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Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust Respondent'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 Case No. 34873

RESPONDENT'S BRIEF

On Appeal from the Fourth Judicial District of the State of Idaho, in and for the County of Ada. The Honorable Thomas A., Neville, District Judge, Presiding.

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of the Proceedings 1

C. Statement of Facts 2

II. ADDITIONAL ISSUES PRESENTED ON APPEAL 7

III. ATTORNEY FEES ON APPEAL 7

A. The Trust is entitled to an award of attorney fees and costs incurred in defending against Tammy's appeal 7

B. Tammy is not entitled to an award of attorney fees and costs on appeal. 8

IV. RESPONSE TO TAMMY'S ARGUMENT 10

A. The district court properly held that Idaho Code Section 41-1803 does not alter the character of the life insurance proceeds 10

B. The district court correctly held that the character of the term life insurance proceeds are determined by the character of the funds utilized to pay the last premium. 14

1. The district court's order granting summary judgment is subject to review applying the same standard as used by the district court in ruling on the motion for summary judgment below. 14

2. The district court correctly found that the 2005 and 2006 premium payments made by Cory Armstrong were gifts to Mark alone. 14

C. The district court correctly found that the gifts were made to Mark rather than the marital community. 19

D. The district court correctly held that the change of beneficiary without spousal consent or signature was not void because of the Joint Temporary Restraining Order. 21

1. The Joint Temporary Restraining Order did not apply to Mark's separate property. 22

2. A violation of a Joint Temporary Restraining Order is punishable by contempt not by voiding the prohibited transfer. 23

3. The divorce court and not the district court in this case is the proper forum for contempt proceedings. 24

4. Mark's change of beneficiary of his separate property life insurance policy did not violate the Joint Temporary Restraining Order. 24

E. The district court correctly held that Mark's change of beneficiary without Tammy's consent or signature did not violate the terms of the insurance policy or Idaho law. 27

F. The Beneficiary Change Form does not prohibit the removal of a spouse as beneficiary without the spouse's consent. 29

G. The district court did not abuse its discretion by granting fees and costs to the Trust. 30

1. The district court properly awarded fees to the Trust pursuant to Idaho Code Section 12-120(3). 30

2. The district court properly awarded fees to the Trust pursuant to Idaho Code Section 15-8-208. 32

V. CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Aetna Life Ins. Co. v. Wadsworth, 102 Wash.2d 652, 689 P.2d 46 (1984) 13, 20, 29
American Family Life Ins. Co. v. Noruk, 528 N.W.2d 921 Minn.Ct.App.1995) 26
Anson v. Le Bois Race Track, Inc., 130 Idaho 303, 939 P.2d 1382 (1997) 8
Boston Ins. Co. v. Beckett, 91 Idaho 220, 419 P.2d 475, (1966) 16
Continental Cas. Co. v. Brady, 127 Idaho 830, 907 P.2d 807 (1995) 31
Cummings v. Cummings, 115 Idaho 186, 765 P.2d 697, (Ct.App.1988) 16
Davis v. Prudential Ins. Co. of America, 331 F.2d 346 (5th Cir. 1964) 23, 26
Drew v. Sorensen, 133 Idaho 534, 989 P.2d 276 (1999) 14
Estate of Hull, 126 Idaho at 440, 885 P.2d at 1156 ..... 15, 16
Estate of Logan 191 Cal.App.3d 319, 236 Cal.Rptr. 368 (1987) 19, 20
Gallaway v. Smith, 70 Ariz. 364, 220 P.2d 857 (1950) 23
Hayes v. Towles, 95 Idaho 208, 506 P.2d 105 (1973) 23
Heslip v. Heslip, 74 Idaho 368, 262 P.2d 999 (1953) 22
Houska v. Houska, 95 Idaho 568, 512 P.2d 1317, (1973) 15
Israel v. Leachman, 139 Idaho 24, 72 P.3d 864 (2003) 32
KEB Enterprises v. Smedley, 140, Idaho 746, 755, 101 P.3d 690, 699 (2004) 7
Knudson v. Bank of Idaho, 91 Idaho 923, 435, P.2d 348 (1967) 9
Krebs v. Krebs, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988) 8
Lonergan v. Strom, 145 Ariz. 195, 700 P.2d 893 (Ariz.Ct.App.1985) 23
Madsen v. Comm'n of Internal Revenue, 97 Wash.2d 792, 650 P.2d 196 (1982) 13
Matter of Estate of Lewis, 97 Idaho 299, 543 P.2d 855 (1975) 16
McClenny v. Superior Court, 60 Cal.2d 677, 36 Cal.Rptr. 459, 388 P.2d 691 (1964) 24
McGrew v. McGrew, 139 Idaho 551, 82 P.3d 833 (2003) 30
Minnesota Mutual Life Insurance Company v. Ensley, 174 F.3d 977 (1999) 19, 24
Nampa & Meridian Irr. Dist. v. Washington Federal Sav., 135 Idaho 518, 20 P.3d 702 (2001). 30
Pope v. Cauffman, 885 F.Supp. 1451 (1995) 26
Post v. Idaho Farmway, Inc, 135 Idaho 475, 20 P.3d 11 (2001) 32
Pringle v. Pringle, 109 Idaho 1026, 712 P.2d 727 (1985) 22
Radermacher v. Radermacher, 61 Idaho 261, 100 P.2d 955 (1940) 22
Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225 (1971) 12, 13
Reid v. Reid, 112 Ca.274, 44 Pac. 564 (1896). 22
Royster Guano co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed 989 (1920) 12
Shapiro v. Shapiro, 303 N.Y. S.2d 565 (N.Y.Sup.Ct.1969) 24
Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133, (1984) 15, 16
Stahl v. Stahl, 91 Idaho 794, 430 P.2d 685, (1967) 15
Stanger v. Stanger, 98 Idaho 725, 571 P.2d 1126, (1997) 15
State v. Blume, 113 Idaho 224, 743 P.2d 92 (1987) 24
State v. Zichko, 129 Idaho 259, 923 P.2d 966, (Ct.App. 1996) 9

Thompson v. Motel 6, 135 Idaho 373, 17 P.3d 874, (2001) 9
Toyama v. Toyama, 129 Idaho 142, 922, P.2d 1068 (1996) 9
Travelers Insurance Company v. Johnson, 97 Idaho 336, 544 P.2d 294 (1976) 20
United Investors Life Ins. Co. v. Severson, __ Idaho__, __ P.3d __, 2007 WL 92489 (Idaho) 20
Williams v. Computer Resources, Inc., 123 Idaho 671, 851 P.2d 967, (1993) 15
Young Electric Sign Company v. Winder, 135 Idaho 804, 25 P.3d 117 (2001) 9

Statutes

Idaho §32-912 13
Idaho Code § 12-107 9
Idaho Code § 12-120 9
Idaho Code § 12-120(3) 7, 8, 30, 31, 32, 34
Idaho Code § 12-121 9
Idaho Code § 15-5-501 29
Idaho Code § 15-5-502 29
Idaho Code § 15-8-208 ..... 8, 32
Idaho Code § 32-712 22
Idaho Code § 32-903 16
Idaho Code § 32-906 15
Idaho Code § 41-1830 ..... 11, 13
Idaho Code §11-604 11
Idaho Code §12-121 ..... 7, 8
Idaho Code §41-1830 10
Idaho Code Section 41-1830 10
Wash. Rev. Code § 48.18.440(1) 13

Rules

I.R.C.P. 54(e)(1) 7, 8
I.R.E. 902(8) 28
I.A.R. 41 ..... 7, 8, 34
I.A.R. 40 34

Treatises

11 Witkin, SUMMARY OF CALIFORNIA LAW, Community Property § 28 (1990) 20
38 C.J.S. *Gifts* § 15 at 792 (1943) 16
44 Am.Jur.2d *Insurance* § 1753 (1982) 10

I. STATEMENT OF THE CASE

A. Nature of the Case

This Appeal involves the characterization of a life insurance policy. On April 22, 2003, Banner Life Insurance Company issued a term life insurance policy insuring the life of Mark Wallace Dixson ("Mark") in the amount of $300,000. The Cross-Defendant/Appellant Tammy Sue Dixson[1] ("Tammy") is appealing the Honorable Thomas A. Neville's conclusion characterizing the life insurance policy as Mark's separate property.

