

# Will Substitutes, Divorce, and Statutory Assistance for the Unthinking Donor

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## ARTICLES

### WILL SUBSTITUTES, DIVORCE, AND STATUTORY ASSISTANCE FOR THE UNTHINKING DONOR

ROBERT J. LYNN\*

#### I. INTRODUCTION

Today the will is still the most familiar of the traditional devices used to provide for the family of a decedent, and more widespread use of wills is encouraged by the adoption of statutory wills acts.<sup>1</sup> If a donor properly executes a will that remains unrevoked at death, and critical elements in the circumstances of the family remain the same in the interval between execution of the will and the death of the testator, the will admitted to probate governs disposition of the net probate estate in the manner intended by the testator.

But the interval between execution of the will and the death of the testator might be extended, resulting in changes of circumstances such as a named beneficiary dying, an unplanned child being born, or property that is the subject of a testamentary gift being removed from the assets of the estate. Even if the time interval is short, disaster might overtake a family and alter its character forever.

A testator can, of course, anticipate change in circumstances, and the thoughtful or well-advised testator does. The will might read: "My classic Cadillac automobile to my son *D*, but if it is not owned by me at my death, \$10,000 to *D*." When the testator fails to anticipate change, statutory inter-

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1. *E.g.*, CAL. PROB. CODE ANN. §§ 6200-6248 (West Supp. 1987).

vention is common. Elective or forced share statutes (precluding disinheritance of the surviving spouse), pretermitted heir statutes (providing for the afterborn child), and anti-lapse statutes (creating a gift by substitution when an intended beneficiary of the will predeceases the testator) abound. Such statutes are not uniform, and they occasionally work quixotically,<sup>2</sup> but such statutes' age and prevalence attest to their general acceptance.

Contemporaneously with the refinement of these remedial statutes applicable to testate succession, will substitutes have proliferated. To the joint tenancy in land with the right of survivorship has been added an array of devices both permitting and encouraging the transmission of property at death without the inconvenience, expense, and delay of the probate process. Life insurance, banking arrangements, pension and deferred compensation plans all lend themselves to providing substantial sums to dependents and successors at death without using either the law of wills or the law of intestate succession — in short, "without probate." Section 6-201 of the Uniform Probate Code specifically authorizes avoiding the probate process.<sup>3</sup> Even the U.S. Savings Bond, that bastion against adversity of the blue-collar class, has been reinvigorated after several decades of neglect to again become a feder-

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2. French, *Anti-Lapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 336-44, 352-63 (1985).

3. Section 6-201(a) of the Uniform Probate Code reads as follows:

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this Code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promissor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

UNIF. PROB. CODE § 6-201(a), 8 U.L.A. 534 (1983).

ally-sponsored means of passing property at death without difficulty.

This development of will substitutes has been aptly styled the nonprobate revolution,<sup>4</sup> and as in all revolutions, old problems arise in new contexts. Suppose that *A* executes a will leaving a gift to his or her spouse *B*. *A* and *B* thereafter divorce, and the property settlement makes no reference to the wills of either *A* or *B*. *A* dies while *B* survives. A statute might intervene to revoke the testamentary gift to the divorced spouse *B*.<sup>5</sup> Under such a statute the gift to *B* is said to be revoked "by operation of law." In the absence of a statute, divorce alone does not revoke provisions in a will for the divorced spouse.

Again, suppose that *A*, married to *B*, procures a policy of insurance on *A*'s life and designates *B* as beneficiary. They divorce, and the property settlement makes no reference to insurance. *A* dies while *B* survives. A statute might intervene to revoke the beneficiary designation of the divorced spouse *B*,<sup>6</sup> but in the absence of a statute, the divorce does not affect the beneficiary designation.<sup>7</sup> Also, a statute applicable to wills might not be extended to revoke the beneficiary designation of a life insurance policy even though in particular instances the proceeds of insurance on the life of a decedent far exceed the value of the net probate estate passed under the decedent's will.

When divorce occurs and death intervenes before a property settlement has been fully executed, the terms of the settlement govern the final distribution of marital assets, irrespective of the fact that legal title is in the survivor by the operation of one or more will substitutes. The case of *White v. White*<sup>8</sup> demonstrates the irrelevance of legal title when equity intervenes. On March 3, 1983, Edith Burdette White filed for divorce, alleging an irretrievably broken marriage and seeking an equitable division of marital property. Her husband, David C. White, filed an answer on April 8, 1983, admitting

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

5. *E.g.*, MICH. COMP. LAWS ANN. § 552.101 (West Supp. 1987).

6. *Id.*

7. Cannon v. Hamilton, 174 Ohio St. 268, 189 N.E.2d 152 (1963).

8. 253 Ga. 267, 319 S.E.2d 447 (1984).

that the marriage was irretrievably broken and likewise seeking an equitable division of marital property. On motion by Edith for judgment on the pleadings as to the divorce only, the trial court on April 25, 1983, entered a final judgment and decree of divorce, reserving the remaining issues for trial.

On May 26, 1983, David died and left Edith as the beneficiary of policies of insurance on David's life, an annuity, and a teacher's retirement account. Edith was also the joint tenant of two savings accounts created by David. Edith contended that the granting of the divorce did not revoke the beneficiary designations of David's life policies, his annuity, or his retirement account, and that on David's death the right to the proceeds vested in her. She also contended that as the surviving joint tenant of the savings accounts, title to the accounts vested in her. She concluded that none of the foregoing were subject to equitable division as marital property, and filed a motion for partial summary judgment, contending entitlement to the assets as a matter of law.

The trial court denied Edith's motion with respect to all of the assets except one life insurance policy.<sup>9</sup> On appeal, the Supreme Court of Georgia agreed with Edith that legal title to the disputed assets vested in her after David's death as a matter of contract law. The supreme court, however, affirmed the trial court's denial of Edith's motion for summary judgment because the issue of the division of the marital assets had not been resolved. The supreme court described the disputed assets as follows:

The property in question here . . . was acquired as a direct result of the labor and investments of the former husband during the course of the marriage, even though [Edith's] rights in some of the property did not accrue until after the former husband's death. Thus, the property is subject to equitable division in spite of the fact that it is titled in [Edith's] name.<sup>10</sup>

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9. *Id.* at 268, 319 S.E.2d at 448.

10. *Id.* at 269, 319 S.E.2d at 449 (citations omitted). *McDonald v. McDonald*, 632 S.W.2d 636 (Tex. Ct. App. 1982) is in accord. In *McDonald*, insurance policies on a husband's life designated his wife as beneficiary. A divorce decree awarded the policies to the husband as his sole and separate property. In the twenty-five day period between the divorce and the former husband's accidental death, he did not change the beneficiary designation. The Texas Court of Appeals awarded the proceeds of the policies to the administrator of the estate of the former husband. *Id.* at 640.

