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LIVING BENEFITS: A RIGHT OF THE TERMINALLY ILL*

Terry,[1] a 31-year old former Capitol Hill lobbyist, has Acquired Immune Deficiency Syndrome, more commonly known as AIDS. His doctor has diagnosed his life expectancy as less than one year. Terry can no longer work. He has no health insurance coverage and is almost bankrupt. One of his few remaining assets is a $100,000 life insurance policy. Faced with cost-of-living expenses, medical care costs, and no income, Terry sells his policy for $66,000, a fraction of the policy's face value. He sells it to Living Benefits, Inc., a small company that buys life insurance policies from AIDS patients. Terry plans to use the money to pay his medical expenses and to buy an air conditioner to improve the quality of his life.

Unfortunately, Terry is not alone in the problems he faces. An estimated 1,000,000 Americans are currently infected with the HIV virus.[2] Of these individuals, 165,000 to 250,000 are expected to die by 1993.[3] Dr. Ruth Berkeley of the Center for Disease Control commented that, "Not everyone has grappled with the reality of [AIDS]. It's really hard to imagine those kind of numbers."[4] Despite the magnitude of the disease, those afflicted have relatively few options to help them cope with the rising costs of treatment. One of the options now available to a person with AIDS ("PWA") is the one Terry chose: living benefits.

Living benefits are a recent development in insurance law. Living benefits enable a policyholder to convert his or her pre-existing life insurance policy into cash.[5] But, not all states recognize the right of terminally ill persons to utilize this development. This Note analyzes how living benefits apply specifi-

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* The author wishes to express thanks to the many people who commented on earlier drafts. In particular, he is grateful to those persons with AIDS without whose encouragement and assistance this paper would not have been possible. Several of those individuals have since died and it is to their memory that this Note is dedicated.

[1] All of the information in this initial paragraph concerning Terry, a person with AIDS, is true and based on Sandra Atchison, *A Gift for the Dying - or Sheer Ghoulishness?*, BUSINESS WEEK, June 19, 1989, at 79.

[2] Between 1981 and 1990, there were 100,777 AIDS deaths in the United States, almost one-third of which were reported in 1990. AIDS LAW & LITIGATION REPORT: A MONTHLY REPORT, Feb./Mar. 1991, at 14.

[3] *Id.*

[4] *Id.*

[5] This Note will use the term "living benefits" exclusively in reference to the service. Other terms used by various companies and legislatures for living benefits include "Life Insurance for the Living," "Accelerated Death Benefits," "Accelerated Life Benefits," "Advanced Death Benefits," "Advanced Death Payouts," and "Living Care Provisions."

cally to PWAs[6] and addresses the legal and public policy issues which arise from living benefits. Part I of this Note presents a brief overview of living benefits. This section will discuss the history of living benefits, the different requirements a PWA must meet to be eligible for them, and how AIDS support groups and the government have reacted to the demand for living benefits. Part II discusses some of the requirements for living benefits and also examines whether living benefits best serve the public interest. This Note concludes that living benefits represent a means which enable the terminally ill to approach death with comfort and dignity.

I. AN OVERVIEW OF LIVING BENEFITS

A. *A Definition of Living Benefits*

At present, two types of businesses offer living benefits: companies formed solely for the purpose of offering living benefits ("living benefits companies") and established life insurance companies which traditionally have never offered living benefits.[7] To demonstrate how living benefits work, this Note will present hypothetical examples of living benefits purchased from both a living benefits company and from an established life insurance company. First, to illustrate the way a living benefits company operates, consider John Doe[8] who buys a standard life insurance policy from Generic Life Insurance Company ("Generic") in 1988. At that time John Doe is in good health and has not developed any signs of having AIDS.[9] When he purchases the policy from

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[6] Depending on the company offering the service and state insurance regulations, living benefits may be available for several terminal illnesses other than AIDS including: renal failure, Alzheimer's Disease, Parkinson's Disease, Multiple Sclerosis and certain life- threatening cancers. This Note, however, will focus solely on living benefits as they apply to individuals with AIDS because ninety percent of all living benefits are purchased by individuals with AIDS, and living benefits were originally conceived as a way of addressing the AIDS epidemic. Mike Scotti, *Living-Benefits Policies Slowly Gaining Acceptance*, ORANGE COUNTY BUS. J., Apr. 2, 1990, at 7.

[7] Samuel Fromartz, *Prudential to Pay Terminally Ill Clients Before Death*, THE REUTERS BUSINESS REPORT, Jan. 29, 1990, BC Cycle.

[8] The pseudonym "John Doe" will be used in this hypothetical because it is the author's opinion that an ethnic fictitious name may perpetuate the misconception that AIDS does not effect all of society but only certain minorities.

[9] While certain states (including Ohio, California, Massachusetts, Florida, and New York) have enacted legislation (*e.g.*, FLA. STAT. ANN. § 760.53 (West 1989)) to restrict life insurance companies from testing policy applicants for exposure to the HIV virus, courts have begun to overturn these statutes. Thus, insurance companies have become able to screen applicants and reject those who test positive to the HIV virus. *See* Life Ins. Ass'n of Mass. v. Commissioner of Insurance, 403 Mass. 410, 530 N.E.2d 168 (1988) (holding that state regulators did not have the authority to dictate insurance indemnity policies without statutory authority). *See also* Carolyn Aldred, *AIDS Poses a Dilemma in the U.S.*, BUSINESS INSURANCE, Sept. 26, 1988, at 15; Benjamin Schatz, *The AIDS Insurance Crisis*, 100 HARV. L. REV. 1782 (1987). However, in

Generic, he names his mother as his beneficiary. Under the policy's terms, Jane Doe will receive $100,000 from Generic upon John Doe's death. In 1990, John Doe develops AIDS. His doctor's diagnosis predicts that he has twelve months to live, and consequently, John Doe decides to contact Acme Living Benefits Company ("Acme"). Acme obtains John's written permission to investigate his medical records. Acme then decides that John satisfies its medical requirements for eligibility. John then agrees to change the policy's named beneficiary from his mother to Acme. He also obtains a waiver from his mother relinquishing any rights she may have to the policy's death benefits. Acme then pays John a percentage[10] of the $100,000 face value of his life insurance policy. When John Doe dies, Generic pays Acme the full face value of the policy. John's mother, the original beneficiary, receives nothing from the policy.

John Doe's alternative is to buy an insurance company's version of living benefits. In this example, John purchases a slightly higher priced policy which contains a living benefits option instead of buying Generic's standard life insurance policy.[11] As in the earlier hypothetical, John is in perfect health when he buys the policy and names his mother as the beneficiary who will receive $100,000 upon his death. In 1990, he is diagnosed with AIDS, which is listed as one of the "dread diseases" covered under his policy's living benefits option. John elects to use the living benefits option. He notifies Generic and they obtain John's written permission to examine his medical records. Satisfied that John meets their requirements, Generic pays him $25,000.[12] At John's death, Generic pays his mother the remaining $75,000, less whatever interest Generic would have earned on the $25,000 they had already paid to John.

