IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 16, 2016 Session

ROSE COLEMAN v. BRYAN OLSON

Appeal from the Circuit Court for Montgomery County
No. MCCCCVDN130157 Ross H. Hicks, Judge

No. M2015-00823-COA-R3-CV – Filed October 20, 2016

This appeal concerns two disputes between the widowed husband and mother of a deceased woman: (1) the proper party to whom the woman's life insurance proceeds are owed; and (2) a request for grandparent visitation. We conclude that the trial court erred in failing to return the life insurance beneficiary to the status quo that existed prior to wife's violation of the automatic injunction pursuant to Tennessee Code Annotated Section 36-4-106(d)(2). The proceeds from the life insurance policy are therefore awarded to husband. We vacate, however, the trial court's seizure of the grandmother's Bank of America account and remand for further proceedings to determine if the funds contained therein represent the remainder of the life insurance proceeds improperly paid to the grandmother. We further conclude that the trial court erred in awarding grandparent visitation, where there was no evidence of opposition to visitation prior to the filing of the grandparent visitation petition. Reversed in part, vacated in part, and remanded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part; Vacated in Part; and Remanded

J. STEVEN STAFFORD, P. J., W.S., delivered the opinion of the court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Travis N. Meeks, Clarksville, Tennessee, for the appellant, Bryan Olson.

Christopher J. Pittman and Zachary L. Talbot, Clarksville, Tennessee, for the appellee, Rose Coleman.

OPINION

Background

Defendant/Appellant Bryan Olson ("Father") and Jessica Olson ("Mother") were married in 2007. The couple's son ("the child") was born in 2008. In the summer of 2012, Father and Mother began having marital difficulties because Mother believed that Father was having an affair. At the time, Mother was pregnant with the couples' second child. The acrimony reached a breaking point on June 30, 2012, when Father and Mother's dispute resulted in Mother physically pushing Father. Although Mother initially called the police, she was arrested for pushing Father. Upon her release from jail, Mother moved from the marital home into the home of her friend, Jessica Mims. In addition, Mother spoke with a co-worker at the bank where she worked about removing Father from "everything" that had Father's name on it. At some point, Mother also spoke with her mother, Rose Coleman ("Grandmother") about removing Father from her financial accounts.

Mother filed a complaint for divorce against Father on July 5, 2012, in Montgomery County Chancery Court. Mother alleged grounds of inappropriate marital conduct, adultery, and irreconcilable differences. Upon the filing of the divorce complaint, an automatic injunction pursuant to Tennessee Code Annotated Section 36-4-106(d) issued preventing Mother and Father from, *inter alia*, changing the beneficiary on their life insurance policies.

Unfortunately, Mother began experiencing significant physical symptoms, including severe vomiting, around July 9, 2012. Mother sought treatment at her local emergency room, but was released shortly thereafter. In a text message between Mother and Grandmother on that day, Grandmother brought up the fact that Mother may have life insurance policies naming Father as beneficiary and suggested that Mother change the beneficiary to the child with Grandmother "as admin." Mother's symptoms progressed to the point to where she again sought medical attention at her local emergency room on July 10, 2012. That evening, Mother was transported to Vanderbilt University Medical Center ("Vanderbilt"), where she was diagnosed with Stevens-Johnson syndrome, "a serious, sometimes fatal inflammatory disease . . . characterized by the acute onset of fever, bullae of the skin, and ulcers on the mucous membranes of the lips, eyes, mouth, nasal passage and genitalia." *Mosby's Dictionary of Medicine, Nursing, & Health Professions* 1691 (9th ed. 2013). Mother was thereafter admitted to Vanderbilt and Grandmother traveled from her home out-of-state to be with Mother.

On July 12, 2012, while Mother was hospitalized, Grandmother created a hand-written document naming herself as the primary beneficiary of Mother's life insurance policy, with the child named as a contingent beneficiary. Mother allegedly signed the document, Mother's friend notarized the document, and it was submitted to the insurance company. By July 14, 2012, however, Mother was apparently no longer able to write or make medical decisions, as Grandmother began signing documents on her behalf. Mother's symptoms progressed rapidly and she passed away on July 19, 2012. After Mother's death, the proceeds from Mother's life insurance policy were paid to Grandmother in accordance with the July 12, 2012 handwritten change of beneficiary.

