A FAIR PRESUMPTION: WHY FLORIDA NEEDS A DIVORCE REVOCATION STATUTE FOR BENEFICIARY-DESIGNATED NONPROBATE ASSETS

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I. INTRODUCTION

Life insurance and other nonprobate assets such as annuities, pay-on-death accounts, and retirement planning accounts have become increasingly popular as estate planning tools.[1] In 2004, Americans purchased $3.1 trillion in new life insurance coverage, a ten percent increase from just ten years before.[2] Purchases made by Floridians accounted for nearly $154 million of this national total.[3] At the end of 2004, there was $17.5 trillion in life insurance policy coverage in the United States.[4] However, it is likely that some of those policies will not provide security for the individuals for whom they were intended, especially if the policyholder resides in Florida. An unfortunate but familiar scenario occurs when a divorced individual fails to change the designated

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1. *See* Robert J. Bruss, *Here's How to Avoid Property Probate: Think Ahead to Eliminate the Steep Fees and the Squabbling Involved in Distributing an Estate*, Chi. Trib. 5 (May 11, 1995) (discussing the benefits of probate-avoidance tools such as joint tenancy, life insurance, and living trusts); Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 Quinnipiac Prob. L.J. 83, 91 (2004) (describing the various types of nonprobate property); Dennis M. Patrick, *Living Trusts: Snake Oil or Better than Sliced Bread?* 27 Wm. Mitchell L. Rev. 1083 (2000) (discussing probate avoidance, and the benefits and disadvantages of utilizing living trusts).

2. Am. Council of Life Insurers, *The 2005 Life Insurers Fact Book* 81 (Am. Council of Life Insurers 2005) (available at http://www.acli.com/NR/rdonlyres/esxaymx75vvrq2ivom3bbbgutumontd2y3rbmkzfs7vpxjqvvwwh4x4ut4iftzqrbyr6yauzbeenln/FBCH%2b14%2bAll%2bw%2bApp%2b212pp%2b.pdf).

3. *Id*.

4. *Id*.

beneficiary on his or her life insurance policy or other contract-based estate planning tool, and the ex-spouse receives the insurance proceeds upon that individual's death.[5] Whether due to oversight,[6] mistake,[7] or poor comprehension of the way contracts such as life insurance policies operate, the outcome is especially regrettable when the decedent policyholder leaves behind minor children or a financially struggling family.

An example of just such a situation was presented in *Lynch v. Bogenrief*.[8] Lynch was a firefighter for the city of Des Moines, Iowa.[9] While married to his first wife, Pauline, Lynch designated her as the beneficiary of his death benefits through the city's fire administration.[10] Five years after the couple's divorce, Lynch remarried and eventually had two children with his new wife, Marcene.[11] Upon Lynch's death, the fire administration was uncertain to whom the benefits should be paid: Lynch's estate, or Pauline as the designated beneficiary.[12] The Iowa Supreme Court held that divorce does not change a designated beneficiary's status, and as such, Pauline was entitled to the proceeds.[13] The Court acknowledged that Lynch probably did not intend to confer the benefits on Pauline, but remained resolute that Lynch's failure to comply

5. Domenico Zaino, Jr., Student Author, *The Practical Effect of Extending Revocation by Divorce Statutes to Life Insurance*, 2 Conn. Ins. L.J. 213, 214 (1996); *see* Kristen M. Lynch, *When Good IRAs Go Bad: Common Pre- and Post-Mortem IRA Problems with Uncommonly Bad Results*, 79 Fla. B.J. 44 (Dec. 2005) (discussing the consequences of an individual's failure to change the beneficiary of an individual retirement account plan); Kaja Whitehouse, *Beneficiary Designation Form Is Key to Passing on Your Assets*, Wall St. J. D3 (June 4, 2002) (explaining how to properly designate retirement accounts).

6. *See e.g. Lynch v. Bogenrief*, 237 N.W.2d 793, 799 (Iowa 1976) (discussing deceased's failure to "legally implement" the change of beneficiary of his death benefits, which ultimately went to his ex-wife).

7. *See e.g. Kent v. Holmes*, 139 S.W.3d 120, 126–127 (Tex. App. 6th Dist. 2004) (holding that decedent who designated son and daughter-in-law as beneficiaries of her retirement benefits failed to make a correct designation, as only one beneficiary was permitted under the policy).

8. 237 N.W.2d 793 (Iowa 1976).

9. *Id*. at 794.

10. *Id*.

11. *Id*.

12. *Id*. The administration resolved the issue by determining that it should pay the proceeds to Lynch's estate unless Pauline was determined to be the rightful beneficiary as a matter of law. *Id*. at 794–795.

13. *Id*. at 797, 799.

with formal beneficiary-change requirements barred Marcene from receiving the proceeds.[14]

While some jurisdictions have enacted legislation to avoid the result in *Lynch*, Florida has not.[15] This Article will propose a Florida divorce revocation statute for nonprobate assets such as life insurance policies, annuities, IRAs and retirement-planning accounts, pay-on-death accounts, and any other type of contract-based asset designating an ex-spouse as beneficiary. By automatically revoking nonprobate asset beneficiary designations upon divorce, such a statute will more accurately enforce the deceased policyholder's intent[16] and avoid seemingly inequitable results when cases similar to *Lynch* are adjudicated by Florida courts.

Part II of this Article will discuss the history of divorce revocation in general, as well as the Uniform Probate Code (UPC) revocation statutes with regard to probate and nonprobate property. Part III will examine the various approaches taken by jurisdictions that have enacted divorce revocation statutes for nonprobate assets. Part IV will discuss the various issues that have arisen in response to nonprobate revocation, including federal preemption and constitutional concerns. Part V will discuss Florida's historical approach to divorce revocation in general, as well as concerns of particular importance to the Florida Legislature and the judiciary. Finally, Part VI will suggest that the Florida Legislature create a revocation statute for nonprobate property, and will provide specific solutions to the concerns addressed in Part V. This Part will also discuss the practical approaches and issues involved with creating such a statute.

14. *Id*. at 799. The Court expressed its opinion that it would be beneficial for the Iowa Legislature to address the issue by creating a statute. *Id*. Thus, there was a recognized need for revocation statutes more than thirty years ago.

15. For a discussion of states with divorce revocation statutes, consult *infra* Part III and Appendix A.

16. Florida courts have recognized that a policyholder's intent is necessarily important when examining any insurance contract. *See e.g. Am. Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d Dist. App. 2006) (reiterating that "[i]n interpreting an insurance contract we must consider the intent and reasonable expectations of the parties in entering into the agreement"), *cert. denied*, 940 So. 2d 1125 (Fla. 2006) (quoting *Commerce Natl. Bank in Lake Worth v. Safeco Ins. Co. of Am.*, 252 So. 2d 248, 252 (Fla. 4th Dist. App. 1971)).

II. REVOCATION AND THE UPC

Prior to the 1960s, courts generally refused to revoke those provisions of a will devising property to a former spouse, even if evidence existed that the testator did not intend to devise his or her property to that individual.[17] However, state legislators "began recognizing that divorce constituted such a detrimental breakdown in a relationship that automatic alterations to a divorced spouse's testamentary plan were needed."[18] Individuals' tendency towards recalcitrance in creating or revising their wills also prompted the reform.[19] The National Conference of Commissioners on Uniform State Laws (NCCUSL) took notice of these societal trends, and began incorporating relevant language into the model probate code it was drafting at that time.[20] UPC Section 2-508 was promulgated in 1969, and essentially provides that, upon divorce, any provision of a will that benefits a former spouse is revoked.[21]

UPC Section 2-508 catalyzed the creation of probate revocation statutes in many jurisdictions.[22] It provides that any disposition of property, power of appointment, or fiduciary nomination of a spouse is revoked upon divorce.[23] While some states have limited their revocation statutes so that they do not include powers of

17. *See In re Est. of Forrest*, 706 N.E.2d 1043, 1045 (Ill. App. 3d Dist. 1999) (explaining why courts refused to revoke marriage provisions in wills prior to 1957).

18. *Id*. (citing *Reeves v. Reeves*, 284 Cal. Rptr. 650 (Cal. App. 3d Dist. 1991)).

19. *Id*. (citing *In re Est. of Knospe*, 165 Misc. 2d 45 (Surrogs. Ct. N.Y. 1995)).

20. *See* Unif. L. Commrs., Natl. Conf. Commrs. Unif. St. Ls., *A Few Facts about the Uniform Probate Code*, http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upc.asp (accessed Dec. 28, 2006) (indicating the completion year of the Uniform Probate Code and years of substantial revisions) [hereinafter *UPC Facts*]; *In re Est. of Graef*, 368 N.W.2d 633, 640 (Wis. 1985) (discussing the history of UPC Section 2-508 and Wisconsin's subsequent adoption of probate revocation).

21. Unif. Prob. Code § 2-508 (1969), 8 U.L.A. 154 (1998); Gary, *supra* n. 1, at 85.

22. *See* Gary, *supra* n. 1 at 85 (noting the differences in states' revocation statutes while recognizing that the UPC provides a general example). Virtually every jurisdiction has enacted a revocation statute substantively similar to UPC Section 2-508. *E.g.* Ark. Code Ann. § 28-25-109 (Lexis 2006); Cal. Prob. Code Ann. § 6122 (West 2006); Ind. Code Ann. § 29-1-5-8 (West 2006); Mo. Rev. Stat. Ann. § 474.420 (West 2006); Ohio Rev. Code Ann. § 2107.33 (Lexis 2006); 20 Pa. Consol. Stat. Ann. § 2507 (West 2006); Tex. Prob. Code Ann. § 69 (2006). However, only a minority of jurisdictions have completely adopted the UPC. *See UPC Facts*, *supra* n. 20 (listing the states that have adopted the UPC).

