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Jefferson County Superior Court No.: 15-2-00139-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

SUN LIFE ASSURANCE COMPANY OF CANADA

v.

ABRIEL C. LEE, Respondent
AND
HEIDI A. LEE, Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Superior Court Judge

BRIEF OF RESPONDENT

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A. INTRODUCTION

This is an action over the distribution of a decedent's \$150,000.00 life insurance policy between his named beneficiary, Abriel Lee, ("Abriel"), and his previously named beneficiary, Heidi Lee, ("Heidi"). Heidi had obtained an order restraining decedent from changing beneficiaries to his life insurance during the pendency of a dissolution action she commenced against him. While the dissolution action was pending, decedent named his daughter, Abriel, as sole beneficiary of his life insurance policy.

After a dissolution trial, the court entered a final decree of dissolution ordering decedent to pay Heidi a fixed amount of maintenance and a fixed monetary judgment. The decree also required the decedent to maintain Heidi as beneficiary of his life insurance until he satisfied the maintenance obligation and paid his dissolution decree financial obligations. Following entry of the final dissolution decree, decedent did not name Heidi as his beneficiary of his life insurance policy. He died one year later, having fully satisfying his maintenance obligation but still owing Heidi \$32,384.00 on the dissolution decree judgment. At the time he died, Abriel remained the named beneficiary of decedent's \$150,000.00 life insurance policy.

The company writing decedent's life insurance received competing claims from Heidi and Abriel on the policy and filed the interpleader action subject of this appeal, naming Heidi and Abriel as defendants. Before the

interpleader action was filed and early in the interpleader action, Abriel offered to pay Heidi the balance decedent owed her on the dissolution decree judgment out of his life insurance proceeds.

Heidi rejected those offers, and then brought a summary judgment motion, seeking decedent's full \$150,000.00 life insurance proceeds and attorney fees against Abriel.

Abriel responded and argued that long established case law on nearly identical facts limited Heidi's interest in decedent's life insurance policy to what both Heidi and Abriel agreed decedent owed Heidi on the dissolution decree judgment. Abriel agreed that there were no material facts in dispute and asked the court to distribute decedent's life insurance proceeds to her that remained after distributing to Heidi the amount decedent owed Heidi under the dissolution decree judgment. Abriel also asked the court to require Heidi to pay the attorney fees Abriel incurred in responding to Heidi's frivolous motion.

The trial court ruled in favor of Abriel and Heidi appealed.

B. SUMMARY OF ARGUMENT

The consequences of violating restraints against changing life insurance beneficiaries during a dissolution action depend on the purpose for which those restraints were imposed. Where that purpose is to secure payment of financial obligations, a wrongfully removed beneficiary's interest in the policy is limited to what she is owed under the dissolution.

That is nearly exactly what happened in this case. Decedent violated a dissolution decree provision ordering him to maintain Heidi as beneficiary of his life insurance until he satisfied liquidated financial obligations to her set forth in the decree. The court's purpose for making the life insurance beneficiary provision was clearly stated in the decree itself. That purpose was to secure payment of the amount decedent owed Heidi under the final dissolution decree. Decedent died owing Heidi \$32,284.00 under the decree. At the time he died, decedent was in violation of the dissolution decree, having designated Abriel, instead of Heidi, as beneficiary of his \$150,000.00 life insurance policy.

Heidi brings this appeal from the trial court's summary judgment limiting her interest in decedent's life insurance proceeds to the \$32,384.00 plus interest that decedent owed her on the dissolution decree when he died. In her appeal brief, Heidi does not argue that the established case law the trial court relied on should be overturned, nor does she reference it in any way.

C. STATEMENT OF THE CASE

Decedent Ronald Lee, (Ron), and Heidi were married in 2001. CP 171. Heidi petitioned for dissolution and the court entered a temporary order in that dissolution action on March 11, 2011, which restrained Ron from changing entitlement of any life insurance policies. CP 178-180. On September 1, 2013, Ron named his daughter, Abriel, as sole beneficiary of his \$150,000.00 Sun Life life insurance policy. CP 182. The dissolution

action was tried in March of 2014. CP 172 The court signed a final decree of dissolution of the Lee marriage on April 9, 2014, awarding Heidi eight months of maintenance at \$2,000.00 per month, and a judgment against Ron of \$35,384.00. CP 230. The final dissolution decree also required Ron to "continue to name the wife as the beneficiary of his life insurance policy to secure future payment of both his spousal maintenance obligation and the judgment entered herein." CP 229 , and to "continue to name the wife as the beneficiary of his life insurance policy until both his spousal maintenance obligation terminates and the judgment is paid in full." CP 230.

At the time the final dissolution decree was entered, Heidi was not the named beneficiary on any life insurance policy on Ron.

Ron died on April 16, 2015, one year after the court entered the decree of dissolution. CP 268. Before he died, Ron had fully satisfied his maintenance obligation to Heidi. CP 172. At the time he died, Ron owed Heidi a balance of \$32,384.00 on the dissolution decree judgment. CP 172.

After Ron died, Abriel received a letter she understood Ron had written to her, stating that Ron had life insurance from which Heidi was to get around \$35,000.00. CP 324, 326.

Heidi submitted a claim for Ron's life insurance proceeds on June 11, 2015, CP 85, and Abriel submitted her claim for Ron's life insurance proceeds on June 25, 2015. CP 2, CP 77.

Abriel proposed paying Heidi the dissolution decree balance Ron owed Heidi upon his death out of Ron's life insurance proceeds when she first learned from the attorney for Sun Life Assurance Company ("Sun Life") of Heidi's claim against Ron's life insurance policy. CP 325.

Sun Life filed an interpleader action in the Jefferson County Superior court on July 27, 2015, naming Heidi and Abriel as defendants, and tendered Ron's life insurance policy proceeds of \$150,000.00 to the court. CP 1.

Heidi filed her answer and cross claim in the interpleader action for the full proceeds of Ron's life insurance policy and attorney fees against Abriel on August 24, 2015. CP 125.

Abriel proposed paying the balance Ron owed Heidi on the dissolution decree judgment out of Ron's life insurance by letter to Heidi's attorney on September 10, 2015. CP 298, 306.

Abriel filed her answer and cross claim in the interpleader action on October 19, 2015, proposing that Heidi receive full payment for the balance Ron owed her on the dissolution decree judgment from Ron's life insurance policy and that Abriel then take the remaining balance of the proceeds from Ron's life insurance policy. CP 154. In her answer and cross claim, Abriel also asked for attorney fees against Heidi. CP 154

After filing her answer and cross claim, Abriel again offered to Heidi to settle Heidi's claim against Ron's life insurance proceeds for

\$45,000.00, which Heidi's attorney rejected on November 11, 2015. CP 298, 307.

On January 8, 2016, Heidi filed a summary judgment motion in the interpleader action seeking the entire proceeds of \$150,000.00 from Ron's life insurance policy. CP 160. In her summary judgment motion, Heidi also requested that Abriel be ordered to pay the attorney fees and costs Heidi incurred in bringing her claim, asserting that "she was forced to bring this claim against Abriel Lee", and "for being forced to file an action to collect Mr. Lee's outstanding financial obligations to her". CP 160, 167, 168.

