

**AN AMERICAN SAMPLER OF THE STATUTORY RIGHTS OF  
SPOUSES AND HEIRS IN LIFE INSURANCE POLICIES  
AND PROCEEDS - - KNOWING *ALL YOUR CLIENTS***

**Christopher S. Armstrong**

Law Offices of Christopher S. Armstrong,  
A Professional Corporation  
Two Embarcadero Center, Suite 1650  
San Francisco, CA 94111  
Telephone: (415) 788-5010  
Facsimile: (415) 788-5013  
Email: [chris@rmstrnglaw.com](mailto:chris@rmstrnglaw.com)  
Website: [www.rmstrnglaw.com](http://www.rmstrnglaw.com)

**I. SPOUSAL ENTITLEMENT TO LIFE INSURANCE IN THE EVENT OF  
DIVORCE**

**A. Determining the Applicable Law**

The rights created by a life insurance contract are determined, in the absence of an *effective* choice of law by the insured in his application, by the local law of the state where the insured was domiciled at the time the policy was applied for unless some other state has more significant relationship. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 192 (1969). Comments interpreting and explaining § 192 repeatedly emphasize that “life insurance is a matter of intense public concern” and advise that

“. . . effect will not be given to a choice of law provision in a life insurance contract designating a state whose local law gives the insured less protection than he would receive under the otherwise applicable law . . .”

and that

“. . . Application of the law of the chosen state must not be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.”

*Id.*, § 192, Comment e.

**B. The Uncertain Import of “Local Law Only” Statutes on Marital Property Rights**

Numerous offshore jurisdictions have enacted laws to facilitate the validity of dispositions in trust which would not be recognized by the law of the settlor’s home country by reason of either (a) forced heirship laws or (b) rights, claims or interests conferred upon a person by reason of marriage; and they have enacted insurance laws which exempt policy proceeds on death and cash surrender value during life from the claims of all creditors. Such jurisdictions have not, however, asserted that their laws have the power to divest a spouse of his or her rights in community property used to fund a trust or purchase an insurance policy. *See e.g.*, Cayman Trusts (Foreign Element) Law, 1987, § 5(a) (“ . . . Section [5] does not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this section affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such a power . . .”).

The dichotomy between the approach of offshore jurisdictions to rights acquired by marriage in America’s common law states (whereunder, as discussed below, a whole life or variable universal life insurance policy may become marital property subject to equitable division upon divorce) and presently vesting community rights acquired from the inception of a marriage by spouses domiciled in America’s community property states is a potentially tenuous one. The Commissioners who drafted the 1990 revision to the Uniform Probate Code, Article 2, specifically commented

“The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993. The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both common-law and community-property states when a marriage ends in divorce.”

Uniform Probate Code, Article II, Part II (revised 1990 version), General Comment, 8 ULA 93; *See also*, Russ, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481 (1985), § 3 (marriage viewed as partnership or shared enterprise).

Recognizing the potential vulnerability of an insurer who makes payment on a policy or takes other action in respect of same contrary to the rights conferred upon a spouse, the Uniform Marital Property Act (1983) § 12(b) expressly provides that an insurance carriers not having actual knowledge of the rights of a claimant spouse shall not be held liable for a good faith payment in accordance with the policy and the issuer's records. Suppose, however, that an insurance carrier in an offshore jurisdiction having actual knowledge of the claims of a present or former spouse of an insured nonetheless pays out a death benefit or alters the beneficiary designation on a policy in disregard of such claims relying upon the protections of its local law? *See, e.g.*, Calif. Family Code § 2050 (form of notice which party to a dissolution proceeding may transmit voluntarily or under court order to a life insurance carrier).