B. Course of the Proceedings

Cross-Claimant/Respondent, the Mark Wallace Dixson Irrevocable Trust ("the Trust"), agrees with the course of proceedings as set forth in Tammy's brief, with some supplementary facts.

On March 14, 2007, the Trust filed the affidavits of Jackie E. Young, Robert Young, Cory Armstrong, Kaye Baker, and Louis M. Schlickman, MD in support of its motion for summary judgment. (R., Vol I., p. 102, Ex. 1-3; p. 102A, Ex. 4-5.) The Trust submitted the affidavits of Canyin Barnes and Robert Young in opposition to Tammy's motion for summary judgment on May 29, 2007. (R., Vol I., p. 102A, Ex. 10-11.)

Tammy submitted only two affidavits to the district court in regard to the cross motions for summary judgment. On May 16, 2007, Tammy filed the Affidavit of Tammie Sue Dixson in

[1] Apparently the Appellant's first name has been spelled incorrectly in the pleadings. (Cross-Defendant/Appellant's Opening Brief, p. 1, n.1.) The Trust will refer to the Appellant in this brief by the correct spelling of "Tammy," rather than "Tammie."

Opposition to Motion for Summary Judgment. (R., Vol I, p. 102A, Ex. 8) On June 26, 2007, Tammy filed the Affidavit of Jana Knowles. (R., Vol I., p. 5.)

C. Statement of Facts

Mark and Tammy were married on January 1, 2000. (R., Vol I., p. 102, Ex. 1, ¶ 4.) Mark was 41 years old at the time. (*Id.*) Tammy was Mark's second wife. Mark had six children of his previous marriage: Elizabeth, Christina, Brenda, Cheri, Michael, and Andrea. (*Id.*) On April 22, 2003, Mark took out a $300,000 life insurance policy with Banner Life Insurance Company bearing policy number 17B635069 ("the Policy") insuring his life. (R., Vol I., p. 102, Ex. 1, ¶ 5, Ex. A.) Section B of the application Part I, attached to and made part of the policy, identified "Tammy Sue Dixson" as the beneficiary. (*Id.*)

In September of 2003 Mark was diagnosed with Amyotrophic Lateral Sclerosis (ALS), also known as Lou Gehrig's Disease. (R., Vol I., p. 102, Ex. 1, ¶ 7; p. 102, Ex. 2, ¶ 3.) Mark required skilled nursing care and was admitted into the Life Care Center of Treasure Valley in December of 2004. (R., Vol. I, p. 102, Ex. 10, ¶ 5.) Due the progression of the disease, Mark's motor skills became hampered, as well as his ability to verbally communicate. (R., Vol I., p. 102, Ex. 1, ¶ 9; p. 102, Ex. 2, ¶ 4.) On January 31, 2005, Mark executed a Durable Power of Attorney naming his parents, Jackie Young and Robert Young, and his brother, David Dixson, as his attorneys in fact. (R., Vol I., p. 102, Ex. 3, ¶ 5, Ex. A.) The Durable Power of Attorney was notarized on January 31, 2005, by Kaye Baker, an employee of Life Care Center of Treasure Valley. (*Id.*)

On August 18, 2005, Mark filed for divorce from Tammy. (R., Vol I., p. 102A, Ex. 8, Ex. F.) Jackie Young, acting as Mark's agent pursant to the Durable Power of Attorney, assisted Mark in preparing divorce documents. (*Id.*) Mark attempted to serve Tammy with divorce papers for six months. (*Id.*) He had difficulty serving Tammy, as she had left the state of Idaho. (*Id.*) Ultimately, Mark obtained a default divorce decree on January 9, 2006. (R., Vol I., p. 102, Ex. 1, ¶ 12, Ex. C.)

Tammy alleges that she visited Mark on a "daily basis, except when requried to travel to Grand Rapids, Michigan, with her sons ... and when she was on bed-rest orders due to her pregnancy in January and February of 2005." (R., Vol. I, p. 102A, Ex. 8, ¶ 13.) It is curious that she mentions her pregnancy, but not the identity of the father. In the Complaint for Divorce filed by Mark on August 18, 2005, Mark verified that no minor children were born as issue of the marriage and no children were conceived during the marriage. (R., Vol. I, p. 102A, Ex. 8, Ex. A.) Paragraphs 4 and 5 of the Complaint for Divorce state:

> 4. **Minor Child/ren.** The parties do no have any minor children.
>
> 5. **Wife's Child/ren, Born or Conceived During this Marriage.**
>
> The following child was born to Wife during the marriage; however Husband is not the father of the child: [redacted]

(*Id.*) Additionally, Mark testified in the Testimony of Default Applicant filed on January 5, 2006 to the following:

> I want a divorce because my spouse and I have differences, which are: SHE HAS HAD AN ONGOING AFFAIR WITH THE EX-SPOUSE OF MY EX-SPOUSE. SHE CONTINUES THIS RELATIONSHIP OPENLY AND TRAVELS TO

> MICHIGAN FOR THEM TO BE TOGETHER. IN DECEMBER, 2004, SHE PLACED ME IN THIS SKILLED CARE FACILITY AND HAS DESERTED ME SINCE THAT TIME.

(R., Vol. I, p. 102A, Ex. 8, Ex. G.)

Mark's recreational therapist at the Life Care Center of Treasure Valley, Canyin Barnes ("Ms. Barnes"), worked closely with Mark from the time he was admitted in December of 2004 until his death. (R., Vol. I, p. 102A, Ex. 10, ¶¶ 3-5.) Ms. Barnes testified that Tammy's visits to the nursing home were sporadic, not even once a month, and each visit was short and almost obligatory. (R., Vol. I, p. 102A, Ex.10, ¶ 16.)

