

DOUBLE TROUBLE – AN EX-SPOUSE’S LIFE INSURANCE BENEFICIARY STATUS & STATE AUTOMATIC REVOCATION UPON DIVORCE STATUTES: WHO GETS WHAT?

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This note analyzes the status of an ex-spouse’s designation as a life insurance beneficiary where the insured has failed to designate a new beneficiary following divorce. The note first discusses life insurance contracts in general, emphasizing that, much like other types of insurance contracts, life insurance contracts are governed by principles of contract law. In fact, it is this basis in contract law which has led most states to uphold the insurance contract and award policy proceeds to the ex-spouse in the event of a dispute over the beneficiary. The note then touches on the minority rule- divorce automatically terminates an ex-spouse’s beneficiary status- before analyzing the constitutionality of automatic revocation statutes within the framework of the Contract Clause. Next, the note discusses the property settlement exception and its application to both the majority and minority rules before concluding with the suggestion that courts employ a two-pronged philosophy in their adjudication of these beneficiary disputes whereby the focus is on executing the insured’s intent and the uniform application of the existing jurisdictional rule.

I. INTRODUCTION

Although the marriage rate in the United States has declined in past ten years,¹ the divorce rate has consistently hovered around fifty

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¹ *Census: U.S. Marriage Rate at a Record Low*, USA TODAY (Dec. 14, 2011, 5:18 PM), <http://usatoday30.usatoday.com/news/health/wellness/marriage/story/2011-12-14/Census-US-marriage-rate-at-a-record-low/51924344/1>.

percent.² Fifty percent of first marriages end in divorce, sixty seven percent of second marriages end in divorce and a staggering seventy four percent of third marriages in the United States fail.³ While many Americans are aware of rising wedding costs,⁴ they don't realize that divorce can cost just as much. The US divorce industry generates about \$28 billion a year, with the average cost of divorce estimated at about \$20,000.⁵ Although many couples take into account the high divorce rates before their wedding by signing a prenuptial agreement,⁶ few Americans realize that simply saying "I do" may give their soon-to-be ex-spouse a legal right to their life insurance policy's proceeds, regardless of a prenuptial agreement.

Another burgeoning industry in the United States is the life insurance industry. According to Prudential, life insurance is "one of the largest sources of capital in the nation, with \$4.5 trillion invested in the U.S. economy."⁷ In total, life insurance premiums alone accounted for 3.8% of U.S. GDP in 2009.⁸ Not only does the life insurance industry have a significant impact on the U.S. macro economy, but about "70% of U.S.

² DIVORCE RATE, <http://www.divorcerate.org/> (last visited Feb. 8, 2013).

³ *Id.* ("50% percent of first marriages, 67% of second and 74% of third marriages end in divorce, according to Jennifer Baker of the Forest Institute of Professional Psychology in Springfield, Missouri.")

⁴ The average cost of a wedding in the United States is \$25,631. COST OF WEDDING, <http://www.costofwedding.com/> (last visited Feb. 8, 2013).

⁵ Kevin McDonald, *The Cost of a Divorce*, BANKRATE (June 8, 2001), <http://www.bankrate.com/brm/news/advice/19990903a.asp> ("According to maritalstatus.com, a Web site geared toward divorce and remarriage, divorce is a \$28 billion-a-year industry with an average cost of about \$20,000.")

⁶ Claudia Buck, *More and More Couples Use Prenuptial Agreements*, ABC2NEWS, (Apr.18, 2011), http://www.abc2news.com/dpp/money/personal_finance/more-and-more-couples-use-prenuptial-agreements-wptv1303137646047#ixzz1eFgiHyN2 ("In a survey of American Academy of Matrimonial Lawyers released last September, 73 percent said they have seen an increase in 'prenups' during the past five years.")

⁷ *The Importance of Life Insurance Industry in the U.S.*, PRUDENTIAL LIFE INS., http://research.prudential.com/media/managed/documents/research_perspective/Importance_of_Life_Insurance_Industry.pdf (last visited Feb. 8, 2013) (citing AM. COUNCIL OF LIFE INS., *Life Insurers Protecting Families, Building America*, available at http://www.acli.com/Tools/Industry%20Facts/Documents/Protecting_Families.pdf).

⁸ *Id.* (citing LIMRA, ANALYSIS OF BUREAU OF ECONOMIC ANALYSIS AND SNL FINANCIAL LLC DATA (2010)).

households depend on life insurance industry products to protect their financial and retirement security.”⁹ Americans rely on the \$59 billion in yearly death benefits paid out by life insurance companies to provide for their families in the event of their death.¹⁰

As unpleasant as dealing with the possibility of divorce may be when drafting a prenuptial agreement, addressing what becomes of life insurance proceeds in the event a deceased spouse forgets to change the beneficiary status of his life insurance policy after a divorce is a tougher issue to tackle. Because a life insurance policy constitutes a separate contract between the insured policyholder and the insurance company, life insurance is a nonprobate asset that does not get settled through the probate system when the insured dies. The high divorce rates in the United States, in conjunction with the growing use of life insurance policies for financial protection for family and inheritance money,¹¹ create a growing number of issues when insureds do not change the beneficiary status of an ex-spouse after a divorce. Conflict arises between the insured’s intent to change his ex-spouse’s beneficiary status and the insurance company’s duty to uphold the letter of the life insurance contract by paying the contract proceeds to the insured’s designated beneficiary.

Many divorcing Americans struggle when dividing assets, spending vast amounts of time and money on attorneys to strike an equal balance. This note explores the effect of divorce on a beneficiary spouse’s right to life insurance proceeds, focusing on the impact of state enacted

⁹ While 70% of Americans rely on insurance policies and products to protect their financial and retirement security, a little under half of U.S. households own individual life insurance policies. *Id.* (citing Eric Soundergeld, LIMRA, THE FACTS OF LIFE AND ANNUITIES (Sept. 2010)).

¹⁰ *Id.* (citing AM. COUNCIL OF LIFE INS., *Life Insurers Protecting Families, Building America*, available at http://www.acli.com/Tools/Industry%20Facts/Documents/Protecting_Families.pdf) (“Over \$59 billion in death benefits and \$67 billion in annuity benefits paid in 2009.”).

¹¹ The main reasons to purchase life insurance are to: replace income for dependents, pay final expenses, create an inheritance for heirs, pay federal and state “death” taxes, make significant charitable contributions, and create a source of savings. *Life Insurance Basics*, INSURANCE INFORMATION INSTITUTE, <http://www2.iii.org/insurance-handbook/insurance-basics/life-insurance-basics.html> (last visited Mar. 1, 2013); *Results of Poll of Reasons People Purchase Life Insurance Announced*, YAHOO! NEWS, <http://news.yahoo.com/results-poll-reasons-people-purchase-life-insurance-announced-210221574.html> (Nov. 16, 2011).

automatic revocation statutes. Typically, divorce alone does not affect the designated soon to be ex-spouse's right to proceeds. Absent a change in beneficiary designation, many courts will award a policy's proceeds to the former spouse over the claim of a current spouse, or other purported beneficiary.¹² However, some states have enacted legislation to automatically revoke a spouse as beneficiary to a life insurance policy that is owned by the other spouse upon divorce.¹³ Whether courts have protected an ex-spouse's status as a life insurance beneficiary, issues arise when the divorce agreement did not discuss the policy, and additional issues arise in states that have enacted legislation to automatically revoke a now ex-spouse's status as a beneficiary, but the policyholder purchased his policy before the legislation was enacted.

Some states have statutory provisions that attempt to provide that a divorce revokes the former spouse's beneficiary status except as otherwise specified by court order.¹⁴ Some courts have found these statutes unconstitutional because the beneficiary's status stems from the insurance *contract*, and the legislature cannot abrogate this part of the insurance contract upon divorce.¹⁵ Even when the relevant state has such a statute, it may not apply if the plan has contrary provisions, such as a provision that a divorce or anything other than the plan's beneficiary designation form has no effect upon the beneficiary designation.

