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## USE AND DISPOSITION OF LIFE INSURANCE IN DISSOLUTION OF MARRIAGE

*Jani Maurer*<sup>1</sup>

When a couple seeks to dissolve their marriage, life insurance warrants attention. Existing life insurance policies with a cash value and term insurance, including employer provided group term insurance, should be addressed. At times, it may be advantageous for one or both parties to be required or allowed to purchase new policies on each others' lives as explained further below.

First, purchase of life insurance or continuation of existing policies by one or both parties incident to the dissolution of marriage may be useful to assure payment of support to a spouse, and/or to the dependent children of the parties. Second, one or both spouses may already own life insurance on their own lives or the lives of others. If these policies have cash value, they constitute property to be accounted for and divided in the dissolution of marriage proceeding. Third, one or both spouses may be settlors of irrevocable trusts created prior to the dissolution of marriage. If these trusts own life insurance policies insuring the lives of one or both spouses, or if the spouses are named present or future trustees or beneficiaries of these trusts, action may be warranted in connection with the dissolution of marriage to terminate the rights of a party in respect to the trusts. If one spouse is nominated a present or future trustee, or is a beneficiary of a trust owning life insurance, and the trust was created by a member of the other spouse's family, it may not be desirable for the spouse nominated to serve as trustee or to continue to be a beneficiary of the trust. Such circumstances would necessitate further action in the dissolution of marriage proceeding. Fourth, disputes may arise upon the death of an insured former spouse following dissolution of marriage regarding who is entitled to life insurance proceeds. At least one Florida judge complained about the lack of guidance from the legislature on when and how to address life insurance in a dissolution of marriage case.<sup>2</sup> Another noteworthy issue is when benefits are

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1. Jani E. Maurer is a professor at the Shepard Broad Law Center at Nova Southeastern University. This Article was inspired by the inquisitive minds of her students.

2. In his concurring opinion in *Kearley v. Kearley*, 745 So. 2d 987, 989 (Fla. 2d Dist. Ct. App. 1999), acting Chief Judge Altenbernd stated: This case presents a good example of the confusion created by Florida's ill-defined approaches to life insurance in divorce proceedings. Trial courts can approach life insurance from at least three different perspectives. First, the cash surrender value of life insurance purchased during the marriage can be treated as a marital asset without restricting the owner's future ability to select beneficiaries. Second, by compelling the policy owner to select the former spouse as beneficiary, the trial court can use the policy as security to indemnify the former spouse for any unpaid obligations arising from the final judgment, typically for alimony or child support due at the time the payor spouse dies. Third, the trial court can compel the owner to select the former spouse as beneficiary in order to minimize future economic harm to the surviving family upon the untimely death of a spouse who paid alimony or child support during his or her life. Chapter 61 does not give trial judges any meaningful guidance concerning when or how to use these approaches.

unintentionally paid to former spouses when life insurance beneficiary designation are not changed or completed by persons after a divorce.<sup>3</sup> This article explores the foregoing life insurance considerations in Florida dissolution of marriage proceedings, reviews current applicable law, and suggests methods of effectively dealing with life insurance in the divorce context.

## I. LIFE INSURANCE TO PROTECT CHILD SUPPORT

Many cases addressing use of life insurance to secure child support involve a custodial parent also claiming that life insurance is required to assure payment of alimony. This section of the article focuses on cases and law specifically applicable only to child support. Cases addressing use of life insurance to secure both alimony and child support<sup>4</sup> are covered in the next section of this article.<sup>5</sup>

The court is authorized to direct a parent of a minor child to obtain and maintain life insurance on his or her life to the extent insurance is necessary to assure that child support will be paid.<sup>6</sup> This authority existed under common law prior to enactment of Fla. Stat. § 61.13(c).<sup>7</sup> A need for the maintenance of a life

Cases decided since 1999 have perhaps clarified the options available and when each might be effectively employed. This article reviews the options suggested by Judge Altenbernd to ascertain the extent to which they are viable today, and considers situations not mentioned in the context of *Kearley*. *Id.*

3. See generally Suzanne Soliman, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 STETSON L. REV. 397 (2007) [hereinafter *A Fair Presumption*].

4. One policy may be used to secure both payment of child support and alimony. See *Haydu v. Haydu*, 591 So. 2d 655, 656 (Fla. 1st Dist. Ct. App. 1991) (the husband's obligation to provide medical and dental insurance for both his former wife and minor child was secured by several life insurance policies on which the former wife and minor child were to be named beneficiaries); *Terry v. Terry*, 788 So. 2d 1129, 1130 (Fla. 4th Dist. Ct. App. 2001) (a final judgment of dissolution expressly authorized the husband to secure payment of alimony and child support either with two \$250,000.00 life insurance policies or one \$500,000.00 life insurance policy); *Hauser v. Hauser*, 644 So. 2d 554, 555 (Fla. 4th Dist. Ct. App. 1994) (father ordered to maintain existing life insurance policy to secure both permanent alimony and child support); *Lorman v. Lorman*, 633 So. 2d 106, 108 (Fla. 2d Dist. Ct. App. 1994) (trial court properly incorporated agreement that the former husband would maintain \$325,000.00 life insurance policy as security for his alimony and child support obligation in judgment, but improperly ordered additional \$250,000.00 life insurance requirement); see also *Smith v. Smith*, 912 So. 2d 702, 704 (Fla. 2d Dist. Ct. App. 2005) (trial court ordered a husband to maintain a \$300,000.00 life insurance policy he already owned, naming his wife beneficiary of \$100,000.00 of policy proceeds and his minor children beneficiaries of the remaining proceeds. The trial court's decision was reversed on other grounds).

5. Similar rules apply to determining when it is appropriate to require life insurance to secure child support and alimony. Thus, the next section of this article may be instructive even when one is contemplating use of life insurance only to secure child support.

6. Fla. Stat. § 61.13(c) (1990); *Cantrell v. Home Life Ins. Co.*, 524 So. 2d 1063, 1064 (Fla. 5th Dist. Ct. App. 1988) (Court can order insurance be maintained to secure a court ordered support obligation); *Jaworski v. Jaworski*, 972 So. 2d 1095 (Fla. 2d Dist. Ct. App. 2008) (The court has discretion to require maintenance of life insurance to secure payment only where need is demonstrated); *Haydu*, 591 So. 2d at 656 (Child support includes payments to the custodial parent, as well as other payments for the minor child's benefit. A parent's obligation to pay for medical and dental insurance for a minor child may be secured by life insurance); see *Bosem v. Bosem*, 279 So. 2d 863, 865-66 (Fla. 1973) (The right of a court to require a parent to provide life insurance as security for child support payments was recognized in Florida long before enactment of the present statute); see also *Riley v. Riley*, 131 So. 2d 491, 493 (Fla. 1st Dist. Ct. App. 1961) (discussing courts discretion to order father to maintain insurance as security for child support obligations). While this article is limited to use of life insurance in divorce cases, a court in a paternity suit may order a parent of a child born out of wedlock to provide life insurance to secure child support under the same standard applicable in divorce cases. See *Gazaleh v. Reeves*, 940 So. 2d 1200 (Fla. 1st Dist. Ct. App. 2006); see also *Guerin v. DiRoma*, 819 So. 2d 968 (Fla. 4th Dist. Ct. App. 2002) (where the court considered imposition of a life insurance requirement in the context of a paternity suit).

7. See *Waskin v. Waskin*, 346 So. 2d 1060, 1063 (Fla. 3d Dist. Ct. App. 1977).

insurance policy requires a showing of special circumstances,<sup>8</sup> or appropriate circumstances.<sup>9</sup> The spouse seeking imposition of a requirement that a payor obligated to remit child support obtain or keep life insurance in effect to assure future payment has the burden of proving that a need or appropriate circumstances exist.<sup>10</sup> In addition, before ordering maintenance of life insurance, the recipient spouse must prove and the trial court must determine the amount of insurance required, the cost and availability of the insurance, and the payor parent's ability to pay for the insurance.<sup>11</sup> Availability of the life insurance focuses on whether the parent obligated to pay child support is insurable,<sup>12</sup> or whether an insurance policy already exists on the payor's life. Availability of insurance is particularly important where the payor suffers from a past or present medical condition. Finally, before ordering purchase or maintenance of life insurance to secure child support, the trial court is required to consider the financial impact of paying insurance premiums on the obligor.<sup>13</sup> The premiums paid, where life insurance is properly required, constitute additional child support.<sup>14</sup> The amount of insurance required "must be related to the extent of the obligation being secured."<sup>15</sup> Failure of the party seeking security to offer competent evidence to meet the burden of proof cannot result in a valid order requiring insurance.<sup>16</sup> It is the trial court's duty

8. This test is supported by ample authority. *Crozier v. Crozier*, 819 So. 2d 834, 837 (Fla. 2d Dist. Ct. App. 2002); *Pinion v. Pinion*, 818 So. 2d 557 (Fla. 2d Dist. Ct. App. 2002); *Baker v. Baker*, 763 So. 2d 493, 494-95 (Fla. 4th Dist. Ct. App. 2000); *McDaniel v. McDaniel*, 653 So. 2d 1076, 1078 (Fla. 5th Dist. Ct. App. 1995); *Mitchell v. Mitchell*, 477 So. 2d 2, 3 (Fla. 5th Dist. Ct. App. 1985).

9. This test originated in *Sobelman v. Sobelman*, 541 So. 2d 1153, 1154-55 (Fla. 1989); *see also Layeni v. Layeni*, 843 So. 2d 295, 300 (Fla. 5th Dist. Ct. App. 2003); *Richardson v. Richardson*, 722 So. 2d 280, 281 (Fla. 5th Dist. Ct. App. 1998).

10. *Longo v. Longo*, 533 So. 2d 791, 795 (Fla. 4th Dist. Ct. App. 1988) (where no need for security is established, and the cost and amount of insurance are not determined, even though there is an existing life insurance policy and proof of payor's ability to pay premiums, it is reversible error to require life insurance as security); *Israel v. Israel*, 824 So. 2d 953, 953-54 (Fla. 4th Dist. Ct. App. 2002); *Mitchell*, 477 So. 2d at 3 (where the father of the minor child was a physician, expected to continue to earn a substantial income, absent other facts the mother failed to prove a need to require the father to maintain life insurance to secure child support); *Frechter v. Frechter*, 548 So. 2d 712, 714 (Fla. 3d Dist. Ct. App. 1989) (where the father is young and expected to continue to earn a living adequate to pay child support, special circumstances are not established).

11. *Byers v. Byers*, 910 So. 2d 336, 346 (Fla. 4th Dist. Ct. App. 2005); *see also Burnham v. Burnham*, 884 So. 2d 390, 393 (Fla. 2d Dist. Ct. App. 2004) (where the court recognized that it could not in a divorce case compel a parent to pay child support after the parent's death absent the parent's consent. The trial court had erroneously required the payor spouse to leave a monetary gift in his will for the child to continue child support payments after payor's death).

12. *Byers*, 910 So. 2d at 346; *but see Scalabroni v. Scalabroni*, 807 So. 2d 793, 794 (Fla. 2d Dist. Ct. App. 2002) (where the parent already owns life insurance to be used to secure payment of child support, evidence that the parent is insurable may not be needed).

13. *Burnham*, 884 So. 2d at 392; *see Schoditsch v. Schoditsch*, 888 So. 2d 709 (Fla. 1st Dist. Ct. App. 2004); *Alpha v. Alpha*, 885 So. 2d 1023, 1033 (Fla. 5th Dist. Ct. App. 2004) (holding a trial court's finding that the cost of insurance "was not prohibitive" without more, is inadequate).

14. *See Guerin*, 819 So. 2d at 970.

15. *Burnham v. Burnham*, 884 So. 2d 390, 392 (Fla. 2d Dist. Ct. App. 2004); *See Smith*, 912 So. 2d at 705.

16. *Lopez v. Lopez*, 780 So. 2d 164, 165-66 (Fla. 2d Dist. Ct. App. 2001) (where order requiring life insurance reversed because the record was devoid of evidence that the payor was insurable, the cost of insurance, or the payor's ability to afford the insurance); *see also Knight v. Knight*, 746 So. 2d 1117, 1120 (Fla. 4th Dist. Ct. App. 2000) (where the father, who was age 50 and had already had both heart and back surgery, could obtain affordable life insurance, it was reversible error to require life insurance to be purchased to secure child support without evidence that a policy existed or could be obtained or the cost of insurance); *see generally Guerin*, 819 So. 2d at 968 (stating a trial court order requiring the father of a child to provide life insurance to secure child support

to determine whether or not there is a need for the policy, the amount the policy should be issued for, the costs incurred in the maintenance of the policy, that the issuance of a policy is attainable, and that the anticipated payor is financially able to maintain the policy. Failure to do so is reversible error.<sup>17</sup>

A final judgment requiring maintenance of life insurance to secure child support should clearly reflect when the obligation ends, and name the child (or the child's representative) as beneficiary of the life insurance policy.<sup>18</sup> The judgment should expressly state that "the insurance is to serve as security only to the extent of prospective child support" owed in the event of the payor parent's death if that is the case.<sup>19</sup> The amount of insurance required should be stated in the court's order.<sup>20</sup> Where existing insurance, including insurance provided by the payor parent's employer, is adequate and is to provide security, that should likewise be stated in the court's order.<sup>21</sup> If employer provided insurance is to provide security, additional terms should be set forth specifying what is to occur if the employer decreases the amount of insurance provided or ceases offering life insurance, or if the payor parent's employment terminates.

The trial court is generally required to include specific findings in its judgment requiring life insurance to secure child support for two reasons. First, the findings are warranted to support the conclusion that the insurance is necessary and required under the statute.<sup>22</sup> Second, the findings are required to provide a sufficient record for appellate review.<sup>23</sup> Where the trial court neglects to make the requisite findings, but the evidence in the record nevertheless supports its conclusion, any error may be harmless.<sup>24</sup> For example, in one case a trial court ordered the husband to maintain a life insurance policy paying \$100,000.00 in death benefits to secure

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in a paternity case was overturned on appeal, due to lack of evidence that the father was insurable, the cost of the insurance, or that the father could afford the premiums).

17. *Byers*, 910 So. 2d at 336, 346; *see also* *Arthur v. Arthur*, 987 So. 2d 212, 215 (Fla. 2d Dist. Ct. App. 2008) (finding that the husband obligated to pay child support maintain \$50,000.00 in life insurance to secure this obligation was reversible error, absent evidence as to the cost and availability of the insurance); *Burnham*, 884 So. 2d at 392; *Cissel v. Cissel*, 845 So. 2d 993 (Fla. 5th Dist. Ct. App. 2003); *Layeni*, 843 So. 2d at 300; *Scalabroni*, 807 So. 2d at 794 (the court held that it was reversible error to require a father to reinstate one life insurance policy to secure payment of child support without first finding the father was insurable, and determining the cost of insurance and the father's ability to pay). Similarly, a trial court's requirement that the payor maintain life insurance to secure child support without a finding of the amount of insurance required, if the payor's employer provided insurance was adequate, or if it was not adequate that the payor could afford the insurance was reversed. *Parks v. Parks*, 637 So. 2d 50 (Fla. 1st Dist. Ct. App. 1994).

18. *Haydu*, 591 So. 2d at 657 (minor children were to be named beneficiaries of the life insurance, but the final judgment neglected to state that they could be removed as beneficiaries as they attained the age of majority).

19. *Trager v. Trager*, 541 So. 2d 148, 148 (Fla. 4th Dist. Ct. App. 1989); *see also* *Lithgow v. Lithgow*, 340 So. 2d 1283 (Fla. 3d Dist. Ct. App. 1997) (where a husband was required to keep an existing term insurance policy in effect to secure child support, but the final judgment was modified to reflect that the policy was only as security if the father died and need only be maintained until the child attained the age of majority).

20. *Parks*, 637 So. 2d at 50-51.

21. *Id.* at 50-51 (it was reversible error for the court to order the former husband to provide life insurance to secure payment of child support, without specifying the amount of insurance or whether the husband's employer provided insurance was sufficient).

22. *Winey v. Winey*, 979 So. 2d 396, 400 (Fla. 1st Dist. Ct. App. 2008).

23. *Id.*

24. *Id.*; *see also* *Scalabroni*, 807 So. 2d at 794 (where the court order requiring a father to continue to maintain a policy he already owned to secure payment of child support was not reversible error due to lack of an express finding that he was insurable, as the record reflected the existence of a policy and the cost of insurance).

child support, without ascertaining the cost of insurance or that the husband was insurable or could afford the premiums.<sup>25</sup> The evidence reflected that the husband's employer provided \$97,400.00 of group term insurance on the husband's life at no cost to the husband, and the husband already had in effect an additional \$146,000.00 in life insurance at a cost of \$5.39 per month. There was adequate evidence in the record that the insurance was available and affordable.<sup>26</sup> Thus, the trial court's error was harmless.<sup>27</sup> Because adequate insurance already existed to secure payment of child support, there was no need for the court to find that the husband remained insurable.

A request that life insurance be provided to secure payment of child support must be properly pled or tried by consent of the parties.<sup>28</sup> Where there is neither pleading nor consent, the trial court lacks authority to require a parent to provide life insurance for this purpose.<sup>29</sup> When an issue is properly raised by the pleadings about whether life insurance should be required, the trial court is obligated to make relevant findings.<sup>30</sup>

As noted previously, special circumstances must be established to warrant security. Special circumstances may exist in a variety of situations. For example, special circumstances requiring security may exist when the payor indicates he may not continue to practice his prior profession.<sup>31</sup> In contrast, special circumstances were not found to exist where the parent paying child support was young, healthy, engaged in a lucrative medical practice, and no evidence of prior nonpayment existed.<sup>32</sup>

Because the obligation to pay child support generally terminates with the death of the payor parent,<sup>33</sup> when life insurance is mandated by the court to assure payment the proceeds of the life insurance are only payable for this purpose to the extent that child support is owed at the time of the payor parent's (the insured's) death.<sup>34</sup> Life insurance is not to be required by a court in a divorce to force a deceased parent to provide an estate or windfall for the child.<sup>35</sup> Nor is it generally

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25. *Winney*, 979 So. 2d at 399.

26. *Id.*

27. *Id.*

28. *Williamitis v. Williamitis*, 741 So. 2d 1176, 1177 (Fla. 2d Dist. Ct. App. 1999).

29. *Id.*

30. *Duffey v. Duffey*, 972 So. 2d 290, 292 (Fla. 5th Dist. Ct. App. 2008) (where wife properly pled her request that the court require the husband to provide life insurance to secure his payments of both alimony and child support, the trial court's failure to make any findings or to address the issue was reversible error requiring remand).

31. *Carbonell v. Carbonell*, 618 So. 2d 326, 327 (Fla. 3d Dist. Ct. App. 1993) (where the payor father stated that he might cease practicing law).

32. *Waskin*, 346 So. 2d at 1063 (this case was decided before enactment of Fla. Stat. § 61.13(c)).

33. *Privett v. Privett*, 535 So. 2d 663, 665 (Fla. 4th Dist. Ct. App. 1988); *see also Riley*, 131 So. 2d at 492 (where this long standing rule was both recognized and criticized).

34. *Longo*, 533 So. 2d at 795; *see also Hauser*, 644 So. 2d at 555 (to the extent that the court's order could be interpreted to require the insured father to support children after they attained age 18 or were otherwise capable of self-support, the order constituted reversible error. Special needs children were involved in that case).

35. *Eberly v. Eberly*, 344 So. 2d 886, 888 (Fla. 4th Dist. Ct. App. 1977); *see also Trager*, 541 So. 2d at 149 (where the court explained that, absent a parent's express agreement, a parent may not be forced to maintain life insurance for the absolute benefit of a child, other than where statute authorizes life insurance as security for child support owed and not yet paid).

proper for a court to require a parent to maintain life insurance for an adult child who is not a dependent.<sup>36</sup> However, courts have recognized the need for child support to continue if the payor dies,<sup>37</sup> and have allowed collection from life insurance proceeds of child support which would have been payable had payor not died, in excess of that owed as of the date of the payor's death.<sup>38</sup> While there is some judicial support expressed for allowing life insurance to support a minor child after the death of the payor parent, a question remains about whether the law actually authorizes such application of life insurance proceeds when the life insurance is maintained solely due to court order.<sup>39</sup> Courts have stated that:

[A] final judgment requiring the security of life insurance must specify whether the insurance is security for unpaid support obligations, in which case only a portion of the proceeds might be encumbered, or whether all the insurance proceeds are to be distributed to the beneficiaries upon the spouse's death to minimize economic harm to the family.<sup>40</sup>

This language may reflect the authority of the court to order maintenance of life insurance and payment of policy proceeds in excess of child support arrearages owed at death.

Courts recognize that a parent may, in a marital settlement agreement, voluntarily commit to purchase and maintain life insurance for the benefit of minor or adult children, and that such provisions are enforceable.<sup>41</sup> By entering the agreement, the insured parent voluntarily deprives himself of any future right to designate a different beneficiary.<sup>42</sup> In a marital settlement agreement a former spouse may voluntarily bind himself or herself to provide life insurance proceeds for a child in excess of the amount of child support owed at the payor's death.

In light of the limited purpose of court mandated life insurance, attention is warranted to the amount of insurance required. The insurance required by a court to be maintained should not exceed the child support owed.<sup>43</sup> Requiring the non-

36. Merkin v. Merkin, 804 So. 2d 595, 598 (Fla. 2d Dist. Ct. App. 2002).

37. See *Carbonell*, 618 So. 2d at 327.

38. See *Browning v. Browning*, 784 So. 2d 1145, 1149 (Fla. 2d Dist. Ct. App. 2001); *Roxy v. Roxy*, 454 So. 2d 84, 84-85 (Fla. 2d Dist. Ct. App. 1984).

39. See *Kearley*, 745 So. 2d at 990 (Altenbernd, J., concurring).

40. *Smith*, 912 So. 2d at 705. *Smith* involved a contested divorce where the couple did not enter a marital settlement agreement. The trial court's order that the husband maintain an existing life insurance policy to secure payment of child support and alimony was reversed due to absence of requisite factual findings.

41. *Cantrell*, 524 So. 2d at 1064 (stating "a parent or spouse can voluntarily agree to name and maintain another person, including a support beneficiary, as an insured under a life insurance policy. Such an agreement need not be limited to security for a support obligation and can constitute a binding and unconditional conveyance of the benefits payable under such policy").

42. *Id.*

43. See *Higgins v. Higgins*, 348 So. 2d 48, 48-49 (Fla. 1st Dist. Ct. App. 1977) (trial court erroneously required the father to maintain a \$75,000.00 life insurance policy on his life, in addition to a \$15,000.00 life insurance policy which was alone adequate to pay any child support owed on his death, where total child support owed by the husband until the child attained age 18 was \$12,000.00); see also *Hedendal v. Hedendal*, 695 So. 2d 391, 392 (Fla. 4th Dist. Ct. App. 1997) (where the \$1,000,000.00 of life insurance the husband was initially

custodial parent to provide life insurance to secure child support payments in a sum more than twice the child support due until the minor attains the age of majority is excessive.<sup>44</sup> Where a parent's total support obligation until the minor children reached age 18 was less than \$325,000.00, it was reversible error for a court to require the payor to maintain a \$1,000,000.00 life insurance policy on his life.<sup>45</sup> However, the fact that the amount of life insurance exceeds the balance of child support owed until the child attains the age of majority is not necessarily reversible error.<sup>46</sup> Even if a parent agrees to be responsible for payments in excess of child support, such as costs of college tuition, the life insurance mandated by a court should not exceed the amount of his potential liability.<sup>47</sup> The court is required to specify in its order the amount of insurance needed to secure payment of child support.<sup>48</sup>

In most Florida cases reported, the parent with custody of the minor child seeks to require the other parent to provide life insurance. Absent a custodial parent's express agreement to the contrary, it is improper to require the custodial parent to provide life insurance to secure the custodial parent's support obligation.<sup>49</sup> This is particularly true where the custodial parent is solely liable for support of the child, has not defaulted in that obligation, and is retired, healthy and not engaged in a dangerous activity.<sup>50</sup>

A judgment, order or marital settlement agreement incorporated therein imposing a life insurance requirement to secure child support payments should be detailed, clear and comprehensive. The judgment or marital settlement agreement should expressly state that the insurance is required to protect child support,<sup>51</sup> to avoid later assertions that it had a different purpose. The exact amount of

ordered to maintain to secure child support was reduced to reflect the lesser amount of child support potentially owed).

