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APPLYING THE DOCTRINE OF REVOCATION BY DIVORCE TO LIFE INSURANCE POLICIES

The Uniform Probate Code states: "If after executing a will the testator is divorced or his marriage annulled, the divorce . . . revokes any disposition or appointment of property made by the will to the former spouse . . . ."[1] Forty-four states have similar revocation-by-divorce statutes.[2]

The revocation statutes recognize that "[d]ivorce usually represents a stormy parting, where the last thing one of the parties wishes is to have an earlier will carried out giving everything to a former

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1 UNIF. PROB. CODE § 2-508 (1982). Section 2-508 states in full:

> If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse, as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change in circumstances other than as described in this section revokes a will.

2 ALA. CODE § 2-508 (1975); ALASKA STAT. § 13.11.185 (1985); ARIZ. REV. STAT. ANN. § I4-2508 (1975); ARK. STAT. ANN. § 28-25-109(a)(2) (1987); CAL. PROB. CODE § 6122 (West Supp. 1988); COLO. REV. STAT. § 15-11-508 (1973); CONN. GEN. STAT. ANN.§ 45-162 (West 1981); DEL CODE ANN. tit. 12, § 209 (1987); FLA. STAT. ANN. § 732.507 (West 1976); GA. CODE ANN. § 53-2-76 (1982); HAWAII REV. STAT. § 560:2-508 (1985); IDAHO CODE § 15-2-508 (1979); ILL. ANN. STAT. ch. 110 1/2, § 4-7(b) (Smith-Hurd Supp. 1987); IND. CODE ANN. § 29-1-5-8 (Burns 1972); IOWA CODE ANN. § 633.271 (West Supp. 1988); KAN. STAT. ANN. § 59-610 (1983); ME. REV. STAT. ANN. tit. 18-A, § 2-508 (1980); MD. EST. & TRUSTS CODE ANN. § 4-105 (1974 & Supp. 1987); MASS. GEN LAWS ANN. ch. 191, § 9 (West 1981); MICH. COMP. LAWS ANN. § 700.124 (West 1980); MINN. STAT. ANN. § 524.2-508 (West 1975); MO. REV STAT. § 474.420 (1986); MONT. CODE ANN. § 72-2-322 (1985); NEB. REV. STAT. § 30-2333 (1985); NEV. REV. STAT. § 133.115 (1980); N.J. STAT. ANN. § 3B:3-14 (West 1983); N.M. STAT. ANN. § 45-2-508 (1978); N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney 1981); N.C. GEN. STAT. § 31-5.4 (1984); N.D. CENT. CODE § 30.1-08-08 (1976); OHIO REV. CODE ANN. § 2107.33 (Anderson 1976 & Supp. 1987); OKLA. STAT. tit. 84, § 114 (1970 & Supp. 1988); OR. REV. STAT. § 112.315 (1983); 20 PA. CONS. STAT. ANN. § 2507(2) (Purdon 1975); R.I. GEN LAWS § 33-5-9.1 (Supp. 1987); S.C. CODE ANN. § 21-7-230 (Law. Co-op. 1976); TENN. CODE ANN. § 31-1-102 (1984); TEX. PROB. CODE ANN. § 69 (Vernon 1980); UTAH CODE ANN. § 75-2-508 (1984); VA. CODE ANN. § 64.1-59 (1987); WASH. REV. CODE. ANN. § 11.12.050 (1967); W. VA. CODE § 41-1-6 (1987); WIS. STAT. § 853.11 (1971); WYO. STAT. § 2-6-118 (1977).

spouse."[3] These statutes also recognize that people have difficulty accepting their own death.[4] The statutes reflect the view that the testator's failure to change his will after divorce is a delay in expressing a changed testamentary intent rather than a continued expression of that intent.[5]

Today, the life insurance policy has replaced the will as the dominant means of wealth transfer at death.[6] The logic behind revocation-by-divorce statutes clearly applies to transfers of wealth by life insurance policies. "[P]rinciples of construction and presumptions of transferors' intent that have been developed in the law of wills do not apply" to life insurance policies, however, because the legal system recognizes and gives effect to the formal distinctions between the two instruments.[7]

Part I of this Note outlines the development of the doctrine of revocation by divorce from the doctrine of revocation by implication. It discusses the traditional interpretation and application of revocation by implication and the subsequent development of revocation-by-divorce statutes. Part II discusses the effect divorce has on life insurance policies, and evaluates the legal rules that have prevented courts from extending revocation by divorce to these policies. Part III demonstrates the practical similarity between wills and life insurance policies, and Part IV criticizes the courts for denying the protection of intent the owners of life insurance that the revocation-by-divorce statutes provide to testators. Finally, the Note concludes that courts and legislatures should abandon the formalistic distinctions between wills and life insurance policies and extend the application of revocation-by-divorce statutes to life insurance policies.

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3 Young, *Probate Change*, 20 BOSTON B.J., Dec. 1976, at 6, 10.

4 *See* S. FREUD, *Thoughts for the Times on War and Death* (1915), in 4 COLLECTED PAPERS 304-05 (1925) ("Our own death is indeed unimaginable, and whenever we make the attempt to imagine it we can perceive that we really survive as spectators. Hence . . . at bottom no one believes in his own death, or to put the same thing in another way, in the unconscious every one of us is convinced of his own immortality.").

5 *See id.*; *see also* Note, *Implied Revocation of Wills after Divorce and Property Settlement*, 4 DUKE B.J. 122, 126 (1954) (authored by Gary S. Stein) ("[I]n the vast majority of cases the testator's failure to revoke his will subsequent to divorce is due to neglect, and that to find an implied revocation usually gives effect to a testator's real intentions.").

6 *See* Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, in LIFE INSURANCE LAW IN INTERNATIONAL PERSPECTIVE 74, 76 (J. Hellner & G. Nord eds. 1967) ("In view of the numbers of people involved, the life insurance beneficiary designation is the principal 'last will and testament' of our legal system.").

7 Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1136 (1984).

I
THE DEVELOPMENT OF REVOCATION BY DIVORCE

A. Revocation by Implication

The law of wills has historically allowed the revocation of a will by implication when a testator experienced certain changes in circumstances after executing his will.[8] At common law, two changes in circumstances revoked a testator's will by implication.[9] For a female, marriage after the creation of a will (marriage of a *feme sole*)[10] revoked the will. For a male, marriage and birth of issue after the creation of a will served to revoke the will.[11]

Eventually the Wills Act[12] nullified the doctrine of revocation by implication in England. In the United States, however, a number of states specifically incorporated the doctrine into their probate statutes.[13] In these states, courts continued to recognize and apply the doctrine. These courts expanded the scope of revocation by implication to apply to other changes of circumstances.

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8 Durfee, *Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406, 406 (1942) ("Among the oldest rules in the law of wills are those by which a will is held to be revoked by implication by certain changes in circumstances of the testator.").

9 Graunke & Beuscher, *The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator*, 5 WIS. L. REV. 387, 387 (1930).

10 The common law prohibited a married woman either from making or changing a will. *Id.* at 388-89. The will in force at the time of her marriage would thus have dictated the disposition of a woman's property. Common law judges who believed in the ambulatory nature of wills refused to accept such a result. *Id.* ("[T]o say that the will of a *feme sole* was to remain in effect . . . would deprive the will of its ambulatory nature, that characteristic . . . which the [common law] courts . . . have always held to be so essential.").

11 Initially the doctrine of revocation by implication was rebuttable. *See, e.g.*, Talbot v. Talbot, 1 Hagg. 705, 711, 162 Eng. Rep. 725, 728 (Eccl. 1828) ("marriage and birth of issue . . . *raise an inference* that a testator would not adhere to a will made previous to their existence") (emphasis added); Graunke & Beuscher, *supra* note 9, at 393-94 (common law courts first adopted view that parol evidence was not admissible to rebut testator's presumed intent; by 1839, ecclesiastical courts had accepted presumption as irrebuttable); Comment, *Wills—Revocation by Divorce—The Doctrine of "Changed Circumstances,"* 34 B.U.L. REV. 395, 396 (1954) (revocation became a rigid rule, regardless of intent of testator). Courts transformed the doctrine into an irrebuttable rule of law by stressing the moral obligations that marriage and birth of issue imposed upon the testator.