23. Unif. Prob. Code § 2-508, 8 U.L.A. 154. The UPC defines a disposition or appointment of property as "a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument." Unif. Prob. Code § 2-804(a)(1) (1990), 8 U.L.A. 217 (Supp. 1998).

appointment or fiduciary powers, all revocation statutes based on Section 2-508 apply to probate property exclusively.[24]

Eventually, some states began extending revocation to certain types of will substitutes.[25] For example, Florida has a revocation statute exclusively for revocable trusts.[26] These jurisdictions felt the rationale for automatic revocation was equally applicable to some types of will substitutes as to wills themselves.[27]

In one case, the Massachusetts Supreme Court applied the theory of implied revocation to a revocable trust created through a pour-over will.[28] Because the testator created the trust on the same day she executed the will, the two estate-planning measures were "integrally related components of a single testamentary scheme."[29] However, the Court noted that these actions did not sufficiently incorporate the trust by reference into the will.[30] Instead, the Court based its decision on the conclusion that it would be inconsistent and illogical to apply implied revocation to wills, but not to revocable trusts.[31]

It was this same rationale that ultimately prompted NCCUSL to enact a revocation statute for nonprobate assets.[32] In previous years, a majority of Americans allocated their assets so

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24. *E.g.* Ala. Code § 43-8-137 (West 2006); Cal. Prob. Code Ann. § 6122; Fla. Stat. § 732.507 (2006); Ohio Rev. Code Ann. § 2107.33 (all revoking any provision of a will that benefits a former spouse after dissolution of marriage); *see Restatement (Third) of Property* § 4.1 (2006) (explaining that divorce is a change of circumstance that presumptively revokes any provision in a testator's will in favor of a former spouse).

25. *E.g.* 35/1 Ill. Comp. Stat. Ann. § 760 (West 2006); Ind. Code Ann. § 30-4-2-15 (West 2006); Iowa Code Ann. § 633A.3107 (West 2006); Mo. Rev. Stat. Ann. § 456.1-112 (West 2006); Nev. Rev. Stat. Ann. § 163.565 (Lexis 2006); Or. Rev. Stat. Ann. § 130.535 (2006); S.C. Code Ann. § 62-7-607 (2005).

26. Fla. Stat. § 736.1105 (2006). The Florida Legislature recently enacted the state's new trust code, which replaced the old statutory trust law. Fla. Stat. § 737.106. For additional reading about the new Florida Trust Code, see David F. Powell, *The New Florida Trust Code*, *Part 1*, 80 Fla. B.J. 24 (July/Aug. 2006).

27. *See* Gary, *supra* n. 1, at 98–99 (clarifying why *inter vivos* trusts perform like a will).

28. *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985).

29. *Id*. at 1092.

30. *Id*. at 1093.

31. *Id*.

32. Unif. Prob. Code gen. cmt. (1991), 8 U.L.A. 93 (1998); s*ee* Unif. L. Commrs., Natl. Conf. Commrs. Unif. St. Ls., *Uniform Probate Code: A Brief Overview*, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upcabo.asp (accessed Dec. 28, 2006) (discussing the revisions of UPC Article II to reflect public expectations).

that they fell into the category of probate property.[33] However, this began to change in the latter half of the twentieth century[34] as the "expense, delay, [and] clumsiness" of probate systems made probate-avoidance tools particularly appealing.[35] Thus, many people began investing in nonprobate assets, which include:

> (1) joint tenancies and tenancies by the entirety in real property; (2) joint tenancies in bank and stock accounts; (3) bank and stock accounts with pay-on-death or transfer-on-death provisions; (4) insurance policies; (5) retirement plans; and (6) revocable inter vivos trusts.[36]

The UPC was amended in 1990 to reflect societal changes, particularly the rapidly increasing use of will substitutes, the evolution of domestic relationships,[37] and the decline of formalism in private law.[38]

UPC Section 2-804 provides that any disposition of property in a governing instrument,[39] or any provision in such an instrument giving a power of appointment or nomination as any type of

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33. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1108, 1116 (1984) (discussing the evolving public utilization of probate courts).

34. *Id.*; *see* Br. of Amicus Curiae Natl. College of Prob. JJ. in Support of Resp., *Marshall v. Marshall*, 545 U.S. 1165 (2005) (noting that "a relatively small portion of decedents' assets pass through the traditional probate process").

35. Langbein, *supra* n. 33, at 1116.

36. Gary, *supra* n. 1, at 91.

37. *See e.g.* Ann Laquer Estin, *Unmarried Partners and the Legacy of* Marvin v. Marvin*: Ordinary Cohabitation*, 76 Notre Dame L. Rev. 1381, 1384 (2001) (discussing the "social and legal norms of ordinary cohabitation" in the aftermath of a California landmark case); Alfred M. Falk, Pennington *and* Vasquez*: A Look at Recent Meretricious Relationship Cases and Their Impact on Estate Planning*, 30 Real Prop., Prob. & Trust (Newsltr. of Wash. B. Assn.) 4 (Spring 2003) (discussing the proliferation of nontraditional living arrangements, particularly the cohabitation of unmarried men and women); Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 Seattle U. L. Rev. 75, 77 (2003) (discussing the application of various recognized ethical theories of representation to nontraditional couples); Mark Strasser, *A Small Step Forward: The ALI Domestic Partners Recommendation*, 2001 BYU L. Rev. 1135, 1135 (2001) (discussing the American Law Institute's proposal regarding the treatment of unmarried individuals as qualified "domestic partners").

38. Unif. Prob. Code art. 2, prefatory n. (1990), 8 U.L.A. 75–76 (1998); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. Pa. L. Rev. 1033, 1060–1061 (1994).

39. A "governing instrument" under the UPC's divorce revocation statute refers to "a[n] . . . instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse." Unif. Prob. Code § 2-804(a)(4).

fiduciary representative to a former spouse, is revoked upon divorce or annulment.[40] The provision also transforms any joint tenancies with right of survivorship between the ex-spouses to tenancies in common,[41] revives the nominations or appointments if the divorce is subsequently nullified,[42] and protects payors and third parties from liability for wrongful disbursements.[43] Thus, the statute covers a wide range of marital dispositions and also contemplates potential uncertainty in marital relationships.

III. TAKING THE LEAD: A SAMPLING OF STATES THAT HAVE ENACTED DIVORCE REVOCATION STATUTES

Several states have already enacted divorce revocation statutes that apply to nonprobate property. As discussed below, twelve of these state statutes closely mirror Section 2-804, and essentially adopt the UPC's language.[44] Others differ significantly, mainly by limiting the types of disposition revoked upon divorce. Meanwhile, even in jurisdictions that have not enacted statutes extending divorce revocation to nonprobate assets, courts have occasionally construed certain nonprobate planning tools so as to avoid strict compliance with traditional change-of-beneficiary requirements.

A. Revocation Statutes Based on the UPC

Some states opted to enact statutes the same as, or substantially similar to, Section 2-804.[45] For example, Colorado's revocation statute is virtually identical.[46] The Colorado General Assem-

40. *Id.* at § 2-804(b)(1).

41. *Id.* at § 2-804(b)(2).

42. *Id.* at § 2-804(d).

43. *Id.* at § 2-804(g)(1). Third parties are protected from liability for a wrongful disbursement if the disbursement is made in "good faith reliance on the validity of the governing instrument." *Id.*

44. Alaska Stat. § 13.12.804 (Lexis 2006); Ariz. Rev. Stat. Ann. § 14-2804 (West 2006); Colo. Rev. Stat. § 15-11-804 (West 2006); Haw. Rev. Stat. Ann. § 560:2-804 (Lexis 2006); Mich. Comp. Laws Ann. § 700.2807 (West 2006); Minn. Stat. Ann. § 524.2-804 (West 2006); Mont. Code Ann. § 72-2-814 (2006); N.J. Stat. Ann. § 3B:3-14 (West 2006); N.M. Stat. Ann. § 45-2-804 (West 2006); N.D. Cent. Code § 30.1-10-04 (2006); S.D. Codified Laws § 29A-2-804 (2006); Utah Code Ann. § 75-2-804 (Lexis 2006).

45. *Infra* app. B (providing the text of the Uniform Probate Code Section 2-804).

46. Colo. Rev. Stat. § 15-11-804; *see In re Est. of DeWitt*, 54 P.3d 849, 852 (Colo. 2002) (discussing the General Assembly's enactment of the statute, which is based on UPC Sec-

bly recognized that the failure of a divorced policyholder to change an ex-spouse's beneficiary designation "more likely than not represents inattention."[47] As such, the Colorado legislature chose to enact a statute inclusive of all of the UPC's recommendations.[48]

Utah's revocation statute is also identical to Section 2-804.[49] Prior to 1998, Utah followed the majority rule that divorce does not affect an ex-spouse's beneficiary status.[50] However, the Utah Legislature amended the state's probate code to reflect the 1993 changes to the UPC;[51] thereby, also acknowledging shifting attitudes and desires with regard to nonprobate assets.[52]

In 1990, the Wisconsin Legislature made significant changes to its probate code.[53] One commentator noted that Wisconsin adopted certain amendments to its code with two major objectives: (1) to implement transferors' intent, and (2) to reduce fraud and coercion.[54] Consideration of a decedent's intent, along with recognition of changing trends in marriage and divorce, prompted the Legislature to extend its revocation statute to nonprobate assets.[55] Wisconsin's revocation statute is one of only two state stat-

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tion 2-804).