### **C. Is It Enough to be Beyond the Jurisdiction of the Marital Domicile?**

It may be that the insurer is beyond the reach of the jurisdiction of the court which has confirmed the interest of a claimant spouse or former spouse in respect of policy proceeds or cash surrender value. In such event the insurer is in a position not unlike that of a Cook Islands trust which was the object of frustrated judicial scrutiny in *Reichers v. Reichers*, 170 Misc. 2d 170, 679 N.Y.S.2d 233 (Sup. Ct. 1998); *aff'd* 267 A.P. 2d 445, 701 N.Y.S.2d 113 (2d Dept. 1999). Query, however, whether an insurance carrier which has affiliates in, or other connections with, the United States wishes to acquire the reputation of facilitating the evasion of American statute law designed to recognize the partnership interest of a spouse in marital property and the legitimate concerns of the state in respect of the support needs of a former spouse.

Outside of academic circles, little attention has been paid to, and no concern manifested by, American observers regarding laws in offshore jurisdictions designed to

defeat forced heirship rights because such rights are unknown in the United States outside of Louisiana, and it could be convincingly argued that, in respect of localization laws intended to defeat forced heirship, offshore jurisdictions have merely followed the long established lead of New York State. *See* N.Y. Estates, Powers & Trusts Law § 3-5.1(h). Should offshore trusts or offshore privately placed variable universal life policies gain notoriety in the United States as a medium for the effective circumvention of marital property rights in the event of divorce or upon the death of the first spouse to die, a distinctly different American legislative and judicial reaction from that which greeted offshore anti-forced heirship statutes is predictable.

#### **D. Precautionary Measures**

Given the frequency with which modern marriage terminates in divorce, it is inevitable that some policies or the proceeds thereof will become embroiled in conflicting claims arising out of divorce. An insurer and professional advisors associated with policy issuance can mitigate or at least better prepare for future interpleader actions and the potentially adverse consequences of constructive trusts placed upon a death benefit in respect of which there has been borrowing during the life time of the insured by making close inquiry during the application process regarding (a) the domicile of the applicant, (b) the marital status of the applicant, (c) the character of the property which he or she intends to use for premium payment (*viz.* separate or community) and (d) the existence of a prenuptial or postnuptial marital property contract which may alter spousal entitlements.

#### **E. Life Insurance as Community Property**

If whole life or universal life policy is acquired using property which is in whole or in part community property, upon divorce a non-policy owner spouse will have a substantial economic claim in respect of the cash surrender value of the policy. *See e.g., In re Marriage of Lorenz*, 146 Cal. App. 3d 464 (2nd Dist. 1983). Where a mix of separate and community property has been used to pay premiums, the entitlement of the

non-owner wife is determined by reference to the proportion that the amount of premiums paid with community property bore to the total amount of premiums. *See Biltoft v. Wootten*, 96 Cal. App. 3d 58 (4th Dist. 1979). A spouse has the power to give his half of an insurance policy constituting community property to a named beneficiary, but he may not give his spouse's half; and if he does, it is the duty of a trial court to make an allocation. *See Patillo v. Norris*, 65 Cal. App. 3d 209 (2nd Dist. 1976).

The rules regarding division of interests in the case of whole life or universal life policies constituting community property which have cash surrender value are reasonably intuitive. The same may not be said with respect to term insurance. Most states which have considered the issue whether term insurance has value when determining the divisible community pot of assets have taken the position that the last premium paid is viewed as the sole source of the proceeds payable at the insured's death, and that earlier payments have served to purchase coverage for a time which has expired. In consequence, such jurisdictions have concluded that term insurance has no value and therefore is not a divisible community asset. This is the position of Arizona, Idaho, Louisiana, New Mexico and Washington. Texas, Wisconsin and Nevada have not addressed the question. *See Stevenson, Is Term Insurance Considered a Divisible Community Asset If the Insured Becomes Uninsurable During a Term Purchased With Community Funds?*, 29 Idaho L. Rev. 1029 (1992).

