7-7-2008

Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust Appellant's Brief Dckt. 34873

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE MARK WALLACE DIXSON IRREVOCABLE TRUST,

CROSS-CLAIMANT-RESPONDENT,

v.

TAMMIE SUE DIXSON,

CROSS-DEFENDANT-APPELLANT.

Supreme Court No 34873

Appealed from the Fourth Judicial District of the State of Idaho,
In and for the County of Ada.
The Hon. Judge Thomas A. Neville, District Judge, Presiding.

CROSS-DEFENDANT/APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page

Cases

STATUTES AND RULES:

Statutes

Rules

I. STATEMENT OF THE CASE

A. Nature of the Case.

Cross-Defendant/Appellant Tammy Sue Dixson (hereinafter referred to as "Tammy")[1] and Mark Wallace Dixson (hereinafter referred to as "Mark") were married on January 1, 2000, and remained husband and wife at the time of Mark's death from Amytrophic Lateral Sclerosis (ALS), which is commonly known as Lou Gehrig's disease, on May 5, 2006. During the parties' marriage, and prior to Mark's diagnosis with Lou Gehrig's disease, Mark applied for and obtained a $300,000 term life insurance policy (the "Policy") from Banner Life Insurance (hereinafter "Banner Life") and named Tammy, his spouse, as the beneficiary.

Mark required skilled nursing care due to the debilitating nature of the disease from December 2004, until his death. Two change of beneficiary designations are at issue in the case at bar, both of which were dated after Mark entered the nursing home in 2004. The first Beneficiary Change Form was "signed" by Mark on or about January 31, 2005. This Beneficiary Change Form did not contain Tammy's consent as required by the Policy. This Beneficiary Change Form was not received by Banner Life.

The Policy premiums for 2005 and 2006 were paid by the Dixson's family home teacher, Cory Armstrong. Tammy asserts that the payments constituted a loan to Mark and Tammy. However, the Trust asserts that the premium amounts were paid by Cory Armstrong and were therefore a gift which caused the policy to become his separate property.

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[1] Appellant Tammy Sue Dixson is referred to in the pleadings and the record as "Tammie;" however, Ms. Dixson's first name is correctly spelled as "Tammy." Thus, Ms. Dixson's name herein is spelled "Tammy," rather than "Tammie."

Mark, assisted by his mother and step-father, Jackie and Robert Young, (referred to as "Jackie" or "Robert" or collectively as the "Youngs") filed a *pro se* divorce action, naming Tammy Sue Dixson as the defendant on August 18, 2005. The Honorable David E. Day issued a *Joint Temporary Restraining Order (Property)*, which specifically prohibited either party **(or their agents)**[2] to the divorce from changing life insurance policy beneficiaries. Mark obtained a Default in the divorce action but such default was set aside by Judge Day on April 25, 2006 because Mark did not effect personal service of the Complaint upon Tammy. A decree of divorce was never entered and the divorce action was dismissed with prejudice on June 19, 2006.

The second purported Beneficiary Change Form, made on or about April 27, 2006, was orchestrated by Mark's mother, Jackie and his step-father, Robert. The second Beneficiary Change Form was not signed by Mark, but was signed by Mark's step-father, Robert, on April 27, 2006 under a power of attorney. Tammy's written consent to the change of beneficiary, required by the Policy, was not obtained. This change of beneficiary removed Tammy as the Policy beneficiary and named Mark's mother, Jackie Young, as the primary beneficiary. The April 27, 2006, Beneficiary Change Form was made in violation of the terms of the *Joint Temporary Restraining Order* issued in the divorce proceeding. Tammy had no knowledge of the 2005 or the 2006, change of beneficiary forms until after Mark's death. Jackie subsequently assigned the Policy proceeds to the Mark Wallace Dixson Irrevocable Trust (hereinafter "the Trust"), which was created by Jackie following Mark's death.

Tammy disputes the validity of both the 2005 and 2006 attempted

[2] Emphasis added.

beneficiary changes on the grounds that the required spousal consent was not obtained for either. Tammy further disputes the validity of the 2006 change of beneficiary which violated the *Joint Temporary Restraining Order (Property)* issued in the divorce proceeding, violated the terms of the Policy and was in contrast to Idaho law.

Claims for the Policy proceeds were filed by both Jackie and Tammy following Mark's death. Banner Life filed an interpleader action, placing the proceeds of the Policy with the Court for determination of which claimant was entitled to the proceeds. Cross-motions for summary judgment were filed by Tammy and the Trust. The trial court ruled that the change of beneficiary form executed by Robert, via the power of attorney, in 2006 was valid and granted the Trust's motion for summary judgment. The trial court denied Tammy's motion for summary judgment. The trial court awarded the Trust attorney fees and costs. Tammy appeals the trial court's decision.

B. Course of Proceedings Below.

Plaintiff, Banner Life, filed a *Complaint for Interpleader* on January 23, 2007, naming the Mark Wallace Dixson Irrevocable Trust and Tammy Sue Dixson as defendants. (R. Vol. I, PP. 7-45). On February 1, 2007, the Trust filed its *Answer to Complaint for Interpleader and Cross-claim* against Tammy, alleging that Tammy's claim to the Policy proceeds was without merit because the 2005 and 2006 Policy premiums were made by a third party as a gift to Mark, thereby rendering the Policy Mark's separate property permitting Mark to remove his spouse as the Policy without his spouse's consent. (R. Vol. I, PP. 45-50).

On March 2, 2007, Tammy filed her *Answer to Complaint for Interpleader, Answer to Cross-claim and Third-Party Complaint* against Robert and

Jackie Young. Tammy, in her *Answer to Cross-Claim*, denied that the Trust was entitled to the Policy proceeds on the basis that: (a) the Trust was not the real party in interest; (b) Idaho Code §41-1830 provides that the Policy proceeds are Tammy's separate property; and (c) that Tammy did not consent to the changes removing her as beneficiary as required by the Policy. (R. Vol. I, PP. 55-56). Tammy's *Third Party Complaint* against the Youngs alleged that the Beneficiary Change Form submitted by Mark on January 31, 2005, was invalid because Tammy had not consented to the change as required by the Policy. Tammy further alleged, in her *Third Party Complaint*, that the Beneficiary Change Form signed by Robert on April 27, 2006, was invalid because: (a) Tammy had not consented to her removal as Policy beneficiary as required by the Policy; (b) any change in life insurance beneficiary was prohibited by the *Joint Temporary Restraining Order (Property)* issued by Judge Day in the divorce proceeding filed by Mark against Tammy; (c) that the Youngs breached their fiduciary duties under the power of attorney by acting in their own best interest in naming Jackie as the beneficiary of the Policy; and (d) the change of life insurance beneficiary without spousal consent by Tammy violated Idaho law. (R. Vol. I, PP. 56-61).