During 2005 and 2006 Mark executed two Beneficiary Change Forms with regard to the Policy. The first Beneficicary Change form was executed on January 31, 2005. (R., Vol I, p. 102A, Ex. 10, ¶ 10, Ex. A.) Ms. Barnes assisted Mark in completing the Beneficiary Change Form. (*Id.*) Mark signed the Beneficiary Change Form in the presence of Ms. Barnes. (*Id.* at ¶ 13.) Ms. Barnes then personally mailed the form to Banner Life Insurance Company on January 31, 2005. (*Id.* at ¶ 14.) The January 31, 2005 Beneficiary Change Form changed the primary beneficiary of the Policy from Tammy to Mark's mother, Jackie Young. (R., Vol. I, p. 102A, Ex. 10, Ex. A.) Robert Young, Mark's step-father, was designated as the contingent beneficiary. (*Id.*)[2]

After the default divorce was entered on January 9, 2006, Tammy filed a motion to have the default divorce set aside. (R., Vol I., p. 102, Ex. 1, ¶ 13.) The court set aside the judgment on April 26, 2006. (R., Vol I., p. 102, Ex. 1, ¶ 13, Ex. D.) On the same day, Mark was taken to

[2] The district court noted in its decision that ". . . it is not known whether such form was actually received by Banner Life Insurance . . . ." (R., Vol I., p. 85)

the emergency room. Robert and Jackie Young were at the hospital that day, but Tammy was not. (R., p. 102A, Ex. 11, ¶ 17.) Mark directed Robert Young to execute a second Beneficiary Change Form on the Policy because he wanted to make sure that the death benefit proceeds would be available to care for his six children. (R., Vol. I., p. 102A, Ex. 4, ¶ 10.)

Under the terms of the Policy, Mark had the authority as the owner of the policy to change the beneficiary designation. The Policy provides at page 7:

> **Change in Beneficiary.**
> During the insured's lifetime, the owner may change the beneficiary designation unless he or she has waived the right to do so. No beneficiary change will take effect until a written notice is received at our administrative office. Such changes will become effective on the date written notice is received by us. All changes will be subject to any payment made by us before notice was received.

(R., Vol I., p. 102, Ex. 1, ¶ 5, Ex. A.)

On approximately April 27, 2006, Robert Young, acting under the Power of Attorney and at Mark's request, sent Banner Life Insurance Company the second Beneficiary Change Form, reaffirming the Policy's primary beneficiary as Jackie E. Young. (R., Vol I., p. 102A, Ex. 4, ¶ 10, Ex. A.) Although Jackie remained the primary beneficary, Robert was replaced as contingent beneficiary by Mark's six children. (R., Vol I., p. 102A, Ex. 4, ¶10, Ex. A.) The Beneficiary Change Form was faxed to Banner Life Insurance Company on April 28, 2006. (R., Vol. I, p. 102, Ex. 1, ¶ 14, Ex. E.)

On May 5, 2006, Mark died of complications from ALS in Boise, Idaho. (R., Vol I., p. 102, Ex. 1, ¶ 15.) On May 20, 2006, Jackie Young sent Banner Life Insurance Company a Proof of Death/Claimant's Statement. (R., Vol I., p. 102, Ex. 1, ¶ 16, Ex. F.) On May 23, 2006, a

lawyer for Tammy Sue Dixson sent Banner Life Insurance Company a letter demanding payment under the terms of the Policy. (R., Vol I., p. 102, Ex. 1, ¶ 17, Ex. G.)

On December 15, 2006, the Mark Wallace Dixson Irrevocable Trust was registered in Idaho. (R., Vol I., p. 102, Ex. 1, ¶ 18, Ex. H.) Jackie Young is named as Trustee and the designated beneficiaries of the Trust are Mark's children: Elizabeth, Christina, Brenda, Cheri, Michael and Andrea. (*Id.*) On the same day the Trust was registered, Jackie Young also executed an assignment formalizing the vesting of the Policy proceeds in the Trust. (R., Vol I., p. 102, Ex. 1, ¶ 20, Ex. I.)

The primary issue in this case is the characterization of the Policy as separate or community property. The Policy is a term insurance policy. (R., Vol. I, p. 102, Ex. 1, ¶ 5, Ex. A.) As a term insurance policy the characterization of the Policy as a community or separate asset depends on the source of funding of the premium for the final term of the Policy. In 2005 and 2006 the insurance premiums were paid by Mark's long time friend and home teacher Cory Armstrong. (R., Vol I., p. 102A, Ex. 5.) Cory paid the premiums as a gift to Mark. (R., Vol I., p. 102A, Ex. 5, ¶ 8.) Cory intended the payments to be a gift only to Mark and not to the community. (*Id.*) Because there was no cash value in the Policy and because the final premium was paid with a separate property gift to Mark, there was no property interest in the Policy arising for the benefit of the community estate or Tammy upon Mark's death. Because the Policy and the Funds are separate and not community property, no consent was required from Tammy for Mark to change the beneficiary.

As a result of the competing claims to the life insurance proceeds between the Trust and Tammy, Banner Life Insurance Company filed a Complaint for Interpleader on January 23, 2007. (R., Vol. I, pp. 7-44.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

The issues presented on appeal in Tammy's brief are somewhat conflated[3] and in the interest of avoiding any confusion the Trust has addressed the issues in this brief in the order of the issues contained in the "Argument" section of Tammy's brief.

III. ATTORNEY FEES ON APPEAL

A. The Trust is entitled to an award of attorney fees and costs incurred in defending against Tammy's appeal.

The Trust is entitled to an award of attorney fees and costs incurred in defending this Appeal pursuant to Idaho Code §§ 12-120(3), 12-121, 15-8-208, Idaho Rule of Civil Procedure 54 (e)(1), and Idaho Appellate Rules 40 and 41.

Because Tammy's appeal consists simply of asserting errors by the trial court without reasoned argument or authority supporting such assertions, the Trust is entitled to an award of attorney fees under Idaho Code §12-121. *KEB Enterprises v. Smedley*, 140, Idaho 746, 755, 101 P.3d 690, 699 (2004). Where plaintiff failed to provide argument or authority in support of the

[3] The confusion arises from the conflicting issues addressed in three different portions of the brief. First, the issues enumerated in the "Table of Contents" are identified A through G, however issue D is missing. Second, the substance of the issues enumerated in the "Table of Contents" differs from the substance of the issues enumerated in the section of the brief titled "Issues on Appeal" located at page 13. Third, the issues enumerated on page 13 are identified A through H, as opposed to A through G. Fourth, the substance of the issues identified in the "Issues on Appeal" section differs slightly from the issues actually addressed in the "Argument" section of the brief located at pages 14 through 32. Fifth, the issues enumerated in the "Argument" section are identified A through G, and H is missing.

only issues on appeal that were properly before the court, the appeal was brought and pursued frivolously, unreasonably and without foundation and thus, defendant was entitled to attorney fees and costs on appeal pursuant to Idaho Code §12-121, Idaho Rule of Civil Procedure 54(e)(1) and Idaho Appellate Rule 41. *Anson v. Le Bois Race Track, Inc.*, 130 Idaho 303, 939 P.2d 1382 (1997).

When appellant has merely disputed the trial court's factual findings by pointing to conflicts in the evidence, and when the trial court's findings are supported by substantial evidence, the appellant is simply inviting the appellate court to second-guess the trial court on conflicting evidence. *Krebs v. Krebs*, 114 Idaho 571, 576, 759 P.2d 77, 82 (Ct. App. 1988). *In Krebs*, the Idaho Court of Appeals held that the appellant did just that and awarded respondent her attorney fees and costs pursuant to Idaho Code §12-121 and I.A.R. 41 because the appeal was brought without foundation. *Id.* Tammy's appeal is frivolous because she is simply asking this court to second-guess the trial court's findings.

The Trust has briefed the issue of attorney fees with respect to Idaho Code § 12-120(3) and Idaho Code § 15-8-208 below, and incorporates that argument in support of its request for attorney fees and costs incurred in defending this Appeal.