Some appellate districts within the state of California have fashioned a different view where the insured under a term insurance policy is of advanced age and has become uninsurable or only insurable under very unattractive terms. *Compare Biltoft v. Wootten, supra*, 96 Cal. App. 3d 58 (whole life deriving from a converted term policy is community property subject to division) *with Spenger v. Spenger*, 5 Cal. App. 4th 288 (4th Dist. 1992) (employment-related group term life insurance is not a community asset beyond expiration of the term acquired with community efforts - - the Second District in the *Biltoft* case got it wrong). Recent commentary in the Louisiana Civil Law Treatise expresses a sympathetic view of the California position that a term policy might have

value as a community asset if such policy is guaranteed renewable and the insured is no longer insurable because of disease or advanced age. *See* 16 La. Civ. L. Treatise, Matrimonial Regimes § 3.2 (2 ed).

**F. Life Insurance as Marital Property Subject to Equitable Division**

The uncertainties which may bedevil an insurer regarding ownership interests where spouses separate are not limited to policies owned by persons potentially subject to a community property regime. *See* Russ, *Divorce: Equitable Distribution Doctrine*, 41 A.L.F. 4th 481 (1985). It is widely established in America's common law states that life insurance is marital property subject to equitable division where such property has been purchased with funds produced by the labors of a spouse during marriage. *See e.g.*, *Jolis v. Jolis*, 111 Misc. 2d 965, 446 N.Y.S.2d 138 (Sup. Ct. 1981), *aff'd*, 98 A.D. 2d 692, 470 N.Y.S.2d 584 (1st Dep't 1983) and *Toler v. Toler*, 292 S.C. 374, 356 S.E. 2d 429 (Ct. App. 1987). These cases recognized that the cash value of a life insurance policy is generally part of the marital estate subject to division unless the policy can be shown to have been separate, untransmuted property which has not been purchased using any marital funds. Controversy frequently arises regarding the precise methodology for valuation and division of insurance policy assets. *Ryman v. Ryman*, 172 Ill. App. 3d 599, 527 N.E. 2d 18 (Ill. App. 1988) contains an edifying discussion of the valuation of interests in cash values in the event of divorce. *See also*, *National Legal Research Group, Life Insurance and Divorce*, 10 *Equitable Distribution Journal* 109 (1999); Chastain, *The Cash Value of Insurance*, 13 *Family Advocate* 30 (1990).

**G. Violation of a Court Order to Maintain Policy In Force for Ex-Spouse**

Courts have often exhibited a preference for dividing up the value of a policy as part of the divorce settlement rather than for giving an ex-spouse a continuing interest in a policy on a life whose termination might not be a source of acute grief to the beneficiary. *See Ahlo v. Ahlo*, 1 Haw. App. 324, 619 P.2d 112 (Ct. App., Haw., 1980). A court may, however, regard it as appropriate in some circumstances to order continued

maintenance of a policy in favor of a former spouse in order to provide security for spousal and child support. Family law lawyers are encouraged in commentary to give prompt notice to an insurer if a judgment maintains the spouse as an insured or beneficiary on a policy after divorce and to follow up such notice by serving a copy of the order on the insurer. *See* Jaffe and Childs, *Insurance, A Marital Asset That Varies From State to State*, 12 Family Advocate 48 (1990). Reality, however, is that such precautions are often not taken and that the insured ex-spouse changes a beneficiary contrary to the marital settlement agreement or court order. In such cases, the courts have been willing to impose a constructive trust on the proceeds paid to the new beneficiary. *See McKissick v. McKissick*, 93 Nev. 139, 560 P.2d 1366 (1977) and *Carpenter v. Carpenter*, 150 Ariz. 130, 722 P.2d 298 (1985).