These hypothetical examples demonstrate the basic scenarios of how living benefits operate. In reality, many additional factors enter into the operation of living benefits.

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some states an insurer may inquire whether a person has been tested positive for exposure to the HIV infection. *See*, FLA. STAT. ANN. § 627.429(e) (West 1989).

[10] This percentage is different for each individual. The exact amount is based on several factors including the number of months the policyholder is expected to live. Atchison, *supra* note 1.

[11] This option, which costs on average an extra ten percent of a standard policy price, specifies at the time of purchase which terminal illness the living benefits clause may cover. *See supra* note 7 for a partial list of diseases that may be covered.

[12] The maximum percentage currently paid by established insurance companies is ninety-five percent of the total face value, with the payout percentages varying with the age of the policy. As a result, policies taken out by younger persons will generally pay only about twenty-five percent of the total face value. So, while percentages paid to policy holders are increasing, such increases are primarily for holders sixty-five or older, a segment of the population with a low rate of HIV infection. *See* Linda Koco, *Accelerated Benefits Vary by Contract*, NAT'L UNDERWRITER (Life, Health, and Financial Services Ed.), August 3, 1992.

B. *A Brief History of Living Benefits*

The president of Prudential Insurance Company's Canadian operations, Ron Barbaro, first developed the idea of living benefits in late 1987.[13] Barbaro, a volunteer at an AIDS hospice,[14] recognized that PWAs often needed additional income to meet the high medical costs associated with their disease.[15] Under Barbaro's guidance, Prudential developed a living benefits option available with their standard life insurance polices.[16] In 1987, Rob Worley Sr., an entrepreneur involved in equipment leasing, and his son, Rob Jr., an insurance agent, conducted market research on the concept of living benefits.[17] In 1988, the Worleys founded Living Benefits Inc., a company formed solely for the purpose of buying policies and selling living benefits. The Worleys financed their operations from bank loans secured by their own assets.[18] In their first six months of business they bought six policies worth $731,000.[19] A year later they had purchased $8,500,000 worth of life insurance policies, making between fifteen to twenty percent in pre-tax profits.[20] As more investors became aware of the money that could be made in offering living benefits, more companies formed to offer the service.[21] As of 1992, living benefit companies had purchased $100 million in insurance policies.[22]

In the fall of 1989, a Gallup Poll showed that ninety-four percent of consumers were in favor of terminally ill policyholders collecting part of their death benefits before their death.[23] As a result of such overwhelming consumer approval, the new service began to flourish, and by October 1990, seventy dif-

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[13] Don Barnes, *When Compassion And Judgment Clash*, NAT'L UNDERWRITER (Life, Health, and Financial Services Ed.), June 26, 1989, at 13.

[14] Fromartz, *supra* note 7.

[15] In 1987, the average cost for medical care for an AIDS case was $35,054. Alfred G. Haggarty, *California Health Plan Projects $88M AIDS Price Tag*, NAT'L UNDERWRITER (Life, Health, and Financial Services Ed.), Aug. 22, 1988, at 11. As of 1991, the cost of caring for PWAs in the United States is estimated at over $3,000,000,000. Letter from Pat Christen, Executive Director to Friends of San Francisco AIDS Foundation, April 1, 1991.

[16] *Id.*

[17] *See* Martha Groves, *A Final Hope for the Dying*, L.A. TIMES, July 2, 1990, at 1, col. 1.

[18] *Id.*

[19] Atchison, *supra* note 1, at 1.

[20] Groves, *supra* note 17, at 1.

[21] While some living benefits companies are financed in the same manner as Living Benefits, Inc., others function more as financial intermediaries and receive their financing from investors. These firms, like Affirmative Lifestyles, Inc. of Houston, obtain groups of investors (both partnerships and individuals) which provide the money to purchase the policy from the PWA. Victoria McNamara, *Insurance Brokers Cashing In On AIDS*, HOUSTON BUS. J., August 27, 1990, at 1.

[22] Peter Kerr, *An AIDS ERA Investment: Death Benefits of the Sick*, N.Y. TIMES, Aug. 20, 1992, at A1, col. 1, (Nat'l ed.).

[23] BEST'S REVIEW, October, 1989, Vol. 90, No. 6, at 12.

ferent companies offered some form of living benefits.[24]

Life insurance companies began to offer living benefits because the option helps to increase the sales of their other policies.[25] The number of living benefits companies has grown because of the attractive return that living benefits offers investors.[26] As both types of companies have begun to offer this service, they have devised specific requirements a policyholder must meet in order to qualify.

C. *Medical Requirements for Living Benefits*

The requirements a policyholder must satisfy include the medical standards of the company offering the benefits. Both insurance companies and living benefits companies review a policyholder's medical records.[27] However, different companies have used different criteria in their decisions. One company, Living Benefits, Inc., required one patient to wait until doctors certified he had only eighteen months to live. Prudential Insurance, on the other hand, allows policyholders to receive benefits if they have six months or less to live or have spent six months in a nursing home and are unlikely to leave.[28] Other companies have required different medical data ranging from a new physical examination with an estimate of life expectancy to only a review of recent medical records by a panel of doctors employed by the company.[29] Generally, life insurance companies appear to have stricter medical requirements.[30] Although one life insurance company, Connecticut Mutual Life Insurance Company, has announced it will provide living benefits to PWAs with life expectancies of up to a year,[31] most insurance companies will only pay the benefits to individu-

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[24] This figure includes both living benefits companies and life insurers. Some of the life insurance companies offering this service are Equitable Life Insurance Company, Aetna Life Insurance Company, John Hancock Mutual Life Insurance Company and Prudential Insurance Company of America. Gannett News Service, *Money Matters*, (Oct. 18, 1990). There were 25 living benefit companies as of August 1992. Kerr, *supra* note 22.

[25] Scotti, *supra* note 6, at 7.

[26] McNamara, *supra* note 21, at 1. (Investors usually average a twenty percent return for their investment with the company. The company then receives an average fee of ten percent of the investor's return for its service of functioning as a broker.)

[27] *Id.*

[28] Groves, *supra* note 17, at 1.

[29] Thomas McCormack and David Petersen, *Living Benefits for the Insured, Terminally Ill Client: A Remarkable New Resource with Tax, SSI and Medicaid Implications*, CLEARINGHOUSE REV. 1348 (April, 1991). *See also* Kerr, *supra* note 22.

[30] Unlike life insurance companies, currently only three states (New Mexico, Kansas and California) regulate the activity of the living benefits industry. Kerr, *supra* note 22. *See also* McCormack and Petersen, *supra* note 29.

