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WHO GETS THE MONEY? THE WIDOW OR THE FORMER WIFE: AN ANALYSIS OF VIRGINIA CODE SECTION 20-111.1 AND THE BODY OF LAW DEVELOPED OVER THE PAST QUARTER OF A CENTURY ON ITS AUTOMATIC STATUTORY REVOCATION-ON-DIVORCE OF BENEFICIARY DESIGNATIONS

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The maxim "set it and forget it" does not apply when it comes to designation of a beneficiary on a life insurance policy, annuity, retirement plan, and so forth. Forgetting to update beneficiary designations[1] can have disastrous consequences for those who have undergone a divorce, especially when the divorcing spouse did not want those proceeds to be paid to the former spouse[2] on death. Twenty-five years ago the General Assembly of Virginia enacted[3] Virginia Code section 20-111.1, Virginia's version of a revocation-on-divorce statute whereby, unless the divorcing couple reached an agreement for a contrary result that is incorporated in the divorce decree, the designation of beneficiaries on a death benefit such as life insurance, annuity, retirement, and so forth, is automatically revoked upon divorce. This past June, the Supreme Court of the United States[4] ob-

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1 Life insurance carriers routinely recommend that the policy owner periodically—or after a major life-change event—check his/her beneficiary designation to be sure that the policy owner is leaving the life insurance proceeds to the intended recipient. These life-change events include marriage, birth of children, divorce, and the death of the current beneficiary. This recommendation is usually in the form of an insertion in the carrier's mailings or emails to the policy owner of premium notices, policy statements, and so forth. Entitled "Important Policy Owner Notice," it may make a recommendation such as the following: "Please review your beneficiary designation if there have been any changes in your circumstances such as marriage, divorce, or the death of your current beneficiary." When circumstances change, the policy owner should change the beneficiary descriptions as appropriate.

2 Civil marriage between two people of the same sex is now permitted. *See* Obergefell v. Hodges, ___ U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

3 1993 Va. Act ch. 417.

4 Sveen v. Melin, ___ U.S. ___, ___, 138 S. Ct. 1815, 1819, 201 L. Ed. 2d 180, 185 (2018).

served that Virginia[5] is one of twenty-six states that have now adopted some form of a substantially similar revocation-on-divorce statute.[6]

This article examines the body of Virginia law that has developed during the past quarter century interpreting and applying Virginia's automatic revocation-on-divorce statute, Code section 20-111.1.

I. Virginia Doctrine before Enactment of Virginia Code Section 20-111.1

Before the 1993 enactment of Virginia Code section 20-111.1, the general principle in most jurisdictions, including Virginia, was that a divorce, by itself, did not automatically deprive the spouse who had been designated on the other spouse's life insurance policy of the benefits of that policy unless the divorcing spouses had entered into a separation agreement that contractually revoked the former spouse's right to receive the policy proceeds.[7] In *Kurtz*, the widow of a deceased police officer filed a declaratory judgment action against the City of Norfolk and her late husband's first wife seeking a determination of who was entitled to receive the accidental death benefits after the policeman's death. At the time of the policeman's death, he had not changed the designation of his first wife as the person to receive his accumulated contributions for accidental death benefits under the code of the City of Norfolk. The Supreme Court summarized the general rule regarding change of the beneficiary designation in the event of divorce as follows:

> Under the rule prevailing in most jurisdictions, a dissolution of the marriage relation existing between a wife and her husband at the time she is designated as his beneficiary in a policy of insurance on his life, does not *ipso facto* deprive her of the right to receive the benefits provided by the insurance certificate upon his death, where there has been no change of beneficiary. The wife's interest in the insurance does not arise out of the marriage relation; it is dependent on the established principles of the law of contract . . . .
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> The legal principle is fairly well established that where one spouse is named as beneficiary in a policy of insurance on the life of the other, such spouse is entitled to the proceeds of the policy, even though the parties were divorced, in the absence of any terms in the policy indicating that the right of the beneficiary to proceeds thereof is condi-

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5 With Code § 20-111.1's effective date of July 1, 1993, Virginia appears to be one of the first states, if not the first state, to enact a revocation-on-divorce statute.

6 In addition to Virginia, the other twenty-five states that have adopted similar revocation-on-divorce statutes include the following: Alabama, Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, and Wisconsin.

7 *See, e.g.*, Kurtz v. Dickson, 194 Va. 957, 76 S.E.2d 219 (1953).

> tioned upon the continuance of the marital relationship, or regulation of the matter by statute.[8]

There was no rule or regulation of the Norfolk retirement system that automatically changed the designation of his first wife as the beneficiary of his accidental death benefits under the retirement system upon divorce. The property settlement agreement in *Kurtz* covered only the first wife's rights and claims to certain specified property and claims for alimony or support and did not cover any interest in any property owned by the other party. On those facts, the court held in *Kurtz* that, despite their divorce, the City should pay the accidental death benefits to his first wife in accordance with her former husband's beneficiary designation.

In the cases of *Vellines v. Ely*,[9] *Woodmen of the World Life Insurance v. Synowietz*,[10] and *Southerland v. Estate of Southerland*,[11] each of the insured husbands failed to change the designation of their former wives as the primary beneficiaries of their life insurance policies.[12] Unlike the situation in *Kurtz*, however, in all three cases the divorcing parties had entered into comprehensive separation agreements that included mutual releases between the parties of all property rights that the former wives had in the property of her former husbands, including their life insurance policies. The court held that these separation agreements barred the first wives' rights to the life insurance proceeds even though they were still the named primary beneficiaries on those life insurance policies at the time of the former husbands' deaths. Since the sweeping language of the separation agreements revoked the former wives' status as the beneficiaries, the proceeds of the policies in the *Vellines* and *Southerland* cases were paid to the insureds' estates, while in *Synowietz* the proceeds went to the insured's mother, whom he had designated as the alternative beneficiary.

