

PROTECTING SURVIVORS OF DOMESTIC VIOLENCE WITHIN THE INSURANCE REGIME: OPPORTUNITIES TO SEEK TERMINATION OR VARIATION OF INSURANCE CONTRACTS

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Abstract: *A person whose life is insured under a life insurance contract for the benefit of another person does not have a contractual or common law right to terminate or otherwise affect the terms of the contract. As well, such contracts remain valid even after termination of the relationship that provided an insurable interest at the commencement of the contract. The existence of a life insurance contract might provide an incentive for the policy owner/beneficiary to cause harm to the insured person in order to collect the insurance money. Recovery of the insurance money is precluded on grounds of public policy if the beneficiary is found liable for the death of the insured person. However, this is no comfort for the victim; indeed, this situation has the potential to create or exacerbate the vulnerability of victims of domestic violence, who are mostly women and children. Manitoba, British Columbia and Alberta have enacted provisions entitling persons whose lives are insured to seek judicial remedies aimed at alleviating the safety concerns in specified circumstances, notwithstanding the applicant's lack of privity of contract. This paper examines the bases and nature of the remedial options and explores how they can effectively protect persons whose lives are insured for the benefit of the policy owner and the appropriate threshold for granting remedies. Applicants may seek remedies under the insurance legislation in conjunction with protection orders in*

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the family or criminal context. Courts are likely to assess similar factors when considering appropriate remedies under the insurance and family law regimes. Although these remedies are not a panacea for domestic violence, they may be significant in preventing violence against women and children whose lives are insured by other family members and where the latter's motivation for violence may include recovery of insurance money.

INTRODUCTION

The insurer-insured relationship is inherently an unequal one. Consequently, an important goal of insurance regulation is to protect consumers of insurance products. However, the vulnerability that may arise in an insurance context is not limited to the insurer-insured relationship. Perpetrators of domestic violence can use the existence of an insurance policy as a “weapon” to terrorize their victims, who are most commonly women and children.¹ A policy owner who is also the beneficiary under an insurance policy can hold a valid insurance contract on the life of another person with whom they may have a strained relationship. This is concerning in circumstances where there is potential for violence by the policy owner/beneficiary against the person whose life is

¹ The prevalence of domestic violence against women was highlighted in a 2013 World Health Organization report. According to the report, over 30 percent of women experience violence at the hands of an intimate partner, making it the most common type of abuse affecting women. As well, the report notes that 38 percent of all murdered women died at the hands of their partners. While there are regional variations in the prevalence of violence against women, the rate of abuse in high-income countries including Canada is 23.2 percent. WHO, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and non-Partner Sexual Violence* (Geneva, 2013), online: <http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf>.

insured. The nature of life insurance contracts whereby the person whose life is insured is different from the beneficiary can create a temptation for the latter to cause the insured risk, that is, end the former's life; this creates "a decidedly harmful tendency".² Concerns about the harmful tendency created by the opportunity to benefit from the death of the person whose life is insured are mitigated by the fact that there is often a relationship of love and affection between the owner/beneficiary and the life insured. The former is interested in the continuing existence of the latter. The force of that assumption may wane where there is a breakdown of the relationship of love and care and the beneficiary may no longer be interested in the continuing existence of the person whose life is insured and upon whose death they have an opportunity for financial gain.

A person whose life is insured under a valid insurance contract for the benefit of another has no common law or contractual right to apply to the insurer for termination or variation of the terms of the insurance contract on her or his life. This position stems from the well-worn doctrine of privity of contract, whereby a third party to a contract is precluded from affecting the contract's terms. The concern that the privity doctrine may be ill-suited to life insurance contracts was raised in the debate in the BC legislature leading to the enactment of the 2012 *Insurance Act*:

Currently a life-insured individual who is not the policyholder cannot cancel the life insurance policy even though the policy owner may no longer have an insurable interest in that person's life. This situation may arise, for example, upon termination of employment or upon a divorce. The person whose life is insured may feel

² Edwin W Patterson, "Insurable Interest in Life" (1918) *Columbia L Rev*, 381 at 389.

uncomfortable or even at personal risk knowing that their death will benefit another individual.³

Insurance legislation is beginning to address this concern. Recent amendments or enactments of insurance legislation in some Canadian jurisdictions aim to protect survivors of domestic violence and, more generally, insured persons upon the breakdown of relationships, and seek to neutralize the potential of an insurance policy to contribute to the systemic violence against women and children. Two specific legislative reforms stand out in this regard: (1) recovery by an innocent co-insured where an insured under the same policy intentionally causes loss or damage to the insured property;⁴ and (2) option for seeking a court order for termination or variation of the terms of an insurance contract where the person whose life is insured feels he or she could be at risk of harm at the hands of the owner/beneficiary of the

³ British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39th Parl, 1st Sess, Vol 4, No 2 (6 October 2009) at 987 (B. Ralston).

⁴ *Insurance Act*, RSBC 2012, c 1, s 35 [BC *Insurance Act*]; see also *Insurance Act*, RSA 2000, c I-3, s 541 [Alberta *Insurance Act*]; *Insurance Act*, CCSM I40, s 136.5 [Manitoba *Insurance Act*]. This provision protects the interests of persons with joint ownership or interests in the same property, such as the family home, and their interests are insured under a single insurance policy with joint rights and obligations for co-insureds. Prior to the introduction of the provision protecting the interests of the innocent co-insured, such persons were vulnerable to the actions of their partners and cohabitants who cause damage or loss to the insured property because they were also precluded from recovering their interest in the insured property under the intentional/criminal injury exclusion clause in insurance contracts. For a discussion of this provision, see E. Adjin-Tettey, "Personal Responsibility for Intentional Conduct: Protecting the Interests of Innocent Co-Insured under Insurance Contracts" (2013) 50 *Alta L Rev* 615.

insurance policy on her or his life,⁵ or where insurable interest ceases to exist.⁶ This paper will focus on the latter issue and examine the extent to which the termination and/or variation provisions offer protection to victims of domestic violence.

