it is necessary to consider the following questions:

[25] 1. **Was MacArthur insolvent at the time of the change of beneficiary and continued so until his suicide?**

[26] We do not have a statement giving details of his finances at the time of the designation. However, the evidence we have results in a fair inference that he was insolvent. I quote from Subsection 2(a) of the APA:

> "insolvent person" means any person who is in insolvent circumstances, or unable to pay his debts in full, or knows himself about to become insolvent.

[27] MacArthur was running a Ponzi scheme. A Ponzi scheme is well described in the following quotation from *Titan Investments Ltd. Partnership (Re)*, 2005 ABQB 637 (Harco, J.) in paragraphs 8 and 16:

> 8 Ponzi schemes are fraudulent investment schemes whereby individuals are enticed by a con-man or fraudster to make investments in an operation promising an unreasonably high rate of return. Once the first few investments are made, subsequent investors are enticed to invest partly through reported gains and partly through the high payouts to earlier investors. Ultimately, the con-man either spends or disappears with the remaining money, or the scheme collapses on itself as funds are exhausted by payouts to earlier investors.
>
> 16 There is a body of American case law holding that Ponzi schemes are insolvent from the moment that the first investment contract is entered into . . . . Counsel for the Applicants submits that the operation of a Ponzi scheme will necessarily leave the debtor without sufficient capital from the inception of the scheme, and unable to pay its debts as they become due. There does not appear to be any Canadian authority on this point, and the Applicants submit that it is therefore open to this Court to adopt this approach. I find the American approach to be reasonable. It is apparent that there were never sufficient funds in the Partnership to enable Titan to pay out its partners at the alleged unit values of the partnership, and the scheme would have collapsed at any time that a sufficient number of investors demanded redemptions. I therefore adopt the American authorities and find that Titan, which was run as a Ponzi scheme by Comte, was insolvent in its inception.

[28] It should be noted that strictly speaking the Ponzi scheme was being operated by Barring, but MacArthur guaranteed all the promissory notes thereby becoming personally liable throughout. There is evidence to indicate that the scheme had been going on at least five years. There were notes going back that far. In 2003 he was promising Mrs. Christian a return which one could only reasonably expect from a Ponzi scheme. In the personal notes he left at his death he admitted that the money invested with

him was lost. There was no enterprise, no business, nothing with any underlying value.

[29] Also his statement of affairs in bankruptcy shows assets of $186,213 and liabilities of $12,300,003.

[30] The fair inference from this evidence is that MacArthur by any definition of the word was insolvent long before the designation was made. From then his position only continued to deteriorate.

[31] 2. **Was the designation of beneficiary a transfer of property?**

[32] There is significant disagreement in the present case law respecting this question. It is outlined by Justice Gibbs in *Sovereign General Insurance Co. v. Dale and Dale* (1988), 32 B.C.L.R. (2d) 226 (SC) in which he gives his view that it is not a transfer of property and comments on the opposite position of Mr. Justice Jessup in *Swallow v. Geraci* (1970), 14 C.B.R. (N.S.) 253 (Ont. C.A.). I quote from *Sovereign* paragraphs 12, 13, 14, and 16:

> 12. Mr. Justice Jessup wrote the decision in *Re Geraci*. The substantive questions before him were whether a change of beneficiary under insurance policy

made by a bankrupt when insolvent was contrary to the Bankruptcy Act, and whether even if it was, it attracted the protection of the Ontario equivalent of s.147 of our Insurance Act. The entire judgment is devoted to an analysis of that question with the exception of one paragraph near the end where Mr. Justice Jessup said:

> I agree with the learned trial Judge that the declaration made by the bankrupt, changing the beneficiary of his policy of insurance to his wife while he was insolvent, was a fraudulent conveyance within the meaning of s. 2. of the *Fraudulent Conveyances Act* and, if it were necessary to do so, I would hold it was therefore fraudulent and void against his creditors and that such a void designation does not attract the protection against creditors provided by either s. 162 or s. 157 of the present *Insurance Act*.