44. *Lakin v. Lakin*, 901 So. 2d 186, 189 (Fla. 4th Dist. Ct. App. 2005); *see also* *Walla v. Thomas*, 805 So. 2d 1041 (Fla. 4th Dist. Ct. App. 2002).

45. *Walia*, 805 So. 2d at 1042.

46. *Bissell v. Bissell*, 622 So. 2d 532, 534-35 (Fla. 1st Dist. Ct. App. 1993) (court required husband to maintain a \$25,000.00 life insurance policy even though the husband's total child support for the three years until the child would be age 18 was \$16,380.00). Perhaps because the father also had responsibilities to pay for medical care costs for the child in excess of those covered by insurance, the court held the amount of life insurance not sufficiently unreasonable to constitute an abuse of discretion or reversible error.

47. *Pyle v. Pyle*, 375 So. 2d 1088, 1089 (Fla. 1st Dist. Ct. App. 1979) (court held it was reversible error to require a father to maintain \$302,000.00 in life insurance for his children, when the present value of the insurance was three times the amount of his obligation).

48. *Parks*, 637 So. 2d at 50-51.

49. *Simon v. Simon*, 319 So. 2d 46, 47 (Fla. 3d Dist. Ct. App. 1975); *see* *Shiveley v. Shiveley*, 635 So. 2d 1021 (Fla. 1st Dist. Ct. App. 1994) (where on appeal both former spouses agreed it was reversible error for the trial court to require the custodial parent to provide life insurance to secure her child support obligation); *see also* *Eagan v. Eagan*, 392 So. 2d 988, 989 (Fla. 5th Dist. Ct. App. 1981) *accord* *Eberly*, 344 So. 2d at 888.

50. *Simon*, 319 So. 2d at 47.

51. *See, e.g.,* *Sedell v. Sedell*, 100 So. 2d 639, 642-43 (Fla. 1st Dist. Ct. App. 1958) (where divorcing spouses entered a marital settlement agreement requiring the husband to continue to maintain a \$10,000.00 life insurance policy, on which his wife was to remain primary beneficiary and their children were to remain alternate beneficiaries. After entry of a final judgment of dissolution of marriage based on the agreement, the former husband unsuccessfully sought modification to require the former wife to hold policy proceeds in trust for the minor children. Neither the agreement nor the final judgment stated that the life insurance policy was to secure payment of child support. As the policy rights of the wife were instead found to be part of the distribution of marital assets, the former husband's request was denied.)

insurance to be maintained should be stated, along with when the insurance may be decreased or other beneficiaries may be named as the children age. The incremental decreasing amount of remaining unpaid child support obligation should also be stated.<sup>52</sup> If the insurance is required in a marital settlement agreement to assure payment of child support, the agreement and final judgment should so state to avoid future disputes about the purpose.<sup>53</sup> If the insurance is to secure payment of support owed for several children the effect on policy proceeds as each child attains age of majority should be set forth.<sup>54</sup> The judgment should expressly specify that the obligation to maintain the insurance or to name the child a beneficiary terminates as the child attains age 18 and all child support due is paid. This will assure the life insurance is only provided as security.<sup>55</sup> The custodial parent should seek a provision in the judgment, or insert a provision in an agreement requiring life insurance, to enable the custodial parent to verify and receive proof that the policy remains in effect,<sup>56</sup> as well as to receive notice of any policy cancellation. Appropriate provisions preventing the insured owner from pledging, encumbering, assigning, transferring or borrowing from the policy are also advisable.<sup>57</sup>

In many cases, where one parent was required to maintain life insurance to secure child support, the minor child or children were named beneficiaries of the policy.<sup>58</sup> Reversible error was found where the court ordered the custodial spouse

52. An example of such wording is found in *Liss v. Liss*, 937 So. 2d 760, 762 (Fla. 4th Dist. Ct. App. 2006). The agreement provided:

The Husband shall maintain, at his sole expense, a life insurance policy providing death benefits to the Wife of \$500,000.00 so long as he shall be obligated to pay either alimony and/or child support. To the extent that the Husband's obligation to pay alimony and/or child support falls below \$500,000.00, then he shall have the right to reduce the available coverage to the extent necessary to fully insure the remaining payments of alimony and/or child support. Further, if the Husband chooses not to reduce the death benefit, he may designate any beneficiary he so chooses for the excess. In determining what is necessary, the procedure will be to determine what amount of lump sum (at an interest rate of 6%) will be [needed] to amortize the outstanding balance.

53. *Cantrell* presents an example of such a dispute. In a marital settlement agreement a husband promised to name his children beneficiaries of his life insurance policies. Ignoring the agreement, the former husband named his second spouse policy beneficiary. Because the agreement did not expressly state that it was to secure child support and no child support was owed on the husband's death, the court held the children were third party beneficiaries of the agreement between their parents. Thus, the children, rather than decedent's widow, were entitled to the policy proceeds. 524 So. 2d at 1063.

54. *Eberly*, 344 So. 2d at 888 (where insurance was required to assure payment of child support for six minor children named as beneficiaries, the court order was deficient for failing to state what happened to a child's share of policy proceeds when the child attained age of majority).

55. See *Eberly*, 344 So. 2d at 888; see also *Kirkwood v. Kirkwood*, 365 So. 2d 793, 794 (Fla. 2d Dist. Ct. App. 1978) (where the wording of the trial court judgment was revised to reflect that the insurance requirement ended when the minor child attained the age of majority).

56. See, e.g., *Terry*, 788 So. 2d at 1130 (stating the judgment required the husband to "provide wife with all reasonable and necessary documentation, on an annual basis, so that she can verify that the life insurance coverage exists and remains effective . . .").

57. See *Terry*, 788 So. 2d at 1130 (for an example of such a provision).

58. See, e.g., *Browning*, 784 So. 2d at 1145; *Haydu*, 591 So. 2d at 655; *Brahmer v. Brahmer*, 596 So. 2d 517 (Fla. 1st Dist. Ct. App. 1992); *Tassone v. Tassone*, 492 So. 2d 1086 (Fla. 2d Dist. Ct. App. 1986); *Eberly*, 344 So. 2d at 886; *Lithgow*, 340 So. 2d at 1283, 1288; *Riley v. Riley*, 131 So. 2d 491 (Fla. 1st Dist. Ct. App. 1961); see

to be named beneficiary of the policy securing child support, whether the beneficiary designation was revocable<sup>59</sup> or irrevocable.<sup>60</sup> The wisdom of naming a minor a policy beneficiary, and thus causing the need for a costly court guardianship proceeding if the insured parent dies while the child is a minor, is questionable. This is particularly true where there are several minor children, each of whom would require a separate guardianship proceeding. One alternative to avoid the costs of guardianship is to name a trustee the policy beneficiary,<sup>61</sup> and possibly the policy owner. A trust agreement would bind the trustee and specify how insurance proceeds are to be expended for the support of the minor child. A trust agreement could also provide flexibility, allowing the insured parent to dispose of insurance proceeds not needed to satisfy child support owed at the insured's death as the parent wished. Another alternative might be to establish a Uniform Transfers To Minors Act account<sup>62</sup> for the minor child, and to name the custodian of the account the beneficiary of the life insurance policy. When the child attains the age of majority, the insured parent may change the policy beneficiary.

Use of a trust also addresses another possible concern, namely who should own the life insurance policy. The insured may wish to own it, particularly if he or she is paying the premiums and desires to retain the right to change the beneficiary once the child support obligation ends. The custodial parent of the minor child may wish to own the policy, to assure that beneficiaries are not prematurely changed and to assure that he or she is notified if premiums are not paid, the insurance is cancelled, or any other adverse changes occur. There is no requirement in the law mandating either that the payor or the former spouse receiving child support own the policy. Nor does the law authorize the former spouse receiving child support to be the policy beneficiary. It is permissible for the payor to create a trust, naming an independent trustee to own the insurance and/or to be the policy beneficiary.<sup>63</sup>

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also *Cissel*, 845 So. 2d at 993 (where the court ordered that the minor child be named primary beneficiary on the life insurance policy).

59. *Parker v. Parker*, 665 So. 2d 233 (Fla. 1st Dist. Ct. App. 1995); *Tassone*, 492 So. 2d at 1086.

60. *Alpha*, 885 So. 2d at 1034; *but see Hauser*, 644 So. 2d at 554. In *Layeni*, 843 So. 2d at 300, the court stated that the custodial parent should not be the named beneficiary of life insurance ordered to assure payment of child support, because she lacks a protectable interest. However, an agreement between the parents may result in the custodial parent being both the owner and the beneficiary of the life insurance. *Robbins v. Jackson Nat'l Life Ins. Co.*, 802 So. 2d 476 (Fla. 2d Dist. Ct. App. 2001). In *Robbins*, the father was ordered to pay child support secured by life insurance. A dispute arose when he failed to do so. After mediation an agreement was reached, under which the mother became owner of two life insurance policies insuring the father. Although the mother paid the insurance premiums, the case arose when the father attempted to interfere with the policies.

61. *Turner v. Turner*, 507 So. 2d 170 (Fla. 5th Dist. Ct. App. 1987) (a former husband was required to maintain \$200,000.00 in life insurance on his life). In part, the insurance was to assure payment of child support. Both the marital settlement agreement and the final judgment of dissolution were silent about the beneficiary of the policy. The former husband created a trust, named the trust beneficiary of the policy, and required the trustee to first use any insurance proceeds to satisfy alimony and child support obligations.

62. Fla. Stat. § 710. (2010).

63. *See Parker*, 655 So. 2d at 234, in which a husband was ordered to pay child support and to secure the payments with life insurance. The court permitted him to establish a trust, and to name the trustee beneficiary of the policy proceeds on his death. The former wife was not designated the trustee. The terms of the trust required payments to the parties' child.

Potential advantages exist to using a trust to own and/or be the beneficiary of the life insurance in the context of a divorce, in addition to avoiding the need for court guardianship proceedings. First, a payor may have greater ability to assure that, if he or she dies, the trustee uses the life insurance to pay only required child support and any excess life insurance proceeds benefit others selected by the payor. Second, if the payor is a wealthy individual with an estate subject to estate taxes, the use of an irrevocable trust to own and be the beneficiary of the life insurance may allow the proceeds to escape estate taxation on the insured's death. Third, a trustee owes fiduciary obligations to adhere to the terms of the trust. If a third party rather than one of the parents is the trustee, the payor may have greater assurance that the life insurance proceeds will serve their intended purpose, and the custodial spouse may have greater confidence that the insurance will remain in effect. A trustee may be obligated, by the terms of the trust agreement, to inform the parent receiving child support payments if funds are not received by the trustee to pay premiums due or if the life insurance is cancelled.

A fourth consideration favoring creation of a trust to own the life insurance is that one former spouse may not be comfortable with the other owning any interest in life insurance on his or her life.<sup>64</sup> Any concern that one former spouse would harm the other for insurance proceeds is diminished if a trustee other than the former spouse owns and is the beneficiary of the policy. Finally, where a trust owns the life insurance, the custodial parent has greater assurance that, if he or she dies, the minor child will still be adequately provided for. Thus, use of a trust to own life insurance provided to secure child support is worthy of consideration.

## II. LIFE INSURANCE TO PROTECT ALIMONY

The court has authority in a dissolution of marriage proceeding to order the spouse obligated to pay periodic alimony to purchase and maintain life insurance on his or her life as necessary to assure that alimony owed will be paid.<sup>65</sup> The need for security must be properly pled unless it is litigated by consent.<sup>66</sup> Where the need for security is not pled the consent to trial of the issue may be express or implied.<sup>67</sup> The entry of an order requiring the payor spouse to purchase and

64. See, e.g., *Robbins*, 802 So. 2d at 476.

65. Fla. Stat. § 61.08(3) (2009). “[S]uch an award is a matter within the discretion of the court.” *Goodwin v. Goodwin*, 640 So. 2d 173, 176 (Fla. 1st Dist. Ct. App. 1994) (citing *Sobelman v. Sobelman*, 541 So. 2d 1153 (Fla. 1989)).

66. See, e.g., *Miulli v. Miulli*, 832 So. 2d 963, 964 (Fla. 2d Dist. Ct. App. 2002). (where the need for life insurance to secure alimony was neither pled nor litigated by consent, it was reversible error for the trial court to order the payor spouse to maintain insurance). See also *Lowe v. Lowe*, 789 So. 2d 1202 (Fla. 4th Dist. Ct. App. 2001) (former wife's failure to raise claim that former husband should be required to obtain life insurance to secure alimony until hearing on motion for contempt precluded trial court from ordering former husband to obtain insurance); *Williamitis*, 741 So. 2d at 1177.

67. See, e.g., *Stalnaker v. Stalnaker*, 892 So. 2d 561, 563 (Fla. 1st Dist. Ct. App. 2005) (where the need for security to assure payment of alimony was not pled, the court determined that it was raised by implied consent during trial without objection based on the facts. During trial the wife's counsel asked the wife if she desired security and the wife said she did. The wife's counsel asked the husband if he objected to naming the wife as beneficiary on his life insurance, and the husband said he objected. The husband's counsel did not object to these questions during trial).

maintain a life insurance policy for this purpose is not routine or automatic.<sup>68</sup> Special circumstances demonstrating a need for security must be shown to exist before an order requiring the purchase or maintenance of life insurance will be entered.<sup>69</sup> Where the payor enters into an agreement requiring him to provide specified life insurance to secure alimony the court cannot increase that obligation unless the court makes all requisite findings.<sup>70</sup> Even where special circumstances exist, the court must make specific findings about the amount of insurance needed, that the insurance is available, and that in light of the cost of the insurance the payor spouse has the ability to afford it.<sup>71</sup> The spouse who seeks imposition of a requirement that the payor spouse purchase or maintain life insurance has the burden of proof.<sup>72</sup> Where proof is lacking, insurance is not required.<sup>73</sup> Failure of the trial court to make specific findings on each point to be proved is reversible error,<sup>74</sup> unless the record reflects sufficient competent evidence to justify the trial court's determination.<sup>75</sup>

Special circumstances may exist in a variety of situations justifying imposition of a life insurance maintenance requirement. Special circumstances are present

68. *Ruberg v. Ruberg*, 858 So. 2d 1147, 1156-57 (Fla. 2d Dist. Ct. App. 2003); *Privett*, 535 So. 2d at 665.

69. *Massam v. Massam*, 993 So. 2d 1022, 1024 (Fla. Dist. Ct. App. 2008); *Konsoulas v. Konsoulas*, 904 So. 2d 440, 445 (Fla. 4th Dist. Ct. App. 2005); *Stalaker*, 892 So. 2d at 563; *Schoditsch v. Schoditsch*, 888 So. 2d 709 (Fla. Dist. Ct. App. 2004); *Ruberg*, 858 So. 2d at 1156 (Fla. 2d Dist. Ct. App. 2003); *Forgione v. Forgione*, 845 So. 2d 968, 970 (Fla. 4th Dist. Ct. App. 2003).

70. *Lorman*, 633 So. 2d at 106. In *Lorman*, the husband agreed to continue to maintain an existing life insurance policy on his life to secure both alimony and child support payments. The policy provided a \$325,000.00 death benefit. The trial court committed reversible error when it required the husband to obtain an additional \$250,000.00 insurance on his life without determining it was needed, its cost or that it was available.

71. *Massam*, 993 So. 2d at 1022; *Byers*, 910 So. 2d at 346; *see also Plichta v. Plichta*, 899 So. 2d 1283, 1287 (Fla. 2d Dist. Ct. App. 2005) (A trial court's finding that the cost of insurance "was not prohibitive" is alone inadequate to prove that the payor is able to obtain and afford the insurance); *Alpha*, 885 So. 2d at 1034 (Additional evidence in the record, including the testimony of the husband, who was an insurance agent, as to the monthly cost for the insurance was adequate proof of cost. The insurance mandate was nevertheless reversed, due to lack of proof that there was a need for security); *Stalaker*, 892 So. 2d at 563.

72. *Levy v. Levy*, 900 So. 2d 737, 745 (Fla. 2d Dist. Ct. App. 2005).

73. *Id.*; *Plichta*, 899 So. 2d at 1287; *Solomon v. Solomon*, 861 So. 2d 1218, 1221 (Fla. 2d Dist. Ct. App. 2003); *Lapham v. Lapham*, 778 So. 2d 487, 489 (Fla. 5th Dist. Ct. App. 2001); *see also Smith v. Smith*, 912 So. 2d 702, 705 (Fla. 2d Dist. Ct. App. 2005) (where a trial court order requiring a husband to maintain life insurance to secure alimony was reversed due to the trial court's failure to make any of the required findings); *Cozier v. Cozier*, 819 So. 2d 834, 836-37 (Fla. 2d Dist. Ct. App. 2002) (where due to lack of evidence of the cost of life insurance, or that the payor spouse could obtain life insurance or afford the premiums, it was reversible error to require him to provide life insurance to secure alimony payments. This was true although the payor was insured under a group term insurance policy through his employment); *Hedendal*, 695 So. 2d at 392 (where the trial court erroneously required the husband to maintain a \$1,500,000.00 policy insuring his life for the benefit of the wife, although there was no proof of need to secure alimony); *Keith v. Keith*, 537 So. 2d 138, 139 (Fla. 2d Dist. Ct. App. 1989) (where the trial court erroneously required a former husband to maintain \$150,000.00 in life insurance on his life to secure payment of \$1,000.00 per month in alimony owed to the former wife, without evidence of the necessity for security).

74. *See Massam*, 993 So. 2d at 1022; *Norman v. Norman*, 939 So. 2d 240 (Fla. 1st Dist. Ct. App. 2006); *Alpha*, 885 So. 2d at 1033-34; *Rubenstein v. Rubenstein*, 866 So. 2d 80 (Fla. 3d Dist. Ct. App. 2003); *Cissel*, 845 So. 2d 993; *Zimmerman v. Zimmerman*, 755 So. 2d 730 (Fla. 1st Dist. Ct. App. 2000); *Privett*, 535 So. 2d 663 (where the trial court's failure to determine need was reversible error); *see also O'Connor v. O'Connor*, 782 So. 2d 502 (Fla. 2d DCA 2001). *Schere v. Schere*, 645 So. 2d 21 (Fla. 3d Dist. Ct. App. 1994) (where the trial courts' failure to consider the cost of insurance and the financial impact of paying premiums on the payor was reversible error, where special circumstances were demonstrated).

75. *Forgione*, 845 So. 2d at 969-70; *Hedendal*, 695 So. 2d at 391-92.

when the recipient spouse proves that a need exists for life insurance to secure payment of alimony.<sup>76</sup> Where the spouse receiving alimony payments would suffer significant financial harm due to the likelihood of future alimony arrearages special circumstances exist.<sup>77</sup> While no one fact is determinative, factors considered by the courts to ascertain if special circumstances exist include:

- Limited earning capacity of the recipient of alimony;<sup>78</sup>
- Payor engaged in a dangerous occupation;<sup>79</sup>
- Illness of the payor;<sup>80</sup>
- Failure of the payor to adhere to prior agreements requiring maintenance of life insurance;<sup>81</sup>
- Prior history of nonpayment of support;<sup>82</sup>
- Recipient's inability to support himself or herself or to maintain his or her standard of living if alimony payments ceased;<sup>83</sup>

76. *Longo*, 533 So. 2d at 795 (citing *Solberman v. Solberman*, 516 So. 2d 7 (Fla. 2d Dist. Ct. App. 1987)).

77. *Massam*, 993 So. 2d at 1022. In *Massam*, because the husband who was obligated to pay alimony had poorly managed his finances and businesses previously and attempted to file bankruptcy to avoid payment of alimony, future nonpayment of alimony was likely and special circumstances existed. See also *Nelson v. Nelson*, 795 So. 2d 977, 985-86 (Fla. 5th Dist. Ct. App. 2001).

78. *Id.* (Where the recipient spouse's poor health prevents him or her from accepting gainful employment, special circumstances exist). See also *Forgione*, 845 So. 2d at 970 (where the wife's age (48), limited employability options, prior employment being only for her husband's business, lack of education, lack of assets, and her inability to earn a sufficient sum to pay her reasonable living expenses together justified the court's conclusion that special circumstances existed. The husband's poor health was a further factor considered by the court as supporting a finding of special circumstances). *Sasnett v. Sasnett*, 679 So. 2d 1265, 1269 (Fla. 2d Dist. Ct. App. 1996) (where the recipient lacked employment skills); *Alpha*, 885 So. 2d at 1034 (where the court noted that special circumstances exist where due to "age, ill health or lack of employment skills" the recipient spouse would suffer severely if the payor died).

79. *Byers*, 910 So. 2d at 346. The payor was an airline pilot regularly flying commercial airplanes on international routes after September 11, 2001. This was sufficient to constitute a special circumstance, justifying the need for life insurance to protect alimony.

80. *Bohner v. Bohner*, 997 So. 2d 454 (Fla. 4th Dist. Ct. App. 2008) (payor previously suffered from cancer). See also *Forgione*, 845 So. 2d at 970 (where payor's condition was likely to be fatal).

81. *Bohner*, 997 So. 2d at 454 (The former husband designated persons other than his former spouse and children as policy beneficiaries, despite the existence of a marital agreement requiring him to provide life insurance to secure alimony and child support obligations).

82. *Watrous v. Watrous*, 961 So. 2d 1121, 1122 (Fla. 2d Dist. Ct. App. 2007); *Smith*, 912 So. 2d at 702, 704-05; *Alpha*, 885 So. 2d at 1023, 1034; *Merkin*, 804 So. 2d at 597-98; *Moorehead*, 745 So. 2d at 552.

83. *Bohner*, 997 So. 2d at 457; *Watrous*, 961 So. 2d at 1121-22; *Sasnett*, 679 So. 2d at 1268. Special circumstances may exist where the payor and the recipient are wealthy, as long as the recipient would suffer economic jeopardy if alimony payments ceased. *Nelson*, 795 So. 2d at 986. In *Nelson*, equitable division of marital assets resulted in the former husband receiving in excess of \$3,100,000.00 and the former wife receiving in excess of \$1,100,000.00. To equalize the distribution, the former husband was ordered to execute a promissory note in the principal sum of \$1,000,000.00 plus 7.5% per annum interest in favor of the former wife, secured by stock in the former husband's business. The former wife was also awarded \$1,000.00 per month alimony. The court upheld a requirement that the former husband keep in effect a \$150,000.00 life insurance policy insuring his

- Other wealth owned by the recipient;<sup>84</sup>
- Illness or disability suffered by the recipient;<sup>85</sup>
- Age of the parties;<sup>86</sup> and
- Presence of minor children residing with the alimony recipient.<sup>87</sup>

In contrast, where there is no evidence that the payor spouse has been or is likely to be delinquent in paying alimony, that the recipient spouse suffers from disability or health problems preventing her from working and supporting herself if the payor dies, and the recipient spouse has sufficient assets and earning capacity to support herself if alimony ceases due to the payor's death, special circumstances do not exist.<sup>88</sup> Where the "husband is in good health and the wife would not be left in dire economic straits upon the untimely death of the husband" special circumstances do not exist.<sup>89</sup> The existence of other assets payable to the spouse receiving alimony if the payor dies, such as retirement plan benefits, may obviate the need for life insurance to secure alimony.<sup>90</sup>

Special circumstances must be adequately set forth in detail in the final judgment for a requirement imposed by the court on a payor spouse to maintain life insurance to be upheld.<sup>91</sup> Where special circumstances exist, evidence must also be offered to establish that the payor spouse is insurable, the cost of the insurance, and that the payor spouse has the ability to pay premiums.<sup>92</sup> The amount of premiums

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life to secure alimony. In reaching its conclusion, the court took into account the facts that (1) the trial court gave the former wife a lien against the husband's closely held corporate stock to assure payment of the promissory note; (2) the trial court refused to allow the former wife to perfect her security interest to avoid interference with operation of the former husband's business; (3) the former husband might not pay the promissory note; (4) if the former husband died the former wife might not be able to collect on the promissory note; and (5) if the former wife did not receive payment on the promissory note her financial circumstances would change radically. In light of the foregoing facts, although the former wife would own in excess of \$1,000,000.00 in assets, it was proper for her alimony awarded to be secured by insurance.