12 7 Will. IV & 1 Vict., ch. 26, § 20 (1937). For a discussion of the history of the Wills Act, see generally J. DUKMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES 183-98 (3d ed. 1984).

13 Those states were Florida, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Ohio, Vermont, Wisconsin and Wyoming. In addition, the doctrine was not excluded by revocation statutes in Maryland, Mississippi and New Mexico. Graunke & Beuscher, *supra* note 9, at 404-05; *see also* Note, *supra* note 5, at 123 (after enumerating specific ways in which a will could be revoked the statutes stated: " 'but nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition of the testator' ").

B. Judicial Extension of Revocation by Implication to Divorce

The first case to recognize divorce as a change of circumstance that revoked a testator's previously executed will was *Lansing v. Haynes*.[14] In *Lansing* a childless couple received a divorce eight years after they had executed mutual wills. The parties entered into a property agreement whereby the husband conveyed certain property to the wife, and she released her interest in the remaining property. The husband died two years later without having changed his will.

Despite the absence of the traditional criteria for applying revocation by implication to a male testator's will,[15] the court held that the divorce implicitly revoked the will.[16] The court stressed that a divorce completely destroyed the obligations and duties between a husband and a wife.[17] In addition, the usual bitterness that accompanied a divorce[18] justified a presumption that the testator would not have wanted his former wife to take under his will.[19] To hold otherwise would have been "repugnant to common sense and common reason."[20]

Although the *Lansing* court attempted to characterize revocation by divorce as a mere extension of revocation by implication, its decision strayed from that doctrine's underpinnings. Common law courts developed revocation by implication because the testator had *acquired* new moral obligations as a result of a change in circumstances.[21] Courts reasoned that the testator should have accounted for this change in his will and therefore implied a revocation to fulfill his moral obligations.[22] Divorce, however, does not create new moral obligations; rather, it destroys old ones. The court aban-

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14 95 Mich. 16, 54 N.W. 699 (1893).

15 *See supra* note 11 and accompanying text.

16 *Lansing*, 95 Mich. at 21, 54 N.W. at 701.

17 *Id.* at 20, 54 N.W. at 701 ("By the decree of divorce in this case, the parties became as strangers to each other, and neither owed to the other any obligation or duty thereafter. There was, therefore, a complete change in these relations . . . .").

18 *Id.* at 17, 54 N.W. at 700 ("as is usual in such cases, the feeling between them . . . became bitter").

19 *Id.* at 21, 54 N.W. at 701 ("The natural presumption arising from these changed relations is the reasonable one, and the one which in law implies a revocation.").

20 *Id.*, 54 N.W. at 701.

21 *See supra* notes 8-13 and accompanying text.

22 *See, e.g.*, Talbot v. Talbot, 1 Hagg. 705, 711-12, 162 Eng. Rep. 725, 728 (Eccl. 1828) ("[M]arriage and the birth of issue create . . . such new obligations and duties, that . . . a testator . . . [would consider] it an act of moral duty to revoke that disposition . . . but . . . if there does not arise such a state of circumstances as to produce new duties . . . there is no reason to presume a revocation."); Jones v. Moseley, 40 Miss. 261, 262 (1866) ("These [changes in circumstances] must be such as to produce change, not merely in testator's *affections and feelings*, but in his *obligations and duties*.") (emphasis in original).

doned the perceived duty of the testator as a justification for implying a revocation of his will and focused instead on the testator's probable intent.[23]

The conceptual difference between a doctrine based on acquired obligations and one based on eliminated obligations forced courts to apply revocation by divorce in a somewhat different manner than they had applied revocation by implication. Traditionally, courts held the testator's entire will revoked and redistributed his property to fulfill his acquired obligations.[24] The *destruction* of moral obligations, however, did not necessarily mean courts should revoke a testator's entire will. Rather, to maximize consistency with a testator's probable intent, courts revoked only those dispositions based on the formerly existing moral duty.[25]

Courts also struggled to determine when a testator's moral obligations were eliminated. Despite *Lansing*'s broad language, courts did not accept the notion that divorce alone revoked a will.[26] Instead they focused on the presence of a property settlement between the two parties.[27] Absent a property settlement, regardless of the testator's probable intent,[28] divorce alone did not revoke a will by implication.[29]

Although revocation by divorce coupled with a property settle-

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23 *Lansing*, 95 Mich. at 21, 54 N.W. at 701 ("To hold the will unrevoked [where the parties have been divorced] would be repugnant to that common sense and common reason upon which law is based.").

24 *See, e.g.*, *Lansing*, 95 Mich. 16, 54 N.W. 699; *see also supra* notes 8-13 and accompanying text.

25 *See* Baacke v. Baacke, 50 Neb. 18, 23, 69 N.W. 303, 304 (1896) ("The doctrine of revocation by implication of law is based upon a presumed alteration of intention arising from the changed . . . circumstances of the testator . . . . [A divorce] could no more than revoke the will as to [the former spouse's] legacy . . . ."); *see also In re* Estate of Battis, 143 Wis. 234, 240, 126 N.W. 9, 12 (1910) ("The changed . . . circumstances of a testator [brought about by divorce and property settlement] are of a nature, and, in effect, of such probative force, as to imply that the testator intended that the . . . provisions . . . made for the wife should become revoked . . . .").

26 *See In re* Arnold's Estate, 60 Nev. 376, 379, 110 P.2d 204, 205 (1941) ("The record before us presents nothing but a divorce from which an implied revocation may be inferred. It is not enough."); Comment, *supra* note 11, at 396 ("In the United States, in absence of a statute, it is generally agreed that a divorce, unaccompanied by a property settlement, does not revoke the legacy in favor of the divorced spouse.").

27 *See In re* Hall's Estate, 106 Minn. 303, 119 N.W. 219 (1909). In this case, the testator had accused his wife of adultery, but withdrew the charge pursuant to a divorce agreement. A property settlement gave the wife the value of approximately one-third of Mr. Hall's property. The court held tbat the will was revoked. *Id.* at 307, 119 N.W. at 221-22.

28 *See Lansing*, 95 Mich. at 21, 54 N.W. at 701.

29 Durfee, *supra* note 8, at 412 (divorce alone does not revoke the will); Note, *supra* note 5, at 122 (absent a statute, divorce alone did not revoke will in favor of ex-spouse). By requiring a property settlement before allowing divorce to revoke a previously executed will, courts have left open the possibility of anomalous results. *See, e.g.*, *In re* Arnold's Estate, 60 Nev. 376, 110 P.2d 204 (1941) (will not revoked where wife sought no

ment was a general rule,[30] there were exceptions. Some courts refused to extend revocation by implication to divorce, limiting the doctrine to its common law applications.[31] Some states enumerated the means of revocation in revocation statutes without specifically retaining revocation by implication.[32] In these states, courts sometimes refused to apply the doctrine in deference to the legislature.[33] As a result of these exceptions, the effect of divorce upon a testator's will was far from uniform among the states prior to the general adoption of revocation-by-divorce statutes.

C. The Development of Revocation-By-Divorce Statutes

The American Bar Association's Model Probate Code of 1946 provided, "If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked."[34] At the time the Model Probate Code was drafted, only three states had revocation-by-divorce statutes.[35] By the mid-1950s six states had adopted such statutes.[36] Today, virtually every state recognizes revocation by divorce.[37]

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alimony at time of divorce and property settlement was impossible due to absence of community property).

30 *See* Annotation, *Divorce as Affecting Will Previously Executed by Husband or Wife*, 25 A.L.R. 49, 49 (1923).

