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Divorce and Life Insurance: Post Mortem Remedies for Breach of a Duty to Maintain a Policy for a Designated Beneficiary

Kelvin H. Dickinson[*]

I. INTRODUCTION

In the last two centuries, life insurance has attained a place of prominence in most Americans' financial and domestic affairs, and a preference in our law. While early life insurance was often no more than the amount necessary to bury the insured,[1] today the average coverage is over $110,000 per household.[2] Group life insurance has become one of the most popular benefits offered (and frequently paid for) by employers.[3]

The popularity of life insurance lies in its ability to indemnify against the pecuniary losses resulting from the death of a person (the "insured"). Life insurance proceeds can replace income lost on the death of a working spouse

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1. Early forms of life insurance included "industrial" and "burial" policies. Such policies were quite small, averaging only $700 as late as 1993. AMERICAN COUNCIL OF LIFE INSURANCE, 1994 LIFE INSURANCE FACT BOOK 21 (1994). These older forms of life insurance are still found occasionally. *See generally* BUIST M. ANDERSON, ANDERSON ON LIFE INSURANCE §§ 1.2-.14 (1990).

2. The total amount of life insurance in force in 1993 was more than $11 trillion. Of that total, almost $6.4 trillion (58 percent) was ordinary life insurance (including term), $4.5 trillion (40 percent) was group life insurance, $200 billion (1.8 percent) was credit life insurance, and $20.5 billion (0.2 percent) was industrial life insurance. AMERICAN COUNCIL OF LIFE INSURANCE, *supra* note 1, at 21. For that year, seventy-eight percent of American households owned life insurance: the average coverage per household was $110,600, and the average coverage per insured household was $143,100. *Id.* at 6.

For the purposes of this article, the discussion will concern only the two most popular forms of policies, ordinary and group life insurance, which together account for ninety-eight percent of all coverage. The differences between ordinary and group policies are discussed *infra* note 7.

3. In 1993, sixty-six percent of all group policies were issued to employers, accounting for eighty-nine percent of all group life insurance coverage, and nearly thirty-six percent of all life insurance in force. *Id.* at 30.

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or parent, or defray additional expenses incurred after the death of a caregiver. Thus, with appropriate planning, a surviving spouse and children will not be forced upon the charity of family and friends, or upon the resources of the state, but can continue to live as they have, financially independent and in their accustomed style.

Life insurance has become as important in divorce[4] as it is in marriage. Increasingly courts and legislatures are requiring that parties to a divorce obtain or maintain life insurance for the benefit of former spouses and children. Such requirements, or "mandates," are also commonly found in divorce agreements. In a surprising number of cases, however, the obligor fails to obtain the policy required, allows it to lapse, fails to designate the required person as beneficiary, or subsequently changes that designation. When such failures are discovered while the insured is still alive, competent, and healthy, they can be remedied easily. Unfortunately, in too many cases, those failures do not come to light until the insured is dead, when it is no longer possible to force compliance with the mandate.

This article examines the application of legal and equitable remedies after the death of an insured who was subject to a life insurance mandate but failed to comply fully with its terms. After a brief review of the nature and advantages of life insurance, the article first examines the ability of the parties, and/or the court, in a divorce to impose a duty to obtain or maintain a life insurance policy, and to mandate a specific beneficiary. The author finds that many problems stem from the failure of the parties, their lawyers, and judges, to develop a clear understanding of the purposes to be served by each mandate, and from poorly drafted mandates whose application is unclear in marginal cases. The article then considers the remedies available for the breach of such a duty, and the significant issues affecting such remedies. The author concludes that, although the courts have generally found the right

4. There are several statutory procedures for terminating a civil marriage: "divorce," based upon the fault of one of the parties (*e.g.*, OHIO REV. CODE ANN. § 3105.01 (Baldwin Supp. 1994) (listing grounds including "[w]illful absence . . . for one year," "[a]dultery," "[e]xtreme cruelty," and "[h]abitual drunkenness")); "dissolution," a procedure similar to divorce that is not based on fault (*e.g.*, OHIO REV. CODE ANN. § 3105.61 (Baldwin 1989) (stating no grounds)); and, "annulment," a statutory procedure for voiding a marriage *ab initio* (*e.g.*, OHIO REV. CODE ANN. § 3105.31 (Baldwin 1989) (listing grounds including "the party . . . was under the age at which persons may be joined in marriage," bigamy, and "consent . . . obtained by fraud . . . [or] force")). Usages are not uniform, however. For example, the UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. 147 (1987), provides for annulment, *id.* § 208, 9A U.L.A. 170-71 (1987), and dissolution, *id.* §§ 301-16, 9A U.L.A. 179-549 (1987), but, ironically, not divorce.

In this article, "divorce" is used inclusively to mean any statutory procedure leading to the end of a civil marriage, including "dissolution" and "annulment."

remedies, the application of those remedies has often been inconsistent with the general principles of equity, and, in some cases, substantively unfair. A final section presents the author's conclusions and illustrates his suggestions and ideas by resolving six hypothetical cases.

II. LIFE INSURANCE

Reduced to essentials, a life insurance policy is a contract between an "insurer" and an "owner"[5] under which the former, in return for a payment (the "premium"), promises to pay a stipulated sum (the "proceeds") to a "beneficiary"[6] on the occurrence of a stated condition, the death of an "insured." Although the variations of life insurance are myriad, most policies fit one of two general types: "ordinary" and "group" life insurance.[7]

The fact that life insurance is a contract carries a significant advantage: since the insurer is bound to pay the proceeds directly to the beneficiary, they are generally free from claims by the insured's creditors. Otherwise, if the insured paid premiums after becoming insolvent, such payments might be fraudulent conveyances, allowing the insured's creditors to assert claims against the proceeds in the hands of the beneficiary.

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5. Under most ordinary life insurance policies, the owner is responsible for the payment of premiums, and has the right to designate the beneficiary. In group life insurance, it is more difficult to identify an owner. For example, an employer may enter into the contract with an insurer, giving to each insured employee the right to name his or her own beneficiary, and the ultimate obligation of paying the applicable premium. For purposes of applying life insurance mandates, group policies are deemed to be "owned" by the insured. *See, e.g.*, Markwica v. Davis, 473 N.E.2d 750, 752 (N.Y. 1984). *See generally* ANDERSON, *supra* note 1, § 23.3.

6. Today most life insurance policies give the owner the right to designate a beneficiary, and to make subsequent changes. The owner also may designate contingent beneficiaries who will take the proceeds if the named beneficiary is dead or otherwise disqualified, and co-beneficiaries who will share the proceeds. *See generally* ANDERSON, *supra* note 1, §§ 18.1-.8; 4 GEORGE B. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 27:60 (Ronald A. Anderson & Mark S. Rhodes, eds., 2d ed. rev. vol. 1984).

7. "Ordinary" policies (also known as "whole-life," "straight-life" or "individual-life") insure the life of one person, and are either "permanent" insurance, providing long-term coverage at a level premium, or "term" insurance, providing coverage for a relatively short period (although some guarantee renewability) at a premium that rises with the insured's age. "Group" life insurance consists of a master policy covering everyone in a defined pool, such as the employees of a business or the members of a professional organization. An individual's eligibility for coverage under a group policy begins or ends when he of she enters or leaves the pool, although coverage under some contracts may require an election and/or payment by the insured.

During the nineteenth century, most states reinforced the natural advantage of beneficiaries by adopting statutes specifically exempting life insurance proceeds from the claims of the insured's creditors.[8] The exemption was justified not only on the basis of the benefit flowing to the families of the insureds, but also by the benefit to society of avoiding those families' impoverishment.[9] So strong are these policies, that the exemption has been applied to life insurance purchased while insolvent, and in a few cases, where actual fraud on a creditor was involved.[10]

Once named, a beneficiary has only an expectancy in the proceeds as long as the insured is alive,[11] since, under most policies, the owner is free to change beneficiaries at any time, thereby divesting the former beneficiary of

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8. *E.g.* FLA. STAT. ch. 222.13(1) (1996) ("Whenever any person . . . shall die leaving insurance on his life, . . . the proceeds thereof shall be exempt from the claims of creditors of the insured . . . ."); GA. CODE ANN. § 33-25-11(A) (1990) ("If a policy of life insurance [is payable to someone other than the insured,] the lawful beneficiary . . . shall be entitled to its proceeds . . . as against the creditors and representatives of the insured . . . ."). In some instances, the statute even protects the proceeds from the claims of the beneficiary's own creditors. *E.g.*, ALA. CODE § 27-14-29(b) (1986) ("If the [designated beneficiary] is the wife of the insured, she shall also be entitled to the proceeds . . . as against her own creditors . . . .").

See generally ANDERSON, *supra* note 1, § 21.5.

9. *See In re* Onorato, 51 So. 2d 804, 810 (La. 1951) ("[S]uch exemption is for the benefit of others as well as of the insured, and is for the public good.").

10. *E.g.*, First Nat'l Bank v. Pope, 149 So. 2d 781 (Ala. 1963) (applying exemption to proceeds of life insurance policy paid for with funds obtained by misrepresentations); *cf.* Harriman Nat'l Bank v. Huiet, 249 F. 856, 859-60 (4th Cir. 1917) (inferring a legislative intent to protect proceeds in the hands of spouse from the fact that exemption was limited in amount). *Contra* Texas Life Ins. Co. v. Morgan, Civ. A. No. 3-86-0846-R, 1987 WL 44392 (N.D. Tex. Oct. 19, 1987) (refusing exemption to proceeds of policy paid for with loan obtained on the security of nonexistent collateral).

Some statutes provide limited exceptions for cases of actual fraud, however. *E.g.*, N.Y. INS. LAW § 3212(e)(2)(A) (McKinney 1985) ("[T]he amount of premiums . . . paid with actual intent to defraud creditors . . . shall enure to the benefit of creditors from the proceeds of the policy. . . ."). Exemption statutes also have been held not to apply where the facts were sufficient to warrant imposition of a constructive trust. *E.g.*, Board of Pub. Instruction v. Mathis, 181 So. 2d 147 (Fla. 1938) (conversion); *In re* Onorato, 51 So. 2d 804, 810 (La. 1951) (breach of fiduciary duty); Massachusetts Bonding & Ins. Co. v. Josselyn, 194 N.W. 548, 549 (Mich. 1923) (commingled funds).

11. *See, e.g.*, Western Life Ins. Co. v. Bower, 153 F. Supp. 25, 28 (D. Mont. 1957) ("mere expectancy"); *see also* Reliance Life Ins. Co. v. Jaffe, 263 P.2d 82, 84 (Cal. Dist. Ct. App. 1953) ("[A] mere expectancy of an inchoate gift which may be consummated upon the death of the insured").

his or her interest.[12] Upon the death of the insured, the condition on the insurer's duty of payment occurs, and the then-named beneficiary's expectancy matures into a right that is enforceable against the insurer in a court of law.[13]

There are circumstances, of course, in which the beneficiary's interests require more than a defeasible expectancy in the proceeds. For example, if the insured could simply designate another beneficiary at whim, a creditor would find the protection afforded by life insurance to be worthless. To protect such a beneficiary, the designation must be "irrevocable," for at least as long as, and in at least the amount of, his or her debt.

Irrevocability can be accomplished in several ways. First, the owner and the insurer could agree that the beneficiary designation either cannot be changed or can be changed only with the creditor's consent. Such modifications impose additional burdens on insurers and, thus, are not commonly found.[14]

Second, the owner of the policy can assign his or her interest to the beneficiary, who, as owner, can protect his or her own interests by controlling future changes of beneficiary. Ownership of the policy also gives the beneficiary the option of making premium payments, thus protecting him or her against a lapse of the policy for non-payment as well. There are limitations on the use of such assignments, however. They are only possible under ordinary life insurance policies, because the insured does not "own" a group policy. Further, such assignments do not work well if the beneficiary's interest is likely to terminate before the insured's death, or is or will be less than the full amount of the policy.

Third, something like irrevocability can result when the owner of the policy promises, or is ordered by a court, to designate a certain person as beneficiary, and not to change the designation thereafter. Such mandates involve only the owner, not the insurer, and are therefore easier to accomplish than either of the preceding methods. Of course, since the insurer is not involved, it may not be bound by the promise, or order, if the owner fails to name the appropriate beneficiary, or subsequently changes that designation, causing the insurer to pay the "wrong" beneficiary.[15] Thus, this approach

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12. *See, e.g.*, Box v. Southern Farm Bureau Life Ins. Co., 526 S.W.2d 787, 789 (Tex. Civ. App. 1975).

13. *See, e.g.*, Travelers Ins. Co. v. Daniels, 667 F.2d 572, 573 (7th Cir. 1981) ("[A]s a general rule, the named beneficiary of a life insurance policy obtains a vested right to the proceeds upon the death of the insured."); *see also* Lee v. Preiss, 118 N.W.2d 104, 105-06 (Wis. 1962).

14. *But see* C. Terrence Kapp, *Ensuring Life Insurance Beneficiary Protection After Divorce*, 15 FAIR$HARE 3, 5 (April 1995) ("Specific forms can be obtained from the insurance company and executed with the separation agreement.").

15. *See, e.g.*, Simonds v. Simonds, 380 N.E.2d 189, 192 (N.Y. 1978) ("This is

entails some risk to the mandated beneficiary not found in either of the preceding approaches—the owner may violate the mandate and die before the dereliction is discovered, resulting in the payment of the proceeds to someone else.

Since the owner of a policy generally has the obligation of paying premiums, this approach also may be a misguided attempt to avoid imposing that obligation on the designated beneficiary. Obviously the question of who will bear the ultimate burden of paying premiums can be treated separately, in the case of divorce, as part of spousal support or even as an adjustment in the parties' property settlement. In some cases, parties have attempted to secure a higher level of compliance by requiring the insured to provide periodic evidence of premium payment, and assurances that the beneficiary designation remains unchanged.

III. DIVORCE AND LIFE INSURANCE

Divorce does not end the need for the protection afforded by life insurance. A division of marital property, spousal maintenance, and child support, all may involve continuing financial obligations not unlike those that exist pre-divorce. Just as life insurance can indemnify against the loss of a spouse or parent during marriage, so too can it indemnify against the loss of a former spouse or parent afterward.[16]

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not to say that an insurance company may not rely on the insured's designation of a beneficiary. None of this opinion [imposing a constructive trust on proceeds in the hands of a named beneficiary] bears on the rights or responsibilities of the insurer. . . .").

16. The persistent surfacing of provisions in matrimonial decrees

> designating minor children as beneficiaries of life insurance suggests to us that such provisions serve a useful purpose and satisfy a legitimate need in modern society. Children of divorced parents, often excessively vulnerable to an uncertain future, may need greater protection from the law than children of a united household. On separation or divorce, normally both spouses wish to assure their minor children's future—insofar as it is possible to do so without undue sacrifice of present enjoyments. Insurance provides a relatively painless manner to achieve this objective . . . .

Franklin Life Ins. Co. v. Kitchens, 57 Cal. Rptr. 652, 657 (Ct. App. 1967); *see also* Holmes v. Holmes, 463 So. 2d 578, 580 (Fla. Dist. Ct. App. 1985) (imposing a constructive trust, in part because of "the public's interest in having a father provide adequate support for his child"); Nielsen v. Nielsen, 535 P.2d 1239, 1240 (Utah 1975) ("The courts quite frequently in divorce decrees . . . require [one spouse] to provide insurance to insure that alimony and support payments will be forthcoming in order that the [other spouse] and children will not become public charges . . . .").

A. Property Division

Under modern divorce statutes, the court is authorized to make an "equitable division" of marital property—not necessarily an equal division, but one the court believes is fair, taking into account the respective needs and contributions of the parties.[17] In general, the court's authority is limited to awarding property to the parties to the divorce. It cannot make an award to a third person, including even the parties' minor child.[18] Often the parties themselves are able to agree on a division of property, however, which need not conform to the court's statutory authority.[19] Consistent with the need for certainty in property transactions generally, courts do not have continuing jurisdiction to modify divisions of marital property.[20]

Individual items of property need not be divided between spouses, however, and many cases necessarily involve payments over some period of time in lieu of a strict division of marital property. Thus, where a major item of marital property is not capable of division, or where division would leave one spouse at the mercy of the other for the value of his or her interest, a court may award that asset to one spouse and either award different assets

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17. *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 15.1 (2d ed. 1988) (discussing division of property incident to divorce). For a list of the relevant statutes, *see id.* at 590 n.6.

18. Merchant v. Merchant, 343 N.W.2d 620, 623 (Mich. Ct. App. 1983); *see also* Vaccaro v. Vaccaro, 227 N.W.2d 62, 65 (Wis. 1975) ("A final property division can only be made between husband and wife."). *Contra* Franklin Life Ins. Co. v. Kitchens, 57 Cal. Rptr. 652, 656 (Ct. App. 1967) ("If the authority of the court in a divorce action was ever restricted to an immediate simple division of community property between the parties, . . . we think such a restriction no longer reflects current law. . . ."); UNIFORM MARRIAGE AND DIVORCE ACT § 307(b) Alternative A, 9A U.L.A. 239 (1987) ("[T]he court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties . . . for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent [child].").

19. For example, parties other than the spouses can receive property under an agreed division of marital property. *E.g.*, Merchant v. Merchant, 343 N.W.2d 620, 623 (Mich. Ct. App. 1983) (parties "free" to agree to matters court could not order); Riser v. Riser, 501 P.2d 1069, 1071 (Wash. Ct. App. 1972) (party may make property agreement that exceeds "legal duty").

Divorce agreements are considered at length, *infra* part III. C. *See generally* Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984).

20. *See, e.g.*, OKLA. STAT. tit. 43, § 134 A (1995); UNIFORM MARRIAGE AND DIVORCE ACT § 316(a), 9A U.L.A. 489 (1987). *See generally* CLARK, *supra* note 17, § 15.1 at 592.

entirely to the other, or provide for periodic payments in lieu of division.[21] Where a property division requires installment payments to be made by one spouse to the other, the court may choose to secure the debtor's performance.[22]

Of course, individual life insurance policies are themselves intangible property and, thus, distributable to one party or the other in a divorce.[23] The present value of such a policy can be nothing at all, or quite substantial, depending upon the amount of the cash surrender value,[24] and the investment

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21. *See, e.g.*, OHIO REV. CODE ANN. § 3105.171(A)(1) & (E)(2) (Baldwin Supp. 1994) (providing for a "distributive award" in lieu of a property division, which is defined as "payments . . . over time, in fixed amounts, that are made from separate property or income, and that are not made from marital property and do not constitute payments of spousal support").

22. Many statutes permit divorce courts to secure the performance of such obligations by imposing a lien on the property involved. *E.g.*, IND. CODE § 31-1-11.5-15 (1979); TENN. CODE ANN. § 36-4-121(f)(2) (1991).

23. *In re* Estate of Barnes, 486 N.W.2d 575, 579 (Wis. Ct. App. 1992) ("[T]he subject insurance policy was already in force during the marriage. It therefore was 'property' and was subject to property division.").

24. After an initial period of a year or two, permanent life insurance has a "cash surrender value," payable upon premature lapse of the policy. This value stems from the fact that premiums for such policies are level throughout the policy period. Since risk of mortality increases with age, level premiums are possible only if premiums paid during the early years exceed the true cost of insurance. This surplus is placed in a "reserve" and invested by insurer. In later years, when the true cost of insurance exceeds the premium, the deficiency is withdrawn from the reserve.