84. The recipient spouse may not own significant assets. *See, e.g., Sasnett*, 679 So. 2d at 1268-69.

85. *Smith*, 912 So. 2d at 704; *Alpha*, 885 So. 2d at 1034; *Sasnett*, 679 So. 2d at 1269; *Child v. Child*, 34 So. 3d 159, 162 (Fla. 3d Dist. Ct. App. 2010) (where the wife receiving alimony was legally blind).

86. *Smith*, 912 So. 2d at 704-05.

87. *Child*, 34 So. 3d at 162; *Smith*, 912 So. 2d at 704-05.

88. *Ruberg*, 858 So. 2d at 1157; *accord Moorehead*, 745 So. 2d at 552.

89. *Baker*, 763 So. 2d at 495 (the spouses were both in their 40s and the wife was capable of working).

90. Where the wife receiving alimony would be entitled to military survivor benefits if the payor husband died, the court suggested that life insurance to secure alimony might be unnecessary. *Zimmerman*, 755 So. 2d at 730.

91. *Massam*, 993 So. 2d at 1024; *Jaworski*, 972 So. 2d at 1096; *Merkin*, 804 So. 2d at 598. In *Merkin*, although the record reflected the husband's prior failure to pay temporary alimony as ordered by the court, the failure to expressly state in the final judgment the circumstances relied on by the court in ordering life insurance to secure alimony payments was reversible error.

92. *Zangari v. Cunningham*, 839 So. 2d 918, 920 (Fla. 2d Dist. Ct. App. 2003); *see also Child*, 34 So. 3d at 162 (where the trial court neglected to determine the cost, amount or availability of insurance, and the failure constituted reversible error).

due to maintain the insurance may decrease the amount of alimony otherwise owed.<sup>93</sup>

The fact that the payor spouse owns insurance on his or her life at the time of dissolution of marriage reflects that he or she was insurable when the insurance was purchased. It does not always follow that the payor spouse is still insurable at all, or at the same premium cost.<sup>94</sup> It may, however, reflect that insurance is available to secure payment of alimony without purchase of a new policy, avoiding the need to prove that the spouse is insurable, and may evidence the insured spouse's ability to pay premiums.<sup>95</sup> If it is asserted that the payor spouse already owns life insurance, absent the payor's admission of that fact and relevant details about the insurance, proof is required that the insurance exists before an order mandating continuation of the policy may be entered.<sup>96</sup>

The recipient spouse has the burden of establishing the amount of life insurance needed and the cost. Absent evidence and appropriate findings on these points, it is reversible error for a court to order purchase or maintenance of life insurance.<sup>97</sup> Testimony of an expert witness about the amount of insurance available and the cost and duration of a policy should be offered.<sup>98</sup> The amount of insurance required must be based on the amount of alimony owed.<sup>99</sup> For this

93. *Norman*, 939 So. 2d 240; *see also Sobelman*, 541 So. 2d at 1154 n.2 (where the Court noted, "any requirement to pay premiums [on life insurance for the benefit of a former spouse] should be taken into account in the determination of the amount of alimony").

94. *Massam*, 993 So. 2d at 1024; *but see Bohner*, 997 So. 2d at 454 (where a magistrate found the payor spouse had the ability to obtain life insurance based on expert testimony introduced by the recipient spouse and the fact that the payor was already insured for \$1,000,000.00. Even if the payor's medical conditions precluded the purchase of a new insurance policy at an affordable premium, use of existing insurance to secure payment of alimony may be appropriate. Also, the fact that the payor already has a policy in place may be used to prove his ability to pay premiums).

95. *See, e.g., Richardson*, 722 So. 2d at 281. The husband, age 63, had three life insurance policies in place on his life, providing \$47,000.00 in death benefits. Within two years after the dissolution of marriage, the policies would continue in force without further payment of premiums.

96. *See, e.g., Struble v. Struble*, 787 So. 2d 48 (Fla. 2d Dist. Ct. App. 2001) (where the trial court's judgment that a husband continue to maintain a \$300,000.00 life insurance policy on his life to secure alimony owed was erroneous, due to the absence of proof that the former husband owned a \$300,000.00 policy). *Id.* at 50. The evidence reflected that the former husband owned a \$100,000.00 life insurance policy on his life, he was insured under a second policy of unknown amount through his job, and he owned two additional policies each paying \$1,000.00 in benefits on his death. *Id.*

97. *Konsoulas*, 904 So. 2d at 445; *Zangari*, 839 So. 2d at 920; *see also Struble*, 787 So. 2d at 50 (where it was error for the trial court to order maintenance of life insurance to secure alimony, without first determining the cost of insurance, the former husband's ability to pay premiums and the financial impact on the payor); *Zimmerman*, 755 So. 2d 730 (where it was reversible error to order the husband to provide a \$100,000.00 life insurance policy to secure \$50.00 per week alimony payments, without evidence of the cost and availability of the policy or a finding that the husband could afford the premiums). *Accord Smith*, 811 So. 2d 840 (Where no evidence was offered and the motion to require the payor spouse to obtain life insurance was made after the evidentiary hearing concluded, the court remanded the case for further proceedings).

98. In *Bohner*, 997 So. 2d 454, a former wife sought to compel the former husband to comply with the terms of a marital settlement agreement requiring his purchase of life insurance on his life to guaranty payment of alimony and child support. The former wife's expert testified about the ability to obtain a \$1,000,000.00 life insurance policy on the former husband's life, and the costs of both a ten year term policy and a fifteen year term policy providing \$1,000,000.00 or \$650,000.00 in death benefits.

99. *Zangari*, 839 So. 2d at 920; *see also Brogdon v. Brogdon*, 530 So. 2d 1064, 1066 (Fla. 1st Dist. Ct. App. 1988) (where it was an abuse of discretion for the trial court to require the former husband to maintain a \$100,000.00 life insurance policy on his life to secure alimony owed of a much lower sum).

purpose, both direct cash support payments and indirect alimony should be considered.<sup>100</sup>

Before a court orders a spouse to obtain or maintain life insurance to secure alimony payments, the financial impact on the payor must be considered.<sup>101</sup> While illness of the payor may be evidence that special circumstances exist, the same fact may increase the cost of the insurance. This could adversely affect the payor's financial condition to the extent that a requirement to maintain life insurance is not practical or warranted. If the payor's medical condition is severe it may not be possible to purchase life insurance, and other security authorized under the statute needs to be investigated.

Care is needed in drafting the final judgment provision requiring maintenance of life insurance.

A final judgment that requires life insurance as security must specify how the proceeds are to be paid upon the obligor spouse's death—whether the life insurance is security for unpaid support obligations that might encumber only a portion of the proceeds, or whether all of the proceeds will go to the payee spouse to minimize economic harm to the family.<sup>102</sup>

It is not adequate for the final judgment to merely state the amount of insurance the payor is to maintain to secure alimony.<sup>103</sup> Instead, the judgment should specify if on the payor's death the recipient receives all insurance proceeds or only a sum equal to past due alimony.<sup>104</sup> If the final judgment states that the life insurance merely secures payment of alimony, absent a contrary provision in a marital settlement agreement, on the payor spouse's death the recipient spouse should receive only so much of the life insurance policy proceeds as required to satisfy any alimony remaining unpaid, rather than all policy proceeds. Where the

100. See *Haydu*, 591 So. 2d at 656 (where the husband was required to provide medical and dental insurance for his former wife, secured by life insurance).

101. *Sobelman*, 541 So. 2d at 1154 n.2; *Forgione*, 845 So. 2d at 970; *Zimmerman*, 755 So. 2d 730; *Milo v. Milo*, 718 So. 2d 343, 345 (Fla. 2d Dist. Ct. App. 1998). In *Milo*, the trial court ordered the former husband to maintain life insurance "if reasonably available" with a death benefit of \$250,000.00 to secure alimony payments. Both former spouses appealed the trial court's decision. The former wife objected to the court imposing a requirement only if insurance was reasonably available. The former husband objected to requiring maintenance of life insurance without evidence and determinations of the cost of the insurance, the former husband's ability to pay premiums and the financial impact on the former husband. The husband was already insured during the marriage under one whole life insurance policy and a \$100,000.00 term life policy through his job. The appellate court reversed and remanded the case to the trial court to make appropriate findings. *Id.* at 345.

102. *Massam*, 993 So. 2d at 1024; *Plichta*, 899 So. 2d at 1287; see also *Merkin*, 804 So. 2d at 598 (where the court noted that the failure to specify in the final judgment how insurance proceeds were to be distributed on the payor's death was unacceptable. Absent this information it was unclear if the life insurance was to serve a purpose other than satisfying arrearages owed at the payor's demise. Without express direction on this point, it was not possible for the appellate court to determine if the amount of insurance required was appropriate in light of the alimony owed.); *Rowland*, 868 So. 2d at 613 (where it was reversible error for a court order to require the former husband to maintain a \$300,000.00 life insurance policy on his life to secure both alimony and child support payments, without specifying how the insurance proceeds were to be distributed if the husband died).

103. *Kearley*, 745 So. 2d at 988.

104. *Id.* ("Either arrangement may be appropriate, but those terms must be certain").

final judgment includes ambiguous and conflicting provisions causing confusion about whether the life insurance is to secure only child support or also alimony payments, the judgment is defective.<sup>105</sup>

It is advisable for the court order or agreement to state who is to own the life insurance and who is to be the beneficiary named on the policy. Where an agreement incorporated into a final judgment of dissolution required a husband to maintain a life insurance policy so long as alimony or child support payments were required, the husband was found to be in compliance when naming a trust as beneficiary so long as the former spouse and children were trust beneficiaries.<sup>106</sup> Thus, if the alimony recipient objects to use of a trust to own or be beneficiary of the life insurance, a provision precluding use of a trust or expressly specifying who will own and be named beneficiary of the policy needs to be included in the court order or marital settlement agreement. Where life insurance is ordered to protect both payments of alimony and child support, it is error to require payor to name only the minor child as beneficiary.<sup>107</sup> Where life insurance is ordered to be maintained to secure only alimony payments, it is not error to require the recipient spouse to be named irrevocable beneficiary of the life insurance until the payor spouse retires.<sup>108</sup> Because the obligation to pay alimony ends on the payor's death, no insurance proceeds would be considered paid as invalid post-mortem alimony.<sup>109</sup>

Differing views initially existed between the districts about whether a court, absent a voluntary agreement of the parties, might properly order life insurance proceeds to be payable to the recipient spouse in excess of the alimony owed as of

105. See, e.g., *Cissel*, 845 So. 2d at 995. In *Cissel*, the final judgment of dissolution stated, in pertinent part:

8. Life Insurance Security For Child Support: As security for the Husband's child support obligation the Husband shall maintain a life insurance policy having a death benefit of \$500,000.00. The Husband shall maintain said insurance for so long as the Husband has continuing obligation to pay child support and alimony to the Wife on behalf of the minor child. Said life insurance benefits may be decreasing in term provided that the death benefit is sufficient to secure the Husband's child support obligation.

A dispute arose about whether the life insurance was required to secure payment of child support only, or also to secure payment of alimony. The former husband also claimed the amount of insurance was excessive.

106. See, e.g., *Turner*, 507 So. 2d at 171. In *Turner*, the final judgment provided in pertinent part:

6. As long as the Husband is required to pay alimony and support to the Wife and child as set forth herein, he shall keep in effect a current life insurance policy having a minimum face value of \$200,000.00. The Husband shall furnish the Wife written proof of the payment of the premiums within thirty (30) days of the due date.

After the divorce the former husband changed the policy beneficiary from the wife to a trust. The trust agreement required policy proceeds to be used to pay alimony as long as it was owed, and provided for payment of child support. Any sums remaining in the trust benefited the parties' child once all alimony and child support owed were paid. The court held that the former husband's creation of a trust did not violate the final judgment, and the former husband was not required to name the former wife or child beneficiary of the policy.

107. *Brahmer*, 596 So. 2d at 518.

108. *Benson v. Benson*, 503 So. 2d 384 (Fla. 3d Dist. Ct. App. 1987). A further point for counsel to address where life insurance is only required until the payor/insured retires is when that retirement may occur. Issues involving timing of retirement and early retirement are beyond the scope of this article.

109. *Id.* at 385.

the payor's death.<sup>110</sup> The view initially espoused by the Fourth District and Fifth District was that life insurance proceeds payable under a court ordered policy to secure payment of alimony could not exceed the alimony owed on the payor's death.<sup>111</sup> The alimony owed on the payor's death included any lump sum alimony payable in the future.<sup>112</sup> Their reasoning was that, as the obligation to pay alimony ends with the payor spouse's death,<sup>113</sup> absent a voluntary agreement of the payor to the contrary, the obligation could not be extended or increased by a court directing the purchase or maintenance of life insurance by the payor spouse on the life of the payor spouse for the benefit of the recipient.<sup>114</sup> "Alimony was initially conceived as a necessary corollary to the common-law obligation of a husband to provide his wife with the necessities of life. Thus, alimony terminated upon the death of the husband . . . ."<sup>115</sup> The statute allowing the payment of alimony to be assured by life

110. See *Longo*, 533 So. 2d 791 (holding that a court lacks authority to order use of life insurance proceeds to pay alimony not owed as of the payor spouse's death). Note that *Longo* was decided prior to *Sobelman*, 541 So. 2d 1153.

111. *Longo*, 533 So. 2d at 795; see also *Privett*, 535 So. 2d at 665; *Perkins v. Perkins*, 310 So. 2d 438 (Fla. 4th DCA 1975) (holding that a court cannot, in a dissolution of marriage action, require a husband to maintain insurance on his life to support his former wife following his death, because the obligation to pay alimony ends on the payor's death). There was also support from other districts of this view. See, e.g., *Keith*, 537 So. 2d at 139; *Putnam v. Putnam*, 154 So. 2d 717, 720 (Fla. 3d Dist. Ct. App. 1963).

112. *Keith*, 537 So. 2d at 140.

113. *Eagan*, 392 So. 2d at 989; *Plant v. Plant*, 320 So. 2d 455, 458 (Fla. 3d Dist. Ct. App. 1975).

114. The court explained its reasoning in *Longo* stating that the statute:

[P]ermits a court to require acquisition or continuation of a life insurance policy . . . to secure an alimony award. The discretion to impose a requirement for insurance is carefully limited: It may only be exercised 'to the extent necessary to protect an award of alimony . . .' The language seems very clear and therefore in our view leaves no room for the application of rules of statutory construction. It is perhaps simplistic to explain that we take the word 'secure' used in this context not to be used as a synonym for 'obtain' but rather to refer to a device (such as a mortgage) to safeguard payment of an obligation. The statute provides a method of securing or protecting an alimony award. It contains no language expressly creating a new duty or expanding an existing one.

It seems trite to suggest that had the legislature intended to overturn venerable precedent it would have 'said so.' However, the legislature is presumed to be cognizant of the rules of law that a particular enactment will affect. It is doubtful if post-mortem alimony . . . [was] intended to be engrafted upon Florida law by unartful legislative draftsmanship and innuendo.

We make one final observation on the issue although others (such as public policy considerations and economics) come readily to mind. If we assume that the amendment authorized post-mortem alimony, does such an award terminate upon the surviving spouse's subsequent remarriage? death? inheritance of several million dollars? Does post-mortem alimony burden the obligor spouse's estate if that spouse dies before the purchase of life insurance is completed? Or where no insurance is contemplated? Simply stated, more problems are created than are solved by reading into these amendments something that the legislature never intended.

*Longo*, 533 So. 2d at 794-95; see also *Eagan*, 392 So. 2d at 988; and cases from the First, Third and Fourth Districts cited therein.

115. *Longo*, 533 So. 2d at 793. Thus, even where in a separation agreement incorporated into a final judgment of dissolution a husband promised to pay support to his wife until her death or remarriage, his obligation ended with his demise absent express provision in the agreement that his estate remained liable to continue payments. *O'Malley v. Pan American Bank of Orlando, N.A.*, 384 So. 2d 1258 (Fla. 1980); see also *In Re Freedland's Estate*, 182 So. 2d 425 (Fla. 1966).

insurance on the payor spouse's life could not expand or extend the underlying obligation.<sup>116</sup> Thus, prior to the Florida Supreme Court's decision in *Sobelman v. Sobelman*,<sup>117</sup> in the Fourth District the order directing use of life insurance to protect an alimony award had to be drafted to allow only payment of arrearages on the death of the payor spouse.<sup>118</sup> The Fifth District agreed.<sup>119</sup>

Contrary views were expressed. It may be viewed as contradictory to ask the trial court in a dissolution of marriage action to determine both that one spouse has the ability to pay alimony, and that arrearages in future payments are likely.<sup>120</sup> Public policy behind alimony is to provide support to the payor's former spouse, and this policy may be furthered by giving the recipient a windfall of life insurance policy proceeds for future support after the death of the payor spouse.<sup>121</sup> The Second District supported use of life insurance to assure payment of alimony even after the death of the payor spouse, when the recipient depended on alimony for her support or would be in desperate financial circumstances if the payor spouse died and alimony ceased.<sup>122</sup> The court's authority to require life insurance to be maintained for a purpose not limited to paying arrearages owed at the payor's demise found support in the First District.<sup>123</sup> Yet, other Second District cases purported to limit use of life insurance proceeds only to satisfy arrearages owed on the payor's death.<sup>124</sup>

To avoid violating the prohibition once perceived to exist on a court requiring a payor spouse to pay alimony after payor's death, absent voluntary agreement of the payor, yet still provide life insurance proceeds on the payor's life to benefit the

116. After amendment of Fla. Stat. § 61.08(3) (1985) the argument was unsuccessfully advanced by a wife in a dissolution action that the statute impliedly authorized the court to impose liability for alimony owed after payor's death on payor's estate. *Clark v. Clark*, 509 So. 2d 364 (Fla. 4th Dist. Ct. App. 1987). The court rejected the wife's argument.

117. *Sobelman*, 541 So. 2d at 1153.

118. *Longo*, 533 So. 2d at 795.

119. *Moore v. Moore*, 543 So. 2d 252, 257 (Fla. 5th Dist. Ct. App. 1989) (A final judgment requiring insurance to be maintained on the payor's life or for the recipient spouse to be named the beneficiary on an existing policy should specify that policy proceeds may only be used to pay alimony arrearages owed on the payor's death).

120. *Longo*, 533 So. 2d at 796 (Stone, J. dissenting). Consistency in these two positions may exist if a court is determining that the payor has the financial wherewithall to pay premiums, but is not sufficiently responsible to actually make the payments.

121. *Id.*

122. *Kearley*, 745 So. 2d at 990 (Altenbernd, J. concurring).

123. *Fiveash v. Fiveash*, 523 So. 2d 764 (Fla. 1st Dist. Ct. App. 1988). The court ordered the payor to maintain \$75,000.00 in life insurance on his life to assure that alimony would be paid to his former wife in the event of his death, as her financial condition was tenuous. Because the insurance company rather than the former husband's estate would remit the proceeds to the recipient spouse, the former husband was not being improperly required to pay alimony after his death. *Id.* at 765. The court certified the following question to the Florida Supreme Court: "Does § 61.08(3) Florida Statutes (1985) authorize a trial court to require an alimony paying spouse to maintain a life insurance policy securing said alimony award, such that upon the death of the paying spouse the receiving spouse is *only* entitled to receive from the insurance the sum total of any existing alimony arrearages?" *Id.* If any response was forthcoming it is not of record. In *Fiveash* the appellate court affirmed the trial court's order that the former husband maintain the insurance and found no abuse of discretion. *Id.* The decision was criticized in *Longo*, 533 So. 2d 791.

124. *Dwyer v. Dwyer*, 513 So. 2d 1325 (Fla. 2d Dist. Ct. App. 1987). The court in *Dwyer* required the final judgment to be corrected to reflect that life insurance proceeds were only payable for alimony arrearages. However, in *Dwyer* both spouses agreed that the trial court erred by requiring the payor to maintain the policy on which the alimony recipient was the primary beneficiary. *Id.* at 1327.

alimony recipient, consideration should be given in determining whether life insurance could be awarded as lump sum alimony.<sup>125</sup> Where a divorcing husband owned life insurance on his life and his former wife would be destitute if he died and alimony payments ceased, as part of the alimony the former wife was awarded ownership of the insurance on the former husband's life and was designated the irrevocable beneficiary of each policy.<sup>126</sup> The former husband was required to pay all premiums due and interest on policy loans.<sup>127</sup> To assure that the policy proceeds would serve the purpose for which they were intended, the court included in its order that the former wife could not assign the policies, surrender them or borrow against them. Further, if she died or remarried prior to the former husband's death the policies would revert to him, and the husband could then designate another beneficiary. The parties involved were required to notify the issuing insurance companies of the court imposed conditions.<sup>128</sup>

"Lump sum alimony may be awarded as a means of insuring an equitable distribution of property acquired during the marriage, or to provide for the wife's further needs for continuing support."<sup>129</sup> Should the court awards a former spouse a life insurance policy on the life of the other spouse as lump sum alimony, as opposed to securing payments of periodic alimony, the insured may be required to pay policy premiums. The premiums are additional periodic alimony.<sup>130</sup> In that situation, the former spouse receiving the insurance as lump sum alimony should be both the owner and the beneficiary of the policy, able to assure that the recipient is informed of non-payment of premiums and other facts affecting the continuation of the policy.<sup>131</sup> To avoid misunderstandings and needless litigation, the court order imposing a life insurance requirement should clearly specify that the

125. *Stith v. Stith*, 384 So. 2d 317 (Fla. 2d Dist. Ct. App. 1980). The court stated the dilemma as follows:

In a continuing marriage, a husband who has not accumulated substantial assets may use life insurance to provide his wife with an adequate estate for her protection in the event of his death. We think it unfortunate to forbid imposing such an arrangement on an ex-husband for the benefit of his ex-wife on the theory that the life insurance under such circumstances can only be viewed as security for an alimony obligation and, therefore, is improper because the alimony obligation cannot extend beyond death.

*Id.* at 320-21; *see also* *McClung v. McClung*, 465 So. 2d 637, 638 (Fla. 2d Dist. Ct. App. 1985); *Noe v. Noe*, 431 So. 2d 657, 658 (Fla. Dist. Ct. App. 1983).

126. *Stith*, 384 So. 2d at 32.

127. *Id.*

128. *Id.* The court also required the parties to obtain and file with the trial court written acknowledgements from each insurance company of the conditions imposed, and the court retained jurisdiction to modify the award if circumstances changed.

129. *Noe*, 431 So. 2d at 658. In *Noe* the trial court required the former husband to keep in effect, without encumbrances, a \$50,000.00 life insurance policy on his life the former husband owned prior to the divorce. The former wife was to remain the named beneficiary until all child support of \$2,500.00 per child per year was paid, and until all permanent periodic alimony of \$21,000.00 per year was paid or until the former wife's remarriage or death. The former husband unsuccessfully challenged the requirement that he maintain the life insurance, asserting that it improperly required him to pay alimony after his death.