13. In my opinion, that statement by Mr. Justice Jessup is obiter. It is my further opinion that, although it is persuasive, the question of whether the designation of a beneficiary is a disposition of property under the Fraudulent Conveyance Act is still open. If the issue had received the same close attention as the other issues in case, or if compelling reasons for the conclusion had been given, I would lean towards holding that the question had already been decided. But that did not occur, and so here where, although the amount of money at issue is not large, the matter is of such vital importance to the defendants, I feel obligated to look more searchingly into the issue.

14. In my opinion, it is not appropriate to look at the consequences that flow from the naming of the wife as beneficiary under the insurance contract to determine whether an interest in property has been disposed of. That seems to have happened in a number of the cases cited. With respect, I think that is the wrong approach for whatever statutory protection might or might not be afforded to the "interest" conveyed cannot be determinative of what the "interest" is. In my view, the task must be to inquire whether the "interest", if that is the correct terminology, has any of the commonly understood incidents of property. When I follow that course I am led to the conclusion that it does not.

> 16. Until a vesting occurs, the expression "interest" is probably nothing more than a convenient label to describe a future expectation which may never become a reality; for instance, the insured may change the beneficiary, or the beneficiary may predecease the insured. Until vesting, if that ever occurs, the expectation of the beneficiary is not real property, or personalty; it is not a chose in action; it is not merchantable; it is not exigible. At the most it is expectancy based upon a contingency. It has been held to be within the broad definition of property in the Bankruptcy Act which includes a future contingent interest incident to property, but it does not follow that it is subsumed within the single word "property" in the Fraudulent Conveyance Act. In my opinion, it is not.

[33] The same question was considered before the Supreme Court of Canada in *Royal Bank of Canada v. North American Life Assurance Co. and Balvir Singh Ramgotra*, [1996] 1 S.C.R .325. Mr. Justice Gonthier reviewed the foregoing two cases. His position is summarized in the following quotation:

> 77. I do not intend to resolve this issue in the case at bar. However, I would make the following observation. The technical question of whether a life insurance beneficiary designation is a "property conveyance" does not arise under art. 1631 of the *Civil Code of Quebec*, which allows creditors to set aside fraudulent "juridical acts": . . .
>
> 78. However, the other provincial statutes all refer to some sort of "conveyance" or "disposition" of "property" with the "intent to defeat" creditors' claims. All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation (see, for example, *The Interpretation Act*, 1993, S.S. 1993, c. I-11.1, s. 10). I agree with the following observation by Professor C. R. B. Dunlop in *Creditor-Debtor Law in Canada* (2nd ed. 1995), at page 598, that the purpose of fraudulent conveyance legislation:

> ...is to strike down all conveyances of property made with the intention of delaying, hindering or defrauding creditors and others except for conveyances made for good consideration and bona fide to persons not having notice of such fraud. *The legislation is couched in very general terms and should be interpreted liberally.*
>
> 79. Given the need for a broad and liberal interpretation, I would suggest that there is a strong case for concluding that a life insurance beneficiary designation is both a "juridical act", and a "disposition" or "conveyance" of "property".

[34] The decision in *Sovereign*, a trial decision, makes the finding that a beneficiary designation is not a transfer of property. The question is then continued before an appeal court in *Geraci* and by the Supreme Court of Canada in *Ramgotra.* Both these decisions turn on other issues without a decision on this question. Nevertheless, both judges take the opportunity to say that, if the question had to be resolved by them, they would be strongly inclined to find that a designation of beneficiary is a transfer of property. This is obviously persuasive, but it is only obiter and thus not binding on me. Mrs. Christian's counsel strongly urges that I follow *Sovereign*, the Trustee's counsel, *Geraci* and *Ramgotra*.