When parties to a divorce action consider property arrangements and attempt to settle them in every respect, statutory intervention might complement the property settlement and discourage litigation like that in *Curley v. Giltrop*.<sup>11</sup> James A. Curley and his wife were divorced on June 7, 1983. Under the divorce settlement the wife agreed not to make any claim on James' retirement program or on his insurance policies of which she was the beneficiary, in return for receiving the house, the proceeds of a bank account, and other assets. James did not change the beneficiary designations after the divorce, and on July 23, 1983, he committed suicide. The estate of James sought to recover from the divorced spouse sums paid to her after his death by the retirement program and two life insurers. The defendant contended that James' failure to change beneficiary designations after the divorce manifested his intent that she take despite her waiver of any claim. The New York trial court found that James' mental and physical state following the divorce precluded a "conscious decision" that his former wife be a beneficiary, and gave judgment for the estate.<sup>12</sup> The appellate division reversed,<sup>13</sup> but the court of appeals reinstated the judgment of the trial court, stating:

We do not accept the position of the majority at the Appellate Division that defendant relinquished nothing more in the divorce settlement than her right to seek a court order requiring decedent to name her as irrevocable beneficiary of the insurance policies pursuant to Domestic Relations Law § 236(B)(8)(a). Defendant's agreement clearly went beyond that and, as found by the trial court, included whatever inchoate and contingent rights she then had to make a claim for sums that might become payable in the future under the retirement program and insurance policies . . . .<sup>14</sup>

A statute revoking the beneficiary designation upon divorce, in the absence of a direction to the contrary in the divorce settlement, would have minimized the dispute in *Curley* because payment of either the retirement benefits or the life insurance proceeds to the divorced spouse would be clearly recoverable.

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11. 68 N.Y.2d 651, 496 N.E.2d 224, 505 N.Y.S.2d 65 (1986).

12. *Id.* at 653, 496 N.E.2d at 225, 505 N.Y.S.2d at 66.

13. *Id.* at 653, 496 N.E.2d at 225, 505 N.Y.S.2d at 67.

14. *Id.* at 653-54, 496 N.E.2d at 225-26, 505 N.Y.S.2d at 67 (citation omitted).

When a party to a divorce action fails to consider property arrangements and a remedial statute intervenes to extinguish rights of the divorced spouse, the statute at that time works imperfectly. But imperfection might originate in application of a statute rather than in the statute itself. *In re Estate of Blanchard*<sup>15</sup> is a case on point. Frederick and Virginia Blanchard married in 1949, and in 1952 Frederick executed a will naming Virginia his primary beneficiary and executrix. They divorced in 1960 and effected a property settlement. A Michigan statute on revocation of wills provided in part that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."<sup>16</sup>

The Blanchards remarried in 1963 and lived together until the accidental death of Frederick in 1970. Virginia sought to probate the 1952 will. Frederick's children contended that the estate passed by intestacy.

The probate court denied Virginia's petition,<sup>17</sup> and on appeal the Michigan Court of Appeals affirmed.<sup>18</sup> A majority of the Supreme Court of Michigan stated the issue as follows: "Should the will, executed during the marriage and unaltered at any time after execution, be revoked by implication of law when the parties divorced, remarried and subsequently lived together for seven years until the testator's death?"<sup>19</sup> The supreme court found that it was not "the natural and reasonable presumption from the chain of conditions and circumstances . . . including divorce, property settlement and remarriage"<sup>20</sup> to imply a revocation of the will. The supreme court reversed the decision of the court of appeals and remanded to the probate court.<sup>21</sup>

The result reached in *Blanchard* is desirable, but for an unpersuasive reason. The correct result is not based on the absence of revocation because revocation occurred by opera-

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15. 391 Mich. 644, 218 N.W.2d 37 (1974).

16. MICH. COMP. LAWS ANN. § 702.9 (West 1980).

17. *In re Estate of Blanchard*, 391 Mich. at 649, 218 N.W.2d at 38.

18. *Estate of Blanchard v. Blanchard*, 43 Mich. App. 752, 204 N.W.2d 730 (1972) *rev'd*, 391 Mich. 644, 218 N.W.2d 37 (1974).

19. *In re Estate of Blanchard*, 391 Mich. at 650, 218 N.W.2d at 38.

20. *Id.* at 653, 218 N.W.2d at 39-40.

21. *Id.* at 654, 218 N.W.2d at 40.

tion of law on divorce.<sup>22</sup> (Would the Michigan court have held Virginia to be a primary beneficiary of Frederick's will had Frederick died in 1962?). The correct result is based on revival of the will by operation of law on remarriage. The *Blanchard* majority did not consider revival, and the dissenting minority, finding a revocation of the will by operation of law, summarily rejected revival as a means of reinstating it: "Any intention of the testator with respect to republication of the will absent the requisite statutory formalities is irrelevant."<sup>23</sup> Michigan, however, recognizes revival if a second will does not expressly revoke a prior will, and the second will is thereafter destroyed by the testator.<sup>24</sup> Why not extend the law on revival to include remarriage to the divorced spouse? The Uniform Probate Code provides for revival by the testator's remarriage to the former spouse.<sup>25</sup>

*Blanchard* signals guarded optimism on improving the law on will substitutes through statutory intervention in the event of divorce. This article considers the effect of divorce on provisions for a spouse by several of the more common will substitutes — the revocable trust, life insurance, bank savings accounts, and joint tenancy or tenancy by the entirety — and the desirability of statutory intervention where a right of originating in survivorship has not been disposed of by a property settlement incident to the divorce.

## II. THE REVOCABLE TRUST

Suppose that *A*, married to *B*, creates a revocable, amendable inter vivos trust of which *B* is a beneficiary. *A* thereafter executes a will of which *B* is also a beneficiary. *A* and *B* divorce. Ideally, *A*'s estate planning devices are considered by *A* and *A*'s attorney in connection with the divorce so that *B*'s

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22. Although a will "speaks at death," that is, acts as an instrument of transfer at death, it can be "revoked" before death, that is, made ineffective. Although "revoked," a will can be "revived," that is, reinstated. T. ATKINSON, *LAW OF WILLS* 419-52, 474-79 (2d ed. 1953).

23. In re Estate of Blanchard, 391 Mich. at 664, 218 N.W.2d at 45 (citation omitted).

24. *Cheever v. North*, 106 Mich. 390, 64 N.W. 455 (1895).

25. Section 2-508 of the Uniform Probate Code provides in part as follows: "If provisions [of a will] are revoked solely by this section, they are revived by testator's remarriage to the former spouse." UNIF. PROB. CODE § 2-508, 8 U.L.A. 122 (1983).



status thereafter as a beneficiary or non-beneficiary is clear. Suppose, however, that the terms of the trust and the will are ignored on divorce, and *A* dies while *B* survives, *A* never having modified either instrument. A statute explicitly applicable to devises and bequests to a spouse revokes the testamentary gift to *B* on divorce. Should the reach of the statute be extended to the gift to *B* under the revocable, amendable inter vivos trust, a common will substitute?

In *Clymer v. Mayo*,<sup>26</sup> the Supreme Judicial Court of Massachusetts applied a statute applicable to wills to a revocable, amendable, *unfunded* inter vivos trust creating a beneficial interest for a spouse who was thereafter divorced by the settlor. The decedent, Clara A. Mayo, married James P. Mayo, Jr., in 1953. In 1964 Clara named James the beneficiary of her group annuity contract, and in 1965 she named him beneficiary of several annuity contracts.<sup>27</sup> In 1971 Clara's parents gave the couple \$300,000 and in 1973 both Clara and James executed trusts and wills.<sup>28</sup> Clara's revocable and amendable trust instrument named James as a beneficiary and gave him a general power of appointment. By making changes in the beneficiaries, Clara named the trustees as beneficiaries of her life insurance and her annuity contracts. The trust was never funded. Its assets were to consist of the proceeds of life insurance and annuity contracts, and property passing from Clara's probate estate under the residuary clause of her pour-over will.<sup>29</sup>

The marriage broke up in 1975. In 1977 Clara changed the beneficiary of her life insurance from the trustees to Marianne LaFrance, a close friend. In 1978 James divorced Clara, and under a property settlement incorporated into the divorce decree, James waived all rights to Clara's "securities, savings accounts, savings certificates, and retirement fund."<sup>30</sup> James remarried in 1978 and executed a will in favor of his wife. Clara died in 1981, leaving her parents as her sole heirs. James survived Clara. Clara's 1973 will was admitted to probate in 1982.