The Youngs filed a *Reply to Third Party Complaint* on March 6, 2007, admitting that Mark and Tammy were married and admitting that Tammy's consent was not given for the April 27, 2006, Beneficiary Change Form. (R. Vol. I, P. 63, ¶ 1; P. 64, ¶ 3).

On May 16, 2007, Tammy filed a *Motion for Summary Judgment* (R. Vol. I, PP. 68 A-C) and a *Memorandum in Support of Tammie Sue Dixson's Motion for Summary Judgment and Tammie Sue Dixson's Memorandum in Opposition to the Mark*

Wallace Dixson's Motion for Summary Judgment. (R. Vol. I, P. 102A, ex 7). Tammy requested that the Court rule as a matter of law that the Beneficiary Change Forms signed by Mark, or by Robert, via power of attorney, were invalid because they lacked Tammy's written consent to her removal as beneficiary. (R. Vol. I, P. 102A, ex 7, PP. _____). Further, Tammy requested that the Court rule as a matter of law that the attempt to remove Tammy as beneficiary of the Policy violated Idaho Code §41-1830. Tammy also asserted that judgment as a matter of law should be entered against the Trust on the basis that the April 27, 2006, Beneficiary Change Form violated the *Joint Temporary Restraining Order* in the divorce action. (R. Vol. I, P. 102A, Ex 7, pp 8-10). Tammy filed the *Affidavit of Tammy Sue Dixon in Support of Motion for Summary Judgment* contemporaneously with her *Motion for Summary Judgment* (R. Vol. I, P. 102A, ex 8). Tammy filed a Reply Memorandum in Opposition to the Mark Wallace Dixson's Motion for Summary Judgment and in support of Tammie Sue Dixson's Motion for Summary Judgment on June 8, 2007. (R., Vol. I, P. 102A, ex 16).

The Trust filed a *Motion for Summary Judgment* on March 14, 2007, asserting that the Trust was entitled to judgment as a matter of law (*see* R. Vol. I, P. 3, 3/14/2007). The Trust also filed a *Motion to Strike Portions of the Affidavit of Tammy Sue Dixon in Opposition to the Motion for Summary Judgment* on May 29, 2007. (R. Vol. I, P. 68D). On June 13, 2007, Tammy filed a *Motion to Strike Portions of the Affidavits of Robert Young, Jackie E. Young, Kaye Baker, Cory Armstrong, and Canyin Barnes in Opposition to Motion for Summary Judgment.* (R. Vol. I, PP. 68G-68V). Each party's *Motions for Summary Judgment* and *Motions to Strike* were heard by the trial court on June 15, 2007. The trial court, the Hon. Thomas A. Neville presiding, ruled from the

bench on the parties' respective *Motions to Strike* (Tr. Vol. I, P. 15, ll. 17-25; PP. 16-28; P. 29, ll 1-6). An *Order Re: Motion to Strike Portions of the Affidavits of Robert Young, Jackie E. Young, Kaye Baker, Cory Armstrong, and Canyin Barnes* was entered on August 14, 2007 (R. Vol. I, P. 68N). An *Order Re: Third Party Plaintiff's Motion to Strike Portions of the Affidavit of Tammie Sue Dixon in Opposition to Motion for Summary Judgment* was issued on August 14, 2007 (R. Vol. I, P. 68S).

The trial court took the *Motions for Summary Judgment* filed by each party under advisement. (Tr. Vol. I, P.63, ll. 24-25; P. 64, ll. 1-13). On November 9, 2007, the Court issued its *Memorandum Decision and Order* granting the Trust's *Motion for Summary Judgment* (R. Vol. I, P. 69). An *Order, Judgment and Decree* was issued on November 14, 2007. (R. Vol. I, P. 93). On November 19, 2007, the Trust filed a *Memorandum of Costs and Attorney Fees* (R. Vol. I, P.102B, ex 19). The *Affidavit of Thomas G. Walker* and the *Affidavit of Mackenzie Whatcott* was filed on November 19, 2007, in support of the Trust's request for an award of attorney fees and costs. (R. Vol. I, P. 102B, ex 20 and 21).

Tammy filed an *Objection to Fees and Costs* on November 30, 2007. (R. Vol. I, P. 96A). The Trust's *Response to Tammy Sue Dixson's Objection to Memorandum of Costs and Attorney Fees* was filed on December 4, 2007. (R. Vol. I, P. 96J). Oral argument was heard on the Trust's request for an award of fees and costs on January 11, 2008. (Tr. Vol. II). The trial court awarded the Trust's fees and costs, and entered *Findings of Fact and Conclusions of Law with Respect to an Award of Costs and Fees to the Mark Wallace Dixson Irrevocable Trust; & Tammie Sue Dixson* on January 16, 2008. (R. Vol. I, P. 101A).

Tammy filed a *Notice of Appeal* on December 21, 2007, appealing in essence the trial court's grant of summary judgment for the Trust and denial of her cross-motion for summary judgment (R. Vol. I, P. 97-101). grant of attorney fees and costs against her and for the Trust. (R. Vol. I, P.109). An *Amended Notice of Appeal* was filed on February 21, 2008.

C. Statement of Facts.

Mark Wallace Dixson and Tammy Sue Dixson were married on January 1, 2000, and remained husband and wife until Mark's death on May 5, 2006, from Lou Gehrig's disease (R. Vol. I, P. 102A, ex 8, ¶ 1). On or about April 23, 2003, Mark completed an application for life insurance with Banner Life Insurance Company (R. Vol. I, P. 8; PP. 12-40, ex A; P. 102, ex 1, ¶ 5; P. 102A, ex 8, ¶ 3), and named his wife, Tammy, as sole beneficiary of the $300,000 life insurance policy under Part I, Section B of the Policy Application. (R. Vol. I, P. 24; P. 102, ex 1, ¶ 6; P. 102A, ex 8, ¶ 4). On April 29, 2003, Banner Life issued Policy Number 17B635069 to Mark, insuring his life and naming Tammy as the beneficiary upon Mark's death. (R. Vol. I, P. 14; P. 24). The Beneficiary Change Form, which becomes a part of the Policy, states that spousal consent is required in the State of Idaho prior to removing the spouse as the beneficiary of the Policy. (R. Vol. I, P. 41).

On or about September 29, 2003, Mark was diagnosed with Amytrophic Lateral Sclerosis (ALS), also known as Lou Gehrig's Disease. (R. Vol. I, P. 102A, ex 2, ¶ 7; P. 102A, ex 8, ¶ 5). Following his diagnosis with ALS, Mark's condition deteriorated to the point that he required skilled nursing care and was admitted to Life Care Center of Treasure Valley in December, 2004. (R. Vol, I, P. 102A, ex 8, ¶ 6; P. 102A, ex 2, ¶ 9).