During the approximately eight days that Mother was in the hospital, the child resided with Mother's friend. Although Father came to the hospital, neither Mother nor Grandmother would see him, and they apparently refused to provide Father with any information regarding the child's whereabouts. Only after Mother passed away was Father able to obtain the child. By all accounts, no one informed the child of the severity of Mother's condition until Father was required to inform the child of Mother's death when he picked him up from the friend's house.

After Mother's death, Grandmother filed a dependency and neglect petition in the Montgomery County Juvenile Court ("juvenile court") regarding the child. On August 27, 2012, the juvenile court entered an agreed order setting a final hearing on Grandmother's petition on November 5, 2012, and granting Grandmother visitation with the child in Grandmother's home state of Massachusetts for a period of nearly one month uninterrupted, from September 21, 2012 to October 19, 2012. The juvenile court thereafter continued the matter several times without allowing the parties an opportunity to present any evidence. During this time, it appears that Grandmother was allowed month-long visitation with the child every other month. On January 24, 2013, Father filed a petition for a writ of certiorari in the Montgomery County Circuit Court ("trial court") asserting that the juvenile court had no authority to hear a grandparent visitation matter or order visitation without a finding of substantial harm. On February 13, 2013, Grandmother non-suited her juvenile court proceeding. Father's petition for a writ of certiorari was eventually denied.[1]

In the meantime, on February 12, 2013, Grandmother filed a petition for grandparent visitation pursuant to Tennessee Code Annotated Section 36-6-306. In her petition, Grandmother alleged that due to the juvenile court order allowing month-long visits with the child, substantial harm would result if Grandmother was not allowed to continue significant visitation with the child. Nothing in Grandmother's petition, however, suggested that Father opposed visitation.

On March 1, 2013, Father filed an answer to Grandmother's grandparent visitation petition. Therein, Father denied that he had ever opposed Grandmother's visitation requests. Father therefore argued that court-ordered grandparent visitation was not appropriate under the statute. On March 12, 2013, Father amended his answer to allege a counter-petition against Grandmother. In his counter-petition, Father asserted that he was entitled to the proceeds of Mother's life insurance policy because the change in beneficiary letter was

[1] The order that denies Father's petition is drafted as an order granting the petition. Rather than signing the order, however, it appears that the trial court merely hand-wrote "Denied" at the bottom of the order with his signature. The order denying Father's petition for a writ of certiorari, however, did not comply with Rule 58 of the Tennessee Rules of Civil Procedure and therefore was not final. The trial court entered an order on September 30, 2016, nunc pro tunc to January 25, 2013, denying the petition that fully complied with Rule 58.

forged. Additionally, Father asserted that any change was the result of Grandmother's control over Mother prior to her death. Father therefore asked the trial court to require Grandmother to pay into court the $400,000.00 proceeds from Mother's life insurance policy.

The parties engaged in several discovery disputes.[2] The parties filed pre-trial briefs on November 12, 2014. In his pre-trial brief, Father noted that as a result of the filing of the divorce petition, the parties were enjoined from changing the beneficiaries on their life insurance policies. The trial court eventually held a hearing on November 14 and December 5, 2014.

Jenny Mims, Mother's friend, testified that Mother requested her assistance in changing the beneficiary of her life insurance policy. According to Ms. Mims, Grandmother drafted the document, but Mother signed. Having witnessed Mother signing the document, Ms. Mims then notarized the document and assisted in it being forwarded to the insurance company. Ms. Mims testified that Mother was coherent and lucid at the time. Although Mother's eyes later became swollen and her hands blistered so as to prevent her from signing documents, Ms. Mims explained that those symptoms had not progressed to prevent Mother from signing the document on July 12, 2012. Further, Ms. Mims testified that it did not appear that Grandmother was placing any pressure on Mother to cause her to change the beneficiary on the policy. Ms. Mims agreed that Mother's intent in changing the beneficiary of her insurance policy was to name her child as the beneficiary; however, Ms. Mims explained that Mother was concerned that Father would receive the funds, rather than the child, due to the child's minority. Accordingly, Mother "wanted [Grandmother] to get the funds so that they would be used for [the child]." Ms. Mims testified that Mother's primary concern was keeping the money out of Father's hands.