130. *Id.*

131. *Id.* If it is not possible to cause the recipient of the life insurance to become the policy owner, the insurance may not be properly part of lump sum alimony. *McClung*, 465 So. 2d at 639.

insurance policy is awarded to the recipient as lump sum alimony where that is the case.<sup>132</sup>

One spouse may be awarded lump sum alimony secured by life insurance on the payor's life.<sup>133</sup> In that situation, it is permissible for a court to order the payor to maintain life insurance on the payor's life until the obligation is satisfied.<sup>134</sup> Fla. Stat. § 61.08(3) is not limited to "circumstances where the wife's rights do not terminate at death."<sup>135</sup> Where life insurance is ordered to be maintained as security for lump sum alimony, the same proof of payor's insurability, cost of insurance and payor's ability to pay premium is still required.<sup>136</sup>

The differing views of the districts about whether life insurance could be required by a court with proceeds benefitting the alimony recipient after the payor's death were resolved by the Florida Supreme Court, interpreting § 61.08(3), Fla. Stat. to authorize use of life insurance "either to satisfy [arrearages] or to otherwise protect the receiving spouse in appropriate circumstances".<sup>137</sup> *Sobelman* involved a contested divorce where the parties did not reach an agreement. The trial court ordered the husband to pay alimony and child support, and to purchase life insurance to secure the alimony award.<sup>138</sup> The husband objected to the life insurance requirement, claiming it was not authorized by Florida Statute as the proceeds could exceed alimony arrearages owed at his death, and that such excess amounted to a requirement to pay post death alimony. The question facing the Florida Supreme Court was "whether a party obligated to pay alimony may be ordered to maintain life insurance as security for the alimony award without limiting the insurance obligation and the payment of insurance proceeds to accrued alimony arrearages."<sup>139</sup> After reviewing the purposes of applicable statutes and determining that they are to be liberally construed, the Court answered the question in the affirmative.<sup>140</sup> The Court held that a "trial court, as an integral part of the equitable distribution and support scheme, [may] order an obligated spouse to purchase life insurance . . . to protect the financial well being of the other spouse, as well as any arrearage owing from alimony obligations."<sup>141</sup> Any insurance

132. Both *McClung* and *Noe* present examples of situations in which the failure of the court order to specify whether life insurance was awarded to secure payment of periodic alimony or as lump sum alimony gave rise to further litigation.

133. *Gepfrich v. Gepfrich*, 510 So. 2d 369 (Fla. 4th Dist. Ct. App. 1987). "As partial equitable distribution of the assets accumulated during the marriage, the wife was awarded as lump sum alimony the husband's interest in the marital home, plus \$270,000, payable in installments over three years. The husband was ordered to maintain life insurance equal to the outstanding balance of the lump sum and rehabilitative alimony." *Id.* at 369.

134. *Id.* at 370.

135. *Id.*

136. *Miulli*, 832 So. 2d at 964.

137. *Sobelman*, 541 So. 2d at 1155.

138. *Id.*

139. *Id.*

140. *Id.* at 1154. The Court determined that the statute then applicable, Fla. Stat. § 61.08(3) (1985), which included identical language to the current provision, was ambiguous, because it did not expressly state either that life insurance could only be ordered to secure alimony and for no other purpose, or that life insurance could be ordered for purposes other than securing alimony. The Court recognized that a purpose of statutes related to dissolution of marriage is to protect and prevent harm to spouses and their children in divorce, and that the dissolution of marriage statutes are thus to be liberally construed. *Id.*

141. *Id.*

proceeds received by the surviving spouse on the death of the payor were not impermissible post-death alimony, because the proceeds would be paid by the insurance company rather than by the payor spouse or his estate.<sup>142</sup> The Court did not define or explain what constituted appropriate circumstances in which it is permissible for a court to order life insurance to protect the financial well being of the spouse receiving alimony. Because the Court generally referred to protecting the well-being of the spouse receiving alimony,<sup>143</sup> courts now interpret appropriate circumstances to include support of a former spouse after the death of the payor spouse, at least where need is demonstrated. Today, in appropriate circumstances, one spouse may be required by the court (as opposed to by consent in a marital settlement agreement) to provide life insurance for a purpose other than to pay alimony arrearages owed at the payor's death.<sup>144</sup>

The parties in a divorce may voluntarily agree that life insurance will be purchased and proceeds will be used to pay post-death support.<sup>145</sup> Where a husband and wife agree that they will create a life insurance trust to be funded with life insurance on the life of the payor spouse, the recipient spouse may receive benefits in excess of the amount of alimony owed at the payor's death.<sup>146</sup> The agreement should provide that the court reserves jurisdiction to enforce life insurance provisions. When enforcement of such an agreement is sought and the agreement recites that the purpose of the life insurance is to secure payment of alimony, the court may still be required to determine that special circumstances exist supporting a need for life insurance, that the payor has the ability to obtain life insurance, the cost of the insurance, and that the payor has the ability to afford the insurance premiums.<sup>147</sup>

While the statute expressly refers to use of life insurance to secure alimony, it also contemplates other security. One Florida court used a commercial annuity contract to protect against nonpayment of alimony during life or after death of the payor spouse.<sup>148</sup> Another court attempted use of a survivor benefit plan.<sup>149</sup> “[T]he trial court can order an obligor spouse to secure his obligation with any assets which may be suitable for that purpose.”<sup>150</sup> Not all assets one spouse offers or proposes as security are appropriate. A promissory note reflecting a debt the recipient spouse owed to the payor of alimony is not an appropriate security where

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142. *Id.*

143. *Id.*

144. In *Jones v. Jones*, 789 So. 2d 1234 (Fla. 4th Dist. Ct. App. 2001), the trial court required the former husband to provide life insurance only to secure alimony arrearages. On appeal, the Fourth District remanded the case directing the trial court to consider whether “other appropriate circumstances required the husband to maintain life insurance.” *Id.* This expressly recognized that *Sobelman* authorized the court to order maintenance of life insurance by one former spouse in favor of the other for purposes other than securing alimony.

145. *Bohner*, 997 So. 2d at 457. A question may arise concerning whether the payment of alimony for periods after the payor spouse's death constitutes alimony for federal income tax purposes.

146. In *Bohner*, 997 So. 2d 454, the parties entered a marital settlement agreement in connection with their divorce. This agreement was incorporated into the final judgment of dissolution of their marriage. The agreement expressly provided that alimony obligations would survive the payor's death. *Id.*; see *Moore*, 543 So. 2d at 257.

147. *Bohner*, 997 So. 2d 454.

148. *Watrous*, 961 So. 2d 1121.

149. *Wrinkle v. Wrinkle*, 592 So. 2d 760 (Fla. 5th Dist. Ct. App. 1992).

150. *Lapham*, 778 So. 2d at 489.

it is to be forgiven on the payor's death, as it may constitute impermissible postmortem alimony.<sup>151</sup>

The parties cannot avoid the requirements to prove need, special circumstances and the other prerequisites to mandating life insurance (other than insurability of the payor) by use of another security. Where an annuity was required as security, the trial court's failure to determine if the annuity was available, if the husband could purchase it, and the financial impact payment for the annuity would have on the husband were grounds for reversing the decision.<sup>152</sup> The appellate court did not determine the propriety of requiring purchase of an annuity rather than a life insurance policy. On remand, among other things, the trial court was directed to consider whether mandating purchase of an annuity was appropriate.<sup>153</sup>

A final factor which must be considered before imposing a requirement to purchase or maintain life insurance to secure alimony is the financial effect of premium payments. The cost of premiums may alter the amount of alimony to be paid or the equitable distribution of marital assets.<sup>154</sup> This is true even if the recipient spouse is to pay part of the cost of the security.<sup>155</sup>

Dissolution of marriage proceedings, insofar as they affect the requirement to provide life insurance to secure payment of alimony, are not always concluded by the time of the death of the spouse obligated to pay alimony. If the payor spouse dies before all appeals are filed and finally decided, before the life insurance is obtained following an order or agreement requiring it, or after entry of a judgment in which the court reserved jurisdiction, proceedings pertaining to life insurance may continue after the death of the payor spouse. In these situations, questions about whether the circuit court retains jurisdiction and who is a proper party to represent the payor's estate may arise. In one instance a court entered a final judgment of dissolution of marriage, ordering the husband to purchase and maintain a life insurance policy to secure payment of alimony.<sup>156</sup> The husband died the following day.<sup>157</sup> The personal representative of his estate appealed and successfully sought reversal of the trial court's decision.<sup>158</sup>

Once alimony is awarded it may be modified or terminated in subsequent proceedings. If this occurs, the life insurance initially required to be maintained

151. *Id.* In *Lapham* a husband and wife married, divorced, married each other a second time, and again sought a divorce. In the first divorce the wife was awarded the marital home, but was required to sign a promissory note for \$70,000.00 payable to the husband. The note was payable without interest on the wife's sale of the home or her death. In the second divorce proceeding the husband offered the promissory note as security for his payment of alimony, and the note was to be cancelled if the husband died before the wife. The court indicated that cancellation of the debt was likely payment of post-death alimony. Hence, the security was unacceptable.

152. *Watrous*, 961 So. 2d at 1122.

153. *Id.* at 1123.

154. *Sasnett*, 679 So. 2d at 1269; *Schere*, 645 So. 2d 21.

155. *See Wrinkle*, 592 So. 2d at 761, where it was held inconsistent and erroneous for the court to determine that a wife was entitled to a set sum in alimony, and then to decrease that sum by requiring her to pay for the survivor's benefit plan securing the alimony. Instead, if security was warranted, the payor spouse alone paid the cost.

156. *Forgione v. Forgione*, 845 So. 2d 968 (Fla. 4th Dist. Ct. App. 2003).

157. *Id.* at 969.

158. *Id.*

should be specifically addressed.<sup>159</sup> However, if alimony is initially awarded without a need to secure it with life insurance, when the court later modifies the alimony award the districts differ on whether the court has authority under Fla. Stat. § 61.14 to impose a requirement for the first time that the award be secured by insurance.<sup>160</sup> The First District has held that this new security requirement cannot first be imposed when alimony is revisited.<sup>161</sup> Contrary views were expressed and the conflict certified.<sup>162</sup> The possible inability to obtain security after the divorce is final increases the importance of obtaining security at the time of dissolution of marriage.

The importance of precise wording about life insurance in a marital settlement agreement or final judgment of dissolution should not be overlooked. Detailed accurate wording may avoid future litigation. An agreement should clearly specify the purpose for which life insurance is required. That purpose might be to secure alimony, as property settlement or to accomplish another specified goal.<sup>163</sup> Not every change in circumstances occurring after a final judgment of dissolution is entered warrants a modification of the requirement to maintain a life insurance policy. To determine if a change in life insurance provisions is appropriate, it is necessary to know if the insurance was initially required as security for alimony, lump sum alimony, equitable distribution, or for another purpose. For example, where one spouse acquired a vested interest in a life insurance policy insuring her former husband in the divorce proceeding, when her husband thereafter sought modification, no change was authorized to adversely affect the wife's vested rights.<sup>164</sup> The outcome might have been different if the continuation of the insurance had been merely court ordered, rather than by agreement of the parties, or had been merely to secure payment of alimony.

Orders requiring payment of alimony, including those imposing a requirement to maintain life insurance, may be modified.<sup>165</sup> The wording of the initial provision in the prior agreement or order has considerable impact.<sup>166</sup> In one case, a husband signed a marital settlement agreement requiring him to maintain his former wife as beneficiary of one-half of the total life insurance on the husband's life in force at

159. Kilpatrick v. Sanders, 541 So. 2d 177 (Fla. 2d Dist. Ct. App. 1989) reflects a situation where a trial court terminated a former husband's obligation to pay alimony and maintain life insurance. The trial court's decision was reversed on other grounds.

160. Burkhart v. Burkhart, 731 So. 2d 733, 735 (Fla. 1st Dist. Ct. App. 1999).

161. *Id.*; but see Carter v. Carter, 164 So. 2d 219 (Fla. 1st Dist. Ct. App. 1964).

162. Dziuba v. Dziuba, 784 So. 2d 1192, 1193 (Fla. 2d Dist. Ct. App. 2001) (*citing* Stern v. Stern, 75 So. 2d 810 (Fla. 1954)); Black v. Miller, 219 So. 2d 106 (Fla. 3d Dist. Ct. App. 1969).

163. In Liss v. Liss, 937 So. 2d 760 (Fla. 4th Dist. Ct. App. 2006) The court was called upon to determine if a provision in a marital settlement agreement, incorporated into a final judgment of dissolution, allowing a former wife to purchase life insurance policies on her former husband's life as she deemed appropriate permitted her to purchase and keep in effect a \$1,000,000.00 policy insuring her former spouse's life despite his objection. Because the agreement did not expressly state whether any policy purchased by the wife was to secure alimony, to secure child support, was property settlement or was for another purpose, the court held the agreement ambiguous. *Id.* at 763. Despite the agreement expressly stating that the wife had an insurable interest in the husband's life, that might no longer be accurate as the wife had remarried, her right to alimony terminated, and child support remaining due was far less than the sum she sought to secure by another life insurance policy.

164. *Sedell*, 100 So. 2d at 640-41.

165. Yedlin v. Yedlin, 464 So. 2d 245 (Fla. 3d Dist. Ct. App. 1985).

166. *Id.*

the time of divorce, and to continue this designation until the former wife's death or remarriage.<sup>167</sup> In a series of transactions the former husband cashed in his existing life insurance, retained the cash value, and purchased replacement term insurance.<sup>168</sup> However, one-half of the new term insurance provided a lesser death benefit than the former wife was entitled to receive.<sup>169</sup> The former husband filed a petition for modification of his alimony obligations.<sup>170</sup> The court held that the former husband had the right to cash in the policies and to retain the cash proceeds, as long as he replaced the policies with term insurance providing the same death benefit to the former wife required in the divorce proceeding.<sup>171</sup> The former wife had no rights to any portion of the cash surrender value or to require the husband to maintain the whole life policies in effect at the time of dissolution of the marriage, nor did she acquire a vested interest in the policies because the marital settlement agreement did not include these provisions.<sup>172</sup> It is advisable for a court order or marital settlement agreement to state what the parties are required to do with respect to life insurance, as well as what actions they are prohibited from taking in the future.

### III. EQUITABLE DISTRIBUTION OF LIFE INSURANCE

In an action for dissolution of marriage, it may be necessary for the court to determine whether life insurance owned by a spouse is a nonmarital asset or a marital asset, and to ascertain which spouse is entitled to own the life insurance after dissolution of the marriage.<sup>173</sup> Only life insurance with a cash value is subject to equitable distribution.<sup>174</sup> This may, in part, explain why term insurance owned by a divorcing spouse is frequently not mentioned in the dissolution action.

The trial court is required to consider a variety of factors to determine which assets a spouse is entitled to retain as his or her property after the marriage terminates. One factor is whether the asset is or is not marital property, which may depend on when and how the asset was acquired.<sup>175</sup> An asset acquired by one party prior to the marriage is generally nonmarital property, and belongs to the spouse who owns it.<sup>176</sup> Appreciation in value of one spouse's separate non-marital

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167. *Id.* at 246.

168. *Id.* at 246-47.

169. *Id.* at 247.

170. *Id.* On appeal the parties disagreed on whether the former husband was entitled to retain the cash proceeds of the original life insurance policies redeemed.

171. *Id.* at 248.

172. *Id.*; see *Yedlin*, 464 So. 2d at 247.

173. Fla. Stat. § 61.075 (2009) provides that the court shall determine how all marital and nonmarital assets are to be equitably distributed.

174. *Lakin v. Lakin*, 901 So. 2d 186, 189 (Fla. 4th Dist. Ct. App. 2005). Although term life insurance is not a subject of equitable distribution, there is no prohibition preventing its ownership and beneficiary designation from being specified in a marital settlement agreement. To minimize further disputes and unintended consequences, it is advisable to address term insurance in an agreement if the term insurance is to remain in effect, and to expressly specify if the parties agree that a term policy is to lapse.

175. *Winney v. Winney*, 979 So. 2d 396, 400 (Fla. 1st Dist. Ct. App. 2008).

176. *Id.*

property during the marriage as a result of marital funds expended on the asset, or efforts of one spouse during the marriage, may constitute marital property.<sup>177</sup>

The initial determination of whether a life insurance policy with cash value is a marital asset, a non-marital asset, or partly a marital asset may be complicated. Where the life insurance policy was acquired during the marriage and premiums were paid using marital assets, the policy is a marital asset. In contrast, where the policy was acquired by one spouse and paid for in full prior to the marriage, or paid for during the marriage by the insured spouse with separate non-marital assets, the policy is likely separate non-marital property of that spouse.<sup>178</sup> Difficulties may be encountered when one spouse purchased and paid premiums on a life insurance policy on his or her life prior to the marriage, and premium payments from marital assets continued during the marriage. The court may then be called upon to determine the proportion of the policy constituting marital as opposed to non-marital assets. The answer depends, in part, on the type of insurance policy involved. Where the policy is a whole life or universal life policy, it should be possible to determine the cash value of the policy on the date of the marriage and on the date of filing of a petition for dissolution, as well as the total premiums paid prior to and during the marriage. The increase in cash value during the marriage, assuming that premiums were paid with marital funds, may readily be accounted for.

The situation is more complex when the type of policy involved is a variable life policy or universal variable life policy.<sup>179</sup> A component of these policies is the existence of an investment account. The policy owner directs which one or more mutual funds are to be used as investment vehicles within the policy. If the investments are profitable, the value of the policy increases. Conversely, if the mutual funds suffer losses the value of the policy declines. “When a premium is paid into a VUL [variable universal life] policy, the insurance company deducts the cost of insurance and certain fees, and the remainder is invested in the funds in the separate account chosen by the owner of the policy.”<sup>180</sup> One court considering such a situation observed:

Because the separate account of a VUL policy is, in essence, no different than a brokerage account, the considerations involved in attempting to establish the value of the marital portion of the policy are not the same as the considerations relevant to the determination of the cash value of other types of cash value policies, such as whole life. Instead, the value of the separate account of a VUL policy must be determined in the same manner

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177. *Id.*

178. Although no case law on point was located, it is likely accurate that a life insurance policy owned by one spouse insuring the life of the other spouse, paid for solely by the owner of the policy with non-marital funds of the owner, is non-marital property of the owner. In this situation the insured may object to the owner’s continued retention of the policy.

179. *Abdnour v. Abdnour*, 19 So. 3d 357, 365 (Fla. 2d Dist. Ct. App. 2009).

180. *Id.*

as one would determine the value of securities held in a brokerage account.<sup>181</sup>

The court follows several steps to compute the portion of the cash value of the separate investment accounts owned in the policy representing marital assets. The first step is to ascertain the number of shares in each mutual fund owned in the policy on the date of the marriage. The second step is to determine the number of shares of each mutual fund owned in the policy on the date the petition for dissolution was filed. Third, the court ascertains the total marital funds used to pay premiums from the date of the marriage to the date of filing of the petition for dissolution. The difference between the number of shares in mutual funds owned in the policy between the date of the marriage and the date of filing the petition for dissolution acquired with marital funds is the portion of the policy investment which is potentially a marital asset, depending on the total sums expended to purchase units or shares during the period. The value of those shares may be ascertained based on the per share or per unit price on the date the petition for dissolution was filed.<sup>182</sup>

Further calculations may be required depending on the facts and circumstances. For example, if the cash account in the VUL policy also increased during the marriage, this increase may need to be added to the value of the marital property portion of the policy.<sup>183</sup> The computation may be further complicated where investments changed over time, so that mutual funds owned at one time differed from the mutual funds owned in the policy when a petition for dissolution was filed. Such circumstances would require tracing. It may be advisable to award the policy to one spouse, and to award other marital assets of value equal to the marital portion of the life insurance to the other spouse. This would allow the court to avoid difficult or imprecise calculations, and potential adverse income tax consequences in a forced liquidation of the policy.<sup>184</sup>

The marital settlement agreement entered by the parties and incorporated into a final judgment of dissolution of marriage may give one former spouse a vested property interest in a life insurance policy, whether it be the entire amount of the proceeds or just a portion, where the policy insures the life of the other former spouse.<sup>185</sup> One or both spouses may own life insurance at the time a petition for dissolution of marriage is filed.<sup>186</sup> If one spouse owns insurance on his or her life

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181. *Id.*

182. *Id.* at 365-66. The per share value may also be determined at the time of trial. *Id.* at 367.

183. *Id.* at 366 n.19. In *Abdnour*, the cash value had been depleted so no additional calculation was needed.

184. *Id.* at 367.

185. See *Yates v. Yates*, 272 F. 2d 52 (5th Cir. 1959); *Sedell*, 100 So. 2d 639.

186. See *Primerica Life Ins. Co. v. Moore*, 2008 WL 1886032 (M.D. Fla. 2008) (the husband owned a \$40,000.00 term life insurance policy on his life at the time of dissolution of the marriage); *Duffey*, 972 So. 2d at 290 (during the marriage the husband maintained a life insurance policy paying \$1,500,000.00 on his death to his wife, and the policy lapsed due to nonpayment of premiums); *Byers*, 910 So. 2d at 341 (the husband, a commercial airline pilot, had \$140,000.00 in employer provided life insurance plus “an accidental death policy purchased through the pilots’ union”); *Cozier*, 819 So. 2d at 834; *Nelson*, 795 So. 2d at 985 (prior to filing the petition for dissolution the parties jointly owned two life insurance policies totaling almost \$1,000,000.00); *Kearley*, 745 So. 2d at 989. In *Kearley*, the husband’s employer provided a term life policy on his life. The

other than term life insurance, the cash surrender value of the policy may be a marital asset to be equitably distributed in the divorce.<sup>187</sup> If cash value is to be divided between the spouses and the policy continued in effect, it may not be appropriate for one spouse to remain the sole beneficiary as part of equitable distribution.<sup>188</sup> The conclusion would likely be impacted by which spouse is to own and pay for the policy in the future, and what other assets the parties each received. Where cash value exists in a life insurance policy and the court does not allocate it to a party, but instead requires the insurance to be continued by the insured for the benefit of the other spouse, it may be assumed that the required equitable distribution did not occur.<sup>189</sup> That outcome is not certain. Better practice is to expressly state in the agreement if the life insurance is property settlement to secure alimony, or is lump sum alimony.

Where, during the marriage, one spouse owns life insurance on his life, and the marital settlement agreement requires him to maintain the policy, retain his former wife as primary beneficiary and his children as alternate beneficiaries, after the agreement was incorporated into the final judgment of dissolution, a dispute arose about the nature of the wife's interest. The wording of the agreement did not make her interest clear. The court held that the former wife had a vested interest in the policy.<sup>190</sup> Because the wife relinquished rights to other assets in the agreement and the agreement did not state that the insurance was to be maintained to secure payment of alimony or child support, the former wife's rights in the policy were part of property distribution.<sup>191</sup>

The purpose for which life insurance on the life of one former spouse is maintained has multiple consequences. One impact is the duration for which the policy must remain in effect. Absent an agreement to the contrary, the payor of premiums may be entitled to cease payments when the policy is to secure child support after all child support is paid. The payor may not generally cease payments when the policy is to secure alimony, until the death or remarriage of the recipient spouse. A consequence of the policy being part of a property settlement is the ability to secure future modification of the agreement or judgment. Absent proof which would generally justify cancellation or change of a contract, a court will not modify a property settlement provision distributing a life insurance policy or rights to proceeds to one former spouse.<sup>192</sup> This is a different, more rigorous standard than that applied where a change in alimony or child support is sought by

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husband also owned a whole life policy on his own life, paying \$93,000.00 in benefits on his death. The whole life policy had a \$4,000.00 cash surrender value at the time of filing the petition for dissolution.