It is common for life insurance policies to terminate prematurely, leaving some money in this reserve. Although early insurers merely kept these sums as extra profit, near the end of the 19th century, states passed non-forfeiture statutes requiring the return of some or all such reserves to policyholders, generally in the form of paid-up insurance. *E.g.*, ALA. CODE § 27-15-28 (1986); KY. REV. STAT. ANN. § 304.15-320 (Baldwin 1994); MASS. GEN. L. ANN. ch. 175, § 144 (1987); MICH. COMP. LAWS ANN. § 500.4060 (West 1993 & Supp. 1995); N.C. GEN. STAT. § 58-58-55 (1995); OHIO REV. CODE ANN. § 3915.071 (Baldwin 1989); TEX. INS. CODE ANN. art. 3.44a (West 1981). Today, many policies provide the owner with the choice of receiving a paid-up policy or a cash payment of part of the reserve. The latter option is known as a "cash surrender value." *See generally* ANDERSON, *supra* note 1, § 10.1-.9.

features included.[25] Policies of group life insurance may not be property at all, and, even if considered so, their value is usually nil.[26]

In the absence of a party's agreement to do so, it is inappropriate for a court to award ownership of a life insurance policy to her or him in a division of marital property, and then to order that her or his spouse be maintained as the beneficiary, if doing so involves the payment of future premiums. The objections are self-evident. First, such an order is not definite in amount, since the length of time over which such payments will be paid is uncertain.[27] Second, unless the marital estate is very large, future premiums will be paid from separate property of the obligor, rather than from marital property. Thus, such an order is really in the nature of a support obligation, rather than a division of marital property.[28]

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25. Insurance companies have been very creative in bundling investment vehicles, such as annuities, with permanent life insurance policies, and marketing them to the public under new names. Examples include "endowment" policies that pay the face amount to the insured if living at a specified future date, and "universal life" policies that apply a "floating" interest rate determined by credit markets to policy accumulations rather than the guaranteed rates found in most whole-life policies.

26. Mark Richardson Brown, Note, *Whose Life (Insurance) is it Anyway? Life Insurance and Divorce in America,* 22 J. FAM. L. 95, 101-02 (1983) ("[T]he rule has also been that where the policy has no surrender value and is of benefit only upon the husband's death, the policy is not 'property' within the true sense of the word and is therefore not subject to division.") (footnote omitted); *see also* Paige Stevenson, *Is Term Life Insurance Considered a Divisible Community Asset If the Insured Becomes Uninsurable During a Term Purchased with Community Funds?*, 29 IDAHO L. REV. 1021, 1025 (1992) ("Most community property jurisdictions have followed the general rule that term insurance has no value and therefore is not a divisible community asset."). *But see* Kapp, *supra* note 14, at 4 (concluding that term life insurance has "economic value" and thus should be divisible property).

27. Sapp v. Sapp, 378 S.E.2d 674, 676 (Ga. 1989) ("Because the premiums are payable for an indefinite period, we conclude that the obligation to pay premiums constitutes periodic alimony rather than equitable property division."). *But see* Peckham v. Metropolitan Life Ins. Co., 415 F.2d 312 (10th Cir. 1969) (upholding order to maintain group policy with former spouse as beneficiary as part of court ordered property division).

If the policy is fully paid, its value can be ascertained at the time of the marital property division, and future payments will not be required. The wisdom of dividing the legal and beneficial ownership of such a policy is still open to question, however.

28. *In re* Vernon, 625 N.E.2d 823, 829-30 (Ill. App. Ct. 1993) ("In essence, the trial court's order is providing that a portion of petitioner's property will go to respondent upon his death. This appears to be an order for maintenance after death.") (dissenting opinion); Gray v. Higgins, 421 S.E.2d 341, 343 (Ga. Ct. App. 1992) ("The portion of the settlement agreement creating an obligation to pay insurance premiums constitutes periodic alimony rather than equitable property division."); Finlay-Wheeler

B. Support

1. Spousal Support

In recent years, the type and amount of spousal support ordered in divorce cases have changed significantly, as society has evolved a more egalitarian view of the roles of marriage partners, and as the career expectations of women have changed. In many jurisdictions, traditional "alimony"[29] has declined, replaced by "restorative" or "rehabilitative" awards providing the dependent spouse with support for a limited period of time in order to develop or regain job skills and become self-supporting.[30]

Awards of periodic alimony are often "permanent," meaning they do not end until the death or remarriage of the recipient, or the death of the payor.[31]

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v. Rofinot, 556 P.2d 952, 954 (Or. 1976) ("[A] provision . . . requiring a parent to carry life insurance upon his own life with a minor child named as beneficiary is to be treated as a provision for support of the child . . . unless a contrary intent is expressed . . . ."). *See also* Brown, *supra* note 26, at 107.

29. "Alimony" or "maintenance" means payments ordered for the purpose of having one spouse support the other after the end of the marriage. An alimony order may require either a lump sum payment or recurrent payments of a fixed amount. "Lump sum alimony," whether paid at once or by installments, is difficult to distinguish from a division of marital property. CLARK, *supra* note 17, § 15.1, at 592-93. *But see* OHIO REV. CODE ANN. § 3105.18(A) (Baldwin Supp. 1994) (Alimony "means any payment . . . that is both for sustenance and for support of [a] former spouse [but] does not include any payment made . . . as part of a division . . . of property."). Probably the most recognizable form is "periodic alimony" calling for payments of fixed amounts for an indefinite time, such as until the death or remarriage of the recipient, or the further order of the court.

See generally CLARK, *supra* note 17, § 16.1 (discussing the history of alimony).

30. *Id.* § 16.1, at 620.

31. *See, e.g.*, ARK. CODE ANN. § 9-12-312(b) (1995); N.Y. DOM. REL. § 236 (McKinney 1986 and Supp. 1996) ("[A]n award of maintenance shall terminate upon the death of either party or upon the recipient's . . . remarriage . . . ."); *cf.* Gray v. Higgins, 421 S.E.2d 341, 343 (Ga. Ct. App. 1992) ("Absent a 'manifest intention of the parties' to the contrary, the obligation to pay periodic alimony terminates on the death of the paying spouse . . . [or] the remarriage of the receiving spouse."). *See generally* CLARK, *supra* note 17, § 16.4 at 650-51 (discussing the duration of alimony).

Under some statutes, a court can order post-mortem maintenance, however. *E.g.*, OHIO REV. CODE ANN. § 3105.18(B) (Baldwin Supp. 1994) ("Any award . . . shall terminate upon the death of either party, *unless the order containing the award expressly provides otherwise.*") (emphasis added); MINN. STAT. § 518.64(3) (1988) ("Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or [recipient's] remarriage"). Decrees mandating life insurance coverage have been upheld under such

Rehabilitative awards generally are made for a fixed period of time, one or two years, for example.[32] In all cases, the court retains the power to modify a spousal support order anytime the circumstances of either or both parties have changed significantly.[33]

Since periodic alimony often ends on the death of the obligor, just when life insurance benefits are paid, there is a logical contradiction inherent in a life insurance mandate based on the power to order spousal support. A few recent decisions have attempted to avoid this inconsistency by rationalizing a life insurance mandate as merely requiring additional support (in the form of policy premiums) while the obligor lives, something the court unquestionably has the authority to do.[34] These decisions ignore the purpose of the mandate, however, which is to indemnify the beneficiary for the loss of support *after* the death of a spouse. Newer statutes that provide for post-mortem support do not suffer from the same logical difficulty.

As noted below,[35] the parties to a divorce often agree on matters of spousal support as part of an overall settlement. In such a case, spousal support may be bargained away in return for property in a division of marital property, or the reverse may be true.

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statutes. *E.g.*, Head v. Metropolitan Life Ins. Co., 449 N.W.2d 449, 454-55 (Minn. Ct. App. 1990).

32. CLARK, *supra* note 17, § 16.1, at 620 ("a relatively short period").

33. *See, e.g.*, Graham v. Graham, 481 So. 2d 903, 905 (Ala. Civ. App. 1985) (approving the modification of a periodic alimony order). *See generally* CLARK, *supra* note 17, § 16.5 (describing the authority and procedure for modification of alimony orders).

34. *E.g.*, *In re* Vernon, 625 N.E.2d 823, 828 (Ill. App. Ct. 1993) ("[The statute] prohibits maintenance payments after an obligor's death, not payments during an obligor's life which have some effect after his death. . . . [A]n obligee could certainly choose to purchase insurance on the obligor's life, and could use the obligor's maintenance payments to pay the premiums . . . ."); Fiveash v. Fiveash, 523 So. 2d 764, 765 (Fla. Dist. Ct. App. 1988) ("By requiring appellant to maintain a life insurance policy . . ., appellant's estate is not forced to pay postmortem alimony, for it is the insurance company . . . that will be obligated to pay appellee. The payments made by appellant would terminate upon his death.").

35. *See infra* note 68 and accompanying text.

2. Child Support[36]

When divorcing parties have minor children, the court has the power, and the concomitant duty, to make adequate provisions for the health, well-being, and education of those children. Just as in the case of families generally, life insurance is well suited to fulfill those functions.[37] Under older statutes, however, a parent's support obligation usually ended with the child's coming of age or death, or with the death of the parent, whichever occurred first,[38] raising an inconsistency parallel to the one mentioned above.[39] Newer statutes often permit the court to require support even after the death of the parent, however.[40]

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36. When the parties to a divorce have minor children, the court must address issues of support and custody. For a list of the relevant statutes, see CLARK, *supra* note 17, § 17.1, at 709-10 n.2. For present purposes, the important matter is child support, and specifically how the support obligation relates to life insurance. Custody and support are often interrelated, however, because support orders are generally entered against non-custodial parents only.

37. This authority has been held to include requiring the obligated spouse to provide life insurance payable to the child.

> [T]he legislature in response to modern needs has extended the parents' liability for child support to broader territory, territory which now includes an obligation to educate children to take their place in adult society. In devising practical means to carry out these expanded obligations of support imposed by the legislature, the courts . . . have been impelled to the use of new techniques to insure the support, maintenance, and education of the children. Among these new techniques are compulsory designation of minor children as beneficiaries of insurance.

Franklin Life Ins. Co. v. Kitchens, 57 Cal. Rptr. 652, 657 (Ct. App. 1967) (citations omitted); *see also* Travelers Ins. Co. v. Daniels, 667 F.2d 572, 575 (7th Cir. 1981) ("[E]ven in the absence of an agreement, the divorce court could have required the father to name his children as beneficiaries.").

38. *See, e.g.*, Broaca v. Broaca, 435 A.2d 1016, 1017 (Conn. 1980) (holding that court lacks jurisdiction to order child support after the age of majority); Clavin v. Clavin, 233 S.E.2d 151, 152-3 (Ga. 1977) ("A requirement to provide child support beyond the age of majority may not, as a matter of law, be imposed."); Flatto v. Flatto, 398 N.Y.S.2d 687, 688 (App. Div. 1977); Riser v. Riser, 501 P.2d 1069, 1071 (Wash. Ct. App. 1972) ("[D]uty [of support] terminates upon the [parent]'s death or upon the attainment of majority or earlier emancipation by the child involved, whichever event first occurs."). *See generally* CLARK, *supra* note 17, § 17.1, at 717-18.

39. *See supra* note 34 and accompanying text.

40. *E.g.*, ARK. CODE ANN. § 9-12-312(a)(5) (Michie 1995) ("[C]ourt may provide for the payment of support beyond the eighteenth birthday of the child [for] educational needs [through high school, and] for a person suffering from a handicapping condition which affects that ability of the person to live independent

As in other matters relating to divorce, the parties may agree on child support and custody matters as part of a divorce agreement. Such an agreement is not binding on the court, however, since it must act in accord with the best interests of the children.[41] Thus, in matters of child support and custody, divorce courts generally exercise more independence and judgment than when dealing with spousal support or property matters.[42] A divorce agreement is indispensable when one of the parties undertakes a support obligation that exceeds the statute.[43]

3. Security for Support

Courts have long attempted to require parties to obtain, or to maintain, life insurance in connection with spousal or child support orders. The reason is, of course, the same as that motivating the purchase of life insurance in non-divorce contexts: to provide financially for that party's dependents in the

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from the custodial parent."); UNIFORM MARRIAGE AND DIVORCE ACT § 316(c), 9A U.L.A. 490 (1987) ("[P]rovisions for the support of a child are . . . not [terminated] by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump sum payment, to the extent just and appropriate in the circumstances."); *cf.* Carbonell v. Carbonell, 618 So. 2d 326, 327 (Fla. Dist. Ct. App. 1993) (holding that support obligation ends at majority, "unless the child is statutorily dependent").

41. *See, e.g.*, OHIO REV. CODE ANN. § 3105.21(A) & (B) (Baldwin Supp. 1994) (authorizing the court to enter such orders for children's "disposition, care, and maintenance . . . as is in their best interest," whether or not entitlement to divorce, annulment or legal separation is shown).

42. For example, a court can order support even in the absence of a request to do so. CLARK, *supra* note 17, § 17.1, at 711. As a corollary, orders for child support are always modifiable, at least prospectively. Koenings v. First Nat'l Bank & Trust Co., 495 N.E.2d 671, 673 (Ill. App. Ct. 1986); UNIFORM MARRIAGE AND DIVORCE ACT § 316(a), 9A U.L.A. 489 (1987) ("[T]he provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification . . . . The provisions as to property disposition may not be revoked or modified . . . "). *See generally* CLARK, *supra* note 17, § 17.2, at 724-33 (regarding the modification of child support orders).

43. *See, e.g.*, Riser v. Riser, 501 P.2d 1069, 1071 (Wash. Ct. App. 1972) (a parent "may agree to support and maintain [a] child . . . after [the] otherwise existing duty terminates").

event of her or his demise.[44] As plainly reasonable as this requirement seems, courts initially had difficulty finding a legal basis for such orders.

Under many early statutes, periodic spousal and child support obligations ended with the death of the obligor.[45] Requiring life insurance was seen as an attempt to continue such obligations beyond the obligor's death, and, thus, beyond the period authorized by statute.[46] Even statutes that permitted courts to require security for performance of support obligations, were sometimes held not to authorize requiring life insurance for the purposes of support to be paid post-mortem.[47] Today, many jurisdictions have changed this rule by decision or statute so that a support obligation does not end with the death of the obligor, and that reasonable means of securing the payment of support, including a life insurance mandate, can be required by a court.[48]

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44. Ironically some early decisions used the converse of this statement as a reason for not requiring life insurance in the divorce context: since spouses and parents who are not subject to a support order are not required to purchase life insurance, it would be inappropriate for divorced spouses and their children to be better off than their never-divorced counterparts. *E.g.*, Clavin v. Clavin, 233 S.E.2d 151, 153 (Ga. 1977) ("The rationale is that the law places no greater duty of support on a divorced father than on one who is not divorced.").

45. *See supra* notes 31 and 38.

46. *E.g.*, Ferguson v. Olmsted, 451 P.2d 746, 749 (Colo. 1969) (invalidating life insurance mandate as attempt to provide post-mortem alimony); Clavin v. Clavin, 233 S.E.2d 151 (Ga. 1977) (attempt to require settling estate on child); *In re* Lytle, 475 N.W.2d 11, 12 (Iowa Ct. App. 1991) (attempt to provide post-mortem alimony); Flatto v. Flatto, 398 N.Y.S.2d 687, 688 (App. Div. 1977) (semble); Hardin v. Hardin, 365 S.E.2d 34, 36 (S.C. Ct. App. 1987) (semble); *cf.* Morris v. Morris, 108 N.W.2d 124, 126 (Wis. 1961) (limiting life insurance mandate to child's minority); Brown, *supra* note 26, at 109 (arguing that a change from the rule invalidating post-mortem alimony should be left to the legislature).

47. *E.g.*, Keith v. Keith, 537 So. 2d 138, 139 (Fla. Dist. Ct. App. 1988) ("Since the obligation to pay periodic alimony does not survive the death of the obligor . . . and life insurance proceeds do not become payable until that time, [the statute providing for security] should not be construed to mean that life insurance could ever be necessary to protect an award of periodic alimony unless to protect an obligation for arrearages . . . .").

The objection did not apply to arrearages under the support order, however, because those sums were due and owing before the death of the payor. *E.g.*, Gray v. Independent Liberty Life Ins. Co., 226 N.W.2d 574, 576 (Mich. Ct. App. 1975) ("The violation [of the insurance mandate contained in the divorce agreement] cannot be permitted to defeat the children's right to be secure with respect to support payments *due to them* from the father.") (emphasis added).

48. Oregon has gone the farthest:

> It is the policy of the State of Oregon to encourage persons obligated to support other persons as the result of a dissolution . . . to obtain or to

A primary question when life insurance is used as security for support is the extent to which the protected party can have recourse to the policy proceeds. Logically, "security" for any obligation should not exceed the amount remaining unpaid.[49] Courts generally have been more willing to

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> cooperate in the obtaining of life insurance adequate to provide for the continued support of those persons in the event of the obligor's death.

OR. REV. STAT. § 107.810 (1990). The statute also permits the court to order the maintenance of existing life insurance policies as security for an order of spousal or child support, *id.* § 107.820(1), or to order the purchase of new policies for that purpose, *id.* § 107.820(2). It grants the supported spouse an insurable interest in the life of the obligor, and authorizes the purchase of a policy on his or her life, although at the expense of the supported spouse. *Id.* §§ 107.820(3) & .830. The court is authorized to order the obligor to submit to a physical examination in order to assist in obtaining such a policy. *Id.* §§ 107.820(3) & .830. The statute also permits a supported spouse to protect himself or herself against changes in beneficiary by the obligor, by informing the insurer of obligation. *Id.* § 107.820(6).

See also CAL. FAM. CODE § 4360 (West 1994) (authorizing life insurance mandates "so that the supported spouse will not be left without means for support in the event [of] the death of the [obligor]"); DEL. CODE ANN. tit. 13, § 1513(e) (1993) ("The court may [order] continued maintenance and beneficiary designations of existing [life insurance] policies . . . originally purchased during the marriage . . . ."); FLA. STAT. ch. 61.08(3) (1985) ("To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy . . ., or to otherwise secure such alimony award . . . ."); 23 PA. CONS. STAT. § 3502(d) (1996) ("The court may direct the continued maintenance and beneficiary designations of existing policies . . . [and] the purchase of, and beneficiary designations on, a [new] policy . . . ."); TENN. CODE ANN. § 36-5-101(g) (1995) ("the court may direct either or both parties to designate the other party and the children . . . as beneficiaries under any existing policies . . ., or the purchase and maintenance of [new policies]."); Broaca v. Broaca, 435 A.2d 1016, 1017 (Conn. 1980) (noting statutory authority to mandate life insurance as security for child support until the age of majority); Fiveash v. Fiveash, 523 So. 2d 764, 765 (Fla. Dist. Ct. App. 1988) (applying statute to require full security for award); Merchant v. Merchant, 343 N.W.2d 620, 625 (Mich. Ct. App. 1983) (holding life insurance as security for child support to cover both arrearages and future payments); *cf.* UNIFORM MARRIAGE AND DIVORCE ACT § 307(b) Alternative A, 9A U.L.A. 239 (1987) ("[T]he court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust").

49. *See, e.g.*, Carbonell v. Carbonell, 618 So. 2d 326, 328 (Fla. Dist. Ct. App. 1993) (remanding for determination of "amount commensurate with the required obligation"); *In re* Estate of Monreal, 337 N.W.2d 312, 314-15 (Mich. Ct. App. 1983) (ordering surplus proceeds returned to the estate of the insured); *In re* Estate of Tanenblatt, 609 N.Y.S.2d 532, (N.Y. Sur. Ct. 1994) (ordering surplus proceeds returned to the estate of the insured). *But see* Head v. Metropolitan Life Ins. Co., 449 N.W.2d 449, 453 (Minn. Ct. App. 1990) ("[T]here is no implication that security be

terminate a life insurance mandate at the same time as the support obligation, than to reduce the amount of that mandate to reflect the amount of that obligation, however.[50] Only a few courts seem to have correctly understood the security function of a life insurance mandate, and provided for a gradual reduction as the total support obligation is reduced by payment.[51]

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strictly equivalent to the obligation. . . . The trial court must simply make a reasonable award."); Bauer v. Bauer, No. 80-498, 301 N.W.2d 462 (table), 1980 WL 99472 at *1 (Wis. Ct. App. Nov. 21, 1980) (rejecting the argument that the amount of the constructive trust should be limited to the amount of support which the child would have received had the parent lived). *See generally* Laurence J. Cutler and Robert J. Durst, II, *Life Insurance as a Security Vehicle in Dissolution Cases*, 12 J. AM. ACAD. MATRIMONIAL LAW 155, 161 (Summer 1994) ("The maintenance of a level amount of life insurance throughout the life of the obligation ignores the theory of the time value of money and the decreasing amount of the obligation.").