This note examines the policies behind whether or not to adopt an automatic revocation statute for life insurance beneficiary designations upon divorce, and recent developments by state supreme courts or legislatures discussing the adoption of automatic revocation statutes or the property settlement agreement exception. Additionally, this note touches upon recent court rulings on the constitutionality of such laws, specifically in the context of the Contract Clause.¹⁶ I argue that all jurisdictions, in keeping with the goal of upholding the insured's intent in forming the insurance contract, should adopt the property settlement agreement exception as a means to opt-out of the existing jurisdictional rule.

¹² See *infra* Part III; see, e.g., *Life Ins. Co. of N. Am. v. Ortiz*, 535 F.3d 990 (9th Cir. 2008).

¹³ See *infra* Part IV; see, e.g., *Lincoln Benefit Life Co. v. Heitz*, 468 F. Supp. 2d 1062 (D. Minn. 2007).

¹⁴ See *infra* Part VI.

¹⁵ See *infra* Part V.

¹⁶ U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

Additionally, courts and legislatures should aim to uniformly apply the existing jurisdictional rule in conjunction with the property settlement agreement opt-out in order to reduce both the number of legal challenges and the amount of time for intended beneficiaries to receive this nonprobate transfer of wealth.

This note does not address federal preemption issues that have arisen with pension plans and life insurance in the context of the *Employee Retirement Income Security Act* of 1974 [hereinafter ERISA].¹⁷ Rather, this note focuses solely on privately purchased life insurance policies.

Part II of this note discusses the nature of the life insurance contract. Part III explains the policy reasons behind the traditional majority rule while Part IV addresses the modern trend of automatic revocation statutes, currently considered the minority rule in this area of law. Parts V and VI describe the recent Contracts Clause issue in jurisdictions that have passed automatic revocation statutes and the arguments for and against the constitutionality of these pieces of legislation. Part VII explains the recent property settlement agreement exception that proposes a way to opt-out of existing jurisdictional rules. In part VIII, I submit what courts or legislatures can do to provide clarity in this area of law in light of the purpose of life insurance and goal of executing the insured's intent.

II. THE LIFE INSURANCE CONTRACT

In a life insurance policy, the insured “enters[s] into a contract with an insurance company that promises to provide [the insured’s] beneficiaries with a certain amount of money upon [the insured’s] death. In return, [the insured] make[s] periodic payments, called *premiums*. The premium amount is based on factors such as [the insured’s] age, gender, medical history, and the dollar amount of life insurance . . . purchase[d]. In the event of [the insured’s] passing, life insurance provides money directly

¹⁷ The Employee Retirement Income Security Act of 1974 regulates employee pension benefit plans. 29 U.S.C. § 1002(2)(A) (2006) (originally enacted as Pub. L. No. 93-406, 88 Stat. 829). The Supreme Court recently addressed the issue of whether ERISA’s qualified domestic relations order is the only valid way a divorcing spouse can waive her right to receive her ex-spouse’s pension benefits under ERISA. *Kennedy v. Plan Adm’r for DuPont Sav. And Inv. Plan*, 555 U.S. 285 (2009).

to [his] beneficiaries.”¹⁸ Unlike other assets that transfer at the time of death, typically through the lengthy probate process, life insurance is “usually transferred directly to the named beneficiaries.”¹⁹

Life insurance policies, along with the majority of insurance contracts, are governed by the principles of contract law.²⁰ In order to acquire a life insurance policy, one must have an “insurable interest”²¹ in the life of the insured.²² Because each person holds an insurable interest in his own life, the insured who takes out a life insurance policy on his own life is generally free to designate the beneficiary of his choosing.²³ In the past, insurance companies had limited an individual’s ability to take out a life insurance policy on his spouse’s life. Insurance companies required individuals to establish an insurable interest by demonstrating an economic dependence on the spouse in order to successfully issue a life insurance policy.²⁴ The modern rule²⁵, established from a combination of case law and state statutes, holds that “husbands and wives can insure each other’s

¹⁸ *Life Insurance: An Introduction*, METLIFE, <http://www.metlife.com/individual/life-advice/personal-insurance/life-insurance-policies/index.html> (last visited Feb. 19, 2013) (alteration in original).

¹⁹ Sandra Block, *Divorce Doesn’t Mean Your Ex is No Longer Your Beneficiary*, USA TODAY (Sept. 7, 2004, 9:40 PM), http://usatoday30.usatoday.com/money/perfi/columnist/block/2004-09-06-block_x.htm (“By the time most estates cleared probate, the beneficiaries may already have received the money . . .”).

²⁰ See also 16 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 49:14 (4th ed. 1993).

²¹ *Insurable Interest*, INSURANCE INFORMATION INSTITUTE, <http://www2.iii.org/index.cfm?instanceID=268> (last visited Feb. 19, 2013) (“[A] person exhibits an insurable interest in a potential loss if that person will suffer a genuine economic loss if the event insured against occurs. Without the presence of insurable interest, an insurance contract is not formed for a lawful purpose and, thus, is not a valid contract.”).

²² BERTRAM HARNETT & IRVING I. LESNICK, THE LAW OF LIFE AND HEALTH INSURANCE §2.04[1] (Matthew Bender, Rev. Ed. 2011) [hereinafter LIFE AND HEALTH INSURANCE].

²³ *Id.* (noting that the majority of states currently hold that a beneficiary does not need to have an insurable interest on the insured’s life); see also Block, *supra* note 19 (noting that many Americans have various accounts and policies with beneficiaries, ranging from individual or employer-provided retirement accounts to variable annuities and insurance policies).

²⁴ LIFE AND HEALTH INSURANCE, *supra* note 22 at §2.04[1][a].

²⁵ See *infra* Part IV.

lives, regardless of their actual economic relationship.”²⁶ A looser rule as to who has the requisite insurable interest to acquire life insurance applies in most other states. These states loosely define insurance interest as “in the case of persons closely related by blood or by law, a substantial interest engendered by love and affection.”²⁷

Once the insured designates a beneficiary of his life insurance policy, the rights of the beneficiary “can only be terminated by an affirmative act to modify or terminate the insurance contract in some way or by creating a separate agreement which overrides the beneficiary designation in the life insurance contract.”²⁸ When the insured dies, the terms of the insurance contract dictate that the insurance company will pay the policy’s proceeds to the insured’s designated beneficiary.²⁹

An ex-spouse named as a beneficiary to the insured’s life insurance contract would not meet the traditional test for having an insurable interest. However, the “insurable interest requirement, if applicable at all, applies as of the time the life insurance coverage is *initiated*.”³⁰ Therefore, a divorce that occurred long after the insured designated his then-spouse as beneficiary to his life insurance policy has no effect on the insurable interest.³¹ The beneficiary’s claim to insurance proceeds does not stem from her spousal status but rather stems from the terms of the insurance policy issued when she had an insurable interest on her ex-spouse.³²

²⁶ LIFE AND HEALTH INSURANCE, *supra* note 22, at §2.05[1][b] (alteration in original) (“Missouri and Arkansas have explicit statutes specific statutes reciting the insurable interest a wife has in her husband, while Ohio . . . recogniz[es] the insurable interest one spouse has in the other spouse’s life.”); *see* ARK. CODE ANN. § 23-79-108; OHIO REV. CODE ANN. § 3911.11 (West 1986); MO. REV. STAT. § 376.530 (1985), *repealed by* L.2007, S.B. No. 613 Revision, § A.

²⁷ LIFE AND HEALTH INSURANCE, *supra* note 22 at §2.05[1][b] (internal quotation marks omitted).