Thus, the well-settled rule in Virginia with decrees of annulment or divorce entered into before July 1, 1993, was that dissolution of a marriage by annulment or divorce did not automatically revoke the former spouse's designation as the beneficiary of a life insurance policy unless the divorcing couple entered into a separation agreement that comprehensively addressed both parties' property by which they expressly agreed that the former spouse's beneficiary designation on the other former spouse's life insurance policy had been revoked by contract even if the former spouse was still listed as the beneficiary at the time of the former spouse's death.

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8 194 Va. at 963, 76 S.E.2d at 222 (citations omitted).

9 185 Va. 889, 41 S.E.2d 21 (1947).

10 32 Va. Cir. 264 (1993).

11 249 Va. 584, 457 S.E.2d 375 (1995).

12 Since the divorce decrees in the *Synowietz* and *Southerland* cases predated the July 1, 1993, effective date of Virginia Code § 20-111.1, in both instances the courts ruled that the statute did not apply. *See Southerland*, 249 Va. at 588 n.3, 457 S.E.2d 377 n.3; *Synowietz*, 32 Va. Cir. at 266.

II. Virginia's Automatic Revocation-on-Divorce Statute

Effective July 1, 1993,[13] the General Assembly enacted the original version of Virginia Code section 20-111.1, which stated:

> § 20-111.1. Revocation of death benefits by divorce or annulment.
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> Upon the entry of a decree of annulment or divorce from the bond of matrimony on or after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent. The payor of any death benefit shall be discharged from all liability upon payment in accordance with the terms of the contract providing for the death benefit, unless the payor received written notice of a revocation under this section prior to payment.
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> The term "death benefit" includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement, or other contract designating a beneficiary of any right, property or money in the form of a death benefit.
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> This section shall not apply (i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contract result as to the specific death benefits, or (ii) to any trust or any death benefit payable to or under any trust.

Effective July 1, 2007,[14] the General Assembly amended the original version of Code section 20-111.1 by inserting the subsection designations A, B, and C and adding subsection D to the statute as follows:

> § 20-111.1. Revocation of death benefits by divorce or annulment.
>
> A. Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent. The payor of any death benefit shall be discharged from all liability upon payment in accordance with the terms of the contract providing for

[13] 1993 Va. Acts ch. 417.

[14] 2007 Va. Acts ch. 306.

the death benefit, unless the payor received written notice of a revocation under this section prior to payment.

B. The term "death benefit" includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit.

C. This section shall not apply (i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contrary result as to specific death benefits, or (ii) to any trust or any death benefit payable to or under any trust.

D. *If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted*.[15]

Effective July 1, 2012,[16] the General Assembly amended Code section 20-111.1 by adding the exceptions at the beginning of the first section in subsection A (*i.e.*, "Except as otherwise provided under federal law or the law of the Commonwealth . . .") and added subsection E such that the statute now states as follows:

§ 20-111.1. Revocation of death benefits by divorce or annulment.

A. *Except as otherwise provided under federal law or law of this Commonwealth*, upon the entry of a decree of annulment or divorce from the bond of matrimony on or after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent. The payor of any death benefit shall be discharged from all liability upon payment in accordance with the terms of the contract providing for the death benefit, unless the payor received written notice of a revocation under this section prior to payment.

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15 Emphasis added.

16 2012 Va. Acts ch. 493.

B. The term "death benefit" includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement, or other contract designating a beneficiary of any right, property or money in the form of a death benefit.

C. This section shall not apply (i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contract result as to the specific death benefits, or (ii) to any trust or any death benefit payable to or under any trust.

D. If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

E. *Every decree of annulment or divorce from the bond of matrimony entered on or after July 1, 2012, shall contain the following notice in conspicuous, bold print:*

> *Beneficiary designations for any death benefit, as defined in subsection B of § 20-111.1 of the Code of Virginia, made payable to a former spouse may or may not be automatically revoked by operation of law upon the entry of a final decree of annulment or divorce. If a party intends to revoke any beneficiary designation made payable to a former spouse following the annulment or divorce, the party is responsible for following any and all instructions to change such beneficiary designation given by the provider of the death benefit. Otherwise, existing beneficiary designations may remain in full force and effect after the entry of a final decree of annulment or divorce.*[17]

Illustrative cases where subsection E's statutory notice[18] has been inserted in the divorce decree[19] and how the divorcing couple has addressed their life insurance policies in the property settlement agreement that was ratified, confirmed, approved, and incorporated, but not merged, into their divorce decree include

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[17] Emphasis added.

[18] What happens if the divorce decree entered after July 1, 2012, fails to contain the statutory notice in conspicuous, bold print as required by Code § 20-111.1(E)? What happens if the post-July 1, 2012, divorce decree contains the required language, but it is not in conspicuous bold print?