187. *Sobelman*, 541 So. 2d at 1154 n.2; see *Norman v. Norman*, 939 So. 2d 240 (Fla. Dist. Ct. App. 2006); see *Eagan*, 392 So. 2d at 990; *Lakin*, 901 So. 2d at 189; see also *Kearley*, 745 So. 2d at 989 (Altenbernd, J. concurring). Where a life insurance policy has no cash value, the policy is not to be included as part of equitable distribution.

188. *Kearley*, 745 So. 2d at 989 (Altenbernd, J., concurring).

189. *Eagan*, 392 So. 2d at 990.

190. *Sedell*, 100 So. 2d at 642.

191. *Id.*

192. *Id.*

the payor post dissolution.<sup>193</sup> The income tax consequences to the former spouse paying premiums may vary depending on whether the policy is property settlement (resulting in no deduction to the payor and no income to former spouse benefited), to secure child support (also resulting in no tax deduction to payor and no income to policy beneficiary, and possible allowing dependency exemptions), or to secure alimony (where premiums paid may be deductible to payor and income to policy beneficiary).<sup>194</sup> Issues may arise, necessitating future litigation, where the initial court order or agreement entered when the divorce occurs does not sufficiently categorize the life insurance benefit.

A vested interest in proceeds of a life insurance policy insuring the former husband was obtained by the former wife when, in a marital settlement agreement incorporated into the final judgment of dissolution, the former husband promised to both satisfy the mortgage on the former wife's home, and assure that the proceeds of life insurance on his life would be used for this purpose if he died before satisfying the mortgage.<sup>195</sup> Due to the first wife's vested equitable interest in the policy proceeds, decedent's second and surviving spouse, who was named beneficiary on the policy, could only receive the proceeds to the extent they were not needed to pay off the first wife's mortgage.<sup>196</sup> However, where the applicable divorce documents merely require one spouse to name a former spouse beneficiary of a life insurance policy, the spouse named beneficiary does not necessarily acquire a vested interest in the policy or the cash surrender value.<sup>197</sup>

One spouse may be covered by life insurance through an employee welfare benefit plan at the time of dissolution of marriage. Where the uninsured spouse waives claims to alimony and child support in exchange for being named irrevocable beneficiary of life insurance in the plan, the insurance proceeds are part of the property settlement.<sup>198</sup> In that situation, the beneficiary's rights vest with the divorce agreement and the insured forfeits any rights to thereafter change the beneficiary designation.<sup>199</sup>

If one spouse owns life insurance on his life with a cash value, and the owner is required to maintain the insurance to secure alimony and/or child support payments, as long as the insurance remains as security it is improper to attribute the policy's cash value to the owner as property settlement.<sup>200</sup> This conclusion follows

193. Generally, alimony awards may be modified by a court on proof of a substantial, permanent, involuntary, unanticipated change of circumstances. Fla. Stat. § 61.14(1). The change may impact payor's ability to pay and/or may be a result of the recipient's needs. The requirement that payor maintain life insurance to assure payment of alimony is likewise subject to review under this standard.

194. 26 I.R.C. § 62(a)(10) (1984), 26 I.R.C. § 71(a) (1984), 26 I.R.C. § 215(a) (1984). Alimony payments are generally deductible for income tax purposes to the payor and included in the recipient's gross income.

195. At the time of the divorce the husband owned two life insurance policies insuring his life, paying in excess of \$25,000.00 on his death. Despite his promise to his first wife, after their divorce he named his second wife beneficiary of both policies. After his demise both women claimed rights to a portion of the proceeds and an interpleader action was instituted by the insurance companies. *Id.* at 53-54.

196. *Id.*

197. *Yedlin*, 464 So. 2d at 245.

198. *Metropolitan Life Ins. Co. v. Williams*, 82 F. Supp. 2d 1346, 1353 (M.D. Fla. 1999).

199. *Id.*

200. *Plichta v. Plichta*, 899 So. 2d 1283, 1286-87 (Fla. 2d Dist. Ct. App. 2005).

because the owner spouse cannot benefit from the cash value while the life insurance is maintained as security.<sup>201</sup>

It is important to ascertain all insurance on each spouse's life in dissolution of marriage proceedings. In addition, the type of insurance (*e.g.*, term, whole life, universal life, or variable life), as well as the owner, death benefit, and cash value should be determined. Life insurance on one spouse's life may already be owned by the other spouse, or may be owned by a trust or other third party for the benefit of the non-insured spouse and/or the parties' children. A loan against a life insurance policy owned by a spouse during the marriage should be accounted for as a liability in the dissolution action.<sup>202</sup> Unless all details about the insurance are discovered, the policy or policy proceeds cannot be adequately accounted for in the divorce proceedings. That may result in future litigation over the policy or loss of a valuable asset when neither spouse pays premiums due after dissolution of the marriage.<sup>203</sup>

Florida case law reflects situations where a life insurance policy or benefit existed, and may not have been sufficiently addressed in the dissolution of marriage action. In *Cozier v. Cozier*, the husband was provided with term insurance by his employer.<sup>204</sup> The court's opinion did not reflect any specific allocation of the policy or its proceeds to one spouse because term insurance lacks cash value. In another case, a substantial policy insuring one spouse was allowed to lapse due to nonpayment of premiums.<sup>205</sup> If the lapse occurred after the petition for dissolution was filed, as the insured suffered medical problems which may have precluded purchase of a new policy at the same premium, the parties might have been better served by continuing the policy. Unless the existence of life insurance policies already owned is disclosed or discovered early in the dissolution action, one spouse may improperly access, sell, or cancel the policies;<sup>206</sup> or the policy may lapse due to nonpayment of premiums.

Where life insurance is owned by one party who agrees to maintain it, any agreement should clearly specify if the policy or proceeds are part of division of marital assets or if the policy is maintained for another purpose. Failure to expressly specify may result in a loss of rights to the spouse anticipating receipt of the policy proceeds if the insurance does not remain in effect.<sup>207</sup>

201. *Id.*

202. *See* *Konsoulas v. Konsoulas*, 904 So. 2d 440, 443 (Fla. 4th Dist. Ct. App. 2005).

203. No Florida law presently requires that life insurance be continued, premiums be paid, beneficiaries not be changed or owners of term insurance not be changed on the filing of a petition for dissolution. To maintain the status quo during the pendency of a dissolution action and to assure that policies are not allowed to lapse and that potentially valuable assets are not lost, it may be advisable for counsel to seek an appropriate order requiring payment of premiums and preventing the taking of loans or the making of other changes with respect to the policy while the dissolution action is pending. This may present an issue on which the legislature should act.

204. *Cozier*, 819 So. 2d at 836.

205. *Duffey*, 972 So. 2d at 290.

206. *Nelson*, 795 So. 2d at 985. While married, the parties jointly owned two life insurance policies paying death benefits of almost \$1,000,000.00. After the parties separated, the husband cashed in the policies, retained \$80,000.00, and purchased new insurance solely owned by him, solely insuring his life, paying about \$1,000,000.00 to his estate.

207. *Mitchell v. Combank/Winter Park*, 429 So. 2d 1319 (Fla. 5th Dist. Ct. App. 1983). A former husband, obligated by a marital settlement agreement to maintain life insurance on his life naming his former wife

Where one spouse is awarded ownership of the policy insuring the other spouse, a copy of the life insurance policy should be obtained and carefully reviewed. The premiums owed, due dates for payment, and other rights and obligations of the new owner should be ascertained. The issuing insurance company should be notified of the change of ownership and any change of beneficiary. Failure to adequately ascertain rights of the policy owner may result in loss of benefits. For example, where a wife was awarded a ten year level term insurance policy insuring her former husband, and she failed to timely exercise her right to renew the policy after the term expired, the policy lapsed and she was not entitled to benefits on her former husband's death.<sup>208</sup> The former wife's claim that she was entitled to notice of renewal from the insurance company, when the policy did not require that any notice be given, was erroneous.<sup>209</sup>

The divorcing spouses may seek to provide for one of them in the future by the purchase of additional life insurance on the lives of one or both of them.<sup>210</sup> If such action is to be taken as part of a property settlement, terms and conditions should be specifically stated. These include any limits on the amount of life insurance to be purchased, who will pay premiums, who will own the policy, who will be the beneficiary, whether any beneficiary designation is revocable, and the type of insurance to be purchased. Attention should be paid to timing, where one former spouse will have the right to purchase life insurance on the life of the other, to assure that the purchaser will still have an insurable interest in the insured's life at the time of policy purchase.<sup>211</sup> Because the insured's consent to any policy insuring his or her life is generally required, a provision is needed in any agreement assuring that the proposed insured will cooperate and sign reasonably required documents to effectuate the insurance purchase.

Not all persons are agreeable to their former spouses owning or being named beneficiaries of life insurance on their lives.<sup>212</sup> The insured may, with or without cause, fear harm from a former spouse who would benefit financially from the insured's death.<sup>213</sup> Where an agreement incident to the divorce allows one former

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beneficiary, neglected to do so. On his death the former wife had no recourse, because the agreement did not state that the insurance proceeds were property distribution.

208. Jackson Nat'l Life Ins. Co. v. Lovallo, 8 So. 3d 1242 (Fla. 1st Dist. Ct. App. 2009).

209. *Id.* at 1243. There was no applicable statute requiring notice of renewal to the policy owner. In contrast, Fla. Stat. § 627.4555 (2008), requires an insurance company to give notice to an owner of a life insurance policy before the policy lapses for non-payment of premiums. The court noted, however, that it was not ruling on whether any communication between the former wife (policy owner) and the issuing insurance company constituted a request to renew the policy, or imposed any duty on the issuing insurance company to inquire further. The only issue before the court was whether the trial court properly granted summary judgment in favor of the former wife. The appellate court reversed the award of summary judgment and remanded the case.

210. *Nelson*, 795 So. 2d at 985 (the former wife was authorized to purchase life insurance on the former husband's life).

211. Insurable interest has been defined as "such an interest, arising from the relations of the party obtaining the insurance, either as a creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." *Liss v. Liss*, 937 So. 2d 760, 764 (Fla. 4th Dist. Ct. App. 2006). A former spouse who is no longer owed alimony or other obligation from his or her former spouse after dissolution of their marriage may lack an insurable interest in the former spouse's life, and thus may be unable to purchase a policy.

212. *Robbins v. Jackson Nat'l Life Ins. Co.*, 802 So. 2d 476 (Fla. 2d Dist. Ct. App. 2001).

213. *Id.*

spouse to own, purchase or be designated beneficiary of life insurance on the other former spouse's life, he may be bound by that agreement, especially where the uninsured spouse pays the policy premiums.<sup>214</sup>

Other circumstances may also impact on equitable distribution of life insurance with cash value. Insurance on the life of one spouse may have been gifted to the other during or prior to the marriage. Also, the insurance may be funding obligations owed to third parties, such as business buy-out agreements or securing payment of a mortgage to a lender. All facts and circumstances related to existing insurance need to be ascertained so that the life insurance could be properly dealt with in the dissolution action.

#### IV. TRUSTS OWNING LIFE INSURANCE

As already noted, a party to a dissolution action may own life insurance on his or her own life, or on the life of his or her spouse. A divorcing spouse may also own insurance on the life of another person, or may be a current or future trustee or beneficiary of a trust owning life insurance on one or both spouses or on the life or lives of third parties. This section of the article describes several circumstances in which insurance may be so owned, and suggests actions which may be appropriate to address future ownership and rights.<sup>215</sup>

There are three common situations in which one or both spouses may own insurance on the life of one or more other persons. The first is where the life insurance insures the life of one or both parents of one spouse.<sup>216</sup> For estate planning purposes, a parent may arrange for his or her child to purchase and own life insurance on the parent's life. The parent frequently provides cash to the child who owns the policy through annual exclusion tax free gifts to enable the child to pay policy premiums. It is also possible that the child paid all or a portion of the premiums due, either from the child's separate property or from marital assets.

214. *Id.* In *Robbins* a father was ordered to pay child support secured by life insurance on his life. He failed to remit child support. Mediation and an agreement followed, in which his former wife was given the right to own two life insurance policies insuring her former husband and paying \$200,000.00 on his death. One of those policies was purchased by the former wife after the divorce, and premiums on both policies were paid by the former wife. The former husband, without evidence supporting his claims, feared harm from the former wife. He attempted to interfere with her ability to continue the policies. The insurance company brought a declaratory judgment action, in which the court ruled that the former wife had an insurable interest in the former husband, based on the court orders and mediated agreement.

215. This section of the article does not purport to be all inclusive. It is recognized that life insurance may be owned in a variety of factual settings not mentioned. This section of the article first attempts to alert the reader to the need to consider situations other than the direct, straight forward ownership by a divorcing party of life insurance on that party's or his or her spouse's life. The second purpose of this section of the article is to introduce the reader to Florida trust law the reader may not otherwise contemplate in the midst of handling a dissolution action. Because the statutes referenced in this section of the article are relatively newly enacted, scant case law applying or interpreting them is currently available. Thus, this section of the article should be viewed as merely setting forth basic introductory information.

216. While the example refers to a parent, a grandparent or other relative of one spouse may engage in analogous planning. Thus, counsel in a dissolution action should inquire if either divorcing spouse owns or is the beneficiary of life insurance on the life of anyone other than parties to the dissolution action.

The purpose of the insurance may be to replace wealth lost in the parent's estate due to payment of estate taxes on the parent's death, to provide liquidity on the parent's death to pay bills, debts, and taxes owed by the parent without forced sales of assets owned by the parent at death under unfavorable conditions, or merely to provide a greater gift to the child at the parent's death, not reduced by payment of federal estate taxes. The child owning the entire policy, or an interest therein, would generally also be a beneficiary of the policy. The policy may be a whole life policy, universal life policy, a term policy, or another type of insurance.

The particular facts and circumstances in a given case will dictate if the policy insuring a parent's life is a marital or non-marital asset. The point here is that regardless of how the asset is categorized, action is generally warranted to assure that the spouse whose parent is insured retains ownership of and all rights to the policy after dissolution of the marriage. Irrespective of how this is accomplished, absent an express intent by the parties for the child-in-law to retain rights as an owner or beneficiary of the policy, the child-in-law's rights should be terminated in the dissolution action. If the child-in-law of the insured was a policy owner and/or a beneficiary, all paperwork required by the insurance company that issued the policy to change the owners or designate new beneficiaries should be completed and filed with the insurance company. Appropriate provisions should be included in any marital settlement agreement to require the child-in-law owning an interest in the policy to relinquish his or her ownership rights. If owners of the policy include persons other than the child-in-law's spouse, federal tax consequences may result from the transfer of ownership.<sup>217</sup>

A second situation which one or both spouses may own insurance on the life of a third party is in the business context. One spouse may be a co-owner of a business with one or more persons. The business may be a partnership, corporation or other entity. In this context the owners of the business may own insurance on each other's lives. The purpose of this insurance is likely either to provide liquidity to continue business operations if one owner dies, or to provide cash to purchase a deceased owner's interest in the business. If this life insurance exists, the spouse who will retain ownership of the business interest after the divorce should become the sole owner and sole beneficiary of the life insurance on a co-owner's life, to the exclusion of the other spouse.

A third situation considered is where one or both spouses own or are beneficiaries of life insurance on the life of their child. Unless the parties resolve in the divorce who will own and be beneficiary of the policy in the future and how premiums will be paid, future disputes and perhaps unnecessary litigation are likely, and the insurance may lapse due to nonpayment of premiums.

In the foregoing situations, the divorcing parties, as policy owners, may have the ability to make needed changes without immediate adverse federal income tax

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217. To illustrate, if mother's life is insured under a \$1,000,000.00 policy with a \$200,000.00 current value, and children A and B, as well as children-in-law, C and D, own the policy, when A and C dissolve their marriage C should relinquish her ownership rights in the policy. If C does so, causing A, B and D to own the policy, taxable gifts may have been made by C to B and D.

consequences. The actions required and the persons who need to be involved are more complicated when an irrevocable trust owns the life insurance. Due to the potential estate tax savings when an irrevocable trust owns life insurance, such ownership is a frequent occurrence. Where life insurance is owned by an irrevocable trust, and one or both spouses are insured under policies owned by the trust, or are trustees and/or trust beneficiaries, specific information should be gathered. First, the identity of each grantor who created the trust and whether each is living and competent, deceased, or incompetent should be determined. Second, the identity of each current trustee and each person named a successor trustee should be ascertained from the trust document. Third, the identity of each beneficiary of the trust should be determined. The beneficiaries may need to be categorized as either qualified beneficiaries<sup>218</sup> or other beneficiaries. A qualified beneficiary includes persons entitled to trust benefits immediately, or if the trust delays benefits until the death of the insured, those persons then entitled to income or principal from the trust. A qualified beneficiary also includes anyone entitled to trust benefits if one or more persons initially entitled to trust benefits die. In contrast to a qualified beneficiary, a beneficiary of the trust includes anyone with an interest in the trust now or at any time in the future.<sup>219</sup> Fourth, the identity of the one or more persons insured under the policy or policies owned by the trust should be determined. Finally, the amount and type of insurance owned by the trust, as well as the current value of the insurance and premiums due to keep the insurance in force, should all be ascertained. Each of the foregoing factors impacts on the available courses of action and their consequences.<sup>220</sup>

When irrevocable trusts are drafted, it would be useful at times if persons named as present or future trustees or beneficiaries were so designated only if they remained family members. To illustrate, if wife creates an irrevocable trust designating her husband a trustee, the trust might entitle him to serve “only if and

218. Fla. Stat. § 736.0103(14) (2006) defines a qualified beneficiary as:

a living beneficiary who, on the date the beneficiary’s qualification is determined:

- (a) Is a distributee or permissible distributee of trust income or principal;
- (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
- (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.

*See also* Fla. Stat. § 736.0110 (2006) for further persons who may be treated as qualified beneficiaries, including charitable organizations, trust enforcers and the Attorney General.

219. Fla. Stat. § 736.0103(4) (2006) includes in the definition of beneficiary “a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee.”

220. The explanation provided in this section of the article is based on the premise that the irrevocable trust is a Florida trust, with a Florida situs, governed by Florida law. The suggestions and conclusions set forth are not applicable where another state’s laws govern the trust or the trust is administered in another jurisdiction. The terms of the trust agreement and Fla. Stat. § 736.0801, should allow counsel to determine if a trust is a Florida trust.

so long as he is married to the grantor or was so married at the time of her death, and no action for dissolution was then pending.” A similar provision naming grantor’s daughter-in-law as a successor trustee might allow her to serve “only if she is then married to grantor’s son or was married to grantor’s son on his death.” Trust provisions are not routinely drafted in this fashion to account for a future divorce. Hence, when a divorce occurs, the grantors or other persons interested in a trust may find they are no longer pleased with the trustees, successor trustees or beneficiaries designated in the trust agreement. Because the trust is irrevocable, grantors may lack standing to take action to change the trust’s provisions.

One situation warranting consideration is where one or both of the divorcing spouses created the irrevocable trust, and the trust owns life insurance on the life of one or both of them. If neither spouse is presently a trustee, neither is named a successor trustee and neither is a beneficiary of the trust, no changes to the trust may be required. The principal determinations to be made would likely be whether the parties wish for the trust to continue for the benefit of their children or the other named beneficiaries, how premiums are to be funded in the future, and whether the existing and successor trustees named in the trust agreement are still acceptable. If the parties remain pleased in all respects with the trust agreement, what remains to resolve in the dissolution action is how future premiums are to be paid to keep the insurance in force. Because the insurance would not necessarily be available to secure child support in this scenario,<sup>221</sup> and no spouse is a beneficiary of the trust, it would appear that agreement of the parties is required. A court does not have statutory authority to mandate continued contributions to a trust to pay premiums in this instance. Depending upon the type of insurance owned by the trust and its loan value, it may be possible for premiums to be paid by the trustee borrowing against the policy.

In the example set forth above, if the divorcing spouses want the trust to continue but now object to one or more of the current trustees or successor trustees, further action may be warranted. This could occur where the parties named family members as trustees and now prefer for independent trustees to serve. The trust agreement should be consulted for any provisions allowing a grantor or the beneficiaries to change the trustees. If such a provision exists, it may permit the desired changes in trustees to be effectuated by complying with its terms. Absent an applicable provision, the resignations of the trustees whose services are no longer desired should be sought. If all trustees resign and the successors nominated in the trust agreement decline to serve because all are deemed unacceptable to the divorcing couple, court appointment of a mutually agreeable trustee may be sought.<sup>222</sup> If only some, but not all of the currently serving and future trustees

221. If the payor of child support is the only insured under the life insurance policy owned by the trust, the parties’ minor children are the trust beneficiaries, and the trust provides for their support, it may be possible for the insurance owned by the trust to secure child support. The terms of the trust agreement must be reviewed. The trust agreement may preclude the use of trust assets to satisfy a parental obligation of support. Also, the insured spouse may object to the children remaining beneficiaries of the trust after the child support obligation has been fulfilled, or being required to fund the trust after all child support has been paid.

222. The circuit court has jurisdiction to appoint a trustee. Fla. Stat. § 736.0201(4)(b) (2006). A court will generally not permit a trust to fail merely for lack of a trustee. A resigning trustee or a beneficiary of the trust,

named in the trust agreement are viewed as unacceptable, court action is avoided. Instead, currently serving unacceptable trustees are asked to resign and any unacceptable future trustee designated is asked to irrevocably waive his or her right to serve.

Where a trustee is uncooperative and refuses to resign or waive the right to serve in the future, further action may be possible. If a currently serving trustee refuses to resign, additional investigation may reflect other grounds for removal.<sup>223</sup> It may also be possible to remove the now undesirable trustee by judicial modification of the trust. Fla. Stat. § 736.04113(1)(b) allows a court to modify or change the terms of an irrevocable trust, on the application of any qualified beneficiary, if due to “circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust.” The dissolution of settlor’s marriage may constitute an unanticipated change in circumstances. As settlor is not usually inclined to continue to fund a trust in which his or her former spouse’s relatives, friends or business associates are the trustees, absent a change in present or future trustees under the trust agreement the trust would not be funded and would thus not accomplish settlor’s material purposes.<sup>224</sup> If a court accepts this argument, it has authority to change the trustees designated in the trust agreement.<sup>225</sup> Fla. Stat. § 736.04113 potentially allows the court to change the trustees or other terms of the trust, regardless of when the trust was created, and irrespective of objections of a trustee or beneficiary to the change, as long as the court finds that the change is not inconsistent with settlor’s purpose in creating the trust. Note that a qualified beneficiary, rather than the settlor, has standing to institute suit for judicial modification of the trust under this statute.

If the trust was created after December 31, 2000, the rule against perpetuities provision set forth in § 689.225(2), Fla. Stat. does not apply to the trust, and if the trust does not expressly preclude judicial modification, another basis may also exist for judicial modification of an irrevocable trust to change the trustees.<sup>226</sup> The court has discretion to change the terms of a trust, on the petition of any qualified beneficiary, “if compliance with the terms of a trust is not in the best interests of the beneficiaries.”<sup>227</sup> It would not generally be advantageous to trust beneficiaries to have a trust end, depriving them of future benefits, because a settlor now finds the trustees unacceptable due to a dissolution of the settlor’s marriage. In an

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rather than the grantor, may need to institute this action to appoint a successor trustee. If no trustee nominated in the trust agreement remains, and no charity is a beneficiary of the trust, a trustee may be designated by unanimous agreement of all qualified beneficiaries without court action. Fla. Stat. § 736.0704(3)(b) (2006). If one or more charities are named beneficiaries in the trust, the charities may unanimously select a successor trustee without court action. Fla. Stat. § 736.0704(4)(b) (2006).

223. See § 736.0706, Fla. Stat. (grounds for removal of a trustee).

224. Under common law, material purposes exist when: 1) a trust is a spendthrift trust; 2) the trust postpones the right of a beneficiary to receive principal until he reaches a given age; 3) a trust agreement grants the trustee discretion with respect to distributions or; 4) the trust is a support trust.