47. *DeWitt*, 54 P.3d at 852.

48. *Id.*

49. Utah Code Ann. § 75-2-804.

50. *Stillman v. Teachers Ins. & Annuity Assn. College Retirement Equities Fund*, 343 F.3d 1311, 1314 (10th Cir. 2003); s*ee generally* Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop., Prob. & Trust J. 683 (1992) (discussing the UPC amendments and subsequent state legislative enactments).

51. Terry S. Kogan & Michael F. Thomson, *Piercing the Façade of Utah's "Improved" Elective Share Statute*, 1999 Utah L. Rev. 677, 677.

52. *See Stillman*, 343 F.3d at 1314 (stating that such provisions recognize that property owners would likely have revoked beneficiary designations had they contemplated it).

53. Wis. Assembly 645 1997–1998 Reg. Sess. (Apr. 27, 1998); *see* Howard S. Erlanger, *Wisconsin's New Probate Code*, 71 Wis. Law. 6 (Oct. 1998) (discussing Wisconsin's amended probate code).

54. Erlanger, *supra* n. 53, at 7. Erlanger suggests that disputes regarding nonprobate transfers generally focus on the transferor's intent and not on "whether formalities of transfer have been met." *Id.* This is a significantly different position from that of the Florida judiciary, which has noted in many cases the fatality of noncompliance with the formalities of change of beneficiaries. *See Cooper v. Muccitelli*, 682 So. 2d 77, 79 (Fla. 1996) (explaining that the plain language of the insurance policy controlled, and that the policy contained an express procedure for changing a beneficiary).

55. Erlanger, *supra* n. 53, at 6; *see* Barbara S. Hughes, *New Probate Code Affects Estate Planning at Divorce*, 72 Wis. Law. 3 (Mar. 1999) (discussing the changes in Wisconsin's probate code and the need for individuals to evaluate their estate plans in divorce

utes that expressly permit the use of extrinsic evidence to ascertain the decedent policyholder's intent.[56]

Arizona's revocation statute also substantially resembles Section 2-804, so it is assumed that the Legislature intended to adopt the UPC's construction.[57] One commentator cited the Arizona Legislature's longstanding preference to align with the UPC as a major reason for the "sweeping" changes in its probate code, particularly in the area of revocation of nonprobate assets.[58]

The Washington Legislature enacted its revocation statute in response to a Washington Supreme Court decision.[59] "By choosing this mechanism, the legislators demonstrated their understanding that life insurance and other nonprobate assets are widely used as essential parts of estate planning and should be treated accordingly."[60]

B. Revocation Statutes That Differ from the UPC

Other revocation statutes differ from the UPC—some substantially and others minimally. Ohio's divorce revocation statute, for example, revokes an ex-spouse's beneficiary status in much the same way as other revocation statutes operate.[61] However, there are some differences. For one, the statute is found in Ohio's commercial code, not within its probate statutes.[62] The language also differs significantly: rather than using the UPC's broad "governing instrument" to define the assets that are revocable upon

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proceedings).

56. Wis. Stat. Ann. § 854.15(5)(f) (West 2006); *see infra* n. 79 and accompanying text (discussing similar provisions in California's statute).

57. *In re Est. of Dobert*, 963 P.2d 327, 331 (Ariz. App. 1st Div. 1998).

58. Robert B. Fleming, *The Top Ten Changes in the New Uniform Probate Code*, Ariz. Atty. 32, 35–36 (Aug./Sept. 1994).

59. *Mearns v. Scharbach*, 12 P.3d 1048, 1052 (Wash. App. Div. 3 2000) (discussing the history of the revocation statute). The Washington State Bar Association prompted the enactment of the revocation statute, reasoning that the result in *Aetna Life Insurance Co. v. Wadsworth*, 689 P.2d 46 (Wash. 1984), contradicted most divorcing couples' intent. *Mearns*, 12 P.3d at 1052.

60. *Id*. at 1053.

61. Ohio Rev. Code Ann. § 1339.63 (Lexis 2006). Ohio's statute is similar to those in other jurisdictions in that it treats the surviving ex-spouse as if he or she had predeceased the policyholder. *Id*.

62. *Id*. The statute appears in Ohio's Uniform Prudent Investor Act, which contains other statutes outlining trustees' duties and otherwise establishing or restricting the liability of those acting in a fiduciary capacity. Ohio Rev. Code Ann. §§ 1339.52–1339.69.

divorce, Ohio specified that revocation is applicable to beneficiaries of "a life insurance policy, an annuity, a payable on death account, an individual retirement plan, an employer death benefit plan, or another right to death benefits arising under a contract."[63] The Ohio Legislature also chose to alter the UPC's liability provision by substituting "third parties or payors" with more specific definitions such as agent, banker, custodian, life insurance company, and trustee.[64] In effect, however, the statute's language, which closely resembles that of the UPC's, indicates that the Ohio Legislature was prompted to create a revocation statute for largely the same reasons as other jurisdictions that modeled their statutes after the UPC.[65]

Pennsylvania has a brief statute that essentially provides for the revocation of any beneficiary designation "of a life insurance policy, annuity contract, pension or profit-sharing plan or other contractual arrangement."[66] The statute does not apply to powers of appointment. It is conceptually based on the state's will revocation statute,[67] but is drafted so that if the spouses execute a settlement agreement retaining beneficiary rights, the settlement agreement is the prevailing document.[68] An interesting aspect of Pennsylvania's statute is that it provides a right for those who are correctly entitled to benefits or account proceeds to pursue such funds from wrongful beneficiaries.[69] The statutory language creates an inference that an individual who believes he is, or in fact is, the rightful beneficiary, will succeed in an action to recover the insurance or account proceeds.

63. Ohio Rev. Code Ann. § 1339.63(A)(1).

64. The above-referenced list is not exhaustive. Ohio Rev. Code Ann. § 1339.63(C).

65. "By enacting [the revocation statute], the General Assembly has created an equitable presumption to ameliorate the perceived unfairness of prior Ohio case law . . . that allowed ex-spouses to reap the benefits of insurance proceeds where the deceased failed to change the beneficiary designation . . . ." *Aetna Life Ins. Co. v. Schilling*, 616 N.E.2d 893, 897 (Ohio 1993) (Sweeney, J., dissenting).

66. 20 Pa. Consol. Stat. Ann. § 6111.2 (West 2006).

67. *Id.* at § 2507(3).

68. Pa. Jt. St. Govt. Commn. Task Force & Advisory Comm. on Decedents' Ests. Ls., Containing Recommendations Amending the Probate, Estates and Fiduciaries Code and the Inheritance and Estate Tax Act with Comments 2, 18–19 (1991).

69. 20 Pa. Consol. Stat. Ann. § 6111.2. The statute reads: "Any former spouse to whom payment is made shall be answerable to anyone prejudiced by the payment." *Id.*

As with Ohio, Texas' revocation statute also appears outside its probate code.[70] It states that an ex-spouse may not receive the benefit of a life insurance policy unless the policyholder re-designates him or her as beneficiary following a divorce.[71] It also has a revocation statute applying to "retirement benefit[s] or other financial plan[s]."[72] Texas addresses insurer liability by providing that an insurer is only liable for a wrongful payout if: (1) before disbursing the proceeds, it receives written notice from an interested person that the beneficiary is wrong, and (2) it does not interplead and deposit the proceeds into the court registry.[73]

It appears that the California Law Revision Commission at one time considered the enactment of a statute combining revocation of both nonprobate assets and joint tenancies.[74] The Commission supported the general principle of nonprobate revocation and issued recommendations with regard to how the statute would affect other provisions of California's probate code.[75] Ultimately, however, the California Legislature enacted two separate statutes for revocation of joint tenancy[76] and nonprobate transfers.[77] Despite utilizing the UPC language in the preliminary drafting stages of the statutes, the Legislature ultimately chose language that is not substantially similar.[78] Probably the most distinctive feature of California's nonprobate revocation statute is that it provides that a beneficiary designation is not revoked if there is clear

70. Tex. Fam. Code Ann. § 9.301(a)(1)–(2) (2006).

71. *Id.* The statute, titled "Pre-Decree Designation of Ex-Spouse as Beneficiary of Life Insurance," provides that a former spouse's beneficiary status is revoked upon divorce unless the divorce decree redesignates him or her as such, or the policyholder redesignates him or her according to the policy terms after the divorce. *Id.*

72. *Id.* at § 9.302.

73. *Id.* at § 9.301.

74. Cal. L. Revision Commn., *Minutes of Meeting* (Sacramento, Cal., Oct. 9, 1997) (available at http://www.clrc.ca.gov/pub/Minutes/Minutes_9710.pdf).

75. *Id.* Specifically, the Commission determined that a nonprobate revocation statute should not: (1) affect the designation of a relative of a former spouse as beneficiary; (2) unconstitutionally impair contractual obligations; or (3) be applied retroactively. *Id.* The Commission had previously analyzed UPC Section 2-804 while evaluating whether to apply revocation to other "revocable spousal dispositions," including joint tenancies. Cal. L. Revision Commn., Memo 97-18, *Severance of Joint Tenancy by Dissolution of Marriage: Comments on Tentative Recommendation* 2 (Apr. 21, 1997) (available at http://www.clrc.ca.gov/pub/1997/M97-18.pdf).

76. Cal. Prob. Code Ann. § 5601.

77. *Id.* at § 5600.

