

Enforcing Life Insurance Provisions In Marital Settlement Agreements

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Marital Settlement Agreements commonly contain provisions requiring that one or both ex-spouses' lives will be insured following the divorce. These provisions come in a plethora of styles and requirements. There is a large and growing body of precedent to support their efficacy.

In this speech, I will begin with a hypothetical scenario, the Sad Story of Denny and Bella. Then I will briefly describe the law and the primary cases which inform the law. Finally, I would like to submit a model for a Life Insurance Clause.*

A. The Sad Story of Denny and Bella

Denny and Bella met, fell in love, married and had one child, Bethany. When Bethany was 8 years old, Denny and Bella were divorced. They entered into a Marital Settlement Agreement ("MSA"), in which Denny agreed to pay child support, including all college expenses. Denny had life insurance worth \$100,000 through his employer, Crane, Poole & Schmidt LLP, so he agreed to maintain life insurance with the benefits payable to Bethany until she turns 21. Denny agreed that Bella could confirm the insurance directly with the insurance company. No amount was specified in the Life Insurance Clause.

Time went by. Denny remarried, this time to Shirley Schmidto, and adopted her child, Alan. Denny changed jobs several times, finally working at Fat Burner, Inc., where he was covered by a group life insurance policy from Allstate in the amount of \$250,000. When he started work at Fat Burner, Inc., Denny enrolled in the group as part of starting his new job. He forgot about the Life Insurance Clause, or maybe he just didn't want to talk about his divorce on his first day at a new job. The Human Resources staff filled in the provision for him, naming "my spouse" as the beneficiary.

Later, Denny also purchased a life insurance policy from Mass Mutual with a \$1,000,000 death benefit and named the trustee of Denny's new living trust as the beneficiary. Shirley is named as the successor trustee after Denny's death. The trust provided that the funds would be held for Shirley for the rest of her life and then distributed in equal shares to Bethany and Alan.

On New Years Day, 2007, Denny tragically fell from the balcony of his office while drinking scotch. He died instantly. At the time of Denny's sudden death, his daughter Bethany, an advanced student, was 20 years of age, just starting her last semester in college.

* The information presented herein is intended solely as general statements made for educational purposes. No one may rely on the information contained as a substitute for independent research.

Bella, the ex-wife, comes to see you. She relays the Sad Story of Denny and Bella to you. She asks what Bethany is entitled to receive.

B. Insurance Provisions In MSAs Are Enforced.

There is no particular provision in the Illinois Marriage and Dissolution of Marriage Act which governs Life Insurance Clauses in MSAs. Clearly, these clauses are allowed under in MSAs by Sec. 502, holding the insurance as a trust is authorized by Sec 503(g) and the insurance can serve as security to fulfill the obligations under Sec. 510(d) and (e).

Life Insurance Clauses can be ordered even without an agreement. If the Court determines that the life insurance is needed to secure the “support, education, maintenance, and general welfare of a party’s children”, then the Court has the authority under Sec. 503(g) to require life insurance even in the absence of an agreement. *In re Marriage of Schneider*, 343 Ill.App.3d 628, 798 N.E.2d 1242 (2nd Dist. 2003), *aff’d in part, rev’d on other grounds* 214 Ill.2d 152, 824 N.E.2d 177 (2005). However, imposing a requirement of life insurance is inappropriate in the absence of evidence that it is needed to protect the interests of the children and cannot be ordered beyond the need to secure support. The clause can only be used to secure the payment of child support. A court in a dissolution of marriage case does not have the power to order that a parent leave a certain amount of property to his child by will. *In re Marriage of Bush*, 191 Ill.App.3d 249, 262, 547 N.E.2d 590, 597 (1989) (“an unlawful court-ordered inheritance”); *In re Marriage of Rogliano*, 198 Ill.App.3d 404, 416, 555 N.E.2d 1114, 1121-22 (1990).