[31] Connecticut Mutual Life Insurance Company last year broke ranks and will pay living benefits for policyholders with up to one year to live. *Questions and Answers: Connecticut Mutual's "Living Benefits" Rider*, (Hartford, Ct.), June 8, 1990, *available in* LEXIS, Nexis Library, PR Newswire file.

als with six months or less to live.[32]

Living benefits companies have a more flexible approach to medical requirements.[33] Most companies will pay living benefits to PWAs with life expectancies of up to 24 months.[34] In some cases, a person with a life expectancy of up to five years may be able to receive living benefits.[35] The longer the life expectancy, however, the lower the amount paid. Other companies even forego a separate medical examination and instead require only that the PWA submit existing laboratory and hospital records.[36] Thus, while all companies offering living benefits require that the policyholder be medically certified as terminally ill, the standards vary greatly as to the life expectancy and the extent of medical verification required for eligibility.

D. *Original Beneficiary*

Besides a medical estimate of life expectancy, the policyholder often must obtain a waiver from the original beneficiary of the life insurance policy. Generally, a policyholder who has reserved the right to change the named beneficiary can change the policy's beneficiary without the original beneficiary's consent.[37] The beneficiary of a life insurance policy with such a reserved right has only a mere expectancy in the proceeds. However, if the right has not been reserved, the beneficiary has a vested right in the proceeds and the insured cannot change the named beneficiary without the benefit of an applicable state statute.[38]

Under an insurance company's living benefits option, an insured exercises the policy's option without a change in the named beneficiary. If the policyholder chooses the option, the insurance company pays the policyholder a percentage of the death benefit at that time.[39] The remainder of the policy's face value, less all interest lost by the insurance company on the amount paid to the policyholder, is eventually paid to the original beneficiary upon the policy-

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[32] In relation to certain Medicare benefits, the federal government has defined "terminally ill" as a prognosis for a life expectancy of six months or less. 42 C.F.R. § 418.20 (1986).

[33] Living benefits companies are not considered "insurance" companies because they do not actually insure anyone. These companies buy insurance policies instead. Because they are not insurance companies, they do not have to meet the requirements of a state's insurance commissioner. Thus, they can be more flexible in their approach than an insurance company which is operating within a set of guidelines set by the state.

[34] Kerr, *supra* note 22. These companies include Affirmative Lifestyles, Inc., Living Benefits, Inc., Beat the Grim Reaper, Inc., and Principal Financial Group. *See* Groves, *supra* note 17.

[35] Kerr, *supra* note 22 at p. C5, col. 1.

[36] McNamara, *supra* note 21.

[37] 44 AM. JUR. 2d *Insurance* § 1750 (1974).

[38] *Id.*

[39] Atchison, *supra* note 1, at 79.

holder's death.[40] Thus the original beneficiary remains the beneficiary, only the death benefits received are less than originally intended. Unlike life insurance companies, living benefits companies always require a change in beneficiary. Under their version of living benefits, the company takes the place of the original beneficiary.[41] These companies require the original beneficiary to sign a waiver allowing the policyholder to name the company as beneficiary.[42] Even where the policy or a state statute would allow the change without one, living benefits companies require a waiver as a precaution against possible lawsuits by the original beneficiary.[43]

E. *Amount Paid for Living Benefits*

The amount an insured may receive in living benefits may vary dramatically. Different life insurance companies offer options that pay from twenty-five percent to one-hundred percent of the face value of the policy.[44] The amount offered by a single company varies according to the age of the policy. For example, a twenty year old policy may pay eighty-nine percent while a forty year old policy may pay ninety-one percent.[45]

Living benefit companies usually pay the policyholder fifty percent to eighty percent of the face amount of the policy.[46] Other factors affecting the amounts paid include medical and legal fees, life expectancy and administrative costs to obtain written releases from beneficiaries.[47] Having briefly discussed some of the different requirements a policyholder must meet, as well as the various percentages paid as living benefits, this Note will now analyze three groups which influence the payment of living benefits: AIDS rights groups, the federal government, and state governments.

F. *AIDS Rights Organizations*

AIDS rights organizations support the concept of living benefits with cautioned enthusiasm. New York's Gay Men's Health Crisis ("GMHC"), the

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[40] *Id.*

[41] *Id.*

[42] Jayne Garrison, *Using Death Benefits While Still Alive*, NEWSDAY, Feb. 27, 1990, at 39, col. 1.

[43] *Id.*

[44] Linda Koco, *Accelerated Benefits Vary By Contract*, NAT'L UNDERWRITER (Life, Health, and Financial Services Ed.), Aug. 3, 1992 at 31.

[45] *Id.* These high percentages may be available only to policyholders sixty-five and over, an age group with a low rate of HIV infection. Prudential Insurance does offer a ninety percent payout if a doctor certifies a six month life expectancy. Kerr, *supra* note 22.

[46] Kerr, *supra* note 22.

[47] McCormack and Petersen, *supra* note 29, at 1349. The amounts paid by insurance companies have increased. However a policy holder must already have the option and usually meet an age requirement to receive these amounts. Most PWAs usually do not meet either of these requirements.

nation's first organization formed to address the AIDS epidemic, has supported living benefits as a means of meeting the financial needs of PWAs.[48] At the same time, GMHC has voiced concern about the possible exploitation of PWAs.[49] One concern arises from the possible physical and mental inability of a PWA to "shop around" for the best terms for the sale of the policy.[50] Another concern focuses on the psychological welfare of the PWA.[51] Freedom from financial stress may bring the PWA benefits, but at the cost of giving a third party a vested interest in one's own death. Concerns have also been raised about the possibility of duress due to a combination of financial stress and the physical and psychological effects of AIDS.[52] AIDS support groups in other parts of the country also support the concept of living benefits. Phoenix's Gay and Lesbian Switchboard ("Switchboard") has been a strong advocate of living benefits. When the Arizona state legislature considered restricting the money paid in living benefits to be spent solely on medical expenses, the Switchboard lobbied against such restrictions.[53] The Switchboard, like other AIDS rights groups, believes that a PWA should be free to use the money for whatever purpose he chooses.[54]

G. *Federal Government and Living Benefits*

The federal government has primarily addressed living benefits in the context of tax policy. Despite the significant effect taxation may have on PWAs, the IRS has made contradictory public statements as to whether such payments should be included as taxable income.[55] Life insurance benefits have traditionally been excluded from income by the IRS,[56] however, such benefits have not been paid directly to the policyholder.

Senator Bill Bradley, Democrat from New Jersey,[57] and Representative Barbara Kennelly, Democrat from Connecticut,[58] have introduced legislation to allow individuals to use life insurance benefits during the final stages of a terminal illness without incurring income tax liability. This legislation would exempt living benefits from taxable income provided that the policyholder had

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[48] Groves, *supra* note 17, at 1.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* For example, a PWA may face financial problems such as eviction in addition to his weakening body and the psychological effects of dealing with imminent death. The combined impact of such factors may cause duress.

[53] *Id.*

[54] *Id.*

[55] McCormack and Petersen, *supra* note 29, at 1350.