Mark continued to reside in the nursing home, requiring 24-hour care until his death on May 5, 2006, due to respiratory failure caused by ALS. (R. Vol. I, P. 102A, ex 8, ¶ 6; P. 102A, ex 1, ¶ 15; P. 102A, ex 4, ¶ 11). Mark's primary care physician, Dr. Louis M. Schlickman, attested in a sworn statement that in "March of 2006, Mark was in the advanced stages of [Lou Gehrig's Disease] and was residing in a long term care facility because he was completely unable to physically care for himself." (R. Vol. I, P. 102, ex 3, ¶ 9). Mark was cognitively intact, but "he was significantly hampered due to his limited ability to communicate." (*Id.* at ¶ 9).

Tammy visited Mark on a daily basis, except when required to travel to Grand Rapids, Michigan, with her sons to facilitate court-ordered visitation with their biological father, when her mother was terminally ill and when she was on bed-rest orders due to her pregnancy in January and February, 2005. In January and February, 2005, she visited Mark a couple of times each week. (R. Vol. I, P. 102A, ex 8, ¶ 13). Cory Armstrong, Mark and Tammy's family home teacher from the Church of Jesus Christ of Latter Day Saints, visited Tammy and Mark once per month and sometimes twice per month from approximately February, 2004 to 2005. (R. Vol. I, P. 102A, ex 8, ¶¶ 10, 11, and 12).

Mark was unable to work from approximately July 22, 2003, until his death due to the effects of ALS, and, as a result, could not support his family and the marital community. (R. Vol. I, P. 102A, ex 8, ¶ 7). Mark and Tammy paid the Banner Life Policy premiums in 2003 and 2004, but in 2005 and 2006, the financial toll of Mark's terminal illness required Mark and Tammy to seek financial assistance. Mark and Tammy turned to Mark's mother and step-father, Jackie and Robert Young for help, but they refused to

provide financial assistance to Mark and Tammy. (R. Vol. I, P. 102A, ex 8, ¶ 9). Mark and Tammy confided in their family home teacher, Cory Armstrong, who offered to pay the Policy premiums in 2005 and 2006, with the understanding that the payments were a loan which would be repaid by Tammy upon Mark's death. Tammy told Jackie about Cory Armstrong's loan for payment of the policy premiums. (R. Vol. I, P. 102A, ex 8, ¶ 10).

On or about January 31, 2005, Mark purportedly executed a beneficiary change form for the Policy, changing the named beneficiary from his wife, Tammy, to his mother, Jackie. (R. Vol. I, P. 41, ex A). On the same date, Robert and Jackie caused their attorney to draft a power of attorney for Mark naming Robert as the attorney-in-fact. (R. Vol. I, P. 102, ex 1, ¶ 9; P. 102A, ex 4, ¶ 8). Mark was not able to sign the power of attorney in January, 2005. (R. Vol. I, P. 102, ex 3, ¶ 5). The power of attorney was notarized, but there are dates handwritten on the notary block and there are two separate dates, approximately one year apart. The notary block recites that Mark appeared before the notary "[o]n this 31st day of January, 2005" and above that date is a handwritten notation "and 3rd day February 2006." (R.Vol. I, P. 102, ex 3 ¶ ¶ 5 and 6). At the bottom of the notary block, at the bottom of page 6 of the power of attorney, is a signature stamp which reads "Mark Dixson." (R.Vol. I, P. 102, ex 3, ¶ ¶ 5 and 6).

The January 31, 2005, Beneficiary Change Form, did not contain Mark's signature, but rather his initials. (R.Vol. I, P. 41). The written initials on the January 31, 2005, power of attorney, which are purportedly Mark Wallace Dixson's, and the Beneficiary Change Form of the same date are significantly different.

The Beneficiary Change Form dated January 31, 2005, provides, in a line directly

below the policy owner's signature line, "_____ Additional Signature **(if necessary). Directly below the "additional signature" line, the Beneficiary Change Form provides "**[t]he following states **require** a spousal signature AZ, CA, **ID**, LA, NV, NM, TX, WA, WI and Puerto Rico." (R. Vol. I, P. 41) (*emphasis supplied*). Mark and Tammy resided in Idaho; however, Mark's spouse, Tammy, **did not** sign the Beneficiary Change Form as required by the Beneficiary Change Form. (R. Vol. I, P. 41; P. 102A, ex 8, ¶ 27).

Mark's mother and step-father drafted a *pro se Complaint for Divorce* for Mark naming Tammy as the defendant. The *Complaint for Divorce* was filed in Ada County on or about August 18, 2005. (R. Vol. I, P. 102, ex 1, ¶ 11). The divorce *Complaint* was typed, presumably by Jackie, and "signed" by Mark via a signature stamp for "Mark Dixson." (R. Vol. I , P. 102A, ex 8, ¶ 36, ex F). In August, 2005, Mark could not write or type due to the advanced state of his ALS. (R. Vol. I, P. 102A, ex 8, ¶ 36, ex G, ¶ 7). On August 18, 2005, the Hon. David E. Day issued a *Joint Temporary Restraining Order (Property)* which provided:

> The judges of the domestic relations court of Ada County are of the opinion that all parties to such proceedings ought to be subject to a joint restraining order from the date of institution of the proceeding or service of process in order to maintain the status quo regarding their property. Therefore, pursuant to I.R.C.P. 65(a) the plaintiff and defendant are prohibited from doing the following acts during the pendency of this action without specific written consent of the parties or prior Order of the Court.
>
> . . .
>
> Cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or indemnity policy, including without limitation life, ...held for the benefit of the parties...

(R.Vol. I, P. 102A, ex 14, and ex A thereto) *(emphasis supplied).*

The *Joint Temporary Restraining Order* also provided:

> ...this Joint Temporary Restraining Order shall become a temporary injunction and shall remain in effect as a temporary injunction until a final order is entered on the Complaint, Petition or Motion, or until further order of the Court...This order shall be binding on each party, on their servants, employees, attorneys, and those persons in active concert or participation with those who receive actual notice of this order by personal service or otherwise.

(*Id.*)

On January 9, 2006, Judge Day, upon Mark's sworn application, entered a *Default* against Tammy, in the pending divorce action. The sworn *Testimony of Default Applicant* submitted by Mark, in support of his application for the entry of default against Tammy in the divorce action, stated: "I am totally disabled and unable to move. My only means of communications is (*sic)* via alphabet board and eye blinks. My disease, ALS, or Lou Gerhig's Disease, is terminal and without a cure." (R. Vol. I, P. 102A, ex 8, and ex G thereto, at p. 2 ¶ 7). Thereafter, on January 27, 2006, Tammy moved to set the default aside on the basis that she had not been personally served. (R. Vol. I, P. 102A, ex 8, ¶ 39, and ex H thereto). On April 26, 2006, Judge Day set aside the *Default* against Tammy. (R. Vol. I, P. 102A, ex 8, ¶ 41 and ex J thereto). The divorce proceeding was pending at the time of Mark Wallace Dixson's death. The Court entered an *Order for Dismissal with Prejudice* in the divorce case on June 19, 2006.