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26. 393 Mass. 754, 473 N.E.2d 1084 (1985).

27. *Id.* at 755-56, 473 N.E.2d at 1086.

28. *Id.* at 756, 473 N.E.2d at 1086-87.

29. *Id.* at 757, 473 N.E.2d at 1087.

30. *Id.*

The administrator of Clara's estate petitioned for instructions on the effect of divorce on the administration of the estate, and Clara's parents brought suit to preclude James from sharing in the estate, and to remove the administrator. The probate court dismissed the parents' action, and the parents appealed.<sup>31</sup>

Two of the principal questions before the Supreme Judicial Court of Massachusetts were (1) whether the unfunded revocable, amendable inter vivos trust was valid, and (2) if it was, whether a Massachusetts statute revoking a testamentary gift to a spouse divorced after the execution of the will also revokes a gift to a spouse made by a revocable, amendable inter vivos trust instrument (a will substitute) executed before the divorce.

With respect to the first question, the court found that under the Massachusetts version of the Uniform Testamentary Additions to Trusts Act, Clara's trust was valid irrespective of the existence of corpus.<sup>32</sup> With respect to the second question, the court found:

It was only as a result of [Clara's] death that [James] could claim any right to the trust assets. It is evident from the time and manner in which the trust was created and funded, that the decedent's will and trust were integrally related components of a single testamentary scheme. For all practical purposes the trust, like the will, "spoke" only at [Clara's] death. For this reason, [James'] interest in the trust was revoked by operation of G.L. c. 191, § 9, at the same time his interest under [Clara's] will was revoked.<sup>33</sup>

By applying the statute pertaining to testamentary gifts to a spouse divorced after the execution of the will to the revocable and amendable inter vivos trust the Massachusetts court avoided the torturing of pour-over language into incorporation by reference language in order to make the trust a testamentary trust to which the statute clearly applies. Treating pour-over language as the equivalent of incorporating language was argued on the basis of an Oklahoma case, *Miller v.*

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31. *Id.* at 759, 473 N.E.2d at 1088.

32. *Id.* at 760, 473 N.E.2d at 1089.

33. *Id.* at 765, 473 N.E.2d at 1092.

*First National Bank & Trust Co.*,<sup>34</sup> but this treatment was rejected.<sup>35</sup>

It bears emphasis that the facts of *Clymer v. Mayo* lent themselves to the course taken by the Massachusetts court. Clara executed a trust instrument and she did not create a traditional inter vivos trust. Under Massachusetts law that instrument could lie dormant during her life, and be made viable by funding only after death. The trust instrument was executed contemporaneously with her will. Therefore, "[r]estricting [their] holding to the particular facts of this case — specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death," the Massachusetts court concluded that James' interest under the trust was revoked.<sup>36</sup>

The execution of a will does not result in a segregation of assets that ultimately become the gross probate estate of the testator. A will "speaks at death," that is, only at death does the will make a transfer of those assets of the decedent that remain after payment of debts of the decedent, expenses of administration, and transfer taxes. An effective transfer turns not only on the existence of a net probate estate, but also on the existence of devisees and legatees who were designated in the will and are alive at the testator's death.<sup>37</sup>

Similarly, where a revocable, amendable inter vivos trust instrument is executed, but (as in *Clymer v. Mayo*) the trust remains unfunded until the settlor's death, there is no creation of beneficial interests until the settlor dies. In such a case, effective creation of beneficial interests turns not only on funding, but also on the existence of beneficiaries designated in the trust instrument (or their successors in interest) who are alive

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34. 637 P.2d 75 (Okla. 1981). In *Miller*, the Supreme Court of Oklahoma construed prototypical pour-over language in a will to be language of incorporation by reference, and then incorporated into the probate estate of the decedent the assets of an inter vivos trust. As a result, a divorced surviving spouse of the decedent was disqualified by statute from sharing in the proceeds of insurance on the life of the decedent. *Miller* is discussed at length in Lynn, *Problems with Pour-Over Wills*, 47 OHIO ST. L.J. 47, 50-52 (1986).

35. *Clymer*, 393 Mass. at 767, 473 N.E.2d at 1093.

36. *Id.*

37. However, if a devisee or legatee has predeceased the testator, an anti-lapse statute might create a gift by substitution. See, e.g., OHIO REV. CODE ANN. § 2107.52 (Anderson 1976).

at the settlor's death.<sup>38</sup> The revocable, amendable inter vivos trust funded only at the death of the settlor is, then, a readily identifiable will substitute that as a matter of policy should be treated like a will.

Not all revocable, amendable trusts are unfunded during the settlor's lifetime. On the contrary, a settlor might intentionally put substantial assets into a revocable trust, motivated in part by a desire to avoid the probate process and in part by a desire to observe professional management and investment of property during life, when change in management can be made if change is warranted.

Although a revocable trust is funded, it might nonetheless be treated as an incomplete or testamentary transfer for some purposes. For example, a creditor of the settlor during his lifetime might compel the exercise of the power to revoke.<sup>39</sup> On the settlor's death a state might treat the subject matter of a revocable trust as part of the augmented or enhanced estate of the settlor-decedent for elective or forced share purposes.<sup>40</sup> Lastly, Section 2038 of the Internal Revenue Code brings into the gross estate of the decedent property transferred by him during life that is subject to a power to revoke exercisable at death.<sup>41</sup>

If a funded revocable, amendable inter vivos trust creates either present or future beneficial interests in a spouse who is thereafter divorced, both the existence of the trust and the existence of the beneficial interests in the spouse are appropriately considered in effecting a property settlement. Suppose they are not considered in the property settlement and the settlor dies with the trust unrevoked. Although the trust was funded during life, the questionable status of gifts to the

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38. Scott states that a trust can be created of which the sole beneficiary is an unborn child. 2 SCOTT, LAW OF TRUSTS § 112.1 (3d ed. 1967). Authority is slight. Just as the unfunded life insurance trust is questionable because it lacks a conventional corpus, the trust for the unborn child is questionable because it lacks a conventional beneficiary.

39. *E.g.*, OHIO REV. CODE ANN. § 1335.01(A) (Anderson 1979).

40. Section 2-202(1)(ii) of the Uniform Probate Code adds to the net probate estate "any transfer to the extent that the decedent detained at the time of his death a power . . . to revoke or to consume . . ." UNIF. PROB. CODE §§ 2-202(i) & (ii), 8 U.L.A. 76 (1983).

41. I.R.C. § 2038 (West 1987).

divorced spouse becomes acute at the settlor's death, when the power to revoke ceases.

That being so, and donors being unthinking and careless, a statute should intervene upon divorce to terminate a spouse's present or future beneficial interests created by a revocable, amendable inter vivos trust, whether unfunded or funded, just as a statute might intervene upon divorce to terminate a spouse's interests intended to arise under a previously executed will.<sup>42</sup> If a statute should intervene with respect to a revocable trust, are there other will substitutes that give rise to the same problem and therefore merit statutory intervention, even though they are somewhat less "testamentary" than the revocable trust?

### III. LIFE INSURANCE

Buying insurance on the life of a donor is a popular method of assuring provision at death for dependents and successors without the necessity of probate. Although the proclivity for procuring life insurance on an individual basis weakened somewhat during the years that managers of mutual funds and similar outlets for the investment dollar competed with life insurers for the attention of consumers, the proliferation of group insurance as an incident of employment has resulted in coverage of millions of persons who otherwise would have no life insurance.