[19] For divorce decrees that contain section E's statutory notice without addressing how the couple will handle their life insurance, *see, e.g., Yang v. Wang*, 2016 Va. Cir. LEXIS 456, at *2–3 (2016), and *Wade v. Wade*, 2018 Va. Cir. LEXIS 220, at *2–3 (2018).

the following: *Buckland v. Buckland*,[20] *Cromer v. Cromer*,[21] *Stosser v. Stosser,*[22] *Perry v. Kuennecke*,[23] and *Smith v. Smith*.[24]

III. The General Rule in Virginia Is That Code Section 20-111.1 Revokes an Existing Beneficary Designation upon Entry of a Decree of Annulment or Divorce

Since the General Assembly's enactment in 1993 of the initial version of Virginia Code section 20-111.1, as a general rule courts applying Virginia law have held that, unless an exception applies, upon the couple's divorce this statute automatically operates to revoke the decedent's designation of his former spouse as the beneficiary of the decedent's life insurance policy. This result is the complete opposite of the Virginia rule that applied before the 1993 enactment of Virginia Code section 20-111.1 that a divorce or annulment, by itself, did not automatically deprive the former spouse who had been designated as beneficiary on the other spouse's life insurance policy unless the divorcing spouses had entered into a separation agreement that contractually revoked the former spouses' beneficiary designation.

In *Metropolitian Life Insurance Co. v. Gorman-Hubka*,[25] the husband designated his then-wife as the sole primary beneficiary of his employer's group universal life insurance policy. The couple entered into a property settlement and separation agreement. On May 30, 2014, they divorced. On July 22, 2014, the husband called the insurer and stated that despite their recent divorce, he wished to keep his former wife as the beneficiary.[26] In that same telephone call, the operator at the life insurance company told the former husband that he did

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20 2012 Va. Cir. Lexis 306, at *8–9, 18 (2012) ("The parties agree to retain ownership of any life insurance policies currently held in that party's sole name. The parties further agree to retain their children as the beneficiaries of these policies until their youngest child reaches the age of eighteen (18).").

21 2014 Va. Cir. Lexis 378, at *3, 10 (2014) ("Life Insurance—That neither party shall be liable for maintaining any form of life insurance on the other party. Nothing in the Agreement shall preclude the other from listing any beneficiary of their choosing on any life insurance policy they may carry on themselves.").

22 2012 Va. Cir. Lexis 235, at *4, 11-13 (2012) ("So long as defendant has an obligation to pay child support, he shall maintain a life insurance policy naming plaintiff as the sole beneficiary of death benefits sufficient to cover the present value of the remaining spousal support at the time of his death. Defendant shall provide proof of maintaining said policy to plaintiff on an annual basis. If defendant defaults in his obligation to provide such insurance, this spousal support obligation shall not terminate upon his death as provided in section 20-109(D) of the Code of Virginia, but shall continue as an obligation of defendant's estate.").

23 2012 Va. Cir. Lexis 326, at *2–3, 18 (2012) ("Except as otherwise provided in this Agreement, each party . . . relinquishes any right or claim to . . . life insurance . . . of the other.").

24 2012 Va. Cir. Lexis 385, at *3, 11–12 (2012) ("5. Ms. Smith is awarded 50% of the marital share portion of Mr. Smith's New York Life Insurance whole life policy, which had net cash value of $20,342.00 on May 26, 2010. As the parties agree that the cash value of the policy at the time of marriage was $0.00, the above mentioned cash value shall be divided equally.").

25 159 F. Supp. 3d 668 (E.D. Va. 2016).

26 In *Attiliis v. Attiliis*, 2009 Va. App. Lexis 261 (2009), the court pointed out that nothing in the divorce statutes of the Code of Virginia "empowers circuit courts to compel a spouse 'to contract for life insurance with the former spouse as the beneficiary.'" *Id*. at *7 (citing Lapidus v. Lapidus, 226 Va. 575, 579, 311 S.E.2d. 786, 788 (1984)).

not need to do anything to reaffirm his designation of his former wife if she were already listed as the beneficiary. On August 3, 2014, the husband died with the only beneficiary designation on file with the insurer being the initial designation where the husband named his then-wife as the sole primary beneficiary.

The life insurance carrier filed an interpleader action to determine who should receive the death benefits as between the former wife listed as the policy's sole beneficiary and the decedent's sisters. The court first found that the group universal life insurance policy was not governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*. (ERISA), and therefore, that Virginia law controlled. At the outset of its analysis, the court stated:

> Because claimants agree that Virginia law controls, they also agree that upon Decedents' divorce, Virginia Code § 20-111.1 automatically operated to revoke Decedent's existing designation of Claimant Gorman-Hubka as the Policy beneficiary.[27]

The court then addressed the former wife's assertion that her former husband's July 22, 2014, telephone call to the insurer constituted a valid, post-divorce designation of her as the beneficiary.[28] The court first found that there was no literal compliance with the policy's change-in-beneficiary requirements since the decedent never submitted the requisite form designating a beneficiary.[29] The court next found that the decedent had not substantially complied with the policy's change-in-beneficiary requirements because he had failed to do "everything to the best of his ability to effect the change" by taking all the steps "he could to comply with the provisions of the policy."[30] The court entered summary judgment in favor of the decedent's three sisters with respect to their cross-claims against the former wife.

In *Attiliis v. Attiliis*,[31] the Court of Appeals of Virginia made the following similar observation about Code section 20-111.1.

> Upon the entry of a decree of . . . divorce from the bond of matrimony on or about July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked . . . . This section shall not apply (i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agree-

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27 139 F. Supp. 3d at 673.

28 In *Metro Life Insurance Co. v. Gorman-Hubka*, 2016 U.S. Dist. LEXIS 193165 (E.D. Va. 2016), the court rejected the former wife's two counterclaims making negligence and breach-of-contract claims against the plaintiff insurer.