The vast majority of divorces are resolved through an MSA, not through a court mandated judgment. If the marriage is being terminated by an MSA, the express terms and the extent of Life Insurance Clause are subject to the negotiation of the parties. There are two primary functions for the life insurance: (1) to secure the payment of child support obligations; and (2) to provide an inheritance to benefit descendants. These two functions are not mutually exclusive. As with any contract, ascertaining the intention of the parties is the goal of construing a Life Insurance Clause. Their intention will be determined from the plain and ordinary meaning of the words.

Insurance clauses in MSAs are enforceable and will be enforced as they are written. The insurance provision creates an equitable right for the children to the policy benefits. That equitable right is superior to the rights of a subsequently named beneficiary. This concept is important. If the children did not have that superior equitable right, the policy proceeds could be paid to the later-named beneficiary before the children could act, since the named beneficiary also has a right to the proceeds under contract law. The children would then only have the right to make a claim in their late father’s estate. The father’s estate, however, may not have the money to pay the claim.

So you advise Bella that Bethany needs to first file a claim with the insurance company, including a copy of the MSA, and, if the insurance company does not honor the MSA, or if the proceeds have already been paid to Shirley, to file suit. If the policies have not yet been paid,

Bethany can file suit for declaratory judgment. If the proceeds have already been paid, then Bethany needs to file an action to impose a constructive trust over the proceeds. Mass Mutual or Allstate may want to file an interpleader action to be protected from having to pay the same money twice. Whether the suit is for declaratory judgment, to impose a constructive trust, or an interpleader, should make no difference to the enforceability of the Life Insurance Clause.

If Shirley has already opened Denny's Estate, the action can be filed as a supplementary proceeding to the Estate, although it can also be filed separately. If the insurance policy proceeds are not paid to Bethany, it may be wise for Bethany to file an alternative claim in Denny's Estate for the dollar value of the proceeds as a contract claim.

There will be several potential issues in the suit: (1) Whether Bethany is only entitled to the amount of the remaining child support obligation under the MSA; (2) Whether the \$250,000 insurance policy through work is a replacement for the \$100,000 work-related policy Denny had when the MSA was created; (3) Whether the \$1,000,000 policy is an additional policy uncovered by the Life Insurance Clause and to which Bethany has no claim; (4) Whether the residuary benefits for Bethany under Denny's Trust satisfy his obligations under the Life Insurance Clause; and (5) Whether Bella waived any of Bethany's rights by not following up and ascertaining Denny's compliance with the Life Insurance Clause.

Life Insurance Clauses often provide that the custodial spouse has the right to require the supporting spouse to provide proof of insurance or that the beneficiary has not been changed. This is a power of little value, since the ex must restart the war they just finished in order to find out if there is just cause to restart the war. Few exes are willing to do that, and those who do make the effort often learn that nothing is wrong. After a few years of checking into the insurance status and finding that it is unchanged, the ex may lose interest.

If the sole purpose of the insurance is to secure the payment of child support obligations, the MSA should say that and should provide that the amount of required insurance decreases over time. That does not mean that the ex-spouse cannot benefit their children to a greater extent if they so choose through additional policies or otherwise.

One theme which quickly becomes evident from the key cases is that the courts carefully scrutinize the actual language used by the parties in the Life Insurance Clause. There is no substitute for careful drafting. If the Clause is intended to be limited to the child's minor years or just to pay for child support obligations, the Clause needs to be clearly limited. In the absence of an express limitation, the courts will construe a Life Insurance Clause as benefiting a child long after the child is an adult.

C. Key Cases.

1. *Koenings v. First Nat. Bank and Trust Co.*, 145 Ill.App.3d 14, 495 N.E.2d 671 (2nd Dist., 1986). This is the seminal case in the Second District. MSA provided: **“INSURANCE. Husband has issued on his life certain policies of insurance and agrees to maintain such policies in full force and effect, pay all premiums when due and designate**

the children of the Parties as beneficiaries of such policies until such time as the youngest child reaches the age of 21 or completes college, whichever last occurs.”