The paper begins with a discussion of the rationale for termination or variation remedies in life, accident and sickness insurance contracts. This is followed by a discussion of the insurable interest requirement for non-indemnity insurance contracts, highlighting concerns about requiring an insurable interest only at the commencement of a contract but not at the time of loss. Next, the paper explains the need to protect persons whose lives are insured by others, especially in the domestic context where there may be the potential for violence. In such cases, the possibility of financial gain from collecting insurance money may reasonably be perceived as a motive for the policy owner/beneficiary to endanger the life or health of the person whose life is insured in order to bring about the insured loss. So far, Manitoba, Alberta and British Columbia have enacted provisions entitling persons whose lives are insured to seek judicial remedies in specified circumstances. Similar amendments have been introduced in Ontario but the provisions are yet to come into force. I examine the bases for and the available remedies, and suggest ways in which the provisions could offer better protections for persons whose lives are insured including the appropriate threshold for granting remedies.

Terminating or Varying Insurance Contracts

Currently in BC, Alberta and Manitoba, a person whose life is insured under a life or accident and sickness insurance policy, and who reasonably believes continuation of the insurance

⁵ BC *Insurance Act*, *ibid*, ss 47 and 109; Alberta *Insurance Act*, *ibid*, ss 648 and 717, Manitoba *Insurance Act*, *ibid*, ss 155.1 and 217.2.

⁶ Manitoba *Insurance Act*, *ibid*, ss 155(4) and 217.1.

contract might endanger her or his life or health, can seek a court order to allay the concern about their health and well-being.⁷ The court has the discretion to provide a remedy that it sees fit in the circumstances, which may include termination of the contract in accordance with its terms or variation of the terms of the contract such as reducing the insurance amount. This remedy is intended to eliminate, or at least reduce, the risk to the insured person's life or health emanating from the policy owner/beneficiary holding an insurance contract on their life. The need for such a remedy typically arises in the domestic context where a family member might be concerned that the beneficiary of the policy, who is also likely to be the policy owner, could harm them to collect insurance money or could engineer the insured event for a variety of reasons including jealousy, acrimonious relationship breakdown, or as an act of violence.⁸

A beneficiary is precluded from recovering the insurance money where he or she is found to be responsible for bringing about the insured loss, specifically for causing the

⁷ BC *Insurance Act*, *supra* note 4, s 47 (life) and s 109 (accident and sickness). See also Alberta *Insurance Act*, *supra* note 4, s 648 (life), s 717 (accident and sickness); Manitoba *Insurance Act*, *supra* note 4, s 155.1 (life) and s 217.2 (accident and sickness); *Insurance Act*, RSO 1990, c I.8, ss 179.1 (life), 306.1 (accident and sickness) (not yet in force)[Ontario *Insurance Act*]. In Manitoba, there is also an option of seeking termination of an insurance contract upon cessation of insurable interest: Manitoba *Insurance Act*, ss 155(4) and 217.1.

⁸ Although the uneasiness about a person continuing to be the owner and beneficiary of an insurance policy after the termination of a relationship often arises in the domestic context, it can also arise in any of the other relationships that give rise to an insurable interest such as breakdown in an employment relationship as was in *Chantiam v Packall Packaging Inc* (1998), 38 OR (3d) 401, 159 DLR (4th) 517 (CA), leave to appeal to SCC refused, [1998] SCCA 358 [*Chantiam*]; and in partnerships as was in *Hechter v Sonya* (1999), 131 Man R (2d) 295 (CA) [*Hechter*].

death of the person whose life is insured.⁹ However, this would be little comfort if the person whose life was insured had been killed. Although it may be difficult to draw a firm link between spousal murder and life insurance benefits, there are a multitude of cases in which such benefits have been cited as a possible factor in homicides.¹⁰ As well, there may not always be sufficient evidence to charge and prosecute the beneficiary, or to find him or her liable for causing the insured event on the criminal standard of guilt beyond a reasonable doubt. Additionally, the insurer may not have sufficient evidence to deny recovery of the insurance money based on the civil standard of balance of probabilities in a claim on the policy. In such cases, the beneficiary may still be able to benefit from the insurance contract even if a cloud of suspicion continues to

⁹ See *Brissette Estate v Westbury Life Ins Co*, [1992] 3 SCR 87; *Papasotiriou-Lanteigne v Manufacturer's Life Insurance Co*, 2012 ONSC 6473 at para 14; *Oldfield v Transamerica Life Insurance Co of Canada*, 2002 SCC 22; *Goulet v Transamerica Life Insurance Co of Canada*, 2002 SCC 21; *Demeter v Dominion Life Assurance Company* (1982), 35 OR (2d) 560 (CA); *Chan Estate (Public Trustee of) v Allstate Life Insurance Co. of Canada*, 1998 ABQB 1031, 238 AR 63 (QB). See also Erik Knutsen, "Fortuity Clauses in Liability Insurance: Solving Coverage Dilemma for Intentional and Criminal Conduct" (2011-12) 37 Queen's LJ 73.