Despite the joint temporary restraining order, Robert, acting under the power of attorney, completed a Beneficiary Change Form naming his wife, Jackie E. Young as the primary beneficiary of the Policy on April 27, 2006. (R. Vol. I, P. 41; P. 102A, ex 4, ¶

10). The Beneficiary Change Form requires the signature of the policy owner's spouse. (R. Vol. I, P. 41). The Form also directs, in bold print, that "[t]o process your request without delay, please make sure the following have been completed:

> _____ Did the Policy owner(s) sign and date the form?
>
> _____ Do the percent totals equal 100%
>
> _____ Did you include the spousal signature if applicable
>
> _____ Did witness sign and date the form and an additional signature if applicable?
>
> _____ Did you enclose the title page and signature page of the trust if listed as a beneficiary?

(*Id.*).

Robert Young made the notation "N/A" on the last item, "[d]id you enclose the title page and signature page of the trust if listed as a beneficiary?" (R. Vol. I, P. 41). Tammy did not sign the Beneficiary Change Form, nor was Tammy notified of the completion or submission of the Beneficiary Change Form. Robert Young did not obtain or request Tammy's consent as Mark's spouse as required by the Policy. (R.Vol. I, P. 102A, ex 8, ¶¶ 20, 28).

On April 27, 2006, the same day the Beneficiary Change Form was executed by Robert, Mark was transported from the nursing home to St. Luke's Hospital via ambulance. Mark was on a respirator at that time. (R. Vol. I, P. 102A, ex 8, ¶ 21). The April 27, 2006, Beneficiary Change Form was sent to Banner Life on May 2, 2006, by Mark's divorce attorney, Geoffrey Goss. (R. Vol. I, P. 40;, P.102A, ex 8, ¶ 1). Mark died on May 5, 2006. Jackie made a claim to the Policy proceeds on May 20, 2006. (R.Vol. I, P. 9). Mark's wife, Tammy, filed a claim form for the Policy proceeds on May 23, 2006. (R. Vol. I, P. 9).

II. ISSUES ON APPEAL

A. Whether the District Court erred in not applying Idaho Code §41-1803.

B. Whether the District Court erred in determining that the last premium payment controlled the characterization of the subject life insurance policy and, subsequently, the life insurance proceeds.

C. Whether the District Court erred in its legal conclusion that the community's interest in the policy lapsed when the premiums were paid by a third party for two years.

D. Whether the District Court erred in finding that the payment of the insurance premiums in 2005 and 2006 was a gift rather than a loan.

E. In the alternative, if a gift was made, whether the District Court erred in determining the gift was made to Mark Dixson, rather than made to the community.

F. Whether the District Court erred in finding that Mark's attempt to change the insurance policy beneficiary was not void although it was in direct violation of the Court ordered Joint Temporary Restraining Order issued in the divorce matter.

G. Whether the District Court erred in finding that the change of beneficiary without spousal consent or signature did not violate the terms of the insurance policy and Idaho law.

H. Whether the District Court erred in granting all or some of attorney's fees to the Mark Wallace Dixson Irrevocable Trust.

III. FEES ON APPEAL

Appellant, Tammy Sue Dixson, is respectfully requests an award of attorney fees

and costs on appeal, as a prevailing party, pursuant to Idaho Appellate Rule 41, Idaho Code §§ 12-120, 12-121, 12-107.

IV. ARGUMENT

A. Whether the District Court erred in not applying Idaho Code §41-1803.

The trial court erred declining to apply Idaho Code §41-1803 in the case at bar. Pursuant to Idaho Code §41-1803, a life insurance policy insuring the life of a husband is the separate property of the wife. The trial court concluded that Idaho Code §41-1803 does not create an exception to community property law and is not dispositive to Tammy's right to the proceeds. (R.Vol. I, PP. 81-82). The Policy, applied for and obtained during Mark and Tammy's marriage, was the separate property of Tammy pursuant to Idaho statute. It is undisputed that the initial beneficiary form completed by Mark named his wife, Tammy, as the beneficiary. It is also undisputed that Tammy did not consent to Mark, in essence, giving away her separate property. Thus, any attempt by Mark, or his agents, to remove Tammy as the beneficiary of the Policy deprived Tammy of her separate property, and is void and unenforceable. Even if the policy was characterized as community property and not Tammy's separate property as set out in the statute, Tammy would have had a community interest in the policy which would preclude a beneficiary change by Mark unilaterally pre-empting her community property interest. It is beyond the trial court's purview and authority to re-write Idaho community property law. It was error for the trial court to circumvent the legislature's intended financial protection for a spouse as set forth in Idaho Code §41-1803 in order to reach a result not intended or provided for by Idaho law.

B. Whether the District Court erred in determining that the last premium payment

controlled the characterization of the subject life insurance policy and, subsequently, the life insurance proceeds.

The trial court granted the Trust's *Motion for Summary Judgment* and denied Tammy's *Motion for Summary Judgment* on the grounds that "[t]he life insurance policy and the relevant premiums paid as a gift by Cory Armstrong to Mark Wallace Dixson became Mark's separate property...However, as is more fully set forth below, the trial court's grant of summary judgment for the Trust ignored material and genuine issues of fact which preclude deciding the matter as an issue of law." (R. Vol. I, P. 90, ll. 22-25; P. 91, ll. 1-10). The trial court erred in determining that the last premium paid defined the characterization of the Policy and the proceeds for the reasons set forth below.

1. The trial court's order granting summary judgment is subject to review applying the same standard as used by the trial court in ruling on the motion for summary judgment below.

The standard of review on appeal from an order granting summary judgment is the same standard used by the trial court in ruling on the motion for summary judgment. *Baxter v. Craney,* 135 Idaho 166, 170, 16 P.3d 263, 267 (2000); *Lockheed Martin Corp. v. Idaho State Tax Comm'n,* 142 Idaho 790,793, 134 P.3d 641, 644 (2006). Summary judgment is appropriate under Rule 56 of the Idaho Rules of Civil Procedure only where "the record reveals no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). *Bromley v. Garey*, 132 Idaho 8017, 810, 979 P.2d 1165 (Idaho 1999). The "record must be liberally construed in favor of the party opposing summary judgment, drawing all reasonable inferences and conclusions supported by the record in favor of that party." *Student Loan Fund of Idaho, Inc. v. Duerner*, 131 Idaho 45, 49, 951 P.2d 1272, 1276 (Idaho 1997). The "burden of

proving the absence of a genuine issue of material fact rests with the moving party." *Tingley v. Harrison,* 125 Idaho 86, 89, 867 P.2d 960, 963 (1994); *Curtis v. Firth*, 123 Idaho 598, 610, 850 P.2d 749, 761 (1993). The trial court, in ruling on a motion for summary judgment, is not to weigh the evidence or resolve controverted factual issues. *Moss v. Mid-America Fire and Marine Insurance Company*, 103 Idaho 298, 647 P.2d 754 (1982). Such factual disputes can only be resolved by a trier of fact after hearing the testimony at trial. *Id.* Evidence presented in support of a motion for summary judgment must be admissible in order to be considered by the Court in ruling on a motion for summary judgment. *Hecla Min. Co. v. Star-Morning Min. Co.,* 122 Idaho 778, 785, 839 P.2d 1192, 1199 (1992). A party opposing summary judgment "may not rest upon mere allegations or denials," but "must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e).