B. Tammy is not entitled to an award of attorney fees and costs on appeal.

Tammy is not entitled to an award of attorney fees and costs on appeal to this Court. The entirety of Tammy's argument for attorney fees is that, "Appellant, Tammy Sue Dixson, is [sic] 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, and 12-107." (Cross-Defendant/Appellant's Opening Brief, p. 13-14.)

"A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *State v. Zichko,* 129 Idaho 259, 263, 923 P.2d 966, 970 (Ct.App. 1996). This Court cited to *Knudson v. Bank of Idaho*, 91 Idaho 923, 435, P.2d 348 (1967) for its holding that "assignment of error would not be reviewed by the Supreme Court where assignment was not supported in brief or argument." *Id.* "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Thompson v. Motel 6*, 135 Idaho 373, 378, 17 P.3d 874, 879 (2001).

Finally, this Court held:

> "YESCO provided no argument in support of its request for attorney fees. Additionally, YESCO is not the prevailing party in this case. Consequently, YESCO is not entitled to an award of attorney fees."

Young Electric Sign Company v. Winder, 135 Idaho 804, 810, 25 P.3d 117, 123 (2001). This Court has also ruled that a request for attorney fees on appeal that fails to include any argument to support a claim to attorney fees should be summarily denied. *Toyama v. Toyama*, 129 Idaho 142, 922, P.2d 1068 (1996).

Although Tammy did set forth statutory authority for an award of attorney's fees, she completely failed to provide any argument in support of her request for attorney fees. Consequently, Tammy is not entitled to an award of her attorney fees on her appeal to this Court. Furthermore, she has provided no explanation or argument as to how the Trust has acted frivolously by defending this Appeal.

IV. RESPONSE TO TAMMY'S ARGUMENT

A. The district court properly held that Idaho Code Section 41-1803 does not alter the character of the life insurance proceeds.

The district court properly held that the character of the Policy is not altered by Idaho Code Section 41-1830. Idaho Code Section 41-1830 provides as follows:

> **Life Policy as Separate Property of Married Woman.** Every policy of life insurance heretofore or hereafter made payable to or for the benefit of a married woman, or after its issue heretofore or hereafter assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or any other person, and whether the assignment or transfer is made by her husband, or by any other person, shall, unless contrary to the terms of the policy, inure to her separate use and benefit.

Idaho Code §41-1830 (2006). The statute specifically excludes situations where the terms of the policy provide for something other than is provided by the statute. Simply stated, the terms of the policy prevail. The method of changing beneficiaries may be prescribed by the insurance policy, charter or bylaws of the insurance company. *Noyes v. Noyes*, 106 Idaho 352, 355-356, 649 P.2d 152, 155-156 (Ct.App.1984); *see generally* 44 Am.Jur.2d *Insurance* § 1753 (1982). "Where the policy, as a matter of contract, specifies the method of changing beneficiaries, ordinarily a change of beneficiary can be accomplished only in the manner pointed out in the policy, with the result that an attempt to make such change in any other manner is ineffectual." *Noyes*, 106 Idaho at 356, 649 P.2d at 156. The Policy provides at page 7:

> **Change in Beneficiary**.
> During the insured's lifetime, the owner may change the beneficiary designation unless he or she has waived the right to do so. No beneficiary change will take effect until a written notice is received at our administrative office. Such changes

> will become effective on the date written notice is received by us. All changes will be subject to any payment made by us before notice was received.

The district court properly concluded that this statute, located in Title 41, chapter 18, which governs insurance contracts, was not intended by the Idaho Legislature to carve out an exception to the law of community property established in Idaho. The court explained,

> Rather, section 41-1830 is cross-referenced to Idaho Code Section 11-604 which provides an exemption for life insurance proceeds reasonably necessary and payable to a spouse or dependent. However, such exemptions allowed by section 11-604 are lost immediatley upon commingling of any funds or amounts, such as life insurance or death benefits, with other funds. Idaho Code Ann. § 11-604(3) (2006). Perhaps this is why the Idaho Legislature chose to make a special exception for life insurance benefits paid to a married woman which remain for her "separate use and benefit" under section 41-1830.

(R., Vol I., p. 82.) The court noted that there is no published decision in Idaho addressing the application of Idaho Code Section 41-1830. (*Id.*) Although raised by the Trust in the district court, the court concluded that there was no need to determine the constitutionality of Idaho Code Section 41-1830 in light of its decision. (*Id.*) As noted above, Idaho Code Section 41-1830 includes an exception if the terms of the policy provide for something other than is stated by the statute. In this case, the terms of the policy provided that Mark, the owner, may change the beneficiary designation. Thus, the terms of the policy prevail.

Moreover, the statute is void because it is unconstitutional and violates the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court has held that "The Equal Protection Clause of that amendment does, however, deny the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S.

71, 75-76, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225 (1971). The Court further explained, "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed*, 404 U.S. at 76, *citing Royster Guano co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed 989 (1920). In *Reed*, the Court reviewed an Idaho statute that gave preference to males over females as the administrator of an estate. The Court stated that the question presented was "whether the difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced" by the operation of the statute. *Reed, supra.*

The Idaho court's rationale for upholding the statute was that its objective was to eliminate one area of controversy when two or more persons, equally entitled under the statute, seek letters of administration and thereby present the probate court with the issue of who should be named. While the United States Supreme Court acknowledged that "the objective of reducing the workload on probate courts by elimination one class of contests is not without some legitimacy," the crucial question, however, is whether the statute "advances that objective in a manner consistent with the command of the Equal Protection Clause." *Reed, supra.* The United States Supreme Court found that it did not and held:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

Reed, supra at 76-77.

In the case at hand, Idaho Code Section 41-1830 purports to give preferential treatment to a married woman over a married man. The preference given to women only does not advance any legitimate objective in a manner that is consistent with the Equal Protection Clause. Married persons each have equal management and control of community property. *See* Idaho Code § 32-912 (2006). Section 41-1830 contains the kind of outdated, arbitrary legislative choice forbidden by the Equal Protection Clause.

Other jurisdictions having similar statutes have held that the statute does not abrogate the state's community property laws. Washington has a statute similar to Idaho Code Section 41-1830. The Revised Code of Washington 48.18.440(1) provides:

> Every life insurance policy heretofore or hereafter made payable to or for the benefit of the spouse of the insured, and every life insurance policy heretofore or hereafter assigned, transferred, or in any way made payable to a spouse or to a trustee for the benefit of a spouse, regardless of how such assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse...

Wash. Rev. Code § 48.18.440(1). Despite the language in the statute, the Supreme Court of Washington has held that that R.C.W. 48.48.440(1) does not convert community property life insurance policies into the sole and separate property of the beneficiary spouse. *Madsen v. Comm'n of Internal Revenue*, 97 Wash.2d 792, 650 P.2d 196 (1982), *overruled on other grounds*. It is well-established in Washington that the character of funds used to pay for the most recent term determines the character of the life insurance policy, despite the language in the statute. *See Aetna Life Ins. Co. v. Wadsworth*, 102 Wash.2d 652, 689 P.2d 46 (1984).

The district court properly found that Section 41-1830 does not transmute the insurance policy into Tammy's separate property. Moreover, while not addressed by the district court, the statute is void because it violates the Equal Protection Clause.