29 139 F. Supp. 3d at 673.

30 *Id*. at 673–77 (quoting United Servs. Life Ins. Co. v. Moss, 303 F. Supp. 72, 75–76 (W.D. Va. 1969)).

31 2009 Va. App. LEXIS 261, at *7 n.2 (2009).

> ment of the parties providing for a contrary result as to specific death benefits . . . .[32]

To the same effect is the case of *Virginia Retirement System v. Boneparte*,[33] where the court stated:

> The parties agree that, as of July 1, 1993, Va. Code § 20-111.1 would control the creation of the respective claims. The statute provides that, for final decrees of divorce entered after that date, revocable beneficiary designations for any death benefit due a spouse are revoked.

In *Fidelity Brokerage Services, LLC v. Burns*,[34] the court likewise summarized the General Assembly of Virginia's interest in exacting this statute as follows:

> The General Assembly stated a clear purpose for § 20-111.1: to bar ex-spouses from inheriting death benefits from his or her former spouse. The mechanism for accomplishing this statutory goal is to treat all former spouses as having predeceased their ex-spouse.[35]

In that case, the decedent designated his former wife as the primary beneficiary and his niece as the contingent beneficiary on his IRA. The court ruled that because section 20-111.1 required that the former wife be treated as if she predeceased the decedent, it followed that there were no living primary beneficiaries at the time of the decedent's death and that payment must be made to his niece as the surviving contingent beneficiary.[36]

Therefore, under Virginia's revocation-on-divorce statute, Code section 20-111.1, for final divorce decrees entered after July 1, 1993, revocable beneficiary designations for death benefits due to be paid to a spouse are automatically revoked.

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[32] Code § 20-111.1 was not implicated in *Attiliis,* which was an equitable distribution case.

[33] 61 Va. Cir. 304 (2003).

[34] 2018 U.S. Dist. 209030 (E.D. Va. 2018).

[35] *Id*. at *7 n.5.

[36] *Id.* at *5.

IV. The Revocation of Any Revocable Beneficiary Designation under Code Section 20-111.1(A) Does Not Operate to Automatically Revoke the Designation upon Divorce or Annulment; However, There Is an Exception to Revocation Detailed in Code Section 20-111.1(C)(I) for a Divorce Decree or Written Agreement of the Divorcing Couple That Provides for a Contrary Result as to Those Death Benefits

Since the 1993 enactment of Code section 20-111.1, a number of reported cases have held that Code section 20-111.1(A)'s automatic revocation of beneficiary designation does not occur because, in accordance with Code section 20-111.1(C)(i), before the entry of the divorce decree the divorcing parties and/or their attorneys contractually addressed the subject of the beneficiary designation on the spouse's life insurance policy in a marital settlement agreement rather than letting the beneficiary designation be automatically revoked by statute.

Lincoln National Life Insurance v. Johnson,[37] was a federal interpleader action in which a divorcing couple's agreement, incorporated into the decree, required the former husband to maintain his life insurance policies naming the former wife as beneficiary until the divorce was final and then requiring him to designate the couple's children as the beneficiaries. The court found that the stipulation and agreement was incorporated into the divorce decree, was a valid contract, and required that after the divorce the former husband maintain the couple's children as the beneficiaries of the policy.

After noting that Code section 20-111.1 does not apply to revoke the beneficiary designation of an former spouse if the divorce decree or separation agreement provides a contrary result for specific death benefits, the federal district court held that this statute itself did not revoke the designation of beneficiaries in the stipulation and agreement but instead it revoked the former wife's beneficiary designation and directed that their two children receive the proceeds, which also provided a result contrary to the statute.[38]

John Hancock Mutual Life Insurance v. Johnson,[39] was nearly identical to *Lincoln National Life*, in that it, too, involved the relatives of the husband making claims for his life insurance benefits. Citing the provision of the parties' stipulation and agreement pertaining to his life insurance,[40] the court ruled that Code section 20-111.1 did not operate to revoke the beneficiary designation of the former spouse because the divorcing couple's agreement, which was incorporated into the divorce decree, required the former husband to maintain his

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37 38 F. Supp. 2d 440 (E.D. Va. 1999).

38 38 F. Supp. 2d at 449.

39 1999 U.S. Dist. Lexis 24140 (W.D.N.C. 1999) (applying Virginia law).

40 The couple's stipulation and agreement stated: "[T]he Husband shall maintain in full force and effect [all] insurance on his life, and the beneficiary of such insurance shall be the Wife until such time as a final divorce decree shall be entered by a court of competent jurisdiction. Thereafter the beneficiaries of such insurance shall be the children of the parties." 1999 U.S. Dist. Lexis 24140, at * 4.

life insurance policies naming his former wife as the beneficiary until the divorce decree was final and then required him to designate the couple's children as the beneficiaries. The court ordered that the interpleaded funds be distributed equally to the couple's children.