**H. Consequences of a Post-Dissolution Failure to Excise An Ex-Spouse as Policy Beneficiary**

All too frequently, when one spouse is awarded unconditional rights to an insurance policy in consequence of a divorce settlement, the owner out of ignorance, ambivalence or laziness fails to remove his or her former spouse as the named beneficiary on the life insurance policy. Some states including Virginia, Michigan, Texas and Washington have divestiture statutes which terminate the status of an ex-spouse as beneficiary upon entry of a divorce decree notwithstanding that the spouse remains a named beneficiary. Most states do not, however, provide such a failsafe; and the courts which have been required to consider entitlement where an ex-spouse remains a beneficiary on a policy have determined that a beneficiary's rights under an insurance policy are a matter of contract law which do not flow from the marital relationship. In consequence, a waiver of rights arising out of the marital relationship does not serve to terminate beneficiary status. *See Mullenax v. National Reserve Life Insurance Co.*, 29 Colo. App. 418, 485 P.2d 137 (Colo. App. Div. 1 1971) (it is not the duty of the court to make new contracts for the parties but merely to interpret one as written).

## **I. Policies or Proceeds Acquired By Gift or As Other Than Compensation**

Consistent with general rules applicable both to community property and to the determination of marital property in the case of common law equitable division, an insurance policy or the proceeds thereof which are (or might) be acquired by a spouse during marriage by way of gift or as other than compensation will not form part of the pot subject to division in the event of divorce. *See e.g., Doland v. Doland*, 562 So. 2d 994 (La. App. 3d Cir. 1990) (husband's father contracted for the policy, paid the premiums and owned the policy; accordingly, the policy was not property subject to division at divorce notwithstanding husband was the insured and his wife the beneficiary); *Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E. 2d 492 (N. Car. App. 1992) (insurance settlement constituted separate property of the wife where evidence showed it was compensation for pain and suffering); *but cf., Wife J. v. Husband J.*, 367 A.2d 655 (Del. Sup. Ct. 1976) (policy proceeds paid on the life of a deceased daughter to her mother held to be marital property subject to division between mother and father who are in process of divorce); *compare Fields v. Fields*, 643 S.W. 2d 611 (Mo. Ct. App. 1982) (father receiving proceeds as named beneficiary of insurance policy on life of a deceased son may treat same as a third party gift or inheritance excluded from the divisible marital estate).

## **II. STATUTORY ENTITLEMENT OF A SURVIVING SPOUSE TO INSURANCE PROCEEDS - - SHIFTING SENTIMENT**

### **A. The Evolution of the Surviving Spouse's Forced Share**

The statutory forced share (also referred to as the "elective share") has replaced dower as the primary means for protecting the economic interests of the surviving spouse in common law states. Forced share statutes are not part of the law of America's community property states because the community property system grants a spouse a vested undivided one-half interest in community property as it is earned or when it acquires community status by transmutation, and in consequence the deceased spouse has testamentary power only over his one-half of the community property.

Because forced share statutes in their inception dealt only with the probate estate, trusts and joint accounts were sometimes employed to defeat the intended effect of the forced share statutes. Initially, courts dealt with the problem by attacking life time transfers over which considerable control had been retained by the donor spouse as illusory and functionally testamentary, or as tainted by an intent to defraud or as being purely fictional. Ad hoc remedies fashioned by the courts to protect the interests of disinherited surviving spouses gave way in time to the concept of the “augmented estate” whereunder various species of non-probate transfers including revocable trusts, joint accounts, payable on death accounts and “Totten trusts” were swept into the calculation of the forced or elective share entitlement of the surviving spouse.

**B. Does the “Augmented Estate” Include Life Insurance?**

Significantly, life insurance was expressly excluded from the definition of the “augmented estate” in the Uniform Probate Code (1969 Act), § 2-202. This gave rise to well reasoned academic criticism which pointed out that the exclusion of life insurance from the definition of the augmented estate in a uniform act intended to influence American state legislatures created an inviting means for the disinheritance of the surviving spouse, and that by reason of the growing popularity of life insurance as an estate planning device, “. . . the loop hole may prove increasingly significant in the future.” See Bridge, *Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate*, 74 Cornell L. Rev. 511 (1989). Judicial commentary regarding the exclusion of life insurance from the definition of augmented estate has evidenced a similar unease. See *Will of Boyd*, 161 Misc. 2d 191, 613 N.Y.S.2d 330 (Surr. Ct. N.Y. 1994) (construing EPTL 5-1.1 -A(b)(1)(F) as excluding life insurance from the definition of “testamentary substitutes” on the basis of legislative history).