The fact that both parties in this case moved for summary judgment does not in and of itself establish that no genuine issues of material fact exist. Each motion must be reviewed on its own merits. *See e.g., Kromrei v. AID Ins. Co.,* 110 Idaho 459, 551, 716 P.2d 1321 (1986); *Stafford v. Klosterman*, 134 Idaho 205, 207, 998 P.2d 118, 1119 (2000), (*citing Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 721, 974 P.2d 528, 532 (1994). Neither party in the instant case requested a jury trial, allowing the trial court to arrive at the "most probable inferences based upon the undisputed evidence properly before it." *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 360, 93 P.3d 685, 691 (2004), *citing Brown v. Perkins,* 129 Idaho 189, 191, 293 P.2d 434, 436 (1996); *Loomis v. Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

This Court, in reviewing the trial court's grant of summary judgment, must

"construe the record in the light favorable to the non-moving party, and draw all reasonable inferences in favor of that party." *Gibson v. Ada County,* 142 Idaho 746, ___, 133 P.3d 1211 (2006).

2. The trial court erred in granting summary judgment as genuine issues of material fact exist with regard to the characterization of the 2005 and 2006 premium payments, as a gift rather than a traditional loan.

The trial court recognized that the issue of characterization of Cory Armstrrong's payment of the 2005 and 2006 premiums involved factual issues. The trial court prefaced oral argument at the hearing on the *Motion for Summary Judgment* with the following comments:

> "I also have to tell you that I don't know if I have to. I don't know if I should. I'm probably just going to tell you that issues about loans versus gifts and if a gift, to whom, that that's can be the stuff of nuances and that's laden with fact.
>
> And as counsel well know, in order to grant a motion for summary judgment under Rule 56, it must find both that there's no genuine issue of material fact and that one side is the moving party is entitled to a judgment as a matter of law.
>
> ...And so I'm concerned about that this may just be the stuff where a hearing or a trial, Court trial or jury trial, is appropriate..."

(Tr. Vol. I, P. 30, ll 1-11; 17-19).

The trial court failed to recognize genuine issues of material fact relative to the characterization of the funds used to pay the 2005 and 2006 Policy premiums. However, in its *Memorandum Decision and Order*, the trial court concluded that the 2005 and 2006 Policy premiums paid by Cory Armstrong, Mark and Tammy's family home teacher, constituted "gifts" solely to Mark, thereby rendering the Policy Mark's separate property to do with as he pleased. (R. Vol. I; P. 81). Tammy attests in her *Affidavit* that the 2005

and 2006 Policy premiums were loaned to Mark and Tammy and paid to Banner Life by Mark and Tammy's family home teacher following conversations between Mark, Tammy and Cory Armstrong. (R., Vol. I, P. 102A, ex8, ¶ 8, 10). Tammy further asserts that the Policy premiums paid by family home teacher, Cory Armstrong, were paid on behalf of and for the benefit of the marital community, rather than for Mark solely. (*Id.*).

There is no dispute that Cory Armstrong, acting as the Dixson's family home teacher, paid the 2005 and 2006 Policy premiums due to the dire financial straits Mark's illness had placed his family in. However, there is a significant and material factual issue as to how those payments are characterized, and what effect that characterization has on Mark's ability to remove his wife as beneficiary without the required consent and in violation of a court order. Tammy asserts that the Policy premiums were made by Cory Armstrong as a loan to Mark and Tammy. Certainly, Tammy, having been present at the meetings with Cory Armstrong and Mark would have personal knowledge of whether repayment was intended. The trial court dismissed Tammy's statements as self-serving and therefore of no consequence. (R. Vol. I, P. 801 II, ll.14-15). The trial court relies on Cory Armstrong's "understanding" that Mark wanted the Policy proceeds to care for his children and gives weight to Cory Armstrong's "understanding" that Tammy refused to make the premium payments. (R. Vol. I, P. 80, l 11, ll 14-15). The trial court dismissed Tammy's "understanding" that the premium payments made by Cory Armstrong were a loan to be repaid, but put great weight on Cory Armstrong's "understanding" that Tammy refused to pay the premiums and his "understanding" as to Mark's intent. The trial court emphatically stated that Tammy's statements were self-serving, but did not recognize or acknowledge that Cory Armstrong's statements were procured by the Youngs to serve the

Young's purposes. Cory Armstrong, whose affidavit was secured by the Trust's attorney, has a different version of the arrangement. Mr. Armstrong believed that the payments were gifts to Mark.

The trial court failed to recognize the significant and material issues of fact. The trial court failed to construe the record in a light most favorable to the non-moving party, and weighed the evidence, all contrary to Rule 56. The trial court grounded its decision to grant summary judgment to the Trust in its erroneous finding that the payment of the premiums was a gift to Mark, rather than a loan to Tammy and Mark. Specifically, Tammy asserts the payments were loans, and the Youngs and Mr. Armstrong assert they were "gifts."

Rule 56 of the Idaho Rules of Civil Procedure requires that all reasonable inferences must be made in favor of the non-moving party. Thus, it can be reasonably inferred that Tammy's recollection of her conversation with Cory and Mark supports a conclusion that the funds advanced to pay the Policy premiums were not gifts, but rather a loan to be re-paid in the future. Tammy and Mark had asked the Youngs for financial assistance, but had been rebuffed. (R., Vol. I, P. 102A, ex8, ¶ 9). There is no evidence in the record that Tammy and Mark were looking for a financial handout or a gift from Cory Armstrong or their church. The characterization of the payments is material to the case and because that characterization is disputed, summary judgment on that basis is erroneous. In construing the facts in favor of the non-moving party, the court is required to infer that the payments were loans before moving forward with its analysis.