Another of Mother's friends, Jessica Stevenson, also witnessed Mother sign the change in beneficiary form. Ms. Stevenson likewise testified that Mother signed the form, at which time she was lucid and able to communicate by writing notes. Ms. Stevenson also testified that there was nothing to give the impression that the change in beneficiary was the result of pressure by Grandmother.

Grandmother likewise testified that she did not influence Mother to change the beneficiary on her life insurance policy. According to Grandmother, Mother was the person to initially raise the subject of changing her beneficiary after the altercation on June 30, 2012. Grandmother testified that on July 12, 2012, when Mother signed the letter, Mother was able

[2] The record on appeal contains several documents pertaining to these disputes. Because neither party raises discovery issues on appeal, these documents were properly excluded from the record. *See* Tenn. R. App. P. 24 ("The following papers filed in the trial court are excluded from the record: . . . (2) all papers relating to discovery, including depositions, interrogatories and answers thereto, reports of physical or mental examinations, requests to admit, and all notices, motions or orders relating thereto[.]").

to make her own decision and able to sign her name, despite the fact that she was physically restrained at time. Grandmother explained that Mother's intention in naming her as beneficiary was to ensure that the funds were used for the child's benefit.

Grandmother testified that once she received the life insurance proceeds, she used the proceeds to pay for funeral expenses for Mother, for attorney's fees associated with this litigation, for a $50,000.00 college fund for the child, and for other expenses such as travel that she attributed to being on behalf of the child.

Grandmother also testified about her close bond with the child. According to Grandmother, during Mother's life, she would visit with the child several times a year in both Tennessee and Massachusetts. After Mother's death, the substantial visitation that was ordered by the juvenile court only added to the bond between the child and Grandmother. Grandmother noted that while Father had not forbidden any visitation, Father carried considerable animosity toward Grandmother. Grandmother admitted that some of this animosity likely stemmed from her prior attorney's improper actions in the juvenile court proceedings. According to Grandmother, however, Grandmother and Father had never been on the best terms.

Grandmother testified that after the juvenile court proceeding was non-suited and she filed the instant grandparent visitation petition, it was difficult to obtain visitation with the child. Grandmother cited one incident wherein Father refused to allow visitation because of allegations that Grandmother "bad-mouthed" Father. Grandmother also noted that Father had for a period of time, indicated that visitation could only take place in Tennessee, rather than in Massachusetts, as had been previously allowed. Grandmother admitted that Father's reaction was the result of her refusing to inform Father that she intended to take the child to "Disney." Indeed, Grandmother indicated that she planned to keep these plans from Father until she "had [the child] in [her] hands." Grandmother testified that she had requested visitation around the November 14, 2014 trial date, but had been granted only two hours.

Finally, Grandmother asserted that she had been completely denied visitation with the child during fall break in 2014. Grandmother introduced a letter written to her from Father's counsel surrounding her request for fall break visitation. According to the letter:

> I spoke with my client and he doesn't have an objection to your client exercising the fall break with the child, but he is requesting that the visitation take place in Clarksville, Tennessee. My client is now in opposition to the visitation since he caught your client lying to him last time she had visitation in Massachusetts and he wants the [trial court] to make a determination as to whether or not visitation is in the best interest of the child given the fact that she is willing to lie to him about the whereabouts of the child. My clients are coming into town around the trial date to testify at trial. My client is willing to

> make concessions to make sure that your client does spend quality time with the child while she is here in town. However, nobody has made solid plans around the trial date. We would like to play it fast and loose and any visitation would take place in Clarksville.

Grandmother asserted that as a result of Father's intention to play "fast and loose" she was unable to book a flight to Tennessee and was therefore denied visitation with the child at that time.