225. Fla. Stat. § 736.04113(2)(a) allows the court to “[a]mend or change the terms of the trust, including . . . terms governing administration of the trust . . . .”

226. Fla. Stat. § 736.04115 (2006).

227. *Id.*

appropriate case, this statute should permit the court to modify an irrevocable trust to eliminate trustees named and to appoint alternate trustees.

Where the trustees refuse to resign or waive their rights to serve in the future, another alternative is for the parties to cease contributions to the trust, causing the insurance to lapse and the trust to terminate. Particularly where the trust was funded with term insurance and the insured settlor or settlors remain insurable at reasonable cost, this option may be attractive. In an abundance of caution, a new replacement trust should be created, and the new trustee should apply for and purchase the life insurance, before policies owned by the prior trust are allowed to lapse.

A second scenario is where one of the divorcing spouses created an irrevocable trust, owning insurance on his or her life, and the other spouse is a beneficiary of the trust and/or a trustee. The settlor may be agreeable to continuing to fund the trust, if and only if the other spouse is eliminated from any participation in the trust as trustee or beneficiary. If both spouses concur, the marital settlement agreement may require the spouse named as trustee to resign, or if he or she is named a successor trustee, to irrevocably waive his or her right to serve as a trustee in the future. The beneficiary spouse may also, by agreement, irrevocably waive all of his or her rights to benefits from the trust, accelerating the rights of children or other beneficiaries designated in the trust agreement.<sup>228</sup> It is more practical to obtain these waivers in the dissolution action than to leave the parties with unresolved matters and unintended consequences after the divorce. If the tax consequences flowing from the beneficiary spouse's waiver would be unacceptable, the insured spouse may wish to consider negotiating to ascertain what benefit might be achieved by retaining the trust with provisions for the beneficiary spouse. This is especially true if there is considerable value in the policies owned by the trust, settlor is no longer insurable or is insurable only at a greater cost, the beneficiary spouse is entitled to only income from the trust or benefits are otherwise limited, and if the existence of the trust avoids the need for other security to ensure payment of alimony.

A third scenario is where one or more persons other than the divorcing spouses created the irrevocable trust and the trust owns insurance on the life of someone other than the divorcing spouses. The divorcing spouses are serving as trustees now, or are nominated to serve as trustees in the future, or are named trust beneficiaries. An example is where grandma created an irrevocable trust owning insurance on her life. The policy proceeds are payable to the trust on grandma's death, and the trust owns the policy. In accordance with the terms of the trust, grandma's daughter and son-in-law are currently serving as co-trustees. On grandma's death the trustees are to distribute trust income to daughter for life, then

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<sup>228</sup> The tax consequences of a waiver by the beneficiary spouse should be carefully considered. Depending on the facts, the life insurance policy proceeds may be included in the insured spouse's federal taxable estate if the insured spouse dies within three years after the transfer of the policy to the trust. Also, the beneficiary spouse's waiver may not be a qualified disclaimer under I.R.C. § 2518, giving rise to further adverse tax consequences.

income to son-in-law for life, then remainder to grandchildren. Daughter and son-in-law are now dissolving their marriage. Daughter objects to her husband continuing to serve as a trustee or being a potential beneficiary of the trust. The settlor of the trust may also object to son-in-law having any further connection with the trust, and may refuse to continue contributions to the trust unless his participation is terminated. Depending on the level of cooperation between the parties and other facts, various alternatives may be available.

If son-in-law is agreeable, he may commit in the marital settlement agreement to resign as trustee and may waive his rights to receive any future benefit under the trust. While this is the simplest solution it may have adverse tax consequences. His resignation as a trustee or his waiver of the right to serve as a trustee in the future generally has no tax consequence. However, his waiver of benefits under the trust may not be a qualified disclaimer under I.R.C. § 2518, either due to the timing of the waiver or because he receives consideration in the dissolution action in exchange for his waiver. Tax consequences need to be determined before action is taken.

If the son-in-law is not willing to voluntarily resign or to waive his right to serve as a trustee, now or in the future, or to waive his rights as a beneficiary, judicial modification of the trust may be available. The daughter, as a trustee or as a qualified beneficiary of the trust, may seek judicial modification under § 736.04113, Fla. Stat., to eliminate all trust provisions relating to son-in-law. The argument justifying relief would be that the divorce is a circumstance settlor did not anticipate, and compliance with the terms of the trust would defeat or substantially impair a material purpose of the trust. One potential difficulty with this argument is the definition of a material purpose. Material purposes generally include support, spendthrift, postponement of possession and discretion reposed in the trustees. Depending on the terms of the trust agreement, while settlor's wishes may have changed, that may not amount to interference with accomplishment of a material purpose. In the example set forth above, the trustees were not given discretion, as trust income was required to be distributed to the daughter and there was no provision for distribution of principal to her at all. Thus, there may be no material purpose frustrated. Had the trust provided instead that income and/or principal were to be distributed to the settlor's daughter in the trustees' discretion, having the daughter's former spouse serve as trustee would be more likely to impair accomplishment of a material purpose. If a material purpose is impaired, the court may change the trust's terms to eliminate the son-in-law as a trustee and a beneficiary,<sup>229</sup> or may terminate the trust.<sup>230</sup> Both remedies give rise to potential tax consequences which must be ascertained before modification is sought.

An argument may be advanced to support judicial modification of the trust based on the best interests of the beneficiaries, if the settlor of the trust is living. In the prior example, daughter, as a qualified beneficiary or as a trustee has standing

229. Fla. Stat. § 736.04113(2)(a) (2006).

230. Fla. Stat. § 736.04113(2)(b) (2006).

to institute suit.<sup>231</sup> To modify the trust under § 736.04115, Fla. Stat., the court must consider the interests of all beneficiaries, including the son-in-law, rather than just qualified beneficiaries. However, no beneficiary would appear to benefit if settlor will cease funding the trust, causing non-payment of premiums and subsequent lapse of insurance, unless son-in-law is removed as a trustee and a beneficiary. Under these facts, the proposed modification may be granted. Note that relief is not available under § 736.04115, Fla. Stat., if the trust was created prior to January 1, 2001, or if the rule against perpetuities provision applicable to the trust requires all interests to vest or fail within 21 years of a life in being under § 689.225(2), Fla. Stat., or if the trust agreement expressly prohibits judicial modification.<sup>232</sup>

A fourth scenario is one in which one or more settlors (other than the parties to the dissolution action) created the irrevocable trust, and named in-laws as successor trustees and/or future potential beneficiaries. However, no in-laws are serving as trustee currently and no in-laws are currently qualified beneficiaries. To illustrate, grandma created an irrevocable trust naming her daughter as a trustee and daughter is currently serving as trustee. The trust owns a life insurance policy insuring grandma's life. The first successor trustee is grandma's son. The second successor trustee nominated in the trust agreement is grandma's son-in-law. The trust provides that the beneficiaries of the trust now and on grandma's death are son and daughter, who shall share equally. If one of them fails to survive grandma, the deceased child's children (settlor's grandchildren) share the deceased child's benefits. Only if the deceased child is not survived by issue does son-in-law benefit financially under the terms of the trust agreement. In that situation judicial modification under §§ 736.04113 or 736.04115, Fla. Stat. may be available as described above. But if the settlor is deceased, a further remedy may exist without judicial intervention.

Where judicial modification would be permitted under § 736.04113(2), Fla. Stat., and the settlor of the trust is deceased, and the trustee and the qualified beneficiaries unanimously agree, the terms of the trust governing distribution and administration may be modified by agreement without court action.<sup>233</sup> Modification by unanimous agreement is only available where the trust was created after December 31, 2000, the rule against perpetuities set forth in § 689.225(2), Fla. Stat. does not apply to the trust or the trust agreement expressly authorizes nonjudicial modification, and there is no charitable organization named a beneficiary. If a charity is a trust beneficiary, modification by unanimous agreement may occur after the charity's interest in the trust ends. While the statute does not so expressly state, § 736.0412, Fla. Stat. does not permit the trustees and qualified beneficiaries to eliminate gifts to other beneficiaries without their consent.<sup>234</sup>

231. Fla. Stat. § 736.04115(1) (2006).

232. Fla. Stat. § 736.04115(3) (2006).

233. Fla. Stat. § 736.0412 (2006).

234. See David F. Powell, *The New Florida Trust Code Part I*, 80 FLA. B.J. 24 (July/August 2006).

Whether settlor is living or deceased, the terms of the trust agreement may provide another means of addressing the situation by creation of a further trust, known as trust decanting.<sup>235</sup> Trust decanting applies where the trust agreement gives the trustee absolute power to invade principal of the trust.<sup>236</sup> A trustee has this absolute power where the trustee may exercise total discretion with respect to which beneficiaries receive principal of the trust, without being limited to distributing principal based on an ascertainable standard.<sup>237</sup> For the trustee to have the power within the meaning of Fla. Stat. § 736.04117, the trust agreement must not expressly deprive the trustee of the right to act.<sup>238</sup> Even if a trustee has absolute discretion to make principal distributions, if the trust agreement deprives the trustee of the power to create new trusts, the trustee may not do so.

Where the trustee has absolute power to distribute trust principal to one or more beneficiaries, and no provision in the trust agreement precludes the trustee from creating a further trust, the trustee may transfer principal from the initial trust to another trust, including a new trust. The beneficiaries of the new or second trust may not include anyone who was not a beneficiary of the first trust.<sup>239</sup> However, persons who were beneficiaries of the first trust may be excluded as beneficiaries of the second trust. Thus, the in-law initially named a beneficiary need not be a beneficiary of the second trust.<sup>240</sup> The statute specifies the procedure to be followed to transfer the principal owned by one trust to the second trust, as well as the procedure to be followed by a beneficiary who objects to the trustee's proposed decanting.<sup>241</sup>

The last statutory method potentially available to revise the terms of an irrevocable trust owning life insurance under Florida law is entry into a nonjudicial settlement agreement.<sup>242</sup> Wherever the court could order judicial modification, all persons who would be affected may instead enter into an agreement consenting to the change in trust terms.<sup>243</sup> At a minimum the interested persons include all trust beneficiaries and the current trustee. However, interested persons may also include

235. David F. Powell, *Administration of Trusts in Florida*, § 18.14 (2009).

236. Fla. Stat. § 736.04117 (2006).

237. Fla. Stat. § 736.04117(1)(b) (2006). The statute specifies that, if distributions are only for "health, education, maintenance, and support" there is an ascertainable standard and the trustee lacks absolute power. In contrast, where the trustee may distribute or expend trust principal for the "best interests, welfare, comfort, or happiness" of one or more beneficiaries, the trustee has absolute power. The word "absolute" need not be used in the trust agreement for the trustee to have absolute power.

238. Fla. Stat. § 736.04117(1)(a) (2006). Inclusion in the trust agreement of a spendthrift provision or a provision precluding revocation or amendment of the trust does not alone prevent a trustee from acting under the statute. Fla. Stat. § 736.04117(5).

239. Fla. Stat. § 736.04117(1)(a)(1) (2006).

240. There are other restrictions and limitations on the trustee's right to transfer principal of one trust to another trust. The trustee cannot, by his actions, cause a loss of a marital or charitable deduction for federal income, gift or estate tax purposes. Fla. Stat. § 736.04117(1)(a)3 (2006). Unless the trust has a charitable beneficiary, these limitations are not likely to interfere with trust decanting in the divorce context to exclude relatives-in-law from participation in the trust.

241. Fla. Stat. § 736.04117(2), (4) (2006).

242. Fla. Stat. § 736.0111 (2006).

243. *Id.* Impediments may exist to obtaining consent of all interested persons, particularly where trust beneficiaries include unknown, unascertained or unborn beneficiaries, or minor children whose interests differ from those of their parents.

creditors of the trust, successor trustees named in the trust agreement and others. While court approval of the settlement agreement is not required, it may be sought on the request of any interested person.<sup>244</sup>

The nonjudicial settlement agreement is mentioned herein primarily for the sake of completeness. For several reasons it is unlikely to be the most effective method to address trusts owning life insurance in the divorce context. First, it requires the consent of many more persons than other alternatives. Second, interested persons who would be impacted by an agreement may include unborn or unascertained persons. These persons may not be represented<sup>245</sup> and it may be difficult, impossible or very expensive to obtain their consent.

The statutes allowing for judicial or nonjudicial modification of an irrevocable trust do not supplant or eliminate common law actions for trust reformation.<sup>246</sup> Thus, trust reformation remains a viable solution. A brief summary of the common law of reformation follows.

Under common law, the question presented generally centered on whether an irrevocable trust could be terminated, rather than amended, prior to the time specified in the trust agreement. The law is still instructive, because if the trust could be terminated early, the same theory would likely permit amendments. Common law, like current statutes, distinguished between judicial and nonjudicial action.

As a general proposition, common law allowed an irrevocable trust to be terminated prior to the time specified in the trust agreement on the unanimous consent of all trust beneficiaries.<sup>247</sup> This was true even over the objection of the settlor or the trustee. However, this rule did not apply if the trust had an unfulfilled material purpose.<sup>248</sup>

Under common law, one impediment to reformation of an irrevocable trust existed where all beneficiaries did not consent to the amendment or were not parties to the action in which amendment was agreed to.<sup>249</sup> It was held that “an irrevocable trust may be amended without the consent of the beneficiary when the settlor surrenders privileges or rights in favor of the beneficiary.”<sup>250</sup> Under common law, a court could revise administrative and distributive provisions of a trust, if such action was appropriate to achieve settlor’s purposes, and those

244. Fla. Stat. § 736.0111(5) (2006).

245. See Fla. Stat. § 736.0310 (2006) (rules pertaining to representation of persons in the trust context).

246. Fla. Stat. § 736.04113(4) (2006) expressly states that the statute’s provisions “are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.” See also Fla. Stat. §§ 736.04115(5) and 736.0412(6).

247. See *White v. Bourne*, 9 So. 2d 170 (Fla. 1942); *Goldentrestre v. Richard*, 498 So. 2d 1303 (Fla. 3d Dist. Ct. App. 1986); Restatement (Third) of Trusts § 65(1) (2003).

248. See Restatement (Third) of Trusts § 65(2) (2003).

249. *Bieley v. Bieley*, 398 So. 2d 932 (Fla. 3d Dist. Ct. App. 1981). In that case a couple created an irrevocable trust for the benefit of their minor son. The trust did not own life insurance. The couple thereafter dissolved their marriage. The trust agreement was purportedly amended in the dissolution action. The validity of the amendment was thereafter questioned, as the parties’ minor son was not a party to the dissolution action and did not consent to the trust amendment.

250. *Id.*

purposes might otherwise be frustrated due to changed circumstances not anticipated by settlor.<sup>251</sup>

Where court action is to be taken to modify or reform a trust, a lawsuit separate from the dissolution proceeding is required. Although the circuit court may have jurisdiction where the trust has a Florida situs, the parties to the trust action are not the same as the parties in the dissolution action.

As noted throughout this section of the article, it is crucial to appreciate that there are potential tax ramifications to any change to an irrevocable trust. The fact that a modification is accomplished by waiver, agreement or court action does not guaranty that the change will be respected by the Internal Revenue Service or that adverse tax consequences will not result from the change in trust terms.

#### V. ENTITLEMENT TO LIFE INSURANCE PROCEEDS AND REMEDIES ON DEATH OF INSURED

Where the payor of alimony or child support dies while insured, after a petition is filed for dissolution or after a final judgment is entered dissolving the insured's marriage, disputes may arise concerning who is entitled to the life insurance proceeds, or what remedies exist if the required life insurance is not in effect. Disputes may also arise if an insured who was required to maintain life insurance for a former spouse or children, even if not to secure alimony or child support, fails to do so. In addition to cases in which the insured failed to name beneficiaries consistent with a marital settlement agreement or final judgment of dissolution, there are cases in which a deceased insured may have had the right to change the beneficiary of life insurance from the former spouse and neglected to do so. Litigation may be caused by the failure of the insured to comply with the final judgment of dissolution or the marital agreement incorporated therein, either in terms of maintaining requisite insurance or naming appropriate beneficiaries, or the failure to otherwise adequately account for the insurance in the prior divorce action. The terms of the agreement or judgment affect the outcome. A review of cases in which courts resolved the disputes reflects the importance of wording of life insurance provisions in the agreement or judgment,<sup>252</sup> and the importance of advising a newly divorced insured to promptly attend to any needed changes to the beneficiary of life insurance.<sup>253</sup> In Florida, divorce does not automatically alter the designated beneficiary of a life insurance policy.<sup>254</sup>

251. Mills v. Ball, 380 So. 2d 1134 (Fla. 1st Dist. Ct. App. 1980).

252. The wording of the court order or judgment directing the purchase or maintenance of life insurance is equally important during the lives of the parties. Disputes arise when the parties cannot understand their obligations, or the provisions of an agreement or order are ambiguous. See, e.g. Lopez v. Lopez, 780 So. 2d 164 (Fla. 2d Dist. Ct. App. 2001). In that case the court rejected an order requiring the purchase of a life insurance policy "if reasonably available," because of inadequate wording. In addition, the order was so poorly drafted that the payor spouse could not determine if he was obligated to provide one \$250,000.00 policy to assure payment of both alimony and child support, or if two separate policies of \$250,000.00 were required. *Id.* at 165 n.1.

253. While the cause may be "oversight, mistake, or poor comprehension of the way . . . life insurance policies operate," because no Florida statute automatically changes or revokes life insurance beneficiary designations when an insured's marriage is dissolved, there is an increased likelihood that a former spouse or

Absent the ability of a former spouse or child to collect the life insurance proceeds, there may be no effective remedy. The individual denied rights to the policy proceeds may, at best, retain rights as a creditor of the deceased obligor's estate based on breach of contract or other action. If decedent's probate estate assets (which do not include life insurance proceeds if a beneficiary is named on the policy and the beneficiary survives the insured) are insufficient to pay the claim, the former spouse or child as a creditor is left without adequate recourse.

Where in a marital settlement agreement the payor-husband agrees to maintain a life insurance policy provided by his employer to secure child support as long as his first wife has custody of the minor child, but names payor's second wife as the beneficiary of the policy, on his death his minor child may be entitled to the policy proceeds.<sup>255</sup> A conclusion favoring the minor child was reached in one case, although the employer changed the insurance coverage several times after the payor-husband was divorced, the insurance company providing the group term coverage changed, and the death benefit increased from \$10,000.00 at the time of the marital agreement to \$20,000.00 at the husband-payor's death.<sup>256</sup>

Vague wording in a marital settlement agreement may preclude such a favorable outcome. In one case the divorcing couple entered into an agreement providing for child custody, child support, alimony and property settlement.<sup>257</sup> The agreement included two critical provisions. In one provision the husband agreed to pay all reasonable college expenses for his children who attended college. In a second provision the husband agreed to keep in effect two life insurance policies. His former wife was to be named beneficiary of each policy. However, if she remarried, the husband's children were to be named beneficiaries of each policy. The agreement neglected to specify if the insurance was to secure alimony, child support or other obligations, or was part of the property settlement. The husband later died, without paying his children's college expenses and having not maintained the life insurance required under the marital settlement agreement. Decedent's former wife and children, who were then adults, filed claims against his estate in an effort to recover the reasonable college expenses owed and an amount equal to the proceeds of life insurance decedent failed to maintain. Decedent's estate objected to the claims. Due to the absence of clear wording in the marital settlement agreement, the court determined that the insurance was merely provided as security for child support.<sup>258</sup> As decedent apparently paid child support owed during his life, there could be no recovery after his death on the security for an

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children of a dissolved marriage will remain beneficiaries of a divorced individual's life insurance at his or her death." Suzanne Soliman, *A Fair Presumption*, 36 STETSON L. REV. 397 (2007).

254. *Id.* at 410.

255. *Roxy v. Roxy*, 454 So. 2d 84 (Fla. 2d Dist. Ct. App. 1984).

256. *Id.* The marital agreement did not state the amount of insurance then in existence or to be maintained for the benefit of the minor child, nor did it limit the policy proceeds payable to the child for child support owed as of the payor's death. Thus, the court declined to limit the share of the policy proceeds to which the child was entitled. The court noted that the deceased insured's surviving spouse had not paid any premiums, implying that had she done so the outcome may have been different.

257. *Mitchell v. Combank/Winter Park*, 429 So. 2d 1319 (Fla. 5th Dist. Ct. App. 1983).

258. *Id.* at 1321-22.

obligation fulfilled. The children had no remedy for the deceased father's failure to keep life insurance in effect.

The right to recover proceeds of a life insurance policy paid at death of the insured parent liable for child support, when the insurance was required by the court to secure payment of child support and the order was not complied with, is generally based on one of two legal theories. The children may sue the deceased parent's estate for breach of contract, as the children are third party beneficiaries of the marital settlement agreement.<sup>259</sup> If the deceased parent's estate does not own sufficient assets, it may be more advantageous to sue the named beneficiary or other recipient of the proceeds in equity for imposition of a constructive trust.<sup>260</sup> To proceed successfully on either theory, the plaintiff needs to identify the policy purchased and maintained by the deceased parent, or owned by the parent obligated to pay child support at the time of the dissolution of marriage.<sup>261</sup> Absent proof identifying the specific policy owned or to be purchased or maintained, an adequate remedy may not be available.<sup>262</sup>

To succeed in imposing a constructive trust on policy proceeds, where despite a court order requiring maintenance of life insurance to secure child support the insured parent named another beneficiary, proof of either fraud, undue influence, abuse of confidence or mistake, and proof that it would be inequitable to unjustly enrich the named beneficiary are needed.<sup>263</sup> The wrongdoing or mistake may be that of the beneficiary or of the insured policy owner.<sup>264</sup> The deceased insured's

259. *Harris v. Byard*, 501 So. 2d 730 (Fla. 1st Dist. Ct. App. 1987); *Lowry v. Lowry*, 463 So. 2d 540 (Fla. 2d Dist. Ct. App. 1985).

260. *Harris*, 501 So. 2d at 730.

261. *Id.*; see also *Homes v. Holmes*, 463 So. 2d 578 (Fla. 1st Dist. Ct. App. 1985), where the final judgment of dissolution merely required the husband to maintain life insurance on his life and to designate his minor child beneficiary. Evidence was offered that the husband owned a \$25,000.00 life insurance policy at the time of dissolution of the marriage. Both the child's mother and her divorce attorney testified that the policy existed and was the policy referenced in the final judgment.

262. *Harris v. Byard*, 501 So. 2d 730 (Fla. 1st Dist. Ct. App. 1987). In that case a husband and wife who had two minor children together divorced. The final judgment of dissolution of their marriage required the husband to maintain life insurance naming the minor children beneficiaries. The final judgment did not reflect whether the husband owned life insurance, and no specific amount of insurance to be purchased or maintained was specified. The record did not indicate the purchase of life insurance by the former husband to fulfill his obligation, or any action by the former wife during his life to compel him to do so. At the time of the former husband's death he had seven minor children, five of whom were born out of wedlock. An employer provided a group term life insurance policy that was in effect at the former husband's death provided \$12,000.00 in proceeds. The former husband named his mother primary beneficiary of the policy and did not name an alternate beneficiary. His mother predeceased him. At his demise multiple parties claimed rights to the proceeds. Decedent's former wife claimed the policy proceeds to pay child support owed to her children. Decedent's sister claimed the policy proceeds were payable to decedent's estate, entitling her to apply them to decedent's funeral bill. Decedent's sister further claimed the remaining proceeds were payable equally to all seven children. *Id.* at 731. The court declined to award the insurance proceeds to decedent's former spouse to pay child support for decedent's two legitimate children. The court found "there was no proof that a particular insurance policy was in existence at the time of the divorce to provide the necessary specificity and meaning to the otherwise ambiguous and indefinite provisions of the dissolution judgment." *Id.* at 734. Furthermore, "the lack of an existing policy at the time of dissolution deprives this case of any specific property interest in which the court could create an equitable interest or constructive trust." *Id.* Absent adequate specific provisions in the prior final judgment of dissolution identifying the policy to be used to secure child support or proof that payor owned the policy in question at the time of dissolution, the proceeds were general estate assets. The court thus ruled in favor of decedent's sister.