¹⁰ For several illustrative examples of cases in which life insurance was thought to play a role in spousal homicide, see *R v Toor*, 2005 BCCA 333 (husband took out life insurance on his new wife and murdered her with the help of his son); *R v Kelley* (1999), 135 CCC (3d) 449 (ON CA), application for leave to appeal denied [2001] SCJ No 26 (one of the motives for spousal murder thought to be collection of life insurance policy); *R v Figueroa*, 2008 ONCA 106 (appeal of conviction for the murder of accomplice's wife where the accomplice/husband was suspected of arranging the murder in order to use deceased's life insurance to pay off debts); *R v Samuels*, [2005] OJ No 1873 (CA), leave to appeal refused [2005] SCCA No 313 (motive for murder of wife thought to be collection of life insurance policy, new trial ordered as a result of misleading jury instructions).

hang over them. It is therefore important to give persons whose lives are insured the means to pre-empt concerns about the insured/beneficiary causing the insured loss, by removing the financial incentive for doing so.

Insurable Interest and Non-Indemnity Insurance Contracts

A court order is required to terminate or vary the terms of a non-indemnity insurance contract because of how the concept of insurable interest operates in relation to such contracts. Life, accident and sickness insurance are non-indemnity contracts. Unlike indemnity insurance contracts (for example, property insurance), recovery under non-indemnity insurance contracts is not dependent on proof of financial loss on the happening of the insured loss (for instance, the death of the person insured). Absence of the requirement for proof of financial loss gives rise to the possibility of personal insurance contracts being used as wagers, with a corresponding risk of moral hazard that a beneficiary may be interested in bringing about the insured loss, in this case, cause the death of the person whose life is insured for financial gain. To avoid this possibility, and to distinguish insurance contracts from wagers, the insured or policy owner is required to have an insurable interest in the person whose life is insured. Insurable interest ensures that the insured has a connection with the person whose life is insured such that they are interested in the latter's continued existence and will suffer a detriment should harm befall that person, even if that loss cannot be estimated in monetary terms. The requirement of insurable interest is therefore intended to minimize the potential for moral hazard given the corresponding detriment to the insured should the insured loss materialize.¹¹ A person has an insurable interest in their own

¹¹ For a discussion of the evolution and critique of the insurable interest requirement, see Jacob Loshin, "Insurance Law's Hapless Busybody: A Case against the Insurable Interest Requirement" (2007) 117 Yale LJ 474.

life and in the lives of designated persons based on blood, affinity or pecuniary interests; these can include immediate family members (such as a child, grandchild, or spouse), employees, and others who consent to the purchaser of the policy insuring their lives.¹² Such contracts do not provide that the insurer indemnify the insured for a pecuniary loss on the happening of an insured event. Rather, it is for the insurer to provide a predetermined amount when the insured risk materializes, for example death of the person whose life is insured.¹³

Non-indemnity insurance contracts only require the existence of insurable interest at the inception of the contract. Subsequent loss of insurable interest during the lifetime of the person whose life is insured does not affect the validity of the insurance contract.¹⁴ As well, an insurable interest is not required at the time of loss. Thus, it is possible that a person could claim insurance money for the death of another person with whom they had never had a relationship: for example, where the former is an assignee of the benefits of the insurance

¹² See *BC Insurance Act*, *supra* note 4, ss 45(2)(b), 46 (life) and ss 107(2)(b), 108 (accident & sickness); *Alberta Insurance Act*, *supra* note 4, ss 646(2)(b), 647 (life) and ss 715(2)(b), 716 (accident & sickness); *Manitoba Insurance Act*, *supra* note 4, s 148(2) (life) and s 203(2) (accident & sickness); *Ontario Insurance Act*, *supra* note 7, ss 178(2)(b), 179 (life) and ss 305, 306(2)(b) (accident & sickness); *Insurance Act*, RSNS 1989, c 231, ss 79, 80(2)(b) (accident & sickness) and ss 180(2)(b), 181 (life).

¹³ See *Glynn v Scottish Union and National Insurance Co. Ltd.*, [1963] 2 OR 705 (CA).

¹⁴ See *Kosmopoulos v Constitution Insurance Company of Canada*, [1987] 1 SCR 2; *Chantiam*, *supra* note 8. See also David Norwood and John P Weir, *Norwood on Life Insurance Law in Canada*, 3d ed (Toronto: Carswell, 2002) at 85 [*Norwood*].

contract.¹⁵ A beneficiary can also make a claim upon the death of a person with whom they had ceased to have a relationship that supported an insurable interest and to whom they might in fact have been an adversary, competitor, etc. In *Chantiam v Packall Packaging Inc.*, the Ontario Court of Appeal did not consider the latter situation to be contrary to public policy, reasoning that if it were, the legislature would have taken steps to address the situation. The Court noted:

So long as the owner had an insurable interest at the commencement of the contract, the contract cannot subsequently be treated as though it were a wagering contract. While one can readily understand that the continuance of the insurance after the relationship giving rise to the insurable interest has ended may, as it is in this case, be offensive to the insured life, this is not a basis for nullifying or revoking an existing policy or for rendering it voidable at the request of the insured life. It must be assumed that the legislature has taken the public interest into account in not enacting provisions requiring that the termination of the insurable interest operates to cancel the contract... In the absence of