[56] 26 U.S.C. § 101(a) (1986).

[57] S.2222, 101st Cong., 2d Sess. (1990).

[58] H.R. 3734, 101st Cong., 1st Sess. (1989). Both the Senate and House bills are under consideration by the respective Finance Committees. Neither committee has taken any action as of April, 1991.

less than twelve months to live.[59] Any benefit received by an individual with a longer life expectancy would be considered taxable income.

Senator Bradley has stated that one of the intended goals of this legislation is to enable individuals to die in comfort and with dignity.[60] He has also said that exempting living benefits from taxation would have little effect on government revenues since death benefits are already tax-exempt.[61] During the bill's introduction to the House Finance Committee, co-sponsor Rep. William J. Coyne, Republican of Pennsylvania, submitted a memorandum prepared by Ms. Jean Rosales, Economic Analyst for the Congressional Research Service.[62] As to the tax consequences of living benefits, Ms. Rosales agreed that an exemption would not deprive the Federal Government of any revenue since life insurance death benefits are already tax-exempt.[63] She further suggested that such payments may save the government money because the policyholder may use the living benefits payment to seek private rather than government provided medical care.[64]

Ms. Rosales raised three general concerns about living benefits. First, she suggested that underwriters inexperienced with living benefits may contribute to consumer protection problems.[65] However, she did not specify any particular problems. Ms. Rosales' second concern was that other financial intermediaries would likely view the treatment of life benefits as a tax-free investment, effectively granting insurance companies a competitive advantage.[66] Again, Ms. Rosales did not elaborate this point. Third, she suggested that policyholders could use the funds "to pay for a trip to visit relatives around the country . . . while the policyholder is still able to travel."[67] To prevent such uses of the funds, Ms. Rosales suggested that Congress and the IRS should consider restricting the tax-exempt status of living benefits to use for health care.[68]

H. *State Governments and Living Benefits*

State governments have responded faster than the federal government to the option of living benefits. On January 26, 1990 only ten states allowed living benefits.[69] Two weeks later, living benefits had been approved in an additional

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[59] Bill to Provide Tax-Free Treatment of Benefits for Terminally Ill Introduced, Pens. Rep. (BNA) No. 17 at 415 (Mar. 5, 1990).

[60] *Id.*

[61] *Id.*

[62] 136 CONG. REC. E1869 (daily ed. June 7, 1990) (statement of Rep. Coyne).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Christine Woolsey, *More Insurers Expected to Offer "Living Benefits"*, BUS. INS., Mar. 12, 1990, at 8.

twenty states.[70] By April of 1991, forty-four states allowed insurance companies to offer living benefits and all fifty allowed life insurance companies to sell policies to third parties.[71]

Within the states that permit insurance companies to offer living benefits, different restrictions apply. For example, the Arizona legislature is considering restricting the use of living benefits monies solely for health care purposes.[72] Texas, which originally enacted a similar policy, is now in the process of eliminating any spending restrictions.[73] South Carolina, Vermont and Washington restrict living benefits to policyholders not in the care of a nursing home.[74] Their rationale is that living benefits serve as a means to reduce the financial burdens of the terminally ill and not as means to provide long-term medical care.[75] Connecticut, on the other hand, restricts living benefits to policyholders residing in nursing homes.[76] Colorado, however, allows living benefits to be spent at the policyholder's discretion.[77]

States not only vary on how the funds may be spent but also on the effect living benefits have on state-paid health care.[78] In 1987, Medicaid programs paid for 23% of all AIDS health care costs which amounted to $400,000,000.[79] Arizona currently precludes living benefits from consideration when determining the eligibility of a person for state-paid health care.[80] States facing budget cuts may consider making recipients of living benefits ineligible for state-paid benefits. California is considering whether MediCal payments will be affected by living benefits.[81] However, Robert Waldron, spokesperson

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[70] *Id.*

[71] McCormack and Petersen, *supra* note 29 at 1351.

[72] Howard Fisher, *State Considers Rules for Early Payout of Life Insurance Benefits*, BUS. J. PHOENIX & THE VALLEY OF THE SUN, Apr. 16, 1990, § 1 at 9. (Often life insurance policies are paid for in installments. Any installment payments outstanding are then deducted from the amount the policyholder receives in living benefits.)

[73] David C. Jones, *States Block Policies With Living Benefits*, NAT'L UNDERWRITER (Life, Health, and Financial Services Ed.), Mar. 24, 1989, at 1.

[74] Woolsey, *supra* note 69, at 8.

[75] *Id.* Long-term health care is to be covered by health insurance, not life insurance. Nursing homes are viewed as a long- term health care cost and therefore should be covered by health insurance.

[76] CONN. GEN. STAT. ANN.N. § 19a-36 (West 1990).

[77] S. 107, 57th Leg. 2d Reg. Sess. 1990, Colo. Laws 90-1080. (This bill, which is intended specifically to address the AIDS epidemic, also protects the privacy of the PWA by imposing fines and jail sentences on anyone releasing the results of the PWA's medical records.)

[78] Scotti, *supra* note 6, at 7.

[79] Robert J. Buchanan, *State Medicaid Coverage of AZT and AIDS Related Policies*, AM. J. PUB. HEALTH, April 1988, at 432. (While Medicare is a federal benefit, some state legislators have denied the deduction of both federal and state benefits from policyholders receiving living benefits)

[80] Fisher, *supra* 72, at 9.

[81] Scotti, *supra* note 6, at 7.

for the American Council of Life Insurance, has said that any discussion of making living-benefit recipients in California ineligible for MediCal payments is "speculative."[82]

Unlike the regulation of insurance companies, currently only New Mexico, Kansas, and California regulate living benefits companies.[83] In August, 1992, an association of state securities regulators expressed concern over the possibility that both PWAs and investors could be victimized by some practices within the industry.[84] There is currently some discussion about whether the living benefits industry is covered by securities regulation.[85]

II. Issues and Concerns Relating to Living Benefits and PWAs

A. *Introduction*

In addition to the human cost of AIDS,[86] there is also a great financial cost.[87] Because of this, living benefits have a great financial appeal to PWAs.[88] Often AIDS patients face unemployment, either because of discrimination at the workplace[89] or simply because the PWA can no longer physically work.[90] Even if employed, the PWA still faces the high medical costs for the treatment of AIDS.[91] The PWA also has to meet everyday living expenses such as rent, food, clothing and utilities. Lacking disposable assets, PWAs often sell

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[82] *Id.* (He stated that while it may possible for California to seek reimbursement for living benefits received by PWAs to be used for medical care, such action on California's part is unlikely because government provided care is usually viewed as an entitlement rather than a supplement.)

[83] Kerr, *supra* note 22.

[84] *Id.*

[85] *Id.*

[86] The World Health Organization ("WHO") estimates the cumulative adult HIV infections worldwide at 10 to 12 million in 1992. WHO estimates there are currently 1.7 million AIDS cases worldwide with 16% of that figure in the United States. Christine Gorman, *Invisible AIDS*, TIME Aug. 3, 1992, at 30, 33.