Abriel filed her opposition to Heidi's motion for summary judgment on January 25, 2016. CP 311. In her opposition, Abriel argued that Heidi's motion for summary judgment awarding her Ron's entire life insurance proceeds of \$150,000.00 and attorney fees against Abriel was frivolous and asked the court to award Abriel her attorney fees pursuant to Jefferson County Local Rule 7.8. CP 321.

In support of her opposition to Heidi's request for attorney fees and in support of Abriel's request for attorney fees under JCLCR 7.8, Abriel filed a letter she believed Ron had written her before he died, instructing her to pay Heidi the debt he owed Heidi out of his life insurance proceeds. CP 324, 326. In further support of her arguments on the attorney fee issues, Abriel also presented evidence of settlement offers she tendered to Heidi before Heidi filed her motion for summary

judgment claiming that she had been forced to file an action to collect on Ron's outstanding financial obligations to her. CP 298, 305, 307.

Following a hearing on the summary judgment motion, the trial court found that there were no issues of material fact in dispute on how to distribute the proceeds of Ron's life insurance. CP 465. The court further found that the undisputed material facts and settled law required that Ron's life insurance proceeds be distributed to the named beneficiary, Abriel, after Heidi received payment for the balance of what Ron owed her under the dissolution decree judgment. CP 465. The court also found that Heidi's summary judgment motion and subsequent pleadings were frivolous under LCR 7.8 because settled case law involving the same issues limited Heidi's recovery from Ron's life insurance proceeds to the amount that Abriel had offered her on September 10, 2015. CP 466. In its order on summary judgment, the court exercised its discretion under LCR 7.8 and ordered Heidi to pay Abriel the attorney fees she incurred after September 10, 2015 from Heidi's share of Ron's life insurance proceeds. CP 466.

After hearing argument on Abriel's proposed Findings of Fact and Conclusions of Law regarding Abriel's petition for attorney fees, the court struck some of the attorney fees Abriel requested and entered an award to Abriel for attorney fees. CP 461, 462, 464, 466.

Heidi timely filed her notice of appeal on April 13, 2013. CP 471.

D. ARGUMENT

1. **Because Heidi did not raise the “Clean Hands Doctrine” in her motion for summary judgment or in her reply below, she is now precluded from having that issue considered on appeal.**

In her appeal brief Heidi argues that the “Clean Hands Doctrine” should have precluded judgment in favor of Abriel. However, Heidi did not raise or argue the “Clean Hands Doctrine” in her motion for summary judgment or in her reply brief on summary judgment. This court's review is limited to the issues called to the trial courts attention. RAP 9.12, Bankston v. Pierce County, 174 Wn. App. 932, 301 P. 3d 495 (2013). Accordingly, this court should not consider on appeal Heidi's argument that the “Clean Hands Doctrine” should have precluded judgment in favor of Abriel.

Even if this court were to consider Heidi's new “Clean Hands Doctrine” argument on appeal here, it does not apply to Abriel's actions. Heidi's trial counsel acknowledged that Abriel has done nothing wrong in responding to this litigation commenced by Ron's life insurance company and pursued by Heidi. RP 14, 25. Abriel has, from the outset of this dispute, been fair and straightforward with all the parties, consistently attempting to pay Heidi what she was owed under the dissolution decree and under established Washington case law. CP 154, 298, 325, 298, 306, 307.

On the other hand, Heidi has not been fair or straightforward in this dispute. Heidi has rejected repeated offers to end this expensive litigation by taking what she was owed under the decree and demanding over four times that amount. CP 307. Heidi has ignored established Washington case law that clearly limits her interest in Ron's insurance policy to what Abriel has offered her from the outset and has demanded that Abriel pay the attorney fees that Heidi is amassing in seeking her windfall. See Ocie v. Sager, 71 Wn.App. 855, 863 P.2d 106 (1993) Accordingly, even if the "Clean Hands Doctrine" was properly before this court, it would apply to preclude the windfall that Heidi is seeking.

2. Ron's violation of a temporary order that was replaced by a final dissolution decree that fully liquidated his financial obligations to Heidi at well under the value of his life insurance does not justify voiding his designation of Abriel as beneficiary of that life insurance policy.

Heidi's reliance on Standard Ins. Co. v. Schwalbe, 110 Wn 2d 520, 755 P. 2d 802 (1988) to justify voiding Ron's improper life insurance beneficiary designation is misplaced. Heidi's assertion that she was in the same position as the litigant in Schwalbe ignores the fact that the decedent in Schwalbe, unlike Ron, died while his dissolution was pending and before the financial issues were resolved. Id at 522. Unlike with Ron, the decedent in Schwalbe died while the temporary order he violated was still in place and while support for his minor children was yet to be determined. Id at 523.

Here, Ron died after the temporary order he violated had been terminated and replaced with a final decree of dissolution. That decree liquidated all financial issues between Ron and Heidi. With all their financial issues finalized, the purpose behind the temporary injunction to protect Ron and Heidi, while their dissolution was pending and the resolution of their financial issues was uncertain, was eliminated. Accordingly, with the financial issues liquidated to a sum certain in a final decree of dissolution, any justification for voiding Ron's improper beneficiary designation under the temporary order was eliminated. Voiding Ron's improper beneficiary designation after he died would only serve to give Heidi a windfall of over four times what Ron still owed her on the dissolution decree. CP 1, and 172.

In Schwalbe, the court suggested, but did not decide, that the court's purpose in ordering a preliminary injunction against changing life insurance beneficiary designation in a pending dissolution action could impact the limit of a wrongfully removed beneficiary's interest in the life insurance:

Ms. Dent does not argue, therefore we do not decide, whether the intended effect of the preliminary injunction was to limit the right of Mrs. Schwalbe and her children to only those policy proceeds necessary to discharge Mr. Schwalbe's future support and maintenance obligations. See In re Marriage of Donovan, 25 Wn. App. 691, 698-99, 612 P.2d 387 (1980); Riser v. Riser, 7 Wn. App. 647, 650-51, 501 P.2d 1069 (1972). Id. at FN 1.