Differences between alimony and traditional debts lead one author to reject entirely the use of life insurance as security. Brown, *supra* note 26, at 110 ("This method of providing security will invariably lead to problems due to the inherent difficulty in calculating future alimony. Actuarial tables will be of little help since alimony not only ceases upon the death of the recipient, but also terminates upon remarriage. Due to this, the use of life insurance as a means of providing security for alimony is questionable."). Child support may also be distinguishable from spousal support and more traditional debts in that the amount required may increase, rather than decrease, in later years. Kapp, *supra* note 14, at 5.

50. For example, in Schwass v. Schwass, 467 N.E.2d 957 (Ill. App. Ct. 1984), the parties had agreed that their "minor children [would] be named as co-equal beneficiaries [of certain life insurance policies which] shall remain in force . . . during the minority of" the children. *Id.* at 958. By the time of the insured's death, one child was over 18, and the other was 16. The court imposed a constructive trust on one-half of the proceeds for the benefit of the younger child, but nothing for the older. *Id.* at 961. *See also In re* Estate of Comiskey, 465 N.E.2d 653, 656, 658 (Ill. App. Ct. 1984) (holding share of emancipated child lapsed, although "[t]here is no indication from the divorce decree that the life insurance proceeds were intended to be related to or disbursed only to the extent of the support obligations."); Riser v. Riser, 501 P.2d 1069, 1072 (Wash. Ct. App. 1972) (holding share of emancipated child lapsed, although "[t]he policies were not merely security for the payment of support and maintenance, and the policy proceeds were payable without regard to any remaining balance of support and maintenance payments that, but for the death of the father, would have become payable."). *But cf.* CLARK, *supra* note 17, § 17.2, at 726 ("When the original divorce decree orders payment of a single sum for the support of two or more children, and one of the children reaches the age of majority, . . . [t]he cases hold that . . . [the obligor] must continue to make the prescribed payments until the appropriate court modifies the decree.").

51. *E.g.*, *In re* Estate of Tanenblatt, 609 N.Y.S.2d 532, 533 (N.Y. Sur. Ct. 1994) (allowing pro tanto reduction in insurance coverage for every payment made); Serrano v. Hendricks, 400 N.W.2d 77, 78 (Iowa Ct. App. 1986) (holding that, after death of

Actually, the relationship of the parties to a life insurance mandate resembles that of traditional debtors and creditors, where the debt will be paid from life insurance in the event of the debtor's death.[52] In other contexts, sad experiences forced courts and legislatures to establish policies limiting a party's ability to obtain life insurance or its proceeds, where he or she had reason to prefer those proceeds to the life of the insured. Thus, for example, a person without an "insurable interest" generally is prohibited from taking out life insurance on another's life,[53] and an insured's slayer is generally

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insured, former spouse entitled to $300 per month from the proceeds until death, remarriage or age 65, with balance payable to named beneficiary); *cf.* Aetna Life Ins. Co. v. Hussey, 590 N.E.2d 724, 727 (Ohio 1992) ("[W]here a separate agreement embodied in a divorce decree states a specific purpose for mandated life insurance coverage, the insured party or policy owner has a contingent right to dispose of any proceeds not used by the beneficiaries in accordance with the agreement's express purpose . . . .").

52. *See* Head v. Metropolitan Life Ins. Co., 449 N.W.2d 449, 456 (Minn. Ct. App. 1990) ("[T]he purpose for which the obligor is required to maintain insurance governs the determination of how much of the proceeds the obligee receives. This is a logical, common-sense approach.") (dissenting opinion). *But see id.* at 454 ("This is not security to ensure payment is made. This is security for the spouse in need of maintenance.").

53. Insurable interests are defined by statute. *E.g.*, GA. CODE ANN. § 33-24-3(a) (1995) ("An insurable interest . . . is an interest based upon a reasonable expectation of pecuniary advantage through the continued life . . . of another person and consequent loss by reason of such person's death . . . or a substantial interest engendered by love and affection in the case of individuals closely related by blood or by law."); VA. CODE ANN. § 38.2-301(B) (Michie 1994) ("'[I]nsurable interest' means: 1. In the case of individuals related closely by blood or by law, a substantial interest engendered by love and affection; [and] 2. In the case of other persons, a lawful and substantial economic interest in the life . . . of the insured[, and not] an interest which arises only . . . by the death . . . of the insured; . . .").

Over time, the insurable interest requirement has been robbed of much of its vigor by exceptions and inconsistencies. Thus, for example, the requirement only applies at the issuance of a policy. Assignments of existing policies to persons without an insurable interest, and changes of beneficiary to such persons, are permitted, at least as long as the transaction is not a fraudulent attempt to avoid the rule. *E.g.*, CAL. INS. CODE § 10110.1(d) (West 1996) ("An insurable interest shall be required to exist at the time the contract of life . . . insurance becomes effective, but need not exist at the time the loss occurs."); ANDERSON, *supra* note 1, § 12.11, at 371.

53. Today, the insurable interest requirement is an anachronism, duplicative of modern underwriting practice that requires the consent of the insured before any policy issues. *Id.* at § 12.13, 379. The consent of an adult insured is also required under some statutes. *E.g.*, OR. REV. STAT. § 743.027 (1994) ("No life . . . insurance policy . . . shall be made . . . unless . . . the individual insured . . . applies therefor or has consented thereto in writing, except . . .: (1) A spouse may effectuate such insurance

precluded from profiting by the crime.[54] Even where an insurable interest exists, but is limited in amount, the proceeds payable are limited to the amount of the creditor's financial stake in the insured.[55]

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upon the other spouse. . . ."); UTAH CODE ANN. § 31A-21-104(4)(a) (1994) ("A life . . . insurance policy may be taken out without consent in the following cases: (i) . . . [A] dependent who does not have legal capacity. (ii) A creditor . . . in an amount reasonably related to the amount of the debt. (iii) . . . [I]mmediate family members living with or dependent on the person. . . .").

Whether one has, or ought to have, an insurable interest in the life of his or her former spouse is problematic. Oregon has dealt with the problem explicitly, providing that "[a] court order for the payment of spousal or child support . . . constitutes an insurable interest . . . ." OR. REV. STAT. § 107.820 (1994).

54. Thus, a beneficiary who murders the insured will be denied the proceeds. *E.g.*, Liberty Nat'l Life Ins. Co. v. Weldon, 100 So. 2d 696, 704-05 (Ala. 1957). The early decisions generally followed other cases of benefits obtained by killing, such as property passing under a will or by intestate succession. Today, many jurisdictions have adopted statutory solutions to the problem. *E.g.*, ALA. CODE § 43-8-253(c) (1991) ("A named beneficiary . . . who feloniously and intentionally kills . . . the person upon whose life the policy is issued is not entitled to any benefit . . ., and it becomes payable as though the killer had predeceased the decedent."); MINN. STAT. § 524.2-803 (1996) (In a case of felonious and intentional killing, "[t]he court may order the insurance company to pay the policy proceeds to any person equitably entitled thereto, including the deceased insured's spouse, children, issue, parents, creditors or estate . . . ."); OR. REV. STAT. § 112.515 (1990) ("Life insurance [p]roceeds payable to or for the benefit of the slayer . . . shall be paid to the secondary beneficiary, or if there is no secondary beneficiary, to the personal representative of the decedent's estate . . . .").

For a seminal article proposing three solutions to the underlying legal problem, see, James Barr Ames, *Can a Murderer Acquire Title By His Crime and Keep It?*, 36 AM. L. REG. (n.s.) 225 (1897), *reprinted in* JAMES BARR AMES, LECTURES ON AMERICAN LEGAL HISTORY, 310 (1913). *See generally* ANDERSON, *supra* note 1, § 20.2.

55. ANDERSON, *supra* note 1, § 12.11 at 370-1. *See, e.g.*, Wages v. Wages, 42 S.E.2d 481, 485-86 (Ga. 1947) (dictum) (creditor has insurable interest for purpose of indemnifying against loss only); Maryland Nat'l Bank v. Tower, 374 F.2d 381, 385-86 (4th Cir. 1967) (applying the Maryland statute on insurable interests); Albrent v. Spencer, 88 N.W.2d 333, 335 (Wis. 1958) ("The rule . . . the creditor to realize . . . the amount of his insurable interest, while at the same time it prevents him from realizing more . . . ."); *cf.* ANDERSON, *supra* note 1, § 12.12 (while creditor is not limited to the mathematical amount of the debt, the amount of the insurance must not be "disproportionate" to it); 5 COUCH, *supra* note 6, §§ 29.15-.16. *But see In re* Estate of Tanenblatt, 609 N.Y.S.2d 532, 533 (N.Y. Sur. Ct. 1994) (holding actual intent of the insured in making the beneficiary designation controls); Sanders v. Forcum-Lannom, Inc., 475 S.W.2d 172, 174 (Tenn. 1972) (distinguishing employer holding "key man" insurance from ordinary creditor).

Essentially, the "insurable interest" requirement is reducible to the strength of the beneficiary's desire to keep the insured alive.[56] In case of immediate family members, the loss of a spouse, or mother, or father, is assumed to entail more than the consequent loss of financial support: it also means a personal loss, which no amount of money can assuage. When the pecuniary aspect of the transaction is paramount, however, as in the case of an ordinary creditor insuring the life of his or her debtor, the restraining influence of familial love and affection is no longer present, and the law provides a similar restraint by withholding the opportunity for profit.

While former spouses are not strangers, neither are they a family bound together by the bonds of love, affection and mutual support. Indeed, in many cases, the most important aspect of the relationship between former spouses is clearly financial, not unlike that of other debtors and creditors. In these cases, the same considerations of public policy that underlie the more familiar restrictions on creditors should be extended to limit a person's interest in life insurance on his or her former spouse, to no more than is reasonably owing under the division of property, and as support.[57]

C. Divorce Agreements[58]

Many divorce cases are less a contest than a negotiation. The resulting agreements are generally thought to be in the best interests of the parties and the public.[59] Although many divorce agreements are essentially contracts,

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56. ANDERSON, *supra* note 1, § 12.3, at 362 ("[T]he policy of the law requires that the assured shall have an interest to preserve the life insured in spite of the insurance, rather than to destroy it because of the insurance.").

57. For a case reaching the same conclusion by different reasoning, *see* Aetna Life Ins. Co. v. Hussey, 590 N.E.2d 724, 727 (Ohio 1992) (limiting the amount to that required to fulfill the purpose of the agreement).

58. Terminology is problematic. Spousal accords that facilitate divorce may be called contracts or agreements, or they may be included in court documents such as stipulations and consent decrees. Common names include separation agreements and property settlement agreements. The title of the document does not necessarily denote its contents, however. Thus, "separation agreements" often contain provisions pertaining to the final decree, and "property settlement agreements" often contain provisions relating to spousal and child support. The name chosen, "divorce agreement," is intended to be generic and inclusive, and not to mislead by suggesting what its contents might include.

59. The fact that separation agreements are so widely used in preference

> to litigation and that lawyers generally agree that it is cheaper, faster and less destructive to the parties' relationship to compromise cases than to try them serve to demonstrate the importance of separation agreements in divorce practice. . . . .

and, thus, governed by standard contract principles,[60] divorce itself is still a

> The obvious need for and advantages of separation agreements as devices for compromising marital disputes and for avoiding the expense, delay and stress of litigation convinced the courts long ago that such agreements are in general valid and to be encouraged. More recently the same view has been expressed in a variety of ways in many state statutes.

CLARK, *supra* note 17, § 18.1, at 755-56 (2d ed. 1988) (footnotes omitted); Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319, 320 (1991) [hereinafter *Semantics as Jurisprudence*] (Divorce agreements ""minimize the psychological and economic costs of divorce, . . . create better prospects for post-divorce cooperation between the parties, . . . lessen the impact of divorce upon children, and . . . promote judicial economy."). *See also* IND. CODE § 31-1-11.5-10(a) (1979) ("To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant upon the dissolution of their marriage, the parties may agree in writing . . . ."); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956-58 (1979) (discussing reasons for preferring divorce agreements over litigation); Sally Burnett Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. REV. 819, 830-38 (1981) [hereinafter *Divorce and the Third Party*] (discussing the conflicts between divorce agreements and public policy).

Agreements have become so important that some states have created special procedures for them. For example, Ohio now provides "dissolution," a divorce-like proceeding applicable only when the parties have reached an agreement. OHIO REV. CODE ANN. § 3105.61-.65 (Baldwin 1989 & Supp. 1994). The agreement must address "a division of all property; spousal support; if there are minor children of the marriage, the allocation of parental rights and responsibilities for the care of the minor children, the designation of a residential parent and legal custodian of the minor children, child support, and visitation rights." *Id.* § 3105.63 (Baldwin Supp. 1994). If either party becomes dissatisfied with the agreement during the proceeding, it is dismissed or converted into an action for traditional divorce. *Id.* § 3105.65(A) & (C) (Baldwin Supp. 1994).

60. CLARK, *supra* note 17, § 18.1, at 757 ("In general, of course, separation agreements are governed by the principles of the law of contracts.") (footnote omitted). The exceptions are agreements in the form of a stipulation or consent decree. Vaccaro v. Vaccaro, 227 N.W.2d 62, 66-67 (Wis. 1975) ("[T]he proper view is that contractual obligations arise only in situations where the court expressly refers to and approves a formal agreement between the parties, and not where, as here, the court merely adopts and to some extent modifies the parties' joint recommendations as to alimony, support or property settlement."). *But cf. Divorce and the Third Party*, *supra* note 59, at 826 ("A consent judgment is basically nothing more than a private contract between the parties that has been entered upon the records of, and received the stamp of approval from a court.") (footnote omitted).

Consistent with the view that a divorce agreement is a contract, persons other than the parties, such as minor children, can seek enforcement as third-party

matter regulated by statute and administered by courts. Even when the parties have made an agreement, all statutes still require the entry of a decree by the court.[61]

It should be unsurprising that a process governed both by agreement and by decree is fertile ground for controversy. Logically, the two documents could be treated as independent, each with its own standards for evaluation and methods of enforcement. Then there would be no need for judicial review of the agreement, or for the parties to seek the court's approval, although some adjustment might be required in cases of conflict, perhaps subordinating the agreement to the decree.

A divorce agreement is not necessarily an arm's length transaction, however, a fact that sometimes raises questions about the fairness of its terms.[62] Further, many legislative concerns that are addressed in divorce statutes, such as providing for the best interests any children, may be either ignored or dealt with in an inappropriate manner in a divorce agreement.[63]

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beneficiaries. *E.g.*, Orsini v. Commercial Nat'l Bank, 639 S.W.2d 516, 518 (Ark. Ct. App. 1982); Lowry v. Lowry, 463 So. 2d 540, 541 (Fla. Dist. Ct. App. 1985); Ferro v. Bologna, 286 N.E.2d 244, 246 (N.Y. 1972); *In re* Estate of Lemer, 306 N.W.2d 244, 246 (S.D. 1981).

61. *E.g.*, OHIO REV. CODE ANN. § 3105.10(A) (Baldwin Supp. 1994); UNIFORM MARRIAGE AND DIVORCE ACT § 302(a), 9A U.L.A. 181 (1987).

62. CLARK, *supra* note 17, § 18.2, at 759-64 (discussing the problems of fraud, duress and unfairness in divorce agreements); *see also* Mnookin & Kornhauser, *supra* note 59, at 993 (discussing role of courts in assuring the fairness of divorce agreements); *Divorce and the Third Party*, *supra* note 59, at 832-38 (discussing fairness, fraud, undue influence, and duress).

Such concerns are not new. In fact, until the latter half of this century, divorce agreements were either judicially forbidden or severely circumscribed. The recent trend toward recognition of such agreements under the principles of freedom of contract has forced courts to assume an active role in preventing their abuse. *Semantics as Jurisprudence*, *supra* note 59, at 321-22.

63. CLARK, *supra* note 17, § 18.5, at 772 ("But if the court finds that the custody and support provided for in the separation agreement does not serve the child's welfare in view of the relevant circumstances, the court is free to disregard the agreement and make a different decree respecting custody or support or both.") (footnote omitted); *cf.* UNIFORM MARRIAGE AND DIVORCE ACT § 306(b), 9A U.L.A. 216 (1987) ("[T]he terms of the separation agreement, except those providing for the support, custody, and visitation of children, are binding upon the court . . . .").

Respect for divorce agreements also affects the power of the court to grant later modifications of the terms. *E.g.*, 23 PA. CONS. STAT. § 3105(b) & (c) (1996) ("A provision of an agreement regarding child support . . . shall be subject to modification by the court upon a showing of changed circumstances [but] [i]n the absence of a specific provision [in the agreement] to the contrary . . . a provision regarding [marital property and alimony] shall not be subject to modification . . . ."); W. VA. CODE

Thus, many states require judicial review of such agreements,[64] and many statutes provide for their "incorporation" into decrees of the court.[65]

Judicial scrutiny and incorporation present yet another conundrum: whether a divorce agreement survives the entry of a decree as an independent contract, or disappears completely by "merger" into the decree, or is partially merged and partially survives, perhaps to the extent that the agreement exceeds the authority of the court. This question affects both the remedies available for non-observance, and the availability and methods of modification of the terms of the divorce. The rules have proven to be extremely complicated, and the results, at best, inconsistent.[66]

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§ 48-2-16(a) (1995) ("Any award of periodic . . . alimony shall be . . . subject to subsequent modification unless there is some explicit, well expressed, clear, plain and unambiguous provision to the contrary [in the agreement]. . . . Child support shall, under all circumstances, always be subject to continuing judicial modification.").

64. *E.g.* N.Y. DOM. REL. LAW § 236, Part B., 3. (McKinney 1996) ["An agreement by the parties . . . shall be valid and enforceable . . . if . . . in writing, subscribed by the parties, and acknowledged . . . . Such an agreement may include . . . (2) provision for the . . . division or distribution of . . . property; [and] (3) provision for the amount and duration of maintenance . . . provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment . . . ."); OHIO REV. CODE ANN. § 3105.10(B)(2) (Baldwin Supp. 1994) ("A separation agreement . . . may be enforceable . . . if the court determines that it would be in the interests of justice and equity to require enforcement of the separation agreement."); W. VA. CODE § 48-2-16(a) (1996) ("[I]f the court finds that the agreement is fair and reasonable, and not obtained by fraud, duress or other unconscionable conduct . . ., and further finds that the parties . . . have expressed themselves in terms which . . . would be enforceable by a court in future proceedings, then the court shall conform the relief which it is authorized to order . . . to the separation agreement of the parties."); UNIFORM MARRIAGE AND DIVORCE ACT § 306(b), 9A U.L.A. 216 (1987) ("[T]he terms of the separation agreement . . . are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence . . . that the separation agreement is unconscionable.").

65. *E.g.*, IND. CODE § 31-1-11.5-10(b) (1979) ("[T]he terms of the agreement if approved by the court shall be incorporated and merged into the decree and the parties ordered to perform them . . . ."); UNIFORM MARRIAGE AND DIVORCE ACT § 306(d)(1), 9A U.L.A. 217 (1987) ("[U]nless the separation agreement provides to the contrary, its terms shall be set forth in the decree . . . and the parties shall be ordered to perform them.").