¹⁵ There are valid reasons for not requiring existence of insurable interest at the time of loss, including making it possible for the beneficiary to assign the benefits of life insurance contracts for security and other purposes. This is justified on the bases that such contracts are non-indemnity and also are investments and a form of property that can be traded like all other aspects of a person's investment or savings portfolio. In fact, insurance legislation specifically gives beneficiaries of a life insurance policy the ability to assign their interest in the insurance money; see *BC Insurance Act*, *supra* note 4, s 66(1); *Alberta Insurance Act*, *supra* note 4, s 667(1); *Ontario Insurance Act*, *supra* note 7, s 200(3); *Sun Life Assurance Co (Steadman) v Admin and Trust Co*, [1933] 2 WWR 348 (Man KB); see also *Norwood*, *ibid*, at 359-360.

legislation to this effect, the general principle that the subsequent termination of an insurable interest does not affect the rights of an owner-beneficiary must prevail.¹⁶

It is not uncommon for a person whose life is insured to feel uncomfortable about the continuation of the insurance policy when the relationship that supported the insurable interest at the outset of the contract ceases to exist, especially when there is hostility between the owner/beneficiary and the person whose life is insured.¹⁷ In such cases, the concern is that the owner/beneficiary may in fact be interested in the happening of the insured event so they may “cash in” on the insurance policy. This situation heightens concerns about moral hazards that could endanger the life and health of the person whose life is insured along with third parties. However, there are also situations in which continuation of a policy even upon relationship breakdown is an admitted advantage. For example, in the family law context, a life insurance policy may be a source of financial security for a spouse or child after the dissolution of a marital relationship. Courts have discretion to make orders for the continuation of life

¹⁶ *Chantiam*, *supra* note 8 at para 18. The amendment to the *Ontario Insurance Act*, s 179.1, that is yet to come into force does not make life insurance contracts voidable upon the cessation of insurable interest. However, it will provide an opportunity for the person whose life is insured to seek an appropriate remedy when s/he reasonably believes her or his life or health is endangered by the existence of an insurance contract on her or his life. Such a provision would have given the plaintiff in *Chantiam* the remedy that he sought after termination of the employment relationship and the plaintiff became a business competitor; termination or transfer of the policy to him at fair market value as the Court saw fit in the circumstances.

¹⁷ See *Hechter*, *supra* note 8; *Chantiam*, *ibid*; *Ralston*, *supra* note 3.

insurance policies as a means to ensure that child or spousal support continue after the death of a payor spouse/parent.¹⁸

Termination of Insurance Policy: The Original Manitoba Provision

In 1986, Manitoba became the first Canadian jurisdiction to amend its insurance legislation to give a person whose life is insured the opportunity to seek termination of an insurance contract on their life following termination of the relationship that gave rise to insurable interest that supported the insurance contract. When insurable interest no longer exists, an individual may obtain a court order to terminate the policy on her or his life. The provision states:

A person whose life is insured may, where insurable interest no longer exists, apply to the court for an order requiring the insurer to immediately terminate the policy and pay over to the policy owner any value that exists in the policy.¹⁹

The provision was prompted by recognition of the fact that some insureds might feel uneasy if another person with whom they no longer had a relationship held an insurance contract on their life. "In some circumstances, such as marriage breakdown or dissolution of a partnership, a person whose life is insured may become uncomfortable or find it offensive that an ex-spouse or an ex-partner continues to pay insurance premiums and to stand to personally gain by that individual's

¹⁸ BC *Family Law Act*, SBC 2011, c 25, s 170(e).

¹⁹ Manitoba *Insurance Act*, *supra* note 4, s 155(4). Manitoba enacted a similar provision in relation to accident and sickness insurance in 2012: Manitoba *Insurance Act*, *ibid*, s 217.1.

death”.²⁰ The provision was intended to remedy a fundamental problem with how the insurable interest requirement operates in relation to life insurance policies. Manitoba addressed this problem decisively; the power to terminate a life insurance policy is absolute if the person seeking termination can prove their life is insured under a policy and that the requisite insurable interest that supported the policy no longer exists. The applicant does not need to advance any other reason for seeking termination of the policy, and Manitoba courts do not have the discretion to decide whether termination in the circumstances is appropriate or not. For example, the court cannot probe a person whose life is insured to advance additional reasons such as stress or actual or potential danger to their life or well-being as further conditions for seeking termination. As the Manitoba Court of Appeal stated in *Hechter v Sonya*:

Where an insurable interest ceases to exist, the person whose life is insured may apply to the court for an order terminating the policy. He/she must establish that his/her life is insured and an insurable interest no longer exists. The provision requires no other conditions to be established for the making of an order terminating the policy. It would be wrong for the court, by the exercise of judicial discretion, to add conditions to the application of s. 155(4) of the Act that the Legislature has not imposed. In our view, that would amount to unwarranted judicial legislation.²¹

²⁰ Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Leg, 1st Sess, Vol 61 (6 August 1986) at 2654 (Alvin Mackling).

²¹ *Hechter*, *supra* note 8 at para 9. In *Hechter*, the parties entered into a partnership as practicing orthodontists and agreed that they would each insure the life of the other. When the partnership ended with the

The provision is not completely inflexible, however. It recognizes that persons who are no longer in a relationship that provided an insurable interest may wish to continue existing policies to ensure mutual benefit and financial security in the event of accident, disability, sickness or death. In fact, it is not uncommon for the continuation of insurance to be one of the terms in separation or divorce agreements.²² There is therefore no assumption of a threat to the person whose life is insured upon cessation of an insurable interest to justify automatic termination of the insurance policy. This is why the provision gives the person whose life is insured the option of seeking termination of the policy upon cessation of insurable interest if he or she feels that is necessary in the circumstances, although there is no requirement to provide reasons for seeking termination beyond proof of loss of insurable interest. Once

plaintiff's retirement and in light of the acrimonious way in which that relationship ended, the plaintiff sought to sever all ties with the defendant including terminating the life insurance policy. The plaintiff terminated the policy on the defendant's life but the latter refused to do the same. The defendant also declined the plaintiff's subsequent request to assign the policy to him or terminate it, whereupon the plaintiff sought a remedy under s 155(4). The Manitoba Court of Appeal upheld termination of the policy, rejecting the defendant's arguments that the motions judge erred in finding that the remedy of termination is mandatory and that the plaintiff had failed to establish valid reasons to justify the court making an order to terminate the policy.