In another federal district court interpleader action, *Transamerica Occidental Life Insurance v. Maree*,[41] the most recent beneficiary designation on a life insurance policy insuring the life of a husband designated his wife and two sisters as primary beneficiaries in stated percentages. The marital settlement agreement was incorporated into a final divorce decree, and the former husband died four years later. The federal district court ruled that the marital settlement agreement, which allowed the divorcing husband to maintain his existing life insurance policy and to name his former wife as its beneficiary,[42] was complete on its face and its terms were unambiguous. It declined to consider any extrinsic evidence because that the marital settlement agreement was the couple's final agreement. Citing Code section 20-111.1(C)(i), which permits a divorce decree or written agreement providing for a contrary result as to specific death benefits, the district court held that consistent with the marital settlement agreement, each of the three named beneficiaries were entitled to recovery, in the percentages specified in the predivorce beneficiary designation.[43]

Recently, in another federal district court case, *Jones v. Jones*,[44] the couple entered into a marital settlement agreement that was incorporated into the final decree of divorce. The operative paragraph of that agreement[45] stated that the husband "has named [his former wife] as the beneficiary to a life insurance policy he owns with Liberty National Life Insurance Company and will provide [her] . . . annual documentation, which indicates that the life insurance policy is active." The former wife alleged that her former husband had seven separate life insurance policies in effect with Liberty National totaling $468,000 and that it was the intent of their agreement that she would be the beneficiary of her late former husband's policies in effect at the time of the entry of that agreement. She further alleged that after his death she had learned that she was named as a beneficiary on only one $25,000 Liberty National life insurance policy.

The former wife filed a complaint against the insurer, her former husband's executor, and currently named beneficiaries of the other six Liberty National policies. She made claims for imposition of a constructive trust on the disputed life insurance benefits, for breach of contract, and for a declaratory judgment that she was the rightful recipient of all proceeds from the seven Liberty Na-

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41 2008 U.S. Dist. LEXIS 58586 (E.D. Va. 2008).

42 Their marital settlement agreement stated: "Neither party shall be required to maintain life insurance on the life of the other. However, by agreement, the wife shall be deemed to have an insurable interest in the life of the Husband . . . . The Husband shall be allowed to maintain his existing life insurance policy and shall be allowed to name the Wife as a beneficiary of this policy." 2008 U.S. Dist. LEXIS 58586, at *6–7.

43 2008 U.S. Dist. LEXIS at *6-8.

44 206 F. Supp. 3d 1098 (E.D. Va. 2016).

45 206 F. Supp. 3d at 1102.

tional life insurance policies. In denying the widow's F.R.C.P. 12(b)(6) motion to dismiss the plaintiff former wife's breach of contract claim, the district court in *Jones* ruled that even though the marital settlement agreement did not identify a specific life insurance policy number, the language in that agreement was sufficient to invoke the exception to revocation for a specific death benefit detailed in Code section 20-111.1(C)(i).

Thus, in Virginia when a couple plans to divorce and wants to avoid the automatic statutory revocation of the beneficiary designation in any party's life insurance policies, the best practice is for the parties, before the divorce, to comprehensively address in a written agreement how they want the beneficiaries on life insurance policies to be designated. Ideally, the agreement should specifically identify the "specific death benefit" under Code section 20-111.1 by providing as much information as possible such as the name of the insurer/account holder, the policy/account number, the face amount of the policy/account, the type of policy/account, and so forth.

V. What Should Happen If in Their Separation and Property Settlement Agreement the Divorcing Spouses Address Some, but Not All, of Their Life Insurance Policies?

Several years ago this author handled a case where the divorced couple's separation and property settlement agreement, which was ratified, affirmed, and incorporated into, but not merged into, the divorce decree, stated that the parties would each maintain a life insurance policy with a face amount of $100,000 naming the couple's children or a trust in the children's favor as the beneficiaries until such time as the youngest child attains the age of twenty-three years or graduated from college, whichever first occurred. That agreement also provided that the husband would maintain a life insurance policy in the face amount of $50,000 that named his wife as the beneficiary for the remainder of his life or until the wife's death and stated that the policy was provided in lieu of providing a survivor benefit on the husband's military retirement. The agreement further stated:

> Apart from what is provided for immediately herein, neither party shall be obligated to maintain or pay for life insurance covering the life of the other, or for which the other party is the beneficiary and each party shall be free to cancel, modify, and/or change the beneficiary or beneficiaries of any existing life insurance policy which he or she presently owns. Each party owns and shall continue to own outright his or her interest in all such insurance policies in which he or she is shown as the owner.

It included a general release provision whereby the parties mutually agreed to accept the agreement's provisions in full satisfaction of all property rights and all obligations whatsoever arising out of the couple's marriage and, except as therein provided, released each other from all claims.

Since the divorce decree and the agreement both provided for a result contrary to the automatic statutory revocation of the beneficiary designation, after the husband's death the insurer promptly paid the proceeds of the husband's life insurance policies with face amounts of $100,000 and $50,000 to the couple's children and the former wife, respectively.

How was the insurer supposed to handle the third life insurance policy insuring husband in the face amount of $30,000, which listed his former wife as the sole beneficiary?

The former wife asserted that the couple intended for the benefits of this $30,000 policy to be paid also to her.

The insurer refused to pay the benefits of the separate $30,000 policy to the former wife for three reasons. First, under Virginia's statutory revocation of beneficiary designations upon divorce statute, the former wife's beneficiary designation had been automatically revoked. Second, the provisions of their agreement noted above identified and addressed only the $100,000 and $50,000 policies and failed to mention in any way the $30,000 policy.[46] Third, the couple's agreement had a broadly worded general release provision by which the parties mutually agreed to release all unmentioned claims. The insurer took the position that, the designation of the former wife as sole beneficiary having been automatically revoked by statute, pursuant to the policy provisions for dealing with the absence of any beneficiary whatsoever, the benefits of the $30,000 policy should be paid to the husband's estate.

Thus, if the divorcing couple's agreement identified some but not all of their life insurance policies in the agreement, as to those policies that were insufficiently identified, Code section 20-111.1 statutorily revokes those policies' beneficiary designations.