At the time of divorce, H had life insurance worth \$85,000. H remarried and had another child. H changed beneficiaries to a trust for the benefit of 2nd Spouse and all children equally. At the time of H’s death, insurance was \$168,000. The trustee collected the policies before the children brought suit.

Children sought to impose a constructive trust over entire policy proceeds. 2nd Spouse argued that: (1) the purpose of insurance was security for child support and the amount exceeded the obligation; and (2) the MSA only required the amount of insurance at the time the MSA was signed, not the increase to \$168,000.

The court found that (1) the MSA, even if it was security, was an obligation which became due and vested upon H’s death, and so was a past-due child support that could not be modified after the death; and (2) the MSA created an equitable right to the policies, not in any particular amount, and that the insurance policies H had at death were replacements for the policies when the MSA was signed, so the MSA captured the larger amount. The Second District affirmed a constructive trust over the full amount paid on the policies.

2. *In re Schwass*, 126 Ill.App.3d 512, 467 N.E.2d 957 (2nd Dist. 1984). The MSA provided: **“That the said minor children be named as co-equal irrevocable beneficiaries on all existing policies in existence as of September 1, 1971 on the life of H and shall remain in force as such during the minority of said children....”**

When H died, he had been remarried, changed the beneficiary on all insurance to his 2nd spouse, had replaced one of the policies, and one of the children was over 18 years old. 2nd spouse argued that she had superior equitable right because she and H had bought a house and she had a mortgage and would have obtained additional insurance if she’d known about the Life Insurance Clause.

The court found that the new policy was a replacement and so imposed a constructive trust over all the insurance. Court also found that the word “minor” in the MSA meant that the child who had reached age 18 was not entitled to any benefit and had no equitable right to the policy. His younger sister got it all.

3. *In re Estate of Downey*, 293 Ill.App.3d 234, 687 N.E.2d 339, (4th Dist., 1997). There was no MSA, the Court ordered the following: **“That W and H will maintain life insurance policies on themselves and shall name the children of the parties as irrevocable beneficiaries until such time as the youngest child has reached his 18th birthday.”**

At the time of the divorce, H had an employer policy for \$55,000. Subsequent to the divorce, H purchased a policy for \$300,000, increased that to \$450,000 and named as the beneficiary his estate, which was to first pay Ex-W for any remaining child support obligations (\$9,000) and then be divided into shares of 1/3rd for Children and 2/3rds for 2nd Spouse. The amounts for Children were to be held in trust for their benefit until they became 21.

The court ruled that H had not breached his obligations under the judgment because he did maintain life insurance (no particular amount or standard was required) and that the judgment did not forbid making the beneficiary a trustee for the benefit of the Children. The trust was simply a conduit for the Children to receive the benefits at a more appropriate age.

4. *IDS Life Ins. Co. v. Sellards*, 173 Ill.App.3d 174, 527 N.E.2d 426 (1st Dist., 1988). The MSA provided: **“H shall keep in full force and effect the life insurance he presently has, with the two children as irrevocable beneficiaries thereunder, and further, he shall be responsible for all items of extraordinary and unusual medical, dental, hospital and orthodontic expenses incurred on behalf of the minor children.”**

H remarried and changed beneficiary of his life insurance to 3rd Spouse. The children were adults when H died. 3rd Spouse collected the insurance benefits, and the children, although then adults, sought a constructive trust. The court found that MSA was not ambiguous and required the insurance to be paid to children even though there was no support obligation remaining.

5. *Allen v. Allen*, 226 Ill.App.3d 576, 589 N.E.2d 1133 (2nd Dist., 1992). The MSA provided: **“H maintain in full force and effect all life insurance now carried by him with the main beneficiary of all such insurance being Child.”**

At the time of the MSA, the insurance was the basic form from H’s employer for \$10,000. H never changed the beneficiary to his son, but rather left Ex-W as the beneficiary. H did, however, make additional, optional insurance purchases through his employer. H remarried but did not change the beneficiary to 2nd Spouse. When H died, the insurance totaled \$80,000 and Child was an adult.