B. The district court correctly held that the character of the term life insurance proceeds are determined by the character of the funds utilized to pay the last premium.

The character of the Policy is determined by the character of the funds used to pay the last premium. No genuine issue of fact precluded the district court from reaching this conclusion.

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

The Trust agrees the same standard of review that applies to the district court in ruling on a motion for summary judgment is the standard of review this Court applies on appeal.

2. The district court correctly found that the 2005 and 2006 premium payments made by Cory Armstrong were gifts to Mark alone.

The district court correctly concluded that the 2005 and 2006 premium payments were separate gifts from Cory Armstrong to Mark. There is no genuine issue of material fact that could preclude the district court from reaching that conclusion. When presented with cross motions for summary judgment and where no jury trial is requested, the court is free to draw the inferences it would be allowed to draw from the evidence at trial. *Drew v. Sorensen*, 133 Idaho 534, 989 P.2d 276 (1999); *see Williams v. Computer Resources, Inc.*, 123 Idaho 671, 673, 851

P.2d 967, 969 (1993). The district court properly drew inferences from the evidence contained in the affidavits from the parties.

An asset's character as community or separate property depends upon the date of its acquisition and the source of funds with which it was acquired. *Estate of Hull*, 126 Idaho 437, 440, 885 P.2d 1153, 1156 (Ct.App. 1994). All property of either the husband or the wife owned by him or her before marriage, or acquired afterwards by gift, bequest, devise or descent, or acquired with proceeds of separate property is separate property. Idaho Code § 32-906 (2006). All other property that is otherwise acquired after marriage by either the husband or wife is community property. *Id.* Property acquired by gift is the separate property of the spouse to whom it was gifted.

Generally, all property acquired during the course of marriage is presumed to be community property. *Estate of Hull, supra; Shumway v. Shumway*, 106 Idaho 415, 420, 679 P.2d 1133, 1138 (1984); *Stanger v. Stanger*, 98 Idaho 725, 727, 571 P.2d 1126, 1128 (1997). This presumption places the burden of persuasion on the party contending that an asset is owned by one spouse as his or her separate property, who must prove "with reasonable certainty and particularity" that an asset is separate property. *Estate of Hull, supra; Houska v. Houska*, 95 Idaho 568, 570, 512 P.2d 1317, 1319 (1973); *Stahl v. Stahl*, 91 Idaho 794, 797, 430 P.2d 685, 688 (1967). This burden may be met by establishing that the property was acquired by one spouse prior to the marriage, by tracing the funds used to acquire the asset to a separate property source, or by showing that the property was acquired by gift, bequest or devise during the

marriage. Idaho Code § 32-903 (2006); *Cummings v. Cummings*, 115 Idaho 186, 188, 765 P.2d 697, 699 (Ct.App. 1988); *Shumway*, 106 Idaho at 420, 679 P.2d at 1138.

Whether the premium payments constitute a gift is dependent upon the intent of the donor. A gift occurs when a grantor delivers property to or for the benefit of another with a manifest intent to make a gift of the property. *Estate of Hull,* 126 Idaho at 443, 885 P.2d at 1159, *citing Matter of Estate of Lewis*, 97 Idaho 299, 302, 543 P.2d 855 (1975). Delivery is accomplished by actions relinquishing all present and future dominion over the property. *Id.; Boston Ins. Co. v. Beckett*, 91 Idaho 220, 222, 419 P.2d 475, 477 (1966). An intent to make a gift may be proven by direct evidence such as statements of donative intent or may be inferred from the circumstances, including the relationship of the donor and donee. *Estate of Hull, supra*; *see generally* 38 C.J.S. *Gifts* § 15 at 792 (1943).

There is no genuine issue of fact that Cory Armstrong paid the premiums in 2005 and 2006. Cory's unequivocal testimony establishes that he intended the premium payments to be a gift to Mark alone. Cory's intent is the only intent that matters. He testified:

> 1. My relationship to Mark Wallace Dixson ("Mark") was as a good friend and as his Home Teacher as a member of the Church of Jesus Christ of Latter Day Saints. Prior to his death, I was acquainted with Mark for approximately 3 years.
>
> 2. I personally paid the annual premium payments of $395 on Banner Life Insurance Policy bearing policy number 17B635069 ("the Policy") to Banner Life Insurance Company for the years 2005 and 2006.
>
> 3. In 2005, I paid the premium as a gift to my friend Mark as it was my understanding that Tammie had refused to pay the premium. At that time, all of Mark's mail was being delivered to him at the care center and it was my understanding that Tammie was not visiting him or taking care of his expenses. This gift to Mark was done with the understanding that Mark wanted to be sure

> the death benefit proceeds ("Funds") would be available to care for his six children.
>
> 4. I also paid the premium in 2006 as a gift to Mark alone.
>
> 5. I did not intend the premium payments to be a gift to Tammie or to their community estate. My gift was to Mark alone.

(R., Vol. I, p. 102A, Ex. 5, ¶¶ 3-7.) The district court correctly held that the intent of the donor is controlling in determining whether the payments constituted a gift. The district court stated,

> There are no statements in the record before the Court regarding Armstrong's intent other than that in his Affidavit that he intended the payment to be a gift to Mark alone and not to the community. Additionally, there is no contrary evidence refuting the fact that Cory Armstrong relinquished all present and future dominion and had no expectation of receiving repayment. Furthermore, there is no scintilla of evidence on which the Court could find that such payment was a loan to Mark and Tammie, despite Tammie's unsupported, self-serving statement that it was her "understanding" that she would repay Cory.

(R., Vol. I, pp. 80-81.)

Tammy alleges that a genuine issue of material fact exists based upon her assertion that the premium payments constituted either a gift to the community or a loan to the community, but apparently even she does not know which. Tammy cites to two paragraphs contained in her own affidavit which she alleges creates an issue of fact:

> 8. That Cory Armstrong was the family home teacher from the Church of Jesus Christ of Latter Saints for Affiant and her spouse, Mark Wallace Dixson, and visited Affiant and Mark Wallace Dixson once per month and sometimes twice per month from approximately February, 2004 to 2005.
> ...
>
> 10. That Affiant and her spouse, Mark Wallace Dixson, confided in their home teacher, Cory Armstrong, and accepted Cory Armstrong's offer to pay the premiums on the life insurance policy in 2005 and 2006, with the understanding

> that, when Affiant received the policy proceeds, she would repay Cory Armstrong.

(R., Vol. I, p. 102A, Ex. 8, ¶¶ 8, 10.)

Tammy's "understanding" that this was a loan to the community rather than a gift from Cory to Mark is irrelevant for the purposes of the determination of whether the premium payments were a gift from Cory separately to Mark. Tammy has provided no evidence that the gift was intended for both she and Mark. Tammy has presented no evidence that the payments were a loan, other than her self-serving "understanding" that it was a loan. As the donor, Cory's intent controls and his intent is unequivocally stated in his affidavit.

Tammy argues that the district court improperly relied upon Cory's testimony that it was his "understanding" that "Tammie refused to pay the premium" and that "Tammie was not visiting him or taking care of his expenses" and then dismissed her "understanding" that the payments were a loan to be repaid. This assertion does not create a genuine issue of material fact. The material issue was not *why* Cory made the gifts to Mark, but that the premium payments *were* gifts to Mark alone. Cory unequivocally testified three times in his affidavit that the premium payments were gifts to Mark.