Assuming, for the sake of argument, that the premiums paid by Cory Armstrong, were gifts, the payments were not gifts made solely to Mark, but were made to Mark and

Tammy's marital community. All doubts are to be resolved against the Trust, as the moving party, and the motion must be denied since reasonable people might reach different conclusions. *Doe v. Durtschi,* 110 Idaho 466, 716 P.2d 1238 (1986); *Ashby v. Hubbard,* 100 Idaho 67, 593 P.2d 402 (1979). The facts are to be liberally construed in favor of the nonmoving party. *Harris v. State Dept. of Health,* 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). The onus of proving the absence of a material fact rests upon the moving party. The burden "is onerous because even 'circumstantial' evidence can create a material fact." *Id.* at 298, *citations omitted.*

The trial court improperly weighed the evidence presented and failed to recognize that two of the parties to the transaction, Tammy and Cory, have differing understandings of the basis upon which the premiums were paid. The third party to the conversations, Mark Dixson, is deceased. Further, Cory Armstrong's statements of "understandings" that "Tammie had refused to pay the premium" and that "Tammie was not visiting him or taking care of his expenses" colored the trial court's conclusion that the payments were a gift. Robert and Jackie Young provide sworn statements that the payment(s) by Cory were gifts solely to Mark, despite the lack of any evidence that the Youngs were personally present and involved in any conversations between Tammy, Mark and Cory. The Youngs testimony is inadmissible hearsay which is not reliable for the purposes of deciding a motion for summary judgment.

C. *The District Court erred in determining that the gift was made to Mark Dixson, rather than the marital community.*

In its *Memorandum Decision and Order,* the trial court stated "[t]o the contrary, there is strong evidence which demonstrates Cory Armstrong's intent to gift to Mark

alone as his separate property based on Armstrong's understanding that Tammie refused to pay the premium." (R., Vol. I, PP. 78-81). The trial court summarily dismissed Tammy's statements as "self-serving," and therefore of no merit. (R., Vol. I, P. 81, l. 1). The trial court violated the summary judgment principle that it is not the trial court's role to weigh the evidence in inferring that the premium payments made by Cory Armstrong were a gift to Mark as his separate property.

Further, consider action of the application of this ruling to other divorce type situations. Should the legislature intend to allow one party by accepting a "gift" of a premium from another to divest the community of all interest in a previously community policy, certainly they would specifically state that. Similarly, in any case where the parties are making payments towards an asset, by simply having another party "gift" the payment, does that, under this analysis, completely divest the community of any interest? If so, this will be a boon to divorcing spouses who want nothing more than to harm the other. Further, if a parent is dying, having a life insurance policy whose premiums were paid out of community funds with his current wife, his child from a prior marriage could make the last few payments to "help dad out" and fully divest the surviving spouse of any interest in the policy proceeds. The application of this rule is directly contrary to the spirit of community property law and directly contrary to the letter of Idaho Code § 41-1803.

D. Whether the District Court erred in finding that Mark's attempt to change the insurance policy beneficiary was not void although it was in direct violation of the Court ordered Joint Temporary Restraining Order issued in the divorce matter.

The trial court ruled that the *Joint Temporary Restraining Order (Property)* issued in the divorce action filed by Mark Dixson was not applicable and did not prohibit Mark

from changing the beneficiary of the Policy. The trial court ruled that based upon its conclusion that the Policy was Mark's separate property, Mark was not bound by the prohibitions of the divorce court's restraining order. The trial court's conclusion is in error and is contrary to the purpose of the restraining orders issued in divorce proceedings which is to preserve the property, both separate and community, of the parties pending a final disposition of the divorce.

The Hon. David E. Day, Magistrate Ada County, issued a *Joint Temporary Restraining Order (Property)* on August 18, 2005, contemporaneously with Mark's filing a *Complaint for Divorce.* This *Joint Temporary Restraining Order (Property)* prohibited either party, Tammie Sue Dixson or Mark Wallace Dixson, from changing the beneficiary of any life insurance policy. *(R., Vol. I, P. 102A, ex 8;* R., Vol. 1, P. 102A, ex 14, and ex A thereto).

The *Joint Temporary Restraining Order (Property)* provides, in pertinent part as follows:

> The judges of the domestic relations court of Ada County are of the opinion that all parties to such proceedings ought to be subject to a joint restraining order from the date of institution of the proceeding or service of process **in order to maintain the status quo regarding their property.** Therefore, pursuant to I.R.C.P. 65(a) **the plaintiff and defendant are prohibited from doing the following acts during the pendency of this action without specific written consent of the parties or prior Order of the Court:**
>
> . . .
>
> Cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or indemnity policy, including without limitation life, ...held for the benefit of the parties...

(Id.).

Finally, the *Order* provides:

> ...this Joint Temporary Restraining Order shall become a temporary injunction and shall remain in effect as a temporary injunction until a final order is entered on the Complaint, Petition or Motion, or until further order of the Court...This order shall be binding on each party, on their servants, employees, attorneys, and those persons in active concert or participation with those who receive actual notice of this order by personal service or otherwise.

Id.

There is no dispute that the *Joint Temporary Restraining Order* was in place at the time Mark, through his agent Robert Young, attempted to change the beneficiary of the Policy on April 27, 2006. Likewise, there is no dispute that Tammy did not consent to the change of beneficiary, nor is there is any dispute that the Magistrate Court did not enter an order in the divorce proceeding allowing the change of beneficiary. The *Joint Temporary Restraining Order (Property)*, was in full force and effect from the date of the filing of the *Divorce Complaint* on August 18, 2005, until the date of the dismissal of the divorce action on June 19, 2006. The *Order,* by its terms, applied to Mark, as the plaintiff in the divorce action, and Robert Young, as Mark's attorney-in-fact, and neither could claim that he was unaware of the injunction created by the restraining order.

The stated purpose of the *Joint Temporary Restraining Order* is to ensure that each party to the divorce action maintained the *status quo* of their property. The *Order* does not differentiate between the spouse's separate or community property as such determinations are typically at issue in a divorce proceeding. The broad terms of the restraining order is intended to preserve a snapshot of the parties' assets pending the disposition of the divorce case.

The *Order* issued in the *Dixson v. Dixon* divorce specifically enjoins either party from changing the beneficiary of a life insurance policy. Many jurisdictions have considered the effect of similar restraining orders issued in divorce cases. Some jurisdictions have upheld the change of beneficiary made during the pendency of a divorce proceeding where the restraining order does **not** specifically reference life insurance policies. *See Nicholas v. Nicholas, 83 P.3d 214, 277 Kan. 171 (Kan. 01/30/02004).* In cases where a restraining order issued in a divorce proceeding specifically enjoins the parties from transferring life insurance, courts have enforced violations of such restraining orders through contempt proceedings. The trial court suggested that Tammy's remedy would have been a contempt proceeding. However, by the time Tammy learned that the *Joint Temporary Restraining Order (Property)* terms had been violated by Mark, Mark was deceased. Where the violator is deceased, a remedy at law is not available and an equitable remedy is appropriate. *See e.g. Standard Insurance Company v. Schwalbe,* 110 Wash.2d 520, 755 P.2d 802 (Wash. 1988). Specifically, the court in *Standard* noted that "[a]t the time this action was brought, Mr. Schwalbe was deceased thus precluding a remedy at law in the form of a contempt proceeding. Recognizing that no remedy at law was available, the trial court can resort to its equity powers." *Id at 526, citing Orwick v. Seattle, 103 Wash 2d 249,252, 692 P.2d 793(1984).* The *Standard* court upheld the trial court's decision and directed the policy proceeds to be paid to Mrs. Schwalbe. As in the *Standard* case, the Court here "loses sight of the real issue: Whether a trial court has the power to order a return to the status quo to remedy the deliberate violation of a court order." *Standard Insurance Company v. Schwalbe,* 110 Wash.2d 520, 526 755 P.2d 802 (Wash. 1988). The correct approach is to

utilize the equitable powers of the Court when no remedy at law is available. *See Willoughby v. Willoughby, 758 F. Supp. 646 (D. Kan. 01/26/1990).*