Responding to the concern that life insurance had been rendered an attractive and highly effective vehicle for the disinheritance of a surviving spouse by the limitations of the 1969 Act, the Conference of Commissioners on Uniform State Laws substantially

revised the elective share rules in the 1990 version. The Uniform Probate Code (1990) § 2-205 expressly includes in the value of the augmented estate proceeds of insurance on the life of the decedent if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death had a presently exercisable general power of appointment over the policy or its proceeds.

### **C. Insurance Industry Resistance**

According to commentary, 1990 revision was accomplished notwithstanding lobbying against it by the insurance industry because the drafters had concluded that no public policy supported an exception for insurance when the statute applies to all other non-probate assets. *See Gary, Share and Share Alike? The UPC's Elective Share*, 12 ABA Probate & Property 18 (1998). Such commentary advises that the insurance industry has continued to mount lobbying campaigns in states proposing to reform their elective share statutes in order to include life insurance in the augmented estate, and that the states of Colorado, North Dakota, West Virginia and New York have acceded to such pressure and have continued to exclude life insurance. Other states such as Minnesota and Hawaii have adopted definitions of an augmented estate which, consistent with the UPC (1990), include life insurance. Effective October 21, 1999, Florida amended its definition of property constituting the "elective estate" to include "the decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life." *See F.S.A. § 732.2035(6)*. Maryland, Massachusetts, North Carolina, Ohio and Michigan all have under consideration legislation which would include all or some portion of the value of life insurance in the augmented estate of the decedent spouse. *See Gary, supra*, ABA Probate & Property 18, 22-24.

### **D. Statutory Protection for Payments Without Actual Notice**

An insurer who makes payment on a policy to a beneficiary designated in the policy or who takes any other action in good faith reliance on the validity of the policy upon request and satisfactory proof of the decedent's death and before it has received

written notice from the surviving spouse or such spouse's representative of an intention to file a petition for the elective share, or that a petition for the elective share has been filed, is not liable. *See* UPC (1990 revision) § 2-214. For an example of the Uniform Act as enacted into the law of a particular state, *see* Hawaii Revised Statutes § 560:2-214 and Minnesota Statutes Annotated § 524.2-214 (protection of payors and other third parties). Commentary, which one might infer materially influenced the drafters of the 1990 revision, presaged the notice requirement and reasoned that, in the event of dispute between an electing surviving spouse and others, interpleader would be a satisfactory alternative for the insurer, and that the expenses an insurance company would incur in an interpleader could generally be deducted by the company from the proceeds of the policy. *See* Bridge, *supra*, 74 Cornell L. Rev. 511, 529-530.

### **III. TRANSMUTATION OF RIGHTS IN AN INSURANCE POLICY BY MARITAL CONTRACT**

#### **A. Marital Property Agreements Gain Widespread Acceptance in the United States**

Prenuptial contracts have long been utilized in America's community property states to alter the incidents of the governing marital property regime notwithstanding judicial refusal in earlier times to enforce in those circumstances where the agreement was deemed a facilitator of divorce by promising sums certain or specific property in the event of divorce. Today, marital property contracts are accepted throughout the United States and are at least as important, and arguably more important, in common law jurisdictions which have adopted the concept of equitable division in the event of divorce (because some equitable division states, unlike the community property states, will add gifts and inheritances into the mix of property divisible upon divorce). More than half of the American states have adopted in some form the Uniform Premarital Agreement Act (1983), and although the provisions of this Act deal exclusively with contracts entered into before marriage, Kansas' highest court has recently upheld the incorporation of the provisions of the Uniform Premarital Agreement Act (as adopted by Kansas) into a

postmarital agreement reasoning that there is no public policy basis for disallowing a purposeful incorporation in such an agreement of statutory provisions enacted in respect of premarital agreements notwithstanding the different social dynamic involved in pre and postmarital agreements. *See Davis v. Miller*, 269 Kan. 732, 7 P.3d 1223 (2000).