78. *Id.*

and convincing evidence that the decedent intended to keep his or her ex-spouse as the beneficiary.[79]

C. Judicial Interpretation to Avoid Strict Compliance with Change-of-Beneficiary Requirements

Some jurisdictions have utilized other methods of circumventing strict change-of-beneficiary requirements. For example, several states have taken the position that a property settlement agreement incorporated into a dissolution decree may revoke a beneficiary's claim to any policy or benefit held in an ex-spouse's name.[80]

In *Pinkard v. Confederation Life Insurance Co.*,[81] the decedent and his wife, Pinkard, divorced and executed a property settlement agreement, which was incorporated into the dissolution decree.[82] The settlement provided that the decedent was entitled to all pensions, retirement accounts, and workers' compensation stemming from his employment.[83] Upon the decedent's death, Pinkard tried to claim the remainder of his annuity benefits.[84] The trial court awarded the annuity payout to the decedent's estate instead, and the Nebraska Supreme Court affirmed.[85] The Court reasoned that, "[i]f the dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect."[86] This is not the majority rule, however: most jurisdictions have established that a release in a property settlement agreement is not sufficient to override specific language designating an ex-spouse as a beneficiary.[87]

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79. *Id.* at § 5600(b)(2). Wisconsin's statute also contains a similar provision. *Supra* n. 56 and accompanying text.

80. *E.g. Est. of Keeton v. Cherry*, 728 S.W.2d 694 (Mo. App. W. Dist. 1987); *Vasconi v. Guardian Life Ins. Co. of Am.*, 590 A.2d 1161 (N.J. 1991); *Rushton v. Lott*, 499 S.E.2d 222 (S.C. App. 1998); *McDonald v. McDonald*, 632 S.W.2d 636 (Tex. App. 5th Dist. 1982).

81. *Pinkard v. Confederation Life Ins. Co.,* 647 N.W.2d 85 (Neb. 2002).

82. *Id.* at 86.

83. *Id.*

84. *Id.* at 87.

85. *Id.* at 87, 90.

86. *Id.* at 89.

87. *E.g. Waller v. Pope*, 715 So. 2d 958 (Fla. 2d Dist. App. 1998) (holding that "a general release clause in a property settlement agreement [does] not control over an ex-spouse's beneficiary designation in a life insurance policy"); *Aetna Life Ins. Co. v. White*, 242 So. 2d 771 (Fla. 4th Dist. App. 1970) (holding that general "intention" clauses con-

Other courts have ruled that an "affirmative act" taken by the decedent that indicates an intent to change a beneficiary is sufficient.[88] Examples of affirmative acts include a policyholder's handwritten change-of-beneficiary request sent to the insurance company,[89] a testator's change of beneficiary of an IRA in his will but not on the actual policy,[90] and an assignment of a life insurance policy to a bank as collateral.[91] These examples, however, are not exhaustive.

A concept that may seem similar is when a policyholder acts with the intent to change a beneficiary, but does not actually complete the change. In one Indiana case, the insured went to his insurer's regional office to complete a change-of-beneficiary form and, within one hour, returned to his home and committed suicide.[92] Unfortunately, his policy mandated that a change of beneficiary took effect when the request was "received at its home office."[93] However, the reviewing appellate court ruled, as have courts in other jurisdictions, that the policyholder did effect a change in beneficiary because he "substantially complied" with the requirements of the policy.[94] The compliance with formal re-

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tained in a settlement agreement are not to be construed as a renunciation of expectancy to insurance policy not dealt with by the agreement); *Cincinnati Life Ins. Co. v. Palmer*, 94 P.3d 729 (Kan. App. 2004) (holding that absent a specific relinquishment to the benefit of a life insurance policy in a divorce decree, Kansas law requires that a beneficiary designation remain undisturbed); *Bruce v. Bruce*, 877 P.2d 999 (Mont. 1994) (holding that an ex-wife remained the beneficiary to an IRA mentioned in a settlement agreement because it did not specifically relinquish her interest as beneficiary); *Eschler v. Eschler*, 849 P.2d 196 (Mont. 1993) (holding that a mutual release in a divorcing couple's property settlement agreement did not divest an ex-wife's right to collect proceeds from her ex-husband's policy); *Girard v. Pardun*, 318 N.W.2d 137 (S.D. 1982) (holding that where a settlement agreement did not specifically relinquish an ex-wife's interest in her ex-husband's life insurance policy, the ex-wife remained the beneficiary).

88. *See e.g. Aetna Life Ins. Co. v. Sterling*, 224 N.Y.S.2d 146, 147 (N.Y. App. Div. 1st Dept. 1962) (indicating "[t]here must be an act or acts designed for the purpose of making the change [in the beneficiary] . . .").

89. *Lopez v. Mass. Mut. Life Ins. Co.*, 566 N.Y.S.2d 359, 360 (N.Y. App. Div. 2d Dept. 1991).

90. *In re Trigoboff*, 175 Misc. 2d 370, 374–375 (Surrogs. Ct. N.Y. Co. 1998); *In re Morse*, 150 Misc. 2d 415, 418 (Surrogs. Ct. N.Y. Co. 1991).

91. *Merchants' Bank v. Garrard*, 124 S.E. 715, 718 (Ga. 1924). "Such an assignment was, in effect, a substitution of a beneficiary." *Id*.

92. *Quinn v. Quinn*, 498 N.E.2d 1312, 1312 (Ind. App. 1st Dist. 1986).

93. *Id*.

94. *Id*. at 1314; *see Martinez v. Saez*, 650 So. 2d 668, 671 (Fla. 3d Dist. App. 1995) (holding that a policyholder who completed and signed a change-of-beneficiary form that was never mailed to the insurer's headquarters effectively changed the policy's benefici-

quirements is what distinguishes these cases from the "affirmative act" cases.

While these examples demonstrate how various states have attempted to address the effect of divorce on nonprobate assets, other states, including Florida, still abide by the old rule that divorce does not alter a contract-based asset. By continuing this hard-line approach, these jurisdictions all too often ignore the likely intent of deceased policyholders by awarding proceeds to listed beneficiaries, thereby leaving surviving spouses and dependent children empty handed.

IV. ISSUES WITH REVOCATION STATUTES

Automatic revocation of a nonprobate asset implicates other legal concerns as well. Potential federal preemption[95] and constitutional contract rights are two issues that have arisen in states that have divorce revocation statutes.

A. Federal Preemption

The Employee Retirement Income Security Act of 1974 (ERISA) contains a preemption provision that applies to any state law that "relates to" any employee benefit plan covered by ERISA.[96] In *Egelhoff v. Egelhoff*,[97] the United States Supreme Court found that ERISA preempted a Washington revocation statute that applied to nonprobate transfers.[98] The policyholder in *Egelhoff* had life insurance and a pension plan through his em-

ary); *Adams v. Jefferson-Pilot Life Ins. Co.*, 558 S.E.2d 504, 508 (N.C. App. 2002) (holding that insured effectively changed his beneficiary designation because mailing it to the insurer, which he failed to do, was a "ministerial act"); *but see Tips v. Sec. Life & Accident Co.*, 191 S.W.2d 470, 471 (Tex. 1945) (holding that the deceased insured did not effect a change of beneficiary despite completing change-of-beneficiary form because he failed to send it to the insurer before his death, thereby not "substantially comply[ing]" with the terms of the policy).

95. *See Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. 2000) (reasoning that "[t]here is no doubt that Manning's claim on behalf of the estate is preempted . . .").

96. 29 U.S.C. § 1144(a) (2000). For a more thorough discussion of ERISA and the intent behind Congress' drafting of the legislation, see Keron A. Wright, Student Author, *"Stuck on You": The Inability of an Ex-Spouse to Waive Rights under an ERISA Pension Plan [*McGowan v. NJR Serv. Corp*., 423 F.3d 241 (3d Cir. 2005)]*, 45 Washburn L.J. 687, 690–695 (2005).

97. 532 U.S. 141 (2001).

98. *Id.* at 147. For an overview of Washington's revocation statute, see *supra* notes 59–60 and accompanying text.

ployer.[99] He had designated his wife at the time as beneficiary of both the life insurance policy and the pension.[100] The spouses subsequently divorced, and after the policyholder's death, his ex-wife received nearly fifty thousand dollars from the two policies.[101] The policyholder's two children from a previous marriage filed suit, arguing that under Washington's divorce revocation statute, the ex-wife's beneficiary status should have been revoked as a matter of law upon dissolution.[102]

The issue in *Egelhoff* turned on the definition of "relate to" for purposes of a state statute affecting an employment benefit plan.[103] The Court acknowledged that ERISA's language is "expansive" and sought to clarify when, exactly, a state law "relates to" an employment plan.[104] The Court determined that one must "look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans."[105]

Using that framework, the Court concluded that Washington's statute "related to" an ERISA plan because it bound plan administrators to the statute's method and rule for determining beneficiaries.[106] Also, the Court reasoned that Washington's statute directly contradicted ERISA language, which mandated that the administered plan controlled who would receive what benefits

99. *Id*. at 144.

100. *Id*.

101. *Id*.

102. *Id*. at 144–145.

103. *Id*. at 146. "ERISA's pre-emption section, 29 U.S.C. § 1144(a), states that ERISA 'shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan' covered by ERISA." *Id*. (emphasis added). The Court had previously determined that a statute "'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983). The *Shaw* analysis does not appear to have added much to the statute's preemption language. *See Egelhoff*, 532 U.S. at 147 (acknowledging that "connection with" is not more restrictive than "relate to").