31 *See, e.g.*, *In re* Estate of Brown, 139 Iowa 219, 227, 117 N.W. 260, 263 (1908) (changes in a testator's circumstances "must be such as would have amounted to a revocation at common law when our statute was enacted."); Hertrais v. Moore, 325 Mass. 57, 61, 88 N.E.2d 909, 911 (1949) (holding that subsequent changes referred to by revocation statute are confined to those at common law when statute was enacted); *In re* Bartlett's Estate, 108 Neb. 681, 689, 189 N.W. 390, 393 (1922) ("[T]he divorce decree merely . . . satisfied the property rights of the parties as they existed when the divorce was granted. The fact that Bartlett did not revoke his will in the statutory manner naturally leads to the presumption that he did not intend to revoke it.").

32 Durfee, *supra* note 8, at 408 ("[T]hirty-four states make no mention of the doctrine in their statutes, but provide that no will shall be revoked otherwise than by certain specified methods, such as burning, cancelling, or by a subsequent will.").

33 *See, e.g.*, Robertson v. Jones, 345 Mo. 828, 136 S.W.2d 278 (1940) (upholding previously executed will granting one half of husband's property to divorced wife despite cash settlement and wife's release of all interest in husband's property on grounds that any change in revocation law must be made by legislature).

34 MODEL PROB. CODE § 53 (1946). Although not adopted in full in any state, the Model Probate Code influenced the probate codes of Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Indiana, Missouri, North Carolina, Oregon and Texas. For a discussion of the Model Probate Code, see Fratcher & Straus, *Model Probate Code*, 35 PA. B.A.Q. 206, 207-08 (1964). *See also* Note, *Uniform Probate Code Section 6-201: A Proposal to Include Stocks and Mutual Funds*, 72 CORNELL L. REV. 397, 406-07 n.74 (1987) (authored by Diane Amado) (discussing history of Uniform Probate Code).

35 MODEL PROB. CODE § 53 comment (1946). The three states were Kansas, Minnesota and Washington.

36 *See* Note, *supra* note 5, at 123 n.5 (Arkansas, Florida, Kansas, Kentucky, Pennsylvania, and Washington).

37 *See supra* note 2.

Revocation-by-divorce 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, and that to find an implied revocation usually gives effect to a testator's real intentions."[38] This presumption ignores the possibility that, by leaving his will intact, a divorced testator intends his former spouse to take under the will. However, man's natural refusal to accept the potential for immediate death[39] and the usual animosity that accompanies divorce[40] support the presumption of intended revocation.

A more significant problem with revocation-by-divorce statutes is that by adopting a per se rule they inevitably defeat a testator's intent in some instances.[41] In providing for per se revocation, legislatures have determined that certainty in the probate process outweighs the risks that revocation will nullify a particular testator's intent.[42] Additionally, were legislatures to adopt statutes that created a rebuttable presumption of intended revocation, courts would have to consider extrinsic evidence of the testator's intent at the time of divorce. Allowing such evidence would invite fraud and other abuses which would increase the risk that a court would frustrate the testator's intent.[43]

One commentator has argued, "To decide whether it is more advisable to hold that a divorce revokes a prior will as to the other spouse or that it does not so revoke, is, of course, a mere guessing game . . . ."[44] Nevertheless, legislatures in the overwhelming majority of states have determined that revocation of a will by divorce is both reasonable and desirable.[45] The logic behind revocation-by-divorce statutes, however, has been almost universally ignored by courts and legislatures with respect to life insurance policies.

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38 Note, *supra* note 5, at 126.

39 *See supra* note 4 and accompanying text.

40 *See* R. NEELY, THE DIVORCE DECISION 19 (1984) ("Family relationships tend to arouse our most intense emotions. When a family breaks up other than by mutual agreement, the parties are often seeking not just a settlement of their legal entitlements; they are also seeking to punish their spouse . . . for years of what they perceive as accumulated wrongs.").

41 *Compare In re* Perigen, 653 S.W.2d 717 (Tenn. 1983) (holding that where divorce and property settlement are entered into but never carried out, testator's will is not revoked by implication) *with* TENN. CODE ANN. § 31-1-102 (1984) (divorce per se revokes any disposition to former spouse in testator's previously executed will).

42 MODEL PROB. CODE § 53 comment (1946) (grounds for revocation of will due to changed circumstances should be limited to divorce to minimize uncertainty about the validity of duly executed will).

43 *Note*, *supra* note 5, at 126 ("[Placing] emphasis on the demonstrable probable intent of the testator, *formed after he has executed the will*, would probably invite fraud and perjury.") (emphasis in original).

44 Graunke & Beuscher, *supra* note 9, at 410-11.

45 *See supra* notes 34-43 and accompanying text.

II
REVOCATION AND LIFE INSURANCE POLICIES

Life insurance is an important component of family estate planning in the United States. In 1986, 85% of American families had some form of life insurance. Life insurance coverage averaged $69,100 per family.[46] Total industry income exceeded one trillion dollars.[47] But despite the overwhelming popularity of life insurance as an estate planning tool, divorce generally does not affect a former spouse's right to take the proceeds of a life insurance policy.[48] However, when the parties enter into a property agreement that specifically mentions the life insurance policy, some courts have held that the insured implicitly revoked the designation of his former spouse as beneficiary.[49] Although this rule is facially similar to the common law revocation standard for wills, its basis is quite different. The following general discussion of life insurance illustrates the difference between the rules for wills and life insurance policies.

A. The Concept of the Insurable Interest

Life insurance derives its validity from the tenets of contract law. A life insurance policy is a contract "in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another."[50] Unlike the typical insurance contract today in which a person insures his own life, early life insurance policies were taken out by third parties with the insured concerned only as the subject of the insurance.[51] Thus, the insurance contract was a kind of wager between the two contracting parties, with the insured's life as the subject of the bet. In fact, at one time it was com-

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46 AMERICAN COUNCIL OF LIFE INSURANCE, 1987 LIFE INSURANCE FACT BOOK UPDATE 6 (1987).

47 *Id.*

48 Note, *Whose Life (Insurance) Is It Anyway? Life Insurance and Divorce in America*, 22 J. FAM. L. 95, 95-96 (1983) (authored by Mark Richardson Brown) (rights of beneficiaries to receive proceeds of life insurance policy are not affected by divorce).

49 *See e.g.*, Harris v. Brewer, 239 Ark. 614, 617, 390 S.W.2d 630, 632 (1965) ("appellant is foreclosed to claim any interest or proceeds from the policies she specifically transferred and released to decedent"); Phillips v. Pelton, 10 Ohio St. 3d 52, 54, 461 N.E.2d 305, 307 (1984) ("[T]he parties specifically directed their attention to the issue of life insurance and expressed their intention to release all rights which each may have had as beneficiary. . . . [T]his language was sufficient to eliminate each party as beneficiary . . . notwithstanding the fact that no specific change of beneficiary was made."). *See generally* 5 G. COUCH, COUCH ON INSURANCE 2d § 29:4 (rev. ed. 1984) (discussing right of divorced wife to insurance policy proceeds); *infra* notes 82-90 and accompanying text.

50 C. BUNYON, A TREATISE UPON THE LAW OF LIFE ASSURANCE 17 (1854).

51 J. GREIDER & W. BEADLES, LAW AND THE LIFE INSURANCE CONTRACT 126-27 (3d ed. 1974).

mon for people to take out insurance policies on the lives of public officials which would pay off if the official died within a specified period of time.[52]

To prevent this most vicious type of wagering, the English Parliament passed the Gambling Act.[53] This act provided that for a person to conclude a life insurance contract, he had to have an insurable interest in the subject of the contract's life.[54] In the United States, a policy holder similarly must have an insurable interest in the insured's life.[55] The United States Supreme Court has defined insurable interest as "such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life."[56] Absent an insurable interest, the insurance contract is void.[57]

B. The Effect of the Cessation of the Insurable Interest

Although the Gambling Act required the policy holder to have an insurable interest in the subject of the contract at the time of contracting, the effect of the cessation of that interest on the validity of the contract was unclear. In *Dalby v. India and London Life-Assurance Co.*[58] the English Court of Common Pleas determined that the cessation of the insurable interest had no effect on the insurance policy.[59] The Court reasoned that an alternative rule was unacceptable because of its potential for unjustly enriching insurance companies at the expense of policy holders.[60]

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52 *Id.* at 127 ("The abuses to which this arrangement might be subjected are apparent. At one time it was almost a sport to wager that public figures would or would not live for even such a short period of time as a few days. Persons in public life were thus made the subjects of so-called life insurance contracts by people who were not even acquainted with them.").