²⁸ Domenico Zaino, Jr., *The Practical Effect of Extending Revocation By Divorce Statutes to Life Insurance*, 2 CONN. INS. L.J. 213, 217 (1996) (citing 44 AM. JUR. 2D, *Insurance*, §§ 1714, 1750-51 (1982 & Supp. 1995)).

²⁹ *See* HARRY P. KAMEN & WILLIAM J. TOPPETA, *THE LIFE INSURANCE LAW OF NEW YORK* 215 (1989).

³⁰ LIFE AND HEALTH INSURANCE, *supra* note 22 at §2.05[1][e][i] (emphasis added).

³¹ *See also Id.*

³² *See* 29-180 ERIC MILLS HOLMES & MARK S. RHODES, *APPLEMAN ON INSURANCE* § 180.11[A][1] (2d ed. 1996) [hereinafter *APPLEMAN ON INSURANCE*].

Given that courts must enforce the terms of a private life insurance policy, including beneficiary designation,³³ issues of the insured's intent to disburse funds to the designated beneficiary typically arise when the insured either forgets to affirmatively change his ex-spouse as the beneficiary of his life insurance policy after a divorce or neglects to clearly address, or address at all, an existing life insurance policy in a property settlement agreement or divorce decree.

Although the simplest opportunity to prevent this issue from occurring exists during divorce proceedings, by informing the insured of the nature of state case law regarding an ex-spouse's beneficiary status, the issue is commonly overlooked.³⁴ Since life insurance benefits are paid after the insured policyholder has died and can no longer state who he desires as his intended beneficiary, thus causing this issue, it remains more important for clear case law to exist regarding this matter when proactive legal counseling cannot help.

³³ See *Ping v. Denton*, 562 S.W.2d 314, 316 (Ky. 1978) ("A policy of insurance is nothing more nor less than a contract wherein an insurance company, for valuable consideration, agrees to pay a sum of money on a specified contingency to a designated person called a beneficiary."); *Shaffer v. Winhealth Partners*, 261 P.3d 708, 711 (Wyo. 2011) ("An insurance policy constitutes a contract between insurer and insureds."); APPLEMAN ON INSURANCE, *supra* note 32, at §180.11(A)(1).

³⁴ *But see* Lauren J. Wolven and Ashley Crettol, *Life Insurance Litigation Post-Divorce: Easy to Avoid, Commonly Neglected*, HORWOOD MARCUS & BERK (Aug. 2, 2010), [http://hmbllaw.com/publications/life-insurance-](http://hmbllaw.com/publications/life-insurance-litigation-post-divorce-easy-to-avoid-commonly-neglected.aspx)

[litigation-post-divorce-easy-to-avoid-commonly-neglected.aspx](http://hmbllaw.com/publications/life-insurance-litigation-post-divorce-easy-to-avoid-commonly-neglected.aspx) ("[O]ne essential step in addressing the issue is to include specific language in a prenuptial agreement or in the divorce decree indicating that any beneficiary designations (excluding ERISA) will be deemed revoked with respect to that spouse. Such provisions should also include a requirement that the spouses cooperate with any subsequent paperwork necessary to perfect the waiver. Ideally, the provision should also reference the specific policy numbers, so as to avoid any claims that the waiver is broadly worded."). This approach works in most, but not all states, as the majority of states have adopted the property settlement agreement exception providing that specific language clearly delineating the insured's intended beneficiary in either the prenuptial agreement or divorce decree adequately delineates the insured's intended policy beneficiary.

III. MAJORITY RULE: DIVORCE DOES NOT AFFECT AN EX-SPOUSE'S BENEFICIARY STATUS

States applying the majority rule, which upholds the terms of the insurance contract, do not change the ex-spouse's beneficiary status even after divorce, if the ex-spouse is still listed as the beneficiary.³⁵ These states hold that divorce per se does not affect a designated ex-spouse's right to receive life insurance proceeds. Here, proceeds from life insurance policies "are deemed payable to the named beneficiary as a matter of law irrespective of a subsequent divorce between the insured and the beneficiary."³⁶

These courts hold that unless the terms of the insurance policy specifically dictate that the spouse's beneficiary status is conditioned on the continuation of the marriage, divorce does not per se affect or defeat any of the vested rights of the ex-spouse as designated beneficiary.³⁷ Some states that apply the majority rule allow for the property settlement agreement exception, but only allow the exception to the extent that the

³⁵ Jurisdictions that follow this rule include: Arkansas, District of Columbia, Alabama, Illinois, Indiana, Iowa, Kansas, Massachusetts, Montana, New Hampshire, New Mexico, North Carolina, South Carolina, and Wisconsin. *See, e.g.,* MFA Life Ins. Co. v. Kyle, 630 F.2d 322, 323 (6th Cir. 1980) (applying Arkansas law); Estate of Bowden v. Aldridge, 595 A.2d 396, 397-98 (D.C. 1991); Rountree v. Frazee, 209 So. 2d 424, 426 (Ala. 1968); Allen v. Allen, 589 N.E.2d 1133, 1137 (Ill. App. Ct. 1992); Hancock v. Ky. Cent. Life Ins. Co., 527 N.E.2d 720, 723 (Ind. Ct. App. 1988); Sorensen v. Nelson, 342 N.W.2d 477, 479 (Iowa 1984); Cincinnati Life Ins. Co. v. Palmer, 94 P.3d 729, 733 (Kan. Ct. App. 2004); Stiles v. Stiles, 487 N.E.2d 874, 875 (Mass. App. Ct. 1986); Eschler v. Eschler, 849 P.2d 196, 201 (Mont. 1993); Dubois v. Smith, 599 A.2d 493, 497 (N.H. 1991); Harris v. Harris, 493 P.2d 407, 409 (N.M. 1972); Daughtry v. McLamb, 512 S.E.2d 91, 92 (N.C. Ct. App. 1999); Estate of Revis v. Revis, 484 S.E.2d 112, 116 (S.C. Ct. App. 1997); Bersch v. Van Kleeck, 334 N.W.2d 114, 116 (Wis. 1983).

³⁶ Zaino, *supra* note 28 at 217; *see also* HARRY P. KAMEN & WILLIAM J. TOPPETA, THE LIFE INSURANCE LAW OF NEW YORK 215 (1989) ("By contract, policy proceeds are payable to the named beneficiaries, and several beneficiaries may be designated for specified shares.").

³⁷ *See Cincinnati Life Ins. Co.*, 94 P.3d at 733; *see also* Hollaway v. Selvidge, 548 P.2d 835, 838 (Kan. 1976); *Stiles*, 487 N.E.2d at 875 n. 3; *Bersch*, 334 N.W.2d at 116.

court order clearly addresses the beneficiary status designation.³⁸ If this exception does not apply in states that adopted the majority rule that allow for the property settlement agreement exception, the designated beneficiary remains the beneficiary even though he is now an ex-spouse.

In an often-cited Kentucky case supporting the majority rule, *Ping v. Denton*, the court summarized the rationale behind the application of the majority rule in light of the state's revocation of a statute providing for automatic termination of an ex-spouse's designation as a life insurance beneficiary upon divorce.³⁹ In *Ping v. Denton*, the administratrix of the insured's estate brought an action against the insured's former wife to recover the life insurance proceeds that the insurance company had previously paid to the ex-spouse, who had remained the beneficiary of the policy after the couple legally dissolved their marriage.⁴⁰ As Kentucky had repealed its automatic revocation statute, the divorce did not necessarily terminate the ex-wife's interest as a beneficiary of the policy.⁴¹ Instead, the insured:

[A]lone determined to make [his ex-spouse] the beneficiary at a time [before] they were married. This he had a right to do. [The insured] alone determined to retain [his ex-spouse] as the beneficiary during the period of their marriage. This he had a right to do. [The insured] alone determined not to take from [his ex-spouse] the interest of a beneficiary. This he had a right to do. [The insured] alone owned and controlled the policy and the right to change the beneficiary if he chose to do so. Not having changed the beneficiary at the time of his death, [his ex-spouse] was entitled to receive the proceeds from the policy of insurance.⁴²

Here, the court was wary of re-interpreting the deceased's intent in not changing his life insurance beneficiary after his divorce, placing

³⁸ See, e.g., *Cincinnati Life Ins.*, 94 P.3d at 733. For a discussion of the property settlement exception, see *infra* Part VII.