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42. Ohio Revised Code does just this:

Unless the trust or separation agreement provides otherwise, if, after executing a trust in which he reserves to himself a power to alter, amend, revoke, or terminate the provisions of the trust, a grantor is divorced, obtains a dissolution of marriage, has his marriage annulled, or, upon actual separation from his spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, the spouse or former spouse of the grantor shall be deemed to have predeceased the grantor and any provision in the trust conferring a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall be revoked. If the grantor remarries his former spouse or if the separation agreement is terminated, the spouse shall not be deemed to have predeceased the grantor and any provision in the trust conferring a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall not be revoked.

OHIO REV. CODE ANN. § 1339.62 (Anderson Supp. 1986).

When life insurance is procured on an individual basis and premiums are paid over time, the owner-insured is likely to be aware of coverage and to have a clear recollection of beneficiary designation. When life insurance is procured as an incident of employment, the probability of awareness by the owner-insured is lower. In either case, awareness might disappear altogether in the trauma of divorce.

Because the proceeds of life insurance so frequently are the only assets of consequence on death of the owner-life insured, the disposition of insurance upon divorce requires careful attention. Proceeds of life insurance might assure continuing support for minor children if the owner-insured with a continuing obligation to support dies before the support obligation would cease through the passage of time. An enforceable promise to maintain a life policy in force and to continue the divorced spouse as designated beneficiary might be an acceptable substitute for a lump sum settlement that is possible upon divorce, but inconvenient. On the other hand, if the policy after divorce is to be the sole property of the owner-insured, and if the divorced spouse is to have no interest in the policy, even by way of beneficiary designation, such lack of interest should be made explicit.

On the death of the life insured there is sometimes no guidance on the appropriate disposition of the proceeds other than the beneficiary designation and the fact of divorce. In *West v. Rudd*,<sup>43</sup> John Rudd, then married to Pamela Rudd, procured a policy of life insurance to provide coverage for himself, his wife, and his children. The application listed Pamela as "Proposed Insured Wife" and the policy designated as beneficiaries "the Insured Wife, if living, otherwise . . . the estate of the Insured."<sup>44</sup> In 1972 John and Pamela divorced, and Pamela remarried. John, unmarried, was accidentally killed in 1976. The administrator of John's estate claimed the proceeds of the policy, contending that at John's death there was no "Insured Wife." Pamela claimed the proceeds as the "Insured Wife" identified in the application for the policy. The insurer paid the proceeds into court and interpleaded the claimants.

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43. 242 Ga. 393, 249 S.E.2d 76 (1978).

44. *Id.* at 394, 249 S.E.2d at 78.

On motions for summary judgment, the trial court directed that the proceeds be paid to John's estate.<sup>45</sup> On appeal, the Georgia Court of Appeals, in affirming the decision of the trial court, found that the primary beneficiary of the policy was "one who occupies a status, i.e., 'wife' rather than a named person."<sup>46</sup> On further appeal to the Supreme Court of Georgia, Pamela prevailed with a majority of the court holding that the application and the policy, when construed together as required by the policy itself, identified Pamela as the primary beneficiary, irrespective of status.<sup>47</sup>

Where there is a property settlement incident to a divorce, it might be ambiguous with respect to life insurance. In *Bersch v. Van Kleeck*,<sup>48</sup> Wayne Bersch had designated "Sandra Sue Bersch - wife" primary beneficiary of three policies of insurance on Wayne's life.<sup>49</sup> Upon the divorce of Sandra and Wayne in 1978, the property settlement incorporated into the divorce decree provided that "[e]ach of the parties shall be awarded the life insurance policies on their respective persons."<sup>50</sup> Fifteen months after the divorce Wayne Bersch died in an automobile accident and was survived by his former wife Sandra and by his father William. Wayne had never changed the beneficiary designations of the three life policies. Wayne's father William, the secondary beneficiary, sought payment of the proceeds from the insurer.

The trial court dismissed the father's action.<sup>51</sup> The court of appeals reversed, finding the language in the divorce decree ambiguous and remanding to the trial court to determine the intent of the trial judge in the divorce proceedings.<sup>52</sup> On review of the appellate court's decision, the Wisconsin Supreme Court stated that there are two property interests in a life insurance policy. First, the interest of the owner is a control interest; second, the interest of the beneficiary is in the pro-

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45. *Id.*

46. *Id.*

47. 242 Ga. at 396, 249 S.E.2d at 79.

48. 112 Wis. 2d 594, 334 N.W.2d 114 (1983).

49. *Id.* at 596, 334 N.W.2d at 116.

50. *Id.* at 596, 334 N.W.2d at 117.

51. *Id.* at 594, 334 N.W.2d at 114.

52. *Bersch v. Van Kleeck*, 108 Wis. 2d 784, 324 N.W.2d 832 (Ct. App. 1982).

ceeds of the policy.<sup>53</sup> The divorce decree had awarded to Wayne the control interest, including the right to change the beneficiary designation. The decree had no language specifically divesting Sandra, the primary beneficiary, of her interest in the proceeds. Wayne had not changed the beneficiary designation after the divorce, and therefore, upon Wayne's death Sandra was entitled to the proceeds.

Both *West* and *Bersch* describe typical situations where a statute might intervene to give the policy proceeds to the secondary beneficiary rather than the divorced spouse. It is possible, of course, that both John Rudd and Wayne Bersch intended that the divorced spouse take the proceeds of the policy despite the divorce. But what is the probability that they so intended? Where a gift to a spouse is made by will, and divorce occurs after execution of the will, statutes revoking the gift to the spouse are based on the belief that had the terms of the will been brought to the attention of the testator, the testator would have revoked the gift. In this respect there is no persuasive reason for treating life insurance — a will substitute — differently from a will. And indeed in Michigan a statute provides in part: "If the judgment of divorce . . . does not determine the rights of the wife in and to a policy of life insurance [on the life of the husband] . . ., the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates."<sup>54</sup>

Prior to amendment of the statute in 1982, the verb "designates" was preceded by the adverb "affirmatively," and in *Starbuck v. City Bank & Trust Co.*,<sup>55</sup> the consequence of requiring an affirmative designation was litigated. A policy of insurance on the life of John Starbuck designated "Peggy L. Starbuck, wife," primary beneficiary and Mary Jane Starbuck, John's mother, secondary beneficiary.<sup>56</sup> John and Peggy divorced, and the divorce decree specifically provided that the proceeds of any policy of insurance on John's life be payable to his estate "or to such named beneficiary as he shall affirmatively designate."<sup>57</sup> After the divorce John made no change in

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53. 112 Wis. 2d at 596-97, 334 N.W.2d at 116.

54. MICH. COMP. LAWS ANN. § 552.101(2) (West Supp. 1986).

55. 384 Mich. 295, 181 N.W.2d 904 (1970).

56. *Id.* at 296, 181 N.W.2d at 905.

57. *Id.* at 297, 181 N.W.2d at 905.



beneficiary designations, and upon his death his estate claimed the proceeds of the policy. John's mother brought suit, claiming the proceeds as secondary beneficiary. The court of appeals agreed with the trial court's conclusion that the phrase "shall affirmatively" contained within the divorce decree required John to take future action.<sup>58</sup> The Supreme Court of Michigan reversed, holding that the naming of the secondary beneficiary satisfied the statutory requirement that the husband affirmatively designate a person to take the proceeds of insurance on his life rather than his estate.<sup>59</sup> Thus, *Starbuck* demonstrates that remedial legislation may be desirable, but that it may be difficult to draft.