VI. Virginia Code Section 20-111.1 Is Not Unconstitutional on the Grounds That the Former Spouse's Rights under Her Former Spouse's Life Insurance Policy Had Vested and/or Was Irrevocable before the Statute's Enactment Such That Its Application Now Would Impermissibly Destroy Those Rights

In *Pittman v. Monumental Life Insurance*,[47] the life insurance carrier issued a policy on the husband's life that named his then-wife as the primary beneficiary and the third party infant as the contingent beneficiary. The couple was divorced, and the former husband died three years later. The former wife demanded payment of the policy proceeds to her, which the insurer refused on the

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[46] In the instant case, the divorcing couple's agreement mentioned the $100,000 and $50,000 face amount policies by insurer (Liberty National) and by face amount. In contrast, their agreement never identified the $30,000 policy in any way, either by insurer, by policy face amount, or by policy number. In contrast, in *Jones* the federal district court held that in their agreement the parties sufficiently identified a "specific death benefit" under Code section 20-111.1(B) by naming the insurer (Liberty National) "even if it does not identify a particular life insurance policy number." 206 F. Supp. 2d at 1112.

[47] 54 Va. Cir. 400 (2001).

grounds that her primary beneficiary designation was revoked by their divorce under Code section 20-111.1. The former wife filed the declaratory judgment action seeking payment to her of the proceeds of her late former husband's life insurance policy. She asserted that the statute was unconstitutional on the grounds that her rights as primary beneficiary under the life insurance policy became vested before the statute's enactment and that the statute's application now would impermissibly destroy those rights.[48] The circuit court rejected the plaintiff's claim that her rights as primary beneficiary were ever vested because her rights were never irrevocable but instead were revocable under both the provisions of the policy and Code section 20-111.1. The court noted that beneficiary designations were revocable unless the policy owner, namely the former husband, specifically indicated that the beneficiary designation was irrevocable, which he never did.[49] By operation of the statute, the couple's 1997 divorce revoked the former wife's primary beneficiary designation and the contingent beneficiary then became entitled to receive the policy proceeds.[50]

Under the reasoning of *Pittman v. Monumental Life Insurance Co*., a former spouse cannot challenge a revocation-on-divorce statute such as Code section 20-111.1 as being unconstitutional on the grounds that the beneficiary designation was vested and/or was irrevocable.

VII. Virginia Code Section 20-111.1 Is Not Unconstitutional on the Grounds That It Violates the Contract Clauses of the Virginia and United States Constitutions

In the *Pittman* case, the plaintiff/former wife also relied upon article 1, section 11 of the Virginia Constitution, which in pertinent part states, "(t)hat the General Assembly shall not pass any law impairing the obligation of contracts . . . ."[51] Since the circuit court had already found that the former wife's rights under the policy were neither vested nor irrevocable, it further ruled that this constitutional provision was not implicated by the application of Code section 20-111.1.[52]

This past summer, the Supreme Court of the United States handed down its decision in *Sveen v. Melin*,[53] in which it ruled[54] that retroactive application of

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48 54 Va. Cir. at 401.

49 *Id*.

50 *Id*.

51 *Id*.

52 *Id*.

53 __ U.S. __, 138 S. Ct. 1815, 201 L. Ed. 2d 180 (2018).

54 Before analyzing the constitutionality of Minnesota's automatic revocation-on-divorce statute, the Supreme Court offered this observation: "All good trust-and-estate lawyers know that death is not the end; there remains the litigation and the estate.'" ___ U.S. at ____, 138 S. Ct. at 1818, 201 L. Ed. 2d at 184 (quoting 8 The Collected Works of Ambrose Bierce 365 (1911)).

Minnesota's revocation-on-divorce statute[55] to the preexisting designation of a beneficiary made before the statute's enactment did not violate the Contracts Clause of Article 1, Section 10, Clause 1 of the United States Constitution.[56] The majority opinion[57] noted that twenty-six states, including Virginia, have revocation-on-divorce laws substantially similar to the Minnesota statute.[58] The Supreme Court reversed the Eighth Circuit's holding that Minnesota's revocation-on-divorce statute violates the Contract Clause when applied retroactively and remanded the case for further proceedings consistent with its opinion. On remand, the Eighth Circuit affirmed the district court's awarding the proceeds of the husband's life insurance policy to the children, as that court had done earlier when it rejected the former wife's constitutional argument.[59]

Applying the analysis of the *Pittman* and *Sveen* decisions, an former spouse cannot challenge a revocation-on-divorce statute such as Virginia Code section 20-111.1 on the grounds that the retroactive revocation of the beneficiary designation violated the contract clauses of either the Virginia or United States Constitutions.

VIII. If the Individual Retirement Account (IRA) Has No Written Beneficiary Designation, the Beneficiary Revocation Provision of Code Section 20-111.1 Does Not Apply

In *UBS Financial Services v. Childress*,[60] a couple entered into a separation and property settlement agreement (PSA) before their divorce, pursuant to which the husband transferred fifty percent of shares of stock in Lowe's Corporation, Inc. from his IRA to an IRA held by his former wife. The PSA provided that the remaining assets of the husband's IRA were his separate property and the former wife waived any right in his property. Two years after the divorce, the husband removed all assets from his original IRA and deposited them in a new IRA. The following year he removed all assets from his second IRA and deposited them into a third IRA. The former husband never designated a beneficiary for either the second or third IRA. The former husband died intestate three years later and both his administrator and his former wife sued UBS demanding payment of the funds in his third IRA. UBS filed an interpleader ac-

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55 The Minnesota revocation-on-divorce statute, Minn. Stat. § 524.2-804, subd. 1, provides that "the dissolution or annulment of a marriage revokes any revocable beneficiary designation made by an individual to the individual's former spouse." Before the enactment of this statute, in Minnesota, as in Virginia, a divorce alone did not affect a beneficiary designation unless the parties had addressed the beneficiary designation in the divorce decree or an agreement incorporated therein. ___ U.S. at ___, 138 S. Ct. at 1820, 201 L. Ed. 2d at 185.