263. *Homes v. Holmes*, 463 So. 2d at 580 (quoting *Wadlington v. Edwards*, 92 So. 2d 629 (Fla. 1957)).

264. *Homes*, 463 So. 2d at 580.

failure to adhere to the court order and name the minor child policy beneficiary has been construed as either a mistake or a breach of confidence.<sup>265</sup>

Cases reflect imposition of a constructive trust, where decedent failed to designate a policy beneficiary as required in a final judgment or marital settlement agreement. However, this remedy may not be available where the recipient of the policy proceeds at the insured's death purchased the policy for valuable consideration<sup>266</sup> or paid premiums to keep the policy in force, as opposed to one who was merely designated a beneficiary gratuitously by the deceased insured.

In disputes between a deceased insured's former spouse or children against a surviving spouse about rights to life insurance proceeds, where the insured voluntarily agreed to maintain insurance for the former spouse and/or children and no purpose to secure support was stated, unless the insured's surviving spouse paid policy premiums, the former spouse or children are likely to prevail. Where the property settlement agreement incorporated into a final judgment of dissolution requires one parent to maintain life insurance, remain the owner of life insurance and name his children beneficiaries, the insurance is not specified as merely security for child support, and the parent owns and pays all premiums on a term insurance policy until his death, the children may have vested rights in the policy proceeds.<sup>267</sup> In that situation, the insured loses rights to change the beneficiary after the final judgment of dissolution. Where the insured improperly attempts to change the beneficiary, the designation is of no effect and the newly named beneficiary acquires no rights to policy proceeds.<sup>268</sup> Although from the insurance company's documents the insured former spouse technically remains the owner of the policy, the courts' view is that the provisions of the agreement are tantamount

265. *Id.* In *Holmes* a husband and wife had one minor child. At the time of their divorce the husband owned a \$25,000.00 life insurance policy on his life. The parties signed an agreement incorporated into the final judgment of dissolution, in which the court ordered the husband to maintain life insurance on his life and to designate his minor child as beneficiary. *Id.* at 579. Three weeks before entry of the final judgment of dissolution, the husband changed the beneficiary of the \$25,000.00 policy to his sister. When the former husband died five months later, both his sister and his minor daughter claimed rights to the policy proceeds. The court was not persuaded by decedent's sister's unsupported assertion that decedent owned a second \$2,000.00 policy on his life, or the evidence she presented to establish that decedent purchased a life insurance policy on his minor daughter's life of which she became owner and beneficiary on her father's death. The court held that either decedent made a mistake or he abused a confidence, and unjust enrichment would result if decedent's sister received the policy proceeds. Decedent's minor daughter was entitled to the policy proceeds.

266. *See Lowry*, 463 So. 2d at 542, where the court held that the deceased insured's children stated a cause of action by asserting that incident to dissolution of their parents' marriage their father agreed to keep a \$40,000.00 life insurance policy in force for their benefit, he instead named his second wife beneficiary of the policy, and his second wife was not a bona fide purchaser for value. *See also Cadore v. Cadore*, 67 So. 2d 635 (Fla. 1953).

267. *Pensyl v. Moore*, 415 So. 2d 771, 773 (Fla. 3d Dist. Ct. App. 1982). Although the deceased insured was the owner of the policy on insurance documents, the court held that the children owned the policy as of the insured's death. *Id.*

268. *Id.* In that case a husband entered a property settlement agreement incident to his divorce requiring him to "maintain and remain the owner of all life insurance policies on his life with the minor children . . . as the direct or indirect beneficiaries thereof." *Id.* at 772. After the divorce the former husband personally paid all premiums to keep the policy in force. Despite the agreement, the former husband thereafter signed a new beneficiary designation naming his girlfriend the primary policy beneficiary and his children alternate beneficiaries. On his death the minor children and decedent's girlfriend both asserted claims to the proceeds. The appellate court affirmed a grant of summary judgment in favor of the children. *Id.* at 773.

to a gift of the policy to the former spouse or children required to be designated beneficiaries “divesting the decedent of ownership interest in the life insurance policy and creating in the beneficiary an indefeasible interest in the proceeds.”<sup>269</sup>

In determining whether the former spouse or child required to be designated beneficiary of a life insurance policy is entitled to the proceeds on the death of the insured when not designated beneficiary on the policy, the courts consider a variety of factors. These include the wording of the marital settlement agreement, order requiring insurance and final judgment of dissolution; who retained physical possession of the policy or other proof of insurance; whether the insurance company was notified of the terms of dissolution; the type of insurance (such as term insurance or whole life insurance); who paid premiums; whether the beneficiary to be named acquired vested rights in the policy and/or proceeds; and what rights the insured policy owner retained. Decisions do not always favor the beneficiary required to be so named in the final judgment of dissolution.

Although a marital settlement agreement with his first wife incorporated into a final judgment of dissolution required a father to name his three children equal beneficiaries of his existing life insurance policy insuring his life, his second wife was entitled to the policy proceeds on his death as the beneficiary designated on the policy.<sup>270</sup> Following his divorce, the father married his second wife, and named her beneficiary on his life insurance despite the terms of the final judgment of dissolution.<sup>271</sup> The second wife was given physical possession of the policy and she paid the premiums due to keep the policy in force.<sup>272</sup> On the insured’s death, both his widow and his three children from his first marriage claimed entitlement

269. *Primerica Life Ins. Co. v. Moore*, 2008 WL 1886032 (M.D. Fla. 2008). In *Moore*, a husband and wife executed a property settlement agreement in connection with their divorce. The husband owned a term life insurance policy on his life paying \$40,000.00 on his death. In the property settlement agreement the husband promised to name his wife a 50% beneficiary and his three daughters equal beneficiaries of the other 50% of the policy proceeds. He thereafter remarried, named his new wife the policy beneficiary and died. Summary judgment was granted to the former spouse and decedent’s three daughters, entitling them to the policy proceeds. See also *Dixon v. Dixon*, 184 So. 2d 478 (Fla. 2d Dist. Ct. App. 1966). Mr. Dixon was married and divorced twice prior to his death. He had two daughters with his first wife and one son with his second wife. All three minor children survived him. There was no marital settlement agreement entered in Mr. Dixon’s second divorce. Instead, the court ordered him to keep in effect all life insurance on his life provided by his employer, and to name his minor son the beneficiary. Although the insurance company providing group term life insurance at Mr. Dixon’s employment changed between his second divorce and his death, life insurance on his life remained in effect at his death. Contrary to the court’s order, Mr. Dixon never named his son policy beneficiary. Following the dissolution of marriage his second wife was named beneficiary and had physical possession of the life insurance certificates. Mr. Dixon later designated his brother as policy beneficiary. After his demise a dispute arose when the second former spouse claimed the policy proceeds for her minor son under the prior court decree and decedent’s brother claimed the proceeds by virtue of the beneficiary designation form. The court held that decedent’s minor son was entitled to the policy proceeds, as “the terms of the stipulation were so encompassing as to amount to a surrender of the essential incidents of ownership.” *Id.* at 480. The court found that decedent’s son acquired a vested interest in the policy proceeds under the divorce decree, precluding decedent from validly changing the policy beneficiary.

270. *Cadore v. Cadore*, 67 So. 2d 635 (Fla. 1953). At the time of his divorce, the father and his first wife had three children, two of whom were minors. The insurance policy was not expressly stated to be security for child support, and all three children were adults at the time of their father’s death.

271. *Id.* at 637.

272. *Id.*

to the policy proceeds.<sup>273</sup> The insured owner did not give up the right to change the owner or beneficiary of the policy, he was not, in the divorce judgment, required to irrevocably designate his children as beneficiaries, he did not forfeit the right to cancel the policy, borrow against the policy or allow the policy to lapse, he was not even required to maintain the policy, and his second wife paid premiums and retained physical possession of the policy. The agreement only required him to name his children beneficiaries and was read literally by the court to require nothing further. These facts caused the court to conclude that the children did not acquire vested interests in the policy, and decedent's widow was entitled to the insurance proceeds.<sup>274</sup>

The instruction gleaned from the cases is that provisions pertaining to life insurance in a marital settlement agreement and a final judgment of dissolution must be clear, specific and detailed. If the policy is to be maintained in effect and premiums are to be timely paid by one former spouse, this must be stated. Whether the policy is maintained to secure payment of alimony, to secure payment of child support, is lump sum alimony or is part of a property settlement should be stated. Every right retained to the insured owner or denied to him or her should be set forth. It is not adequate to merely state who is to be named beneficiary, without specifying if that beneficiary designation is irrevocable, or if it is revocable when and on what terms it may be changed. Who is to notify the insurance company issuing the policy of the restrictions should be set forth, in addition to how each interested party will receive notice of any changes related to the insurance, attempts to change the owner or beneficiary of the policy or to borrow against or pledge the policy, failure to pay premiums or other relevant events. Other terms to consider including in the pertinent divorce documents are whether the beneficiary is acquiring a vested interest in the policy, and how future spouses of the insured are to be notified of the restrictions applicable to the policy prior to marriage. Where the details about the policy are known, such as the identity of the company issuing the policy, the policy number and the date of issuance, as many details as possible identifying the policy should be included in the marital settlement agreement, order or judgment of dissolution.

Including detailed provisions in the final judgment of dissolution, as suggested above, is not only important to protect the rights of the beneficiary designated in the divorce documents against another beneficiary designated by decedent or if none, against the decedent's probate estate. The policy beneficiary designated by decedent may or may not be a later spouse. The decedent's surviving spouse,

273. *Id.* Although the policy was in the sum of \$3,000.00, double benefits were payable due to the insured's death in an accident.

274. *Id.* at 638. In reaching its conclusion, the court examined many rights the insured owner had under the policy and general insurance law. These included the right to retain and transfer possession of the policy, the right to transfer and assign the policy, the right to pledge the policy as collateral and to change the beneficiary. Neither the marital settlement agreement nor the final judgment of dissolution purported to deny the insured owner any of these rights.

where one exists, may claim policy proceeds either as a named beneficiary or against a named beneficiary under Florida's elective share law.<sup>275</sup>

The elective share entitles a decedent's surviving spouse to a sum equal to thirty percent of decedent's elective estate.<sup>276</sup> Included in the elective estate is a "decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life."<sup>277</sup> Term insurance is thus generally excluded from the elective estate as it has no cash value. The proceeds of life insurance on decedent's life in excess of the net cash surrender value are likewise excluded from the elective estate.<sup>278</sup> Also excluded from the elective estate are "[a]ny policy of insurance on decedent's life maintained pursuant to court order"<sup>279</sup> and "[a]ny transfer of property by the decedent to the extent the decedent received adequate consideration in money or money's worth for the transfer."<sup>280</sup> Absent proper wording in the divorce documents, the deceased insured's surviving spouse may be able to include a policy's cash surrender value in the elective estate, asserting that a vested interest was not transferred by decedent, the transfer was not for valuable consideration, or that the policy is not maintained pursuant to court order.

Whether a deceased insured transferred a vested interest in life insurance in a divorce is also important, because if an irrevocable transfer occurred before decedent's marriage to the surviving spouse, neither the cash surrender value of the policy nor the death benefit are included in the elective estate.<sup>281</sup> If any portion of the insurance proceeds (including cash surrender value) is included in the elective estate, it may be payable to the surviving spouse in satisfaction of the elective share.<sup>282</sup>

Where a marital settlement agreement requires one spouse to provide life insurance to secure alimony, and to name the alimony recipient as the beneficiary, the payor may fail to do so. Where on the payor's death his revocable trust is the owner and beneficiary of the policy, the former spouse receiving alimony may nevertheless be entitled to the life insurance proceeds.<sup>283</sup> Similarly, where the final judgment of dissolution required a husband to name the family trust as beneficiary of a \$110,000.00 life insurance policy and he failed to do so, on his death the remedy of a constructive trust was available to his former spouse.<sup>284</sup> After the dissolution of his marriage the insured surrendered his life insurance, and replaced it with new policies paying \$150,000.00 on his death to his second wife.<sup>285</sup> Yet his will stated that he left no gift for his children born of his first marriage, because

275. Fla. Stat. § 732.2101 *et. seq.* (2006).

276. Fla. Stat. § 732.2065 (2006).

277. Fla. Stat. § 732.2035(6) (2006).

278. Fla. Stat. § 732.2045(1)(d) (2006).

279. Fla. Stat. § 732.2045(1)(e) (2006).

280. Fla. Stat. § 732.2045(1)(b) (2006).

281. Fla. Stat. § 732.2045(1)(a) (2006).

282. Fla. Stat. § 732.2075 (2006).

283. *Vaughn v. Vaughn*, 741 So. 2d 1221 (Fla. 2d Dist. Ct. App. 1999).

284. *Blaney v. McCluskey*, 529 So. 2d 314 (Fla. 1st Dist. Ct. App. 1988). The opinion did not reflect whether the insurance was required to secure alimony or child support or was for another purpose.

285. *Id.*

their mother was the beneficiary of life insurance on his life. He then died with no life insurance payable to his former spouse or the family trust.<sup>286</sup> The court recognized that an action for constructive trust was stated, as there was either an abuse of confidence or mistake by decedent, and a need to avoid unjust enrichment of the surviving spouse who received and could otherwise retain the life insurance proceeds.<sup>287</sup>

In a common situation, in the dissolution of marriage the court orders one spouse to maintain life insurance to secure payment of alimony. In violation of the final judgment, the payor former spouse instead names his or her subsequent spouse beneficiary. On the insured's death litigation ensues when both the former spouse and the surviving spouse claim entitlement to the life insurance policy proceeds.<sup>288</sup> An action for constructive trust may provide a remedy for the former spouse who is denied insurance proceeds.<sup>289</sup>

The wording of a court order requiring life insurance, as well as the type of policy involved, the owner of the policy, and the insured's rights in the policy all may impact entitlement to proceeds on the insured's death. Whether the life insurance was solely ordered by the court, or was also agreed to in a marital settlement agreement, was to secure alimony or child support and if so whether unpaid support is owed and the wording of any order or agreement, affect the outcome.

In one case the court ordered in a final judgment of dissolution of marriage that the husband maintain life insurance already in effect and name his minor children beneficiaries of the proceeds.<sup>290</sup> The insurance was provided by the husband's employer, and the employer was the policy holder.<sup>291</sup> The insured had the right to convert the group term insurance to an individual policy if his employment ended or if the employer ceased providing the insurance, and the right to change the beneficiary of the policy.<sup>292</sup> The insured was not the owner of the policy, and did not have the rights to assign, gift or change the owner of the policy, as the owner was at all times his employer.<sup>293</sup> Only the husband, or his employer, paid the premiums due.<sup>294</sup> Despite the court's order, the husband never named his children beneficiaries of the policy. Instead, he designated his second spouse as

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286. *Id.*

287. *Id.* To state a cause of action for constructive trust the surviving former spouse must assert that, in this context, allowing someone other than the former spouse, child or other recipient designated in the final judgment of dissolution to collect the life insurance proceeds would cause unjust enrichment to the policy beneficiary, and the unjust enrichment resulted from fraud, undue influence, abuse of confidence or mistake. Abuse of confidence or mistake by the deceased former spouse is adequate to support the imposition of a constructive trust. Decedent's mistaken belief that he, at death, would own life insurance on which his former spouse was designated beneficiary was a sufficient mistake. As the issue in *Blaney* was whether the trial court improperly dismissed the former spouse's complaint, the court did not address whether a constructive trust should actually be imposed.

288. *See Gartley v. Gartley*, 662 So. 2d 77 (Fla. 2d Dist. Ct. App. 1993).

289. *Id.*

290. *Vath v. Vath*, 432 So. 2d 806 (Fla. 1st Dist. Ct. App. 1983). At the time of dissolution the husband's mother was the named beneficiary of the policy.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

beneficiary. When the first wife learned of her husband's failure to comply with the final judgment, she instituted contempt proceedings. The matter was not resolved in these proceedings due to the husband's death. Both the first wife, on behalf of the two minor children, and the husband's surviving spouse claimed entitlement to the life insurance proceeds.<sup>295</sup> Because the policy was by its terms not assignable, no third party paid premiums, and decedent failed to comply with the court order to both name his children beneficiaries and to maintain the policy for their benefit, the children were entitled to the policy proceeds in equity.<sup>296</sup>

Similarly, where a marital settlement agreement entered in connection with a divorce required the husband to keep in force \$40,000.00 of life insurance he already owned and to designate his minor children irrevocable beneficiaries, the children were third party beneficiaries of the agreement.<sup>297</sup> When the husband failed to comply with the agreement and instead named his widow beneficiary, his children remained entitled to the policy proceeds at his death.<sup>298</sup> This was true although the children were adults at the time of their father's death, the policy was not required to secure child support, and despite the assertion by the surviving widow that she did nothing wrong. Even absent facts establishing wrongdoing by the widow, she would have been unjustly enriched by her deceased husband's wrongful conduct were the court to award her the life insurance policy proceeds.<sup>299</sup>

Where life insurance is mandated for child support in a final judgment, as opposed to in a marital settlement agreement, and the payor neglects to maintain the insurance and dies, the ability of the child to recover is uncertain. In one case the judgment required a father to maintain a \$100,000.00 life insurance policy insuring his life, naming the minor child as irrevocable beneficiary.<sup>300</sup> The father died owning no \$100,000.00 policy and no other policy on which the minor child was a named beneficiary. There was in effect at his death a \$95,000.00 policy provided by his employer, on which his second wife was named beneficiary. The minor child's mother (decedent's first wife) sought to impose a constructive trust on the proceeds of the \$95,000.00 policy. The appellate court recognized that a constructive trust might be an appropriate remedy, but remanded the case for further consideration of the equities, in light of the social security benefits the minor child was receiving due to his father's death.<sup>301</sup>

While it is preferable for a court order or a marital settlement agreement to clearly identify each policy an insured is required to keep in force, failure to do is not fatal to a claim of the beneficiary designated in the order or agreement where evidence is available to prove the identity of the policy. In one case a marital settlement agreement required the husband to designate his minor children

295. *Id.* Due to the conflicting claims, the insurance company commenced an interpleader action.

296. *Vath*, 432 So. 2d at 809. The holding was based on "application of the maxim that equity regards as done that which ought to be done." *Id.*

297. *Lowry v. Lowry*, 463 So. 2d 540 (Fla. 2d Dist. Ct. App. 1985).

298. *Id.*

299. *Id.*

300. *Browning v. Browning*, 784 So. 2d 1145, 1147 (Fla. 2d Dist. Ct. App. 2001). The policy was stated to be additional child support rather than security for payment of child support.

301. *Id.* at 1148-49.

irrevocable beneficiaries of his existing life insurance.<sup>302</sup> There was no mention of the life insurance serving as security for child support and no further information in the agreement about the policy.<sup>303</sup> Extrinsic evidence reflected that at the time the agreement was entered, the husband was insured by an employer provided group term insurance policy paying \$32,000.00 on his demise.<sup>304</sup> The insured paid all premiums to keep the policy in effect, named his new wife beneficiary contrary to the agreement, and by the time of his death the policy proceeds increased to \$63,261.00.<sup>305</sup> Due to the wording of the agreement, the court found that the children had an ownership interest in the policy, entitling them to all proceeds remaining at decedent's death, including the increase in death benefits since the date of dissolution of decedent's marriage.<sup>306</sup>

Disputes about entitlement to life insurance proceeds after the insured former spouse dies are not limited to situations in which, whether by court order or agreement, the insurance was required to secure child support or alimony. These disputes also arise where the policy proceeds constitute lump sum alimony or marital property divided in the divorce proceedings.<sup>307</sup>

Where the life insurance policy is provided through an employee welfare benefit plan or other type of plan governed by the Employee Retirement Income Security Act (ERISA), and on the employee's death the beneficiary designation in effect conflicts with provisions in a prior divorce agreement or decree, a three step analysis is required to determine who receives policy proceeds.<sup>308</sup> As explained by one court faced with this situation,

Initially, the Court must decide whether ERISA's anti-alienation provision, specifically 29 U.S.C. § 1056(d)(1), applies to a life insurance policy. Courts generally agree the provision does not apply . . . . The next step in the analysis concerns federal preemption. The circuit courts addressing the issue of whether state or federal law determines the true beneficiary of the policy are split. If federal law applies, the Court must determine whether

302. Prudential Life Ins. Co. v. Boyd, 781 F. 2d 1494, 1495 (11th Cir. 1986).

303. *Id.* at 1496.

304. *Id.* at 1495.

305. *Id.* at 1496.

306. *Id.* at 1497. Decedent's widow, who was named beneficiary of the policy, unsuccessfully argued that the children should only receive \$32,000.00 of the policy proceeds which was equal to the death benefit existing when the marital settlement agreement was entered. She was also unsuccessful in her argument that the agreement failed to sufficiently identify the policy from which the children were to receive benefits. The court held that the general wording of the agreement required the children to benefit from all life insurance decedent owned at the time of his divorce.

307. Metropolitan Life Ins. Co. v. Williams, 82 F. Supp. 2d 1346 (M.D. Fla. 1999). In *Williams*, the husband of the divorced couple was covered by \$51,500.00 in life insurance through the employee welfare benefit plan provided by his employer, General Motors. In the marital settlement agreement incorporated into the final judgment of dissolution, as part of the property settlement, the wife was to be the beneficiary of the life insurance. After the divorce was final and prior to his death, the former husband designated another beneficiary on the policy. Following the former husband's death, both his former wife and the designated beneficiary claimed entitlement to the policy proceeds.

308. *Id.* at 1138-39.

the state court order designating the beneficiary is a Qualified Domestic Relations Order (QDRO), as defined by ERISA. If a valid QDRO, the Court must finally resolve the competing claims to the life insurance proceeds. (footnote omitted)<sup>309</sup>

When life insurance is owned in a plan governed by ERISA, the marital settlement agreement is generally preempted by ERISA.<sup>310</sup> Under this general rule the beneficiary named on the policy, rather than the beneficiary who should have been named according to the marital settlement agreement, receives the life insurance policy proceeds. An exception to the general rule applies if the final judgment of dissolution qualifies as a qualified domestic relations order (“QDRO”) under ERISA.<sup>311</sup>

A final judgment of dissolution of marriage qualifies as a QDRO under ERISA if it sets forth:

- (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
- (ii) the amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
- (iii) the number of payments or period to which such order applies, and
- (iv) each plan to which such order applies.<sup>312</sup>

“The standard in evaluating whether a state judgment meets the requirements for QDRO status is a flexible one.”<sup>313</sup> If a court determines that the final judgment of dissolution qualifies as a QDRO after considering any marital settlement

309. *Id.* at 1348-49. 29 U.S.C. § 1056(d)(1) provides “each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” This is the anti-alienation provision referred to by the court as not applicable to life insurance.

310. *Williams*, 82 F. Supp. 2d at 1351; see Suzanne Soliman, *A Fair Presumption*, 36 STETSON L. REV. 397, 410-13 (2007).

311. See *Williams*, 82 F. Supp. 2d at 1351, in which the court held that the QDRO exception applied to all ERISA plans, including not only pension plans but also welfare plans.

312. 29 U.S.C. § 1056(d)(3)(C); *Williams*, 82 F. Supp. 2d at 1352.