When a married person in a community property state procures or keeps in force a policy of insurance on his or her own life, disposition of the policy upon divorce or upon the death of the life insured may be complicated by procurement of the policy or payment of premiums with community funds. Use of community funds gives the other spouse a claim on the insurance, but the nature of the claim is not the same in all community property states. Irrespective of the nature of the other spouse's claim, if not disposed of in the divorce proceedings, it persists thereafter regardless of beneficiary designation, and should be unaffected by statutory intervention into beneficiary designation upon divorce.

The nature of the other spouse's claim in Texas is discussed in *Prudential Insurance Co. v. Burke*.<sup>60</sup> During the marriage of Riley P. Burke and Dorothy Jo Burke, Riley procured a policy of insurance on his life and designated Dorothy as beneficiary. Thereafter, they divorced, remarried, and again divorced. Neither divorce decree mentioned the insurance policy. Riley then married Melba and directed Prudential, the insurer, to change the beneficiary to Melba. Prudential refused on the ground that under Texas law, despite a policy provision permitting a change of beneficiary, Dorothy had a community interest in the policy and a right to the proceeds that could not be divested by Riley alone. Riley sued Prudential, and the trial court declared that Prudential

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58. *Id.* at 298, 181 N.W.2d at 906.

59. *Id.* at 301, 181 N.W.2d at 907.

60. 614 S.W.2d 847 (Tex. Civ. App.), *aff'd*, 621 S.W.2d 596 (1981).

had the duty to change the beneficiary in accordance with Riley's direction.<sup>61</sup> Prudential appealed.

The Texas Court of Appeals agreed with the trial court that Riley's right to change the beneficiary was not precluded by Dorthy's interest:

[T]he beneficiary's interest in the policy arises from the operation of our community property law. By that law, a policy purchased with community funds is an unmatured chose in action owned by the community which matures at the death of the insured. The proceeds, when paid, constitute community funds, except where the beneficiary survives the insured, in which case a gift of the insured's portion of such proceeds is presumed to have been intended and completed by the insured's death.<sup>62</sup>

In *Burke*, the divorce decrees did not dispose of the insurance on Riley's life, and Dorthy's interest as a co-owner of the policy and the proceeds persisted after the divorces. Were a statute to intervene upon divorce to change the beneficiary designation from Dorthy to Riley's estate, Dorthy's interest as co-owner would be unaffected. This persistence of the interest of the co-owner ex-spouse is demonstrated in *Yeats v. Estate of Yeats*.<sup>63</sup> When William and Agnes Yeats divorced, community property policies of insurance on William's life were not disposed of by the settlement agreement and divorce decree. William remarried and died six months later. The Supreme Court of Washington held that "[r]egarding the policies on the life of the husband, the trial court correctly awarded the first wife [Agnes] one half of the proceeds . . . . This was the amount properly due her as a tenant in common."<sup>64</sup>

The Washington court again considered the interest of the divorced spouse in *Aetna Life Insurance Co. v. Wadsworth*.<sup>65</sup> On the divorce of Lawrence and Joan Wadsworth in 1978, a separation contract incorporated into a divorce decree transferred to Lawrence as his separate property, free of any interest in Joan, all insurance policies on his life. Lawrence married Sharon and subsequently died in 1981, never having

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61. *Id.* at 848.

62. *Id.* at 849 (emphasis in original).

63. 90 Wash. 2d 201, 580 P.2d 617 (1978).

64. *Id.* at 206, 580 P.2d at 620.

65. 102 Wash. 2d 652, 689 P.2d 46 (1984).

changed the designation of Joan as beneficiary of a group life policy. Because the community funds of Lawrence and Sharon were used to purchase coverage for *the most recent term* of the group life policy, the supreme court held that the policy was the community property of Lawrence and Sharon, and Sharon was therefore entitled to half the proceeds. But the court distinguished present interest in policies from future expectancies, stating that “[i]n general, the beneficiary named in the policy will be entitled to the proceeds to the extent that the present spouse’s community property rights are not invaded.”<sup>66</sup> When divorce occurs:

A dissolution decree will divest the former spouse of his or her expectancy as named beneficiary . . . if (1) the dissolution decree, in clear and specific language, states that the former spouse is to be divested of his or her expectancy as beneficiary *and* (2) the policy owner formally executes this stated intention to change the beneficiary within a reasonable time after the dissolution decree has been entered.<sup>67</sup>

More than a year having elapsed between the date of the divorce decree and Lawrence’s death, it was conclusively presumed that Lawrence intended to retain Joan as beneficiary of one-half of the proceeds.

Statutory revocation of a gift to a spouse by a will executed before divorce is based on a legislative assumption that the testator’s failure to change his or her will is a matter of oversight. The conclusive presumption created by the Supreme Court of Washington in *Wadsworth* is based on the assumption that it was Lawrence’s intention that Joan continue as beneficiary of the group life policy despite the divorce, and despite the fact that Lawrence married Sharon on the day of his divorce from Joan.

The conclusive presumption of *Wadsworth* is simply at odds with the legislative assumption underlying the statutes revoking a gift to a spouse by a will executed before divorce. Quite apart from that, the opinion in *Wadsworth* offers no persuasive reason for ignoring “clear and specific language” of a divorce decree stating that the former spouse is divested of his or her expectancy as beneficiary. If the language of the decree

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66. *Id.* at 662, 689 P.2d at 52.

67. *Id.* at 663, 689 P.2d at 52 (emphasis in original).

is clear, and the insurer is protected against paying twice,<sup>68</sup> the terms of the decree should be observed.

#### IV. BANK SAVINGS ACCOUNT

The survivorship interest of a spouse in a bank savings account can be created in a number of ways: "A or B or the survivor of them"; "A, pay on death to B"; "A, in trust for B." The particular form that the survivorship account takes is an index, although not an infallible index, to the origin of the account and the motive for establishing it. If the account takes the form "A, pay on death to B," or "A, in trust for B," the origin of the deposits to the account is probably A alone, and the motive for using the "pay on death to" or "in trust for" language is to make a gift of the balance in the account to B on A's death if B survives. If the account takes the form "A or B or the survivor of them," the origin of the deposits to the account might be A alone or might be both A and B. Irrespective of the origin of the deposits, the motive for using survivorship language is to give the survivor of A and B access to the balance in the account by virtue of the contract with the depository bank rather than through the probate process.

The Uniform Probate Code Section 6-103 describes some of the characteristics of multiple-party accounts as follows:

- (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
- (b) A P.O.D. account belongs to the original payee during his lifetime and not the P.O.D. payee . . . .
- (c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime

. . . .<sup>69</sup>

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68. An insurer who pays with notice of conflicting claims pays at his peril. In *McDonald v. McDonald*, 632 S.W.2d 636 (Tex. Ct. App. 1982), a life insurer notified by mail of a divorce and conflicting claims to proceeds of a policy, nonetheless paid the proceeds to the designated beneficiary, a divorced spouse. Thereafter, the administrator of the estate of the former husband recovered judgment against both the divorced spouse and the insurer for the proceeds, and the insurer recovered judgment against the divorced spouse for the proceeds. *Id.* at 637.

69. UNIF. PROB. CODE § 6-103, 8 U.L.A. 523 (1983).

Also as the comment to section 6-103 perspicaciously concludes:

[T]he right of survivorship which attaches . . . really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.<sup>70</sup>

A savings account differs from a revocable trust or a life insurance policy in that it is likely to be viewed as money, and being money, it is more likely than either a trust or a life policy to receive close attention on divorce. If it is ignored in divorce, then the form that the account takes should be factored in when cutting off the rights of a divorced spouse by a statute.