66. *Divorce and the Third Party*, *supra* note 59, at 847 ("An almost impenetrable complex of problems surrounds the ultimate relationship between a separation agreement and a final divorce decree."). For example, *compare* Kennedy v. Kennedy, 411 A.2d 25, 27-8 (Conn. 1979) (holding that contempt may not be imposed for violation of an incorporated divorce agreement where the promise is outside of the

Obviously, many well-planned and well-drafted divorce agreements contain a life insurance mandate. To the extent that promised coverage is within the authority of the court to require life insurance, there is no question about the mandate's validity once the agreement has been approved or incorporated into a decree by the court. If the life insurance mandate merely exceeds that permitted by statute (as, for example, when the life insurance secures payment of child support beyond the age of majority), the validity of the promise of life insurance should be treated no differently than the underlying promise of support. Generally, such promises are enforceable as a matter of contract, and may be enforceable under the decree as well, in jurisdictions that permit "incorporated" agreements to extend the authority of the court.[67]

Today, many divorce agreements contain a more problematic type of life insurance mandate, however, one in which the promised coverage is different in kind from that which could be ordered by a court in the absence of the agreement. Such agreements often promise permanent coverage, rather than mere security for the division of marital property or spousal support, or designation of a beneficiary who would not otherwise be entitled to either support or a share in a division of marital property. In essence, such agreements create "hybrid rights," that is, contract rights obtained for the surrender or modification of statutory rights to marital property or spousal

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court's statutory powers) *with* Gray v. Higgins, 421 S.E.2d 341, 344 (Ga. Ct. App. 1992) (holding that an "incorporated" divorce agreement may be enforced by damages under the decree, or by an action in contract). *See also* MD. CODE ANN., FAM. LAW § 8-105(a) (1991) ("The court may enforce by power of contempt the provisions of [an] agreement . . . that [is] merged into a divorce decree [and] by power of contempt or as an independent contract . . . the provisions of [an] agreement . . . [that, by its terms,] is incorporated but not merged . . . .").

For an excellent treatment of this problem, see Dawn Del Tosto Brogan, *Divorce Settlement Agreements: The Problem of Merger of Incorporation and the Status of the Agreement in Relation to the Decree*, 67 NEB. L. REV. 235 (1988). *See also* CLARK, *supra* note 17, § 18.7 at 776-80 (discussing three approaches to the problem of relating divorce agreements and decrees); *Semantics as Jurisprudence*, *supra* note 59, at 323-24; *Divorce and the Third Party*, *supra* note 59, at 848-50 (semble).

A few statutes permit the parties to determine the question of incorporation of their agreement. *E.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 306(D), 9A U.L.A. 217 (1987).

67. 23 PA. CONS. STAT. § 3105(a) (1996) ("A party to an agreement . . ., whether or not . . . merged or incorporated into the decree, may utilize a remedy or sanction . . . to enforce the agreement to the same extent as though the agreement had been an order of the court except as provided to the contrary in the agreement."). *But see* Flatto v. Flatto, 398 N.Y.S.2d 687, 688 (App. Div. 1977) (holding that contempt not available to punish noncompliance with life insurance mandate that exceeded the court's statutory authority to provide for child support).

support. Put differently, one spouse sacrifices statutory rights under the divorce statute to obtain a promise of life insurance by the other, a promise that would be completely outside of the court's authority in the absence of such agreement. Such promises generally have been upheld by the courts,[68] notwithstanding the problems of policy, interpretation, and remedy, inherent in them.

Certainly there is no policy or principle prohibiting one person from contracting to be retained as the beneficiary of her or his spouse's life insurance. Freedom of contract doctrine suggests that everyone, including divorcing spouses, should have the right to evaluate their own needs and interests, and to enter agreements affecting those needs and interests on any terms they choose. In divorce, as in most other contexts, courts have favored settlement agreements and encouraged parties to resolve their differences in that way. There are exceptions to the rule of enforcement, however, including cases tainted by defects in the bargaining process, such as overreaching, mistake and misunderstanding, and cases involving public policy concerns, such as the prevention of fraud and illegality.[69]

Courts should approach divorce agreements with more caution than other agreements, and with a more skeptical attitude toward their interpretation and enforcement, for several reasons. First, divorcing spouses are less likely to be bargaining at arm's length.[70] In some cases, the parties' marital relationship has created an atmosphere of trust and confidence that does not disappear

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68. *E.g.*, Ferro v. Bologna, 286 N.E.2d 244, 246 (N.Y. 1972) ("valid consideration . . . found in the wife's waiver of all right to share in the husband's estate and in the provisions for distribution of the parties' property."); *see also* Thomas v. Studley, 571 N.E.2d 454, 460 (Ohio Ct. App. 1989).

69. *See generally* Sharp, *supra* note 19 (concluding that only "a system of meaningful judicial review" can insure fairness in divorce agreements).

70. [A]t an analytical level, it is difficult to resist the conclusion that settlement agreements are in fact different from other types of contracts. Standard contract principles are designed to operate within the context of a rational, competitive market that assumes a relative parity of bargaining strength between the parties. To equate the 'market' of settlement agreements, marriage dissolution—a situation virtually always accompanied by extraordinary stress and rarely accompanied by mutual desires to achieve fair results—with the paradigmatic 'marketplace' in which strangers bargain at arms' length, is simply to ignore the realities of human nature, the adversarial process, and the realities of most divorce bargaining.

Semantics as Jurisprudence, *supra* note 59, at 350 (footnotes omitted). *Cf.* CLARK, *supra* note 17, § 18.2, at 759 ("Although fraud and duress and to some extent unfairness may be grounds for the courts' refusal to enforce contracts today, they are much more likely to have that effect on separation agreements than on ordinary commercial contracts.") (footnotes omitted).

immediately on the breakdown of the marriage.[71] In other cases, a party may exhibit economically irrational behavior, such as a "scorched earth" approach, seeking to leave his or her spouse with nothing at all, or an "out at all costs" attitude, accepting unconscionable sacrifices in order to obtain freedom from a relationship that he or she has come to despise. Under any of these circumstances, the existence of a technical consideration for the promise of life insurance does not necessarily make the enforcement of that promise fair.

Second, questions about the meaning of promises of life insurance arise with alarming frequency. Of course, a court can easily resolve such questions by applying the rules of contract interpretation to divine an objective "meaning" for the parties' words. The fact that the issue can be resolved judicially does not prove that the parties really meant the same thing when the agreement was made, however. Further, a healthy degree of skepticism is warranted in such cases, because almost all involve claims first asserted *after* the death of the insured, when the evidence of his or her intent is scant or unavailable, and when his or her former spouse has an incentive for opportunistic interpretation. Further, as discussed below,[72] the meaning of the parties' words is not necessarily dispositive of the equitable issues involved in determining entitlement to life insurance proceeds under these circumstances.

Third, it seems unlikely, although concededly not impossible, that many people would choose to forgo any substantial, present interest in marital property, or present spousal support, in return for a right to receive the proceeds from insurance on a healthy ex-spouse's life at an indeterminable future time. The rights obtained are so speculative (that is, worth little if the ex-spouse lives a long and happy life, or much if he or she dies soon),[73] that, absent a clear and unequivocal statement that the parties intend such a problematic result, courts would be justified in assuming that such provisions serve other interests arising under the settlement agreement, such as security for the division of property, or child or spousal support.[74]

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71. [Divorce agreements] are negotiated under conditions of extraordinary stress by parties unusually susceptible to what Arthur Leff called 'bargaining naughtiness,' and uniquely positioned to exploit psychological and emotional dependencies built up over a period of years.

Sharp, *supra* note 19, at 1406 (footnotes omitted).

72. *See infra* part V. 3.

73. Divorce courts generally seem unmindful of the possibility of foul play in such cases. Given the frequency of arguments and litigation between former spouses concerning money, this disregard may be short-sighted. *See supra* notes 52-57 and accompanying text.

74. *See, e.g.*, Smith v. John Hancock Mutual Life Ins. Co., 237 N.W.2d 244, 246 (Mich. Ct. App. 1975) (construing the provision in an agreement as limited to period of support); Reid v. Reid, 208 N.E.2d 1, 3 (Ill. App. Ct. 1965) (order to provide life

Fourth, if the parties indeed intend a permanent change in the beneficial ownership of a policy, there are better ways of accomplishing that end than requiring the insured obtain, or maintain, a policy and to name his or her ex-spouse as the beneficiary. Ownership of an individual policy is generally assignable. Since the incidents of such ownership include the right to designate beneficiaries, the right to receive notices, and the duty of paying premiums, by permanently transferring ownership of the policy to a spouse or child, the insured is effectively prevented from changing beneficiary or permitting the policy to lapse by non-payment of premiums.[75]

Fifth, courts often appear to overlook the straight-forward, common-sense application of a life insurance mandate.[76] For instance, where a provision mandating life insurance terminates by its own terms on an event related either to the property division or to a support obligation, the requirement seems intended as security for that obligation, and it should be so interpreted. A more difficult problem is presented when the agreement includes provisions for spousal or child support, or a division of property, but does not relate the life insurance requirement to those provisions. Even in those cases, however,

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insurance for support and education through college, held to be for purposes of security only). *But cf.* Pierce v. Pierce, 767 P.2d 252, 254 (Kan. Ct. App. 1988), *aff'd,* 758 P.2d 292 (Kan. 1989) ("[A]s a general rule, the words 'minor children' are descriptive only and intend to identify the children by reference to their ages and not to grant benefits to them only during their minority."); Kelly v. Medical Life Ins. Co., 509 N.E.2d 411, 413 (Ohio 1987) (holding that provision requiring maintenance of life insurance "so long as his [child] support obligation exists" unrelated to that obligation for purposes of determining its amount).

75. Obviously, the parties may want the original owner of the policy to continue paying the premiums. The settlement agreement and decree can provide for additional payments or transfers of property to allow the transferee to pay the premiums when due. Thus, the ultimate cost is borne by the original owner, but the transferee is protected against his or her default by having the option to pay for the policy from his or her own funds in the original owner defaults on that obligation.

76. Judges are neither responsible for, nor necessarily the only ones afflicted by, this problem.

> The typical separation agreement is a loosely worded, hurriedly drawn instrument that follows some routine form that is inappropriate under the particular or varying circumstances. The desire to settle a vexatious and emotionally charged matrimonial situation too often induces separation agreements to which counsel has devoted inadequate thought.
>
> These agreements become a plague. During the period following the divorce, some former spouses read and reread the separation agreement as some kind of a Bible. The opposite spouse is supposed to follow meticulously its sacred text.

Mitchell Salem Fisher, *Toward Better Separation Agreements,* 11 PRAC. LAW. 65, 66 (1965), *reprinted in* 30 PRAC. LAW. 65, 66 (1984).

a conclusion that the parties intended the life insurance mandate to be independent of the support and property provisions means that the parties not only engaged in what is usually an absurd speculation, but also chose the least effective means of doing so.

IV. LIFE INSURANCE MANDATES

Whether a life insurance mandate is imposed by agreement or decree, its form and content are often critical. A mandate for existing life insurance that fully identifies the policy or policies involved is virtually certain to be upheld. A similar mandate lacking such detail probably does not create an interest sufficiently specific to be granted a remedy.[77] Some problems can be clarified by extrinsic evidence and the mandate enforced, however.[78]

Mandates to maintain all "present" life insurance policies are common, but problematic. While the identification of the policy is clear, or at least easily determined, such a mandate can be misunderstood to apply only to

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77. *See, e.g.*, Harris v. Byard, 501 So. 2d 730, 732 (Fla. Dist. Ct. App. 1987) ("[T]he trial court failed to identify any particular insurance policy in effect at the time of the judgment . . . .").

For an interesting attempt to circumvent the problem of specificity, see Appelman v. Appelman, 410 N.E.2d 199, 210 (Ill. App. Ct. 1980) (decree and agreement requiring party to "maintain unencumbered that present insurance on his life, . . . to the extent of the *first* $20,000") (emphasis added). *See also* Taylor v. Taylor, 353 S.E.2d 156, 264 (S.C. Ct. App. 1987) (imposing constructive trust for total amount stated in the divorce agreement, but disallowing evidence concerning the specific policy intended).

Perhaps thorough lawyering avoids such problems. Consider, for example, this advice to the matrimonial lawyer:

> [A]t the initial interview . . . identify all whole-life policies covering the parties and their children. Specifically, find out the exact name of the insurance company that issued the policy, the policy number, the exact name of the insured, his or her date of birth and social security number, the exact name of the policy owner, and the death benefit. When possible, obtain the policy itself or make copies.
>
> The same is true of term insurance. Remember, in particular, to ask your client about any group policies. . . . Get a list of all the lodges, clubs, and organizations to which your client's spouse belongs. Some credit card companies also provide accidental death coverage for a cardholder who dies on a trip if transportation costs were charged on the card. Such coverage can provide a substantial benefit.

Kapp, *supra* note 14, at 2.

78. Generally extrinsic evidence is permitted for the purpose of showing that an existing policy is the one intended by a non-specific command or mandate. *E.g.*, Holmes v. Holmes, 463 So. 2d 578, 580 (Fla. Dist. Ct. App. 1985).

those policies currently in force, thus creating controversy about replacement policies. Further, unless the mandate clearly provides the amount of coverage required, increases can be problematic.[79]

Mandates that require the insured to purchase a new policy are also troublesome. A similar problem is presented upon the lapse of a mandated policy. Generally, equitable remedies presume the existence of property.[80]

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79. *See, e.g.*, Chandler v. Ratcliffe, 285 S.E.2d 694, 695 (Ga. 1982) (mandate applicable to insurance "through . . . employment," did not include increases); Knazze v. Banker's Life & Casualty Co., 632 N.E.2d 162, 163 (Ill. App. Ct. 1994) (mandate to "maintain life insurance through . . . employer" included additional coverage paid for by insured that was acquired before order, but not to such coverage acquired after it); McWhite v. Equitable Life Assurance Soc'y of the U.S., 490 N.E.2d 1310, 1316 (Ill. App. Ct. 1986) ("any and all life insurance policies maintained by his employer" held not to apply to additional coverage purchased after decree); Merchant v. Merchant, 343 N.W.2d 620, 626 (Mich. Ct. App. 1983); ("whatever insurance [decedent] now has on his life" held not to include after-acquired increases); White v. Michigan Life Ins. Co., 204 N.W.2d 772, 775 (Mich. Ct. App. 1972) (increases to policy not included); Aetna Life Ins. Co. v. Hussey, 590 N.E.2d 724, 725 (Ohio 1992) ("present insurance policies" interpreted to include increases provided by employer); Madsen v. Estate of Moffitt, 542 P.2d 187, 188 (Utah 1975) (increases not included because "the parties knew of the insurance coverage at [the time of the divorce]"); Crozier v. Equitable Life Assurance Soc'y of the U.S., 658 P.2d 39, 41 (Wash. Ct. App. 1983) ("the children were to be beneficiaries of the policy, not of any specified dollar amount"); Washington v. Hicks, 325 N.W.2d 68, 70 (Wis. Ct. App. 1982) ("[t]he divorce judgment by its terms did not anticipate or provide for an increase in insurance benefits"); Bauer v. Bauer, No. 80-498, 301 N.W.2d 462 (table), 1980 WL 99472 at *1 (Wis. Ct. App. Nov. 21, 1980) (existing policies interpreted not to include increases). *But see* General Am. Life Ins. Co. v. Rogers, 539 S.W.2d 693, 698 (Mo. Ct. App. 1976) (increases included even though agreement stated an amount because, "[s]urely [the insured] would not set aside merely $4,500 for all his children").

As always, careful lawyering avoids problems. Kapp, *supra* note 14, at 7 ("Clarify how much life insurance is provided by each policy. Is it the intention of the decree to make the beneficiary the recipient of the face value plus any increase above the face value, or just the face value?").

80. RESTATEMENT OF RESTITUTION § 160, cmt. i (1937) ("A constructive trust does not arise unless there is property on which the constructive trust can be fastened . . . .").

See, e.g., Franklin Life Ins. Co. v. Kitchens, 57 Cal. Rptr. 652, 659-60 (Ct. App. 1967) ("[T]he divorce court did not attempt to go beyond the entry of a personal order directing the husband to take certain action. . . . [W]e are not prepared to recognize a direct interest in the insurance in the children."). *But see* Pernick v. Brandt, 506 N.W.2d 243, 245 (Mich. Ct. App. 1993) ("[P]laintiff was vested with an equitable interest in $50,000 of the proceeds of *any* insurance policy subsequently purchased by [the insured].") (emphasis added); *but cf.* Travelers Ins. Co. v. Johnson, 579 F. Supp. 1457, 1461 (D.N.J. 1984) (imposing a constructive trust on policy acquired after lapse

Of course, in either case, the wrong can be redressed by contempt or money damages while the insured is alive, or by money damages from his or her estate after death.

In the lapse cases, courts have found an answer by analogy to the law of trusts. When a trustee exchanges trust property for other property in a breach of trust, the beneficiary's rights not only continue in the original property, but also extend to any "product," or substitute property, received by the trustee in the exchange.[81] When one life insurance policy lapsed and was immediately replaced by another, courts held the mandate simply attached to the replacement policy.[82] In many cases, applying the mandate to a replacement policy is convenient, common-sensical and should be unsurprising to the insured.[83] In group policies, substitution is a common phenomenon as group

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of designated policy).

81. RESTATEMENT (SECOND) OF TRUSTS § 202 (1959) (express trustees). *See also* RESTATEMENT OF RESTITUTION § 205 (1937) (constructive trustees).

82. In general, it is necessary to trace one's equitable interest to

> identifiable property in the hands of the purported constructive trustee. But in view of equity's goal of softening where appropriate the harsh consequences of legal formalisms, in limited situations the tracing requirement may be relaxed. . . .
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> To find that decedent had escaped the obligation imposed upon him by the separation agreement simply because of the absence from the agreement of words specifically addressing the cancellation of the first policy, when the intendment is plain, would be to erect a legal formalism and defeat an essential purpose of equity.

Rogers v. Rogers, 473 N.E.2d 226, 227-9 (N.Y. 1984) (citations omitted). *But see* Rau v. Rau, 429 So. 2d 593, 595 (Ala. Civ. App. 1983) ("[W]e are unable to find any property interest, either legal or equitable, of appellees in the proceeds of a policy of insurance which did not exist at the time of the decree of divorce. . . . There is no evidence that [the prior] policy was intentionally dropped and the present policy purchased in its place in order to fraudulently evade the children's interest and the court's decree.").

On similar reasoning, if a newly-acquired policy meets the terms of a hitherto unfulfilled mandate, presumably the beneficiary's right would simply attach to that policy.

83. The clearest case is where the same policy has been reinstated. *E.g.*, White v. Michigan Life Ins. Co., 204 N.W.2d 772, 774 (Mich. Ct. App. 1972) (policy reinstated following military service). New policies obtained by conversion under the terms of an old policy are also clear substitutes. *E.g.*, Bentley v. New York Life Ins. Co., 488 N.W.2d 77, 79 (S.D. 1992) ("Policy 1 contained a conversion privilege and [the decedent] converted Policy 1 to Policy 2 simply by filing an application. Thus, Policy 1 did not terminate or lapse and [the designated beneficiary]'s equitable rights in Policy 1 continued in Policy 2 . . . ."); *see also* Hunter v. Hunter, 570 A.2d 246, 247 (Conn. Super. Ct. 1989) (conversion of group policy).

sponsors, actually policy owners, seek better rates, more coverage, or both.[84] Even individuals may allow one policy to lapse and immediately obtain another in its stead, perhaps in order to lower the premium payments.[85] Even if the mandate refers to a specific policy by name and number, it generally does no violence to the spirit of the order to attach the obligation to a replacement policy.

This analysis falters when there has been a break in coverage, however. The central question is really one of fact.[86] When one policy is substituted for another on an employee's change of job, the connection is clear, even if a brief period of unemployment intervenes.[87] When the mandated policy lapsed long before the new policy is taken out,[88] or where the circumstances under which the new policy was acquired indicate that it was intended to

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84. *See, e.g.*, Carpenter v. Carpenter, 722 P.2d 298, 302 (Ariz. Ct. App. 1985); Dixon v. Dixon, 184 So. 2d 478, 481 (Fla. Dist. Ct. App. 1966); Curtis v. Curtis, 255 S.E.2d 693, 694 (Ga. 1979); Schwass v. Schwass, 467 N.E.2d 957, 961 (Ill. App. Ct. 1984); Wanthal v. Rockland Trust Co., Civ. A. No. 89-0340-N, 1990 WL 100338 at 8 (D.Mass. July 10, 1990); and *In re* Goodfriend, 542 N.Y.S.2d 379, 380 (App. Div. 1989); Hudspeth v. Stoker, 644 S.W.2d 92, 95-96 (Tex. Ct. App. 1982).

85. *See, e.g.*, Bentley v. New York Life Ins. Co., 488 N.W.2d 77, 79 (S.D. 1992) (conversion of policy pursuant to original terms).