313. *Williams*, 82 F. Supp. 2d at 1352. In that case, even though neither the participant’s nor the spouse’s address were expressly set forth in the final judgment of dissolution, the court held that the judgment qualified as a QDRO. This was based on the facts that the agreement, which was incorporated into the final judgment, reflected an address of real property to be transferred to the wife in the divorce, that real property was in fact the wife’s residence despite the failure of the agreement to explicitly so state, and the addresses of the participant and his former wife could have been “obtained from the [plan] administrator’s records, from the state court records, or from . . . the attorney who prepared the Agreement and whose address and telephone number appear in the Agreement.” *Id.* at 1353.

agreement incorporated therein, the court then reaches the question of entitlement to the life insurance proceeds from the plan. State law governs this analysis.<sup>314</sup>

A party who obtains a final judgment mandating the purchase and maintenance of life insurance by a former spouse should take steps to assure that the judgment is promptly complied with. Delay in purchasing insurance may result in a loss of benefits. This could occur where the spouse, required to purchase insurance, becomes ill and uninsurable after entry of the judgment and prior to purchase of the policy. Benefits may also be lost after the policy is purchased. Where a husband delayed purchasing mandated life insurance for four years after entry of the final judgment of dissolution, and he thereafter committed suicide, no insurance benefits or other sums were recoverable by his former wife.<sup>315</sup> Had the former wife promptly instituted contempt proceedings when the husband initially delayed, she might have hastened the purchase of the policy causing the two year uncontestability clause to have expired prior to the husband's death.

Enforcement of a requirement to maintain life insurance when a former spouse fails to do so may be by civil or criminal contempt.<sup>316</sup> When the former payor spouse willfully or intentionally fails to obtain insurance or pay premiums, the court order should specify if the payor is guilty of civil or criminal contempt.<sup>317</sup> The purpose of civil contempt is generally to benefit the injured former spouse or child. In contrast, the goal of criminal contempt is to punish the wrongdoer.<sup>318</sup> For a civil contempt order to be valid, the errant payor must have an opportunity to perform and provide the insurance to avoid the contempt.<sup>319</sup> Before the former spouse may be held in criminal contempt, due process requirements and Fla. R.

314. *Id.* Because the former wife's rights to the life insurance proceeds were part of her property settlement and were vested, she prevailed over a subsequently designated beneficiary.

315. *Terry v. Terry*, 788 So. 2d 1129 (Fla. 4th Dist. Ct. App. 2001). The final judgment of dissolution required the husband to purchase \$250,000.00 in life insurance to secure payment of child support and an additional \$250,000.00 in life insurance to secure payment of alimony. Following his suicide within two years of purchasing the insurance, the insurance company declined to pay any proceeds. The former wife then unsuccessfully sought imposition of a constructive trust on another life insurance policy purchased for the husband's second wife, retirement plan benefits on which the second wife was named beneficiary, and a residence owned by the second wife. Because the first wife failed to pursue remedies available to her in a timely manner, and decedent's second wife did not benefit from decedent's actions, the first wife was denied an equitable remedy. *Id.* at 1131.

316. *Berlow v. Berlow*, 21 So. 3d 81 (Fla. 3d Dist. Ct. App. 2009). In *Berlow*, after the divorce was final, the former spouses entered into an agreement requiring the former husband to obtain a \$1,000,000.00 irrevocable term life insurance policy on his life naming the former wife as beneficiary. The divorce was final in 1994, the agreement was entered into in June 2006, and the life insurance was to be purchased within 90 days. When the former husband failed to obtain the insurance, the former wife filed first a motion to compel and then a motion for contempt. After the second order was entered holding the former husband in contempt he produced an accidental death and dismemberment policy, rather than a life insurance policy. The wife persisted and filed a third motion, resulting in an order granting the former husband an additional 60 days to purchase the correct insurance. Rather than doing so, the former husband designated the former wife as beneficiary of an existing \$500,000.00 life insurance policy. On the wife's fourth motion, a further motion for contempt, the judge finally granted the relief requested. The order entered did not specify if the contempt was civil or criminal, required the former husband to pay a \$5,000.00 fine, and included a no purge provision. Hence, the order was defective and was overturned on appeal.

317. *Id.* at 83.

318. *Id.*

319. *Id.*

Crim. P. 3.840 must be strictly complied with.<sup>320</sup> Compelling compliance with court ordered life insurance requirements may pose a considerable challenge.

Cases reflect that, if the payor wishes to limit the circumstances in which life insurance proceeds will be used to pay alimony or child support, appropriate specific provisions are required to be inserted in the marital settlement agreement and/or final judgment. These provisions might include limiting the use of life insurance policy proceeds to pay only sums owed as of the payor spouse's death, and limiting the proceeds to be applied in this fashion to the amount of death benefit in effect at the time the agreement or final judgment is entered.

Disputes also arise where the marital settlement agreement and final judgment do not reference life insurance owned by or insuring one spouse. The agreement or judgment may be completely silent, may include general provisions allowing each spouse to retain all assets in his or her name not specifically mentioned, or may include waivers of rights to the former spouse's assets without itemizing the assets. The failure to explicitly address life insurance may result in further litigation when one former spouse dies, particularly if the surviving former spouse is still named a beneficiary of the life insurance. The outcomes of litigation focus in the wording of the marital settlement agreement, exactly what the surviving former spouse waived, and timing of the purchase of the life insurance.

If life insurance is not specifically designated in the marital settlement agreement or final judgment as separate property of one former spouse, and the agreement includes a general waiver of rights to the other spouse's property, even if the waiver is interpreted to include rights to life insurance proceeds, the surviving former spouse generally still receives the insurance proceeds if the former spouse is the designated policy beneficiary.<sup>321</sup> While the surviving spouse

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320. *Id.*

321. *Cooper v. Muccitelli*, 682 So. 2d 77, 79 (Fla. 1996). While married, a husband owned two life insurance policies on his life. He named his spouse primary beneficiary on both policies, and named his sister alternate beneficiary on one policy. Thereafter the husband and wife divorced pursuant to a written separation agreement. The agreement included the following pertinent provisions:

Whereas, the parties desire to settle their financial, property and other rights and obligations arising out of the marriage and otherwise

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6. Mutual Release and Discharge of Claims in Estates. Each party shall have the right to dispose of the property of such party by last will and testament in such manner as such party may deem proper in the sole discretion of such party, with the same force and effect as if the other party had died. Each party, individually and for his or her heirs, personal representatives, executors, administrators, successors and assigns, hereby waives, releases and relinquishes any and all claims, rights or interests as a surviving spouse in or to any property, real or personal, which the other party owns or possesses at death, or to which the other party or his or her estate may be entitled.

7. Mutual Release of General Claims. Except as expressly provided in this Agreement, each party hereby waives, releases and discharges all claims, causes of action, rights or demands, known or unknown, past, present or future, which he or she now or hereinafter has, might have, or could claim to have against the other by reason of any matter, thing or cause whatever, prior to the date of this Agreement. Nothing in this Article 6 shall be deemed to prevent either party from enforcing the terms of this Agreement or from asserting any rights or claims expressly reserved to either party in this Agreement. Nothing herein

may have, by general language in a marital agreement, waived rights to an insurance policy or the proceeds thereof, the insured former spouse who owned the policy retained the right to designate a beneficiary of his or her selection.<sup>322</sup> By failing to remove the former spouse as policy beneficiary, the insured former spouse exercised that right. The surviving former spouse thus remains entitled to the policy proceeds on the insured's death.<sup>323</sup>

A marital settlement agreement or final judgment which sets forth distribution of specific assets other than insurance may then include generic language. In one case the agreement stated that after delivery of specific assets "neither party hereto shall have any claims on the other party of any kind whatsoever".<sup>324</sup> The insured former husband died not quite three months after the final judgment of dissolution was entered. At his death he owned life insurance on his life on which his former spouse was still named the beneficiary. Both his former spouse and his estate claimed entitlement to the life insurance proceeds.<sup>325</sup> While divorce does not automatically change the beneficiary of a life insurance policy insuring one spouse, it is possible for an appropriate agreement to constitute a waiver of a beneficiary's rights under a policy.<sup>326</sup> A marital settlement agreement, like any other contract, is to be interpreted by its terms, and extrinsic evidence is only admissible if there is an ambiguity.<sup>327</sup> In light of the wording of the agreement, the court found an ambiguity existed precluding summary judgment in favor of the former wife.<sup>328</sup> Further litigation was needed to ascertain whether the parties intended the marital settlement agreement to operate as a waiver of rights to life insurance proceeds.<sup>329</sup>

Even if future ownership by one or both spouses of insurance policies on their respective lives is expressly provided for in a marital settlement agreement, a general waiver of rights to the other spouse's assets does not necessarily constitute a waiver of rights to policy proceeds where the insured neglected to change the policy beneficiary prior to death.<sup>330</sup> In *Smith v. Smith* the divorcing couple each

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shall impair or waive any cause of action which either party may have against the other for a dissolution of the marriage or any defenses either may have to any such cause of action.

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11. General Provisions. This Agreement is entire and complete and embodies all understandings and agreements between the parties. No oral statement or prior written matter outside the Agreement shall have any force or effect.

*Id.* at 78.

322. *Id.* at 79.

323. *Id.*

324. O'Brien v. Elder, 250 F. 2d 275, 279 n.3 (5th Cir. 1957).

325. *Id.* at 275-78.

326. *Id.* at 278; *Davis*, 301 So. 2d at 156; *Aetna Life Ins. Co. v. Hoffman*, 242 So. 2d 771, 773 (Fla. 4th Dist. Ct. App. 1970) *aff'd after remand* 277 So. 2d 290 (Fla. 4th Dist. Ct. App. 1973).

327. *Elder*, 250 F. 2d at 278.

328. *Id.* at 280.

329. In *Elder*, the court noted that where the insured policy owner retains the right to change beneficiaries, as he had in this case, the beneficiary had only an expectancy interest. The outcome would have differed if the beneficiary was irrevocably designated and could not be changed. 250 F. 2d at 279.

330. *Smith v. Smith*, 919 So. 2d 525 (Fla. 5th Dist. Ct. App. 2005).

owned term life insurance on their own lives.<sup>331</sup> The marital settlement agreement specifically identified each policy, and stated that each spouse would retain as his or her own separate property the policies insuring his or her own life. Each spouse waived his or her rights to the other spouse's assets.<sup>332</sup> The agreement was silent about the proceeds of life insurance. After the divorce, the former husband obtained forms to change the beneficiary of his life insurance but never completed them. On his death his former wife was still named the policy beneficiary. In a dispute between the former wife and the former husband's estate, the court held the former wife entitled to the policy proceeds.<sup>333</sup>

The timing of the purchase of the life insurance policy, the proceeds of which are claimed by multiple parties, is important. In yet another case where ownership of life insurance was not expressly mentioned in the marital settlement agreement or final judgment of dissolution, general, all encompassing releases and waivers were set forth.<sup>334</sup> The husband owned one life insurance policy on his life at the time the marital settlement agreement was entered. After the marriage was dissolved, the husband named his second wife the beneficiary of the policy. However, after signing the marital settlement agreement, the husband also applied for and purchased a second life insurance policy, naming his first spouse the beneficiary.<sup>335</sup> This new policy was issued to the husband after his marriage to his first wife was dissolved, although he applied for it while still married. The husband never changed the beneficiary during his life. On his death both his first wife and his estate claimed entitlement to the policy proceeds. The court held the first (former) wife entitled to the policy proceeds. The wording of the marital settlement agreement was not a waiver by the former spouse of proceeds of a life

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331. *Id.* at 527.

332. *Id.*

333. *Id.* at 528. There were two basis justifying the court's decision. First, in the marital settlement agreement the wife did not expressly waive her rights to life insurance policy proceeds. Second, the former husband neglected to change the policy beneficiary although he had the right to do so.

334. In *Raggio v. Richardson*, 218 So. 2d 501 (Fla. 3d Dist. Ct. App. 1969), the marital settlement agreement, incorporated into the final judgment of dissolution stated, in pertinent part:

IV. For and in consideration of the execution and delivery of the conveyance, assignments and liens herein after described, each party hereby releases and relinquishes to the other all rights or claims of dower, curtesy, inheritance, descent, distribution, and all other rights or claims growing out of the marriage relations between them, and each shall be forever barred from all rights in the estate of the other party, real, personal or mixed, now owned or hereafter acquired, and that the wife does hereby agree to waive any and all alimony or support money now and hereafter.

\* \* \* \* \*

X. That this is a complete settlement of any and all claims of whatever kind or nature now and heretofore existing between the parties, on account of their marriage or otherwise, and that this agreement is made freely and voluntarily on the part of each of the parties, without any compulsion, constraint, apprehension of fear of or from one to the other, and for the purpose of making a complete settlement of any and all claims whatsoever of the parties hereto, in or against the other, or his or her properties.

*Id.* at 501-02.

335. *Id.* at 502.

insurance policy which did not exist at the time the marital settlement agreement was entered.<sup>336</sup>

Courts may be inclined to hold in favor of the beneficiary named in the insurance company's records, rather than to find that a marital settlement agreement or final judgment of dissolution, which did not specifically mention the insurance policy, altered the beneficiary.<sup>337</sup> For a court to hold that the surviving former spouse waived rights to the policy proceeds when that former spouse remained the named beneficiary, a knowing and intentional waiver must be established.<sup>338</sup> General release language in a marital settlement agreement will not usually be construed as a knowing and intentional waiver or a relinquishment or abandonment of a known right.<sup>339</sup> This is particularly true where the surviving spouse was unaware of being named beneficiary of the policy. The same conclusion is not always reached where the marital settlement agreement does not mention life insurance or the policy, included general language about the intent of the parties to finalize their financial matters in the agreement, and included only a release by the insured spouse who thereafter died.<sup>340</sup> In addition to the wording of

336. *Id.* at 503-04. Summary judgment was entered in favor of decedent's former spouse. Her position was supported by evidence, including a letter from decedent informing her that the insurance proceeds would be payable to her at the former husband's death.

337. This is in part due to a recognition by the courts that, to properly conduct their business, insurance companies require definiteness in ability to ascertain and identify the policy beneficiary. *Spoerr v. Manhattan Nat'l Life Ins. Co.*, 2007 WL 128815 (S.D. Fla. 2007). Another example of the court favoring the beneficiary named by the deceased insured, although the beneficiary was the insured's former spouse, when the marital settlement agreement did not mention the insurance policy or include an express waiver of rights to insurance proceeds, is found in *Davis v. Davis*, 301 So. 2d 154 (Fla. 3d Dist. Ct. App. 1944). In that case the husband was insured by a life insurance policy provided by his employer, and the husband named his wife the policy beneficiary. *Id.* at 155. The parties thereafter divorced, having entered into a marital settlement agreement providing only: "The wife hereby accepts this Agreement in full satisfaction of all her right of Dower, or right of alimony or other special equities in the properties she might otherwise have been entitled to receive." *Id.* at 157 n.9. This language was held not to constitute a waiver by the former wife of the right to receive life insurance proceeds. Additional relevant facts considered by the court were that the insured admitted to his son that he did not change the policy beneficiary, but stated he would do so in the future. Thus, on the insured's death his former spouse, rather than his son, was entitled to the insurance proceeds. See also *Metropolitan Life Ins. Co. v. Dunn*, 243 F. Supp. 2d 1358 (M.D. Fla. 2003), where the court was called upon to determine entitlement to annuity proceeds as opposed to a life insurance policy. A husband owned an annuity during his marriage. The marital settlement agreement entered in connection with his divorce reserved to him ownership of all annuities titled in his name, without specifically identifying any annuity contracts. The wife was the beneficiary designated on the annuity in question. Following the dissolution of his marriage the husband did not change the beneficiary of one annuity, although he changed the beneficiary designated on other annuity contracts. The husband died, survived by his former wife. She too was deceased by the time the insurance company that issued the annuity learned of the owner's death. A contest ensued between the estates of the former spouses over entitlement to annuity proceeds remaining at the former husband's death. The marital settlement agreement was interpreted strictly, so that the former wife's waiver of rights to the former husband's annuities and other assets was not construed as a waiver of rights to proceeds of the annuity. As the former husband did not actually change the annuity beneficiary, the former wife's estate was entitled to the proceeds. Summary judgment was awarded in favor of the former wife's estate.

338. *Spoerr v. Manhattan Natl. Life Ins. Co.*, 2007 WL 128815 (S.D. Fla. 2007).

339. *Id.*; *Cooper v. Muccitelli*, 682 So. 2d 77, 79 (Fla. 1996); *Smith*, 919 So. 2d at 528.

340. In *Aetna Life Ins. Co. v. Hoffman*, 242 So. 2d 771 (Fla. 4th Dist. Ct. App. 1971) the deceased insured purchase a life insurance policy on his life while he was married to his first wife. After their divorce, he changed the policy beneficiary to his second wife, and named his sister the contingent beneficiary to take the proceeds if his second wife failed to survive him. *Id.* at 772. The insured and his second wife thereafter divorced, but the insured never changed the beneficiary designation on the life insurance policy. A marital settlement agreement was entered between the insured and his second wife. The agreement included two relevant provisions. First, the agreement specified "it is the desire and intention of the parties that their relations with respect to property and

the marital settlement agreement, which alone may not constitute a waiver of rights to life insurance proceeds by the surviving former spouse, the court may consider other facts and circumstances. These might include the length of the marriage between the insured and the named beneficiary, their relationship at and after divorce, and whether the surviving spouse knew about the policy.<sup>341</sup> These facts may enable a court to conclude that the surviving former spouse's rights in the life insurance proceeds were waived.<sup>342</sup>

When a question is raised about whether a surviving spouse waived rights to life insurance proceeds in a marital settlement agreement which fails to specifically address a life insurance policy, basic contract law applies.<sup>343</sup> The intent of the parties to that marital settlement agreement is to be determined from the entire agreement.<sup>344</sup> "Further, where there are general and special provisions in the contract relating to the same thing, the special provisions will govern its construction over matters stated in general terms."<sup>345</sup>

Disputes about entitlement to life insurance or policy proceeds post-divorce may also arise when a third person purports to act for the insured or owner of the policy. Attempts by third parties, such as the holder of the policy owner's durable power of attorney, to change a beneficiary designation from a former spouse to another may not be successful.<sup>346</sup> A durable power of attorney must be carefully reviewed to assure that it authorizes that agent to change the beneficiary of life insurance, before the agent attempts such a change or the insurance company processes it.<sup>347</sup> Generally the holder of a Florida resident's durable power of attorney does not have authority to change the beneficiary on a life insurance

financial matters be fixed by this Agreement." *Id.* at 773. Second, the agreement included a general release by the insured in favor of his wife "of and from any claims, demands due, debts, rights or causes of action" except for divorce. *Id.* On the insured's death his first former wife, as court appointed curator of his estate, his surviving second former wife and his sister all claimed entitlement to policy proceeds.

341. *Hoffman v. White*, 277 So. 2d 290, 291 (Fla. 4th Dist. Ct. App. 1973).

342. *Id.* In *Hoffman*, the court concluded that the short duration of the marriage, the hostility between the parties, and the general language of the marital settlement agreement about finalizing financial matters justified a court's conclusion that the insured's second former wife, named beneficiary of the policy proceeds, was not entitled to them. Instead, the contingent beneficiary named by the insured was to receive the policy proceeds.

343. *Davis*, 301 So. 2d at 157.

344. *Aetna Life Ins. Co. v. White*, 242 So. 2d 771, 773 (Fla. 4th Dist. Ct. App. 1971).

345. *Id.*

346. *See Spoerr v. Manhattan Nat'l Life Ins. Co.*, 2007 WL 128815 (S.D. Fla. 2007). In that case the wife was the owner and insured under a life insurance policy. She named her spouse as the beneficiary. The insured and her spouse divorced, but she did not personally change the policy beneficiary. The marital settlement agreement did not specifically mention the life insurance policy or distribute it to either spouse. Nor did the marital settlement agreement include an express waiver of rights by the former husband to the insurance. Instead, it stated: "The Husband further agrees and does hereby release, discharge and exonerate the Wife from any and all claims for curtesy, special equity, division of property, inheritance, descent and distribution and/or preferences as personal representative." Following the dissolution of marriage, the wife executed a durable power of attorney authorizing her son to act for her. The durable power of attorney did not expressly give the son the right to change the beneficiary of life insurance policy on his mother's life. To the contrary, the document denied the son the rights to change any disposition effective at the mother's death or to transfer assets to a trust created by the mother. Despite this provision, the son contacted the insurance company and purported to designate himself, as trustee of his mother's trust, as beneficiary of the policy. On the insured mother's death litigation was instituted, as both the son and the former husband claimed entitlement to the policy proceeds.

347. *Id.*

policy owned by the principal.<sup>348</sup> This power may be expressly granted to the agent in the durable power of attorney.<sup>349</sup> A review of the durable power of attorney is required to determine if the power to change the beneficiary of a life insurance policy was expressly stated.<sup>350</sup> Powers of attorney are strictly construed by the court in an attempt to ascertain the principal's intent.<sup>351</sup>

Where parties divorce pursuant to a marital settlement agreement or final judgment of dissolution under which one spouse is required to maintain life insurance, and the couple thereafter remarries, the effect of the remarriage on the life insurance requirement merits consideration. The answer depends on whether the parties have an agreement specifically addressing the life insurance requirement, and if not, whether the life insurance provision was executed or executory.<sup>352</sup> A provision already performed prior to the remarriage is not abrogated by the subsequent remarriage of the couple, but a provision which remains executory at the time of remarriage is no longer enforceable.<sup>353</sup>

348. Fla. Stat. § 709.08(7)(b)(5); *Spoerr v. Manhattan Nat'l. Life Ins. Co.*, 2007 WL 128815 (S.D. Fla. 2007); *but see Hunter v. Travelers Ins. Co.*, 131 So. 2d 209 (Fla. 2d Dist. Ct. App. 1961).

349. Fla. Stat. § 709.08(7)(b)(5).

350. In *Liberty Assurance Co. of Boston v. Miller*, 2007 WL 423347 (S.D. Fla. 2007), a husband and wife were initially married and had a child together. The couple entered a marital settlement agreement and thereafter divorced. The marital settlement agreement required the former husband to maintain \$100,000.00 in life insurance on his life, naming either the parties' minor child or a trust as the beneficiary for so long as this was possible. After the divorce was final, the husband became covered by \$81,000.00 in group term life insurance provided by his employer. The couple then remarried and their marriage was dissolved for a second time. The former husband then named a friend primary beneficiary of the policy, and designated his minor child secondary or alternate beneficiary. The former husband also eliminated \$40,500.00 in policy benefits, leaving only \$40,500.00 in remaining benefits at his death. The former husband was ill, and after his second divorce he signed a durable power of attorney authorizing his former spouse to act for him in financial matters. She used the power to change the beneficiary of the life insurance policy to the former husband's estate. On his death, both his estate and the beneficiary the husband previously designated sought policy proceeds. One question facing the court was whether the wording of the durable power of attorney was sufficient to authorize decedent's former spouse to change the beneficiary of the life insurance policy. The language in the durable power of attorney, which convinced the court that decedent's former wife acted within her express authority, included the following provisions:

(i) Under the heading "No Limitation on Attorney-In-Fact's Powers" the document provided the principal "intend[s] to give [his] Attorney-in-Fact the fullest powers possible, including all powers set forth in Florida Statute Section 709.08 as now in effect or hereafter enacted, and [he] [does] not intend, by the enumeration of [his] Attorney-in-Fact's powers to limit or reduce them in any fashion

(ii) Under the heading "Management and Contracting Powers" the agent was expressly permitted "to alter, insure, and in any manner deal with any real or personal property tangible or intangible and any interest therein" and "to improve, manage and insure intangible property that [the principal] owns 'upon such terms and conditions as the Attorney in Fact shall deem proper' "

(iii) Under the heading "Special" the agent was given "the full power of substitution, in other words, the full power to do and perform every act necessary and convenient to be done as if [the principal] were still personally present."

351. *Id.*

352. *Id.*

353. *Liberty Life Assurance Co. of Boston v. Miller*, 2007 WL 4233547 (S.D. Fla. 2007); *Cox v. Cox*, 659 So. 2d 1051, 1053-54 (Fla. 1995).