2nd Spouse argued that she should receive everything above \$10,000. The court ruled that Child was entitled to the basic life insurance of \$10,000, even though he was an adult and there was no remaining child support obligation. The court also ruled that since Ex-W was the named beneficiary, she, and not her own Child, was entitled to the additional \$70,000 insurance, even though the MSA had also included a general waiver of Ex-W’s rights in H’s property.

6. *McWhite v. Equitable Life Assur. Soc. of U.S.*, 141 Ill.App.3d 855, 490 N.E.2d 1310 (1st Dist., 1986). The MSA provided: **“The husband shall name the minor child of the parties as the irrevocable beneficiary in any and all life insurance policies maintained by his employer until said child reaches his majority or completes his college education, whichever event first occurs.”**

H remarried and changed his life insurance beneficiary designation to 2nd Spouse and the minor Child from the prior marriage in equal shares. H also purchased optional, additional life insurance through his employer, with the same beneficiary designation.

The court determined that the words “maintained by his employer” meant paid for by his employer, and held that the minor Child was only entitled to a constructive trust over the amount

of the policy for which the premiums were paid by the employer, but not to 2nd Spouse's ½ of the additional insurance which was the result of H's optional payments.

7. *Estate of Comiskey*, 125 Ill.App.3d 30, 465 N.E.2d 653 (1st Dist., 1984). The MSA provided that H was to: **“A. Name the two minor children of the parties as irrevocable beneficiaries of said policies during their minority under the same terms and conditions now existing and furnish proof to the wife that same has been done. B. Pay the premiums when they become due. C. Direct the duplicate premium notices and receipts be sent to the wife. D. Make no further loans against said policies other than what has already been made and exist against said policies. E. Do all other acts and execute all documents needed to keep those policies in full force and effect and to accomplish all matters set forth above.”** The specific policies were identified by policy number and totaled \$55,000.

H did not change the beneficiary to Children, but, rather, changed the beneficiary to 2nd Spouse. Upon his death, 2nd Spouse argued that only the amount needed to pay the child support obligation was subject to the provision and that Ex-W had waived here rights to enforce the Life Insurance Clause by not timely checking on H's compliance.

The court found that the language was clear and unambiguous and did not limit Children to only amounts needed for child support. The court also found that, regardless of whether Ex-W timely enforced the Life Insurance Clause, any failing by Ex-W could not be used to bar minor Child's claim. The court also found that because one Child had become an adult while the other Child was still a minor, and since the Life Insurance Clause only required H to name Children during their minority, H only owed half of the life insurance to remaining minor Child. Thus, 2nd Spouse could, as named beneficiary, take the other half. Adult Child received nothing.

D. Model For Life Insurance Clause In A Marital Settlement Agreement:

“Insurance. (A) Until the Husband has provided all child support obligations under this Agreement, the husband shall maintain insurance on his life in amounts sufficient to pay said obligations, but no less than \$_____. The beneficiary of said life insurance policies shall be _____ [“the Wife”; or, “Bank & Trust Company”; or, “Husband's brother”] as trustee for the benefit of the children.

(B) Upon the death of the Husband and the funding of the trust, the trustee shall only make payments to fulfill the Husband's child support obligations. Upon the youngest child reaching the age of 22 years, the trustee shall distribute the trust to the parties' children in equal shares per stirpes. The trustee will have those powers and discretions as are generally provided to trustees under Illinois law.

(C) The Husband shall notify the Wife if he does not pay any premium or perform any other obligation to maintain said life insurance policies, or if he obtains replacement policies. The Wife may request proof of the insurance from time-to-time, but no more often than annually. The Husband shall not be required to notify the Wife if he obtains additional insurance which is not required under this Agreement. Upon the youngest child reaching the age of 22, this section shall terminate and Husband shall be under no obligation to maintain any life insurance.”