86. At least one court has ignored factual connection, substituting continuity of the obligation in its place.

> [T]he first wife's equitable interest would be easier to trace if the new policies were quid pro quo replacements for the original policies. . . . But inability to trace plaintiff's equitable rights precisely should not require that they not be recognized, much as in the instance of damages difficult to prove. The separation agreement provides nexus between plaintiff's right and the later acquired policies.

Simonds v. Simonds, 380 N.E.2d 189, 193 (N.Y. 1978) (citations omitted).

87. *See, e.g.*, Thomas v. Studley, 571 N.E.2d 454 (Ohio Ct. App. 1989).

88. *See, e.g.*, Rindels v. Prudential Life Ins. Co. of Am., 489 P.2d 1179, 1181 (N.M. 1971) (refusing constructive trust after three month hiatus of unemployment); Ferguson v. Owens, 459 N.E.2d 1293, 1296-7 (Ohio 1984) (holding genuine issues of material fact presented by six month hiatus of unemployment); Parge v. Parge, 464 N.W.2d 217, 219 (Wis. Ct. App. 1990) ("In this case, there were no 'funds' or policies in existence at the time of the order. There was no transfer to another fund upon which a trust could attach because there was nothing to transfer. The trial court did not abuse its discretion by denying imposition of a constructive trust on the life insurance proceeds from policies which were acquired long after the first divorce judgment."). *But see* Travelers Ins. Co. v. Johnson, 579 F. Supp. 1457, 1461-62 (D.N.J. 1984) (applying mandate after hiatus of five years); Perkins v. Stuemke, 585 N.E.2d 1125, 1128 (Ill. App. Ct. 1992) (imposing constructive trust on policy acquired two years after the lapse of mandated policy for failure to pay premiums).

fulfill a specific need unrelated to the mandate,[89] substitution probably does not exist as a matter of fact. Incredibly, even here a few courts have found a continuing duty to maintain the mandated beneficiary's interest in any insurance obtained while the mandate is unfulfilled.[90] On cognate reasoning, mandates should probably never be applied to concurrent policies either.[91]

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89. *See, e.g.*, Larson v. Larson, 173 S.E.2d 700, 701 (Ga. 1970) (refusing constructive trust where mandated policy lapsed and new policies obtained years later at marriage to second spouse); McDonald v. McDonald, 643 P.2d 1280, 1281 (Or. Ct. App. 1982) (refusing constructive trust where mandated policy lapsed and new policies obtained after marriage to second spouse).

For a case holding that where a policy obtained specifically to fill the mandate is allowed to lapse, it is improper to impose a constructive trust on other subsequently acquired policies, see Lock v. Lock, 444 P.2d 163, 168 (Ariz. Ct. App. 1968).

90. *E.g.*, Richetti v. Sanzo, Civ. A. No. 11760, 1994 WL 18683, at *4 (Del. Ch. Jan. 5, 1994) (questionable decision imposing constructive trust for the benefit of former spouse on later policies payable to then spouse, notwithstanding the fact that a existing policy payable to children was still outstanding); Pernick v. Brandt, 506 N.W.2d 243, 245-46 (Mich. Ct. App. 1993) (holding mandated beneficiary possesses equitable interest in after-acquired policy); Simonds v. Simonds, 380 N.E.2d 189, 193 (N.Y. 1978) ("The [insured], upon lapse or cancellation of the earlier policies, had by virtue of the separation agreement an obligation to name [spouse] as beneficiary on the later policies, an obligation enforceable in equity despite the [insured]'s failure to comply with the terms of the separation agreement."). *But cf.* Rollins v. Metropolitan Life Ins. Co., 912 F.2d 911, 915 (7th Cir. 1990) (There is no evidence indicating that, by using the word 'maintain' in the divorce decree, the Indiana court meant to include any and all after-acquired life insurance policies."); Weiner v. Goldberg, 306 S.E.2d 660, 661 (Ga. 1983) ("[W]here the deceased has allowed a policy to lapse in derogation of the decree and has acquired a new policy and designated a new beneficiary, this, without more, will not give rise to a constructive trust. . . ."); McDonald v. McDonald, 643 P.2d 1280, 1282 (Or. Ct. App. 1982) ("There is no trust property or unjust enrichment here. Although [the decedent] may have been obligated to carry a life insurance policy for the benefit of plaintiffs, that he happened to carry life insurance policies for the benefit of defendant does not mean that anything she held was, or ever had been, plaintiffs' property.").

91. If the insured allows a mandated policy to lapse, while maintaining other coverage, an equitable remedy is generally inappropriate. *See, e.g.*, Lambert v. Lambert, No. 84CA6, 1986 WL 10941 at *4 (Ohio Ct. App. Sept. 23, 1986) ("[T]here is no superior equitable right in the first wife as to the proceeds of the second life insurance policy on the basis of fraud even though the deceased had breached his obligation under the divorce decree."); *see also* Jacoby v. Jacoby, 11 N.W.2d 135, 137 (S.D. 1943) ("We have been unable to find a case in which a court, in dealing with a contract which without describing a particular policy provided for protection to the promisee in a stated amount, has held that such a contract of its own separate force operated to create an interest in any of the policies of insurance of the promisor."). *But see* Singer v. Jones, 496 N.W.2d 156, 159 (Wis. Ct. App. 1992) ("We see no

A related issue commonly presented by replacement policies is whether to include increases in coverage.[92] Logically the treatment of increases should be determined by the purposes of the mandate. If the coverage is security for a property division, or for spousal or child support, the amount of insurance required should decrease as the obligation is paid, and any increases should be distributed pursuant to the owner's directions.[93] If the mandate is made pursuant to hybrid rights under a divorce agreement, the amount of coverage generally does not reduce over time, and treatment of increases should be determined by the intent of the parties.[94]

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practical or legal difference between a situation where the obligor removes the children as beneficiaries and names another on a preexisting policy . . . and the situation here in which the obligor allows a preexisting policy with the child as beneficiary to lapse and continues in effect a later acquired policy with another named as beneficiary.").

92. Increases occur frequently in group insurance where the amount of coverage is a multiple of the insured's salary, *e.g.*, Newton v. Newton, 472 P.2d 718, 720 (Colo. Ct. App. 1970); Schwass v. Schwass, 467 N.E.2d 957, 958-59 (Ill. App. Ct. 1984); Mowen v. Kathe, No. 90-CA-114, 1991 WL 227681 at *1 (Ohio Ct. App. Aug. 2, 1991); Thomas v. Studley, 571 N.E.2d 454, 460 (Ohio Ct. App. 1989); Madsen v. Estate of Moffitt, 542 P.2d 187, 188 (Utah 1975); or where the employer provides optional coverage, *e.g.*, Knazze v. Banker's Life & Casualty Co., 632 N.E.2d 162, 163 (Ill. App. Ct. 1994); McWhite v. Equitable Life Assurance Soc'y of the U.S., 490 N.E.2d 1310, 1316 (Ill. App. Ct. 1986); or where an employer changes its benefit plan, *e.g.*, Nielsen v. Nielsen, 535 P.2d 1239, 1240-41 (Utah 1975) (change of group insurer); Washington v. Hicks, 325 N.W.2d 68, 70 (Wis. Ct. App. 1982) (change of labor contract). Increases can occur, although less frequently, under individual life insurance policies. *E.g.*, McKissick v. McKissick, 560 P.2d 1366, 1369 (Nev. 1977) (policy provided additional coverage upon death from accidental causes).

For an interesting variation in which the mandated policy was declining value term insurance replaced by permanent life insurance in a fixed amount so that the amount of coverage at time of death was more than the amount mandated, see Bentley v. New York Life Ins. Co., 488 N.W.2d 77, 79 (S.D. 1992) (mandate only applied to amount which would have been paid on term policy).

93. *See, e.g.*, Merchant v. Merchant, 343 N.W.2d 620, 626 (Mich. Ct. App. 1983); *cf.* Bauer v. Bauer, No. 80-498, 301 N.W.2d 462 (table), 1980 WL 99472 at *1 (Wis. Ct. App. Nov. 21, 1980) (increases not covered, although argument that coverage should decline with support obligation rejected). *But cf.* Aetna Life Ins. Co. v. Hussey, 590 N.E.2d 724, 727-29 (Ohio 1992) (constructive trust "for the purpose of insuring [child's] education" imposed on increased coverage); Mowen v. Kathe, No. 90-CA-114, 1991 WL 227681 at *2 (Ohio Ct. App. Aug. 2, 1991) (increases included without regard to the purpose of the provision in the decree).

94. If the parties intended that the mandate apply to a specific policy, rather than to a specific amount, any increases in the coverage of that policy should be included in the agreement's effect. *See, e.g.*, Koenings v. First Nat'l Bank & Trust Co., 495 N.E.2d 671, 674 (Ill. App. Ct. 1986); Schwass v. Schwass, 467 N.E.2d 957, 961 (Ill.

There is generous authority indicating that the divorce agreement or decree need not prohibit changes in beneficiaries,[95] naming additional beneficiaries,[96] or surrendering the policy,[97] or provide a term,[98] in order to be so construed.

V. REMEDIES

Before the death of the insured, a life insurance mandate can be enforced easily. If the duty flows from a court decree, the court has the power to punish contumacy as civil contempt.[99] If the duty stems from a promise, specific performance may be available, especially where the legal remedy is inadequate because the injured party cannot obtain a substitute policy without

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App. Ct. 1984) ("[T]he language of the agreement provided that decedent's children were to be beneficiaries of the insurance policies, not of any specified dollar amount."); Thomas v. Studley, 571 N.E.2d 454, 460 (Ohio Ct. App. 1989) ("[T]he separation agreement failed to state that . . . a definite face value. Considering that the policies were indexed to the husband's current salary, . . . the parties most likely intended that the child receive all of the benefits of the policy."). *But see* Sullenger v. Sullenger, 314 S.E.2d 482, 484 (Ga. Ct. App. 1984) (holding that amount to be determined as of date of divorce); McKissick v. McKissick, 560 P.2d 1366, 1369 (Nev. 1977) (including additional accidental death coverage that was over and above the amount stated in divorce agreement).

95. *E.g.*, *In re* Estate of Boyd, 118 N.W.2d 705, 706 (Wis. 1963); Duhame v. Duhame, 453 N.W.2d 149, 151 (Wis. Ct. App. 1989); Madsen v. Estate of Moffitt, 542 P.2d 187, 188 (Utah 1975) (dissenting opinion).

96. *E.g.*, Chandler v. Ratcliffe, 285 S.E.2d 694, 694-95 (Ga. 1982) (While "this provision of the agreement does not require that the children be the sole beneficiaries," . . . [the insured] may add or delete beneficiaries at his pleasure, [but] he may not, by any means, alter the provisions of the policy in such manner as to dilute the entitlement of his children as that entitlement stood on the date of the agreement.") (citation omitted).

97. *E.g.*, Perkins v. Stuemke, 585 N.E.2d 1125, 1129 (Ill. App. Ct. 1992) ("[T]he obligation to maintain a person as a beneficiary clearly entails the obligation to maintain the policy.").

98. *In re* Estate of Boyd, 118 N.W.2d 705, 706 (Wis. 1963) ("[I]f the clause did not give [the designated beneficiary] a *continuing* beneficial interest, it really gave [her] nothing. We find it hard to believe that the parties intended to stipulate to something valueless and that the judgment based thereon was intended to mirror such emptiness.") (emphasis added).

99. *See, e.g.*, Graham v. Graham, 481 So. 2d 903, 906 (Ala. Civ. App. 1985) (setting aside an incarceration order upon showing of uninsurability); Chandler v. Ratcliffe, 285 S.E.2d 694 (Ga. 1982) (refusing contempt citation where additional beneficiary designated).

the consent of the insured.[100] Neither remedy works after the death of the insured, however.[101]

A. Actions at Law

Damages are generally available for breach of a life insurance mandate.[102] If the party in breach (or his or her estate[103]) has sufficient funds to pay such a claim, the legal remedy is probably adequate.[104] Too often such is not the case, however.

Many obligations arising under child and spousal support orders, and some installment obligations under divisions of marital property, will be paid from the obligor's future flow of earnings, rather than from his or her present estate. Over time, of course, the obligation will decrease, perhaps even to the point that it can be paid from the obligor's estate. But, in many cases, especially those involving the premature demise of a party, the amount owed simply exceeds the decedent's estate.

Further, various rules concerning the distribution of decedents' estates reduce the amount of money otherwise available to satisfy claims arising from

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100. *See supra* note 53.

101. For a case in which the disappointed beneficiary brought contempt *after* the death of the insured, see Thomas v. Studley, 571 N.E.2d 454 (Ohio Ct. App. 1989).

102. *See, e.g.*, Gray v. Higgins, 421 S.E.2d 341, 345 (Ga. Ct. App. 1992) ("[A] breach of settlement contract allowing the policy to lapse and not to be reinstated in any form prior to death of decedent would result in damages in the policy amount . . ., and such damages would arise naturally and according to the usual course of things from such a breach."); *see also* Williams v. Williams, 158 So. 2d 901, 904 (Ala. 1963) (legal action against insured's estate available where state statute exempts promised policy from agreement to name beneficiary); Rau v. Rau, 429 So. 2d 593, 595 (Ala. Civ. App. 1983) (policy never existed or was unidentifiable); Lock v. Lock, 444 P.2d 163, 168 (Ariz. Ct. App. 1968) (policy allowed to lapse); Tintocalis v. Tintocalis, 25 Cal. Rptr. 2d 655, 658 (Cal. Ct. App. 1993) (insured's suicide caused non-payment); Greenberg v. Greenberg, 71 Cal. Rptr. 38, 40 (Cal. Ct. App. 1968) (named beneficiary's equities held to be higher); Behrens v. Milliken, 461 N.W.2d 276, 280 (S.D. 1990) (federal law exempts policy from agreement to name beneficiary); *In re* Estate of Zellmer, 82 N.W.2d 891, 894 (Wis. 1957) (policy not in existence).

103. While normally only the estate of the insured is liable for breach of a life insurance mandate, a surviving spouse also may be liable if he or she obtained assets from the estate without a probate proceeding. *E.g.*, Spurr v. Spurr, 151 Cal. Rptr. 813, 815 (Cal. Ct. App. 1979).

104. Liquidity is not the only issue when determining adequacy of the legal remedy, however. *E.g.*, Green v. Green, 433 N.E.2d 92 (Mass. App. Ct. 1982) (named beneficiaries were also heirs under the insured's will, so that legal remedy would have the effect of depleting their share of the estate).

a divorce. Secured creditors are, of course, entitled to full payment, or to foreclose their liens on the collateral property. In most jurisdictions, there are priorities accorded claims relating to the decedent's last illness, funeral, and certain other claims.[105] Finally, in some circumstances, surviving spouses or minor children are permitted to choose a "statutory share" of the deceased obligor's estate, even against the wishes of the decedent as expressed in his or her will.[106]

B. Equitable Remedies

In the absence of a legal remedy, or at least of an effective one, the mandated beneficiary can only turn to a court of equity for relief. Once the insured dies, life insurance proceeds legally belong to the beneficiary named in the policy.[107] Thus, the interest, and remedy, of a mandated beneficiary must be equitable, if one exists at all.

1. Adequacy of the Legal Remedy

Traditionally, the key to accessing a court of equity has been a showing that the injured plaintiff does not have an adequate remedy at law. This could be done in two ways. First, plaintiff could show that his or her legal remedies, primarily money damages, were incomplete or ineffective on the facts of his or her case. Or, second, plaintiff could show that the case involved matters that historically were deemed not to be within the jurisdiction of courts of law. Such matters included fraud, mistake, duress, and breach of fiduciary duty.[108]

Mandated beneficiaries generally can make the showing required to seek relief in courts of equity. In many instances the assets of the decedent's estate

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105. *E.g.*, OHIO REV. CODE ANN. § 2117.25 (Baldwin 1994) (enumerating eight categories of priority claims).

106. *E.g.*, OHIO REV. CODE ANN. § 2106.01 (Baldwin 1994) (providing for election by surviving spouse).

107. *See supra* note 13 and accompanying text.

108. The unique jurisdiction of equity was said by Coke to extend to "covin, accident and breach of confidence," EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 84 (1671). In modern terminology, "covin" is fraud, "accident" includes mistake and impossibility, and "breach of confidence" extends to express and implied trusts. Even by the time of Blackstone and Story, many matters within Coke's description were treated by both courts of equity and of law. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, § 59 (1836); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 431 (9th ed. 1783).

are too few to satisfy a judgment, making the legal remedy inadequate.[109] Many cases also involve one or more of the traditional equitable matters. Thus, a failure to maintain life insurance as required may entail fraud in the form of misrepresentation, mistake, or breach of a fiduciary duty.[110] Indeed, some courts have refused even to consider the question of the adequacy of the legal remedy in cases involving life insurance mandates.[111]

2. Specific Remedies

a. Constructive Trust

One of the most common remedies for breach of a life insurance mandate is a constructive trust imposed upon the proceeds in the hands of the designated beneficiary. A constructive trust is not a trust in the usual sense,[112] but a remedy in which the holder of property or funds is deemed

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109. *See, e.g.*, Simonds v. Simonds, 380 N.E.2d 189, 192 (N.Y. 1978) (the "estate's insolvency, however, would make such an action fruitless").

110. *See infra* notes 122-24.

111. *E.g.*, Brunnenmeyer v. Massachusetts Mut. Life Ins. Co., 384 N.E.2d 446, 448 (Ill. App. Ct. 1978) ("[W]here a party seeks a particular fund, such as the proceeds of an insurance policy, rather than a mere money judgment, he need not show there is no adequate remedy at law in order to submit the cause to equity jurisdiction."); Markwica v. Davis, 473 N.E.2d 750, 752 (N.Y. 1984) ("That the children might also have a breach of contract claim against their father's estate is of no moment so far as the liability of the [constructive trustee] is concerned. . . .").

It has also been held that the choice of remedy is up to the injured party. *E.g.*, Green v. Green, 433 N.E.2d 92, 94 (Mass. App. Ct. 1982) ("[T]he rule appears to be that the person having the equitable interest in the property may pursue either the property, or the fiduciary who improperly disposed of the property, or both . . . ."); Head v. Metropolitan Life Ins. Co., 449 N.W.2d 449, 455 (Minn. Ct. App. 1990) ("Even if [the claimant] has an opportunity to claim against the estate, . . . the obligees' claims to the insurance [are] not barred by their concurrent probate claim.").

112. Trusts can be divided into express trusts and implied trusts. Implied trusts can be further divided into resulting trusts (intended, but unexpressed) and constructive trusts. This typology is venerable. *See* Cook v. Fountain, 3 Swanst. R. 585, 36 Eng. Rep. 984 (Ch. 1676); 2 STORY, *supra* note 108, § 1195. It also may be misleading because it suggests a stronger connection between constructive and other trusts than actually exists. *See* 5 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 404.2 (4th ed. 1989). For example, express and resulting trusts impose the usual fiduciary duties on the trustee. RESTATEMENT OF RESTITUTION § 160 cmt. b (1937). A constructive trustee normally does not have such duties, however. An exception is where the constructive trustee was a fiduciary at the time of the transaction giving rise to the constructive trust. *See generally id.* §§ 190-201.

to be a "trustee" for the purpose of compelling a transfer of that property to a "beneficiary" whose "equities" are found to be superior.[113] Cardozo described a constructive trust as ". . . the formula through which the conscience of equity finds expression."[114] The American Law Institute's definition would impose a constructive trust "[w]hen a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. . . ."[115]

Traditionally, constructive trusts have been imposed where property belonging to one person was transferred to another as a result of mistake,[116] or duress or undue influence,[117] or fraud or breach of a confidential or fiduciary relationship.[118] Today, these requirements are sometimes generalized into a single requirement, "unjust enrichment."[119] This change

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Another method of relating the different types of trusts is by analogy to contracts. Express trusts can be analogized to express contracts, resulting trusts to implied-in-fact contracts (that is, intended, but unexpressed), and constructive trusts to quasi- or implied-in-law contracts. *Id.* at § 160 cmt. a. This analogy also helps explain why constructive trusts and quasi-contracts are both found in the RESTATEMENT OF RESTITUTION, rather than in the restatements of the substantive areas whose names they bear. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b (1978).