Five years later, in Ocie v Sager, 71 Wn.App. 855, 863 P.2d 106 (1993), the Court considered and resolved that question Schwalbe commented on in FN 1. In Sager, Id, decedent's life insurance company deposited the proceeds of his life insurance into the court after decedent's first wife claimed the entire proceeds on behalf of decedent's minor child and decedent's second wife, who was the named beneficiary, claimed the proceeds for herself. Sager, Id at 856. Decedent had been ordered under a dissolution decree to make his minor children beneficiaries of life insurance that existed through his employment. Sager, Id at 856 Decedent remarried and, contrary to the decree, changed the beneficiary to his second wife. Sager, Id at 856 The court clearly confirmed that the decedent had improperly removed his children as beneficiaries, contrary to the decree:

As further discussed below, it is apparent that the intent of the 1985 decree was to secure Ocie's payment of his child support obligation. "Where a life insurance policy is used as security for child support, equities arise in favor of the children that preclude the insured's right to change beneficiaries." Standard Ins. Co. v. Schwalbe, 110 Wn.2d 520, 523, 755 P.2d 802 (1988). Such equities arose here, and Ocie was not permitted to entirely remove his children as beneficiaries so long as his child support obligation continued. Id. at 860

The court next ruled on the extent to which the decree that decedent had violated encumbered the life insurance policy:

*[6] The second limitation is that Estelle cannot claim more than unpaid past child support, plus the present value of unpaid future child support that the decree would have obligated Ocie to pay if he had not died. Life insurance is commonly required as security for child support, because it provides "a relatively painless method of protecting children from the untimely death of an obligated parent." *Bunt*, 110 Wn.2d at 380. As already noted, it is obvious that this decree intended that life insurance existing through Ocie's employment would provide security for his obligation to pay child support. *Id.* at 860 [emphasis added]*

The court reiterated the extent to which a life insurance policy is encumbered where a decedent changes beneficiaries on his life insurance in violation of a dissolution decree, holding:

*In summary, Estelle is entitled to recover the lesser of (1) Ocie's one-half of the policy proceeds or (2) unpaid past support, plus the present value of future support that the decree would have obligated Ocie to pay if he had not died. Julie is entitled to the balance of the policy proceeds. *Id.* at 864 [citations omitted]*

The trial court below properly applied the holdings of Schwalbe , *Supra*, and Sager, *Id.*, to the undisputed material facts Heidi presented when it found that there was no basis to completely void Ron's beneficiary designation even though it violated its temporary order and the final dissolution decree.

- a. The Superior Court properly considered both the purpose of its orders and Ron's violation of those orders in reaching its ruling.**

In ruling on the summary judgment motion, the court did not disregard the fact that Ron violated two written orders when he designated Abriel as beneficiary of his life insurance. The court discussed its consideration of Schwalbe and Sager, which both involved disputes between designated beneficiaries and wrongfully replaced beneficiaries over the proceeds of life insurance policies and decedents who had violated court orders requiring them to name specific beneficiaries, just as in the present case. RP 26-33. The court emphasized the requirement to consider a court's purpose in ordering life insurance beneficiary designation in a dissolution before imposing a remedy for its violation. The court recognized that Sager, Id., absolutely limits a wrongfully removed beneficiary's interest in a violator's life insurance proceeds to the sum the life insurance beneficiary designation was to secure. RP 31-32.

Heidi presents in her brief the trial court's extensive comments on its reasoning that the obvious purpose behind the written decree provision requiring Ron to maintain Heidi as beneficiary of his life insurance was to secure his financial obligations to her under the decree. Appellants Brief at 13. The trial court's interpretation of the purpose behind the life insurance beneficiary provision set forth in the decree is especially reliable considering he was the same judge that signed the decree after presiding over the dissolution trial. CP 172.

b. The dissolution decree stated that the intent of ordering Ron to maintain Heidi as beneficiary of his life insurance was to secure payment of Ron's liquidated financial obligations to Heidi.

Heidi's argument that the court's dissolution decree did not limit her recovery of Ron's life insurance proceeds, of which he made Abriel beneficiary, ignores the stated and obvious purpose of the decree provisions regarding his life insurance and the established case law regarding those provisions. The decree clearly states that the purpose for ordering Ron to maintain Heidi as beneficiary of his life insurance was to insure she received what Ron was ordered to pay her for maintenance and the decree judgment. CP 229,230. Under Sager, Id., as discussed at section 2 above, Heidi's interest in Ron's life insurance to which he named Abriel beneficiary is therefore strictly limited to what Ron owed Heidi under the dissolution decree at the time he died.

c. The temporary order restraining both parties from changing life insurance beneficiaries was terminated by law, replaced by the final dissolution decree and is no longer enforceable.

The temporary order was terminated by law and replaced with a final dissolution decree liquidating Ron's financial obligations to Heidi before Ron died. RCW 26.09.060 (10) (c). Heidi was not impacted in any way by Ron's violation of the temporary order before all of the financial issues between them were settled in their final decree of dissolution. The Superior Court properly focused on the financial provisions of the final dissolution decree when remedying Ron's violation of the order to

maintain Heidi as beneficiary of his life insurance to secure payment of his financial obligations to her.

d. Washington case law absolutely limits Heidi's interest in Ron's life insurance policy to what Ron owed her under the dissolution decree.

As discussed above at section 2, under established Washington case law, Heidi's interest in the life insurance policy under which he designated Abriel as beneficiary is strictly limited to what Ron owed Heidi under the dissolution decree. Under Sager, Id., Heidi is not entitled to attorney fees or costs she incurred in this interpleader action, but only entitled to the undisputed amount Ron owed her on the dissolution judgment when he died.

e. Under the undisputed material facts that Heidi presented in this case, established Washington case law does not allow the court to void Abriel's beneficiary status of Ron's life insurance.

As discussed above at section 2 above, the Superior Court properly applied Sager, Id. in refusing to void the beneficiary designation he made in violation of the temporary order and final dissolution decree order even where he remained silent as to his violation of the orders. The Superior Court carefully considered the purpose of the orders Ron violated and fulfilled the purpose of those orders in limiting Heidi's interest in Ron's life insurance policy to what she was owed under the final decree. The court properly limited Heidi's remedy to that which Washington state law provides under the circumstances of Ron's

violations of the court orders he violated by not maintaining Heidi as beneficiary of his life insurance.

f. The circumstances of Ron and Heidi's marriage and dissolution and the fairness of the property division established in their final dissolution decree cannot be reviewed or reconsidered in this action.

At section 2(f) of her appellate brief, Heidi again invites this court to ignore the controlling case law authority set forth in Sager, Id., which the trial court relied on in its order on summary judgment. It is unclear why Heidi does not address or even acknowledge this controlling case that Abriel briefed below and that the court relied on below anywhere in her appellate brief. Even though Heidi does not recognize Sager, Id, its holding is controlling here and limits her interest in Ron's life insurance policy to the balance he owed her on the decree judgment.

Heidi also asks this court to disregard Washington statutory law and reconsider the fairness of the property disposition set forth in her decree of dissolution. Such reconsideration is barred by RCW 26.09. 170 which provides in pertinent part:

26.09.170. Modification of decree for maintenance or support, property disposition Termination of maintenance obligation and child support Grounds.

(1) ... The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

HISTORY:

2010 c 279 1; 2008 c 6 1017; 2002 c 199 1; 1997 c 58 910;

1992 c 229 2; 1991 sp.s. c 28 2; 1990 1st ex.s. c 2 2; 1989 c 416 3; 1988 c 275 17; 1987 c 430 1; 1973 1st ex.s. c 157 17.

