

You Bet Your Spouse's Life:



Examining Virginia's Position on Life Insurance in Divorce

by Brian M. Hirsch

Many married couples have life insurance¹ to cover the economic loss resulting from the death of one or both spouses. This insurance typically names the surviving spouse as beneficiary or places the insurance proceeds in trust for the couple's children, to cover education and other expenses. However, when couples divorce, life insurance takes on a new (and sometimes uncomfortable) meaning. After all, who would want an ex-spouse to have a financial interest in his or her death?

Virginia law takes a definitive stance on this topic. A Virginia court has the authority to require a divorcing spouse to maintain life insurance for the parties' children's benefit.² Yet, it can only be an existing life insurance policy, and only for so long as a child-support obligation is owed. The same is not true for life insurance covering one spouse (or an ex-spouse) for the benefit of the other.

Despite popular belief, a Virginia court does *not* have the power to order a spouse (or an ex-spouse) to obtain or

maintain life insurance for the benefit of the other.³ Neither does a Virginia court have the authority to allow one party to take out life insurance on the other even if the party benefitting from the life insurance pays the premiums. However, property settlement agreements commonly provide for one spouse to maintain life insurance exclusively for the benefit of the other spouse, or allow one party to take out life insurance on the other.⁴ This is usually done to protect a recipient of spousal support in the event of the death of the payer. Absent a private agreement incorporated into an order, though, a court has no authority to order such insurance.

Not only is there no statutory basis for a Virginia court to order one spouse to keep life insurance for the other, but any designation of a spouse as a beneficiary of life insurance is automatically revoked by operation of law at the time of divorce. *Virginia Code* § 20-111.1 specifically directs:

Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993,

any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked . . . The term "death benefit" includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit.

To inform the consuming public about this automatic revocation, *Virginia Code* § 38.2-305 requires that the following language be in all life insurance policies:

Under Virginia law (*Virginia Code* § 20-111.1), a revocable beneficiary designation in a policy owned by one spouse that names the other spouse as beneficiary becomes void upon the entry of a decree of annulment or divorce, and the death benefit prevented from passing to a former spouse will be paid as if the former spouse had predeceased the dece-

dent. In the event of annulment or divorce proceedings, and if it is the intent of the parties that the beneficiary designation of the former spouse is to continue, you are advised to make certain that one of

New Jersey permits a court to order a party to maintain life insurance “for the protection of the former spouses or the children of the marriage in the event of the death of the payer spouse’s death.” *See*, N.J.S.A. 2A:34-25. In addition, New Jersey

require a spouse to carry life insurance until he or she pays certain marital debt. *See*, *Davin v. Davin*, 842 A.2d 469 (PA Super 2004).

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the following courses of action is taken prior to the entry of a decree of annulment or divorce: change the beneficiary designation to make it irrevocable; change the ownership of the policy or contract; execute a separate written agreement stating the intention of both parties that the beneficiary designation is to remain in effect beyond the date of entry of the decree of annulment or divorce; or make certain that the decree of annulment or divorce contains a provision stating that the beneficiary designation is not to be revoked pursuant to § 20-111.1.

Thus, the only way to maintain life insurance on an ex-spouse for the benefit of the other ex-spouse is to make the beneficiary designation irrevocable, change ownership of the policy to the beneficiary, or enter into a property settlement agreement or final decree that such insurance is to remain in effect beyond the date of divorce. Otherwise, the divorce causes an automatic revocation of the beneficiary designation.

Comparison to Other States

Virginia is not alone in preventing courts from ordering life insurance for an ex-spouse or revoking a life insurance beneficiary designation upon divorce.⁵ However, other states take different positions on whether to require an ex-spouse to provide life insurance for the benefit of the other.

Rule 5:4-2(f) requires the first pleading of each party in an action “to have annexed thereto an affidavit listing all known insurance coverage of the parties and their minor children, including but not limited to life, health, automobile, and homeowner’s insurance.” This same rule directs that all such insurance identified in the affidavit “shall be maintained pending further order of the court.”