104. *Egelhoff*, 532 U.S. at 146–147.

105. *Id*. at 147 (quoting *Cal. Div. of Labor Stand. Enforcement v. Dillingham Const., N. A., Inc.*, 519 U.S. 316, 325 (1997)). One of Congress' primary concerns in the enactment of ERISA was the protection of interstate commerce and beneficiaries by requiring disclosure and reporting, and by setting standards of conduct for fiduciaries. 29 U.S.C. § 1001(b). Another important reason behind the creation of ERISA was the uniform administration of benefit plans for employers, so that processing of claims and disbursement of benefits do not differ between jurisdictions. *Egelhoff*, 532 U.S. at 148.

106. *Id*. at 147–148.

at what time.[107] The Court then articulated a two-step analysis to determine whether ERISA should preempt a state law.[108] A "state law 'relates to' an employee benefit plan 'if it (1) has a connection with or (2) a reference to such a plan.'"[109] Without either of these two elements, a state law will not be federally preempted.

B. Violation of Constitutional Contract Rights

The Contracts Clause of the United States Constitution provides that no state may enact a law that impairs an individual's contractual obligations.[110] Many state constitutions also bar the government from impairing a citizen's contractual obligations.[111] There has been litigation regarding retroactive application of revocation statutes to contract-based assets in several states, with many courts finding the practice unconstitutional.[112]

The Pennsylvania Supreme Court reviewed the issue in *Parsonese v. Midland National Insurance Co.*[113] Midland issued a life insurance policy to the decedent, who later changed the beneficiary from his children to his new wife, Parsonese.[114] Later that year, the Pennsylvania Legislature enacted its revocation statute,[115] which applied to nonprobate assets.[116] Parsonese and the policyholder subsequently divorced, and the policyholder died not long after.[117] Parsonese argued that the Legislature's revocation statute unconstitutionally impaired the policyholder's contract obligations.[118] The policyholder's adult children maintained that the Contracts Clause did not prevent a state from exercising its police power in furtherance of public policy.[119] The Court agreed

107. *Id*. at 147.
108. *Pharm. Care Mgt. Assn. v. Rowe*, 429 F.3d 294, 301 (1st Cir. 2005).
109. *Id*. at 302 (quoting *Dillingham*, 519 U.S. at 324).
110. U.S. Const. art. I, § 10, cl. 1.
111. *E.g.* Va. Const. art. I, § 11; Wis. Const. art. I, § 12.
112. *See Parsonese v. Midland Natl. Ins. Co.*, 706 A.2d 814, 819 (Pa. 1998) (holding that retroactive application of a revocation statute violates constitutional contract rights); *but see DeWitt*, 54 P.3d at 860–861 (holding that retroactive application of revocation statute is not unconstitutional).
113. 706 A.2d 814 (Pa. 1998).
114. *Id*. at 815.
115. *Id.*
116. 20 Pa. Consol. Stat. Ann. § 6111.2.
117. *Parsonese*, 706 A.2d at 815.
118. *Id*. at 816.
119. *Id*. at 817. The adult children were appellants in the action, along with the insur-

with Parsonese and held that retroactive application of the State's revocation statute indeed violated both the United States and the Pennsylvania Constitutions.[120]

A federal district court in Wisconsin disagreed with *Parsonese*, reasoning that historically, the United States Supreme Court has not strictly interpreted the Contracts Clause.[121] Rather, the Court has relied upon the provision to limit states' ability to modify contracts to which they are parties.[122] The district court also challenged the standing of the ex-spouse, reasoning that one challenging an action under the Contracts Clause must show that he has a contractual relationship as well as "substantial impairment."[123] To show substantial impairment, one would have to show that the challenged law disrupted his or her contractual rights, rather than a mere expectancy.[124] The court explained that the ex-wife did not have a contractual right because her ex-husband, the policyholder, had the authority to change her status as beneficiary at any time while he was alive.[125]

The court went on to hold that the application of Wisconsin's revocation statute was not unconstitutional, reasoning that even if the statute substantially impaired the ex-spouse or the decedent's contract rights, the statute serves a "significant and legitimate public purpose."[126] Other courts have agreed that a beneficiary has merely an expectancy or is the recipient of a donative transfer, and is not contractually impaired by retroactive application of a revocation statute.[127] Therefore, despite the arguments presented by ex-spouses, the majority of courts that have heard such cases have ruled that revocation statutes applied retroactively are not unconstitutional.[128]

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ance company. *Id*. at 814–815.

120. *Id*. at 819.

121. *Allstate Life Ins. Co. v. Hanson*, 200 F. Supp. 2d 1012, 1017 (E.D. Wis. 2002).

122. *Id*.

123. *Id*. at 1017–1018. The court explained that the determination of substantial impairment must consider the parties' expectations and whether the impairment was foreseeable, i.e., if the industry or area is already highly regulated. *Id*. at 1018.

124. *Id*. at 1018.

125. *Id*. at 1019. Rather than a vested interest, the ex-wife of the decedent policyholder had a "revocable expectancy contingent upon being the beneficiary at the time of [her ex-husband's] death." *Id*.

126. *Id*. at 1020–1021.

127. *E.g. Stillman*, 343 F.3d at 1322; *DeWitt*, 54 P.3d at 860–861.

128. *E.g. Stillman*, 343 F.3d at 1322; *In re Est. of Dobert*, 963 P.2d at 332; *DeWitt*, 54

V. FLORIDA'S RESPONSE TO DIVORCE REVOCATION

The relevant Florida case law involving divorce and overlooked or forgotten beneficiaries of nonprobate assets evidences the need for a revocation statute.[129]

A. History of Florida Divorce Revocation Law

Florida follows the majority rule that "divorce alone will not serve to divest a wife of her expectancy in the proceeds of insurance on her husband's life."[130] The rule also applies to state employee pensions,[131] individual retirement accounts,[132] credit union accounts,[133] and other contract-based assets.

One of the earliest cases applying Florida law that considered whether a former spouse should be barred from collecting the proceeds of a contract-based asset was *O'Brien v. Elder*.[134] The decedent and Elder were married when he named her as beneficiary of three life insurance policies.[135] When the couple later divorced, they included a separation agreement in the divorce decree.[136] After his death, when two of the insurance companies paid out proceeds to Elder, the personal representative of the decedent's estate filed an action for a constructive trust against her.[137] The personal representative presented alternate theories as to why Elder was not entitled to the proceeds: (1) there was an implied revocation because the decedent manifested a desire to change the beneficiary before his death; and (2) the settlement agreement, which the decedent and Elder incorporated into their di-

P.3d at 860–861; *In re Est. of Becker*, 32 P.3d 557, 562 (Colo. App. 2000); *Otto v. Est. of Moen*, 2000 WL 34236018 at *1 (W.D. Wis. Nov. 29, 2000).

129. *E.g. Luscz v. Lavoie*, 787 So. 2d 245, 246 (Fla. 2d Dist. App. 2001); *Vaughn v. Vaughn*, 741 So. 2d 1221, 1222 (Fla. 2d Dist. App. 1999); *Waller*, 715 So. 2d at 959; *Raggio v. Richardson*, 218 So. 2d 501, 501 (Fla. 3d Dist. App. 1969) (*receded from in Cooper v. Muccitelli*, 682 So. 2d 77, 77 (Fla. 1996)); *Smith v. Smith*, 919 So. 2d 525, 527 (Fla. 5th Dist. App. 2006).

130. *White*, 242 So. 2d at 773.

131. *Rogers v. Rogers*, 152 So. 2d 183, 185–186 (Fla. 1st Dist. App. 1963).

132. *Luszcz*, 787 So. 2d at 248; *Vaughn*, 741 So. 2d at 1222.

133. *Waller*, 715 So. 2d at 959.

134. 250 F.2d 275, 276–277 (5th Cir. 1957).

135. *Id*. at 277.

136. *Id*.

137. *Id*.

vorce decree, extinguished any interest Elder may have had.[138] The court rejected the implied revocation theory, stating that a mere intent to change a beneficiary is not sufficient.[139] However, the court interpreted the settlement agreement as encompassing the three policies, and therefore ruled that the proceeds should not have been paid to Elder.[140]

The rationale[141] provided in *Elder* was used in some later Florida decisions.[142] However, in 1996, the Florida Supreme Court reviewed a Second District Court of Appeal case and established the current precedent in this area of the law. In *Cooper v. Muccitelli*,[143] the decedent and Muccitelli were married when he purchased two life insurance polices and designated her as the primary beneficiary of both policies.[144] After the couple divorced, they executed a settlement agreement that contained a general mutual release clause.[145] The decedent then changed the first policy so that other relatives became the primary beneficiaries.[146] Muccitelli, the decedent's ex-wife, remained the primary beneficiary of the second policy and Cooper, the decedent's sister, was the contingent beneficiary.[147] After the policyholder's death, both Muccitelli and Cooper filed for the proceeds of the second policy.[148] The Second District affirmed the trial court's award to Muccitelli,

138. *Id*.

139. *Id*. at 277–278. In *O'Brien*, the administratrix of the decedent policyholder's estate argued that a court of equity would complete an unfinished change-of-beneficiary if the policyholder clearly manifested the intent to do so but failed to perform the necessary "ministerial" act. *Id*. at 277.

140. *Id*. at 279.

141. The *O'Brien* court disagreed with the trial court that the settlement agreement between the decedent and his ex-wife, which did not mention insurance, did not encompass the decedent's life insurance policies. *Id*. Rather, the court reasoned as follows: "When we consider the condition of the parties, the object which they had in view and the nature of the agreement, all of which can be done within the four corners of the instrument itself, we think that it is plain that the defendant relinquished any interest in the proceeds of her husband's insurance." *Id*.