53 14 Geo. III, ch. 48. The Gambling Act was designed to prevent abuses that had arisen under the existing laws of life insurance. J. GREIDER & W. BEADLES, *supra* note 51, at 126-27 (3d ed. 1974).

54 J. GREDIER & W. BEADLES, *supra* note 51, at 127. ("[T]he requirement of an insurable interest as a safeguard against the possible misuse of life insurance was early adopted, independently, in the United States. Sometimes it was enacted into statutory law; sometimes it was expressed as case law, as a matter of public policy.").

55 *Id.*

56 Warnock v. Davis, 104 U.S. 775, 779 (1881) (invalidating assignment of insurance policy to one without an insurable interest).

57 J. GREIDER & W. BEADLES, *supra* note 51, at 140 ("If the insurance is to be payable to someone who has no insurable interest at the time the contract is completed, the contract will be void.").

58 15 C.B. 365, 139 Eng. Rep. 465 (C.P. 1854).

59 *Id.* at 390-91, 139 Eng. Rep. at 475-76.

60 Were the insurance policy holder's interest to be measured at the time of the insured's death

American courts ultimately accepted the *Dalby* rule that the destruction of the insurable interest in the insured did not affect the right of a beneficiary to take the proceeds of an insurance policy.[61] As a result, if one spouse was the beneficiary and policy holder of an insurance policy on the life of the other spouse, a later divorce did not affect the surviving former spouse's right to the proceeds of the policy.[62] Similarly, if one spouse insured his own life and named the other spouse as beneficiary of the policy, divorce did not affect the insurable interest because every individual has an insurable interest in his own life.[63] Thus, divorce alone could not affect a beneficiary's right to receive the proceeds of a former spouse's life insurance policy.

C. Factors Affecting a Beneficiary's Right to Take the Proceeds of a Former Spouse's Life Insurance Policy

Whether the beneficiary's interest is vested determines whether the former-spouse beneficiary will receive the proceeds of the life insurance policy. Where the beneficiary is irrevocable, he holds a vested interest in the proceeds.[64] In such a case, the beneficiary will receive the proceeds of the policy unless he voluntarily divests himself of his interest in that policy.[65]

If the policy holder can change the policy beneficiaries, it is more difficult to define a beneficiary's interest in the proceeds. Courts variously have interpreted such a beneficiary's interest as

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> [i]t [would] no longer [be] a contract to pay a certain sum as the value of a then-existing interest, in the event of death in consideration of a fixed annuity calculated with reference to that sum; but a contract to pay,—contrary to express words,—a *varying* sum, according to the alteration of the value of that interest at the time of death . . . ; and yet the . . . premium to be paid, is fixed, calculated on the original fixed value, and is unvarying . . . .
>
> This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot . . . be put upon this section.

Id., 139 Eng. Rep. at 475-76 (emphasis in original).

61 *See, e.g.*, Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 463 (1876) (Joint life insurance policy payable to wife at ex-husband's death despite divorce on grounds that "in our judgment a life policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured.") (citing *Dalby*); Courtois v. Grand Lodge of A.O.U.W., 135 Cal. 552, 67 P. 970 (1902) (wife entitled to policy proceeds at husband's death despite intervening divorce) (citing *Schaefer*); *see also* 5 G. COUCH, *supra* note 49, § 29:4, at 235 (termination of beneficiary spouse's insurable interest upon divorce does not affect his or her right to recover policy proceeds).

62 *See* 5 G. COUCH, *supra* note 49, § 29:4, at 234.

63 J. MUNCH, LIFE INSURANCE IN ESTATE PLANNING, ¶ 6.1.2, at 112 (1981).

64 J. GREIDER & W. BEADLES, *supra* note 51, at 145 (an irrevocable beneficiary has "a vested right to the benefit payable at the death of the insured . . . [that] cannot be reduced or destroyed without the beneficiary's consent").

65 *Id.*

vested, subject to total divestment;[66] an inchoate right;[67] or a mere expectancy.[68] Regardless of which definition a court uses, the beneficiary has essentially the same right: "[the beneficiary] has been told 'I hereby give you the right to receive certain assets, to be delivered upon my death, unless I decide to give those assets to someone else.' "[69] One commentator has defined the differences in the characterizations of this interest as ' "mere nicet[ies] of language, comparable to using the right fork or spoon at the table.' "[70]

Insurance contracts generally prescribe whether and by what method a policy holder can change the desiguated beneficiary.[71] Courts have held that the policy holder must substantially comply with the prescribed method of change in order to change the beneficiary.[72] To meet this substantial compliance requirement, the policy owner must attempt to do everything possible to comply with the change-of-beneficiary requirements.[73]

Johnson v. New York Life Insurance Co.[74] represents one of the more striking examples of the substantial compliance rule's operation. The life insurance policy in *Johnson* contained an endorsement change-of-beneficiary clause,[75] which required the insured to notify

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66 *See, e.g.*, Johnson v. New York Life Ins. Co., 56 Colo. 178, 182-83, 138 P. 414, 416 (1913); Indiana Nat'l Life Ins. Co. v. McGinnis, 180 Ind. 9, 18-21, 101 N.E. 289, 292-93 (1913); Metropolitan Life Ins. Co. v. Woolf, 138 N.J. Eq. 450, 454-55, 47 A.2d 340, 342-43 (1946); John Hancock Mut. Life Ins. Co. v. Heidrick, 135 N.J. Eq. 326, 328, 38 A.2d 442, 443 (Ch. 1944).

67 *See, e.g.*, Shaw v. Board of Admin., 109 Cal. App. 2d 770, 774, 241 P.2d 635, 637 (1952); Gurnett v. Mutual Life Ins. Co., 356 Ill. 612, 619, 191 N.E. 250, 253 (1934).

68 *See, e.g.*, Thorp v. Randazzo, 41 Cal. 2d 770, 773, 264 P.2d 38, 40 (1953) (en banc); McEwen v. New York Life Ins. Co., 42 Cal. App. 133, 138 (1919); Hicks v. Northwestern Mut. Life Ins. Co, 166 Iowa 532, 537, 147 N.W. 833, 885 (1914); Life Ins. Co. of N. Am. v. Jackson, 475 A.2d 1150, 1151 (Me. 1984).

69 Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1578 (1982).

70 Langbein, *supra* note 7, at 1128 n.81 (quoting J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 911, at 475 (1966)).

71 The three common methods by which the policy holder can change the beneficiary are the endorsement method, the filing method, and the endorsement-at-insurer's-option method. The endorsement method requires the policy holder to send written notification of the change to the insurance company's home office. The change is valid as soon as the company endorses it onto the policy. The filing method requires the policy holder only to file a written request of change with the company. The endorsement-at-insurer's-option method provides that ordinarily a change may be made merely by the filing method, but that the company reserves the right to require endorsement if it so desires. J. GREIDER & W. BEADLES, *supra* note 51, at 400-01.

72 *See id.* at 401-03 (if insured has done everything in his power to comply with policy procedures, change of beneficiary ordinarily will be given effect).

73 *Id.* at 402.

74 56 Colo. 178, 138 P. 414 (1913).

75 For a discussion of the types of change of change of beneficiary provisions, see *supra* note 70.

the company in writing of any change of beneficiary.[76] The insured initially had named his mother as the beneficiary, but after marriage he wanted to change this designation to his wife. To that end, he delivered the actual policy to his wife, and she paid several of the premiums.