New York also authorizes a trial court to order a party “to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage . . . as irrevocable beneficiaries during a period of time fixed by the court.” NY CLS Dom. Rel. § 236(B)(8).⁶ However, such obligation shall cease “upon termination of the spouse’s duty to provide maintenance, child support or a distributive award.” *Id.*

Pennsylvania takes a more moderate approach. It permits a court to direct “the continued maintenance and beneficiary designations of existing policies insuring the life . . . of either party which were originally purchased during the marriage and owned by or within the effective control of either party.” 23 Pa. C.S. § 3502 (2004).⁷ The court also has the ability to require a party to purchase life insurance and designate a beneficiary where it is necessary to protect the interests of the other party. *Id.* For instance, a Pennsylvania court can

Delaware’s approach is similar to that adopted by Pennsylvania. As part of the distribution of marital property in a Delaware divorce proceeding or in modification of support, a spouse may be required to maintain an existing life insurance policy with his or her former spouse as the beneficiary. 13 Del. C. § 1513(e) (2004).⁸ The statute limits the court’s power to require such insurance for policies originally purchased during the marriage and owned by or within the effective control of either party. Unlike Pennsylvania, though, a Delaware court cannot order one ex-spouse to “obtain and maintain” a new policy insuring his or her life naming the other ex-spouse as the beneficiary. *See*, *Husband B.W.D. v. Wife B.A.D.*, 405 A.2d 123 (Del. 1979).

Consideration of Modification to Virginia Law

The gap in Virginia law in this area is most apparent in a long-term marriage where there are disparate earning capacities between the parties and few assets to divide. Consider the following example. The parties are each fifty-five years old and have been married for thirty years. During their entire married life they have resided in Northern Virginia, which has the highest cost of living in the state. The parties separated upon the wife learning of the husband’s adulterous relationship. The wife has an associate’s degree. She recently found work as a teacher’s aide, but was not gainfully employed in the prior twenty-six years, when she was raising the parties’ four children. Due to the wife taking care of “hearth and home,” the husband was able to build a successful dental practice. The parties have few assets due to putting four children through college and the husband’s unwise investment in speculative financial ventures. The husband currently earns \$175,000 per year through his dental practice, and the wife earns \$19,000 per year as a teacher’s aide. The court orders the husband to pay the wife \$5,000 per month in permanent spousal support. With a total

annual income of \$79,000 (*i.e.*, \$60,000 spousal support and \$19,000 through employment), the wife is able to live comfortably, but not lavishly, considering the cost of living in Northern Virginia. If the husband refuses to allow the wife to maintain life insurance on him, then the wife will be left with only her \$19,000 annual salary (and Social Security at the appropriate age) in the event of the husband's death. This is not fair for the wife, who has invested at least as much effort in the marriage as her spouse and who was not at fault for the dissolution of the marriage.

While the above example is not typical, it is not that uncommon either. Furthermore, the genders in the above example could easily be switched, considering the changing roles of men and women. Nevertheless, whether Virginia law should allow a court to order either that one ex-spouse maintain life insurance on his or her life for the benefit of the other or that one ex-spouse be able to purchase a policy on the life of the other is a thorny issue. It raises such issues as:

- Do we want someone benefitting from the death of his or her ex-spouse?
- How much life insurance should a court be allowed to order? It would seem that if someone could take a five million dollar life insurance policy on his or her ex-spouse that it would seem more like a bounty on the insured's head.
- How long should one spouse be required to keep life insurance for the other? Age sixty, sixty-five, seventy?

- What if the intended insured party smokes or has physical problems which result in higher-than-normal premiums or renders the intended insured uninsurable?
- What if the intended insured will not submit to a physical examination?

While all of the above issues deserve scrutiny, it should be kept in mind that a close cousin of life insurance still exists in one area of divorce in Virginia. A Virginia court can still order survivor benefits for retirement plans. *Virginia Code* § 20-107.3(G) permits a court to divide the marital share of any "pension, profit-sharing or deferred compensation plan or retirement benefits, whether vested or nonvested." This same code section further authorizes a Virginia court, to the extent permitted by federal or other applicable law, to "designate a spouse or former spouse as irrevocable beneficiary during the lifetime of the beneficiary of all or a portion of any survivor benefit or annuity plan of whatsoever nature, but not to include a life insurance policy." The court, in its discretion, may apportion the cost of maintaining such survivor benefits between the parties. *Virginia Code* § 20-107.3(G)(2).