142. *Davis v. Davis*, 301 So. 2d 154, 156–157 (Fla. 3d Dist. App. 1974); *but see Raggio*, 218 So. 2d at 502–503 (declining to follow *Elder* based on factual differences); *White*, 242 So. 2d at 774 (reasoning that a "general release" contained in a settlement agreement did not reasonably imply that the beneficiary was to be released of her expectancy).

143. 682 So. 2d 77 (Fla. 1996).

144. *Id*. at 77–78.

145. *Id*. at 78.

146. *Id*.

147. *Id*.

148. *Id*.

even though it recognized a conflict with other Florida decisions.[149]

Upon review, the Florida Supreme Court reasoned that the plain language of the life insurance policy controlled.[150] To permit the settlement agreement to trump the express beneficiary designation would place insurers in the "impossible position" of never being certain as to whom proceeds should be paid.[151] There have been cases since *Cooper* that involved contract-based assets such as annuities, IRAs, and pensions.[152] Although Florida courts have traditionally interpreted divorce agreements like any other type of contract, with the parties' intent as the prevailing guide,[153] the *Cooper* legacy ensures that when an individual overlooks a beneficiary, his intentions remain just that—intentions.

B. Revocation of Wills and Trusts

In 1951, the Florida Legislature enacted a statute providing for revocation of wills upon divorce,[154] which was recodified as Florida Statutes Section 732.507. The statute creates a legal fiction that the ex-spouse predeceased the testator.[155] Presumably, the Florida Legislature agreed with the general theory that one who obtains a divorce from his or her spouse generally does not wish to devise property to that individual.[156]

In 1989, the Florida Legislature enacted a revocation statute for revocable trusts.[157] It provides that upon dissolution or annulment, any provision in a revocable trust which benefits a for-

149. *Cooper v. Muccitelli*, 661 So. 2d 52, 54 (Fla. 2d Dist. App. 1995) (recognizing conflict with *Davis*, 301 So. 2d 154; *White*, 242 So. 2d 771; and *Raggio*, 218 So. 2d 501).

150. *Cooper*, 682 So. 2d at 79.

151. *Id.*

152. *Smith*, 919 So. 2d at 527; *Luscz*, 787 So. 2d at 246–247; *Waller*, 715 So. 2d at 959.

153. *See Berry v. Berry*, 550 So. 2d 1125, 1126 (Fla. 3d Dist. App. 1989) (articulating the principle that courts interpret property settlement agreements like any other contract); *Bacardi v. Bacardi*, 386 So. 2d 1201, 1203 (Fla. 3d Dist. App. 1980) (same).

154. 1951 Fla. Laws ch. 26914.

155. Fla. Stat. § 732.507(2).

156. *Id.*; s*ee Ireland v. Terwilliger*, 54 So. 2d 52, 53 (Fla. 1951) (reasoning "[i]t is only fair to assume that if the legislature had intended that a divorce should [affect] a revocation of a will it would have so expressly provided"); *see generally* Thomas A. Thomas, *Trusts and Succession*, 8 Miami L.Q. 431, 437 (1953-1954) (discussing Florida trusts and probate).

157. Fla. Stat. § 737.106. The statute was amended in 2003 to include annulment. *Id.*

mer spouse is revoked.[158] The statute also treats the former spouse as if he or she had predeceased the settlor.[159]

C. Settlement Agreements or Dissolution Decrees That Order an Ex-spouse to Procure Life Insurance

A settlement agreement may call for an individual to purchase life insurance and designate the ex-spouse as beneficiary, usually as security for the well-being of minor children or to secure alimony.[160] Several Florida courts have ruled that when an ex-spouse violates the agreement and changes the beneficiary without notifying the other party, the insurance proceeds should go to those for whom the policy was originally intended.[161] The fact that courts will award the proceeds to someone other than the designated beneficiary may seem ultimately supportive of a nonprobate divorce revocation statute. However, courts only permit this result because the policy was expressly purchased in accordance with a stipulation in the divorce settlement.[162]

VI. OVERRULING COOPER*: A FLORIDA DIVORCE REVOCATION STATUTE*

The *Cooper* ruling, now ten years old, is the most current Florida Supreme Court decision involving divorce and overlooked or forgotten beneficiaries of contract-based death benefits. While *Cooper* resolved a certified conflict between the district courts of appeal and promoted consistency, it sacrificed equity in the process.[163] However, it is not the judiciary's role to create a revocation

158. *Id*.

159. *Id*.

160. *See Sobelman v. Sobelman*, 541 So. 2d 1153, 1154 (Fla. 1989) (finding that ordering a spouse to purchase life insurance as security for alimony is supported under Florida law).

161. *E.g. Dixon v. Dixon*, 184 So. 2d 478, 480 (Fla. 2d Dist. App. 1966) (finding that the insurance policy was a "continuing obligation" that could not be discharged by changing the beneficiary); *Pensyl v. Moore*, 415 So. 2d 771, 772 (Fla. 3d Dist. App. 1982) (affirming the trial court's grant of summary judgment because the issue was almost identical to *Dixon*). The *Cooper* Court also noted in dicta that a settlement agreement that calls for one spouse to maintain life insurance in the name of a particular beneficiary "will control the disposition of proceeds upon notice to the insurer." 682 So. 2d at 79 n. 1 (citing *Cantrell v. Home Life Ins. Co.*, 524 So. 2d 1063 (Fla. 5th Dist. App. 1988)).

162. *Pensyl*, 415 So. 2d at 772.

163. *See Cooper*, 682 So. 2d at 79 (reasoning that "[a]fter signing the separation agree-

law where none exists.[164] The Florida Legislature should therefore enact a divorce revocation statute for nonprobate transfers such as life insurance policies, annuities, retirement-planning accounts, and pay-on-death accounts. Indeed, at least one member of the Florida judiciary has recommended as much:

> The Florida Legislature has thus expressed the public policy of this state with regard to inheritance and trust rights of former spouses. I would have concluded that the courts had fashioned a similar rule, so that when assets are distributed by a final judgment of dissolution, the final judgment controls over the beneficiary designation unless expressly provided otherwise. In today's opinion, however, this court reaches a contrary conclusion. Thus, the legislature may wish to consider enacting a law similar to sections 732.507 and 737.106 to cover assets passing outside an estate or trust.[165]

Critics of a revocation statute may present the argument that the Florida Legislature would essentially be helping those who were negligent in their estate planning.[166] However, one must be mindful that the careless parties in the cited cases are deceased when these actions are litigated. The Legislature would actually help those who need protection and are innocent of any negligence or oversight: dependent families, including minor children.

A. Proposed Language

The proposed nonprobate revocation statute should resemble Section 2-804[167] to the extent that the Legislature wishes to adopt certain provisions of that statute. There are several logical reasons to align Florida's revocation statute with the UPC. First, it promotes consistency, something which is significantly lacking in

ment, Thomas did just what he needed to do to ensure that the proceeds would go to Karin—he did nothing").

164. *See Chiles v. Children A, B, C, D, E and F*, 589 So. 2d 260, 264 (Fla. 1991) (reiterating that the separation of powers doctrine prohibits the judicial branch from encroaching on the lawmaking powers of the legislative branch).

165. *Luszcz*, 787 So. 2d at 250 n. 4 (Blue, J., dissenting).

166. *See e.g. Metro. Life Ins. Co. v. Est. of Dunn*, 243 F. Supp. 2d 1358, 1363 (M.D. Fla. 2003) (concluding that the decedent's ex-wife's estate was entitled to the insurance proceeds because he had the power to change the policy's beneficiary and elected not to do so).

167. *Supra* nn. 39–43 (discussing UPC Section 2-804).

many state probate codes today.[168] Indeed, Florida's probate revocation statute itself is substantially similar to UPC Section 2-508,[169] so modeling a new nonprobate revocation statute after Section 2-804 would advance a consistent theme in favor of automatic revocation upon marital dissolution. Second, following the UPC language would continue the Florida Legislature's historical trend of aligning its own probate reform with the UPC's progression.[170] Finally, because the UPC nonprobate revocation statute is the result of a collaborative effort of commissioners from each jurisdiction,[171] its well-thought-out policy rationale reflects modern social values, as well as various other concerns, which are as applicable to Florida as any other American jurisdiction.

B. Procedure

1. Revocation upon Date of Dissolution Judgment

The Legislature may wish to have revocation occur as a matter of law when the judgment of dissolution of marriage is delivered by the court. This is the procedure currently in effect for the revocation of any provision in a will benefiting an ex-spouse.[172] Again, a proposed revocation statute should operate in the same way so the revocation of both probate and nonprobate property is consistent.[173] Revoking a beneficiary's status at the time a disso-

168. *See* Stephanie J. Willbanks, *Parting Is Such Sweet Sorrow, but Does It Have to Be So Complicated? Transmission of Property at Death in Vermont*, 29 Vt. L. Rev. 895, 901 (2005) (discussing the purposes of the UPC). "The primary purposes of the UPC are to (1) modernize and clarify the laws governing intestacy, wills, and other donative transfers, (2) provide uniformity across the country, and (3) establish a simple, straightforward, and efficient probate procedure." *Id.*

169. Fla. Stat. § 732.507; s*ee Bauer v. Reese*, 161 So. 2d 678, 680 (Fla. 1st Dist. App. 1964) (discussing the legislative intent behind Florida's will revocation statute).