In attempting to excuse the insured's failure to comply with the contractual method of changing beneficiaries, his wife presented evidence that:

> he resided about 50 miles from [the home office], and made a trip for the purpose of making application at the office of the company . . . to have plaintiff designated as the beneficiary; that he was ignorant of the manner and procedure required to be taken for the purpose of effecting such change; that he endeavored to find the agent through whom the policy was effected; that he was unable to do so; that he then attempted to transact the matter himself, but found the offices of the company closed; that he was a laboring man, a miner, a poor person, and a foreigner, and unable to either read or write the English language, except meagerly . . . .[77]

Despite the extreme circumstances of this case, the court held the attempted change of beneficiary ineffective. The insured simply had not tried hard enough to comply with the contract and therefore had failed to satisfy the substantial compliance requirement.[78]

The substantial compliance requirement is the major reason for the different effects of divorce on a will and on a life insurance policy. In the law of wills courts fashioned the doctrine of revocation by divorce because the testator's intent ostensibly controls the result in a will case.[79] No such doctrine of presumed intent is possible in the case of insurance policies because the insurance contract governs the beneficiary designation.[80] Thus, in the paradigmatic revocation-by-divorce case, in which divorce is coupled with a property settlement, unless the insured at least substantially complies with his life insurance policy's change-of-beneficiary requirements, his former spouse will recover the proceeds of the policy upon his death.[81]

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76 56 Colo. at 179-80, 138 P. at 415.

77 *Id.* at 181, 138 P. at 415.

78 The complaint fail[ed] to allege a sufficient attempt on the part of the insured to make a change of the beneficiary in the manner provided, or that he was prevented from doing so by the happening of that over which he had no control. What it allege[d] . . . in the way of an excuse was pure neglect upon his part, and nothing more.

Id. at 184, 138 P. at 416.

79 *See supra* notes 14-23 and accompanying text.

80 One reason for the different treatment is that the insurance company must know to whom it is obligated to pay the proceeds of the insurance policy. For criticism of this reason for the different treatment, see *infra* notes 134-38 and accompanying text.

81 *See* Shaw v. Board of Admin., 109 Cal. App. 2d 770, 776-77, 241 P.2d 635, 638-39 (1952) (wife entitled to proceeds of former husband's death benefit policy despite

D. The Property Settlement as a Waiver of the Beneficiary's Interest in an Insurance Policy

Contract law prevented courts from recognizing implied revocation by divorce of life insurance policy beneficiary designations. The courts did, however, fashion a limited revocation-by-divorce doctrine using the concept of waiver.[82] The California Supreme Court first articulated this doctrine in *Grimm v. Grimm*.[83] The court held that when a designated beneficiary entered a contract with the insured in which he surrendered his interest in the policy, he was equitably estopped from claiming the proceeds.[84]

In *Grimm* a married couple had entered into a property agreement in 1939 which divided their community property. Under the terms of the agreement, a life insurance policy on the husband's life naming the wife as beneficiary became the husband's sole property.[85] Two years later the couple obtained a divorce. Mr. Grimm died in 1943 without having changed the beneficiary designation.

Judge Traynor noted the general rule that an ex-wife was entitled to the proceeds of a life insurance policy on the life of her former spouse if she remained the named beneficiary.[86] He explained, however, that because equity would enforce the release of an expectancy,[87] a beneficiary who had surrendered his interest in the proceeds could not receive those proceeds regardless of the policy's beneficiary designation.[88] The court's determination of whether a

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having accepted $400 by divorce decree in lieu of interest in community property); Cox v. Employers Life Ins. Co., 25 Ill. App. 3d 12, 19, 322 N.E.2d 555, 560 (1975) (Where life insurance policy required that to change beneficiary designation of change must be in writing and must be filed with company, "The property settlement agreement in this case in no way complies with this requirement and, therefore, would be ineffective to change the beneficiary of the insurance policy . . . ."); Life Ins. Co. of N. Am. v. Jackson, 475 A.2d 1150, 1151 (Me. 1984) ("The mere fact that the named beneficiary has been divorced from the insured does not affect the beneficiary's rights to the insurance proceeds."); Bowers v. Bowers, 637 S.W.2d 456, 459 (Tenn. 1982) (property settlement held to have "no force and effect whatever upon the life insurance policy and neither the agreement nor the divorce terminated wife's status as named beneficiary in the policy or her right to receive the proceeds.").

82 A waiver is "the intentional and voluntary giving up of a known privilege or right." J. GREIDER & W. BEADLES, *supra* note 51, at 291.

83 26 Cal. 2d 173, 157 P.2d 841 (1945).

84 *Id.* at 175-76, 157 P.2d at 842-43.

85 The property settlement agreement provided: "'The parties hereto do mutually covenant and agree that this agreement is . . . a complete property settlement between the parties hereto, and that it compromises . . . all claims arising . . . by reason of the marriage of the parties hereto.'" *Id.* at 177-78, 157 P.2d at 843-44. The agreement specifically included the life insurance policy as marital property. *Id.* at 178, 157 P.2d at 844.

86 *Id.* at 177, 157 P.2d at 843.

87 *Id.* at 176, 157 P.2d at 843 ("An assignment or release of an expectancy becomes enforceable in equity when the expectancy has developed into a right.").

88 *Id.* at 175, 157 P.2d at 842 ("She would not be entitled to such proceeds, how-

beneficiary surrendered his interest would depend on the parties' intent as reflected in their property settlement.

The court in *Grimm* determined that the beneficiary had not intended to waive her right to the policy proceeds.[89] Subsequent courts have used the *Grimm* court's statement that a beneficiary can contractually surrender his rights to an expectancy to create a quasi-revocation-by-divorce doctrine for insurance policies. The majority of courts today hold that when a divorce decree specifically mentions a life insurance policy (other than to require the insured to name a specific beneficiary), the spouse beneficiary has waived his expectancy interest in the proceeds.[90]

E. A Comparison of the Operation of Revocation By Divorce in Wills and Waiver by Agreement in Life Insurance Policies

State legislatures almost universally have determined that divorce should revoke any gift to the testator's former spouse in his previously executed will.[91] Absent specific reference to an insurance policy in the divorce decree, however, an ex-spouse can receive the proceeds of a life insurance policy.[92]

This division in the laws respecting wills and life insurance policies can lead to anomalous results. For example, suppose a man

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ever, if the parties agreed that no rights were to accrue to her, even though she remained the beneficiary at the time of the husband's death.").

89 *Id.* at 179, 157 P.2d at 844 ("The express reference in the agreement to the right of the husband to change the beneficiary indicates that there was no immediate change and that the wife would remain the beneficiary . . . unless the husband exercised his right to change the beneficiary.").

90 *See, e.g.*, Brewer v. Brewer, 239 Ark. 614, 390 S.W.2d 630 (1965) (property settlement in which wife transferred and released her interest in husband's life insurance and which gave husband right to change beneficiaries held to have changed beneficiary); Phillips v. Pelton, 10 Ohio St. 3d 52, 53, 461 N.E.2d 305, 307 (1984) (exception to general rule that divorce does not revoke right of beneficiary to take policy exists "where the terms of a separation agreement . . . 'plainly indicate' the elimination of the named beneficiary from all rights to the life insurance proceeds"); Beckham v. Beckham, 672 S.W.2d 41, 42 (Tex. Ct. App. 1984) (where husband purchases insurance policies and designates wife as beneficiary, later divorces wife and is awarded policies, and dies shortly after divorce without having changed beneficiaries, intent of insured rather than policies determines the beneficiaries.). *See generally* Annotation, *Property Settlement Agreement as Affecting Divorced Spouse's Right to Recover as Named Beneficiary Under Former Spouses Life Insurance Policy*, 31 A.L.R.4th 59 (1984). *But see* Lewis v. Lewis, 693 S.W.2d 672 (Tex. Ct. App. 1985) (divorce decree in which wife gave up rights to husband's life insurance did not affect ex-wife's designation as beneficiary; Aetna Life Ins. Co. v. Wadsworth, 102 Wash. 2d 652, 689 P.2d 46 (1984) (divorce decree which conveyed to husband all life insurance policies insuring his life held to waive only wife's present ownership interest, not expectancy interest as beneficiary).