If a survivorship bank account is in co-ownership form upon divorce (“*A* or *B* or the survivor of them”) and is not allocated by a property settlement, then upon *A*’s death while *B* survives it is possible that *B* might have a claim to some or all of the balance as *co-owner*, the matter of survivorship aside. *B* might have made contributions to the account during the marriage of *A* and *B*, and *B*’s contributions might not have been exhausted by withdrawals from the account by *B* for *B*’s sole benefit during the marriage.<sup>71</sup> In this respect, a survivorship savings account in co-ownership form is like an insurance policy on the life of a married person in a community property state. If the life policy is procured or kept in force with community funds, it bears the community property stamp, and that is taken into account in allocating the proceeds of the policy upon the death of the life insured when the divorced spouse survives.

In the absence of an effective claim to a co-ownership account based on contributions by the surviving divorced

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70. *Id.* at § 6-103, 8 U.L.A. at 524-25.

71. The Supreme Court of Ohio summarized the law on joint and survivorship bank accounts as follows:

Joint and survivorship accounts . . . are frequently utilized without their legal ramifications being fully understood by their creators. As a result, this court has held that the creation of such accounts raises a rebuttable presumption that the parties to the account share equally in the ownership of the funds on deposit, allowing the presumption to be rebutted by a showing of the “realities of ownership.”

Estate of Thompson v. Botts, 66 Ohio St. 2d 433, 436, 423 N.E.2d 90, 93 (1981).

spouse, a statute might intervene to cut off rights of the surviving divorced spouse to the balance in the co-ownership account, just as a statute might intervene to cut off the survivor's rights to the simpler "A, pay on death to B" or the "A, in trust for B" savings accounts.

If a statute does intervene, should it do so only presumptively? There is much force to the argument that presumptions invite dispute and litigation, and that the very purpose of statutory intervention upon divorce is to reduce the incidence of both. Nonetheless, *Clayman v. Prochaska*<sup>72</sup> suggests that if injustice is to be avoided, perhaps risks must be run. Claire Guerard and Joseph Prochaska were married in 1965 and divorced in 1977. A separation agreement incorporated into the dissolution decree provided that Claire would hand over to Joseph their joint savings accounts, and thus she delivered seven passbooks to Joseph's attorney. In the interval between receiving the passbooks and Joseph's death in 1979 (Claire survived him), Joseph closed three of the accounts. Four accounts remained in survivorship form. Joseph's executor brought a declaratory judgment action to determine ownership of the accounts. The trial court found that Joseph's maintenance of the accounts in survivorship form following the end of the marriage manifested his intent to make a gift at death of the balance in the accounts to his divorced spouse.<sup>73</sup> On appeal, the Connecticut Court of Appeals affirmed the judgment of the trial court for the divorced spouse.<sup>74</sup> The court of appeals stressed Joseph's continuing concern for Claire's financial well being:

Without any obligation to do so, he gave the defendant \$300 each month until he died. In 1977, he sent her as a gift at Christmas a check in the amount of \$1000. He also volunteered to pay a portion of her 1977 income taxes, having returned to her a \$2000 check which she had sent to him . . . . Interest on the four savings accounts was paid quarterly. The interest checks, payable to both Joseph and Claire Prochaska, were sent to Claire Prochaska who, in turn, for-

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72. 2 Conn. App. 430, 479 A.2d 1214 (1984).

73. *Id.* at 432, 479 A.2d at 1215. Under statute, creation of the account in survivorship form was prima facie evidence of an intention to vest title in the survivor. CONN. GEN. STAT. ANN. § 36-3 (West 1981).

74. *Clayman*, 2 Conn. App. at 437, 479 A.2d at 1218.

warded them to her former husband. As the trial court pertinently noted, the interest checks served as a quarterly reminder to Joseph Prochaska that the accounts were held jointly. When asked by Claire Prochaska if he intended to change over the accounts, Joseph Prochaska said, "[n]o, no."<sup>75</sup>

Although at the time of the divorce Joseph executed a will leaving his entire estate to Claire, he thereafter changed it and divided his estate between his nurse and a daughter by a former marriage.<sup>76</sup> Should this fact be sufficient to overcome the evidence relied on by the trial court showing an intention that Claire as survivor take the balances in the savings accounts? The Connecticut Court of Appeals thought not, and that position is a defensible one. In sum, in *Clayman v. Prochaska* an outright statutory elimination of a survivorship provision by divorce (absent disposition by a property settlement) would have frustrated intention.

## V. REAL PROPERTY

Husbands and wives frequently own real property together. A likely form of ownership is tenancy in common, with each owning an undivided one-half interest. However, being husband and wife, they might hold title as tenants by the entirety (which carries with it the incident of survivorship) or as joint tenants with the incident of survivorship.

Because a tenancy by the entirety is based on the marriage relation, divorce ends the tenancy by the entirety.<sup>77</sup> If the ten-

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75. *Id.* at 434, 479 A.2d at 1216.

76. *Id.* at 434 n.5, 479 A.2d at 1216 n.5.

77. Charles and Erna Warner married in 1934. In 1964 they took title to real property as tenants by the entirety. In 1970 Charles obtained an ex parte decree of divorce in Mexico and thereafter married Eileen. Erna refused to recognize the Mexican divorce and obtained a decree of separate maintenance. In neither Erna's separate maintenance action nor subsequent proceedings originating in Erna's attempt to procure maintenance payments was the validity of the Mexican divorce determined. In 1981 Erna died, devising the real property to two of her children. Thereafter, Charles conveyed his interest in the real property to Eileen. The probate court held that on Erna's death full title to the real property vested in Charles as the surviving tenant by the entirety. On appeal by Erna's personal representative and her devisees to the Missouri Court of Appeals, the court reversed the judgment of the probate court and held that both Charles and Eileen were estopped from denying the validity of the Mexican divorce decree. Therefore, half of the real property was a part of Erna's probate estate. *Estate of Warner v. Warner*, 687 S.W.2d 686 (Mo. Ct. App. 1985).

ancy then becomes a tenancy in common, the problems posed by an undisposed survivorship interest on divorce are absent. If the tenancy then becomes a joint tenancy with the incident of survivorship, problems persist. A Michigan statute, for example, prefers simplicity by stating that “[e]very husband and wife owning real estate as joint tenants or as tenants by entireties shall, upon being divorced, become tenants in common . . . unless the ownership thereof is otherwise determined by the decree of divorce.”<sup>78</sup>

Similarly in Ohio, a state which recognizes a joint tenancy in real property with a right of survivorship that is not destroyed by a conveyance by one of the co-owners, divorce transforms the tenancy into a tenancy in common unless the divorce decree provides otherwise.<sup>79</sup>

Both the Michigan and Ohio statutes expressly recognize the existence of property interests in both husband and wife that antedate the divorce and persist despite the divorce.<sup>80</sup> The statutes simply abolish the incident or right of survivorship that advantages the survivor, absent divorce. A similar approach appears in the Uniform Simultaneous Death Act which treats one of two joint tenants or tenants by the entirety as the survivor with respect to half of the property if the order of deaths cannot be established by evidence.<sup>81</sup> Even in separate property states, residential property occupied by a married couple is likely to be viewed by both the couple and the public as owned by both of the partners to the marriage regardless of whether title rests in one or the other or both. In this respect traditional attitudes toward real property in separate property states differ from traditional views of life insurance which is commonly viewed as “mine, and mine alone,” or “yours,” but rarely “ours.”

That a transfer of separate property to a husband and wife as joint tenants constitutes a gift of half of the value of the

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78. MICH. COMP. LAWS ANN. § 552.102 (West 1967).