C. The district court correctly found that the gifts were made to Mark rather than the marital community.

Tammy appears to argue that the character of the funds used to pay the premiums of a term life insurance policy should not control the characterization of the policy. Tammy cites no legal authority in support of this argument. To the contrary, the law supports the district court's conclusion that the Policy was Mark's separate property.

On April 28, 2006, a Beneficiary Change Form was submitted to the Banner Life Insurance Company by Robert Young, one of Mark's agents under a Durable Power of Attorney that he executed in January of 2005. (R., Vol. I, p. 102A, Ex. 4, ¶ 10, Ex. A. The Beneficiary Change Form dated April 27, 2006 reaffirmed the change of beneficiary from Tammy to Mark's mother Jackie Young and named Mark's children as the contingent beneficiaries. (*Id.*)

The Policy is a term policy. The title of the Policy is "Renewable and Convertible Term Life Insurance." The distinction between a term policy and a whole life policy is significant to the legal analysis in this case. Whole life insurance pays death benefits and builds cash surrender value. Term life insurance is written for a fixed or specified term and expires at the end of the term without retaining cash value. Term insurance typically contains a right to renewal for future terms without proof of current medical eligibility. *Minnesota Mutual Life Insurance Company v. Ensley,* 174 F.3d 977 (9th Cir. 1999); *see also Estate of Logan* 191 Cal.App.3d 319, 321, 236 Cal.Rptr. 368 (1987). The Policy in this case is identified as a "term" policy and it had no cash surrender value and was for a fixed term of one year and expired at the end of the term, unless it was renewed with a premium payment.

Although there are no Idaho cases directly on point, the majority view is expressed in a federal case dealing with California law. In *Ensley*, the court held that with respect to a term insurance policy, characterization of the policy as a community or separate asset depends on the source of funding of the premium for the final term of the policy. *Id.*, *see also Estate of Logan* 191 Cal.App.3d 319, 321, 236 Cal.Rptr. 368 (1987); *Aetna Life Ins. Co. v. Wadsworth*, 102 Wash.2d 652, 689 P.2d 46 (1984). Once the community ceases to pay the premiums and the premium for a new term is paid with separate property, the policy is characterized as separate property. See *Estate of Logan*, 191 Cal.App.3d at 324 ("The community having received everything it bargained for, there is no longer any community property interest in the policy and no community asset left to divide.").

In *Travelers Insurance Company v. Johnson*, 97 Idaho 336, 340, 544 P.2d 294, 298 (1976), this Court found that, "The payment of life insurance proceeds is triggered by . . . death. Proceeds only come into being upon the dissolution of the community . . . at death." Furthermore, this Court set forth specific requirements that must be met to support a claim that a community interest exists when one spouse has changed the beneficiary of a life insurance policy during the marriage without the knowledge or consent of the other spouse. This Court explained, "According to *Travelers*, when certain requirements are met, including that a policy is acquired after marriage and the premiums are paid with community funds, that policy is community property." *United Investors Life Ins. Co. v. Severson*, 143 Idaho 628, 632, 151 P.3d 824, 828 (2007). Therefore, because the final premium was paid with a separate property gift to Mark,

then there is no property interest in the Policy arising for the benefit of the community upon Mark's death.

Cory Armstrong paid the two $395 premiums to renew the Policy for the years 2005 and 2006. He relinquished all present and future dominion over the funds and had no intention of receiving repayment. Furthermore, he has testified that he intended the gift to be to Mark alone. The surrounding circumstances also support the donative intent, as Mark and Cory were long time friends and Cory had been Mark's home teacher. The premium payments made by Cory were a valid and completed gift to Mark. A gift to one spouse during marriage is that spouse's separate property. Because Mark's separate property was the source of the final premium payment, the Policy was Mark's separate property.

D. The district court correctly held that the change of beneficiary without spousal consent or signature was not void because of the Joint Temporary Restraining Order.

The first Beneficiary Change Form was executed on January 31, 2005. (R., Vol. I, p. 102A, Ex. 10, ¶ 10, Ex. A.) This was six months prior to the filing of the divorce complaint. (R., Vol. I, p. 102, Ex. 1, ¶ 11.) Canyin Barnes mailed the Beneficiary Change Form to Banner Life Insurance on January 31, 2005. (R., Vol. I, p. 102A, Ex. 10, ¶ 14.)[4]

The second Beneficiary Change Form executed on April 27, 2006 reaffirmed the primary beneficiary as Jackie Young and changed the contingent beneficiaries to Mark's children. The second Beneficiary Change Form was not void because of the Joint Temporary Restraining Order entered in the divorce action.

[4] As noted above, the district court stated in its decision that ". . . it is not known whether such form was actually received by Banner Life Insurance . . . ." (R., Vol I., p. 85)

1. The Joint Temporary Restraining Order did not apply to Mark's separate property.

First, the district court correctly concluded 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 because it was not being 'held for the benefit of the parties. . .'" (R., Vol. I, p. 90) This Court has held that the courts are without jurisdiction to award to one spouse the sole and separate property of the other, even if on a temporary basis. In *Pringle v. Pringle*, 109 Idaho 1026, 1028, 712 P.2d 727, 729 (1985), this Court held, "The court has the power under I.C. § 32-712 to divide the community property between the parties, but has no power or authority to award the wife's separate property, or any part of it, to the husband." *Id.*, *citing Heslip v. Heslip*, 74 Idaho 368, 372, 262 P.2d 999, 1002 (1953). In *Radermacher v. Radermacher*, 61 Idaho 261, 273-74, 100 P.2d 955, 961 (1940), the Court held that a judge is "without power to award the separate property of the husband to the wife, either permanently or temporarily." The *Pringle* Court affirmatively states, "The Supreme Court has not authorized involuntary divestiture of title to separate property." *Pringle, supra.* This Court noted that the California Supreme Court has also held that divorce courts have "no jurisdiction" over separate property. *Pringle supra*, (citing *Reid v. Reid*, 112 Ca.274, 44 Pac. 564 (1896)).

2. A violation of a Joint Temporary Restraining Order is punishable by contempt not by voiding the prohibited transfer.

Second, even if the Joint Temporary Restraining Order covered Mark's separate property, violation of the order is punishable by contempt not by voiding the prohibited transfer. *Hayes v. Towles,* 95 Idaho 208, 506 P.2d 105 (1973)(violation of a restraining order issued for that purpose may be punished as criminal contempt); *Davis v. Prudential Ins. Co. of America*, 331 F.2d 346 (5th Cir. 1964)(holding that the effect of an injunction does not void the prohibited transfer of the property. "Injunctions may be enforced by contempt proceedings, damage actions, or actions to enforce a penalty included within the injunctive order, but they do not, under the circumstances here, operate to void the transfer they prohibit in a suit by the protected party against the transferee.").

Although this issue has not been addressed in Idaho, the Supreme Court of Arizona has held that the husband who transferred a restaurant in violation of a restraining order procured against him in a then pending divorce action did not void the transaction. "Transfers of property made to innocent third parties, in violation of a restraining order, are not void nor voidable because made in disregard of such order." *Gallaway v. Smith*, 70 Ariz. 364, 370, 220 P.2d 857, 861 (1950); *see also, Lonergan v. Strom*, 145 Ariz. 195, 700 P.2d 893 (Ariz.Ct.App. 1985)(holding that a domestic relations court injunction in effect at the time of the execution and recording of the deeds in question does not make the proscribed conveyances invalid automatically).