### **B. Impact Upon Creditors**

A marital property agreement can affect their rights of creditors. As a matter of community property law, the separate debts of either spouse (including debts incurred before marriage as well as during marriage) may be settled out of the community property of the spouses but not out of the separate property of the spouse who has not contracted the debt or assumed liability for a debt of the other spouse. *Compare* Calif. Family Code § 910 (community estate; liability for debts) *with* Calif. Family Code § 913 (separate property of married person; liability for debt). In consequence, a marital property contract which reduces the amount of community property may in some instances prejudice a third party creditor.

California law, which allows spouses to transmute property from community to separate or vice versa during the marriage as well as in advance of the marriage, makes fraudulent transfer rules enacted for the protection of creditors expressly applicable to such transmutations. *See* Calif. Family Code § 851 (transmutation subject to fraudulent transfer laws); *State Bd of Equalization v. Woo*, 82 Cal. App. 4th 481 (1st Dist. 2000), *modified on den. reh'g* (postmarital agreement with debtor husband to transmute community to separate property held to constitute a fraudulent transfer).

### **C. Applicability to Characterization of Life Insurance**

The Uniform Premarital Agreement Act makes no express mention of life insurance, and commentary on the treatment of life insurance in the context of a prenuptial agreements is scarce. Few (if any) courts appear to have considered how a marital property agreement might affect ownership of life insurance, but there is no logical reason why a marital property contract should not affect the characterization of an

ownership interest in life insurance just as it affects the characterization of other property interests.

**D. Enforceability of a Marital Property Contract When Spouses Migrate**

Because rules governing the validity of marital property agreements and the form and procedure which must be observed in order to insure enforceability vary significantly from one jurisdiction to the next, challenging issues may be raised when spouses party to a marital property agreement move the their marital domicile. A recent California case illustrates the nature of the cultural issues which may implicated. *See Marriage of Shaban*, 88 Cal. App. 4th 398 (3rd Dist. 2001). Ahmad and Sherifa Shaban were married in the Arab Republic of Egypt in 1974. They immigrated to the United States in the early 1980s and after living in the United States for approximately 17 years, had their marriage dissolved. The husband asserted that general references to “Islamic law” in what the trial court determined to be merely a marriage certificate constituted a prenuptial agreement to have separate property. The trial court and the appellate court both disagreed with husband’s contention and found a community interest in his medical practice and his retirement accounts. The California court declined to address the question of whether the agreement alleged by Ahmad Shaban was against public policy and rested its decision solely on the lack of a writing and failure to comply with the requirements of the statute of frauds.

Where a marital property contract entered into in another jurisdiction has been committed to writing in accordance with the required procedures of such jurisdiction, and where the intentions of the parties in respect of property ownership are clear, a court presiding over a dissolution in a new marital domicile or determining the rights of the surviving spouse should enforce the terms of the marital property contract unless such contract offends public policy. A mere agreement to separate rather than community property would not be offensive to public policy in, for example, the state of California; but an agreement waiving all spousal support in the event of marital dissolution or all

rights to any property or support in the event of the death of the other party to the contract absent special circumstances (such as the independent wealth of both spouses) might result in a refusal to enforce or a judicially mandated modification. *See generally*, Rosenson, *Family Law and Choice of Law - - Danger on the Horizon*, 28 Beverly Hills Bar Association Journal 63 (1994)(a thoughtful analysis of a hypothetical involving a husband and wife married in France subject to a French antenuptial contract who subsequently move to California and later divorce).