³⁹ *Ping*, 562 S.W.2d at 316.

⁴⁰ *Id.* at 314.

⁴¹ *Id.* at 317.

⁴² *Id.* (alteration in original) (citations omitted).

priority on executing the insured's formal intent evidenced by the text of his life insurance policy.⁴³

Courts and legislatures that have adopted the majority rule in honoring the insurance contract have given three main reasons for doing so. Courts and legislatures adopting the majority rule are fearful about the potential for the court guessing about the insured's intent when interpreting the insurance contract.⁴⁴ Because the problem with deciphering whether or not the insured intended to leave an ex-spouse as a beneficiary of a life insurance policy always arises after the insured died, courts cannot simply ask the insured to make his intent clear. The courts must consider whether the insured's failure to make a formal beneficiary change when the beneficiary has relinquished or been divested of the right to continue in such status still then indicates that the insured intends his ex-spouse to receive the proceeds anyways. In order to minimize the amount of guesswork done by courts in sorting out this issue, jurisdictions adopting the majority rule note that an insured's failure to formally change his ex-spouse's status as life insurance beneficiary after their divorce is evidence in and of itself of the insured's intent for his ex-spouse to remain the policy's beneficiary, despite the absence of any legal requirement in connection with their divorce.⁴⁵ Simply put, the insured could have changed the policy's beneficiary had he wished to do so, so the courts should not actively interfere with an insurance contract, especially when the insured is no longer able to make his intent clear. Courts and legislatures that have adopted the majority rule also note that the insured who wished to have his ex-spouse retain her beneficiary status should not needlessly have to go through the exercise of re-designating his ex-spouse as the beneficiary with an automatic revocation statute.⁴⁶ These courts hold that simply retaining an ex-spouse as the legal beneficiary of the policy establishes clear evidence of the insured's intent.

A second reason courts adopt the majority rule is to preclude the insurer from being held liable for dispensing the policy's proceeds, which, as a non-probate asset, are quickly disbursed after the policyholder's death,

⁴³ *See id.*

⁴⁴ *See* LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][i][A].

⁴⁵ *See id.* Some divorce decrees include provisions requiring an ex-spouse to maintain life insurance as a part of child support or alimony. *Divorce*, AXA EQUITABLE, <http://www.axa-equitable.com/plan/divorce/overview.html> (last visited Jan. 8, 2012).

⁴⁶ *See* APPLEMAN ON INSURANCE, *supra* note 32, at §180.11(A)(1).

to the wrong beneficiary.⁴⁷ When issues of the insured's intent in change of beneficiary arise, the insurance company can be sued from either the primary or contingent beneficiary for incorrectly dispensing the funds.⁴⁸

Most recently, majority rule jurisdiction Kansas amended its statute that provided that a divorce decree must provide for changes in beneficiary designation.⁴⁹ In *Cincinnati Life Ins. Co. v. Palmer*, a life insurer filed an interpleader action to resolve competing claims by the insured's ex-spouse, the primary beneficiary and mother, the contingent beneficiary.⁵⁰ In considering the statutory amendment Kan. Stat. Ann. §60-1610(b), which is presently codified at §23-2802, the court addressed whether the statute imposed a requirement that a "beneficiary change be filed with the insurer in order to make an express provision in a divorce decree effective, or whether this provision is intended for the protection of the insurer that might be unaware of the decree."⁵¹ The court held that the divorce decree did not affect the designation of a non-spouse as the new beneficiary of the policy because the decree didn't contain an express change of beneficiary provision, which the court ruled was necessary under the statute for a decree to effect the designation.⁵²

The third policy reason for upholding the insurance contract derives from life insurance categorization as a non-probate asset, so courts should not play an active role in its disbursement, and considering that life insurance is a contract between two private parties, courts are bound to

⁴⁷ In times where the insurance company swiftly anticipates a lawsuit from a non-designated beneficiary, the insurance company must interplead all parties involved to preclude its own liability for the wrongful disbursement of insurance proceeds. *See, e.g., Cincinnati Life Ins. Co. v. Palmer*, 94 P.3d 729 (Ky. Ct. App. 2004).

⁴⁸ *See id.* at 731.

⁴⁹ KAN. STAT. ANN. § 23-2802(d) (2011) (previously codified as 60-1610(b) ("nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of the policy."); *see also* LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][i][A].

⁵⁰ *Cincinnati Life Ins.*, 94 P.3d at 729.

⁵¹ LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][i][A]; *see also Cincinnati Life Ins.*, 94 P.3d at 729.

⁵² *Cincinnati Life Ins.*, 94 P.3d at 733.

follow the policy terms and apply contract law principles when disputes arise.⁵³

The majority rule is not without its flaws. It does not take into account the intricacies of ex-spousal personal relations in deciding what the insured's intent was. Instead, the courts seem more concerned to minimize potential insurer liability by executing the formal beneficiary designation from the life insurance policy to allow for the quick disbursement of the policy's proceeds without such an event causing the insurer to be open to litigation.

IV. MINORITY RULE – DIVORCE AUTOMATICALLY REVOKES EX-SPOUSE'S BENEFICIARY STATUS

Other states have adopted, either through legislation or judicial mandate, the minority rule, whereby a final divorce automatically revokes the status of the designated spouse as a beneficiary and terminates their right to the life insurance proceeds of their former spouse.⁵⁴ States that have adopted the minority rule include Michigan, Colorado, Minnesota, Missouri, Ohio, Arizona, Oklahoma, and Texas.⁵⁵ Many, but not all, of these states have based their revocation statute on the 1990 revisions of the Uniform Probate Code [hereinafter "UPC"] that reflect "the rapidly increasing use of will substitutes, the evolution of domestic relationships,

⁵³ See KAMEN & TOPPETA, *supra* note 29. The ex-spouse's claim is not derived from status of the relationship, but rather from the terms of the policy. APPLEMAN ON INSURANCE, *supra* note 32, at §180.11(A)(1).

⁵⁴ See *Lincoln Benefit Life Co. v. Heitz*, 468 F. Supp. 2d 1062, 1066 (D. Minn. 2007); NEW APPLEMAN INS. LAW PRACTICE GUIDE §34.31 (Jeffrey E. Thomas et al. eds. 2013).