3. The divorce court and not the district court in this case is the proper forum for contempt proceedings.

Third, because the proper remedy for the violation of an order is contempt, the court that issued the Joint Temporary Restraining Order is the proper court to hear the contempt proceedings. The Idaho Court of Appeals has held that a contempt proceeding brought to enforce a domestic relations decree was a continuation of the underlying action. *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (1987); *see also McClenny v. Superior Court*, 60 Cal.2d 677, 36 Cal.Rptr. 459, 388 P.2d 691 (1964). "The contempt power is virtually the only tool a court can employ to compel obedience of its decisions. In addition, the judge who presides over the underlying action is familiar with the subject matter of the suit, and often will be in the best position to evaluate the merits of one party's motion to hold the other in contempt." *Blume*, 113 Idaho at 227, 743 P.2d at 995, *see also, Shapiro v. Shapiro*, 303 N.Y. S.2d 565 (N.Y.Sup.Ct.1 969)(motion to hold party in contempt for violation of court order is part of underlying action, and must be brought in same court as that action).

4. Mark's change of beneficiary of his separate property life insurance policy did not violate the Joint Temporary Restraining Order.

Fourth, while there are no Idaho decisions directly on point addressing this issue, the Ninth Circuit has held that if a life insurance policy is the separate property of one of the parties and that party changes the beneficiary designation in violation of a joint temporary restraining order, that violation does not void the change of beneficiary. In *Minnesota Mut. Life Ins. Co. v. Ensley*, the life insurance company issued a policy insuring the life of the husband. *Ensley, supra.* When the policy issued, husband and wife were married and resided in California.

Originally, husband was the owner of the policy and wife was named as the beneficiary. A document was executed changing ownership of the policy to wife's name. Wife admitted in her deposition that the document may have been forged. Subsequently, husband went to prison and wife moved to Arizona where she filed for divorce. The Arizona court issued a joint preliminary injunction enjoining either party from "transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property" belonging to the parties. *Ensley, supra* at 979.

Shortly after she filed for divorce, wife could no longer afford to pay the premiums and she and the insurance agent agreed that the agent would pay the premiums in exchange for a 50% ownership of the policy. A few months later he assigned the policy back to wife. After husband was released from prison, he investigated the status of the policy. Wife told husband that it had lapsed. As a result of husband's investigation, the insurance company changed the ownership of the policy back to husband and husband named his brother as the sole beneficiary. Husband died shortly thereafter. Although husband and wife had submitted a stipulated decree of divorce to the court, the court did not enter the decree until after husband's death so they were still legally married when he died.

The *Ensley* court explained, "Characterization of the insurance policy as separate or community property will determine the proper allocation of the policy proceeds. If the insurance policy was James' separate property, then James was free to name [his brother] as beneficiary. [His brother] would be entitled 100% of the proceeds. If, on the other hand, the community owned some portion of the policy, then [wife] retains an interest in the policy." *Id.* at 985. In

Ensley, the court had to remand the matter for a determination of whether the funds used to pay the premiums were separate or community property.

The second issue addressed by the court was the effect of the change in light of the issuance of the temporary injunction. The district court had determined that husband's attempt to name his brother as a beneficiary violated the Arizona injunction and therefore was void. The Court of Appeals disagreed. The *Ensley* court looked to a decision from the Fifth Circuit, *Davis v. Prudential Ins. Co.*, 331 F.2d 346 (5th Cir.1964) in which the husband had changed the designated beneficiary from wife to his mother while a temporary restraining order was in place. The *Davis* court considered, and rejected, the wife's argument that the change in beneficiary was void because it violated the joint temporary injunction. *Ensley, supra* at 986. "An insured's act of changing a beneficiary while subject to a temporary restraining order restraining the parties to a divorce action from selling, encumbering or disposing of the parties' property, does not automatically result in the voidance of the insured's change in the designation of the beneficiary." *Pope v. Cauffman*, 885 F.Supp. 1451, 1454 (1995); *see also Davis v. Prudential Ins. Co. of America, supra* (holding that the effect of an injunction does not void the prohibited transfer of the property. "Injunctions may be enforced by contempt proceedings, damage actions, or actions to enforce a penalty included within the injunctive order, but they do not, under the circumstances here, operate to void the transfer they prohibit in a suit by the protected party against the transferee."); *see also American Family Life Ins. Co. v. Noruk*, 528 N.W.2d 921 (Minn.Ct.App. 1995)(insured's change in beneficiary designation, executed in violation of

express terms of court's temporary restraining order, is not void and ineffective as a matter of law).

Furthermore, the *Ensley* court also found that the change of beneficiary was not in violation of the restraining order. The court looked at the legislative intent behind the purpose of the Arizona statute. "The purpose of the Arizona statute is 'to forbid actions by either of the parties that would injure or dissipate the property of the marital estate and to forbid actions that would place the property beyond the power of the court thus preventing the court from allocating the property in its final decree.'" *Id.* at 986. The *Ensley* court determined that husband's attempt to designate his brother did not violate the injunction because it did not remove the property from the marital estate. "If the insurance policy was [husband's] separate asset, then he was free to change the beneficiary designation." *Ensley, supra* at 986.

There is no genuine issue of material fact regarding whether Banner Life Insurance Company received the second Change of Beneficiary Form on April 27, 2006. The district court properly concluded that Mark's change of beneficiary, even if in contravention to the Joint Temporary Restraining Order, did not void the second Beneficiary Change Form.

E. The district court correctly held that Mark's change of beneficiary without Tammy's consent or signature did not violate the terms of the insurance policy or Idaho law.

Tammy failed to present the district court with any admissible evidence to support her claim that Mark was unable to communicate on the date the Beneficiary Change Form was executed. The only evidence Tammy presented to the district court regarding Mark's verbal communication was that when she visited him in April of 2006 he 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, ¶ 21.) The record is replete with evidence that Mark was able to communicate by the alphabet board up until the date of his death. The Affidavit of Robert Young dated May 24, 2007, sets forth in detail Mark's method of communication utilizing an alphabet board. (R., Vol. I, p. 102A, Ex. 11.) Canyin Barnes testified that, "Although Mark's motor skills were significantly impaired because of the ALS disease, Mark's mental faculties were extremely sharp when he was admitted to this facility and remained so until his death." (R., Vol. I, p. 102A, Ex. 10, ¶ 6.) Dr. Louis Schlickman, Mark's primary physician, testified that, "Up to the date of his death on May 5, 2006, Mark was still cognitively intact and able to make decisions about his care, but he was significantly hampered due to his limited ability to communicate." (R., Vol. I, p. 102, Ex. 2, ¶ 10). Tammy presented no testimony from anyone at the hospital, care facility, doctors or staff to dispute the testimony that Mark was able to communicate.