[35] The latter two cases strongly urge that one should take a purposeful approach having regard to practical reality as to what is property. Life

insurance is not only used for family security but is often given as security in commercial transactions. The rights of beneficiaries are for various reasons very important. They are something of value and bear many of the characteristics of what is considered property. A beneficiary designation may be a "contingency based on an expectation" but still has value.

[36] The same problem is considered in the decision of the Supreme Court of Canada in *Benoit Joseph Saulnier and Bingo Queen Fisheries Limited* v. *Royal Bank of Canada*, [2008] 3 S.C.R. 166, which counsel for the Trustee takes as authority for a rule of interpretation that a broad and purposive approach must be taken in determining what constitutes property. It considered whether a fishing license issued at the discretion of the Federal Ministry of Fisheries and Oceans was property under Section 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Mr. Justice Binnie characterizes the license in Paragraph [34] as follows:

> My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" in s. 2 of the *BIA*, where reference is made to a *"*profit, present or future, vested or contingent, in, arising out of or incident to property". In this connection the property in question is the fish harvest.

[37] I think one can also say the same of the designation of beneficiary coupled with a property interest in the insurance money when it becomes payable, as Mr. Justice Binnie said of the license and the fish caught. I think the better course is to accept the reasoning, though strictly obiter, of Mr. Justice Gonthier in *Ramgotra*. Also it is consistent with the definition of property in Subsection 2 ( c ) of the APA.

[38] 3. **Was the transfer made to a creditor?**

[39] Mrs. Christian had been loaning money to Barring from the beginning of her employment with it. MacArthur guaranteed these loans. As indicated above, when the designation was made, she had just received a note confirming that $251,200 was owing to her. Except for the interest paid later in the year the debt remained outstanding at the time of MacArthur's death. This quite conclusively establishes that she was a creditor.

[40] 4. **Was the designation along with the suicide done with intent to give Mrs. Christian an unjust preference over other creditors?**

[41] We do not know what MacArthur intended to do, but we can draw reasoned inferences from his acts and the notes he left behind.

[42] He had obtained several policies of insurance during the last ten years of his life. He named his mother as beneficiary on all of them. There is nothing to suggest that they were required to look after her. He had no other family responsibilities. He must have had some other reason to maintain these policies.

[43] He changed the beneficiary designations on all the policies except one beginning in March 2009, naming Mrs. Christian and the investors referred to as "friends" as beneficiaries. He had provided a directive in 2006 to his solicitor expressing the hope that there would be sufficient life insurance to pay certain creditors including Mrs. Christian, in full. He clearly had devised a scheme to look after Mrs. Christian and the "friends" as opposed to his many other creditors.

[44] I am satisfied that designating her a beneficiary, he intended to give Mrs. Christian an unjust preference over other creditors.

[45] 5. **Was there injury or prejudice to the other creditors?**

[46] The following section of the *Insurance Act* R.S.N.S. 1989, c. 281 deals with exemptions from execution and seizure respecting insurance policies and their proceeds:

> 198 (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse or common-law partner, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in contract are exempt from execution or seizure.

[47] When the policy was issued, MacArthur's mother was named the beneficiary. From that point the proceeds on his death would be payable to her. His estate and thus his creditors would have had no claim against the proceeds. The policy and its proceeds were exempt.

[48] When Mrs. Christian was designated as beneficiary, the creditors lost nothing. The policy ceased to be exempt as Mrs. Christian was not among the list of people in Subsection 198(2). It could have been seized and sold

and the beneficiary changed to benefit the creditors. This was not done. He died. There was a designated beneficiary, Mrs. Christian. On his death Subsection 198(1) directs that the insurance money is not part of the estate nor subject to the claims of his creditors. It is payable to the designated beneficiary.

[49] The applicable principle is stated in Houlden, Morawetz & Sarra: *The 2012-2013 Annotated Bankruptcy and Insolvency Act* at F§ 364, at page 361:

> If property is exempt from seizure, a disposition of it cannot be attacked as a fraudulent conveyance, since the disposition cannot, by definition, delay, hinder or deprive creditors.