79. OHIO REV. CODE ANN. § 5302.20(c)(5) (Anderson Supp. 1986).

80. See *supra* notes 78-79.

81. Section 3 of the Uniform Simultaneous Death Act reads in part as follows: “Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived . . . .” UNIF. SIMULTANEOUS DEATH ACT 63, 8A U.L.A. 575 (1983).



property, absent clear and convincing evidence to the contrary, is demonstrated in *Chastain v. Posey*.<sup>82</sup> Irene and J.T. Chastain were married in 1972. A divorce was granted to Irene in September, 1980, and the judgment divided the joint property. Both Irene and J.T. filed motions for a new trial. While rulings on the motion were under advisement, J.T. died. Irene thereupon filed a motion to dismiss the divorce action based upon J.T.'s death. J.T.'s executor resisted, and the Oklahoma District Court overruled the motion to dismiss and the motion for a new trial.<sup>83</sup> On appeal to the Supreme Court of Oklahoma, Irene unsuccessfully argued that as a matter of law the marriage was ended by J.T.'s death rather than divorce. However, she successfully sought a reconsideration of the division of jointly owned property. The district court had failed to recognize the presumption of gift that applied when a transfer of separate property is made to husband and wife as joint tenants. This was error, and the case was remanded for a new trial on the issue of the division of jointly owned property and the allocation of separate property.<sup>84</sup>

If the breakup of a marriage occurs over a period of time, but death itself intervenes before a decree of divorce issues, neither a rule of property that terminates the advantage gained by survivorship, nor a statute that intervenes to terminate the advantage, has an opportunity to operate. The resolution of disputes that arise under such circumstances is probably best left to case-by-case determination. And this is so despite the fact that cases not remarkably different reach different results. In *Rucks v. Taylor*,<sup>85</sup> Floyd and Della Rucks, husband and wife, acquired title to real property as tenants by the entirety. In 1980 they separated and Floyd filed for divorce for the second time. The couple executed a separation and property settlement agreement providing that the real property be sold and the proceeds of sale be divided equally between them. Floyd died before the land was sold and before the petition for divorce was heard. Floyd's executrix sought specific performance of the agreement. Della

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82. 665 P.2d 1179 (Okla. 1983).

83. *Id.* at 1180.

84. *Id.* at 1183.

85. 282 Ark. 200, 667 S.W.2d 365 (1984).

sought sole ownership of the land as the survivor of an estate by the entirety.

The Arkansas Court of Appeals affirmed a finding of the trial court that the agreement was controlling, that the tenancy be converted to a tenancy in common, and the land be sold.<sup>86</sup> The Supreme Court of Arkansas also affirmed the trial court, stressing that “[t]he language of this agreement shows an intent to terminate all property rights between the parties with the signing of the agreement . . . . While the agreement was to be incorporated into a divorce decree, if any, it was not contingent upon their obtaining a divorce.”<sup>87</sup>

In *Rucks v. Taylor*, the parties had entered into a property settlement before death intervened to terminate the marriage. In *Miller v. Miller*,<sup>88</sup> Raymond C. Miller and Ruby V. Miller owned real property as tenants by the entirety. In October, 1982, Ruby executed a will leaving the property to her daughters. Prior to her death in January, 1983, Ruby filed for divorce, alleging that she had been separated from Raymond for more than one year. Raymond counterclaimed, alleging a voluntary separation for more than one year, the unlikelihood of reconciliation, and entitlement to at least one-half of the real property that the couple owned. In *Miller*, Ruby’s daughters, devisees under her will, contended that all the requirements for a divorce had been met and that the property should be distributed by the court. The trial court found that in the absence of divorce, Ruby and Raymond, legally married, held the real property at issue as tenants by the entirety, and that Raymond, as survivor, was the sole owner.

On appeal, the District of Columbia Court of Appeals affirmed the judgment of the trial court, and stressed the requirement of the District of Columbia Code that allows distribution of property held as tenants by the entirety only upon “the entry of a final decree of annulment or divorce in the absence of a valid ante-nuptial or post-nuptial agreement or decree of legal separation disposing of the property of the

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86. *Rucks v. Taylor*, 10 Ark. App. 195, 662 S.W.2d 199 (1983), *aff’d*, 282 Ark. 200, 667 S.W.2d 365 (1984).

87. *Rucks v. Taylor*, 282 Ark. at 202, 667 S.W.2d at 366.

88. 487 A.2d 1156 (D.C. App. 1985).

spouses . . . .”<sup>89</sup> Nor did the record “indicate facts which would justify the imposition of a constructive trust on the property.”<sup>90</sup>

In *Rucks*, the report makes clear that the duration of the marriage before Floyd Rucks filed for divorce was brief. The report in *Miller* does not indicate the duration of the marriage of Ruby and Raymond prior to their living apart for more than one year. An allusion to “her” daughters suggests that Ruby had children by someone other than Raymond, perhaps from a prior marriage. In both *Rucks* and *Miller* the marriages were certainly in disarray when death intervened. Did the District of Columbia Court of Appeals in *Miller* err in rejecting the possibility of imposing a constructive trust to the extent of one-half the value of the property?

That there are remedial statutes stating the effect of divorce on the joint tenancy or the tenancy by the entirety in the absence of the tenancy disposition by the divorce settlement reflects the age of these real property devices. Unlike the revocable trust which attained respectability and acceptance only in this century, the joint tenancy and the tenancy by the entirety have long been used to “avoid probate.” Some lay persons in all economic strata show an interest in having residential property pass to the surviving spouse as expeditiously as possible. Only the well-to-do and the financially-secured realistically contemplate using the revocable trust as a will substitute.

## VI. SUMMARY

What emerges from an examination of the effect of divorce on some familiar will substitutes when there is no disposition of the will substitute by a property settlement? First, although the revocable trust might appear to a lawyer to resemble a will much more than, say, a policy of life insurance resembles a will, both permit property to pass at death without supervision by the probate court. Suppose that *A*, married to *B*, creates a revocable trust, reserving the income to himself for life and naming *B* as beneficiary of the principal. *A* also procures insurance on his life, naming *B* as beneficiary. They thereafter

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89. *Id.* at 1157.

90. *Id.*

divorce. *A* dies while *B* survives. Whether *B* as a divorced spouse should be advantaged as a beneficiary should not turn on whether the will substitute is a revocable trust or an insurance policy. If statutory intervention is appropriate with respect to the revocable trust, it is appropriate with respect to the insurance policy. That a revocable trust resembles a will more than a life policy resembles a will does not justify treating the two devices differently.

Second, a surviving divorced spouse might have a property interest in the will substitute that antedates the divorce. If so, the divorce does not terminate the property interest. For example, if *A*, married to *B* in a community property state, procures and maintains in force with community funds a policy of insurance on *A*'s life, *B* has a property interest in the policy on procurement of the policy, and divorce in itself does not terminate that property interest. If divorce occurs and there is no disposition of the policy by a property settlement, *B*'s interest persists. If *A* dies while *B* survives, and *B* is the designated beneficiary of the policy, there is no doubt that *B* has an interest in the proceeds of the policy. The critical question is whether *B* as a surviving *divorced spouse* should be further advantaged as the *beneficiary* of the policy. Similarly, in a separate property state, if *A* and *B*, a married couple, jointly buy real property and take title to real property as joint tenants with the right of survivorship, each has a property interest at the outset of the tenancy. If they divorce and there is no disposition of the joint tenancy by a property settlement, the property interests of both *A* and *B* persist. If *A* dies while *B* survives, there is no doubt that *B* has a property interest in the land. The critical question is whether *B* as a surviving divorced spouse should be further advantaged as the surviving co-tenant through the right of ownership.