²² See *Bond v Bond*, 2012 ONSC 4374; *Turner v DiDonato* (2009), 95 OR (3d) 147 (Ont CA); *Dufresne v Dufresne*, 2009 ONCA 682; *Haber v Nicolle*, 2011 BCSC 210; *Stewart v Stewart Estate*, 2011 BCSC 774; *Job v Job*, 2009 BCSC 1806. These cases all involve situations wherein the continuation of life insurance, with the ex-spouse or children as the named beneficiary/beneficiaries is included as an explicit term in the separation/divorce agreement. See also Keith B Farquhar, "Designated Insurance and Pension Beneficiaries and Unfulfilled Expectations" (1997) 14 Can J Fam L 63.

such an application is made, the court is mandated to grant, and *only* to grant, a termination order. No other remedy, such as variation of the terms, is possible under s 155(4) (and now s 217.1) of the Manitoba legislation. While important in providing comfort to persons no longer in a relationship with the policy owner/beneficiary, these provisions do not provide a remedy so long as the relationship that provided insurable interest for the contract continues. Like Alberta and BC, Manitoba has now enacted provisions entitling persons whose lives and well being are insured to seek a judicial remedy for termination or variation even if the relationship giving rise to insurable interest continues to exist. Amendment to the Ontario *Insurance Act* introducing similar provisions is yet to come into force.

Seeking a Judicial Remedy for Termination or Variation of Insurance Contracts

Currently, persons whose lives are insured by others in British Columbia, Alberta and Manitoba may obtain a remedy where they reasonably believe that continued existence of the policy endangers their life or health.²³ Courts have discretion to grant the remedy that they see fit in the circumstances, and may include an order for the termination of the policy in accordance with the terms of the insurance contract or for a reduction in the insurance amount. While the provisions recognize the importance of protecting insured persons who fear for their lives or well-being, they also ensure due process for the insured, insurer and others with an interest in the insurance contract. The provisions strike a fair balance between the

²³ BC *Insurance Act*, *supra* note 4, s 47 (life), s 109 (accident and sickness); Alberta *Insurance Act*, *supra* note 4, s 648 (life), s 717 (accident and sickness); Manitoba *Insurance Act*, *supra* note 4, s 155.1 (life) and s 217.2 (accident and sickness); Ontario *Insurance Act*, *supra* note 7, ss 179.1 (life), 306.1 (accident and sickness) (not yet in force).

interests of the person whose life is insured and other stakeholders by ensuring that they are aware that the person whose life is insured is seeking a remedy under those provisions. Generally, the insured, insurer and others with an interest in the insurance contract such as assignees must be given notice of the application.²⁴ The legislation also recognizes that in some cases notifying some stakeholders, especially the insured/beneficiary, of the application for a remedy may actually endanger the health or life of the person whose life is insured. Courts have the discretion to waive the notice requirement to a person other than the insurer or insured for contracts of group insurance or creditor's group insurance if it deems it just in the circumstances. For example, the person whose life is insured may convince the court that the danger is imminent and the notice period could be detrimental to their life or health as the beneficiary could act within that period or a notice might trigger the beneficiary to take the dreaded action.²⁵ An order made under these provisions is binding on anyone with interest in the insurance contract.²⁶ The discretion to waive the notice requirement is particularly useful where the need for a remedy stems from actual or potential acts of domestic violence because it allows the abuser/beneficiary to be blind-sided.

²⁴ BC *Insurance Act, ibid*, s 47(3), s 109(3); Alberta *Insurance Act, ibid*, s 648(3), s 717(3); Manitoba *Insurance Act, ibid*, ss 155.1(3) and 217.2(3).

²⁵ BC *Insurance Act, ibid*, s 47(4), s 109(4); Alberta *Insurance Act, ibid*, s 648(4), s 717(4); Manitoba *Insurance Act, ibid*, s 155.1(4), s 217.2(4). The reference to insured in the context of group insurance is not to the individual insured/beneficiary but rather the owner or sponsor of the policy such as the beneficiary's employer, trade union or professional association.

²⁶ BC *Insurance Act, ibid*, s 47(5), s 109(5); Alberta *Insurance Act, ibid*, s 648(5), s 717(5); Manitoba *Insurance Act, ibid*, s 155.1 (5), s 217.2(5).

Cessation of insurable interest between the insured and the person whose life is insured is not a precondition for granting a remedy under these provisions.²⁷ Thus, a person whose life is insured can obtain an order for termination of the insurance contract or variation of the insurance amount even when the relationship that supported insurable interest continues to exist. This allows for the protection of, for example, abused partners, estranged spouses, or children who may still be considered to be legally in a relationship with the owner/beneficiary that supported an insurable interest.