#### **IV. CHANGE OF DOMICILE - - DOES IT ALTER APPLICABLE LAW**

##### **A. The RESTATEMENT Position**

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS, states the general proposition that the local law of the state where the insured was domiciled at the time the policy was applied for will govern, but official comment explains that where following application the insured changes his domicile to another state “. . . the state of the insured’s new domicile will have the dominant interest in him, and it may be that its local law should be applied to determine at least some issues arising under the policy . . .”, and that “. . . local law of the insured’s new domicile is most likely to be applied in the case of issues that do not substantially affect the obligations of the insurance company.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 192, Comment d.

##### **B. Judicial Application of the RESTATEMENT’s Premise**

At a time when Texas law provided that an individual could have no “insurable interest” in his or her former spouse, a number of cases arose in respect of policies acquired by an individual on the life of his or her spouse while married in a state other than Texas and where after an intervening change of domicile to Texas, the marriage terminated. Should the law of the domicile of the applicant at the time of policy application or the law of the domicile of the applicant at the time of policy maturity govern. Judge Learned Hand, a preeminent American jurist, determined this to be a situation in which the change of domicile should be recognized as effecting a change in

the applicable law in respect of the policy with the result that the interest of the first wife in an insurance policy on her husband's life was extinguished by reason of divorce. *See New England Mutual Life Insurance Co. v. Spence*, 104 F.2d 665 (2d Cir. 1939).

A more recent case, considering applicable law for the purpose of determining whether Kentucky's restoration of property statute which abrogates the interests of a divorced spouse named as beneficiary should apply, cited the *Spence* case with approval. *See Traveler's Insurance Co. v. Fields*, 451 F.2d 1292 (6th Cir. 1971). The Sixth Circuit buttressed its holding in favor of Kentucky law (the jurisdiction where the decedent and his former spouse had been domiciled at the time of divorce) over Ohio law (Ohio being the jurisdiction in which the policy had issued and the jurisdiction in which the decedent was resident at the time of his death) on the basis that Kentucky had ". . . had a strong interest in ascertaining and dividing whatever property is possessed by its citizens who are properly before its court in a divorce action. The Fourteenth Amendment does not require that the state, in adjudicating the division of this property, ignore its own laws and look to the law of each state in which the rights of the property originated to determine the effect of the divorce upon those rights." *Id.*, 451 F.2d 1292, 1300.

More problematic for the insurance carrier are the "Cuba cases" which opt for the law of the locus of the insurer as the applicable law where such choice allows "the maximum protection of the insured." *See Blanco v. Pan-American Life Insurance Co.*, 221 F. Supp. 219 (S.D. Fla. 1963), *aff'd*, 362 F.2d 167 (5th Cir. 1966) (application of the local law of the place of payment which was also the insurer's place of incorporation). The court in *Blanco* in fact determined that choice of law was not dispositive of its holding in favor of the insured because it was unwilling in all events to give recognition in an American court to a Cuban decree of expropriation in respect of property having a situs in the United States.

## V. RIGHTS OF A COMPULSORY HEIR TO AN INSURANCE POLICY OR ITS PROCEEDS

### A. A Concept of Limited Application in the United States

Two considerations materially mitigate the likelihood that avoidance of forced heirship would raise controversy in respect of an insurance policy written on the life of an individual domiciled or resident in the United States. First, forced heirship in favor of children or other blood relatives (as distinguished from a forced statutory share in favor of a surviving spouse) is not a part of American law save in the state of Louisiana. Second, offshore jurisdictions which have developed a life insurance industry have adopted legislation which (a) in the case of dispositions in trust vitiate the whole law application of forced heirship rights conferred by the law of the trustor's domicile, *see, e.g.*, Cayman Trusts (Foreign Element) Law, 1987, § 6(b); and (b) in the case of policies of life insurance provide that on the death of the insured the insurance "... shall inure exclusively to the benefit of the person for whose and benefit such insurance is designated in the policy, and the proceeds thereof shall be exempt from the claims of any creditor of the insured, his estate, and of any beneficiary under the policy or of the owner or estate of the owner ..." and that the cash surrender value of an insurance policy "...shall not be liable to attachment, garnishment or legal process in favour of any creditor of the insured, his estate, and of any beneficiary under the policy or of the beneficiary of any Trust, which is the owner of a life insurance policy or of an annuity contract issued by a registered external insurer." *See, e.g. Bahamas External Insurance Act*, 1983 (incorporating amendments up to and inclusive of 31st August 2001), § 10(4) and (5).