91 *See supra* note 2 and accompanying text.

92 Michigan is the only exception to this rule. *See* MICH. COMP. LAWS ANN. § 552.101 (West Supp. 1987). For text of the statute, see *infra* note 139.

simultaneously executes a will leaving an estate worth $50,000 to his wife and purchases a $500,000 life insurance policy naming her the primary beneficiary. The couple then divorces without including the life insurance policy in their property settlement. The husband dies without changing either the will or the life insurance beneficiary designation. The divorce would revoke the $50,000 gift to the former wife on the presumption that "the last thing one of the parties [would wish] is to have an earlier will carried out giving everything to a former spouse."[93] The same spouse would receive the $500,000 in insurance proceeds, however, on the presumption that " 'if the insured had wished to substitute another person or his estate as beneficiary following the divorce, he would have at least attempted to effect a change with the insurer or included a provision in the property settlement.' "[94] Such inconsistent presumptions make sense only if people recognize the differences between wills and life insurance policies. In fact, people do not recognize these differences and think of life insurance as a pure will substitute.

III
THE FUNCTIONAL EQUIVALENCE OF WILLS AND LIFE INSURANCE POLICIES

A. Probate Avoidance as a Motive for Purchasing Life Insurance

One of the key advantages offered by life insurance is that the proceeds pass to the beneficiary without the necessity of probate.[95] The public commonly believes "that succession via probate runs directly against such usually desired objectives as privacy in regard to family property matters, avoidance of delay in transmission at death and avoidance of artificial non-liquidity following death."[96] In addition, people view probate as a means of enriching lawyers at the expense of beneficiaries.[97]

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93 Young, *supra* note 3, at 10.

94 Cox v. Employers Life Ins. Co., 25 Ill. App. 3d 12, 19, 322 N.E.2d 555, 559 (1975) (quoting O'Toole v. Central Laborers' Pension & Welfare Funds, 12 Ill. App. 3d 995, 997, 299 N.E.2d 392, 394 (1973)).

95 *See* J. DUKMINIER & S. JOHANSON, *supra* note 12, at 315-17.

96 Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 194 (1968); *see also* J. MUNCH, *supra* note 63, ¶ 8.1, at 160 (Making insurance proceeds payable to the estate of the insured "is undesirable, if for no other reason than because it subjects the proceeds to probate. The estate is enlarged . . ., attorney and executor's fees are increased, and in some states, the costs of the probate process are increased.").

97 *See* Meyers, *Probing the Source of Probate Pains*, Wall St. J., May 14, 1968, at 18, col. 3 ("[A] lot of beneficiaries believe . . . that they have been gypped by outrageous overcharging by lawyers probating estates. It isn't too hard to find someone with what he considers a very sad story about legal fees.").

The practical similarities between wills and life insurance policies render life insurance an easy will substitute for those who wish to avoid probate. Indeed, the two most basic requirements for a will—that it be revocable until the death of the maker, and that it vest no enforceable property right in the beneficiary until that time[98]—are both characteristics of life insurance policies that allow a change of beneficiary.[99]

Considering the public's desire to avoid probate[100] and the similarities between a life insurance policy and a will,[101] a life insurance policy is best characterized as a "nonprobate will."[102] Indeed, the reason people cite most often for purchasing life insurance is to provide financial protection for their families in case they die prematurely.[103] The characterization of life insurance as a nonprobate will is supported further when one considers that, in most cases, people understand almost nothing about their insurance contracts.

B. Consumer Ignorance of Insurance Contracts

An overwhelming number of Americans have some form of life insurance,[104] yet Americans as a whole remain remarkably ignorant of the contractual rights and duties contained in their policies.[105] This ignorance probably results from insurance contract complexity and consumer apathy.[106] Whatever the cause of this ignorance, it is

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98 Langbein, *supra* note 7, at 1110 (interests of beneficiaries do not exist until insured's death); Alexander, *supra* note 69, at 1571 (life insurance beneficiary's interest in proceeds of policy is "vulnerable to [the policy holder's] legally recognized power of termination").

99 *See* Grimm v. Grimm, 26 Cal. 2d 173, 175-76, 157 P.2d 841, 842 (1945) ("The interest of a beneficiary designated by an insured who has the right to change the beneficiary is, like that of a legatee under a will, a mere expectancy of a gift at the time of the insured's death."); Culbertson v. Continental Assurance Co., 631 P.2d 906, 910 (Utah 1981) (quoting *Grimm*); Langbein, *supra* note 7, at 1110 ("We say that a will is revocable until the death of the testator and that the interests of the devisees are . . . nonexistent until the testator's death. Unless specifically restricted by contract, the life insurance beneficiary designations operates identically.") (footnote omitted).

100 *See supra* notes 96-97 and accompanying text.

101 *See supra* notes 98-99 and accompanying text.

102 *See* Langbein, *supra* note 7, at 1137; *see also* I.R.C. § 2042 (1982) (proceeds of life insurance policies payable to third parties included in decedent's gross estate if, at time of death, decedent possessed any incident of ownership).

103 AM. COUNCIL OF LIFE INSURANCE, 1986 LIFE INSURANCE FACT BOOK 8 (1984); *see also* AM. COUNCIL OF LIFE INSURANCE, MONITORING ATTITUDES OF THE PUBLIC 27 (1984) [hereinafter M.A.P. 1984] (In 1984, 65% of people polled stated that they agreed with statement, "Everything considered, life insurance is the best way of protecting one's family financially against the premature death of the breadwinner.").

104 *See supra* notes 46-47 and accompanying text.

105 *See* V. ZELIZER, MORALES AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 21-22 (1979) (most policy holders are ignorant about their own policies and about life insurance in general).

106 *Id.*; *see also* J. BELTH, LIFE INSURANCE: A CONSUMERS' HANDBOOK 178-87 (1973)

a fact that most insureds do not understand the exact nature of their relationship with the insurance company.[107] Given this consumer ignorance, it is hard to believe that people choose to purchase a life insurance policy because of its contractual features.

1. *Ignorance Resulting From Contract Complexity*

Life insurance contracts are tremendously complex.[108] Indeed a recent study concluded that insurance contracts were less understandable than both the Bible and Einstein's theory of relativity.[109] Studies since 1968 have shown that only between nine and eleven percent of people surveyed believed that they were "very well informed" about life insurance.[110] Even more telling is that only twenty percent of people surveyed in 1984 believed that they understood the terms and provisions of their life insurance policies "very well."[111]

Unfortunately, in most cases insurance agents cannot explain policy complexities to life insurance purchasers. Insurance agents' lack of policy knowledge is a result of the great weight that insurance companies accord training agents in sales techniques.[112] Because sales are insurance companies' first priority, "many companies fail to educate their [agents] to the technicalities of life insurance."[113] Consumers thus remain unaware of the specific terms of their contracts, and their primary source of information, their agent, is unable to education them.

("Ignorance, complexity and apathy are the three words that best characterize the insurance market." *Id.* at 178.).

107 *See infra* notes 108-19 and accompanying text.

108 *See* J. BELTH, *supra* note 106, at 178; J. GOLLIN, PAY NOW, DIE LATER 5 (1966) ("[T]he life insurance industry has long chosen to conduct its affairs is a strange jargon, a kind of Mandarin, that mystifies and alienates everybody who has to cope with it."); *see also* Comment, *Life Insurance—Divorce Property Settlements—Relative Rights of Beneficiaries—New Jersey's Inflexible Approach*, 25 RUTGERS L. REV. 189, 197-98 (1970) ("Due to the intricate and sometimes confusing language used in many life insurance policies, insureds often fail to comprehend the full impact of most policy provisions.").

109 *See* V. ZELIZER, *supra* note 105, at 22.