⁵⁵ See, e.g., ARIZ. REV. STAT. ANN. § 14-2804 (1956); MINN. STAT. § 524.2-804 (2012); MO. REV. STAT. § 461.051.2 (2007); OHIO REV. CODE ANN. § 5815.33 (2012) (previously codified as § 1339.63); OKLA. STAT. tit. 15, § 178 (1993); TEX. FAM. CODE ANN. § 9.301(a) (2006) (previously codified as § 3.632(b)); WASH. REV. CODE 11-07-010 (2012).

and the decline of formalism in private law.”⁵⁶ Specifically, the statutes are based on section 2-804 of the 1990 UPC.⁵⁷

The Michigan legislature adopted a revocation statute⁵⁸ in 1939 that terminated the designated spouse’s “right to proceeds or interest in the policy upon divorce, unless the decree provides otherwise or unless the insured spouse takes some action to see that the ex-spouse is again designated.”⁵⁹ Michigan courts have utilized the statute to “foreclose a designated wife’s interest where she claimed to have interest in two life insurance policies on her ex-husband’s life by reason of a contractual arrangement with him.”⁶⁰ Because “the divorce decree did not mention the policies . . . the court held that the statute terminated her rights in them.”⁶¹

In Colorado, the legislature superseded existing case law supporting the majority rule that divorce did not abrogate an ex-spouse’s beneficiary status by enacting essentially a divorce revocation statute.⁶² The Colorado legislature adopted language almost identical to the UPC 2-804 in its divorce revocation statute. The legislation allows for an exception to the automatic revocation of an ex-spouse’s beneficiary status if the insured inserts an express provision allowing for the ex-spouse to retain her beneficiary status in a property settlement agreement.⁶³ Unlike states adopting the majority rule, the Colorado legislature believed the insured more likely did not intend to have an ex-spouse remain a beneficiary and that his failure to make a formal change to the policy’s beneficiary merely constituted an oversight.⁶⁴

Minnesota’s divorce revocation statute provides that that dissolution of marriage revokes any designation as beneficiary of a spouse

⁵⁶ Suzanne Soliman, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 STETSON L. REV. 397, 402 (2007); *see, e.g.*, ARIZ. REV. STAT. ANN. § 14-2804 (1956); COLO. REV. STAT. § 15-11-804 (2012); UTAH CODE ANN. § 75-2-804 (1998); WASH. REV. CODE § 11.07.010 (2012); WISC. STAT. ANN. § 854.15(3)(a) (2002).

⁵⁷ UNIF. PROB. CODE § 2-804 (amended 2010).

⁵⁸ MICH. COMP. LAWS § 552.101 (2007).

⁵⁹ LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][i][C].

⁶⁰ *Id.* (citing *Northeastern Life Ins. Co. of N.Y. v. Cisneros*, 392 F.2d 198 (6th Cir. 1968) (applying Michigan law)).

⁶¹ *Id.*

⁶² COLO. REV. STAT. § 15-11-804(2)(a) (2012) (overruling *Christensen v. Sabad*, 773 P.2d 538 (Colo. 1989)).

⁶³ COLO. REV. STAT. § 15-11-804(2)(a).

⁶⁴ *See Soliman, supra* note 57, at 403-04.

in a life insurance policy, except as otherwise provided by a “governing instrument, . . . a court order, a contract relating to the division of the marital property . . . , or a plan document governing a qualified or nonqualified retirement plan.”⁶⁵ The statute permits the insured to change his beneficiary upon the dissolution of marriage, as long as the change remains in line with any conditions imposed by the divorce proceedings and provisions (such as a property settlement agreement) per Minn. Stat. Ann. § 61A.12(4). In Minnesota, like in many other states that have enacted such divorce revocation statutes, people have brought suits arguing the statute violated the Contract Clause.⁶⁶ In 2007, a federal district court held that the Minnesota statute, if applied to revoke a beneficiary designation that preexisted its effective date, was not an impairment of contract so as to violate the United States Constitution.⁶⁷ Alternatively, in 2008 another federal district court in Minnesota held that the retroactive application of Minnesota’s automatic revocation statute as applied violated the Contract Clause.⁶⁸

Under Missouri law, the dissolution of marriage after a life insurance policy owner’s designation of the spouse or of a relative of the spouse as the beneficiary revokes the beneficiary’s designation.⁶⁹ In 2001, however, Missouri enacted legislation providing that the divorce revocation statute does not apply “to transfers pursuant to life or accidental death products sold by insurance companies unless the statute is

⁶⁵ MINN. STAT. § 524.2-804 (2012).

⁶⁶ See *infra* Parts V-VI.

⁶⁷ *Lincoln Ben. Life Co. v. Heitz*, 468 F. Supp. 2d 1062, 1067 (D. Minn. 2007) (holding no Contract Clause issue existed because an ex-spouse’s beneficiary designation prior to divorce did not create a vested contractual right in the ex-spouse sufficient to allege a Contract Clause challenge).

⁶⁸ *MONY Life Insurance Co. v. Ericson*, 533 F. Supp. 2d 921, 923-24 (D. Minn. 2008) (noting the Contract Clause issue exhibits the heightened level of uncertainty in this area of law. In addition to the jurisdictional split in between majority and minority rule, a split of authority exists in minority jurisdictions that have retroactively applied divorce revocation statutes).

⁶⁹ MO. ANN. STAT. § 461.051.1 (1989); see, e.g., *Gillespie v. Estate of McPherson*, 159 S.W.3d 466, 471 (Mo. Ct. App. 2005) (holding that divorce revoked the designation of an insured’s second wife as beneficiary of life insurance policy and no existing exceptions to the revocation statute applied, so second wife was not entitled to policy’s proceeds).

incorporated into the policy or beneficiary designation.”⁷⁰ However unlike in Minnesota where the federal district court rejected a Contract Clause challenge to a retroactively applied provision affecting an insurance contract, this legislation amending the original divorce revocation statute could not be applied retroactively.⁷¹ The court explained that Mo. Rev. Stat. §461.051’s automatic revocation on dissolution provision, governing the effect that a dissolution of marriage had on nonprobate transfers to former spouses, did not apply to the decedent’s and former wife’s divorce, because at the time of the dissolution, Mo. Rev. Stat. §461.073, which controlled the scope and application of the nonprobate transfers law, stated that §461.051 “did not apply to property, money, or benefits paid or transferred at death pursuant to a life or accidental death insurance policy, annuity, contract, plan, or other product sold or administered by a life insurance company.”⁷² Therefore, the court held that the decedent’s designation of his former wife as the beneficiary of his life insurance policy was valid at the time of his death.⁷³

The Ohio legislature invoked its divorce revocation statute in 1990. The legislative text revokes an ex-spouse’s beneficiary status upon divorce. However, unlike other legislative enactments based on UPC section 2-804, the Ohio statute is located in Ohio’s Revenue Code and specifically mentions life insurance designations. Ohio’s divorce revocation statute is located in its commercial code and contains language specific to nonprobate assets such as life insurance.⁷⁴ This Ohio Revenue Code provision provides that divorce automatically revokes the ex-spouse’s beneficiary status for policies owned by the insured spouse,⁷⁵ unless a divorce decree or judgment granting the divorce specifically

⁷⁰ LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][i][C] (citing MO. REV. STAT. § 461.073.6 (1995) (as amended by 2001 H.B. 644 and 2001 S.B. 227)). Exceptions included irrevocable beneficiary designations, designations made after the dissolution, designations that expressly stated that it shall not be affected by a future dissolution. MO. REV. STAT. § 461.051.2.

⁷¹ *United Investors Life v. Wilson*, 191 S.W.3d 76, 77 (Mo. Ct. App. 2006).

⁷² *Id.* at 78 (citing MO. REV. STAT. § 461.051).

⁷³ *Id.* at 79.

⁷⁴ OHIO REV. CODE ANN. § 1339.63 (West 1990).

⁷⁵ For the purpose of the insurance contract, “[ex-]spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made. *Id.* (alteration in original).

provides otherwise.⁷⁶ Also included in Ohio's divorce revocation statute is a provision addressing the insurer liability issue which provides:

[a]n agent, bank, broker, custodian, issuer, life insurance company, plan administrator, savings and loan association, transfer agent, trustee, or other person is not liable in damages or otherwise in a civil or criminal action or proceeding for distributing or disposing of property in reliance on and in accordance with a designation of beneficiary.⁷⁷

A 1987 Oklahoma statute revokes an ex-spouse's beneficiary status unless the insured goes through the process of formally re-naming the ex-spouse as the intended beneficiary following their divorce.⁷⁸ Oklahoma's statute has been deemed unconstitutional if applied to contracts retroactively because it violated the Contract Clause.⁷⁹ To remedy constitutional issues with its divorce revocation statute while still adopting the minority rule, the Oklahoma legislature since amended its statute to render it applicable only to insurance contracts entered on or after the statute's effective date.⁸⁰

Texas's 1987 divorce revocation statute is not modeled on UPC section 2-804. Instead, the Texas law renders the ex-spouse's beneficiary designation ineffective upon divorce unless either:

(1) The decree designates the insured former spouse as the beneficiary; (2) the insured re-designates the former spouse as the beneficiary after rendition of the decree; or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either spouse.⁸¹

⁷⁶ *Id.*

⁷⁷ *Id.* (alteration in original).