Courts have held that transfers of property in violation of restraining orders in divorce actions are invalid and may be set aside. "Transfers of property in violation of an injunction are invalid and may be set aside by the party to a divorce suit, and subsequent death of the injunction violator does not prevent the court from exercising such power." *Webb v. Webb, 375 Mich. 624, 134 N.W.2d 673 (1965).* The death of a party does not deprive a court of the right to return the property to the status quo. This approach is particularly applicable here, where Mark filed for divorce and obtained the *Joint Temporary Restraining Order (Property)* at the time of filing. Mark's mother, Jackie, and step-father, Robert, assisted Mark in preparing and filing his divorce Complaint and were well aware of the terms of the restraining order. Allowing the change of beneficiary to stand where the change was a blatant and intentional disregard of the Magistrate Court's *Order,* which nullifies the *Order* and its intent to maintain the status quo of property during divorce proceedings. If it were the intent of the courts or the legislature to make such a determination as to the ability to change a beneficiary designation in a divorce context, the standard form of the *Joint Temporary Restraining Order* would be changed. Even if such were the case and there was not a specific prohibition contained in the Order, the issue becomes one of equity as discussed above. The Court erred in failing to enforce the terms of the *Joint Temporary Restraining Order* as it applied to the change in the beneficiary designation for the life insurance policy.

E. Whether the District Court erred in finding that the change of beneficiary without spousal consent or signature did not violate the terms of the insurance policy and Idaho law.

The Trust asserts in its Motion for Summary Judgment and arguments in opposition to Tammy's Motion for Summary Judgment, that Mark was able to change the beneficiary of the Policy without Tammy's consent because the Policy was Mark's separate property. The Trust, in affidavits filed in support of its Motion for Summary Judgment, asserts that Mark communicated his "desire" to remove his wife, Tammy, as beneficiary of the Policy and name his mother, Jackie, as the beneficiary. Mark's ability to communicate his desire to change the beneficiary is a material fact central to the conclusion in this case. The issue is not whether Mark had "mental capacity" to direct the April 24, 2006 change in beneficiary, but rather was Mark able to even communicate such a desire.

The trial court's analysis and conclusion that there is no evidence that Mark was "mentally incapacitated" is misplaced (R. Vol. I, PP. 13-20). The Trust and the Youngs repeatedly assert that Mark "communicated" his desire to remove Tammy as his beneficiary on the Policy. The Trust and the Youngs concede in the *Affidavits* filed by Jackie, Dr. Louis Schlickman, and Robert, that Mark's communication was significantly hampered. In fact, on April 26, 2006, the day Mark allegedly "communicated" his desire to change the Policy beneficiary from his spouse to his mother, he was transported by ambulance to the hospital and was on a ventilator (R. Vol. I, P. 102A, ex 8, ¶21). Tammy asserts that Mark was unable to communicate his desires, especially by April of 2006. As Mark's spouse, and given her frequent visits with Mark in the nursing home, Tammy would have personal knowledge of this fact. In April, 2006, Mark was "unable to use the

eye board for communication and had a very difficult time blinking due to the progression of his ALS." (R. Vol. I, P. 102A, ex 8, ¶ 14). Tammy attests that on April 26, 2006, Mark was taken by ambulance from the nursing home to St. Luke's hospital and was on a respirator at that time. (R. Vol. I, P. 102A, ex 8, ¶ 21). Mark's physician, Dr. Louis Schlickman, confirmed, in his affidavit, that Mark "was significantly hampered due to his limited ability to communicate" as a result of the advanced stage of his ALS. (R. Vol. I, P. 102A, ex 2, ¶ 9). In January, 2006, Mark himself stated, under oath, in his *Application for Default* in the divorce action: "I am totally disabled and unable to move...[m]y only means of communications is via alphabet board and eye blinks..." Robert Young stated, in his sworn statement, that "[d]ue to the progression of the disease, Mark's motor skills were hampered, as well as his ability to verbally communicate..." (R., Vol. I, P. 102A, ex 4, ¶ 7).

The record is replete with evidence that Mark was unable to verbally communicate, was significantly hampered due to limited communication and limited physical ability, and unable to use an eye board by April, 2006. Robert and Jackie's version of Mark's ability to designate a beneficiary are questionable and self-serving. Robert and Jackie assert that they visited Mark in the hospital on or about April 26, 2006, when he was taken from the nursing home via ambulance, and that on that date, Mark "directed" Robert to change the beneficiary of the Banner Life Policy to name Jackie as the beneficiary. (R. Vol. I, P. 102A, ex 4, ¶ 10; P. 102A, ex 1, ¶ 14). The record demonstrates that there is a genuine dispute about Mark's ability to communicate a directive on April 26, 2006, to Robert to remove Mark's wife, Tammy, as the beneficiary, and substitute Mark's mother, Jackie, as the beneficiary. It is Tammy's position that

Mark could not communicate a desire to change the beneficiary of the policy from his spouse to his mother, Jackie Young, either verbally or non-verbally in April, 2006.

The trial court attempts to avoid the gravity of Mark's inability to communicate in 2006, by simply concluding that "because the Court has determined that the life insurance policy became the separate property of Mark, the *Joint Temporary Restraining Order* would not prevent him from making a change of beneficiary..." (R. Vol. I, P.90. ll. 4-7). Even assuming for the sake of argument that the Policy was Mark's separate property, Mark could not direct a change if he was unable to communicate. The Trust asserts that Mark "directed" the change on April 26, 2006 (R. Vol. I, P. 102A, ex 4, ¶ 10), but the record contains conflicting evidence which places into question Mark's ability to communicate and "direct" any action on April 26, 2006, in the final days of his life.

The trial court failed to construe the facts and inferences in the light most favorable to Tammy, as the non-moving party. The trial court glossed over the multitude of conflicting material facts which appear in the record. The trial court adopted a version of the facts which favors the moving party's theory of the case, and incorrectly applied community property law to the facts, despite the requirement of Rule 56 of the Idaho Rules of Civil Procedure that the facts and inferences be construed in a light most favorable to the non-moving party. The evidence submitted in opposition to the Trust's motion for summary judgment was more than colorable and sufficient to withstand summary judgment. The trial court's function, in evaluating motions for summary judgment, is not to weigh the evidence, but determine if there are genuine issues for trial. *G & M Farms v. Funk Irr. Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991).