Heidi had her dissolution trial on the merits after which the court finalized the property issues and Ron's obligation to her in a final decree of dissolution. CP 172, CP 91. She did not appeal the decision. She cannot re-litigate those matters now.

This court should reject Heidi's call for it to disregard controlling case law authority and statutory law in considering Heidi's appeal.

3. The Superior Court properly admitted and considered a letter Abriel believed Ron wrote her shortly before he died for the purposes of showing Abriel's state of mind in offering to pay Heidi money from Ron's life insurance proceeds.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *ER 801*.

Abby did not offer the letter that she believes Ron wrote her before he died to establish the truth of any statements contained in that letter. She did not offer it to prove what Ron owed Heidi or for the truth of any other statements contained in the letter. She offered it to explain why she agreed from the time she learned of Heidi's claim against Ron's life insurance policy to pay Heidi money out of the insurance proceeds she believed Heidi was entitled to. CP 423 , RP 6. Abriel offered the letter to rebut Heidi's claim for attorney fees against her and Heidi's assertion that

she had been forced to file the action to collect what Ron owed her.

Accordingly, the letter Abriel offered was not hearsay.

Even if the court determines the letter was hearsay, it was still admissible under ER 804:

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute. *ER802*

RULE 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

. . .

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or . . .

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Ron's letter to Abriel contains his statement that he owed a substantial amount of money to Heidi, which was contrary to his

pecuniary interest. CP 324. Ron is now unavailable to testify.

Accordingly, his letter, though not offered for hearsay purposes, should be admissible under ER 804 as an exception to the hearsay rule.

Abriel offered Ron's letter to show what her state of mind was early on and to explain why, early on, she agreed to give Heidi money out of insurance proceeds that Abby was entitled to as Ron's beneficiary. CP 423. This evidence was relevant on the issue of Heidi's claim for attorney fees against Abriel because "she was forced to bring this claim against Abriel" and "for being forced to file an action to collect Mr. Lee's outstanding financial obligations to her". CP 160, 167, 168.

Abriel adequately authenticated the letter under ER 901:

Rule 901. Requirement of authentication or identification.

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

...

History: Adopted Dec. 19, 1978, effective April 2, 1979; amended, effective December 10, 2013.

Here, Abriel testified that she received the letter addressed to her by her dad. CP 324. The letter described her as the daughter of the writer and the writer as her dad. CP 326. It included details about her father, a photograph of a man and a younger woman and details about his affairs. CP 326. Abriel testified that she believed the letter was written to her by her father, Ron. CP 324. The letter also included details about a debt that Ron owed Heidi that was consistent with other evidence Heidi presented in her motion for summary judgment. CP 326. The circumstances of Abriel's receipt of the letter, its contents, Abriel's testimony that she believed it was a letter written to her by Ron, and the other evidence introduced by Heidi that was consistent with its contents, including the amount of the debt Ron owed her and the identification of Ron's attorney, when considered together, satisfy the requirements of ER 901 (a), (b) (1) and (b) (4) and make it admissible.

4. **The Superior Court properly admitted and considered evidence of Abriel's settlement offers for the purposes of rebutting Heidi's claim that Heidi had been forced to bring her claim against Abriel to collect on Ron's outstanding obligations to her.**

ER 408 does not require exclusion of all settlement offers:

ER 408

COMPROMISE AND OFFERS TO COMPROMISE

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in

compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis added] *ER 408*

In Bulaich v. AT&T, 113 Wn.2d 254, 778 P.2d 1031 (1989) our state Supreme Court rejected an ER 408 objection and approved the admission in evidence of an offer of settlement by an employer who was defending an unlawful discharge claim. The employer argued that it offered a settlement proposal into evidence not to show liability but instead to show that the employer's mental state was not to terminate an employee. *Id.* at 264. In ruling on the ER 408 objection, the court considered the purpose behind ER 408 and quoted the Comment to ER 408:

Comment 408 provides, in part:

[R]ule 408 makes the evidence inadmissible and is based on the policy of promoting complete freedom of communication in compromise negotiations. Parties are encouraged to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event such efforts fail. *Id.* at 263

After recognizing that the purpose behind ER 408 was to promote settlement negotiations between disputing parties, the court reasoned:

AT&T recites the justifications for ER 408, namely, the desire to promote settlement through a free exchange of offers and the recognition that an offer of settlement may not necessarily reflect the belief that the adversary's claim has merit. AT&T uses these to persuasively explain the rule's inapplicability to the objection at hand. For, when the settlement offeror is the same party attempting to gain the admission of the settlement letter into evidence, the threat of admissibility should not be a deterrent to the articulation of a settlement proposal. Id. at 263 [emphasis added]

Ruling against the ER 408 objection, Bulaich held that a court can admit into evidence a settlement proposal offered into evidence by the party who made the settlement proposal for some reason other than to show liability. Id at 265

The Bulaich reasoning applies here. In this case, Heidi claims that she was “forced” to bring this action against Abriel to recover what Ron owed her under the decree judgment. CP 160, 167, 168. That is not true.

Abriel attached her settlement proposals to her response to Heidi's summary judgment motion to rebut Heidi's claim that Abriel forced Heidi to file this action to recover what Ron owed Heidi under the decree, not to prove Heidi's liability on any issue.

The purpose of ER 408 would not be served by excluding the settlement offers that Abby made and presented in her response

materials to rebut Heidi's claims that she was forced by Abby to bring this action.

In light of the settled case law directly on point to Heidi's summary judgment motion for Ron's entire life insurance proceeds, it would be unfair for the court to weigh Heidi's additional claim for attorney fees against Abriel that Heidi asserts she was forced to incur without considering the settlement offers that Abriel made early and repeatedly in this interpleader. Under the circumstances of this case, ER 408 does not exclude the settlement proposals that Abby offered to rebut Heidi's claim for attorney fees.

5. The Superior Court did not abuse its discretion in finding that Heidi's litigation for Ron's full \$150,000.00 life insurance policy together with her attorney fees against Abriel was frivolous after she rejected Abriel's offer at the outset to pay what Ron owed Heidi under the dissolution decree.

The Jefferson County Superior Court has promulgated a rule discouraging parties from filing pleadings and motions that are frivolous:

LCR 7 Pleadings Allowed; Form of Motions.

7.8. Sanctions. The court may impose sanctions or terms for any frivolous motion, non-appearance, or in granting a continuance of any matter.

In this case, although Heidi admits that Ron's balance owing to her under the decree is only \$32,384.00, she filed a summary judgment motion for disbursement of the full amount to her of Ron's \$150,000.00 in life insurance proceeds and attorney fees and costs against Abriel. In

pursuing this litigation, Heidi has ignored settled case law involving nearly identical facts and issues. Before filing her summary judgment motion, Heidi rejected Abby's repeated attempts to settle this dispute under terms that the settled law requires. CP 298, 306. Before filing summary judgment Heidi rejected Abby's attempts to settle this dispute for a sum that exceeded what Heidi was entitled to under the settled law of Washington. CP 298, 307.