One might, however, take caution from the words of a respected commentator who opined in his monograph:

"It might also be argued that the forced heirship law is not merely a matter of succession law after death but that it may also apply *inter vivos* to render a transfer of assets to trustees that was designed to frustrate succession rights, invalid under

the law of the transferor's domicile. Under many forced heirship systems, transfer of assets by gift before death can be set aside and the transferees can be required to surrender the assets after the death of the donor. The heirs, therefore, may have a claim against the trustee of a trust created in the settlor's lifetime. Where the trustee is owned by a bank, the fact that the trustee is not itself in the jurisdiction of forced heirship will not necessarily protect the parent bank from some form of indirect action or commercial pressure if it has a branch office or a subsidiary company in the forced heirship jurisdiction of the deceased settlor."

Willoughby, *Misplaced Trust* 31 (1st ed. 1999). Logically, the late Professor Willoughby's caution to parent banks of offshore trustees might be read as equally applicable to parent holding companies of offshore insurers.

#### **B. The Distinguishing Features of Louisiana Law**

Louisiana is unique among the American states in requiring a forced share for heirs. It is well established, however, both by statute and judicial construction of Louisiana law, that a life insurance policy is a contract *sui generis* governed by rules peculiar to itself. Commentary explains that

"Life insurance is generally said to have come to Louisiana from the common law. In fact, French law originally condemned insurance policies as waging contracts of the worst type. Thus, neither the Code Napoleon nor the Louisiana Civil Code regulated life insurance."

10 La. Civ. L. Treatise, Successions and Donations § 9.8. (2001). The statutory exclusion of life insurance from the calculation of disposable portion on mass of succession is found at Louisiana Civil Code Article 1505(c) and at Louisiana Revised Statutes § 22:647. A recent judicial holding confirms the effect of Article 1505. *See Succession of Willis*, 682 So. 2d 920 (La. App. 3d. Cir. 1996) ("The life insurance proceeds paid to a named beneficiary are not subject to the civil code articles on donations *inter vivos* or *mortis causa* or the constitutional principles of forced heirship").

Consistent with its exclusion of life insurance from the forced heirship determination, Louisiana law also excludes the proceeds of a matured insurance policy from the definition of community property regardless of the source of the funds used to pay the premiums; and nothing in the Louisiana Civil Code prohibits a spouse in community from entering into a life insurance contract without the consent of the other. *See* 16 La. Civ. L. Treatise, *supra* § 3.32. The mischief potential inherent in Louisiana's exclusion of life insurance proceeds from the claims of the community is substantially identical to the mischief which may be accomplished in certain states such as New York which continue to exclude life insurance proceeds from the "augmented estate" for the purpose of calculating the elective share of a surviving spouse.

Although Louisiana excludes the proceeds of a life insurance policy from the community in the event of death, the rule is otherwise where the value of the community is being calculated for the purpose of dividing assets in the event of divorce. The difference of approach has been justified on the ground that "while life insurance is generally considered *sui generis* in Louisiana, it is the proceeds of the life insurance policy, not the policy itself, which are not subject to claims of the community." *Kambur v. Kambur*, 652 So. 2d 99, 102 (La. App. 5th Cir. 1995).

*This article should not be construed as legal advice or opinion, since legal opinions are only given to clients in response to inquiries involving specific facts.*