The trial court's grant of summary judgment in favor of the Trust was error given

the genuine issues of material fact which exist with regard to the change of beneficiary of the Policy.

F. The Beneficiary Change Form, as part of the Policy, prohibits the removal of a spouse as beneficiary without the spouse's consent.

Further, the Beneficiary Change Form, which becomes a part of the Banner Life Policy, states that spousal consent is required in the State of Idaho prior to removing the spouse as the beneficiary of the Policy. (R. Vol. I, P. 41). Specifically, an insurance policy includes the policy as issued, as well as any subsequent amendments, revisions, and beneficiary change forms. "Where the Policy, as a matter of contract, specifies the method of changing beneficiaries...a change in beneficiary can be accomplished only in the manner pointed out in the policy..." *Noyes v. Noyes*, 106 Idaho 352, 354-355, 679 P.2d 152, 154-155 (1984). Thus, Mark was required to comply with Banner Life's terms in order to make an effective beneficiary designation change and that did not occur. It is undisputed that Tammy did not give her consent to either of Mark Wallace Dixson's purported change of beneficiary forms removing her as the beneficiary of the Policy. The Youngs fully acknowledge that Tammy's consent was not sought.

The trial court acknowledges that, absent statutory regulation, an insurance company can prescribe the method by which the beneficiary of an insurance policy may be changed. (R. Vol. I, P. 88). The trial court ignores the Beneficiary Change Form's requirement for spousal consent, which is not hidden on the Beneficiary Change Form, but appears directly below the owner's signature line. The Policy's requirement for spousal consent in the State of Idaho is in bold directly below the line provided for spousal consent. The April 24, 2006, Beneficiary Change Form is not signed by Tammy.

The trial court's position is that Robert Young had the authority to make the beneficiary change through use of the power of attorney. However, regardless of whether Robert Young, as Mark's attorney-in-fact had the authority to sign the Beneficiary Change Form, the Policy terms require spousal consent and control the method by which a beneficiary change is made.

The trial court, in reaching its conclusion that Tammy's consent was not required, has rewritten the insurance contract in order to reach its desired result. The trial court's failure to recognize and apply the terms of the insurance Policy is reversible error.

G. The trial court erred in granting fees and costs to the Trust.

The trial court awarded the Trust fees and costs pursuant to Idaho Code §12-120(3) and Idaho Code § 15-8-208. The award of fees was in error and properly reversed on appeal.

1. Idaho Code §12-120(3) Is Reserved For Awarding Attorneys Fees And Costs In Only Very Specific Enumerated Situations, None Of Which Are Present Here.

I.C. §12-120(3) states:

> In any civil action to recover on an open account, account stated,
> note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

The basis of this civil action is clearly not a commercial transaction. No party is seeking to recover on an "open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services." This is a dispute about the proceeds of an insurance policy of the decedent. As the facts alleged in this action are not consistent with any of the enumerated causes of action set forth in I.C. §12-120(3), any claim for an award of attorney's fees and costs pursuant to this statute must be denied.

2. It Would Be Inequitable For The Court To Order Ms. Dixson To Pay The Trust's Attorney Fees Pursuant To Idaho Code §15-8-208 Under The Circumstances Of This Case.

Idaho Code § 15-8-208 sets forth:

> 15-8-208. COST -- ATTORNEY'S FEES. (1) Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party:
>
> (a) From any party to the proceedings;
>
> (b) From the assets of the estate or trust involved in the proceedings; or
>
> (c) From any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.
>
> (2) This section applies to all proceedings governed by this chapter including, but not limited to, proceedings involving trusts, decedent's estates and properties, and guardianship matters. Except as provided in section 12-117, Idaho Code, this section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, unless such statute specifically provides otherwise.

The statute specifically states that costs, including a reasonable attorney's fee may be awarded within the Court's discretion. This is not a situation in which such

attorney's fees are mandatory unless the Court finds that such an award is particularly appropriate and equitable under the circumstances. I.C. §15-8-208 further elaborates that attorney's fees may be awarded to any party, regardless of whether they are considered the "prevailing" party. It is clear that this statute was established to provide the Court with wide discretion to do what would be fair and equitable under the circumstances of any given case.

Tammy was interplead in this action initially. She did not initiate this action. Moreover, the facts and law involved in this action were not clear-cut. In fact, due to the difficulty of the situation, the insurance company did not even know who the proper beneficiary of the proceeds of the decedent's life insurance was. Even if Tammy did not file a cross-claim against Robert and Jackie Young, the Trust would have had to pay attorney's fees simply by virtue of the interpleader action. It can be undisputed that this action was necessary in order to determine the questions of fact and law. Under such circumstances as presented herein, it would be inequitable for Ms. Dixson to be required to pay the Trust's attorney's fees.

Even if the Court agrees that the Trust should be awarded its attorney fees, the Court has the ability to order such a payment from any party to the action including the "nonprobate asset that is the subject of the proceedings" or even the "assets of the trust or estate involved in the proceedings." Accordingly, under the circumstances of this case, if the Court believes the Trust's attorney's fees should be paid in this action, equity dictates that said attorney's fees be paid either out of the insurance proceeds or the decedent's estate.

V. SUMMARY OF CONCLUSIONS

The District Court erred in granting Summary Judgment for the Trust for the reasons set forth herein. The District Courts disregard of Idaho Code 41-1803, the terms of the Policy requiring spousal consent for the change of beneficiary, and the Joint Temporary Restraining Order (Property) issued by the Magistrate Court in the divorce action initiated by Mark Dixson each constitute reversible error. Further, the District Court granted Summary Judgment despite genuine issues of material fact presented with regard to the characterization of the property nature of the Policy and the effect on disposition of the Policy proceeds.

CONCLUSIONS

Appellant respectfully requests that this Court reverse the District Court's grant of Summary Judgment in favor of the Trust for the reasons set forth herein. Further, Appellant respectfully requests that the District Court award of attorney fees and costs to the Trust under I.C. § 15-8-208 and be reversed. Appellant respectfully requests an award of attorney fees on appeal as set forth herein.

RESPECTFULLY SUBMITTED: This 3rd day of July, 2008.

FINCH & ASSOCIATES LAW OFFICE, P.A.

By:_____
Michelle R. Finch

RESPECTFULLY SUBMITTED: This 3rd day of July, 2008.

ELLSWORTH, KALLAS, TALBOY &
DEFRANCO, P.L.L.C.

By:_____
Robert W. Talboy

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2008, two true and correct copies of the within and foregoing document were served via hand delivery on the following:

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_____
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