56 The Contracts Clause of Article 1, Section 10, Clause 1 of the United States Constitution, in pertinent part, states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

57 The *Sveen* case was an 8-1 decision with the sole dissenting Justice being the Court's then-newest Justice, Justice Gorsuch. ___ U.S. at ___, 138 S. Ct. at 1826–32, 201 L. Ed. 2d at 192–99.

58 *Sveen*, __ U.S. at __ n.1, 138 S. Ct. at 1819 n.1, 201 L. Ed. 2d at 185 n.1.

59 899 F. 3d 953 (8th Cir. 2018).

60 2013 U.S. Dist. Lexis 98069 (W.D. Va. 2013).

tion seeking the court's determination of which party is entitled to the fund, which then exceeded $350,000.

The administrator argued that since the IRA had no named beneficiary, both the husband's contract with UBS and Virginia intestate law required his IRA assets to be distributed to his estate. The administrator alternatively argued that even if the original IRA's beneficiary designation applied to the husband's third IRA, under the provisions of Code section 20-111.1, the former wife's beneficiary status would have been revoked as a matter of law when the couple divorced. The former wife contended that since the Virginia statute was preempted by ERISA, she was entitled to the IRA assets.

The federal district court ruled in *UBS* that since the third IRA was not governed by ERISA, no pre-exemption analysis was needed with respect to Virginia's revocation of death benefits statute, Code section 20-111.1. It further found that the third IRA never had a written beneficiary designation naming the former wife as the third IRA's beneficiary upon her husband's death, and that, therefore, there was no need for the court even to invoke the provisions of Code section 20-111.1. The former wife could point to no legal authority supporting her contention that the beneficiary designation for the original IRA applied to his third IRA to which she was making a claim. No evidence was ever introduced that he ever named his former wife as the third IRA's beneficiary. Nor was there evidence that he ever intended his earlier designation of his then-wife as the beneficiary of the original IRA, which had an entirely different UBS account number, to apply to his third IRA, which he did not establish until several years after the couple divorced. The court refused to rule that the divorcing couple's PSA governed his third IRA.

Based on the evidence and settled Virginia law that made his third IRA part of his estate, the federal district court in *UBS* concluded that the husband's estate was entitled to the funds of his third IRA.

IX. Situations When Federal Law Preempts Virginia Code Section 20-111.1

Since the 1993 enactment of Virginia Code section 20-111.1, courts have had to determine whether this state statute is preempted by federal statutes that also attempt to address who shall receive death benefits following a couple's divorce.

A. SURVIVOR BENEFIT PLAN

Dugan v. Childers,[61] involved the Survivor Benefit Plan, established by 10 U.S.C. §§ 1447–1455, under which a military retiree, following entry of a divorce decree, could elect to provide an annuity to a former spouse, provided that the election was brought in writing, signed by the person making the election, and received by the secretary of the appropriate branch of the military service within one year after the date of the divorce decree. The husband retired from the

61 261 Va. 3, 539 S. E.2d 723 (2001).

United States Army. Twelve years later, the couple divorced by final decree that incorporated, ratified, and confirmed the couple's property settlement agreement by which they stipulated that she was entitled to one-half his military retirement benefits. He agreed to assign to her one-half his income from the benefits and to designate her as the beneficiary of the military retirement benefits. Seven years later he married his second wife and shortly thereafter changed the survivor beneficiary of his military retirement benefits to his second wife. Three years later he died—without ever having changed his survivor beneficiary from his widow to his first wife. His widow had been receiving survivor benefits since her husband's death.

In affirming the trial court's ruling[62] that Virginia state law was preempted by the federal Survivor Benefit Plan and that the former wife was barred from any recovery, the Supreme Court of Virginia pointed out that the case was its first opportunity to consider whether the federal Survivor Benefit Plan preempted Virginia law on the subject of a former spouse's entitlement to the survivor benefits of a military retiree and that there was not an abundance of authority outside the Commonwealth on that issue.

B. ERISA

In *UBS Financial Services v. Childress*,[63] the federal district court held that since the former wife could offer no reason why her late husband's third IRA should be considered an employee benefit plan subject to ERISA, it found that the IRA was not governed by ERISA. The court then ruled that no preemption analysis was necessary with respect to Virginia's revocation-on-divorce statute, Code section 20-111.1.

Since the former wife's counsel continued to argue that the litigation was ERISA controlled even though he could offer no evidence whatsoever that the IRA was an employee benefit plan, the court in *UBS Financial Services*,[64] ordered counsel to show cause—*responsive statutory cause*—why their litigation conduct did not violate F.R.C.P. 11(b) or 28 U.S.C. § 1927.

In *UBS Financial Services v. Childress*,[65] the court declined to impose sanctions against the former wife's counsel under § 1927 because it failed to find that counsel's conduct amounted to bad faith. However, the court found that the former wife's counsel had violated F.R.C.P. 11, with the former wife's two counsel receiving a sanction of a formal reprimand and order that counsel pay into the court a penalty of $750. The apparent premise for this award was that repeated assertions that the wife was a named beneficiary of the IRA were baseless.