[87] WHO's AIDS budget for 1992 is $90,000,000. Gorman, *supra* note 89 at 34. As of 1992. the life insurance industry has paid out more than $640 million in death benefits to policyholders who died of AIDS. Kerr, *supra* note 22, at C1, col. 2.

[88] For example, in 1987 the average cost of AIDS related medical care for an adult was $35,461. Cella and Brown, *AIDS Treatment a Financial Burden for Hospitals, Other Providers*, HEALTHCARE FIN. MGMT., November 1988, at 52.

[89] While such discrimination is prohibited by the newly passed American with Disabilities Act, it still exists. To circumvent continuing workplace discrimination, for example, Harvard Community Health Plan in Massachusetts assigns PWAs to doctors who work evening hours so that the PWA can receive medical care without drawing unnecessary attention by frequently missing work for doctors appointments. Interview with Ralph Rosenfield, patient at Harvard Community Health Plan, in Boston, MA. (Nov. 23, 1990).

[90] Groves, *supra* note 17, at 1.

[91] Atchison, *supra* note 1, at 79.

their cars and homes to pay medical bills.[92] Living benefits offer PWAs a possible means to pay some of these costs. The possibility of obtaining a large sum of money is not only an appealing idea, it is often a necessity when faced with such high costs.[93] However, using living benefits to pay these non-medical costs raises concern about possible abuse. This section examines factors affecting living benefits such as: the rights of the original beneficiary, differences in medical requirements, the differences in amounts paid to policyholders, and governmental restrictions on living benefits. Also, this section will analyze personal considerations of the PWA: the ability to make an informed choice, mental competency, and the psychological benefits involved.

B. *Rights of the Original Beneficiary*

Discussions about living benefits often focus on the rights of the original beneficiary. All living benefit companies require policyholders to obtain written releases and consents from the named beneficiary for the sale of the policy.[94] Often, living benefits companies require written consents from heirs, relatives, and other interested parties.[95]

Traditionally, life insurance companies paid death benefits to the named beneficiary of the policy upon the policyholder's death.[96] The purpose of life insurance was to provide lost income to the beneficiary after the death of the policyholder.[97] Thus, in the paradigmatic case, a life insurance policy's beneficiary would be a family member. The benefits were designed to serve as the family's source of financial support after their income producer's death.[98] To protect this important financial interest, courts have held that where policyholders have not reserved the right to change beneficiaries, beneficiaries have a vested property interest in the policy.[99] Some courts have allowed an exception to this vested interest where there has been a significant change in the relationship or responsibilities between the beneficiary and the policyholder as in the case of a divorce.[100] In contrast, the original beneficiary in living benefits cases is removed not because of a change in relationship with the policyholder, but rather because the policyholder is dying and seeks the funds which the policy could provide. With living benefits, the beneficiary is being changed so that the financial benefits go to the policyholder instead of any dependents.[101] Circumstances may be strong enough to allow a change in policy without the

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[92] McNamara, *supra* note 21, at 1.

[93] Garrison, *supra* note 42, at 39.

[94] McCormack and Petersen, *supra* note 29 at 1349.

[95] *Id.*

[96] BLACK'S LAW DICTIONARY 723 (5th ed. 1979).

[97] Joseph R. Jordan, *We Must Return to Survivor's Needs*, NAT'L UNDERWRITER (Life, Health, and Financial Services Ed.), May 7, 1990, at 37.

[98] Rob Dillard, *Cash Advance on Life Insurance*, BUS. RECORD, JUNE 25, 1990, P. 1.

[99] *Hollaway v. Selvidge*, 219 Kan. 345, 548 P.2d 835 (1976).

[100] 10 Am. Jur. 2d *Insurance*, §§1750-1751 (1982).

[101] Jordan, *supra* note 97, at 37.

consent of the beneficiary, but to date there has not been litigation where an original beneficiary contested being removed as the beneficiary.[102]

One debate in this area involves the beneficiary who depends upon the policyholder's income and would suffer financial hardship if the policyholder elected to receive living benefits. In a worst-case scenario, the PWA opts for living benefits, sells the policy to a living benefits company, changes his beneficiary from his wife (and mother of his children) to the financial intermediary and then uses his money to finance a brief but expensive vacation. Upon his death, he leaves his family destitute. Some members of the insurance industry feel that the survivor's need for financial security should take precedence over the policyholder's need for living benefits. They argue that the survivor's financial needs will continue for many years as opposed to the policyholder's needs which last for only a brief time.[103]

In reality, such hypotheticals have little chance of occurring. Most PWAs do not fit the role of the income producer in the paradigmatic case.[104] Most PWAs who own life insurance policies are single men.[105] These men rarely have families which are dependent on their income. PWAs differ from most life insurance policyholders who own the policy to protect their family.[106] In most cases single men have named parents as their beneficiaries.[107]

Typically, a PWA's employee benefit package included a life insurance policy. Without dependents to support, the PWA probably did not give a great deal of thought to the life insurance policy. After naming the beneficiary on the insurance form, one of many forms signed at the start of his employment, he may not have thought about the policy again. He may never have discussed this policy with his parents since it is likely that children do not discuss the terms of their own death with their parents. As such, the PWA does not fit the

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[102] There are three possible reasons for the lack of litigation on this point: (1) living benefits have only been in existence for a few years; (2) Living Benefits Companies all require a waiver from the beneficiary; and (3) the short life expectancy of a PWA may prevent him from waging a court battle to change a policy against his original beneficiary's wishes.

[103] Jordan, *supra* note 97, at 37.

[104] The caseload as of November, 1990 of AIDS Action Committee of Massachusetts, Inc. (1,058 persons with AIDS or AIDS related diseases) demonstrate this point. The statistics of the case load are: Sex: 85.0% are men and 15.0% are women. Race/Ethnicity: 71.8% Caucasian, 12.5% Black, 8.3% Hispanic, 1.6% Haitian, and 5.8% Other. Category: 60.4% Gay/Bisexual, 28.6% IV Drug User, 15.9% Heterosexual, .5% Transfusion, .8% Pediatric, .5% Hemophiliac, and 1.3% Not Reported. AIDS Action Committee is the largest AIDS support group in Massachusetts. Of the 3,162 cumulative AIDS cases the U.S. Center for Disease Control has reported in Massachusetts, 3,015 have been serviced by the AIDS Action Committee. *Current AIDS Statistics*, UPDATE, November 1990, at 4.

[105] Garrison, *supra* note 42, at 1.

[106] Don Barnes, *When Compassion and Judgment Clash*, NAT'L UNDERWRITER (Life, Health, and Financial Services Ed.), June 26, 1989, at 13.