170. Henry A. Fenn & Edward F. Koren, *The 1974 Probate Code: A Marriage of Convenience*, 27 Fla. L. Rev. 1, 2 (1974). Major changes to Florida's probate rules were "[u]ndoubtedly spurred by the promulgation of the UPC." *Id.* Further, the 1974 Probate Code was "organized, and generally structured along the lines of the UPC." *Id.*

171. *See* Unif. L. Commrs., Natl. Conf. Commrs. Unif. St. Ls., *Frequently Asked Questions about NCCUSL*, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61 (accessed Mar. 27, 2007) (explaining that the Conference is comprised of commissioners from every jurisdiction).

172. Fla. Stat. § 732.507.

173. Consistency in the treatment of probate and nonprobate property is practical due to the treatment of nonprobate assets as will substitutes. *See* Diane C. Amado, *Uniform Probate Code 6-201: A Proposal to Include Stocks and Mutual Funds*, 72 Cornell L. Rev.

lution order is rendered is logical because it provides a definitive moment for identifying when the marriage covenant, and therefore the beneficiary designation, is terminated.[174] At least one state has gone even further in ensuring that beneficiary designations are revoked during dissolution proceedings: Michigan's revocation statute is supplemented by a rule stating that an ex-spouse's beneficiary rights under all insurance policies, annuities, or other nonprobate assets must be determined within the dissolution judgment.[175]

2. Notification to Insurers and Other Third Parties

Section 2-804 provides that an insurer or third party must receive written notification of a policyholder's or account-holder's divorce by certified mail or through service of process.[176] Then, if probate proceedings have commenced, the third party may deposit funds or property with the court where the probate is occurring, or, if proceedings have not yet commenced, with the court having jurisdiction in which the decedent was domiciled.[177] Thus, the UPC revocation statute really only provides guidance for third parties when the policyholder is already deceased. The state revocation statutes which are based on Section 2-804 largely follow the same procedure.[178] As discussed in greater detail below, Florida may wish to provide greater guidance for third parties to protect them from liability.

397, 404 (1987) (discussing the advent of will substitutes and the need for protective mechanisms for them).

174. *See Ryan v. Ryan*, 277 So. 2d 266, 269 (Fla. 1973) (explaining that marriage is a contract and not merely a relationship between two people).

175. Mich. Comp. Laws Ann.. § 552.101(2) (West 2006).

176. "Written notice of the divorce, annulment, or remarriage under subsection (g)(2) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action." Unif. Prob. Code § 2-804(g)(2), 8 U.L.A. 218.

177. *Id*.

178. *E.g.* Ariz. Rev. Stat. Ann. § 14-2804 (stating that "[w]ritten notice of the divorce, annulment, or remarriage . . . must be mailed to the payor's or other third party's main office or home by certified mail . . . or served on the payor or other third party in the same manner as a summons in civil action"); Ohio Rev. Code Ann. § 1339.63 (providing that third parties are not liable for damages so long as the third person did not have notice of the fact that resulted in the revocation of the beneficiary designation).

C. Florida Concerns

1. Insurer Liability

In *Cooper*, the Florida Supreme Court cited insurer uncertainty as a compelling reason why it should not interpret settlement agreements containing a general mutual release as trumping an express beneficiary nomination.[179] At least one member of the Florida Legislature has also cited potential insurer liability as an important consideration in drafting a divorce revocation statute.[180]

There are several ways to drastically reduce insurer liability. First, Section 2-804 contains a protective provision for third-party payors if the third party, in good faith, disburses proceeds prior to receipt of written notification of the revocation.[181] Florida's revocation statute should also contain a good-faith-reliance provision in the event a disbursement is made to a wrongful beneficiary.

Additionally, the Florida Legislature should consider establishing an affidavit requirement for beneficiaries seeking to collect the proceeds of a policy or account. Upon receipt of the beneficiary's claim, the insurer or third-party payor would send to the beneficiary the appropriate documents, including an affidavit verifying that the beneficiary designation is indeed current and correct.[182] This does not appear to be a requirement in other jurisdictions that have revocation statutes for nonprobate assets.[183]

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179. *Cooper*, 682 So. 2d at 79.

180. "[I]f the Florida Legislature were to pursue such a policy, it might want to ensure that the processes and standards in the law are clear, so that insurers or others who are obligated to pay under the policy or other instrument are not placed in a position of uncertainty about whether to pay or whom to pay." E-mail from Mike Fasano, Fla. Sen., Dist. 11, to Suzanne Soliman (May 26, 2006, 3:31 p.m. EST) (copy on file with *Stetson Law Review*). Senator Fasano is a member of the Banking and Insurance Committee of the Florida Senate.

181. Unif. Prob. Code § 2-804(g), 8 U.L.A. 218. The protection, however, does not extend past the time the third party receives the written notification, either by formal service of process or registered or certified mail.

182. *See* Fla. Stat. § 92.50 (2006) (explaining authorization and procedure for affidavits procured within Florida and foreign jurisdictions).

183. Pennsylvania's statute, for example, treats the former beneficiary ex-spouse as if he or she had predeceased the policyholder, so that the secondary beneficiary shifts to the primary position. 20 Pa. Consol. Stat. Ann. § 6111.2. Notes from the statute indicate that the Pennsylvania Legislature amended the statute in 1994 to provide "further guidance" to insurance companies. *Id.* Beyond the legal construction, however, the statute does not propose a practical method of ensuring that the disbursement is made to the individual

However, compliance with the affidavit requirement would be one more step that would shift liability to the individual in verifying his or her eligibility as a beneficiary. It would also serve as tangible evidence of the third party's good-faith effort to ascertain the correct beneficiary.

In the event a wrongful disbursement is made by a third party, and the wrongful beneficiary fraudulently submits an affidavit, the rightful beneficiary should be permitted to file a constructive trust action against the wrongful beneficiary.[184] To prove that a constructive trust should be imposed, the rightful beneficiary should show: (1) that the wrongful beneficiary asserted that his or her eligibility was legitimate; (2) that the proceeds were transferred based on reliance on the beneficiary's assertion; (3) that the wrongful beneficiary claims a "confidential relationship" as beneficiary; and (4) that consequently, the wrongful beneficiary was unjustly enriched.[185]

2. Banking Industry Concerns

As with insurance companies, Florida's financial institutions may also oppose a nonprobate revocation statute.[186] Section 2-804 applies to joint property, so that when a couple divorces, any

entitled to receive it under law.

184. *See Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1025 (Fla. 4th Dist. App. 1996) (citing *Quinn v. Phipps*, 113 So. 419, 422 (Fla. 1927) (holding that "[a] constructive trust is one raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it")).

185. *Whiting-Turner Contracting Co. v. Electric Mach. Enters.*, 2006 WL 1679357 at *2 (M.D. Fla. June 19, 2006). The affidavit requirement would satisfy the first and second elements of a constructive trust, promise and reliance. *Id.* The element of "confidential relationship" is malleable to courts of equity, which have found "confidential relationships" in many different factual instances. *See* George G. Bogert, George T. Bogert & Amy M. Hess, *The Law of Trusts and Trustees* § 482 (Rev. 2d ed., West 2006) (discussing various factors courts evaluate in determining whether a "confidential relationship" exists). A parent/child relationship sometimes, but not always, indicates a confidential relationship. *Jones v. Jones*, 148 P.2d 989, 992 (Okla. 1944). In fact, there may be no formal relationship at all; the mere placing of trust in an individual may infer a confidential relationship. *Quinn*, 113 So. at 420–421.

186. Memo. from Russell B. Hale, liaison Fla. Bankers Assn., to Kristen M. Lynch, Chair, IRA & Emp. Benefits Comm. of Real Prop., Trust & Prob. Sec. of Fla. B., *Proposed RPPTL Statute on Disposition of Non-probate Assets after Divorce* 1–3 (Aug. 4, 2006) (copy on file with *Stetson Law Review*).

property held jointly is converted to a tenancy in common.[187] Joint property may include checking, savings, and other types of bank accounts.[188] In Florida, it is presumed that if a married couple jointly owns a bank account that possesses the requisite elements of jointly held property, the bank account is tenancy-by-the-entireties property.[189] Additionally, each spouse who holds title to tenancy-by-the-entireties property owns the entire property, and not a divisible portion.[190] Therefore, if a revocation statute were to apply to jointly held banking accounts, it would be quite difficult to ascertain the apportionment of funds within the accounts to each spouse.[191] Some financial institutions may refuse to shift tenancy-by-the-entireties bank accounts to tenant-in-common accounts, as the UPC suggests, for that very reason.[192]

It is also quite possible that third parties who do business with Florida residents, which includes insurers, retirement and investment planning companies, and financial institutions, will resist the enactment of a revocation statute due to concern that lack of knowledge of the law will lead to liability for non-compliance down the road.[193] However, the Legislature should be reminded that companies that conduct interstate business are already subject to the individual states' laws, some of which currently have revocation statutes in effect.[194]

187. Unif. Prob. Code § 2-804(b)(2), 8 U.L.A. 218.

188. Fla. Stat. § 655.78 (2006); *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 51 (Fla. 2001).

189. *Beal Bank*, 780 So. 2d at 58.

190. *Id*. at 53 (quoting *Bailey v. Smith*, 103 So. 833, 834 (Fla. 1925)).