Conclusion

While states like New Jersey have comparatively extensive laws regarding life insurance in divorce, Virginia's total elimination of life insurance for an ex-spouse seems to go too far in the other direction. Given the inequities resulting from the current law, Virginia should consider allowing a court to order life insurance in long-term marriages where one spouse is

extraordinarily financially dependent on the other. Naturally, any modification to this law should be approached with a fair amount of caution, as there is clearly a potential for abuse. [↗](#)

Endnotes:

- 1 *Virginia Code* § 38.2-102 defines life insurance as follows:
 - A. "Life insurance" means insurance upon the lives of human beings. "Life insurance" includes policies that also provide (i) endowment benefits; (ii) additional benefits in the event of death, dismemberment, or loss of sight by accident or accidental means; (iii) additional benefits to safeguard the contract from lapse or to provide a special surrender value, a special benefit or an annuity, in the event of total and permanent disability of the insured; and (iv) optional modes of settlement of proceeds. As used in this title, unless the context requires otherwise, "life insurance" shall be deemed to include "credit life insurance," "industrial life insurance," "variable life insurance" and "modified guaranteed life insurance."
 - B. "Life insurance" also includes additional benefits to provide for educational loans, subject to the provisions of § 38.2-3113.3. (1952, c. 317, § 38.1-3; 1976, c. 562; 1986, c. 562; 1992, c. 210; 2000, c. 173.)
- 2 *Virginia Code* § 20-108.1(D) provides that in "any proceeding under this title [*i.e.*, 20], Title 16.1 or Title 63.2 on the issue of determining child support, the court shall have the authority to order a party to (i) maintain any existing life insurance policy on the life of either party provided the party so ordered has the right to designate a beneficiary and (ii) designate a child or children of the parties as the beneficiary of all or a portion of such life insurance for so long as the party so ordered has a statutory obligation to pay child support for the child or children.
- 3 This article only addresses the issue of a Virginia court's inability to order one spouse to carry term life insurance for the benefit of the other. It does not address the issue of division of cash value of whole life insurance policies, which a Virginia court has the authority to do. See, *Frazer v. Frazer*, 23 Va. App. 358, 477 S.E.2d 290 (1996); *Jobson v. Jobson*, 25 Va. App. 368, 488 S.E.2d 659 (1997).
- 4 *Virginia Code* § 20-150(6) specifically authorizes parties to enter into marital agreements regarding the "ownership rights in and disposition of the death benefit from a life insurance policy."
- 5 Texas takes a similar approach as Virginia. *Texas Family Code* §§ 9.301 states:
 - (a) If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of rendition, a provision in the policy in favor of the insured's former spouse is not effective unless: (1) the decree designates the insured's former spouse as the beneficiary; (2) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse. (b) If a designation is not effective under Subsection (a), the proceeds of the policy are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the estate of



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the insured. (c) An insurer who pays the proceeds of a life insurance policy issued by the insurer to the beneficiary under a designation that is not effective under Subsection (a) is liable for payment of the proceeds to the person or estate provided by Subsection (b) only if: (1) before payment of the proceeds to the designated beneficiary, the insurer receives written notice at the home office of the insurer from an interested person that the designation is not effective under Subsection (a); and (2) the insurer has not interpleaded the proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.

6 This section of the New York State Consolidated laws states that the “court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of the spouse’s duty to provide maintenance, child support or a distributive award.”

7 This section of the *Pennsylvania Consolidated Statutes* states that the “court may direct the continued maintenance and beneficiary designations of existing policies insuring the life or health of either party which were originally purchased during the marriage and owned by or within the effective control of either party. Where it is necessary to protect the interests of a party, the court may also direct the purchase of, and beneficiary designations on, a policy insuring the life or health of either party.

8 This section of the *Delaware Code* states that the “court may also direct the continued maintenance and beneficiary designations of existing policies insuring the life of either party. The Court’s power under this subsection shall extend only to policies originally purchased during the marriage and owned by or within the effective control of either party.”

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