If a married couple are domiciled in a community property state rather than in a separate property state, a surviving divorced spouse is much more likely to have a property interest in the will substitute that antedates the divorce. This is so because some or all of the funds creating the will substitute are likely to be community property. In a community property state earnings of either spouse during marriage are community property. In a separate property state, however, such earnings are separate property. If *A*, married to *B* in a sepa-

rate property state, procures and maintains in force with his earnings a policy of insurance on *A*'s life, naming *B* as beneficiary, and divorce occurs without disposition of the policy by a property settlement, should *B* as a surviving divorced spouse be deprived by a remedial statute of *all* interest in the policy? In this case might there not be an inquiry into what the disposition of the policy would have been had it been considered in the property settlement? In short, in separate property states where "equitable division" of assets is a part of the process of divorce, might not the process be extended to cover cases where the process has failed in part?

Third, there are statutes applying to wills (or will substitutes) that simply eliminate the advantage that a divorced surviving spouse would enjoy as beneficiary in the absence of legislation or judicial intervention. Such legislation is attractive in its simplicity. Yet, it is worth noting that the very statute that eliminates the advantage might also restore it under some circumstances if the divorced couple remarry. Perhaps the statute that intervenes upon divorce should *presumptively* eliminate the advantage that a divorced surviving spouse enjoys as beneficiary, with the surviving spouse being given the opportunity to overcome the presumption by clear and convincing evidence that the testator, or the donor by way of a will substitute, intended that the surviving spouse take despite the divorce. Of course, creating a presumption carries with it the very real possibility that a divorced surviving spouse with little evidence to overcome the presumption will nonetheless threaten to go forward with suit in the hope of forcing a substantial settlement. That possibility must be weighed against the possibility that the outright elimination of the advantage to the divorced spouse gained by survivorship might in some instances work an injustice. Presumptions exist elsewhere in the law. Indeed, they exist at the creation of will substitutes.<sup>91</sup> Experience with them should shed some light on both the desirability and the dangers of creating a presumption here.

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91. See, e.g., 2 AMERICAN LAW OF PROPERTY § 6.6, at 23 (J. Casner ed. 1952): Today the tenancy by the entirety arises only where the grantor or testator intends that it should. Husband and wife may take as tenants in common or as joint tenants if the conveyance so indicates. If the conveyance is to husband and wife without an affirmative expression of how they are to take, there is a presumption that they take by the entirety.

Fourth, if a statute creates a presumption and affords the divorced surviving spouse an opportunity to overcome the presumption by clear and convincing evidence, it is doubtful that the statute should attempt specificity with respect to evidence bearing on the intention of the deceased spouse. For example, if the marriage was one of long duration, produced children, and neither the deceased spouse nor the divorced surviving spouse remarried, one might view the presumption as overcome. But if there are added facts — for example, the precipitating cause of the divorce was the infidelity of the divorced surviving spouse, and the divorce was acrimonious — then the presumption appears to persist.<sup>92</sup> There is infinite variety in human experience, and if a statute takes the form of a presumption, the evidential niceties had best be resolved on a case by case basis.

Fifth, where a will substitute works through payment by a third party after the death of the deceased spouse, and a statute intervenes either presumptively or conclusively with respect to the rights of the divorced surviving spouse as beneficiary, a statute should protect the third party payor who makes payment to the divorced surviving spouse without knowledge of the divorce. Bankers and insurers have been adept in securing such protection in other contexts, and they

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92. In *McDonald v. McDonald*, 632 S.W.2d 636, 638 (Tex. Ct. App. 1982), where a divorce decree did award policies of insurance on the life of the husband exclusively to him, but prior to his death he had not changed the designation of his former wife as beneficiary, the Texas Court of Appeals set out the following telling facts:

[U]nder the facts of this case, it can hardly be said that the decedent intended to give the insurance proceeds to his wife. A hotly contested divorce had been in progress between the parties from April 1978, when the decedent filed suit for divorce, until its termination, after a jury trial of March 13, 1979, only twenty-five days before decedent's death. The record in this case contains portions of the testimony of the decedent in the divorce action reflecting a high degree of animosity between the parties, allegations of drug abuse, and charges of adultery leveled against Margaret by the decedent, as well as charges that she abandoned their children, and committed acts of violence against the decedent. There was further evidence that he wanted his children to have all the money he had left after the divorce. As a result of the jury verdict in the divorce trial, the decedent was named managing conservator of the children. We conclude that the evidence sufficiently rebutted the usual presumption of gift arising in favor of the named beneficiary by the decedent's failure to change the named beneficiary of the policies prior to his death.

*Id.*

would prove ready to suggest appropriate legislation to protect themselves here.

Sixth, if a statute intervenes with respect to will substitutes upon divorce, the propriety of permitting a divorced spouse to be advantaged by surviving should not turn on where title lies when controversy arises. For example, if an insurer pays a divorced surviving spouse as beneficiary of an insurance policy on the life of the deceased spouse, that payment is final from the insurer's standpoint if made without knowledge of the divorce. It is not final from the standpoint of that person or those persons entitled to the proceeds of the policy, however, if a statute revokes the beneficiary designation.

## VII. CONCLUSION

If divorce occurs and there is no disposition of a will substitute by a property settlement, there is no persuasive reason for differentiating a will substitute from a will if it is deemed desirable as a matter of policy to terminate by a statute the advantage which a divorced spouse would otherwise enjoy as a surviving beneficiary. Whether termination should be presumptive rather than outright turns on weighing the probability of the frequency of dispute and litigation against the possibility of working an injustice in some instances. During the administration of the estate of a decedent some aspects of property law unquestionably lend themselves to efforts by survivors with questionable claims to advance them with the hope of forcing a settlement as differentiated from prevailing in a lawsuit. There is, of course, public interest in minimizing litigation, with attendant expenses, costs and delays. But there is also a public interest in distributing the estate of a decedent in accordance with the intention of the decedent unless that intention contravenes a rule of law. If creating a presumption of termination of advantage by survivorship were to result in questionable payments to a disfavored divorced spouse, the price of creating a presumption might be too high.

There is great variety in will substitutes. The pay-on-death bank account is relatively simple. The life insurance policy is more complex. Also, some will substitutes — for example, the United States Savings Bond in co-ownership or

pay-on-death form — are created under federal law, not state law. Pension plans providing for a surviving spouse are sponsored by the federal government, by states and subdivisions of states, and by business and industry.

Giving statutory assistance to an unthinking or careless donor in the event of divorce is defensible and desirable, but doing so requires considering both the diverse origins of will substitutes and their varying characteristics. As the task of providing statutory intervention on divorce proceeds, studies of will substitutes might also encompass assimilating will substitutes and wills with respect to requiring a minimum *period* of survivorship by the survivor in order to qualify for the survivorship advantage. If a beneficiary under a will must survive the testator by 120 hours to share in the net probate estate,<sup>93</sup> might not the beneficiary of a policy of life insurance be required to survive for a like period in order to qualify for the proceeds?

Whether examination of will substitutes proceeds with a limited objective or with more ambitious objectives, organized lawyers will provide the bulk of the work required. Bankers, insurers and investment counselors will assist and be heard, but they are unlikely to initiate change, and they will resist change that is perceived to adversely affect the product or service they offer. Assimilating wills and will substitutes is in the public interest, and therefore such assimilation should proceed.

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93. Section 2-601 of the Uniform Probate Code requires that a devisee survive the testator by 120 hours. UNIF. PROB. CODE § 2-601, 8 U.L.A. 128 (1983).