Heidi did not need to file her unwarranted summary judgment motion to receive what she was owed against Ron's life insurance policy. Heidi filed her unwarranted summary judgment motion to deprive Abriel of insurance proceeds that Abriel is entitled to under Ron's insurance policy and settled law.

By pursuing litigation that had no support in controlling law and that seeks remedies contrary to settled law, including an unwarranted and frivolous summary judgment motion, Heidi triggered the remedies set forth in JCLCR Rule 7.8.

By pursuing her unfounded litigation, including her summary judgment motion against Abriel, Heidi forced Abriel to incur substantial attorney fees and unnecessary stress in responding to and opposing Heidi's litigation. Accordingly, the court properly applied the remedies provided under LCR 7.8 and required Heidi to pay Abriel the attorney fees and costs she should not have been forced to incur. The court properly

exercised its discretion pursuant to JCLCL 7.8 in awarding Abriel her attorney fees against Heidi.

6. Abriel requests that she be awarded her attorney fees and costs against Heidi on appeal.

Heidi ignored the pertinent controlling Washington case law under Sager Supra, in her opening brief on her summary judgment motion. In her opposition to Heidi's motion for summary judgment, Abriel thoroughly briefed Sager, Id. The trial court discussed Sager Id. at the motion and relied on it in ruling that Heidi's litigation for the entire proceeds of Ron's life insurance was frivolous under JCLCR 7.8. Accordingly, Abriel was entitled to the attorney fees she was awarded at trial pursuant to JCLCR 7.8.

Heidi now brings this appeal and has not distinguished Sager or argued for overturning Sager. In fact, Heidi has not even acknowledged Sager in her appellate brief.

Accordingly, Heidi's appeal is frivolous under JCLCR 7.8 and under RAP 18.1. Generally, a party may recover fees on appeal if the party was entitled to recover fees in the trial court. Landberg v. Carlson, 108 Wn. App. 749, 758, 33 P.3d 406 (2001).

Abriel respectfully asks this court to affirm the trial court's order on summary judgment and award Abriel her the attorney fees she has incurred in responding to this frivolous appeal pursuant to JCLCR 7.8 and RAP 18.1.

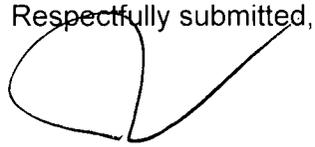
E. CONCLUSION

The undisputed material facts supported the trial court's order on summary judgment. The trial court did not abuse its discretion in awarding Abriel attorney fees against Heidi pursuant to JCLCR 7.8.

Abriel respectfully requests that the Court affirm the trial court's decisions herein and grant her an award of attorney's fees and costs on appeal.

DATED this 21st day of September, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James A. Doros', written over the text 'Respectfully submitted,'.

JAMES A. DOROS WSBA No. 16267
Attorney for Respondent

FILED
 COURT OF APPEALS
 DIVISION II
 2016 SEP 23 AM 11:43
 STATE OF WASHINGTON
 BY _____
 DEPUTY

CERTIFICATION

I hereby certify that on September 22, 2016, I delivered a copy of the document to which this certification is attached for delivery to all counsel of record as follows:

Name: Robert Miller, Esq. Address: 732 NW 19 th Avenue Portland, OR 97209 Counsel for Plaintiff Sun Life Assurance Company of Canada	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Delivery bobmiller@kilmerlaw.com <input type="checkbox"/> Hand Delivery
Name: Rafael Urquia, Esq. Address: 211 Taylor Street, Suite 32A Port Townsend, WA. 98368 Counsel for Appellant Heidi A. Lee	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Delivery rafael@urquialaw.com <input type="checkbox"/> Hand Delivery
Name: Bret Roberts, Esq. Address: 624 Polk Street Port Townsend, WA 98368 Counsel for Appellant Heidi A. Lee	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Delivery bretjacpd@gmail.com <input type="checkbox"/> Hand Delivery

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of September, 2016 at Seattle, Washington.


 Lynne Poser

APPENDIX

71 Wn. App. 855, 863 P.2d 106, MARRIAGE OF SAGER

Dec. 1993

[No. 14293-7-II. Division Two. December 7, 1993.]

MARRIAGE OF SAGER

**In the Matter of the Marriage of OCIE (NMI) SAGER, Respondent,
and ESTELLE LORETTA SAGER, Appellant.**

[1] Insurance – Divorce – Child Support – Insurance as Security – Identification of Policy – Existing Through Employment. A divorce decree requiring a person to make minor children of the marriage the beneficiaries of life insurance policies which exist through the person's place of employment sufficiently identifies the policies to encumber them as of the date the decree was entered.

[2] Divorce – Decree – Construction – Meaningful Interpretation. A court will not construe a divorce decree as requiring a divorcing person to perform a vain and useless act.

[3] Insurance – Divorce – Child Support – Insurance as Security – "Make" Beneficiaries – Obligation To Maintain as Beneficiaries. A divorce decree requiring a person to "make" minor children of the marriage the beneficiaries of a life insurance policy obligates that person to maintain the children as beneficiaries for so long as they have the status of dependent minors.

[4] Insurance – Divorce – Child Support – Insurance as Security – Change of Beneficiary – Validity. When a divorce decree requires a person to make minor children of the marriage the beneficiaries of a life insurance policy to secure payment of a child support obligation, the person may not change beneficiaries so long as the child support obligation continues.

[5] Insurance – Divorce – Child Support – Insurance as Security – Limitation – Community Property. When a divorce decree requires a person to make minor children of the marriage the beneficiaries of a life insurance policy to secure payment of a child support obligation and the person dies while married to a new spouse, the policy is community property, the new spouse owns a one-half interest in the policy, and the minor children's claim to the proceeds of the policy is limited to one-half of the proceeds.

[6] Insurance – Divorce – Child Support – Insurance as Security – Limitation – Support Obligation. When a divorce decree requires a person to make minor children of the marriage the beneficiaries of a life insurance policy to secure payment of a child support obligation, the minor children's claim to the proceeds of the policy is limited to the amount needed to fulfill the decedent's child support obligation. i.e., the unpaid past child support plus the present value of unpaid future child support that the decedent would have been obligated to pay had the death not occurred.

[7] Divorce – Decree – Construction – Ambiguity – Applicable Rules. A court construes an ambiguous dissolution decree so as to give effect to the intent of the court that entered the decree. The construing court applies the general rules of statutory and contract construction. Normally, the court may not look beyond the language of the decree itself.

PETRICH, J. Pro Tem., dissents by separate opinion.

Nature of Action: Action to distribute life insurance proceeds. The decedent's second wife was the named beneficiary of the policy. The decedent's divorce decree required him to "make" his minor children the beneficiaries of the policy.

Superior Court: The Superior Court for Pierce County, No. 84-3-02737-1, Bruce Cohoe, J., on August 28, 1990, entered a judgment in favor of the decedent's second wife.