Effectiveness of the Termination or Variation Provisions to Protect Persons Insured by Others

The provisions giving courts discretion to terminate or vary terms of an insurance contract provide a broader basis for protecting persons whose lives and well being are insured compared to the termination only remedy upon cessation of insurable interest provisions; applicability of the former is not limited to situations where insurable interest ceases to exist. There may be good reason for a person, usually a woman, whose life is insured to seek termination or variation of the insurance policy, even before the termination of a relationship or loss of insurable interest, or variation such as reduction in the insurance amount after a relationship breakdown. The termination-only remedy upon cessation of insurable interest seems to be focused on situations of dissolution of partnerships or business relationships, breakdown of spousal relationships, or withdrawal of consent to insure a person outside the designated relationships giving rise to insurable interest. Yet, insurable interest exists in a broader range of relationships, often based on blood and kinship ties that are not severable, for example a parent-child relationship. As well, cessation of insurable interest may not be readily ascertainable in some

²⁷ BC *Insurance Act*, *ibid*, s 47, s 109; Alberta *Insurance Act*, *ibid*, s 648, s 717; Manitoba *Insurance Act*, *ibid*, s 155.1, s 217.2.

situations such as where the owner/beneficiary is dependent on the person whose life is insured for support or otherwise has a pecuniary interest in the duration of their life.²⁸ The broader provisions giving courts the discretion to grant appropriate remedies recognize that while the concern about moral hazard may arise in the business or spousal context, it can also arise in the other relationships giving rise to insurable interest. Thus, it is unduly restrictive to limit the option of seeking a remedy to situations of loss of insurable interest and for the only option to be termination of the insurance contract.

As well, a termination-only option for judicial intervention appears to impose too great a constraint on courts and does not adequately recognize the range of concerns that persons whose lives are insured may have. Depending on the situation, a reduction in the insurance amount may be all that is required to protect the insured person or at least give them a sense of security. There may also be legitimate reasons to have the policy continue after cessation of insurable interest as insurance money can be included in the division of assets or used to support children and spouses after relationship breakdown. The broader termination or variation provisions recognize the variability of situations that may necessitate seeking a judicial remedy and the reality that termination of the insurance contract may not be warranted in every situation. That is why courts have the discretion to fashion a remedy that they consider to be just in the circumstances.

This is not to say that the provisions giving courts discretion to grant an appropriate remedy without reference to cessation of insurable interest are without shortcomings. Like the termination-only remedy, the discretionary provisions raise some real concerns and questions about achieving the intended remedial purpose. An obvious difficulty is that persons whose

²⁸ See definition of insurable interest: *BC Insurance Act*, *supra* note 4, s 46; *Manitoba Insurance Act*, *supra* note 4, s 156.

lives are insured by others must be aware of the existence of the policy and must also know of the option of seeking a judicial remedy. An insured may insure the life of a person in whom they have an insurable interest, usually a family member, or to increase the insurance amount without that person's knowledge or consent.²⁹ It is therefore possible that persons whose lives are insured may not be aware of the insurance contract on their lives or of an increase in the insurance amount in circumstances that could pose a threat to their life or health. Without that knowledge, a person whose life is insured may not be aware of the danger to her or him or the need to seek an order to eliminate or at least reduce the threat to her or his life. The potential for lack of knowledge is particularly great in the domestic context—the very context the provisions attempt to address—because family relationships give rise to insurable interests and the consent or knowledge of a family member is not required to obtain an insurance policy on her or his life. Therefore, it may well be that the provisions only benefit those who are aware of the insurance policy on their lives and have the opportunity to apply to court for a

²⁹ Consent of the person whose life is to be insured is required only for those who do not fall within the relationships giving rise to an insurable interest. See *BC Insurance Act*, *supra* note 4, ss 45, 46, 107 and 108. A person whose life is insured may be aware of the contract to be obtained or increase in the insurance amount where they are asked to answer questions about their health status or disclose relevant factors affecting insurability not disclosed by the insured pursuant to the disclosure obligation that is imposed on both the insured and the person whose life is insured. *BC Insurance Act*, *ibid*, s 51(1); s 111(1). However, the need for such disclosure and hence awareness of the policy may not be necessary where the insured can confidently answer all the relevant questions or make the necessary disclosure regarding the person whose life is insured. As well, individualized assessment of insurability may not be required under some group plans. Thus, there is no guarantee the person whose life is insured will get to know of the existence of the policy and/or increase in the insurance amount.

remedy when they reasonably believe their life or health may be endangered by it or upon cessation of insurable interest.

These termination and variation provisions are more likely to be effective if the legislation also mandated that persons whose lives are insured must be made aware of the existence of such an insurance policy on their lives and/or increase in the insurance amount within a reasonable time after the policy is taken or any increase, for instance within 30 days, and given the option to seek a remedy as outlined in the insurance legislation. Such a requirement would be similar to the obligation on the part of insurers to notify a loss payee before cancelling an insurance contract,³⁰ and to inform an insured about the existence of provisions in the contract that limit their rights of recovery, such as deductibles or co-insurance clauses.³¹ In the meantime, to make the termination or variation provisions more effective, it should be a matter of best practice for insurers to notify persons whose lives are insured of the existence of such a contract and or increases in the insurance amount. It is also important for individuals who work with survivors of domestic violence to inquire about the existence of life insurance policies and to advise their clients to seek the appropriate remedy.³²

³⁰ *BC Insurance Act*, *supra* note 4, s 28; *Alberta Insurance Act*, *supra* note 4, s 539; *Manitoba Insurance Act*, *supra* note 4, s 136.3.

³¹ *BC Insurance Act*, *ibid*, s 31; *Alberta Insurance Act*, *ibid*, s 543; *Manitoba Insurance Act*, *ibid*, s 136.6.

³² This may not be an effective approach if the person whose life is insured is unaware of the existence of the policy. However, if they know an estranged partner has such a policy on their life, the inquiry may prompt them to also see the financial incentive as a possible reason to be concerned about their safety and seek an appropriate remedy.