[107] *Id.*

paradigmatic case of a life insurance policyholder. Often the PWA's beneficiary does not rely on the PWA for financial support,[108] and therefore the beneficiary's financial security does not depend on continued income from the policyholder. Thus, the interests of the PWA's original beneficiary are not as strong as the interests of the typical beneficiary who relies on the policyholder for income. Since the PWA's beneficiary has not relied on the policy, the beneficiary should not have the power to prevent the PWA from using the policy for his own needs. Therefore, it seems reasonable that the PWA should be able to obtain the policy proceeds without any interference from a beneficiary, who ideally, should be concerned about the PWA's welfare.

What happens when the PWA has not finished making installment payments on the policy is an important question.[109] Consider the following example. The policyholder is no longer able to work and the policyholder's former employer, who first offered the policy, has not paid all of the premiums. The unemployed PWA must now pay health insurance premiums, previously paid for by his employer, in addition to his life insurance premiums. In this case, faced with high medical costs and unemployment, PWAs often stop making such life insurance payments because they cannot afford them.[110] The PWA will often let the policy lapse, in which case the beneficiary does not receive any benefit upon the PWA's death.[111] If the original beneficiary refused to allow the PWA to receive living benefits, the PWA would end up losing the policy and the beneficiary would lose any death benefit. If the PWA sells his policy to a financial intermediary, the intermediary will continue to make premium payments and the PWA will receive the needed money.[112] In such circumstances, when the beneficiary would lose the death benefits anyway, the beneficiary does not have a strong interest in preventing the PWA from using the policy to receive living benefits.

It should be noted that most living benefits companies have addressed this issue with self-regulation.[113] If the policyholder has minor children, a spouse or parents in need, most of these companies will not purchase the policy.[114] The assumed reason living benefits companies request the waiver is the fear of possible lawsuits brought by the original beneficiary at the time of the policyholder's death.[115] Self-regulation may be the answer to the problems inherent in living benefits. At present, however, none of the state statutes regulating living benefits address this issue. If the beneficiary depends financially on the

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[108] Garrison, *supra* note 42, at 1.

[109] This problem does not arise where the policy has a disability waiver. Such a waiver allows for the suspension of premiums for the length of the disability. McCormack and Petersen, *supra* note 29 at 1348.

[110] Atchison, *supra* note 1, at 79.

[111] *Id.*

[112] *Id.*

[113] McNamara, *supra* note 21, at 39.

[114] *Id.*

[115] Garrison, *supra* note 42, at 1.

policyholder, then the life insurance policy serves its original purpose. In such instances the beneficiary has a strong interest in the death benefits and it may be appropriate to require the beneficiary's waiver. If, however, as in most PWA cases, the beneficiary does not rely on the policyholder for financial support, then the policyholder should be able to change the policy's beneficiary without seeking the original beneficiary's consent.

A balance must be found between the needs of the PWA to sell his policy and the need of the living benefits company to be free from litigation. While a waiver might serve both parties interests, seeking waivers from other heirs and possible interested parties might be more troublesome. Securing such consents are not only financially costly to the PWA,[116] but they may be emotionally costly as well. Both the stigma of AIDS and the homophobia present in our society may cause a PWA to be reluctant to approach all possible heirs and interested parties. As a result, the PWA may decide not to attempt to receive living benefits. If the PWA attempts to secure waivers from all interested parties and they refuse, their refusal may prevent the sale of the policy.[117] In such cases, the PWA is left without the money the living benefits would have provided. The process might also alienate the PWA's family. As a result, living benefit companies should be restricted from requiring consents from interested parties other than the named beneficiary.

C. *Variance of Life Expectancy Requirements*

The accuracy of the life expectancy calculation also raises concerns. Accurately diagnosing a PWA's life expectancy[118] is difficult because AIDS is an unpredictable disease. Carissa Cunningham, a spokesperson for GMHC has said that it is almost impossible to predict when a PWA will die.[119] Often PWAs come to the brink of death only to make dramatic recoveries.[120] The life expectancy certification required by all companies to qualify for living benefits is often merely a medical guess.[121] No actuarial tables have been developed for PWAs.[122] Besides the physical health of the PWA, psychological and behavioral factors have a direct bearing on the life expectancy of a PWA.[123] The psychological relief living benefits bring to a PWA may even

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[116] McCormack and Petersen, *supra* note 29, at 1349.

[117] *Id.*

[118] Fromartz, *supra* note 7.

[119] Tamar Lewin, *To the Dying, Life Policy Can Bring Money Now*, N.Y. TIMES, Mar. 5, 1990, at A10, col. 4. (Lewis Katoff, Director of Client Services of GMHC, was diagnosed as having nine months to live in 1987 and as of March 5, 1990 appeared in good health.)

[120] Interview with Alan Barnett, GMHC volunteer, in New York, N.Y. (Sept. 30, 1990).

[121] *Id.*

[122] McCormack and Petersen, *supra* note 29, at 1349.

[123] Janice Kiecolt-Glaser and Ronald Glaser, *Psychological Influences on Immunity*, AM. PSYCHOL., Nov. 1988, at 892.

lengthen the PWA's life expectancy.[124] Therefore, it is hard to say how much weight should be given to the number of months a PWA is expected to live when determining when to make a living benefits payment.

The time requirements a PWA must satisfy under plans provided by either a living benefits company[125] or a life insurance company vary greatly from company to company. Life expectancy requirements range from less than six months to up to five years.[126] This restriction helps the PWA to alleviate the pain towards the end of his life, but seriously harms the PWA who is diagnosed months before the required time period. This individual must endure pain and suffering before qualifying for the benefit. Not only must he wait to be eligible, but once he meets the time requirement, further delays may occur. For example, suppose the PWA has six months to live. He goes to the doctor to get the necessary life expectation certification. He files the forms with the company offering living benefits. The company reviews the PWA's forms, has the original beneficiary consent to a waiver and then pays the PWA the living benefits. This chain of events generally takes three to four months.[127] Unlike insurance companies, most living benefits companies will make payments to PWAs with life expectancies of twenty-four months.[128] Payments this early raise several concerns. Taxation is one such concern. Under the proposed Kennelly-Bradley legislation, payments in excess of twelve months prior to death would be taxed as ordinary income and thus push the PWA into a higher tax bracket.[129] This tax would diminish the funds available to the PWA and would defeat the purpose behind living benefits which is to provide needed cash.

If the PWA must wait to qualify for funds to pay for medical care until he has only six months to live, he may just give up the fight to live. On the other hand, if the PWA receives the funds twenty-four months in advance of his expected death, then he may be taxed and lose necessary funds. One solution to the problem of life expectancy predictions, is to allow payment for periods of up to twenty-four months without the possibility of taxation.

Arizona has addressed the problem by allowing living benefits for any individual with "a terminal illness, a catastrophic illness, or eligibility for long-term care."[130] The federal terminal illness standard usually limits the life expectancy of the person receiving living benefits to six months.[131] A diagnosis of AIDS with a life expectancy of more than six months, however, would not be ruled out by Arizona's definition. AIDS is covered by the "catastrophic illness" designation. The "eligibility for long-term care" would also be satisfied

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[124] McCormack and Petersen, *supra* note 25 at 1351.