110 M.A.P. 1984, *supra* note 103, at 28. Other studies have show that people are not well informed about their policies. *See* INSTITUTE OF LIFE INSURANCE, THE M.A.P. REPORT 20 (1973) [hereinafter M.A.P. 1973] ("[A] sampling of the public was tested on their life insurance knowledge, and the results confirmed that people's perceptions of their lack of knowledge were accurate.").

111 M.A.P. 1984, *supra* note 103, at 29.

112 J. BELTH, A REPORT ON LIFE INSURANCE 148 (1967).

113 *Id.*; *see also* N. DACEY, WHAT'S WRONG WITH YOUR LIFE INSURANCE 355-56 (1963) (Insurance industry "is interested only in a man with a professional knowledge of *how to sell* [life insurance]. They don't want salesmen to know what insurance *is*. The industry's slogan is '*Just do as we tell you* . . . . Don't tell them anything about the policy. Just talk generalities.' ") (emphasis in original).

2. *Consumer Ignorance Resulting From Consumer Apathy*

Insureds also are largely ignorant of their policies' terms because of their own apathy.[114] Although people generally believe that they should have some form of life insurance,[115] most people do not feel that they should learn more about their policies.[116] Apathy toward life insurance stems from two factors. First, because people are averse to discussing their own death they fail to seek information regarding the different aspects of their policies.[117] Second, because insurance contracts are contracts of adhesion,[118] insureds have no choice as to the terms of the contract. Consequently, most people accept what the agent tells them without actually reading the contract for themselves.[119]

Courts have balked at applying revocation by divorce to life insurance policies because these policies are governed by contract law. Yet in almost all cases insureds neither understand nor care about any of the contractual aspects of their policies. It is necessary, therefore, to study other possible justifications for distinguishing life insurance policies and wills.

IV
POSSIBLE REASONS FOR DISTINGUISHING BETWEEN WILLS AND LIFE INSURANCE POLICIES WHEN APPLYING REVOCATION BY DIVORCE

Courts have failed to advance reasons for distinguishing between applying revocation by divorce to wills and applying it to life

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114 *See* J. BELTH, *supra* note 106, at 181 ("Apathy in the life insurance market is widespread. . . . People would rather spend their leisure time discussing automobiles, sports, politics, social problems, or the state of the economy."); V. ZELIZER, *supra* note 105, at 22 (people prefer to remain ignorant about life insurance).

115 *See* M.A.P. 1984, *supra* note 103, at 27 (When given statement, "Most people should have some form of life insurance coverage," in the years 1980-1984, between 77% and 80% of people surveyed stated that they agreed. Only between 6% and 9% disagreed.).

116 *See* V. ZELIZER, *supra* note 105, at 22 ("[R]ecent data confirm consumers' ignorance of the various policies available, the various options, the provisions in the contracts and price variations.") (citing LIFE INSURANCE AGENCY MANAGEMENT ASS'N, LIFE INSURANCE CONSUMERS 25 (1973)).

117 *See* J. BELTH, *supra* note 106, at 181-82 ("[An] important effect of apathy on the life insurance market is that it tends to perpetuate ignorance. When people are not interested in discussing life insurance, they do not find out how it operates or how it can be useful to them.").

118 *See* E. FARNSWORTH, CONTRACTS § 4.26, at 295 (1982) (Contract of adhesion is standard form contract that is "a take-it-or-leave-it proposition . . . under which the only alternative to complete adherence is outright rejection.") (footnote omitted).

119 *See* V. ZELIZER, *supra* note 105, at 23 n.* ("Another reason why people did not read their insurance policies is that they are contracts of 'adhesion,' unilaterally drafted by one of the parties involved in the contractual relationship. The insured merely adheres to it with little choice as to its terms.").

insurance policies. While there are a number of possible reasons for such a distinction, none provides a logical basis for the different treatment. Courts should therefore extend the doctrine of revocation by divorce to life insurance policies.

A. Protection of the Insured's Intent

One possible reason why courts have refused to extend revocation by divorce to life insurance policies is to protect the policy holder's expressed intent. Courts presume that the insured did not intend to remove his spouse as beneficiary of his life insurance policy after divorce. Indeed, courts commonly declare that the insured knew whom he had named as beneficiary, that "it was in his power to change that designation [and that] [h]e chose not to do so even though time and opportunity permitted."[120] Therefore, the reasoning goes, the policy holder intended his former spouse to receive the insurance proceeds upon his death. The logic of revocation-by-divorce statutes, however, contradicts this presumption[121] unless people are more likely to change their life insurance than their will.

Such a greater likelihood of change for life insurance policies is doubtful for two reasons. First, because of the substantial compliance requirement it may be more difficult to change the beneficiary of a life insurance policy than to make a similar change in a will.[122] For example, in states recognizing holographic wills,[123] a testator can change the beneficiary in a will merely by writing out a holographic codicil.[124] In contrast, such a written expression of intent would fail to change the beneficiary of a life insurance policy.[125]

In addition, a person is as likely to neglect to change the benefi-

120 Girard v. Pardun, 318 N.W.2d 137, 140 (S.D. 1982); *accord* Bowers v. Bowers, 637 S.W.2d 456, 458 (Tenn. 1982).

121 *See supra* note 38 and accompanying text.

122 For a discussion of the substantial compliance requirement, see *supra* notes 71-78 and accompanying text.

123 A holographic will is a will that is handwritten by the testator. *See* J. DUKMINIER & J. JOHANSON, *supra* note 12, at 230. The states that recognize holographic wills are: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. *Id.* at 230 n.28.

124 *See, e.g., In re* Estate of Morris, 15 Ariz. App. 378, 381, 488 P.2d 1015, 1018 (1971) ("We are satisfied that under the Arizona statutes a holograph and a witnessed will are of equal formality, and that the holographic codicil here effectively modified the witnessed will."); Welch v. Straach, 531 S.W.2d 319, 321 (Tex. 1975) (holographic will giving wife fee simple estate in homestead modified to give life estate by holographic codicil stating "this homestead shall remain in her possession as long as she live").

125 *See, e.g.*, Allen v. First Nat'l Bank, 261 Ark. 230, 547 S.W.2d 118 (1977) (en banc) (written and signed statement that "I hereby change the beneficiaries of all those life insurance policies . . . mentioned above" held not effective because it failed to comply with contractual method of change); *see also supra* notes 73-78 and accompanying text.

ciary of a life insurance policy as to neglect to change a will. Both changes require the person to deal with the inevitability of death, yet his natural reluctance to accept this inevitability[126] may cause him to neglect both the changes in his will and in his insurance policy. The insured does not demonstrate his intent to have the proceeds pass to his former spouse by failing to change the designated beneficiary any more than a testator's failure to change his will demonstrates his intent to convey his estate to his former spouse.[127] Indeed, because it is a "generally accepted proposition that most policy holders rarely look at their policies,"[128] implying an insured's intent from his inaction with respect to his policy would seem to depart from reality. Courts therefore cannot justify the current treatment of life insurance policies as a means of protecting the insured's intent.

B. Protection of the Beneficiary

A second possible reason why courts have refused to extend revocation by divorce to life insurance policies is that they are concerned with protecting the named beneficiaries.[129] This concern, however, does not justify treating an insurance contract differently from a will because a will and a life insurance policy create identical property interests.[130]

Courts should not protect the former-spouse beneficiary in any event. Insurance law has been shaped by courts' desires to avoid unjust enrichment.[131] Yet allowing the former spouse to take the life insurance proceeds contrary to the insured's intent[132] unjustly enriches the former spouse at the expense of the true objects of the insured's bounty.[133] Courts, therefore, cannot justify their refusal to extend revocation by divorce to insurance policies by claiming this refusal protects the designated beneficiary of the policy.

C. Protection of the Life Insurance Companies

A third possible reason courts treat life insurance policies differently than wills is to protect insurance companies from wrongful

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126 *See supra* note 4 and accompanying text.

127 *See supra* notes 38-40 and accompanying text.