⁷⁸ See OKLA. STAT. tit 15, § 178, (A),(B)(3) (1987).

⁷⁹ Whirlpool Corp. v. Ritter, 929 F.2d 1318 (8th Cir. 1991).

⁸⁰ LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][i][C],[D] (citing OKLA. STAT. ANN. tit. 15, § 178).

⁸¹ TEX. FAM. CODE § 9.301(a) (2006) (formerly codified as TEX. FAM. CODE § 3.632(b)); LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][i][C].

Unlike UPC section 2-804 which releases insurer's from liability for wrongful disbursements, the Texas statute holds insurers liable only if: "(1) before disbursing proceeds, it receives written notice from an interested person that the beneficiary is wrong, and (2) it does not interplead and deposit the proceeds into the court registry."⁸²

A few major policy reasons exist as to why jurisdictions adopt the minority rule. One argument is that in executing the insurance contract, the policy should be in line with the insured's interest - the divorce itself is evidence of the insured's intent not to have an ex-spouse receive the policy's proceeds. The failure to change beneficiary after a divorce constituted a mere oversight because the execution of a final divorce decree exhibited the insured's true intent to revoke the ex-spouse's beneficiary status. Another policy behind the adoption of these statutes is the inequities that can result from an insured not having time to make a formal beneficiary change after a divorce.⁸³ Additionally, courts adopting the minority position understand that an insured's failure to make a beneficiary change does not necessarily mean he intended to give the proceeds to his ex-spouse, but rather could have resulted from an inadvertent misunderstanding about the nature of the divorce process in that the divorce itself did not effect a change in beneficiary status.⁸⁴

The minority rule is the more modern rule, in contrast with the traditional majority rule. The minority rule attempts to tackle the issue of deciphering who the deceased's intended policy beneficiary was by assuming the finalized divorce established a clear intent to revoke an ex-spouse's beneficiary status. While this approach likely reflects the current sentiments of divorcing spouses in the twenty-first century, the minority rule, much like the majority rule applies in every situation, is too blunt of a tool to use in such intricate family situations.

V. AUTOMATIC REVOCATION STATUTES & THE CONTRACT CLAUSE

A tension exists between a state's retroactive application of an automatic revocation statute that revokes an ex-spouse's beneficiary status to a life insurance contract. Under the federal constitution's Contract Clause, "No State shall . . . pass any . . . Law impairing the Obligation of

⁸² TEX. FAM. CODE § 9.301 (2006); Soliman, *supra* note 57 at 407.

⁸³ *See, e.g.*, Life Ins. Co. of N. Am. v. Ortiz, 535 F.3d 990 (9th Cir. 2008).

⁸⁴ *See* LIFE AND HEALTH INSURANCE, *supra* note 22, at §5.21[1][k][I][iii][A].

Contracts”⁸⁵ The Contract Clause forbids “any interference with contracts” by state law.⁸⁶ Under the Contract Clause, “laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it.”⁸⁷ These laws typically cannot be changed by ex post facto legislation.⁸⁸ Many states that have adopted automatic revocation statutes have retroactively enforced the statutes. The retroactive application of automatic revocation statutes provoked arguments that the state’s involvement substantially impaired a prior, private contractual (here, the life insurance contract) obligation between the named beneficiary and the insurance company.

In its analysis as to whether a state enacted statute is in conflict with the Contract Clause, courts must first establish whether the statute “has operated as a substantial impairment of a contractual relationship.”⁸⁹ The inquiry “has three components: whether there is a contractual relationship, whether . . . the law impairs that contractual relationship, and whether the impairment is substantial.”⁹⁰ If the court has found that the first two components of substantial impairment existed, it then decides whether a significant and legitimate public purpose exists behind the statute.⁹¹ Lastly, if the court found that a legitimate and significant public purpose existed behind the statute, it must determine whether the state-caused contractual impairment was nevertheless justified as reasonable and necessary in serving an important public interest.⁹²

⁸⁵ U.S. CONST. art. I, § 10, cl. 1.

⁸⁶ *Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass’n*, 110 F.3d 547, 551 (8th Cir.1997).

⁸⁷ *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 188 (1992) (citing *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934)).

⁸⁸ *See also* *MONY Life Ins. Co. v. Ericson*, 533 F. Supp. 2d 921, 928 (D. Minn. 2008).

⁸⁹ *Gen. Motors Corp.*, 503 U.S. at 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

⁹⁰ *Id.*

⁹¹ *See* *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977).

⁹² *Id.*

VI. CHALLENGING STATE AUTOMATIC REVOCATION STATUTES THROUGH THE CONTRACT CLAUSE

Many states have found the retroactive application of an automatic revocation statute unconstitutional under the Contract Clause.⁹³

While Oklahoma initially retroactively enacted a statute that automatically revoked an ex-spouse's beneficiary status upon divorce unless the insured renames the ex-spouse as beneficiary after divorce, the Oklahoma legislature amended the statute to avoid a Contract Clause issue.

In *Whirlpool Corp. v. Ritter*, the Eighth Circuit found that the retrospective application of Okla. Stat. tit. 15, § 178(B)(6) violated the Contract Clause.⁹⁴ Again, an insured did not change his ex-spouse's primary beneficiary status after their divorce before he died.⁹⁵ In examining whether the Contract Clause prohibited the state from retroactively passing the statute Okla.Stat. tit. 15, § 178(B)(6), the Eighth Circuit reasoned that the insured was entitled to expect that his wishes regarding the insurance proceeds (per the then-existing law) would be effectuated.⁹⁶ By retroactively applying the automatic revocation statute, the State impaired the insured's contract by reaching back in time and disrupting this expectation.⁹⁷ Finding the impairment significant, the statute impeded the primary purpose of forming the contract – mainly to provide for the people of the insured's choosing in the event of his death.⁹⁸ In next analyzing whether the State's impairment of the contract was with legitimate purpose and done in a reasonable manner, the court found that while the statute intends to effectuate a change in beneficiary because a fundamental family change had occurred and a tendency to overlook the formality of changing beneficiary status frequently occurred, retroactively applying the statute those who entered into contracts before the legislation passed may frustrate the insured's intent to provide for his designated

⁹³ See, e.g., *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1322 (8th Cir. 1991); *Scott v. Pub. Sch. Ret. Sys. of Missouri*, 09-4241-CV-C-NKL, 2010 WL 3749210, *12 (W.D. Mo. Sept. 21, 2010); *MONY Life Ins. Co.*, 533 F. Supp. 2d at 928 (D. Minn. 2008); *Maddux v. Philadelphia Life Ins. Co.*, 77 F. Supp. 2d 1123, 1128 n.1 (S.D. Cal. 1999); *In re Estate of Holycross*, 858 N.E.2d 805, 809 (Ohio 2007); *Paronese v. Midland Nat. Ins. Co.*, 706 A.2d 814, 816 (Pa. 1998).

⁹⁴ See also *Whirlpool Corp.*, 929 F.2d 1318.

⁹⁵ See also *id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1322.