[125] Kerr, *supra* note 22.

[126] *Id.*

[127] McCormack and Petersen, *supra* note 29 at 1349.

[128] Groves, *supra* note 17, at 1.

[129] Fromartz, *supra* note 7.

[130] ARIZ. REV. STAT. ANN. § 20-1136 (1990 Supp.). AIDS is considered a catastrophic illness.

[131] 42 C.F.R. § 418.22 (1991).

by an AIDS diagnosis. The Arizona approach may be the best, provided the federal government allows for tax-exempt status for persons receiving living benefits.[132]

D. *Possible Income Tax Liability*

As can be seen from the above discussion, taxation on an early payout could cause hardship for the AIDS victim. Thus, AIDS rights groups have argued against taxation of these benefits.[133] While current federal tax policy includes taxation of capital gains[134] and gifts[135], living benefits differ from these forms of income. Unlike capital gains, living benefits are not the result of an investment designed to increase one's own wealth. The life insurance policy was not intended to be used for the policyholder's benefit. Living benefits occur because of an unexpected terminal illness. The policyholder does not receive the same "rate of return" the original beneficiary of the policy would have received upon the policyholder's death.[136] It is also hard to imagine living benefits fitting into a "gift" classification. After all, one has to face imminent death to qualify. Insurance has historically enjoyed advantages under income tax laws.[137] Benefits paid upon the death of a policyholder are excluded from taxation.[138] Medical benefits paid by accident or health insurance are also tax-free.[139] Living benefits should be governed by the same tax policy that excludes life insurance benefits and medical benefits.

Ms. Rosales in her memorandum to Rep. Coyne[140] suggested that living benefits may be viewed as tax-free investments.[141] This concern stems from the rationale that if the money received were tax-free, investors could receive a higher rate of return than from a taxable investment. If so, living benefits would act as a tax shelter. This argument, however, overlooks the fact that few investors would qualify for this "tax benefit" since imminent death from a specified disease is required to receive living benefits. Considering this basic requirement for living benefits, the fear that these benefits would be used primarily for tax purposes appears unfounded.

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[132] State taxation law traditionally defers to the Internal Revenue Code to define such terms as "taxable income."

[133] Groves, *supra* note 17, at 1.

[134] I.R.C. § 1222 (1986).

[135] I.R.C. § 2503 (1986).

[136] Atchison, *supra* note 1, at 79.

[137] Marvin A. Chirlestein, FEDERAL INCOME TAXATION, p. 37-44 (1988).

[138] I.R.C. § 101 (1986).

[139] I.R.C. § 105 (1986).

[140] 136 Cong. Rec..E1869, (1990), *supra* note 68.

[141] Jordan, *supra* note 97. (Jordan, an insurance executive, argues that unless life insurance remains solely for the beneficiary, it is in reality an investment for the policyholder and should be treated as such.)

E. *Restrictions on the Use of Living Benefits*

Another concern AIDS rights groups raise is whether the use of living benefits should be restricted solely to medical care. A PWA facing high medical costs may turn to state-paid medical treatment. With living benefits he could pay for at least some of the treatment himself.[142] In her memo to Rep. Coyne, Ms. Rosales raised the concern that a PWA may spend money to visit family members rather than on medical care.[143] However, some states, such as Connecticut, do require that the funds be spent solely on medical treatment.[144] Most PWAs have used living benefits for improved medical care.[145] The fear that the funds will be "misspent" may not be very compelling.

On the other hand, since the PWA paid for the policy and is facing death, he should have the right to spend the money as he sees fit. There is neither a state interest nor a public policy interest strong enough to outweigh a dying person's desire to spend the money as he wishes. Even if the money is spent on a vacation, that trip may give the PWA a psychological boost in his remaining months.

The proceeds of a life insurance policy are already considered at law to be a vested property interest of the beneficiary.[146] If the beneficiary waives any right to proceeds of the policy, then a government restriction on the use of the proceeds would be an obstruction to the property interest of the policyholder. Such an obstruction would seemingly conflict with the Due Process Clause of the Fourteenth Amendment,[147] but there has been no litigation raising this constitutional issue.

F. *Making An Informed Choice*

AIDS rights groups have raised the concern that the PWA may not be able to make an informed decision about living benefits.[148] The PWA faces not only imminent death but also high medical expenses, possible unemployment, and cost-of-living expenses. As a result of these factors, the PWA may be unable to spend the time researching the best consumer deal available. The choice of living benefits in the marketplace is quite varied. The amount paid ranges from fifty-five to eighty percent of a life insurance policy's face value.[149] The eligibility requirements vary as to life expectancy.[150] Also, the financial needs

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[142] 136 Cong. Rec. E 1869 (daily ed., June 7, 1990).

[143] 136 Cong. Rec. E 1869 (daily ed., June 7, 1990).

[144] Woolsey, *supra* note 69, at 8.

[145] Garrison, *supra* note 42, at 39.

[146] 44 AM.JUR.2d *Insurance* § 1750 (1974)

[147] U.S. CONST. Amend. XIV, § 1.

[148] Susan Ellicott, *Spending Spree Brightens Road to Grim Reaper*, N.Y. TIMES, July 4, 1990.

[149] Garrison, *supra* note 42, at 39.

[150] McNamara, *supra* note 21, at 1.

of PWAs vary greatly.[151] As such, it is difficult for a PWA to make a decision about living benefits.

If the PWA resides in a major city, there may be an AIDS support group that could provide such information. But these organizations are dependent upon volunteers and can only provide as much information as the volunteers have been trained to give. The groups may not have access to the latest information. If the PWA does not reside in a major city he may have a harder time deciding on what to do about living benefits or even knowing that such an option exists.

In either case, the PWA may turn to an attorney, as Living Benefits, Inc. suggests to all of its clients.[152] But the PWA must address the question of finding and paying an attorney. The attorney may be willing to work pro bono, but she may not have the latest information concerning living benefits. As of October 1990, seventy companies offered living benefits plans which varied greatly. Because of these factors, the public needs better information about living benefits. Knowledge of such benefits might be increased by ending the restriction against advertising them. Alan Rachlin, lawyer for the New York State Insurance Department, stated that it is illegal to advertise to buy a stranger's life insurance policy.[153] He has said that speculation on death is against public policy. Because of the high medical costs and the financial need of PWAs, public policy should change in this instance so that more people can find out about the option of living benefits.

Minnesota has addressed the advertising problem by simply requiring all advertisements for living benefits to be cleared by the state commissioner of insurance.[154] The commissioner may deny the advertisement if it will mislead the policyholder to believe the living benefits is a "long-term care policy" and not accelerated death benefits.[155] This approach would protect the policyholder from mistaking the purpose of the benefit as well as allowing companies to advertise the service.