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62 The *Dugan v. Childers* case was decided by the Honorable Henry E. Hudson, Judge of the Circuit Court of Fairfax County, who is now a Senior United States District Judge of the U.S. District Court for the Eastern District of Virginia.

63 2013 U.S. Dist. LEXIS 98069 (W.D. Va. 2013).

64 2013 U.S. Dist. LEXIS 125121 (W.D. Va. 2013).

65 2013 U.S. Dist. LEXIS 153972 (W.D. Va. 2013).

In the circuit court case, *Griffin v. Cowser-Griffin*,[66] the decedent's children asserted claims to their father's ERISA-governed and employer-provided group life insurance policy and 401(k) plan based on a separation and property settlement agreement that their father had entered into with their mother before their divorce. That agreement provided that as long as any of their children were under the age of twenty-one years, both their father and their mother agreed to designate the children as primary beneficiaries on the life insurance policies of not less than $500,000 and to maintain and to continue in force those life insurance policies. Both the group life insurance policy (which provided life insurance benefits of $392,433) and 401(k) plan (which provided benefits worth $354,126) named their father's widow as the beneficiary of the plans. The children conceded that the plan administrator could not distribute the ERISA benefits directly to them in contradiction of the beneficiary designations to their father's widow. They asserted, however, that the imposition of a constructive trust over the benefits was not preempted by ERISA. Finding that the children's claim for the imposition of a constructive trust "relates to" plan benefits designated to the widow under ERISA, the circuit court ruled that the children's claim was preempted by ERISA[67] and entered summary judgment for the widow.

C. FEDERAL EMPLOYEES' GROUP LIFE INSURANCE ACT OF 1954 (FEGLIA)

In *Hillman v. Maretta*,[68] the Supreme Court of the United States ruled that since Virginia Code section 20-111.1(D) is in direct conflict with Congress's objective that insurance proceeds belong to the named beneficiary, section D of the Virginia statute is preempted by the federal law, FEGLIA. There, a husband named his then-wife as the beneficiary of his FEGLIA policy. The couple divorced, and he later remarried. After his death benefits under the FEGLIA policy were paid to the first wife, the widow filed suit against the former wife claiming that under Virginia Code section 20-111.1(D), the former wife was liable to her for the death benefits that she had received as the named beneficiary of his FEGLIA policy. In upholding the Supreme Court of Virginia's decision, the Supreme Court of the United States held that Code section 20-111.1(D) directly conflicted with Congress's objective that the life insurance proceeds belong to the named beneficiary.[69]

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66 85 Va. Cir. 435 (2012).

67 In *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed 2d 264 (2001), the Court held that ERISA preempts state revocation-on-divorce statutes as applied to life insurance and *personal policy benefits* governed by ERISA.

68 569 U.S. 483, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013), *affirming*, 283 Va. 34, 722 S.E.2d 32 (2012), *reversing*, 80 Va. 439 (2010). For a discussion of the trial court's opinion, *see* 22 J. CIV. LITIG. 397 (2010).

69 *Id.* at 499, 133 S. Ct. at 1955, 186 L. Ed. 2d at 58.

D. FEDERAL EMPLOYEE'S RETIREMENT SYSTEM ACT OF 1996 (FERSA)

Van Den Broek v. Tang,[70] involved whether federal law preempts a breach-of-contract claim against a properly designated beneficiary of Thrift Savings Plan (TSP) death benefits under FERSA. A husband designated his then-wife as the beneficiary of his TSP benefits under FERSA. The beneficiary form that he executed that day was the only beneficiary form on file with the husband's employer. A few years later, the court entered the couple's final decree of divorce, which affirmed, ratified, and incorporated the property settlement agreement that the parties had entered into earlier and which addressed the husband's TSP benefits.

The first wife filed a declaratory judgment action to determine her rights to the TSP benefits on grounds of federal preemption. The defendant widow countersued the plaintiff former wife for breach of contract alleging that she had breached the couple's property settlement agreement in receiving the TSP benefits. The court ruled that the defendant widow's counterclaim would be dismissed and the plaintiff former wife's motion for summary judgment would be granted on the grounds that federal law preempts the widow's claims.

X. CONCLUSION

Used properly, designation of beneficiaries in life insurance, annuity, and retirement plans can be an effective tool to direct how a person wants his life insurance, annuity, and retirement benefits to be paid upon his death. Careful drafting[71] of the divorcing couple's marital settlement agreement and the divorce decree with attention to the requirements discussed above can go a long way in successfully navigating the process of duly complying with the provisions of Code section 20-111.1 while also conforming to the client's wishes as to whom benefits will ultimately be paid upon death.

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70 88 Va. Cir. 65 (2014). For a discussion of the court's opinion, *see* 26 J. CIV. LITIG. 253 (2014).

71 Alabama is one of the twenty-six states that, like Virginia, have a revocation-on-divorce statute. In interpreting Alabama's revocation-on-divorce statute, the Supreme Court of Alabama recently offered this observation, which applies with equal force to other revocation-on-divorce statutes such as Virginia Code section 20-111.1:

> A divorce, or annulment, affects a beneficiary designation under any number of contractual documents such that spouses should carefully consider how to address beneficiary designations, mindful that our laws (as in many other instances) provide a default in the absence of action by divorcing spouses.

Blalock v. Sutphin and N.Y. Life Ins. Co., 2018 Ala. LEXIS 115, *12, ___ So. 2d ___, ___ (2018).