128 J. BELTH, *supra* note 112, at 155; *see also* Comment, *supra* note 108, at 198 ("Unquestionably, many insureds also take the policy for granted, only concerning themselves with the payment of premiums.).

129 An insurance contract does create some kind of a property interest in the beneficiary. *See supra* notes 65-70 and accompanying text.

130 *See supra* note 99 and accompanying text.

131 *See supra* notes 58-60 and accompanying text.

132 *See supra* notes 38-40 and accompanying text.

133 *See supra* notes 17-19 & 38-50 and accompanying text.

disbursement liability. The strict manner in which courts enforce the substantial compliance rule[134] supports this notion. The change-of-beneficiary provisions in insurance contracts are designed to protect insurance companies from wrongful disbursement liability,[135] making it easy for them to determine a policy's proper beneficiary. The substantial compliance rule reifies this protection by allowing companies to rely on their beneficiary determinations.

Courts' refusals to extend revocation by divorce to insurance policies similarly protects insurance companies from wrongful disbursements by allowing them to rely on their beneficiary determinations. Insurance companies do not need this type of protection, however, for two reasons. First, insurance companies can rely on interpleader to avoid liability.[136] Interpleader allows the insurance company to submit to any court of competent jurisdiction the question of who among all individuals claiming an interest in the policy proceeds is entitled to receive those proceeds.[137] Thus an insurance company can avoid potential liability for wrongful disbursement through a single judicial proceeding.[138]

Second, insurance companies can protect themselves by assuring that the insured wants the named beneficiary to receive the policy proceeds. The insurance company could do that by including a statement of the current beneficiaries of the policy with the insured's premium bill for the insured to sign and return. By having the insured sign and return such a statement, the company could be confident that the insured's beneficiary designation was a true expression of his intent. Courts, therefore, cannot justify their refusal to extend revocation by divorce to insurance policies by claiming the current distinction is necessary to protect insurance companies.

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134 *See supra* notes 71-78 and accompanying text.

135 Comment, *supra* note 108, at 198 ("the formal policy requirements for changing beneficiaries were designed to protect the insurer from wrongful disbursement").

136 J. GREIDER & W. BEADLES, *supra* note 51, at 495 ("The remedy of interpleader permits any person, corporation, or association holding money or property belonging to someone else to submit to a court the question of who is rightfully entitled to it. Whenever two or more persons claim the same property and the holder cannot decide between or among them, he may file a bill of interpleader in a court, deposit the money with it, and the court will decide among the claimants.").

137 *Id.*

138 *See id.* at 496 (after the insurance company has filed bill of interpleader a "final court decision settles the question, and the company is discharged of all further liability").

V
A Proposal For Change

A. Reverse the Current Nonrevocation Rule For Life Insurance Policies

The presumption of the revocation-by-divorce statutes, that revocation of a will reflects the testator's true intent, applies equally to life insurance policies. Thus, the current approach gives effect to the decedent's intent in distributing assets transferred under a will but frustrates the decedent's intent in distributing assets transferred by a life insurance policy.

To correct the current inconsistency in treatment of asset transfers to a former spouse at death, states should follow Michigan's lead and enact statutes providing that divorce alone revokes any right a former spouse has to the proceeds of a previously executed life insurance policy.[139] These statutes also would provide certainty in the outcome of each former-spouse beneficiary case. As a result of this certainty former spouses would bring fewer cases questioning whether the specific words in any given property settlement waived their rights to life insurance policy proceeds.[140]

Absent legislative action, courts should nevertheless apply rev-

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139 *See* MICH. COMP. LAWS ANN. § 552.101(2) (West Supp. 1987). The statute provides, in pertinent part:

> Each judgment of divorce or judgment of separate maintenance shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the husband in which the wife was named or designated as beneficiary, or to which the wife became entitled by assignment or change of beneficiary during the marriage or in anticipation of marriage. If the judgment of divorce or judgment of separate maintenance does not determine the rights of the wife in and to a policy of life insurance, endowment or annuity, the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates. However, the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy, unless before the payment the company receives written notice, by or on behalf of the insured or the estate of the insured or 1 of the heirs of the insured, or any other person having an interest in the policy, of a claim under the policy and the divorce.

140 For cases involving the interpretation of various property settlements, see, e.g., Allen v. First Nat'l Bank, 261 Ark. 230, 547 S.W.2d 118 (1977) (en banc) (no waiver by spouse where property settlement incorporated into divorce did not specifically mention life insurance policies at issue); Thorp v. Randazzo, 41 Cal. 2d 770, 264 P.2d 38 (1953) (en banc) (property settlement that mentioned life insurance policy in question held to waive former spouse's rights to policy); Maxwell v. Britt, 171 Ga. App. 230, 319 S.E.2d 88 (1984) (where property agreement did not mention insurance policies, no waiver by former spouse); Redd v. Brooke, 96 Nev. 9, 604 P.2d 360 (1980) (no waiver where property agreement did not state that each party intended to give up rights to expectancy in policy); Bersch v. VanKleeck, 112 Wis. 2d 594, 334 N.W.2d 114 (1983) (no waiver where property agreement specifically awards each party their respective insurance policies but

ocation by divorce to insurance policies. Current laws concerning the effect of divorce on life insurance policies reflect an outmoded characterization of those policies.[141] Courts should recognize the fact that life insurance is nothing more than a will substitute[142] and extend the treatment of wills to the area of life insurance.[143]

In applying revocation by divorce to life insurance, courts should try to minimize the insurance company's potential liability for wrongful disbursement.[144] The courts should require a company to interplead opposing parties if it knows of the insured's divorce. Absent such information on the part of the insurance company, courts should relieve the company from further liability.[145]

CONCLUSION

The current distinction between the effect of divorce on wills and on life insurance policies is not logically justifiable. The oddest aspect of this distinction is that when discussing the effect of a divorce on a life insurance policy courts believe they are "under no obligation to mention, much less reconcile, the contrary rule and rationale of the law of wills."[146] The fact is, most people think of life insurance policies in the same manner as wills[147] and do not understand that a complicated set of legal rules attaches to a life insurance policy.[148]

Perhaps the will/life insurance distinction was valid at one time.[149] This distinction, however, is not valid today. Legislatures should follow Michigan's lead and provide that unless otherwise or-

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did not specifically denote how beneficiaries interest was to be terminated). For a discussion of the use of waiver, see *supra* notes 82-87 and accompanying text.

141 *See supra* notes 50-52 and accompanying text.

142 *See* Langbein, *supra* note 7, at 1136-37 ("Transferors use will substitutes to avoid probate, not to avoid the subsidiary law of wills. The subsidiary rules are the product of centuries of legal experience in attempting to discern transferor's wishes and suppress litigation. These rules should be treated as presumptively correct for will substitutes as well as for wills."); *supra* notes 104-19 and accompanying text.

143 Where a legal rule diverges from reality, courts have a duty to exercise their function of common law formulation. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982) ("What, then, is the common law function to be exercised by courts today? *It is no more and no less than the critical task of deciding when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule.* It is the judgmental function . . . of deciding when a rule has come to be sufficiently out of phase witb the whole legal framework . . . .") (emphasis in original).

144 *See supra* notes 134-35 and accompanying text.

145 For an example of how this limitation of liability for insurers may be formulated, see MICH. COMP. LAWS ANN. § 552.101 (West Supp. 1987).

146 Langbein, *supra* note 7, at 1136.

147 *See supra* notes 100-02 and accompanying text.

148 *See supra* notes 108-19 and accompanying text.

149 *See* J. GREIDER & W. BEADLES, *supra* note 51, at 425.

dered by a divorce decree, life insurance proceeds shall be payable to the secondary beneficiary or, absent a secondary beneficiary, to the insured's estate.[150] If state legislatures fail to adopt such statutes, courts should recognize the practical similarity between wills and life insurance policies and apply the doctrine of revocation by divorce to life insurance policies.

Alan S. Wilmit

150 *See supra* note 139.