G. *The Competency of the PWA to Make Choices*

Even if the information needed to make an informed choice were available, the neurological[156] and psychological[157] profile of a PWA may affect the

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[151] Groves, *supra* note 17, at 1. (Groves interviewed PWAs ranging from a doctor who had lost his savings and his house and had declared bankruptcy before buying a living benefit policy, to a former Senior Vice President of Columbia Pictures who has a generous disability plan and decided not to purchase a living benefit for fear of tax consequences.)

[152] Garrison, *supra* note 42, at 39.

[153] Lewin, *supra* note 119, at A10.

[154] Minn. Stat. Ann. § 61A.072(ii) (West 1990 Supp.).

[155] *Id.*

[156] Gregory A. Elder and John L. Sever, *Neurological Disorders Associated with AIDS Retroviral Infections*, REVIEW OF INFECTIOUS DISEASES, March/April 1988, at 286.

PWA's ability to make a decision in his own best interest. AIDS carries a stigma because it is a sexually transmitted disease,[158] because there is no known cure, and because gay men are in a high risk group to develop AIDS.[159] This stigma has resulted in embarrassment and discrimination in jobs,[160] education[161] and housing.[162] It is no understatement to say that the public has reacted to AIDS with hysteria.[163]

The stigma of AIDS coupled with the prospect of near certain death can have a detrimental effect on the PWA's mental health. Suicide is not uncommon among PWAs.[164] The psychological effects of the disease may render the PWA incompetent to make a contract for living benefits. Psychological effects may not be the only factors which render the PWA incompetent. Most AIDS cases develop some form of AIDS-related dementia.[165] Dementia is characterized by a diminished mental capacity, forgetfulness, apathy, personality changes and disorientation.[166] Often dementia will manifest in subtle symptoms for a period of months and then accelerate with the rapid mental deterioration.[167] Dementia could easily render a PWA too incompetent to make a living benefits contract. In cases where there is a possibility of diminished capacity of the PWA, a court-appointed temporary guardian may be able to act in the PWA's best interest with regard to living benefits.

New Mexico is one of the few states to specifically address this problem in its living benefits statute. The statute first requires a written statement from a licensed physician or psychologist that the policyholder is competent to make the contract.[168] The second requirement is a written statement by the policyholder that they have a full understanding of the meaning of the contract, an

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[157] *AIDS and the Elusive Power of Belief*, NEWSWEEK, Nov. 7, 1988, at 92.

[158] STEDMAN'S MEDICIAL DICTIONARY, 38 (25th ed. 1990).

[159] THE SLOANE-DORLAND ANNOTATED MEDICAL LEGAL DICTIONARY, 687 (1987) (72% of AIDS cases are homosexual or bisexual men with multiple sex partners).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] Peter M. Marzuk, *Increased Risk of Suicide in Persons with AIDS*, 259 J.A.M.A. 1333 (1983). (The suicide rate for men aged 20- 59 with AIDS is 36 times the rate for men in the same age range without AIDS and is 66 times the rate of general population.)

[165] Christopher A. Joyce, *Assault on the Brain*, PSYCHOLOGY TODAY, March, 1988, at 38. Dementia is a "general mental deterioration due to organic or psychological factors." STEDMAN'S MEDICAL DICTIONARY, at 410 (25th ed. 1990).

[166] *Id.*

[167] Mary K. Morgan, et. al., *AIDS-Related Dementia: A Case Report of Rapid Cognitive Decline*, 44 J. of CLINICAL PSYCHOLOGY 1024, (1988). (a study of the dramatic drop in IQ of a PWA over a period of six months).

[168] N.M. STAT. ANN. § 59A-20-34(C)(1) (Michie 1990 Supp.) ("[A] written statement from a licensed physician or psychologist attending the terminally ill person that the terminally ill person is of sound mind and under no constraint or undue influence").

acknowledgement of the terminal illness by the policyholder, and, acknowledgement that it is entered into freely.[169] These requirements answer the concerns of the policyholder's competency. To further protect the policyholder, New Mexico makes it a crime for anyone to violate these provisions or to take advantage of a policyholder.[170]

H. *The Psychological Benefits of Living Benefits*

Living benefits provide the funds necessary to relieve a PWA of such worries as paying for medical care and living expenses. It is hard to put a value on such relief because it can improve the quality of life in the PWA's last months. By obtaining the money from living benefits, PWAs can take back some control over their lives by playing a more active role in choosing the medical care they receive. This control can help erase some of the helplessness the PWA may feel and enable him to die with dignity.

However, living benefits can also cause psychological problems. The PWA is, in a sense, gambling with his own life. He is giving a stranger a vested interest in his death. While all firms promise confidentiality to policyholders,[171] concerns have been voiced about breaches of that promise. Two companies are known to have sent investors a choice of PWA policyholders from which to choose. The companies not only revealed the PWA's life expectancy, but also their infection and white blood cell counts.[172] Some companies have even given the PWA's last name to investors.[173] One PWA complained about the company he sold his life insurance policy to because the company called him once a month "just to check in."[174] Such constant reminders that someone is waiting for you to die so that they can make some money could be devastating. One solution to this problem is to restrict the companies from contacting the policyholder. The company has already reviewed the PWA's medical records. Any further medical information can be relayed to the company by the doctor, when the doctor feels it is necessary to do so. Also, companies should be forbidden to reveal names of policyholders to investors. Such breaches of privacy are highly insensitive to the dying PWA who becomes a mere investment opportunity.[175]

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[169] N.M. STAT. ANN. § 59A-20-34(C)(2) (Michie 1990 Supp.).

[170] N.M. STAT. ANN. § 59A-20-36 (Michie 1990 Supp.).

[171] McCormack and Petersen, *supra* note 29 at 1349.

[172] Kerr, *supra* note 22.

[173] *Id.*

[174] Interview with Gregg Winkleman, in New York, N.Y. (Sept. 30, 1990).

[175] It should be noted that two companies known to reveal such information to potential investors have been issued cease and desist orders by the Securities and Exchange Commissioner of North Dakota. While such actions by the Commissioner are to be applauded, the focus of securities regulators is the protection of the investor. As such, securities regulations may not be the proper forum to address the rights of a dying policyholder. The seriousness of the problem is highlighted when the president of one such company compared the sale of PWA living benefit policies to the "reselling of

III. CONCLUSION

At first blush the idea of living benefits is morbid because it involves dealing in death, something our culture abhors. However, thousands of men and women are facing death far earlier than they, or anyone else, expected. AIDS is one of the costliest diseases. Living benefits seems to be an answer to help those with AIDS deal with these costs and to improve the quality of their lives during their last months. Because a person with AIDS could be an easy target for someone out to make some fast money, the procedures for obtaining living benefits need to be safeguarded. With the proper precautions living benefits can work for a person with AIDS. In fact, it may be his last hope.

Andrew L. Lee

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bank mortgages to investors." Kerr, *supra* note 22.

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