On occasion constructive trusts are known by other names, such as a trust *ex maleficio*, a trust *ex delicto*, a trust *in invitum*, and an involuntary trust. GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 471 at 9 (2d rev. ed. 1978).

113. 5 SCOTT & FRATCHER, *supra* note 112, § 462, at 304-06 (obligation to return the property establishes constructive trust, not vice versa).

114. Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 386 (N.Y. 1919).

115. RESTATEMENT OF RESTITUTION § 160 (1937).

116. *Id.* at §§ 163, 165. "Mistake" means a state of mind that is not in accordance with the facts, and looks to the correctness of a person's belief, rather than to his or her intention. *Id.* § 6.

117. *Id.* at §§ 166, 168.

> Duress takes two forms. . . . In one, a person physically compels conduct that appears to be a manifestation of assent by a party who has no intention of engaging in that conduct. . . . In the other, a person makes an improper threat that induces a party who has no reasonable alternative to manifesting his assent. . .
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> Undue influence involves unfair persuasion, a milder form of pressure than duress.

RESTATEMENT (SECOND) OF CONTRACTS ch. 7, topic 2 introductory note (1981).

118. RESTATEMENT OF RESTITUTION §§ 166, 168 (1937). "Fraud" in its broadest and original sense means to overreach, and subsumes misrepresentation, and breach of a confidential relationship or fiduciary duty. *Id.* § 8.

119. *Id.* at § 160 cmt. d. This formulation has been widely adopted. *E.g.*, Rau v. Rau, 429 So. 2d 593, 595 (Ala. Civ. App. 1983) ("A constructive trust . . . operates

is part of a trend in the United States to affiliate various restitutionary remedies, such as quasi contracts and constructive trusts, by reference to a common animating principle.[120] This process has not been without problems, however. First, even a cursory review of cases will show that the term "unjust enrichment" is so overused that it is in danger of becoming a meaningless generality. Second, the search for a common principle suggests a homogenization of remedies that does not yet in fact exist.[121]

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to prevent unjust enrichment; such trust may be imposed when property interest has either been acquired by fraud, or where, in the absence of fraud, it would be inequitable to allow property interest to be retained by the person who holds it."); Head v. Metropolitan Life Ins. Co., 449 N.W.2d 449, 455 (Minn. Ct. App. 1990) ("[A] constructive trust arises where a person has an equitable duty to convey property to another and, if allowed to keep the property, would be unjustly enriched at the other's expense."); Hirsch v. Travelers Ins. Co., 341 A.2d 691, 693 (N.J. Super. Ct. App. Div. 1975) ("All that is required to establish a constructive trust is a finding that there was a wrongful act resulting in the transfer of property and consequent unjust enrichment of another."); Simonds v. Simonds, 380 N.E.2d 189, 194 (N.Y. 1978) ("[T]he purpose of the constructive trust is prevention of unjust enrichment."); Ferguson v. Owens, 459 N.E.2d 1293, 1295 (Ohio 1984) ("A constructive trust is . . . an appropriate remedy against unjust enrichment. [Although] usually invoked when property has been acquired by fraud[, it] may also be imposed where it is against the principles of equity that the property be retained . . . even though the property was acquired without fraud."); Richards v. Richards, 206 N.W.2d 134, 137 (Wis. 1973) ("[A constructive trust] is created by law to equitably prevent unjust enrichment which arises when one party receives a benefit, the retention of which would be unjust as against the other.").

Some courts have refused to impose constructive trusts based solely on unjust enrichment, however. *E.g.*, Prince v. Bryant, 275 N.W.2d 676, 678 (Wis. 1979) ("[I]n defining the elements necessary to invoke [a] constructive trust this court has consistently said that unjust enrichment in itself is not sufficient . . . . Additional factors suggested have included actual or constructive fraud, duress, abuse of confidential relationship, mistake, commission of a wrong or any form of unconscionable conduct.") (citations omitted); *cf.* Imgrund v. LaRue, 851 S.W.2d 40, 44 (Mo. Ct. App. 1993) ("One of the requirements for a constructive trust is the existence of a 'confidential relationship.'").

120. Obviously the RESTATEMENT OF RESTITUTION moved in this direction by defining persons from whom restitution is required in terms of unjust enrichment, without regard to the specific remedy sought. *Id.* §§ 1, 160. By contrast, British law has moved much more slowly to integrate the disparate elements of restitutionary remedies into a conceptual whole. ROBERT GOFF & GAERTH JONES, THE LAW OF RESTITUTION 12-16 (1993); *see also* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 3-6 (1985).

121. Even assuming that several restitutionary remedies address a common problem, unjust enrichment, each remedy is nevertheless distinct. Thus, quasi-contracts and constructive trusts are not interchangeable remedies, even though both in theory may be based on a finding of unjust enrichment. RESTATEMENT OF RESTITUTION § 4

In cases involving life insurance mandates, courts have employed almost all of the above reasons to justify granting a remedy. Thus, a change of beneficiary made because the owner was mistaken about his or her responsibility under a divorce decree or agreement can be remedied by imposing a constructive trust.[122] They have also been imposed to remedy fraud,[123] breach of a confidential relationship or fiduciary duty,[124] and

(1937) ("In situations in which a person is entitled to restitution, he is entitled, *in an appropriate case*, to . . . a decree by a court of equity that the title or possession of the subject matter be transferred to him . . . .") (emphasis added). *Id.* Part II, Topic 1., Introductory Note, at 640 ("A person entitled to restitution is entitled, in an appropriate case, to [an equitable] remedy. . . . The available remedies . . . include . . . a constructive trust. . . . In some cases the plaintiff is entitled to only one of these remedies; in other cases he has a choice among two or more of them.").

Courts have not always been clear about the basis for their decisions either. For example, in Torchia v. Torchia, 499 A.2d 581 (Pa. Super. Ct. 1985), the court upheld a decree that a named beneficiary "should pay the proceeds of the policy to the decedent's children" as unjust enrichment. *Id.* at 581. The real remedy afforded is unclear, however. Although many of the cases cited concerned the constructive trust remedy (see lengthy string citation, *id.* at 584), the opinion never actually used those words. *Cf.* Hile v. DeVries, 836 P.2d 1219, 1221 (Kan. Ct. App. 1992) ("[The parties] argue about whether the district court employed a constructive trust theory or an unjust enrichment theory in reaching its decision. Frankly, we find these semantic arguments to be of no practical importance.").

122. *See, e.g.*, Blaney v. McCluskey, 529 So. 2d 314, 316 (Fla. Dist. Ct. App. 1988); Holmes v. Holmes, 463 So. 2d 578, 580 (Fla. Dist. Ct. App. 1985); Prince v. Bryant, 275 N.W.2d 676, 680 (Wis. 1979).

123. *See, e.g.*, Hunter v. Hunter, 570 A.2d 246, 294 (Conn. Super. Ct. 1989) ("In removing the children as beneficiaries of the policy, the decedent violated the judgment . . . and that constituted fraud."); Gutierrez v. Madero, 564 S.W.2d 185, 189 (Tex. Civ. App. 1978) ("[By] redesignating the beneficiary . . ., [the decedent] misappropriated the children's interest in the policy. This misappropriation constituted constructive fraud.").

124. *See, e.g.*, Rollins v. Metropolitan Life Ins. Co., 912 F.2d 911, 915 (7th Cir. 1990) ("Although a parent-child relationship alone will not create the confidential or fiduciary duty necessary to impose a constructive trust, the parental relationship in conjunction with the obligation imposed by the divorce decree will create such a duty.") (citation omitted); *see also* Blaney v. McCluskey, 529 So. 2d 314, 316 (Fla. Dist. Ct. App. 1988) ("abuse of confidence"); Holmes v. Holmes, 463 So. 2d 578, 580 (Fla. Dist. Ct. App. 1985) ("at least abused a confidence"); Appelman v. Appelman, 410 N.E.2d 199, 203 (Ill. App. Ct. 1980) ("A fiduciary relationship can be inferred from the marital bond . . . .").

Confidential relationships and fiduciary relationships are closely related. Imgrund v. LaRue, 851 S.W.2d 40, 44 (Mo. Ct. App. 1993) ("A confidential relationship is generally synonymous with a fiduciary relationship. However, the relationship need not be technically fiduciary but may be merely informal.") (citations omitted).

unjust enrichment.[125] In a surprising number of cases, the court has ignored the question of grounds altogether and simply imposed a constructive trust for breach of the divorce agreement or decree, without further explanation.[126]

b. Interpleader

Disputes over the proceeds of life insurance policies hold special risks for insurers. For example, if the beneficiary designation is ambiguous,[127] more than one claimant might claim the proceeds, or even obtain a judgment against the insurer for that amount. From the insurer's point of view, the risk of multiple liability is unfair: it is merely a stakeholder, a disinterested party holding funds that belong to one of several claimants. The essential dispute is between the claimants.

Courts have long heard the pleas of stakeholders in other contexts, and responded with a procedure known as "interpleader."[128] Under this

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125. *See, e.g.*, Orsini v. Commercial Nat'l Bank, 639 S.W.2d 516, 518 (Ark. Ct. App. 1982); Markwica v. Davis, 473 N.E.2d 750, 753 (N.Y. 1984).

126. *E.g.*, Tintocalis v. Tintocalis, 25 Cal. Rptr.2d 655, 659 (Ct. App. 1993) ("Where, as here, the obligor spouse violates an order to maintain life insurance, a constructive trust may be imposed . . . .") (dictum); McKissick v. McKissick, 560 P.2d 1366, 1369 (Nev. 1977) ("[Decedent] violated the agreement and decree when he designated [another beneficiary]. In such circumstances it is permissible to conclude . . . that [such beneficiary] holds the insurance proceeds in a constructive trust . . . .").

127. A classic example is the beneficiary designation, "To my spouse." If the insured was married at the time the designation was made, but subsequently divorced and remarried, which "spouse" is entitled to the proceeds on the insured's death? The case is far from fanciful. *See* Simmons v. Simmons, 272 S.W.2d 913, 915 (Tex. Civ. App. 1954) (holding that policy naming "Mrs. Joe Simmons" as beneficiary was payable to spouse at the time of the designation, not at the time of death.)

128. The origins of interpleader extend back to the early 14th century. Although courts of law provided limited relief in the nature of interpleader, the procedure flourished in equity because legal remedies were often inadequate. For example, if one or more of the competing claims was equitable in nature, as is typically true in cases involving life insurance mandates, interpleader could only be had before a chancellor. 2 STORY, *supra* note 108, § 808, at 115-16. For a modern opinion in which the complexities of applying interpleader to both legal and equitable interests, see Equitable Life Assurance Soc'y of the U.S. v. Jones, 679 F.2d 356, 360-61 (4th Cir. 1982) (Murnaghan, J., dissenting) (since only the named beneficiary would have an action against the insurer, it was under no threat of multiple liability, and interpleader was improper).

For the early history of interpleader, see Ralph V. Rogers, *Historical Origins of Interpleader*, 51 YALE L.J. 924 (1942). *See also* 2 STORY, *supra* note 108, at 110-28; 7 CHARLES ALAN WRIGHT *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1701 (1986);

procedure, the stakeholder can bring the stake and all claimants into court. He or she is then released as an active party, and the court determines which of the remaining parties is entitled to the stake.[129]

Interpleader has obvious application where a mandated beneficiary makes a claim to the proceeds before they have been paid to the named beneficiary. In such cases, interpleader eliminates the insurer's risk of inconsistent adjudications, and allows the court to resolve the dispute between claimants efficiently. If the mandated beneficiary asserts a claim after the insurer has paid the proceeds to another, the insurer has a defense of payment, and the mandated beneficiary's remedies are limited to damages from the estate of the obligor, or a constructive trust on the proceeds in the hands of the named beneficiary.

It is important to note that interpleader is only a procedural device, providing a means for resolving the dispute between the real parties in interest. The principles for resolving that dispute are not to be found in rules of interpleader, but must be drawn from substantive legal or equitable principles found elsewhere. Interpleader is completely transparent on the issue of entitlement to the proceeds. Thus, the results of an interpleader action when the proceeds are still in the hands of the insurer, and of a suit to impose a constructive trust after the proceeds have been paid to the named beneficiary, should be the same, because the equitable principles involved are the same.[130]

c. "Vested" Interests

One of the most common, and nonsensical, modes of analysis employed in life insurance mandate cases has been the "vested equitable interest." Since the nineteenth century, courts have held that, where a policy permits the owner to make changes of beneficiary, a named beneficiary has a "mere expectancy" in the policy, subject to divestiture by subsequent changes of beneficiary. There are, of course, circumstances in which a beneficiary needs to deprive

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Zechariah Chafee, Jr., *Modernizing Interpleader*, 30 YALE L.J. 814 (1921).

129. As this description suggests, interpleader typically has two stages. In the first, the stakeholder demonstrates its entitlement to the procedure. Usually this consists of a showing that there is no dispute concerning its liability or the amount thereof. The stakeholder then pays the stake into court and is allowed to withdraw, and the court enjoins the other parties from pursuing their claims against him or her. The second stage consists of the other parties litigating their right to the stake now held by the court. CHAFEE, *supra* note 128, at 814.

130. *See infra* part V. 3.

the owner of the power to make changes, in order to protect that beneficiary's own interests. Such irrevocability can be achieved in several ways.[131]

Something facially similar to irrevocability can result when an insured contracts to name another person as beneficiary, and not to make any changes thereafter.[132] Because the parties' relationship flows from a contract, the promisee's interest can be specifically enforced in equity, assuming no adequate legal remedy. Thus, such an arrangement has been said to create a "vested equitable right" to the proceeds.[133] The terminology is unfortunate, however, because the promisee's rights are "vested" only in the sense that, as between the insured and the putative beneficiary, that is, as between the promisor and promisee, a court of equity will enforce the rights of the latter. The owner of the policy still retains the power to transfer the legal right to the proceeds to another.

Unfortunately, some courts have concluded that the "vested interest" doctrine goes much further, even impairing the rights of third parties such as beneficiaries subsequently named in violation of the agreement. It has been held that an owner who agrees not to change beneficiaries, is "estopped,"[134] or has "waived" the right,[135] to make later changes, or that his or her power to do so has been terminated by the agreement.[136] Courts have even applied

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131. *See supra* note 14 and accompanying text.

132. Even if the promise not to make subsequent changes is missing, courts will imply such a promise where it is in keeping with the evident intent of the parties' agreement. *E.g.*, Perkins v. Stuemke, 585 N.E.2d 1125, 1128 (Ill. App. Ct. 1992) (no promise to maintain the policy); *In re* Estate of Boyd, 118 N.W.2d 705, 705-06 (Wis. 1963) (no promise to retain designated beneficiary).

133. The cases are legion. *E.g.*, Travelers Ins. Co. v. Daniels, 667 F.2d 572, 573 (7th Cir. 1981) ("a vested right"); Williams v. Williams, 158 So. 2d 901, 903 (Ala. 1963) ("an equitable interest"); Whitehead v. Whitehead, 381 S.E.2d 757, 758 (Ga. Ct. App. 1989) ("a vested interest"); Cohn v. Metropolitan Life Ins. Co., 559 N.E.2d 790, 791 (Ill. App. Ct. 1990) ("an equitable right"); Green v. Green, 433 N.E.2d 92, 94 (Mass. App. Ct. 1982) ("a vested, equitable interest").

It has also been called an "equitable assignment" of the proceeds to the designated beneficiary. *E.g.*, Reliance Life Ins. Co. v. Jaffe, 263 P.2d 82, 84 (Cal. Dist. Ct. App. 1953).

134. *E.g.*, Campbell v. Prudential Ins. Co. of Am., 137 N.E.2d 515, 519 (Ohio Ct. App. 1955) ("[T]he insured estopped himself from invoking the privilege of changing the beneficiary under the policy as fully as if his designation . . . was set forth in an irrevocable clause in the policy.").

135. *E.g.*, Myers v. Myers, 408 A.2d 279, 280 (Del. 1979) ("[T]he power [to change beneficiaries] is generally deemed waived by the contract.").

136. *E.g.*, Dixon v. Dixon, 184 So. 2d 478, 481 (Fla. Dist. Ct. App. 1966) ("We hold that the terms of the stipulation were so encompassing as to amount to a surrender of the essential incidents of ownership."); Aetna Life Ins. Co. v. Bunt, 738 P.2d 322,

the doctrine in cases in which the intended beneficiary was never named on a policy,[137] or where the policy on which she or he was to be named as beneficiary never existed.[138]

The fallacy upon which such sweeping applications of the "vested interest" doctrine are based, is that contracting parties can, by their agreement, affect the equitable rights of others. This observation is hardly new. As early as 1896, courts correctly perceived the fallacy underlying the doctrine:

> The few authorities shedding light upon this question declare the rights of the beneficiary are such as to create a vested interest in the proceeds of the certificate. Possibly this is not a correct declaration of the principle of law applicable to the conditions; for a second beneficiary might be substituted, wholly innocent of the contractual relations existing between the insured and the first beneficiary, and his substitution give rise to the creation of equities in his behalf all-controlling upon a judicial disposition of the rights of the parties concerned. If the original beneficiary's interest was vested, no subsequent conditions could possibly arise which would defeat his right; and, for this reason, we think it can hardly be termed a vested interest. The

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324 (Wash. 1987) ("Since [the insured's] right to deal freely with the policy was restricted, his designation of [a new beneficiary] is invalid."); *see also* Myers v. Myers, 408 A.2d 279, 280 (Del. 1979) ("[A]n 'irrevocable' grant by contract of beneficiary rights in an insurance policy removes the insured's power to change the beneficiary. . . ."); Green v. Green, 433 N.E.2d 92, 94 (Mass. App. Ct. 1982) ("[T]he insured policy-owner who is obligated not to change beneficiaries despite his power to do so is treated as a fiduciary.").

The same analysis has been extended to beneficiary mandates contained in a divorce decree, instead of an agreement. *E.g.*, Goodrich v. Massachusetts Mut. Life Ins. Co., 240 S.W.2d 263, 270 (Tenn. Ct. App. 1951) ("The effect of this decree is more than a mere assignment by the insured of his right to change the beneficiary. It was a judicial determination that the insured should have the right to change the beneficiary only in the event that [the named beneficiary] should remarry."); *see also* Bank One Trust Co. v. Transamerica Life Ins. Corp., 451 N.E.2d 542, 545 (Ohio Ct. App. 1982) (Whiteside, P.J., concurring) ("Any attempted change of beneficiary contrary to the decree is void at least in the absence of injury to an innocent third party caused by reliance upon the attempted change of beneficiary.").

137. *E.g.*, Travelers Ins. Co. v. Daniels, 667 F.2d 572, 574-75 (7th Cir. 1981); Dixon v. Dixon, 184 So. 2d 478, 481 (Fla. Dist. Ct. App. 1966).

138. *E.g.*, Pernick v. Brandt, 506 N.W.2d 243, 245 (Mich. Ct. App. 1993) ("[T]here was no life insurance policy naming plaintiff as beneficiary at the time of the divorce. . . . [P]laintiff was vested with an equitable interest in $50,000 of the proceeds of any insurance policy subsequently purchased by [the decedent] on his life."). *But see* Brooks v. Brooks, No. 03A01-9309-CH-00323, 1994 WL 71528, at *2 (Tenn. Ct. App. March 3, 1994) ("[W]here . . . no policy of insurance was in effect at the time of the divorce decree, the wife acquired no vested interest.").

> whole matter seems to be rather a question of equities, and the stronger and better equity must prevail.[139]

3. Fundamental Questions

Once before a court of equity, the analytical framework for deciding cases involving life insurance mandates should be the same regardless of which remedy is sought. In all cases, the mandated beneficiary's claim derives from the venerable maxim,[140] "Equity regards and treats that as done

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139. Jory v. American Legion of Honor, 38 P. 524, 526 (Cal. 1894) (citations omitted).