⁹⁸ *Id.*

beneficiary.⁹⁹ The court held that the statute, when retroactively applied, violated the Contract Clause.¹⁰⁰

In 1998, a Pennsylvania court reviewed the same issue regarding a retroactively applicable Pennsylvania automatic revocation statute¹⁰¹ in *Paronese v. Midland National Insurance Company*.¹⁰² Here, the ex-spouse primary beneficiary of a life insurance policy brought an action against an insurer and the contingent beneficiaries to recover benefits following divorce from insured.¹⁰³ The Pennsylvania Supreme Court, like in *Whirlpool*, found that the retroactive application of such a statute violated the Contract Clause. In its Contract Clause analysis, the Court found that the retroactive application the statute undermined “the very essence of [insured’s] contract”¹⁰⁴ and that the state neither had an emergency need to protect this small group nor was the retroactive application of the law protecting a basic societal interest.¹⁰⁵

In *Scott v. PSRS*,¹⁰⁶ a district court took an even broader view in holding that the automatic revocation statute violated the Contract Clause pertaining to an independent contract for retirement benefits, not a formal life insurance policy. An ex-spouse brought an action alleging a violation of the Contract Clause seeking money damages based on the refusal to pay certain death benefits after her ex-husband died but did not change the plaintiff’s beneficiary designation status after their divorce.¹⁰⁷ The court

⁹⁹ *Id.* at 1323 (“While it may be true that some individuals, given a choice, would prefer to guaranty the financial security of their new family instead of their former family, this is certainly not a universal truth.”).

¹⁰⁰ *See also Whirlpool Corp.* 929 F.2d at 1323-4, n.6 (alteration in original) (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19-20 n.17 (1977) (“However, [the Eighth Circuit] note[d] that, for purposes of the contracts clause, there [wa]s a profound difference between changing the law directly governing contracts yet to be made and changing the law directly governing contracts that have already been made. In the former case, the parties can be expected to incorporate the changes into their planning and negotiating, whereas in the latter case the parties expect their bargain to be protected in accordance with the law existing at the time of their agreement.”).

¹⁰¹ 20 PA. CONS. STAT. § 6111.2 (1994).

¹⁰² *Paronese v. Midland Nat. Ins. Co.*, 706 A.2d 814 (Pa. 1998).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 818 (alteration in original).

¹⁰⁵ *See id.* at 818-19.

¹⁰⁶ *Scott v. PSRS*, No. 09 4241 CV C NKL, 2010 WL 3749210 (W.D. Mo. Sept. 21, 2010).

¹⁰⁷ *Id.* at *3.

noted that under Section 169.076 of the Missouri Revised Statutes,¹⁰⁸ the insured's existing beneficiary designation had been "automatically and retroactively revoked by operation of Missouri law due to divorce" and the plaintiff ex-spouse was "no longer entitled to the benefits."¹⁰⁹

In analyzing the merits of the Contract Clause claim, the Court held that, relying on *Whirlpool* as precedent, "a party designating a beneficiary was entitled to expect that his . . . wishes – as expressed in a contract which pre-dated the divorce revocation statute- would be honored" and that "disrupting that expectation, the statute substantially impaired the contract."¹¹⁰ Even though the court noted the death benefits in this case were in fact "a contract concerning post-death retirement proceeds" and not a formal life insurance policy, the similarities in intending to provide for the insured's family after his death were substantial enough for this case to be encompassed under the Eight Circuit's existing rule that the revocation statute could not be applied to a pre-existing contract.¹¹¹

Most recently, a court held Minnesota's automatic revocation statute, § 524.2-804,¹¹² unconstitutional.¹¹³ In *MONY*, the insured's ex-spouse sought a declaration from the court that he was entitled to his ex-spouse's insurance proceeds.¹¹⁴ The court, relying on *Whirlpool*, found that under the Contract Clause, substantial impairment existed in the contractual relationship between the insured and the insurer and the purpose behind Minnesota's statute, that ex-spouses often intend to change their beneficiaries, cannot be used to justify the fundamental change to the existing life insurance contract.¹¹⁵ Most interestingly, although *MONY* held the retroactive application of the statute unconstitutional, just a year prior

¹⁰⁸ MO. REV. STAT. 169.076.2 (2005) ("The member's marriage, divorce, withdrawal of accumulated contributions, or the birth of the member's child . . . shall result in an automatic revocation of the member's previous designation in its entirety upon the retirement system receiving actual notice of such event before or after the member's death and prior to any payment being made under the provisions of this chapter.").

¹⁰⁹ *Scott*, 2010 WL 3749210, at *3.

¹¹⁰ *Id.* at *12 (citing *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1322 (8th Cir. 1991)).

¹¹¹ *Id.*; see *Whirlpool*, 929 F.2d at 1323.

¹¹² MINN. STAT. § 524.2-804 (2002).

¹¹³ *MONY Life Ins. Co. v. Ericson*, 533 F. Supp. 2d 921 (D. Minn. 2008).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 924-25.

another Minnesota District Court held the retroactive application of the statute constitutional.¹¹⁶

Other courts analyzing the retroactive application of automatic revocation statutes have found that no Contract Clause issue existed because an ex-spouse's beneficiary designation prior to divorce did not create a vested contractual right in the ex-spouse sufficient to allege a Contract Clause challenge.¹¹⁷ This division in the constitutionality of the statutes adds to the confusion in this area of law.

VII. PROPERTY SETTLEMENT AGREEMENT EXCEPTION

When beneficiary status issues arise in both majority and minority jurisdictions, the court typically will examine the terms of the property settlement agreement or divorce decree to decipher whether the terms of the agreement or decree provide sufficient clarity of the insured's intent to divest his ex-spouse of her beneficiary status. Some jurisdictions allow the terms of a property settlement agreement, if sufficiently explicit, to act as a change in beneficiary status without formally changing the beneficiary through the terms of the insurance policy. These states examine the precise wording of the property settlement agreement, when the insured purchased the insurance policy and what the surviving ex-spouse specifically waived in order to determine whether the property settlement exception to either the majority or minority rule applied.¹¹⁸

Some majority jurisdictions do not recognize this exception, holding that a release in a property settlement agreement is not sufficient to override the insurance contract language.¹¹⁹ In contrast, some minority

¹¹⁶ See generally *Lincoln Benefit Life Co. v. Heitz*, 468 F. Supp. 2d 1062, 1063, 1067 (D. Minn. 2007) (holding that a nonexistent Contract Clause issue because an ex-spouse's beneficiary designation prior to divorce did not create a vested contractual right in the ex-spouse sufficient to allege a Contract Clause challenge).

¹¹⁷ See, e.g., *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003); *Allstate Life Ins. Co. v. Hanson*, 200 F. Supp. 2d 1012, 1019 (E.D. Wis. 2002); *Estate of DeWitt v. DeWitt*, 54 P.3d 849 (Colo. 2002); *Mearns v. Scharbach*, 12 P.3d 1048, 1056 (Wa. Ct. App. 2000).

¹¹⁸ See Jani Maurer, *Use and Disposition of Life Insurance in Dissolution of Marriage*, 16 BARRY L. REV. 57, 109 (2011).

¹¹⁹ The most notable example of a majority jurisdiction that does not apply this exception, even for unambiguous property settlement agreements, is Florida. Soliman, *supra* note 57, at 407.

jurisdictions allow the insured to execute his intent for an ex-spouse to remain the beneficiary of his life insurance policy despite the automatic revocation statute if his intent is clearly expressed in a property settlement agreement.¹²⁰ For example, although the New Jersey legislature enacted a divorce revocation statute, the courts have adopted an exception to the statute that allows for divorcing spouses who have entered into a property settlement agreement which purports to “wipe the slate clean” between them, divorce creates a presumption that designation of either of the spouses as the beneficiary of the other’s life insurance policy has been revoked.¹²¹ A New Jersey court first held that the state had joined “the overwhelming number of states that have enacted statutes recognizing revocation by divorce. Those statutes adopt the presumption that ‘in the vast majority of cases the testator’s failure to revoke his will subsequent to a divorce is due to neglect . . .’” in 1978.¹²² In 1991, the New Jersey Supreme Court adopted the presumption that when the agreement supposedly covers all property rights, the insured’s intent per the agreement is to revoke or keep the existing designation of a spouse as beneficiary.¹²³

Different state standards exist as to whether the decree or settlement meets the specificity required for the property settlement exception to apply. Some states decide whether the settlement may be reasonably construed as a relinquishment of an ex-spouse’s beneficiary status.¹²⁴ Other states examine whether wording of the agreement on the whole appears to indicate the intention of relinquishment.¹²⁵ Another standard adopted by states is whether the agreement expressly states the intent to deprive the ex-spouse of her beneficiary status.¹²⁶

¹²⁰ See *e.g.*, *Vasconi v. Guardian Life Ins. Co.*, 590 A.2d 1161 (N.J. 1991).