Court of Appeals: Holding that the divorce decree encumbered the insurance policy, that the decree required the decedent to maintain his minor children as beneficiaries, and that the ex-spouse's claim on behalf of the decedent's remaining minor child was limited to the lesser of (1) one-half of the proceeds or (2) the amount needed to pay the decedent's unpaid child support obligation, the court reverses the judgment and remands the case for further proceedings.

Bertha R.S. Houser, for appellant.

Timothy P. Coogan, for respondent.

MORGAN, J. – This is a dispute over the proceeds of a life insurance policy. We reverse and remand for further proceedings.

The record is so poorly developed that it is difficult to marshal the facts. Nevertheless, it appears that the following facts are not truly disputed.

Estelle and Ocie Sager were married on December 7, 1968. Four children, Benita, Regas, Carolynn and Michelle, were born to the marriage.

In 1984, Ocie petitioned for dissolution. The matter was tried, and a decree was entered on February 22, 1985.

The decree stated in paragraph 5 that Ocie was to pay \$700 per month in child support "as long as the oldest minor child, Regas, is in high school." «1»

«1» Clerk's Papers, at 2.

After that, Ocie was to pay \$600 per month "for the two remaining minor children, Carolynn and Michelle" until Carolynn "graduates from high school or later reaches the age of 18 years of age or is otherwise sooner emancipated." «2»

«2» Clerk's Papers, at 2.

After that, Ocie was to pay \$450 per month for Michelle until she "graduates from high school, or later reaches the age of 18 years or is sooner emancipated." «3»

«3» Clerk's Papers, at 2.

Additionally, the decree stated in paragraph 8 that Ocie "shall make the minor children of the parties . . . beneficiaries of the medical and life insurance policies which exist through his place of employment." «4»

«4» Clerk's Papers, at 3.

By its terms, this provision did not apply to Benita, because she had reached majority before it was entered. It did apply to Regas, Carolynn, and Michelle, all of whom were minors when it was entered. «5»

«5» When the decree was entered, Benita was 18, Regas was 16, Carolynn was 15, and Michelle was 6. Clerk's Papers, at 5.

After dissolution of his marriage to Estelle, Ocie married Julie Marie Oquist, now Julie Sager. He and Julie were still married when he died on March 17, 1990. At that time, Michelle was still a minor, but the other children were not.

In February 1985 and March 1990, Ocie had group life insurance through the State, by whom he was employed. Sometime after dissolution of his marriage to Estelle, he made Julie the sole

beneficiary of that insurance. After Ocie died, the proceeds of this insurance were paid into the Pierce County Superior Court by Northwestern Life Insurance Company. Peculiarly, Northwestern did not start an interpleader action. Instead, it paid the money into the 1984 dissolution action, to which Ocie and Estelle had been the original parties.

Estelle and Julie then made competing claims in the 1984 dissolution case. Relying on the 1985 decree, Estelle claimed the entire proceeds on behalf of Michelle. Relying on her status as named beneficiary, Julie also claimed the entire proceeds. The trial court granted judgment in favor of Julie, and Estelle now appeals.

I

The first problem is whether Estelle has any claim against the proceeds of the Northwestern policy. We ask (A) whether the 1985 decree encumbered the Northwestern policy as of the date the decree was entered, and (B) whether the encumbrance continued until Ocie's death.

A

[1] A decree does not encumber a particular life insurance policy unless it adequately identifies it. *Sullivan v. Aetna Life & Cas.*, 52 Wn. App. 876, 879, 764 P.2d 1390 (1988), review denied, 112 Wn.2d 1009 (1989); see *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 754 P.2d 993 (1988). The decree in *Bunt* incorporated a separation agreement stating that the husband would "name their two minor children as irrevocable beneficiaries of the Aetna life insurance policy available to George as a Boeing employee." 110 Wn.2d at 370. The decree in *Sullivan* stated only that "[e]ach party shall maintain a minimum of \$10,000 life insurance with their minor child as beneficiary until said child attains majority." 52 Wn. App. at 877. The decree in *Bunt* adequately identified the policy in issue, but the decree in *Sullivan* did not.

The decree in this case is more specific than the decree in *Sullivan*, but less specific than the decree in *Bunt*. Like *Bunt*, it said Ocie was required to maintain life insurance that existed through his employment. Like *Sullivan*, it did not identify the employer or the insurer.

Although the decree here is less specific than the one in *Bunt*, we believe it adequately identified the Northwestern policy. It encumbered life insurance that existed through Ocie's employment, and the life insurance existing through Ocie's employment was the Northwestern policy.

B

Julie makes two arguments designed to show that even if the decree initially encumbered the policy, it ceased to do so before Ocie died. The first argument is based on the fact that the decree omitted to say that Ocie shall "maintain" the minor children as beneficiaries of such life insurance; rather, it said only that Ocie shall "make" the minor children beneficiaries of life insurance existing through his employment. The result, Julie says, is that Ocie's only duty was to "make" the minor children beneficiaries for a moment in time; once he did that, he had no further duty to "maintain" them as beneficiaries, and he could remove them at will. The children apparently were named as beneficiaries of the policy for a period of time following dissolution,

so Julie concludes that Ocie's duty to "make" them beneficiaries ended before he substituted her as sole beneficiary on the policy.

[2, 3] We reject this reasoning. If we were to read the decree as requiring Ocie to "make" the children beneficiaries for only a moment in time, we would be reading it as requiring a vain and useless act. We decline to read it that way. Cf. *Oak Harbor Sch. Dist. v. Oak Harbor Educ. Ass'n*, 86 Wn.2d 497, 500, 545 P.2d 1197 (1976) (court will not presume Legislature engaged in useless act); *Kelleher v. Ephrata Sch. Dist.* 165, 56 Wn.2d 866, 355 P.2d 989 (1960) (same); *Fifteen-O-One Fourth Ave. Ltd. Partnership v. Department of Rev.*, 49 Wn. App. 300, 742 P.2d 747 (1987) (same), review denied, 110 Wn.2d 1005 (1988); see also *Orion Corp. v. State*, 103 Wn.2d 441, 457, 693 P.2d 1369 (1985) (court will not require party to do "vain and useless" act). Instead, we read it in accordance with its obvious intent, which was to require that Ocie "make" the minor children beneficiaries for as long as they were dependent minors.

Julie's second argument starts with the proposition that the decree failed to require Ocie to make the children irrevocable beneficiaries. As a result, she says, he remained free to remove them from the policy at any time.

[4] We reject this reasoning also. As further discussed below, it is apparent that the intent of the 1985 decree was to secure Ocie's payment of his child support obligation. "Where a life insurance policy is used as security for child support, equities arise in favor of the children that preclude the insured's right to change beneficiaries." *Standard Ins. Co. v. Schwalbe*, 110 Wn.2d 520, 523, 755 P.2d 802 (1988). Such equities arose here, and Ocie was not permitted to entirely remove his children as beneficiaries so long as his child support obligation continued.

II

Having concluded that Estelle can make a claim against the policy, we turn now to the extent of that claim. We discuss two limitations.