140. The "maxims" are (or perhaps were) terse statements of fundamental principles of equity jurisprudence.

> Underlying the entire body of equity jurisprudence, extending through every one of its departments, and shaping to a greater or less extent its doctrines concerning almost every important subject, are certain broad comprehensive precepts which are commonly denominated maxims of equity. These maxims are in the strictest sense the *principia*, the beginnings out of which has been developed the entire system of truth known as equity jurisprudence. They are not the practical and final doctrines or rules which determine the equitable rights and duties of individual persons . . . [but] are rather the fruitful germs from which these doctrines and rules have grown by a process of natural evolution.

2 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 360, at 4-5 (Spencer W. Symons ed., 5th ed. 1941) (emphasis in the original; footnotes omitted). *See also* GEORGE T. BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY § 37, at 46 (2d ed. 1874) ("A maxim is the embodiment of a general truth or principle expressed in the shape of a familiar adage.").

The maxims have been out of favor in recent times, although many are still familiar: "He who comes into equity must do so with clean hands," for example. Other maxims are now obscure and unfamiliar: "[e]quity follows the law;" and, "between equal equities priority of time will prevail." Indeed, the wording of the maxims was never standardized, and even their number was not even certain. *See, e.g., id.* at §§ 37-48 (discussing 12 maxims); GEORGE L. CLARK, EQUITY § 17, at 28-29 (1954) ("There is no general agreement as to the number or identity" of maxims.); *Id.* at §§ 17-32 (discussing 15 maxims); 2 POMEROY, *supra*, § 363, at 8-10 (listing 11 maxims). In the past, the maxims were thought to form a convenient framework upon which the narrower rules of equity jurisprudence could be fixed. *E.g.*, 12 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 191 (1936) ("[A] satisfactory course of lectures on the general principles of equity can be grouped round some of the most important of these maxims."). *But cf.* CLARK, *supra* this note, § 17, at 29 ("Maxims are of little or no value to the student—in fact, they may be worse than useless—unless he gets a fairly clear idea as to their meaning and applicability.") (footnotes omitted).

which in good conscience ought to be done."[141] The maxim, which serves as the foundation of equitable interests in property,[142] refers to what the insured ought to have done: make and retain[143] the person mandated as beneficiary of the life insurance policy. The insured's breach of that duty, that is, his or her failure to give the mandated beneficiary the legal right to the proceeds upon death, as required by the divorce agreement or decree, creates an equitable or beneficial interest in the mandated beneficiary that will be recognized and protected in equity.[144]

Equitable interests are never absolute interests, however. For the injured plaintiff, the price of having his or her equitable interest recognized and enforced, is the recognition of other parties' equitable interests in the same property under the maxim, "He who seeks equity, must do equity."[145] Thus, before according recognition to an equitable interest in property, the court

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See generally Paul Jackson, *The Maxims of Equity Revisited, in* EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS 72-99 (Stephen Goldstein ed., 1992) (concluding that the role of equitable maxims is in decline).

141. 2 POMEROY, *supra* note 140, § 364 at 10.

142. *Id.*

143. Not all negative decrees (that is, orders not to change the beneficiary) create equitable rights in the party retained, however. *See, e.g.*, Wilharms v. Wilharms, 287 N.W.2d 779, 784 (Wis. 1980) (temporary restraining order preventing change of beneficiary insufficient alone to create equitable interest in protected beneficiary).

144. For an incorrect application of this maxim, see Travelers Ins. Co. v. Daniels, 667 F.2d 572, 574 (7th Cir. 1981) ("The record does not indicate if the deceased made any attempt to . . . [name his son as beneficiary]. However, we will follow the maxim . . . and . . . determine the rights of these parties [as if the son] had been made beneficiary of the policy.").

145. 2 POMEROY, *supra* note 140, § 385 at 51.

> [W]hatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy.

Id. at 52.

Other maxims also come into play, especially when determining priority among claimants. Thus, for example, the commonly made exception for *bona fide* purchasers (*see infra* part V. B. 3. a.) has been said to rest upon various maxims. *Id.* § 417 at 167-68 ("Where there is equal equity, the law must prevail."); 1 STORY, *supra* note 108, § 57, at 75 ("Where there is equal equity, the law must prevail."). BISPHAM, *supra* note 140, § 59, at 225 ("Between equal equities, the law will prevail," and "Between equal equities, priority of time will prevail.").

must determine whether others have legal or equitable interests in it, and, if so, the priority between or among the claimants.

a. Bona Fide Purchase Rule

The most prominent exception to the principle giving legal ownership of property to the holder of an equitable interest is the rule protecting *bona fide* purchasers. Under this rule, if the holder of the legal title to property acquired it for value and without notice of the circumstances giving rise to an equitable interest in another, the holder's equitable interest is superior and he or she retains possession of the property.[146] Since equity can reach property in the hands of parties other than a conscious wrongdoer, this common sense rule is necessary to balance the equities of possessors against those of claimants, and to terminate equitable interests in property or funds.[147] It is one of the most

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146. Concisely stated, the rule is:

> A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase.

James B. Ames, *Purchaser for Value Without Notice*, 1 HARV. L. REV. 1, 3 (1887).

The reach of the rule, if a rule it is, is extremely broad, and riddled with exceptions. *See generally* 4 GEORGE E. PALMER, THE LAW OF RESTITUTION § 16.5 (1978 and Michael Eisenstein Supp. 1992) (discussing the rule in the context of mistake in business transactions); SCOTT & FRATCHER, *supra* note 112, at §§ 284-309 & 474-78 (discussing application of the doctrine in cases of express and constructive trusts, respectively); Ames, *supra* this note (reviewing the history and general rationale of the rule); Edgar N. Durfee, *Priorities* (pts. 1 & 2), 57 MICH. L. REV. 459, 685 (1959) (discussing entitlement to property generally, and the rule *passim*); Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L. J. 1057 (1954) (discussing the application of the rule in commercial law).

The RESTATEMENT OF RESTITUTION (1937) includes two versions of the *bona fide* purchaser rule, one generally applicable to restitution cases, *id.* § 13, and one applicable to constructive trusts, *id.* § 172(1).

147. Where two parties have equitable interests (or one a legal and the other an equitable interest) in property or funds, a court of equity must decide who has the better claim. If the party presently in possession acquired his or her interest tortiously, or retains possession inequitably, the answer is clear. Where both parties are innocent of any unconscionable conduct in acquiring or retaining their interests, the court must apply some arbitrary rule in order to make a decision between the parties. Such rules include that favoring a bona fide purchaser for value. *See id.* § 13, cmt. a. (The rule "involves no moral issue, since it merely creates convenient rules for determining which of two innocent persons should bear a loss which must be borne by someone.").

venerable doctrines of equity practice,[148] and has been applied in a broad array of factual situations.[149]

Three things are required to establish a *bona fide* purchase: a purchase transaction, a valuable consideration, and good faith on the part of the purchaser. The first requisite, a purchase transaction, is seldom controversial: one who gives value in the absence of an agreement to do so is a volunteer rather than a *bona fide* purchaser.[150] The second requirement, value, means that something of substance must be paid or transferred to the seller.[151] Further, such property must have present worth and be transferred to the seller at or about the same time as his or her transfer to the purchaser.[152] Therefore most releases of pre-existing debt[153] and mere promises of payment,[154] do not constitute "value." The third requisite, good faith, means

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148. Ames, *supra* note 146, at 1 ("It seems to have been a common opinion in early times that a court of equity would give no assistance against a purchaser for value without notice.").

149. The cases are too numerous to permit citation. *See, e.g.*, those cited in RESTATEMENT OF RESTITUTION §§ 13 & 172 [cases cited] (1937).

The rule is also related to the rules protecting creditors who, in good faith, discharge a debt for value (*see id.* § 14; 4 PALMER, *supra* note 146, § 16.5(a), .6-.7), and holders in due course of negotiable instruments (*see* U.C.C. § 3-302(a) (1994); Gilmore, *supra* note 146, at 1062-66).

150. *See, e.g.*, Perry v. Perry, 484 S.W.2d 257, 260 (Mo. 1972) (person paying premiums for life insurance in the absence of agreement to do so entitled to return of premiums but not proceeds of the policy).

151. *See generally* RESTATEMENT OF RESTITUTION § 173 (1937), incorporating the rules stated in RESTATEMENT OF TRUSTS § 298-309 (1935), now found in RESTATEMENT (SECOND) OF TRUSTS §§ 298-309 (1959).

Although the rules do not explicitly require an equivalence in value between the property transferred and the consideration given therefor, a disparity in value is a fact that may call into question the recipient's good faith. *Id.* § 298 cmt. i.

For an extensive discussion of value for the purposes of applying the rule to transfers of trust property, see SCOTT & FRATCHER, *supra* note 112, § 297A-8.

152. *Id.* at §§ 299-301.

153. *Id.* at § 304.

There has been much dispute whether transfers for an antecedent debt are "for value." *See, e.g.*, PALMER, *supra* note 146, § 16.5(b) at 488 ("Loosely, it may be said that the commercial view, applied to commercial paper, has been that [antecedent debt] is value, whereas the equity view . . . is that this is not value."); *see also* RESTATEMENT OF RESTITUTION § 173, cmt. j. (1937) ("Where a person holds property subject to a constructive trust, his creditors are not purchasers for value and are subject to the constructive trust, except [when purchasers at a judicial sale]").

154. *Id.* at § 302. The proposition that a promise of payment should be considered value for the purposes of the rule has not gone without criticism, however. For example, see SCOTT & FRATCHER, *supra* note 112, § 302 at 151-53.

without notice of the facts giving rise to the plaintiff's equitable claim.[155] Such notice may be actual or constructive.[156]

There have been few cases in which a named beneficiary could claim the status of *bona fide* purchaser, for obvious reasons.[157] In life insurance mandate cases, most named beneficiaries are either later spouses or children of later marriages. In a society such as ours where marriage is an inherently personal arrangement based on mutual trust and confidence, it would be surprising to find many prospective spouses bargaining over matters such as life insurance protection. The character of the institution simply makes such bargaining unlikely.[158]

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155. RESTATEMENT OF RESTITUTION §§ 13 cmt. b & 174 ("[A] person has notice of facts giving rise to a constructive trust if he knows the facts or should know them.").

156. *Id.* § 174 cmt. b. *See also* Durfee, *supra* note 146, 488-89 ("'Good faith' does not, to say the least, tell the whole story of notice. To actual knowledge and actual suspicion, which touch good faith in fact, we add constructive notice, and therewith whole chapters of technical lore.").

157. The principle of bona fide purchase is mentioned often in life insurance cases. *E.g.*, Equitable Life Assurance Soc'y of the U.S. v. Jones, 679 F.2d 356, 359 (4th Cir. 1982) ("[I]f the second beneficiary had, without notice of the prior interest, given value for the change of beneficiary, the second beneficiary would have a superior equity and would be entitled to the life insurance proceeds."); Lowry v. Lowry, 463 So. 2d 540, 542 (Fla. Dist. Ct. App. 1985) (named beneficiary held not "bona fide purchaser for value"); Hirsch v. Travelers Ins. Co., 341 A.2d 691, 693 (N.J. Super. Ct. App. Div. 1975) ("Where two innocent parties are involved and the recipient of a wrongful transfer is a Bona fide purchaser for value, the recipient will prevail. . . .").

The principle has seldom been decisive, however. For two example in which it was, see Greenberg v. Greenberg, 71 Cal. Rptr. 38, 39-40 (Ct. App. 1968) (second spouse who accepted offer to be named beneficiary in return for paying premiums and interest on policy loans, without notice of agreement with first spouse, was entitled to proceeds as bona fide purchaser); and, Pernick v. Brandt, 506 N.W.2d 243, 246-47 (Mich. Ct. App. 1993) (remanding for consideration of equities created by named beneficiary's lack of knowledge of spouse's agreement and her payment of premiums from separate property).

For a case in which the court refused to apply the principle, see Locomotive Eng'rs Mut. Life & Accident Ins. Ass'n v. Locke, 13 N.E.2d 781 (N.Y. 1938).

158. It is well established that marriage itself could be consideration for a promise to name an intended spouse as beneficiary of life insurance, however. *See, e.g.*, Equitable Life Assurance Soc'y of the U.S. v. Jones, 679 F.2d 356, 359 (4th Cir. 1982); Hirsch v. Travelers Ins. Co., 341 A.2d 691, 694 (N.J. Super. Ct. App. Div. 1975).

b. Change of Circumstance

A second exception to the principle awarding property to one with an equitable interest is known as reliance, change of position, or change of circumstance.[159] Applications of this exception have been relatively rare, and its origins relatively recent, when compared to the *bona fide* purchase rule.[160]

The most common assertion of reliance, or change of circumstance, involves a recipient's expenditure of his property before learning of plaintiff's claim to it. To the extent that the property was used to acquire other property,

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159. RESTATEMENT OF RESTITUTION § 142 (1937) provides:

§ 142. CHANGE OF CIRCUMSTANCES.

> (1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
>
> (2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant. . . .

Id. § 142; *see also id.* §§ 69 & 178.

In order to defeat a claim for restitution, the change of position must be "detrimental . . ., material and irrevocable." Jonklaas v. Silverman, 370 A.2d 1277, 1281 (R.I. 1977). *See generally* SCOTT & FRATCHER, *supra* note 112, § 480.

160. Professor Palmer cites several older cases, although he notes that a "high percentage" of cases fall into a handful of categories, such as payments received by agent or fiduciary, misapplication of payments by a creditor (now known as "discharge for value"), and depreciation or diminution in value of property in the hands of a recipient. 4 PALMER, *supra* note 146, § 16.8, pp. 510-29. None of the cases cited by Professor Palmer, or by other scholars, such as Scott and Fratcher, can equal the antiquity of the *bona fide* purchaser cases, however. *Compare id.*; SCOTT & FRATCHER, *supra* note 112, § 480, *with* 2 HENRY BALLOW, A TREATISE OF EQUITY, 313 (John Fonblanque ed. 1794) ("[P]recedents [assisting *bona fide* purchasers] are very ancient and numerous. . . .").

The British law has been even slower to recognize the defense of change of position in restitution cases. *Compare* Ministry of Health v. Simpson, [1951] App. Cas. 251, 276 (H. L.) ("[Equity does] not excuse the wrongly paid legatee from repayment because he [has] spent what he had been wrongly paid.") *with* Lipkin Gorman v. Karpnale Ltd., [1991] 2 App. Cas. 548, 578 (H. L.) ("[S]uch a defence should be recognized in English law."). *See also* BIRKS, *supra* note 120, at 410 ("[T]his defence admitted by American law but not yet recognized in England except in one or two special circumstances."); GOFF & JONES, *supra* note 120, at 90-91 (citing Lipkin Gorman v. Karpnale Ltd., *supra* this note).

or to pay debts, the recipient is still enriched, only in a different form.[161] When the property has been transferred away, either by gift or pursuant to another duty, the original recipient may be excused from restitution,[162] but

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161. *See, e.g.*, Securities Settlement Corp. v. Jachera, 772 F. Supp. 770, 774 (S.D. N.Y. 1991) ("Although a payee may have spent money mistakenly delivered, she has not changed his [sic] position if she has used the money to pay living or business expenses, or even to make gifts, 'unless such expenses were incurred or gifts made because of the receipt' of the mistaken payment.") (citation omitted); WestAmerica Sec., Inc. v. Cornelius, 520 P.2d 1262, 1270 (Kan. 1974) ("[T]he change must be detrimental to the payee, material and irrevocable .... If the payee uses the erroneous payment to pay debts existing when he received the money, or to pay living expenses, there is no change of position."); Castock Corp. v. Bailey, 492 N.Y.S.2d 921, 922 (Sup. Ct. 1985) ("The fact that the defendant parted with the proceeds of the sale is not sufficient to excuse repayment, if pecuniary benefit was obtained from such disposition. This includes the discharge of a debt or the expenditure of money.") (citation omitted); Ohio Co. v. Rosemeier, 288 N.E.2d 326, 329 (Ohio App. Ct. 1972) ("[T]he defendant merely changed the cash into a paid mortgage and retained the value. . . ."); *cf.* Hilliard v. Fox, 735 F. Supp. 674, 679 (W.D. Va. 1990) (holding decline in value of stock purchased is change of circumstance).

In any of these cases, there remains a logical problem of associating a specific expenditure with a specific enrichment. Such a connection may be shown factually, as by the technique of equitable tracing, or causally. In cases of the latter type, the size of the expenditure is relevant. Securities Settlement Corp. v. Jachera, 772 F. Supp. 770, 774 (S.D. N.Y. 1991)

To the extent that proceeds are converted into other property, the worth of the recipient has still been increased. Reaching such other property is one of the functions of "equitable tracing" (or "following property" as it is known in the RESTATEMENT OF RESTITUTION). *See id.* at § 204 ("Where a person [who] receives . . . property [subject to another's] beneficial interest . . . exchanges it for other property, he is under a duty either (a) to surrender the property which he acquired in exchange, or, at his option, (b) to pay the value of the property which he originally received. . . .").

Similarly, to the extent that proceeds are used to pay liabilities, the net worth of the recipient is increased by having his or her debts reduced. Although in this case there is no substitute property that can be reached, the party seeking restitution can recovery the monetary benefit conferred or reach the same result by means of subrogation to the debt paid. *See id.* § 207 ("Where a person wrongfully uses property of another in discharging an obligation . . . or a lien . . ., the other is entitled to be subrogated to the rights which the third person had before the obligation or lien was discharged."). *Id.*

See generally id. § 142 cmt. b; PALMER, *supra* note 146, § 16.8(e).

162. *See, e.g.*, Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees Div. 998 v. Danielson, 128 N.W.2d 9, 11 (Wisc. 1964) (holding payment of deceased father's hospital bill as change of circumstance).

the plaintiff can trace the property into the hands of any secondary recipient who is not a *bona fide* purchaser.[163]

Even if a recipient spends the property without receiving anything in return, and under such circumstances that his or her transferees have a defense to equitable claims, there remains the question whether the expenditure was "in reliance" on the receipt of the property, or would have occurred anyway. For example, spending a disputed fund on food would not be a defense to the equitable claim of another because the recipient would doubtlessly have made that purchase in any event.[164] On the other hand, spending the fund on an ocean cruise that the recipient could not have afforded, and would not have taken, but for receiving the fund, would be a good defense.[165] On similar logic, reliance may be shown by incurring additional liabilities or performance that would not have undertaken had the recipient not honestly believed that his or her worth had been increased by the amount received.[166]

In general, reliance arguments have fared poorly in life insurance mandate cases.[167] Since the purpose of life insurance is to indemnify a

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163. It is clear that a constructive trust can be imposed on the property in the hands of a non-*bona fide* purchaser transferee. RESTATEMENT OF RESTITUTION § 168(1) & cmt. b.

See generally id. § 142 cmt. b; PALMER, *supra* note 146, § 16.8(e).

164. *See* RESTATEMENT OF RESTITUTION § 142 cmt. b, illus. 2 (1937); *cf.* PALMER, *supra* note 146, § 16.8(e), at 524 ("When [the recipient] proves expenditures for a specific purpose, but they are expenditures that he would or might make in the normal conduct of his own affairs, this will rarely provide a defense.").

165. *Cf.* Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees Div. 998 v. Danielson, 128 N.W.2d 9, 11-12, (Wis. 1964) (paying decedent's debts with proceeds showed reliance where recipient "honestly believed, after receipt of the money, that she was entitled to keep it").

166. Lake Gogebic Lumber Co. v. Burns, 49 N.W.2d 310, 313 (Mich. 1951) ("[D]efendant . . . did change his position . . . by assuming liabilities and obligations which would not otherwise have been assumed."); *see also* Capin v. S & H Packing Co., 636 P.2d 1223, 1224 (Ariz. Ct. App. 1981) (finding reliance in continuing to perform hauling services which would have been terminated had party not honestly believed it was entitled to allegedly mistaken payments); Lincoln Nat'l Life Ins. Co. v. Rittman, 790 S.W.2d 791, 792 (Tex. Ct. App. 1990) (denying restitution for health insurance benefits paid by mistake where recipient "could not have kept his daughter in treatment without [them] and . . . would have withdrawn her if he had had to pay the medical costs personally").