Moreover, it is irrelevant whether Mark did or did not communicate his desire to Jackie or Robert Young because he had previously granted them a Durable Power of Attorney to make those decisions for him. The durable power was executed by Mark and notarized by Kaye Baker on January 31, 2005. (R., Vol. I, p. 102, Ex. 3.) As set forth in her affidavit, Kaye personally witnessed Mark initial the document as his signature on January 31, 2005. (*Id.*)

Idaho Rule of Evidence 902(8) provides a Durable Power of Attorney is a self-authenticating document if accompanied by a certificate of acknowledgment executed by a notary. No credible evidence was presented that Mark was legally incapable on January 31,

2005 of granting the Durable Power of Attorney. Kaye Baker testified that, "despite Mark's rapidly decreasing physical mobility and motor skills, at all times up to the day of his death, Mark was lucid and competent." (R., Vol. I, p. 102, Ex. 3, ¶ 8.) The Durable Power meets all of the requirements of Idaho Code § 15-5-501[5] and grants general powers to the three attorneys-in-fact, Robert Young, Jackie Young and David Dixson.

Idaho Code § 15-5-502 also provides:

> All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled.

Idaho Code § 15-5-502 (2006).

Consequently, Robert's execution and delivery of the second Beneficiary Change form in April of 2006 was valid and fully effective in every respect. Additionally, as set forth in the statute, the power of attorney continues even after the principal has become disabled.

F. The Beneficiary Change Form does not prohibit the removal of a spouse as beneficiary without the spouse's consent.

The Policy does not require spousal consent to remove the spouse as a beneficiary. The Beneficiary Change Form provides at Paragraph II, "**The following states require a spousal signature AZ, CA, ID, LA, NV, NM, TX, WA, WI and Puerto Rico." (R., Vol. I, p. 41.) This boilerplate language is a misstatement of the law in Idaho and in no way abrogates the laws in Idaho. The form document also includes the states of California and Washington as requiring spousal consent, but as set forth in *Ensley*, *Estate of Logan*, and *Aetna Life Ins. Co.*, that is not

[5] Sections 15-5-501 to 15-5-507 were repealed by S.L. 2008, Ch. 186, § 1, effective July 1, 2008.

the law in California or Washington. The contract requires only that if you reside in a state where spousal consent is required, then a spouse's signature is necessary under the respective state's law.

G. The district court did not abuse its discretion by granting fees and costs to the Trust.

The trial court awarded the Trust its attorney fees and costs pursuant to Idaho Code Sections 12-120(3) and 15-8-208. "The award of attorney fees rests in the sound discretion of the trial court, and the burden is on the person disputing the award to show an abuse of discretion. *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 525, 20 P.3d 702, 709 (2001). "However, the award must be supported by findings as set forth in I.R.C.P. 54(e), and those findings, in turn, must be supported by the record." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). The district court issued "Findings of Fact and Conclusions of Law with Respect to an Award of Costs and Fees to the Mark Wallace Irrevocable Trust; and Tammie Sue Dixson" filed on January 16, 2008. (R., Vol. I, p. 101 A-G.)

1. The district court properly awarded fees to the Trust pursuant to Idaho Code Section 12-120(3).

This action was commenced when Banner Life Insurance Company filed a complaint for interpleader on January 23, 2007. The Trust filed its answer and cross claim against Tammy on February 1, 2007. Tammy filed her answer to the cross claim and third-party complaint against the Trust on March 2, 2007. The nature of the case involved the recovery of the $300,000 life

insurance proceeds. The life insurance policy is a contract that was entered into between Mark Wallace Dixson, the deceased, and the Banner Life Insurance Company.

Idaho Code Section 12-120(3) provides:

> 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.

(emphasis added). Idaho Code Section 12-120(3) defines a commercial transaction as, "all transactions except transactions for personal or household purposes." Thus, by the plain terms of the statute, '[w]here a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3), ... that claim triggers the application of the statute." *Continental Cas. Co. v. Brady*, 127 Idaho 830, 835, 907 P.2d 807, 812 (1995).

This Court has held that an insurance contract constitutes a "commercial transaction" and awarded fees pursuant to Section 12-120(3). In *Continental Cas. Co.,* the parties had entered into an insurance contract and the insurance company filed the lawsuit in order to seek a judicial declaration regarding its contractual obligations to defend or pay damages. The Court found that both obligations were grounded in a "commercial" contract. *Id.* The Trust filed its cross-claim to enforce the insurance contract. The recovery of the death benefit proceeds of the life

insurance policy was the gravamen of the action which involved a commercial transaction between Mark Wallace Dixson, Banner Life Insurance Policy and the named beneficiaries.

Furthermore, this Court has held that when considering an interpleader action, a court should look to the underlying transaction to determine whether it is commercial in nature. In *Post v. Idaho Farmway, Inc*, 135 Idaho 475, 20 P.3d 11 (2001) this Court affirmed the trial court's award of attorney fees and costs in an interpleader action involving the resolution of conflicting demands for lease payments between judgment debtors and judgment creditors.

It is noteworthy that despite Tammy's argument that this case does not involve a commercial transaction and therefore the district court improperly awarded fees to the Trust pursuant to Idaho Code Section 12-120(3), she requests fees from this Court pursuant to Section 12-120.

2. The district court properly awarded fees to the Trust pursuant to Idaho Code Section 15-8-208.

Idaho Code Section 15-8-208 provides that, "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..." Idaho Code § 15-8-208(1) (2006). The statute provides that an award of attorney fees is discretionary with the court. That determination will be disturbed only upon a showing of abuse of discretion. *Israel v. Leachman*, 139 Idaho 24, 26, 72 P.3d 864, 866 (2003). To review an exercise of discretion, this Court applies a three-factor test. The three factors are: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choice s available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Israel, supra.*

The district court issued specific findings in its "Findings of Fact and Conclusions of Law with Respect to an Award of Costs and Fees to the Mark Wallace Irrevocable Trust; and Tammie Sue Dixson" filed on January 16, 2008. (R., Vol. I, p. 101 A-G.) The district court specifically found that, "It is not inequitable for the Court to enter an award against Tammie Sue Dixson because she had knowledge of all of the essential facts of this case at the commencement of the proceedings." (R., Vol. I, p. 101C, ¶ 1.3.)

Tammy has failed to show, or even allege, that the district court abused its discretion by awarding attorney fees to the Trust pursuant to Section 15-8-208. Tammy argues that it would not be equitable to award fees and costs because she did not file the initial action. She made this same argument to the district court.

While it is true that Tammy did not initiate the original action, she did file a Third Party Complaint against the Trust. Furthermore, her statement that the Trust would have incurred attorney fees even if she had not filed a cross-claim lacks merit. As set forth in the Memorandum of Attorney Fees and Costs, the majority of the fees incurred in this action stemmed from the Trust's motion for summary judgment and opposition to Tammy's motion for summary judgment. Tammy was the cause of the Trust incurring attorney fees.

Lastly, it would be highly inequitable for the beneficiaries of the Trust, Mark Dixson's children, to receive less than their share of the insurance proceeds because their stepmother attempted to wrongfully usurp the funds from them.

V. CONCLUSION

The Trust requests that this Court affirm the district court's order granting summary judgment in favor of the Trust.

The Trust also requests that this Court affirm the district court's order awarding attorney fees and costs to the Trust.

Finally, the Trust requests that this Court award attorney fees and costs incurred in defending this appeal under Idaho Code § § 12-120(3), 12-121, 15-8-208 and Idaho Appellate Rules 40 and 41.

DATED: August 1, 2008.

COSHO HUMPHREY, LLP

By: _____
THOMAS G. WALKER
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The Mark Wallace Dixson Irrevocable Trust

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 1st day of August, 2008 a true and correct copy of the within and foregoing Respondent's Brief was served upon:

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