191. It would seem impossible to determine how much each spouse should receive as his or her "share," particularly if one of the spouses is not employed outside of the home. Regardless, property held as joint tenants with right of survivorship is assumed to be apportioned in equal shares. *Id.*

192. Memo., *supra* n. 186, at 1–3.

193. *But see supra* n. 186 (evidencing the Florida Bankers Association's assertion that the "liability exposure of financial institutions should not increase" if Florida adopts a revocation statute).

194. *Supra* pt. III; *see Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 550 (1948) (discussing the relationship between states and third parties such as insurers).

3. Violation of Constitutional Contract Rights

As discussed earlier in this Article,[195] the several states that have enacted divorce revocation statutes applicable to nonprobate property have heard cases in which a party alleged his or her constitutional contract rights were violated by retroactive application of the statute.[196] To avoid litigation based on claims of impairment of constitutional contract rights, the Florida Legislature should not retroactively apply the nonprobate revocation statute to accounts created prior to the enactment of the law. However, should the Legislature choose to provide for retroactive application, it should take substantial measures to communicate that its intent is to further public policy, so that the judiciary will have clear language articulating legislative intent in the event of constitutional litigation.[197]

To prevent litigation asserting violations of constitutional contract rights,[198] the Legislature should address the notification procedure for individuals seeking to purchase insurance or other contract-based death benefits. Essentially, as part of the revocation statute, third parties should be required to provide notice to applicants that the asset they are seeking to purchase is subject to revocation of one's spouse as beneficiary if a divorce should occur. The sample language may resemble this:

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195. *Supra* pt. IV(B) (discussing several courts' holdings in cases in which the plaintiff alleged a violation of constitutional contract rights).

196. *See Mearns*, 12 P.3d at 1056 (holding that Washington's divorce revocation statute serves a legitimate public purpose and therefore retroactive application is not unconstitutional).

197. *See Parsonese*, 706 A.2d at 819 (applying the principles the United States Supreme Court articulated in *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) to the issue of Pennsylvania's revocation statute to determine whether the state could validly exercise its police power in retroactively applying the statute). In *Blaisdell*, the Court affirmed the Minnesota Supreme Court's holding that a statute that extended a mortgagee's period of redemption did not violate the federal Contracts Clause. 290 U.S. at 444. The Court considered that Minnesota, like the rest of the nation during the Great Depression, was experiencing an economic crisis as devastating as a "flood, earthquake or disturbance in nature." *Id*. at 423. Therefore, the Court held that Minnesota's statute "was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society." *Id*. at 445.

198. *See Schilling*, 616 N.E.2d at 894–895 (agreeing with decedent policyholder's former spouse that retroactive application of Ohio's revocation statute impaired the decedent's constitutional contract rights).

> This policy is subject to Florida Statute § _____, which states that upon dissolution or annulment of a marital relationship, any beneficiary designation under this policy that benefits a former spouse will be terminated.

Third parties would do well to display this notice prominently, so as to avoid subsequent disagreements about whether such information is contained in the notorious fine print of instruments such as insurance policies.[199]

4. Federal Preemption by ERISA

A statute that would revoke beneficiaries of insurance or retirement plans that are subject to ERISA administration will likely be preempted.[200] The language in ERISA's preemption statute is quite broad; therefore, a court has a great deal of discretion in determining whether a potential revocation statute impermissibly "relates to" an ERISA plan.[201] However, because *Egelhoff*[202] involved a statute very similar to that proposed here, it is probable a court would determine that a Florida revocation law has a "connection with" or "reference to" an ERISA plan.[203] Thus, benefit plans maintained by "employer[s] engaged in commerce" or organizations that represent employees who are engaged in commerce would likely remain unaffected by a new revocation statute.[204]

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199. *See generally Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th Dist. App. 2001) (discussing Florida's recognition of implied good faith and fair dealing in all contracts).

200. *See Egelhoff*, 532 U.S. at 150 (holding that Washington's nonprobate revocation statute did not revoke an ERISA-administered benefit plan due to federal preemption); *but see Silber v. Silber*, 786 N.E.2d 1263, 1269 (N.Y. 2003) (holding that a claim of waiver may be asserted against a beneficiary of an ERISA-administered plan if the purported waiver meets common-law requirements).

201. 29 U.S.C. § 1144(a); *see Pharm. Care Mgt. Assn.*, 429 F.3d at 301 (discussing the "broad and expansive" language of ERISA's preemption provision).

202. For a discussion of the *Egelhoff* case, review *supra* notes 97–107 and accompanying text.

203. *Egelhoff*, 532 U.S. 141.

204. 29 U.S.C. § 1003(a). The statute exempts employee benefit plans offered by the government and religious groups; plans offered solely for compliance with worker's compensation, disability, and unemployment laws; plans maintained outside of the United States for the benefit of nonresident aliens; and supplemental benefit plans. *Id.* at § 1003(b).

5. Elective Share

Another issue practitioners may encounter and the Legislature may wish to address is how a proposed revocation statute would affect the elective share. In 1974, the Florida Legislature abolished curtesy and dower rights and enacted the elective share statute in their place.[205] The purpose of the common-law right of dower was to provide security for a decedent's widow and their children.[206] Likewise, the elective share ensures that the spouse of a decedent is supported after his or her death.[207] The current elective share encompasses a decedent's ownership in pay-on-death accounts or securities, life insurance policies, and certain types of joint tenancies, all of which would likely fall under a divorce revocation statute.[208]

The elective share was created expressly to provide security for a surviving spouse.[209] By definition, the statute excludes anyone from claiming the elective share other than the individual who was legally married to the decedent at the time of his death.[210] Therefore, an ex-spouse would not have an entitlement to the elective share even if a revocation statute did not exist.

Examining the elective share statute another way, it may ultimately provide support for a divorce revocation statute. While the Florida Legislature has been virtually silent as to enactment of a statute, the judiciary has cautioned against deviating from strict compliance with change-of-beneficiary requirements.[211] However, when a surviving spouse exercises his or her right to the elective share, nonprobate assets that may have beneficiaries other than the surviving spouse may be added into the valuation.[212] In probate situations, therefore, it may be acceptable to override a designated beneficiary by adding the value of a pay-on-

205. 1974 Fla. Laws ch. 74-106.

206. *Via v. Putnam*, 656 So. 2d 460, 462 (Fla. 1995).

207. *Id.* at 465–466

208. Fla. Stat. § 732.2035. Life insurance policies maintained by a decedent pursuant to court order are excluded from elective share computation. Fla. Stat. § 732.2045(e).

209. *In re Est. of Anderson*, 394 So. 2d 1146, 1147 (Fla. 4th Dist. App. 1981).

210. Fla. Stat. § 732.201.

211. *McDaniel v. Liberty Natl. Life Ins. Co.*, 722 So. 2d 865, 866 (Fla. 5th Dist. App. 1998).

212. Fla. Stat. § 732.2055. The permission of such options may reflect the Legislature's recognition of "the obligation one has towards his or her family." *Taylor v. Johnson*, 581 So. 2d 1333, 1337 (Fla. 1st Dist. App. 1990).

death account or an insurance policy into the share awarded to the surviving spouse.[213] The theoretical basis is no different from that supporting a revocation statute for nonprobate assets.[214] In fact, if the Legislature wished to promote consistency in estate planning, it would recognize that a revocation statute for nonprobate assets reflects Florida's longstanding policy of protecting surviving spouses.[215]

6. Lack of Choice

The enactment of a revocation statute will not eliminate policyholder choice. Rather, it will shift the "default" from one in which a beneficiary remains as such despite a divorce or annulment, to a new default in which it is presumed that a divorced individual does not wish to keep an ex-spouse as a beneficiary.[216] With this in mind, it is critical that the proposed legislation contain clear direction as to how a policyholder could retain an ex-spouse as a beneficiary if they so desire.[217] It should be required that the instrument expressly affirm that the ex-spouse is the proper beneficiary, notwithstanding the proposed revocation statute.

213. Fla. Stat. § 732.2055.

214. The rationale behind Florida's "slayer statute," Florida Statute Section 732.802 (2006), also provides support for the creation of a public-policy-conscious divorce revocation statute. It provides that any beneficiary of a provision in a will, or of a life insurance policy, bond, or other contract-related agreement, or a joint tenant, who unlawfully kills the testator or holder of the policy, is not entitled to collect proceeds or property. *Id*. The statute treats the beneficiary as if he had predeceased the policyholder (or joint tenant or testator). *Id*. The Florida Legislature chose to enact the public-policy-conscious slayer statute in 1982 based on the UPC's model. Florida Probate Code Manual 1–1 § 1.10 (2006). This enactment offers yet another example of the UPC providing guidance for progressive, policy-driven probate change in Florida.

215. *See e.g. Via*, 656 So. 2d at 461 (reciting Florida's long tradition of protecting surviving spouses as justification for awarding the surviving spouse an elective share of a decedent's estate, despite a will naming children from the decedent's previous marriage as beneficiaries).

216. The rationale is similar to that applied to wills. Fla. Stat. § 732.507.

217. The UPC model statute also contains a provision that retains an ex-spouse as beneficiary if a governing instrument, court order, or contract *expressly provides* as such. Unif. Prob. Code § 2-804(b), 8 U.L.A. 218.

VII. CONCLUSION

Like many Americans, Floridians invest significantly in beneficiary-designated nonprobate estate planning tools such as life insurance. These types of assets comprise the bulk of many Floridians' estate plans because they are easy to obtain and, in many instances, affordable compared to other estate planning tools. It is important to effectuate the policyholder's intent, particularly because so many families trust that these assets will provide some degree of security. Enacting a divorce revocation statute to protect nonprobate assets will provide protection and security for many Florida families.