167. *E.g.*, Schwass v. Schwass, 467 N.E.2d 957, 959 (Ill. App. Ct. 1984) (Named beneficiary "had to pay various bills as a result of [decedent's] death."); Pernick v. Brandt, 506 N.W.2d 243, 244 (Mich. Ct. App. 1993) (reversed on other grounds) ("Defendant asserted that she had spent approximately $75,000 of the proceeds to pay for expenses associated with her husband's illness."); Augustine v. Szwed, 432 N.Y.S.2d 962, 966 (App. Div. 1980) (proceeds used for decedent's medical and burial

person against the loss of *future* income by the death of the insured, this is unsurprising. Designated beneficiaries, at least spouses and minor children, can be expected to preserve proceeds received on the death of a spouse or parent for the payment of future expenses.

c. Anticipatory Reliance

It is also possible for a person to rely on enrichment *before* he or she actually receives it. Thus, for example, parties to a contract often expend substantial amounts of property or time before receiving anything in return.[168] Such reliance is not unreasonable because the contract creates legally enforceable rights once all of its conditions are met.

In most cases, the beneficiary of a life insurance policy would be imprudent in the extreme to rely on receiving the proceeds. As long as the insured is alive and in good health, the beneficiary's interest in the policy is too speculative and indefinite to justify any reasonable reliance. The time of payment is unknown, rendering its present value uncertain. Further, it is commonly understood that life insurance policies can lapse or beneficiary designations can be freely changed, leaving the present beneficiary with nothing at all.[169]

Spouses and children often "anticipatorily rely" on each other when undertaking significant commitments, however. Life insurance has become a common and natural way for a family to indemnify itself against the financial consequences flowing from the loss of one of its members.[170] Thus, when a later spouse or family has relied unknowingly on life insurance coverage that is subject to a life insurance mandate, and therefore fails to secure additional

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expenses and to make gifts pursuant to his request).

The argument has also been made when the reliance occurred before the receipt of the proceeds, but after the death of the insured, when, in theory, the beneficiary's interest had vested. *E.g.*, Campbell v. Prudential Ins. Co. of Am., 137 N.E.2d 515, 518-19 (Ohio Ct. App. 1955) (sister of named beneficiary paid funeral expenses before payment but after verifying policy and name of beneficiary).

168. *E.g.*, Lake Gogebic Lumber Co. v. Burns, 49 N.W.2d 310, 313 (Mich. 1951) (Executor made commitments on the basis of a contract which proved to be the product of mutual mistake.).

169. This is essentially the point behind the "mere expectancy" description used by some courts when dealing with the rights of a beneficiary before the death of the insured. *See supra* note 11 and accompanying text.

170. For example, family members frequently assume substantial obligations, such as mortgages, with the expectation that either a spouse *or his or her life insurance* will pay the debt when and as due. Such reliance is reasonable and palpable, notwithstanding the fact that unforeseen circumstances (divorce or lapse of the policy) alter the outcome in a few cases.

insurance protection, that reliance is natural, expected, and should be weighed by a court of equity before imposing a constructive trust or other equitable remedy on the proceeds for the benefit of the insured's first spouse or children.[171]

In making a finding of anticipatory reliance, the knowledge of all parties, the insured and the named and mandated beneficiaries, is relevant to the conclusion. Obviously, if a named beneficiary knows that his or her designation violated a life insurance mandate, he or she cannot claim to have relied in good faith, a fact essential to establishing his or her entitlement to the proceeds. In many cases, the named beneficiary's primary source of information concerning his or her spouse's earlier divorce is that spouse (the insured). Thus, the insured's state of mind may be important in establishing the good faith of the named beneficiary. If the insured misunderstands the mandate, or is mistaken as to his or her obligations under it, the later spouse may share that misunderstanding or mistake. Even if the insured understands the mandate, and wilfully violates its terms, however, it must be determined whether his or her spouse was aware of, or shared in, that defalcation.

Generally there is little a mandated beneficiary can do that will jeopardize their right to receive the proceeds. Even where the divorce decree or agreement required submission of annual proof of coverage to the mandated beneficiary,[172] courts seem to have overlooked that beneficiary's failure to insist upon compliance with the requirement. In most cases that position seems correct: such requirements are for the protection of the mandated beneficiary, and no one else.[173] When balancing the equities between two

171. For a case in which this argument was clearly made, and apparently overlooked by the court, see Schwass v. Schwass, 467 N.E.2d 957, 959 (Ill. App. Ct. 1984) ("She points to the facts that she had no knowledge of the terms of the divorce, [and] that when she and Charles purchased a home securing a substantial mortgage she did not obtain additional insurance coverage because Charles told her she was the beneficiary on his life insurance policies . . . .").

172. Such requirements are sometimes found in divorce agreements. *E.g.*, Aetna Life Ins. Co. v. Hussey, 590 N.E.2d 724, 725 (Ohio 1992) (requiring "proof that the premiums on said policies are continuously paid and also proof that said child has been made the irrevocable beneficiary of said policies."); Prudential Ins. Co. v. Stoneburner, No. 88-CA-18, 1988 WL 74195, at *2 (Ohio Ct. App. July 14, 1988) (requiring "semi-annual evidence that said insurance is in effect, that Defendant has been named the beneficiary, and that the premium payments have been made."); *In re* Estate of Comiskey, 465 N.E.2d 653, 655 (Ill. App. Ct. 1984) (requiring provision of "duplicate premium notices and receipts").

173. The fact that the mandated beneficiary (*e.g.*, Travelers Ins. Co. v. Daniels, 667 F.2d 572, 574-75 (7th Cir. 1981)) or his or her parent (*e.g.*, Dixon v. Dixon, 184 So. 2d 478, 481 (Fla. Dist. Ct. App. 1966); Thiebault v. Thiebault, 421 N.W.2d 747, 748 (Minn. Ct. App. 1988)) did not attempt to assure compliance with the divorce

innocent spouses, however, the fact that the mandated beneficiary failed to avail himself or herself of such protection, and thus avoid the loss altogether, should be given weight.

VI. CONCLUSIONS

Life insurance mandates have become an important part of the legal framework of divorce. Life insurance serves a useful and appropriate purpose in American family life, and can continue to do so during and after a divorce. Courts and legislatures generally have come to the same conclusion, although sometimes by different rationales.

As the use of life insurance mandates in divorce cases increases, so will the incidence of disobedience. Courts can deal easily with such disobedience by the same means as used to address recalcitrance in other cases, contempt, unless the obligor is deceased. Then, the mandated beneficiary is left, in most cases, with only an equitable remedy, whether denominated a constructive trust, interpleader, or some other proceeding.

As in many equitable proceedings, the issues involved in proceedings under a life insurance mandate after the death of an obligor are intensely factual. The circumstances of the breach, the knowledge of the parties, real or imputed, and the effect on both the mandated beneficiary and the named beneficiary, all must be considered in determining whether to provide, and the extent of, a remedy.

In reported cases, courts have displayed little compassion for, or even understanding of, the insured's reasons for disobeying a life insurance mandate, and a surprising lack of sympathy for the disappointed spouse or family named as beneficiary in violation of the mandate.[174] Two

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agreement or decree is usually of no importance. In the case posited, however, vigilance on the part of the designated spouse would in most cases avoid the claim of reliance on the part of the named beneficiary, and should be taken into account in this limited circumstance.

174. Judicial attitudes are sometimes reflected in the words used to describe named beneficiaries. *E.g.*, Pensyl v. Moore, 415 So. 2d 771, 771 (Fla. Dist. Ct. App. 1982) ("girlfriend"); Torchia v. Torchia, 499 A.2d 581, 584 (Pa. Super. Ct. 1985) ("a mere volunteer"). *But see* Bentley v. New York Life Ins. Co., 488 N.W.2d 77, 78, 81 (S.D. 1992) ("intended spouse" to the majority who denied relief; "girlfriend" to the dissent who would grant it).

Cf. Metropolitan Life Ins. Co. v. Marcoulier, 322 F. Supp. 246,251 (E.D. Mo. 1971) ("The courts have no difficulty in finding decisions justifying fully their actions awarding the proceeds to the ones considered by the courts to be the deserving claimants. In any study of the cases involving changes in beneficiary we cannot, therefore, overlook the equities of the situation and particularly the relationship between the insured and the claimants. Abstract statements of the law, always

explanations suggest themselves. First, judges are assuring the welfare of the former spouses and children in a divorce, even at the risk of disadvantaging later spouses and their children.[175] Second, judges are offended by the insured's contempt, though death has placed her or him beyond the court's power to punish it.[176] Neither explanation is satisfactory, however, especially in light of equity's traditional concern for fairness.

In fact, the reasons for disobedience in many cases are probably less sinister than reported cases suggest. In an environment charged with emotion, such as a divorce case, ordinary people, even those with a high degree of social sophistication, neither fully understand the nuances and importance of life insurance mandates in decrees or agreements, nor contemplate the extent to which those mandates will impact on them in the future. What appears to a healthy person undergoing divorce as an accommodation on a minor matter, may assume much larger proportions after one's health has been threatened, or life changes have occurred, such as remarriage.

As long as the insured is healthy, additional insurance can be purchased. In some cases, it may also be possible to obtain relief from the mandate or to lower the amount required. Rather than follow one of these courses, some insureds feel compelled to, or simply choose to, change beneficiaries in violation of the mandate. It is among the most common of humankind's foibles to believe, hear, or read what is agreeable, and to overlook,

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dangerous, are especially dangerous here." (quoting Kelly v. Layton, 309 F.2d. 611, 613-14 (8th Cir. 1962)).

175. *See, e.g.*, Bentley v. New York Life Ins. Co., 488 N.W.2d 77, 81 (S.D. 1992) ("An old legal maxim is applicable here: You must be just before you are generous. Before father was generous to his girlfriend, he should have been just with his children.") (citation omitted); Crozier v. Equitable Life Assurance Soc'y of the U.S., 658 P.2d 39, 40 (Wash. Ct. App. 1983) (refusing to apply community property concepts to the ownership of a life insurance policy on the grounds that party was "encumbered" by order entered in previous divorce).

176. The most notorious example of such judicial pique is Cannata v. Cannata, No. 59965, 1992 WL 156570 (Conn. Super. Ct. June 24, 1992). The divorce judgment required decedent to maintain his daughter as the beneficiary on an insurance policy provided by his employer "until [her] eighteenth (18th) birthday." Thirteen days before that date, decedent filed a change of beneficiary form with his employer, naming his second wife as the primary beneficiary. *Id.* at *1. The decedent died about 21 months later. In imposing a constructive trust on the proceeds, the court explained: "[T]he decedent attempted to remove [his daughter] as a beneficiary of the CIGNA policy before she had attained the age of eighteen years. This constitutes a violation of the stipulation . . . ." *Id.* at *3.

For a properly reasoned decision under similar circumstances, see Whitten v. Whitten, 592 So. 2d 183, 186 (Ala. 1992) (refusing to impose a constructive trust "simply because the change in beneficiaries preceded the date of the child's majority.").

misconstrue, or ignore what is not. By giving in to this weakness, the insured may create a situation which will have an immense impact after his or her death: the impoverishment of one of his or her spouses and families.

Obviously, it would be helpful if divorce courts were more direct, clear and complete when framing or approving life insurance mandates. Many cases involving "interpretation" of a mandate would be avoided by better drafting and attention to details, including future changes such as replacement policies and increases in coverage. Careful drafting cannot eliminate completely the need for post-mortem remedies, however. It is inevitable that courts will hear and decide cases involving life insurance mandates.

These cases present an opportunity for courts to apply equity at its best. Whether the dispute arises before payment of the proceeds, as in interpleader, or afterwards, by way of constructive trust, a fair and just resolution requires the sort of pragmatic, individual judgment that has been, and is, the peculiar province of a chancellor. The task for the court is to balance the equities of the claimants, *and not* to determine the right of the mandated beneficiary against the insured. The decedent is not on trial; the dispute is between his or her hapless, and perhaps helpless, spouses and families. It is ironic that so many courts have resolved such cases on the basis of "vested interests," a method that is more consistent with law's mechanistic approach than equity's sensitivity to the individual merit.[177]

Finally, for cases in which a court must decide entitlement to life insurance proceeds post mortem, the suggestions are three:

First, the court should be true to the purposes of the mandate, and realistic about its scope, when granting a remedy. If the mandate appears reasonably to have been intended to assure payment of spousal or child support, it should be so limited in term and amount after the obligor's death, even if that intent must be drawn from the evident sense of the agreement, rather than from its language.

Second, the court should recognize that families commonly rely on life insurance to indemnify against the untimely loss of a spouse or parent. Indeed, in all contexts but divorce, that reliance is encouraged by common experience as well as by law. It is neither speculative nor foolish, imprudent nor unwise. In weighing the equities of the claimants to life insurance proceeds, therefore, reliance, including anticipatory reliance by second spouses and families, should be recognized fully.

177. The "vested interest" approach stands traditional equity on its head. Since by definition the mandated beneficiary has only an equitable claim and the named beneficiary has a legal claim, under classical equity principles, the latter should prevail unless and to the extent that the former can show higher equities. 2 POMEROY, *supra* note 140, § 416, at 166.

Third, courts should not hesitate to divide proceeds from a policy when it is equitable to do so. In many cases, such as when a life insurance mandate is intended as security for a support obligation or when intervening circumstances have caused policy increases, the amount required is less than the face amount of the mandated policy. The equities of the mandated beneficiary extend no farther than is reasonably necessary to accord her, him or them, the protection contemplated in the mandate. To grant a remedy encompassing more than is reasonably necessary for this purpose gives the mandated beneficiary a windfall at the expense of the named beneficiary.

VII. ILLUSTRATIVE CASES

Case 1:

A is required by a decree incorporating a separation agreement to make all premium payments on Acme Life policy #1234 when due, and to retain B, his former spouse, as beneficiary, and to furnish proof of payment annually to B.

Thereafter, A changes the beneficiary to C, a friend, although he continues to assure B that she is the beneficiary on the policy. After A's death C obtains payment of the policy proceeds.

This is a clear case of A perpetrating fraud on B, the mandated beneficiary. Although a change of beneficiary may not be fraudulent by itself, A's continuing misrepresentation of the beneficiary designation is made in order to mislead B and to prevent her from taking action to assert her rights under the mandate. Although C may be entirely blameless for the situation, her interest is attributable to A's fraud and, thus, is inferior to B's equitable interest. In an appropriate proceeding, a court should impose a constructive trust on the proceeds in C's hands for the benefit of B. The amount of the constructive trust may be limited, however, depending upon the purpose and intent of the mandate.

Case 2:

D is required by a decree to pay child support of $800 per month until her son, E, now 8, attains majority. The decree also requires that D obtain a $100,000 policy insuring her life, and name E as the beneficiary. D complies with the order.

Five years later, D changes the policy's declaration, naming her new spouse, F, as beneficiary. D dies unexpectedly after making the change.

> Faced with competing claims, the insurer files an interpleader action naming E and F as defendants.

Although the decree does not explicitly relate the life insurance mandate to the child support obligation, the fact that the face amount of the policy required approximates the amount of support to be paid over the next 10 years, suggests that it was intended to serve as "security" for such support.

D's change of beneficiary is a violation of the court's order, and a violation of E's equitable rights, although perhaps the result of misunderstanding or mistake rather than outright fraud. The question now is not D's rights, however, but the relative equities of E, whose rights are equitable and flow from the decree, and F, whose rights are legal and flow from D's act designating him as the beneficiary. Since F claims no special equities in the proceeds, E should prevail, but only up to the extent of his remaining equitable interest. Thus, E should receive a portion of the proceeds that approximately equals the child support for the remainder of D's obligation, and F should receive the balance as named beneficiary.

Case 3:

> J promises in a divorce agreement to name K, his spouse, as beneficiary of "all life insurance provided by [J's] employer." At the time, J's employer provides each employee with life insurance coverage of $35,000 free of charge.
>
> Later J's employer changes group carriers and increases the coverage available without cost to $40,000, and makes additional coverage of $20,000 available to employees who request it and paid for by payroll deductions. J takes the additional coverage, and names L, his new spouse, as the sole beneficiary on all $60,000 of life insurance. J dies shortly thereafter. Faced with competing claims, the insurer files an interpleader action naming K and L as defendants.

The divorce agreement creates "hybrid" rights in K to "all life insurance provided by [J's] employer." Since K's interest does not appear to be related to either spousal support or an equitable division of marital property, it will not diminish over time or with payment. The employer's substitution of one group insurer for another does not alter K's equitable rights. This is an archetypical "replacement policy."

The real issues are whether K's interest extends to increases in the basic coverage provided by the employer, or to the optional coverage of $20,000 purchased by J. The answers to these question turn on correctly applying the parties' agreement. Since the agreement refers to *all* life insurance provided by J's employer, it encompasses any policy meeting that description, rather

than being limited to the original amount. Thus, K's interest would extend to at least $40,000, the present amount provided by J's employer. The optional coverage of $20,000 should be paid to L, the named beneficiary, however, because it was separately obtained and paid for by K. The fact that J's employer was the instrumentality though which the purchase was made is irrelevant. It is not a policy *provided by* J's employer, and K could not have forced J to obtain such a policy under the mandate had he chosen not to elect the optional coverage.

Case 4:

> M is required by a divorce decree to name her daughter, N, as the beneficiary of any life insurance provided by her employer. At the time, N is 3 and M's employer provided life insurance of $20,000. M complies with the order by designating N as the beneficiary.
>
> Two year later, M takes a new position with an employer who does not make life insurance available to its employees. Ten years after that, M again changes jobs and receives life insurance coverage of $50,000 from her new employer. M names O, her current spouse, as the beneficiary on this policy, and then dies. The insurer pays $50,000 to O before N's guardian learns of M's death. N's guardian brings a proceeding to impose a constructive trust on the proceeds.

While the decree unquestionably gave N equitable rights in the original $20,000 policy, that policy lapsed more than ten years before the current policy was issued. A ten year hiatus between policies is too long to permit a factual or legal inference that the second policy is a "replacement" for the first. Thus, N is not entitled to any of the $50,000 proceeds.

Case 5:

> P is required by decree to obtain a $40,000 policy of life insurance as security for his obligation to pay child support for his son, Q. P fails to comply.
>
> Seven years later, while Q is still a minor receiving support from P, P obtains a new $50,000 naming his mother, R, as beneficiary. P dies unexpectedly.

In order for Q to obtain any equitable rights in any life insurance policy, either the mandate must identify a specific policy, or the obligor must identify the policy by fulfilling the mandate. Neither has occurred. While a short break between the order to obtain life insurance and the issuance of a policy

may not be fatal, a life insurance mandate is not a free-floating lien that secretly attaches to any or all policies insuring the obligor's life at any time in the future. Here the passage of time, and the naming of R as beneficiary, indicate that the policy was not obtained in compliance with the decree. Thus Q has no equitable rights to the proceeds.

Case 6:

> S is required by a decree incorporating a separation agreement to maintain Acme Life policy #5678 in the face amount of $100,000, and to retain T, his former spouse, as beneficiary.
>
> Thereafter, S marries U and names U as the beneficiary of the policy. Later S and U have a child, V, and purchase a home. After S's death, U obtains payment of the policy proceeds. T brings a proceeding seeking to declare U a constructive trustee.

The outcome of this case may require more factual development, and making difficult judgments. The decree clearly gives T an equitable interest in the proceeds. The nature and extent of that interest is not apparent, however. For example, if the agreement made provision for periodic notices which were neither given nor insisted upon, T's lack of diligence would affect her equities adversely.

As the named beneficiary, U has a legal interest in the proceeds, but the extent of her equities is unclear. Since life insurance is a normal and common means by which families secure their future against the premature demise of a wage-earner or caregiver, the fact that U has undertaken the substantial obligations of parenthood and home-ownership may demonstrate significant reliance on her part as named beneficiary. This fact may tip the balance in U's favor and against imposition of a constructive trust. On the other hand, if U knew of the mandate, she lacked good faith and a constructive trust should be imposed.