Cessation of insurable interest *per se* does not entitle a person whose life is insured to seek a remedy under the termination or variation provisions. It is only when they reasonably believe that their life or health may be endangered by the continuation of the insurance contract that they can seek a remedy. Thus, as previously mentioned, while the provisions recognize that the threat to a person's life or health may arise even in the course of an ongoing relationship, it does not assume that a person's health or life is endangered upon cessation of insurable interest. However, the provision does not indicate the necessary evidence and/or threshold for an applicant to prove reasonable belief that her or his life is in danger to warrant termination or variation of a policy. This might allow courts to exercise greater discretion in determining when and what remedy is warranted in particular circumstances. However, until there is established case law from higher courts giving guidance for assessing such applications, there may be concern about what trial courts would consider appropriate evidence to justify making an order.

There may also be a concern that individuals who feel their health or life may be endangered by the continuation of an insurance contract may not be able to provide the requisite proof and could be denied a remedy. Given the potential for volatility in the domestic context, it may be relatively easy for ex-partners or spouses or those in the process of separating and seeking divorce to establish threat to their life or health as a reason for seeking a court order for termination or variation of the terms of an insurance contract on their life. In fact, such an order may be sought as part of separation or divorce proceedings or even pending the termination of the relationship, or where a party obtains a protection order as an at-risk family member or a victim of family violence in the family law context. However, the need for a remedy may be less clear where the person whose life is insured continues to have contact or some relationship with the insured, which is not

uncommon in the spousal context. For instance, a woman may not easily leave an abusive relationship because of financial dependence on her partner or threats of violence if she dares to leave. As well, ex-partners may continue to have contact with each other because of shared parenting responsibilities. Thus, a more nuanced consideration of the applicant's situation is required in such cases to determine the appropriate remedy in the circumstances.³³

Establishing the Basis for a Remedy: Lessons from the Family Law Context

There are similarities in the remedial purposes of the termination or variation provisions under the *Insurance Act* and protection orders in the family law context;³⁴ in particular, both regimes seek to protect vulnerable family members.

Comparisons can also be drawn with a recognizance or “peace bond” under s. 810 of the *Criminal Code*.³⁵ It is therefore

³³ There may be a number of reasons – social, economic, cultural – why a person who feels her or his life or health may be endangered by the continuation of a life insurance policy on her or his life may not terminate a relationship with the policy owner/beneficiary, or at least not at that time.

³⁴ *Family Law Act*, SBC 2011, c 25, s 183; *Protection Against Family Violence Act*, RSA 2000, c P-27, s 4.

³⁵ According to the *Criminal Code*, RSC 1985, c C-46, s 810(1), an information for a recognizance “may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property”. If the requirement for reasonable grounds is met, the individual in question may be required to enter into a “peace bond” for a period of up to twelve months prohibiting them from coming within a certain distance of a place or communicating with the person for whom the information was laid; see s 810(3) and (3.2). The past actions of the defendant can be used to help determine if the informant's fear rests

reasonable to expect that courts are likely to assess similar factors when considering termination or variation of insurance policies as they do in making protection/restraining orders in the family context. A court may make a protection order under the BC *Family Law Act* when it determines that a person is an "at-risk family member" because she or he has been subjected to family violence or because such violence is likely to occur. An "at-risk family member" is defined as "a person whose safety and security is or is likely at risk from family violence carried out by a family member".³⁶ Similarly, courts in Alberta may issue protection orders if an applicant or a person on whose behalf the order is sought has been a victim of family violence,³⁷ which includes "any act or threatened act that intimidates a family member by creating a reasonable fear of property damage or injury to a family member".³⁸ Relevant factors for determining whether a court should issue a protection order under the BC *Family Law Act* include history, frequency and recentness of psychological, emotional or physical violence. Courts will also consider whether there has been deliberate damage to property, the current status of the relationship between the parties including recent separations or intent to separate, and the claimant's perception of risks to her or his safety and security.³⁹ In *Dawson v Dawson*,⁴⁰ the claimant sought a protection order after her ex-husband served a prison sentence for what was "described as a serious,

on reasonable grounds; see *R v Patrick* (1990), 75 CR (3d) 222 (BC Co Ct).

³⁶ BC *Family Law Act*, *supra* note 34, s 182.

³⁷ Alberta *Protection Against Family Violence Act*, *supra* note 34, ss 4, 6.

³⁸ *Ibid*, s 1(1)(e)(ii).

³⁹ BC *Family law Act*, *supra* note 34, s 184(1). See *Morgadinho v Morgadinho*, 2014 BCSC 192 [*Morgadinho*].

⁴⁰ 2014 BCSC 44, *aff'd*: 2014 BCCA 44 [*Dawson*].

unprovoked, and disturbing incident...a brutal attack on a defenceless victim”, that resulted in serious bodily injuries.⁴¹ In holding that the claimant was an at-risk family member, justifying a protection order, Barrow J noted that while evidence of repetitive acts of violence would often indicate the likelihood of family violence recurring in the future, warranting a protection order, the justification for such an order could equally be founded on a single serious act of family violence, as was in this case.

The passage of time may reduce the probative value of previous acts of violence, especially in relation to a single act of violence. However, if the circumstances that gave rise to the earlier act(s) of violence remain unresolved, then the court is more likely to be wary of family violence recurring in the future.⁴² In addition, the nature and gravity of harm that might ensue from an act of violence is relevant in determining whether the claimant is at risk of future violence. The court in *Dawson* preferred to adopt a preventative approach to the determination of whether family violence was likely to recur in the future. Barrow J stated:

Given the protective purpose of orders under Part 9 of the Family Law Act, it is reasonable in my view to apply what might be termed a sliding

⁴¹ *Dawson, ibid* at para 9.