The origin of this proposition is *Banque Canadienne National* v. *Tencha*, [1928] S.C.R. 26. It considered whether the transfer by a farmer of certain exempt grain to his wife was a fraudulent transaction. The Supreme Court of Canada determined that it was not. This principle was more recently adopted in *Hamm* v. *Metz* [2002], 2002 SKCA 11. I quote from Paragraph 39:

> Although Tencha has been much criticized as not being a reasoned decision, the principle behind it is not only venerable but logical: if property is exempt from seizure, disposition of it cannot, by definition, delay, hinder or defraud creditors within the meaning of *The Statute of Elizabeth* . . . .

[50] The timing of the fraudulent act is critical. I quote from paragraph 29 of *Woodman Interiors Ltd. v. Zeh* (1989), 75 C.B.R. (N.S.) 100, paragraph 31.

> The time to determine whether it is fraudulent is at the time of the conveyance.

[51] In this case the conveyance of property which later became a homestead and thus not subject to these statutes was considered. The property was not a homestead at the time of the conveyance and thus was subject to these statutes. After the conveyance it became a homestead and not subject to them. It was held that what happened later is not applicable; what is applicable is the situation at the time of the conveyance.

[52] Counsel for the Trustee submits that the conveyance sought to be set aside is not the single act of MacArthur executing and delivering the designation of Mrs. Christian as beneficiary. Rather the conveyance is a process beginning with the designation, continuing with the payment of premiums, his mother's death and then his suicide, all the time leaving her as beneficiary, although he could have at any time withdrawn the designation or designated another.

[53] I do not see that the payment of the premium was an advantage to Mrs. Christian over the other creditors. The premium had to be paid to keep the policy alive and he had to die regardless of who might be the beneficiary.

[54] It is submitted that the mother's death is material. I am unable to understand how this is the case. I do not think it had anything to do with the timing of his death.

[55] The act whereby Mrs. Christian became the beneficiary as opposed to his mother, his estate or anyone else was the execution and delivery of the designation. It is the situation at that time which is material. What was conveyed was an exempt proprietary interest in the policy.

[56] The designation did not injure or prejudice the other creditors, they had no claims against the proceeds while his mother was the beneficiary. Designating Mrs. Christian took nothing away from them.

[57] 6. **Was there consideration for the transfer so as to create an exception under Section 5 of the APA and meet the requirements of the**

***Statute of Elizabeth*?**

[58] The only evidence given by Mrs. Christian regarding consideration is in the quote from her affidavit found in paragraph [15]. Let me repeat what she said:

> Glen expressed concern over my ability to re-enter the workforce if such an event were to occur, and expressed that this designation was in consideration of the work that I did for his company.

The work in question was already done. It is past consideration and thus not valid. However, if he was referring to her continued work, it must meet the test in Section 5(d) of the APA, namely:

> that the money paid, or the property sold or delivered, bears a fair and reasonable relative value to the consideration therefor.

or the requirement for valuable consideration in the *Statutes of Elizabeth.* Her annual salary was less than $50,000. I do not think that $300,000 "bears a fair and reasonable relative value to the consideration therefore". Also, her employment was not with MacArthur, but with Barring. It might be otherwise, if she had required security, had agreed to forbearance on her part, or had committed herself to continued employment. However, there is no evidence of any enforceable understanding of this nature.

[59] Accordingly I am satisfied that the necessary consideration has not been proved to support a contractual right of Mrs. Christian to be the beneficiary sufficient for the requirements of the two statutes.

[60] My answers to questions 1, 2, 3, 4, and 6 support the Trustee's position. However, my answer to question 5, that the designation of Mrs. Christian as beneficiary did not have the effect of delaying, defeating, injuring, prejudicing or postponing the other creditors, results in one of the essential requirements for relief under each statute not being met.

[61] Accordingly, the designation of Mrs. Christian as beneficiary stands and she is entitled as against the Trustee to the insurance money.

R.

Halifax, Nova Scotia
May 23, 2013