A

[5] The first limitation is that Estelle cannot claim more than Ocie's half of the policy proceeds. It seems clear that when Ocie died, the Northwestern policy was his and Julie's community property. *Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 659, 689 P.2d 46 (1984). It follows that Julie owns a one-half interest in the policy, and that Estelle cannot claim against that half.

«6»

«6» Michelle acknowledges these propositions here, though she may not have done so at the trial level. She states in her brief, "[T]he appeal court should declare that Ocie's change of the beneficiary designation of said policy was invalid and the insurance proceeds from his half should be awarded to his minor daughter, Michelle Sager." (Italics ours.) Brief of Appellant, at 11.

Porter v. Porter, 107 Wn.2d 43, 726 P.2d 459, 6 A.L.R.4th 859 (1986).

B

[6] The second limitation is that Estelle cannot claim more than unpaid past child support, plus the present value of unpaid future child support that the decree would have obligated Ocie to pay if he had not died. Life insurance is commonly required as security for child support, because it provides "a relatively painless method of protecting children from the untimely death of an obligated parent." Bunt, 110 Wn.2d at 380. As already noted, it is obvious that this decree intended that life insurance existing through Ocie's employment would provide security for his obligation to pay child support. Both sides stated as much in oral argument before this court. Additionally, Estelle states in her brief:

Although the decree here does not state that the purpose of the provision requiring Ocie to "make" the children beneficiaries of his life insurance was to secure the support obligation, it is obvious that that was its purpose, and it must be so inferred.

Brief of Appellant, at 9. And Julie states in her brief:

In this case we are forced to decide between the nonspecific language of the divorce decree which may have been intended to secure child support payments after Mr. Sager's death (even though death should extinguish the child support obligation) and Mr. Sager's clearly expressed wishes that his wife, Julie Sager, receive his Northwestern National Life policy proceeds.

Brief of Respondent, at 7. Because the intent of the decree was to secure Ocie's payment of child support, Estelle's claim is limited to the amount needed for that purpose. Sutherland v. Sutherland, 77 Wn.2d 6, 10, 459 P.2d 397 (1969); In re Marriage of Donovan, 25 Wn. App. 691, 699, 612 P.2d 387 (1980); see Riser v. Riser, 7 Wn. App. 647, 650, 501 P.2d 1069 (1972) (parent not required to maintain life insurance in excess of that needed as security for support).

This conclusion disposes of Julie's argument that because the decree did not require Ocie to make the children sole beneficiaries, he remained free to name cobeneficiaries. «7»

«7» Brief of Respondent, at 7.

The decree precluded Ocie from designating cobeneficiaries whose interest would infringe on the amount of insurance needed as security for child support, Schwalbe, 110 Wn.2d at 523, but it did not preclude him from naming cobeneficiaries whose interest would not have that effect.

III

[7] We respectfully disagree with the dissent's position that the 1985 decree entitles Estelle to collect Ocie's entire interest in the policy, and not just the amount needed to replace his child support payments. In *In re Marriage of Gimlett*, 95 Wn.2d 699, 629 P.2d 450 (1981), the Supreme Court described how to interpret an ambiguous decree of dissolution. The decree in that case provided that child support would terminate when the child became emancipated, but it failed to define emancipation. The court stated:

Where a judgment is ambiguous, a reviewing court seeks to ascertain the intention of the court entering the original decree by using general rules of construction applicable to statutes, contracts and other writings. . . . Normally the court is limited to examining the provisions of the decree to resolve issues concerning its intended effect.

(Citations omitted.) *Gimlett*, 95 Wn.2d at 704-05. The court went on to say that "the original decree makes it obvious the original judge equated emancipation with the age of 18." 95 Wn.2d at 705.

As in *Gimlett*, the decree here is ambiguous. As Julie has correctly pointed out, it did not require Ocie to name the minor children as sole beneficiaries. Nor did it require that Ocie name the minor children as beneficiaries of a particular dollar amount of insurance. Thus, it might mean Ocie was required to name his children as beneficiaries to the full extent of the policy, or it might mean Ocie was required to name his children as beneficiaries to some lesser extent.

As in *Gimlett*, the intent here is obvious from the face of the decree. There was no intent to erroneously divest Ocie of rights or property that were lawfully his. See *Sutherland*, 77 Wn.2d at 10 (erroneous to award parents' property to child); *Riser*, 7 Wn. App. at 650 (same). Rather, the intent was only to provide security that would pay Ocie's child support obligation in the event he died. Effectuating this intent, we construe the decree as requiring Ocie to name his minor children as beneficiaries of his insurance only to the extent necessary to secure his child support obligation. Beyond that, he was free to name other beneficiaries, including Julie.

Although neither party cites *Puckett v. Puckett*, 41 Wn. App. 78, 82, 702 P.2d 477, review denied, 104 Wn.2d 1018 (1985), overruled on other grounds in *Porter v. Porter*, 107 Wn.2d 43, 53, 726 P.2d 459, 68 A.L.R.4th 859 (1986), the dissent argues that it governs this case. The Supreme Court has clearly distinguished the ownership interest of a policyholder from the expectancy interest of a beneficiary. *Wadsworth*, 102 Wn.2d at 656, 661-63. The core of *Puckett* is that the parents' divorce decree distributed the life insurance policy to the minor daughter as owner; thus, the father's later change of beneficiaries was ineffective. «8»

«8» In *Puckett*, the decree required a father to maintain life insurance for his daughter. When the father died, he had a life insurance policy worth \$187,500. The trial court ruled that the intent of the provision was to require life insurance as security for child support, and that \$90,000 was needed for that purpose. Thus, it awarded the daughter \$90,000, and the named beneficiary the balance. On appeal, this court rejected the argument that the decree's life insurance provision was intended to provide security for the father's child support obligation. Based on the language of

the particular decree, it said the life insurance provision as "a property provision without restriction." 41 Wn. App. at 83. Citing Sutherland, 77 Wn.2d at 9-10, it said "the divorce court [may well have] lacked the authority to award property to the child over and above the support obligation." 41 Wn. App. at 83. However, it found that fact immaterial because the "decendent neither contested the divorce proceedings, nor appealed the default divorce decree." 41 Wn. App. at 83. Essentially, it held that the decree effected a 3-way division of the spouses' property, with the father receiving some assets, the mother receiving some assets, and the daughter receiving the life insurance policy as an asset. Because the daughter owned the life insurance policy, she was entitled to collect the entire \$187,500.

In this case, there is no indication whatever that the dissolution court was trying to award insurance to the children as property; indeed, it would appear that the insurance was term insurance. Thus, Estelle does not claim that the 1985 decree made Michelle or her siblings the owners of a property interest in the Northwestern policy; at most, her claim is that the decree gave Michelle and her siblings an expectancy that was nondefeasible for so long as they were dependent minors. See Schwalbe, 110 Wn.2d at 523; Wadsworth, 102 Wn.2d at 656, 661-63. Because a policy-holder's ownership interest has attributes different from a beneficiary's expectancy, Puckett has no applicability here.