⁴² *Ibid*, at para 44. The court concluded that the assault on the plaintiff was due in part to the defendant’s mental illness, which remained unresolved: *ibid*, at para 44. Similarly, in *Morgadinho, supra* note 39, where the parties had separated by the time of the action, the court refused to characterize the previous acts of violence as escalating or repetitive, and there was no likelihood of increase in the risk to the claimant. Yet, the court concluded that the continuing dysfunctional nature of the relationship between the parties was likely to provoke threats of violence against the claimant, endangering her safety and security, which justified making a protection order.

scale to the threshold. The potential for very serious acts of violence is sufficient to engage the provisions of the Act, even if those acts of violence are, in absolute terms, not particularly likely.⁴³

Prior abusive behaviour will not always justify making a protection order, especially where parties have had limited contact since separation and where that situation is unlikely to change in the future, or where the court is confident that the defendant is unlikely to engage in future acts of violence, thereby making the recurrence of violence against the applicant unlikely.⁴⁴ As well, acts or threats of violence arising from feelings of anger, animosity, betrayal, etc., during and immediately following a relationship breakdown may diminish over time, and thereby obviate the potential for violence justifying a court making a protection order.⁴⁵ While such a position is intended to prevent the making of unnecessary protection orders, courts should not lose sight of the remedial purpose of the provision and should be cautious about refusing to grant protection orders when the underlying trigger for previous abusive conduct remains at large, even if future contact between the parties is likely to be limited.

Similarly, an applicant's subjective fear for her or his safety will not justify making a protection order unless those fears are objectively reasonable to justify such a limitation on the respondent. The requirement of objective justification of an applicant's fear for her or his safety is intended to balance the parties' competing interests and prevent abuse of the court's powers by applicants who may have ulterior motives for

⁴³ *Dawson*, *supra* note 40 at para 45.

⁴⁴ See *Cabezas v Maxim*, 2014 BCSC 767; *NCR v KDC*, 2014 BCPC 9 at paras 117-118.

⁴⁵ See *Andres v Andres*, 2009 ABQB 26 at para 42 [*Andres*].

seeking such an order.⁴⁶ However, courts need to be attentive to the complicated and subtle ways in which victimization may occur and the reasons why a person may reasonably feel her or his life or health may be endangered even without seemingly corroborative evidence. This is particularly important in situations where there have been threats of violence that may be escalating but not yet resulted in physical acts of violence. In *Fuda v Fuda*,⁴⁷ the court cautioned against the tendency to discount an applicant's subjective fears for her safety arising from potential acts of violence, noting that the focus should rather be on whether those fears are legitimate. Specifically, the court noted that an application for a protection order should not be denied even where the applicant's fear for her or his safety is somewhat subjective provided there are compelling facts justifying those fears.⁴⁸

Although there are similarities in the purposes of the termination or variation provisions under the insurance legislation and protection orders in the family law context, and courts are likely to assess similar factors in determining the appropriateness of a remedy under both regimes, the threshold for a remedy need not be the same. Obtaining a variation or termination remedy in the insurance context should not depend on whether a person can establish the basis for a threat on a balance of probabilities, but instead, whether there is a reasonable chance of the risk materializing. Courts need to be attentive to the insured person's subjective assessment that her or his life may be endangered because of the existence of a life insurance contract on her or his life and/or the insurance amount. However, there must be some reasonable basis for the

⁴⁶ See *Andres, ibid*, at para 40; *RP v RP*, 2012 ABQB 353 at paras 29-33.

⁴⁷ *Fuda v Fuda*, 2011 ONSC 154.

⁴⁸ *Ibid* at paras 31-32. See also *Khara v McManus*, 2007 ONCJ 223 [*Khara*].

insured person's concerns about their life and safety, for instance, based on the respondent's conduct. Care must be taken not to insist on a high threshold that may make it difficult for applicants to justify the need for a remedy in particular circumstances. Dunn J's statement in *Khara* in relation to an application for a restraining order is equally instructive in this regard; he stated that while the applicant's perception of fear of harassment need not "be understood by everyone...an applicant's fear of harassment must not be entirely subjective, comprehended only by the applicant".⁴⁹ While past threats or acts of violence and abuse should generally support an application for a remedy, a court should be equally open to granting an appropriate order even if there is no history of abuse, provided that the evidence suggests a possibility of violence given the parties' current situation.

CONCLUSION

The current insurance regimes in BC, Alberta, and Manitoba, have taken critical steps in recognizing the need for greater protection for those whose lives are insured by others. Ontario is moving in a similar direction with an amendment to its insurance act that is yet to come into force. By allowing persons whose lives are insured to apply to the court for termination or variation of an insurance policy, more lives may be protected. As well, more transparency and discussion on how to better address these situations may be encouraged. This is particularly positive for women and children who are predominantly the victims of domestic violence. It is hoped that other jurisdictions will also seriously consider similar amendments to their insurance legislation. While concerns may remain about the consequences of imposing a burden of proof on persons whose lives are insured by others to adequately articulate threats to their life or health, one might argue that it is good public policy. It may be a way to balance

⁴⁹ *Khara*, *ibid* at para 33.

the competing interests of the insured/beneficiary and the person whose life is insured to better protect the public and in particular victims or potential victims of domestic violence.