¹²¹ *Id.* at 1165-66 (citation omitted).

¹²² *Id.* at 1164 (citation omitted).

¹²³ *Id.* at 1164-66.

¹²⁴ See, *e.g.*, *Beneficial Life Ins. Co. v. Stoddard*, 516 P.2d 187 (Idaho 1973); *Hollaway v. Selvidge*, 548 P.2d 835 (Kan. 1976); *Prudential Ins. Co. v. Weatherford*, 621 P.2d 83 (Or. Ct. App. 1980).

¹²⁵ See *Costello v. Costello*, 379 F. Supp. 630 (D. Wyo. 1974) (applying Wyoming law); *Life Ins. Co. of N. Am. v. Cassidy*, 676 P.2d 1050 (Cal. 1984) (en banc); *Redd v. Brooke*, 604 P.2d 360, 361 (Nev. 1980); *Pitts v. Ashcraft*, 586 S.W.2d 685 (Tex. Civ. App. 1979); *Culbertson v. Cont’l Assurance Co.*, 631 P.2d 906 (Utah 1981).

¹²⁶ See *Metro. Life Ins. Co. v. Frawley*, 712 F. Supp. 131, 133 (S.D. Ohio 1989) (applying Ohio law).

In Washington, for the property settlement exception to revoke an ex-spouse's beneficiary status, the decree must expressly divest the ex-spouse of any expectancy under the policy and a beneficiary change within a reasonable time must exist for the designated ex-spouse to lose her right to the proceeds.¹²⁷

The property settlement agreement exception, likely a response to the blunt application of the existing majority and minority rules, provides a way for certain situations to opt out of the existing jurisdictional rule, while still executing the insured's intent. Each state can tailor the required level of specificity for the property settlement agreement exception to what it views as clear evidence of the insured's intent.

VIII. CONCLUSION: HOW TO DEVELOP MORE COHERENT RULES IN THIS AREA OF LAW

The recent split of authorities in minority jurisdictions regarding the retroactive application of automatic revocation statutes only adds confusion to the existing dichotomy between majority and minority jurisdictions and jurisdictions that have adopted the property settlement agreement exception, contributing to more uncertainty as to whether or not an ex-spouse still named as a beneficiary after having divorced the insured will receive the policy's proceeds. In this area, the courts must balance the need to execute the insured's intent, while upholding the nature of the insurance contract. Because this issue arises only after the insured died and can therefore no longer state his intended beneficiary, it remains more important for clearer case law to exist regarding this matter when proactive legal counseling can no longer help.

While the modern trend of adopting automatic revocation statutes addresses the growing trend of asset transfer through nonprobate financial instruments rather than the slow moving probate process,¹²⁸ the majority rule of upholding the existing text of the insurance contract executes a verifiably true intent of the insured. In an attempt to garner more consistent

¹²⁷ *Aetna Life Ins. Co. v. Wadsworth*, 689 P.2d 46 (Wash. 1984).

¹²⁸ See generally John Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (Suggesting the development of nonprobate financial instruments as the primary means of transferring wealth as basis for legitimating the main will substitutes as "nonprobate wills" and for unifying the constructional law of wills and will substitutes).

case law on this issue, I would encourage legislatures enacting automatic revocation statutes to at least avoid potential Contract Clause issues altogether by not retroactively applying the statute. Retroactive application of automatic revocation statutes only confuses an already dizzying area of law.

Because of the pivotal nature of life insurance in providing for families in the event of the death of a primary wage earner¹²⁹, ensuring the policy's proceeds go to the correct beneficiary is the purpose of obtaining the policy. Compounding on life insurance's role in providing for loved ones in the event of the insured's death is the difficulty in not only not having the correct beneficiary receive the policy's benefits, but also having an ex-spouse receive policy's proceeds.

In most instances, the determination of a policy's actual beneficiary can take a substantial amount of time when insurance companies must interplead both primary and contingent beneficiaries in a lawsuit. Courts and state legislatures should recognize life insurance's role of providing immediate financial aid to families who have just suffered a loss when determining whether to adopt either the majority or minority rule in their jurisdiction or change existing precedent.

While legislatures and courts adopting either majority or minority rule need to instill a sense of uniformity and equity to decisions in this area of law, the role of life insurance in conjunction with the intricacy and variation of each couple's divorce proceedings require the court to take a closer look at these matters. The court needs to decipher whether an omission in a change of beneficiary after a divorce is a mistake of legal form, and if so, whether the court can and should correct this mistake. Ultimately, courts and legislatures are trying to address the intent issue.

Compelling policy reasons exist on both majority and minority opinions on this issue. If a state wants to adopt the modern trend of the minority rule by passing an automatic revocation statute, the action should preferably come from the legislature to better represent the constituent consensus and prevailing societal views on the relationships of ex-spouses upon divorce. Either the majority rule of upholding the letter of the insurance contract or the minority rule revoking an ex-spouse's beneficiary status applies as a default rule. However, the often intricate relationship dynamic between divorced couples along with how and when the insured's

¹²⁹ *Life Insurance Is Key Component of a Family Financial Plan*, INS. INFO. INST. (Nov. 5, 2010), http://www.iii.org/press_releases/life-insurance-is-key-component-of-a-family-financial-plan.html.

policy was executed require the court to look closer to decipher the insured's intent. Because the court is ultimately trying to decipher intent, all states should adopt the property settlement exception. The property settlement agreement, as a part of the divorce process, best captures the insured's intent on what he did or didn't intend to give over to his ex-spouse. Because the property settlement agreement is executed when both parties are represented by counsel, the court should recognize the insured's intent as evidenced by a higher level of specificity from the property settlement exception over whatever the existing jurisdictional rule is. If the insured meets a higher threshold of proof that he either did or didn't intend to have his ex-spouse remain his life insurance beneficiary, the court should recognize this higher level of intent regardless of the existing jurisdictional rule.

If the insured's property settlement agreement meets the required level of specificity to opt out of the existing jurisdictional rule, the courts should accept that. This would allow the court, in certain instances where the insured clearly intended (the guidelines about what level of specificity should be outlined by the legislature) the opposite of what the existing jurisdictional rule dictated, to better match the insured's intent.

The courts and legislatures should have two goals in mind when dealing with this area of law: executing the insured's intent and uniformity. The court should try to get the policy's proceeds to the correct persons while also uniformly applying the jurisdictional rule in order to give a greater sense of certainty to those in the jurisdiction looking to challenge the insurance company's disbursement of a deceased's life insurance policy proceeds to an ex-spouse. This would not only allow for quicker resolutions and fulfill one of the purposes of a non-probate asset like life insurance – to quickly transfer wealth outside of the lagging probate system to the intended beneficiary. State legislatures' retroactive application of automatic revocation statutes interfere with the uniform applicable of the state's rule in this area of law. Because of the Contract Clause issue, states that choose to adopt the modern minority rule should avoid making them retroactively applicable because the issue incites more challenges to an insurance company's dispersal of a policy's proceeds, creating more unsettlement in an already murky area of law.