Even if Puckett were not distinguishable, it would not support the dissent's position that Estelle should take Ocie's entire one-half of the policy. If applied here, Puckett would characterize the life insurance portion of the Sager decree as "a property provision without restriction". When the Sager decree was entered in 1985, there were three minor children. Thus, if Ocie's life insurance was awarded to them as property, each must have acquired a one-third interest, and Estelle, who now acts solely on behalf of Michelle, «9»

«9» The older two children reached majority before Ocie died. They are not parties here, and Estelle does not purport to assert their interests.

is entitled to only one-third of Ocie's one-half.

In summary, Estelle is entitled to recover the lesser of (1) Ocie's one-half of the policy proceeds or (2) unpaid past support, plus the present value of future support that the decree would have obligated Ocie to pay if he had not died. Donovan, 25 Wn. App. at 699. Julie is entitled to the balance of the policy proceeds.

Reversed and remanded for further proceedings.

ALEXANDER, C.J., concurs.

«10» *Judge John A. Petrich was a member of the Court of Appeals at the time oral argument was heard on this matter. He is now serving as a judge pro tempore of the court pursuant to CAR 21(c).

(concurring in part, dissenting in part) – While I agree with the majority's conclusion that the dissolution decree encumbered the insurance policy in favor of the daughter, Michelle, I disagree with its holding that the daughter's interest is limited to the lesser of the father's interest in the policy or the value of past unpaid and future child support obligations. In my view the entire interest of the deceased father in the policy should be awarded to the daughter.

As the majority points out, children as beneficiaries of an insurance policy mandated by a divorce decree have a vested equitable interest in the proceeds of the policy which cannot be divested by a later formal change of beneficiary. *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 380, 754 P.2d 993 (1988); *Standard Ins. Co. v. Schwalbe*, 110 Wn.2d 520, 523, 755 P.2d 802 (1988).

The majority, in support of its ultimate conclusion, relies on cases in which the obligated parent successfully challenged on appeal the trial court's decree requiring the parent to maintain minor children as beneficiaries of the parent's policy. Those cases hold that such decrees amount to an award of property to the children and the trial court exceeds its authority where the award is not limited in the amount or extent needed to secure or pay the parent's child support obligation. Majority opinion, at 862 (citing *Sutherland v. Sutherland*, 77 Wn.2d 6, 10, 459 P.2d 397 (1969); *In re Marriage of Donovan*, 25 Wn. App. 691, 612 P.2d 387 (1980). «11»

«11» *Riser v. Riser*, 7 Wn. App. 647, 501 P.2d 1069 (1972), cited by the majority, was not an appeal challenging the divorce court's authority to award property in the form of an obligation to maintain insurance benefits for minor children. At issue was the interpretation of an unappealed decree which incorporated a property settlement agreement. The court there held that the decree awarding the policies to the father, subject to the obligation to maintain the policies with the children as irrevocable beneficiaries until the children reached majority, was a provision in addition to support and maintenance requiring policy benefits to be paid without regard to any balance of support/maintenance that, but for the death of the father, would have become payable.

Here we are not dealing with an appeal from the divorce decree challenging the award of the insurance benefits. The Sager decree was never appealed. The case before us is much like the issue resolved by an opinion of this division rendered in *Puckett v. Puckett*, 41 Wn. App. 78, 702

P.2d 477, review denied, 104 Wn.2d 1018 (1985). In Puckett the decree provided for child support payments as well as requiring the father to maintain an existing Pan American Life Insurance policy for the benefit of his minor child. Prior to his death, the father changed the beneficiary of the policy to his estate and by his will provided that the child was to receive \$90,000 of the policy proceeds which then totaled \$187,500. The trial court ruled that the policy was only security for the decedent's support obligation, which was satisfied by the \$90,000 bequest, and that the estate was entitled to the insurance benefits. This court disagreed and awarded the entire policy benefits to the child. In support of its ruling the court there stated:

For all purposes, the obligation to maintain the Pan American policy for Jai Ann is a property provision without restriction. The terms of the divorce decree clearly express this intent. It may well be, as decedent's estate argues, that the decedent did not intend such an outcome or that the divorce court lacked the authority to award property to the child over and above the support obligation. Sutherland v. Sutherland, *supra*. However, decedent neither contested the divorce proceedings, nor appealed the default divorce decree. We will not look behind the face of the judgment now. Thompson v. Thompson, 82 Wn.2d 352, 359, 510 P.2d 827 (1973); Svatonsky v. Svatonsky, 63 Wn.2d 902, 904, 389 P.2d 663 (1964).

Puckett, 41 Wn. App. at 83.

In support of its holding the majority erroneously concludes that the provision regarding insurance in the Sager decree is ambiguous and then construes the decree to have included something that may have been intended in light of limited authority of the court to award property to children but was never expressed. In so doing, the majority has misapplied the tenets governing the determination of the intent of a judicial decree.

The construction of a dissolution decree is a question of law. Byrne v. Ackerlund, 108 Wn.2d 445, 739 P.2d 1138 (1987). A reviewing court, charged with the task of ascertaining the intended effect of a divorce decree, is limited to examining the provision of the decree and if the decree is unambiguous it is not open to construction. Puckett. If the judgment is ambiguous, the court seeks to ascertain the intention of the court entering the decree guided by the general rules of construction applicable to statutes, contracts and other writings. Callan v. Callan, 2 Wn. App. 446, 448-49, 468 P.2d 456 (1970). An instrument is ambiguous when its terms are uncertain or susceptible to more than one meaning. Harding v. Warren, 30 Wn. App. 848, 850, 639 P.2d 750 (1982).

In interpreting a statute, a court cannot read into a clear statute that which it may believe the Legislature intended but failed to express. Automobile Drivers & Demonstrators Union Local 882 v. Department of Retirement Sys., 92 Wn.2d 415, 598 P.2d 379 (1979), appeal dismissed, 440 U.S. 1040 (1980); Vita Food Prods., Inc. v. State, 91 Wn.2d 132, 587 P.2d 535 (1978). The same applies to a court's interpretation of a former judgment or decree. Callan.

It may be that the judge intended the insurance provision to be a means of securing support obligations, but one cannot glean that from the decree itself. One thing is certain, on that score the provision is clear and unambiguous.

The decree governing the insurance provision is contained in paragraph 8, which in its entirety states:

8. Medical and Life Insurance: The petitioner, OCIE (NMI) SAGER, shall make the minor children of the parties . . . beneficiaries of the medical and life insurance policies which exist through his place of employment.

This provision is placed three paragraphs down from the provision for child support payments; it does not limit the amount of insurance benefits in any way, shape, or form; and neither does it limit the effectiveness of the grant to the minority of the children.

I will concede that such a provision exceeds the court's authority and if it was challenged it should have been modified, but it is not ambiguous and thus subject to the majority's construction.

In the case before us the decree expressly awards the insurance policy benefits to the children. No appeal was taken from that award. We should not look behind the face of the judgment now. I would hold that the daughter is entitled to the deceased father's entire interest in the policy.