Father admitted that he and Mother had engaged in an altercation that resulted in Mother's arrest on June 30, 2012. Despite this altercation, Father testified that he was not afraid of Mother. Still, Father admitted that he attempted to obtain an order of protection against Mother. Father also admitted that he texted Mother's friends and family, including Grandmother, a picture of Mother's mug shot. Father agreed that the demise of the marriage was a result of Mother's belief that he had been having an affair. Father denied the affair, but did admit to posting a picture with his now-girlfriend onto social media on the day prior to Mother's memorial service in Massachusetts, captioned that the two could not make their relationship "Facebook official." Father admitted that his now-girlfriend drove to Massachusetts with him for the memorial service and that they now live together.

Father testified that once he learned of Mother's illness, he attempted to visit her in the hospital but was turned away by hospital staff. Father believed that hospital staff had done so upon Grandmother's direction. Father also attempted to call Mother at the hospital, but Mother would not respond. Father testified that he was only informed that Mother's condition was life-threatening after she passed away. Father admitted, however, that he and Mother at the time had been engaged in a very acrimonious divorce, and that he had told Mother that her pregnancy was a "mistake." Further, Father admitted that when Mother initially informed him that she was going to the hospital, his only response was "Good luck with that."

Father next testified that when he asked Grandmother about the child's whereabouts, she refused to respond. Father admitted, however, that it was Mother's decision to prevent him from seeing the child, as he did not have information regarding the child's whereabouts even prior to Mother's hospitalization. Father only learned of the child's whereabouts from a third-party after Mother's death, when Father was finally able to retrieve the child.

Father stated that he had always been willing to facilitate visitation with Grandmother. Father testified that Grandmother had never liked Father, but that he did not particularly have an issue with Grandmother. Indeed, Father asserted that it was Grandmother that had initiated court proceedings to settle the visitation issue, not Father. Father testified, for example, that he attempted to coordinate visitation in the summer of 2014 with Grandmother, but that she insisted all communication take place through her counsel. The parties were able, however,

to coordinate Christmas vacation visitation in 2014 without the benefit of their counsel. Father admitted, however, that he lost some trust in Grandmother over her efforts to take the child to Disney World without his permission. According to Father, he had agreed to allow Grandmother visitation with the child in July 2013. Father, requested, however, that Grandmother provide him an itinerary. Grandmother refused and only provided Father with the child's flight number the day before she was set to pick up the child. When Father learned that the flight would involve a trip to Orlando, Florida, he objected to Grandmother taking the child to Disney World. Grandmother thereafter agreed to cancel the Disney World Trip. Father also could not recall sending text messages to a friend indicating that he wanted to move away and not tell Grandmother where they were going. Father also denied sending text messages indicating that Grandmother was "crazy" and that he did not want her around his child. A document purporting to show those text messages was introduced as an exhibit. Father also admitted that Grandmother was not able to exercise visitation during or around fall break, despite the fact that the child was in Massachusetts for a few days around that time. Father testified that the denial of visitation on fall break in 2014 was the result of Grandmother refusing to provide a date upon which she would be in Tennessee, rather than his refusal to provide her with a date to come to Tennessee. Father also denied that he had ever refused Grandmother visitation due to allegations that she was bad-mouthing him to the child.

According to Father, as result of Mother's death, he was saddled with considerable debts that had been accumulated jointly by the couple during their marriage. For example, Father testified that the couple owed roughly $230,000.00 in debt on their home, their cars, and a consolidation loan, all of which Father was required to shoulder after Mother's death. Father admitted, however, that he did receive a $15,000.00 retirement account of Mother's as a result of her death. Father also asserted that based on his familiarity with Mother's signature, he did not believe that Mother had signed the change in beneficiary letter. Father testified that despite his belief that Grandmother had forged Mother's signature on the change in beneficiary letter, he was willing to facilitate visitation with Grandmother.

The parties submitted competing expert handwriting analysis regarding Mother's purported signature on the change in beneficiary letter. At the close of the proof, the trial court directed the parties to submit proposed findings of fact and conclusions of law. In his proposed findings of fact and conclusions of law, Father noted that the automatic injunction entered in the divorce proceeding prevented Mother from changing the beneficiary of her life insurance policy. On February 12, 2015, the trial court entered a written memorandum opinion and order containing detailed findings of fact and conclusions of law. First, the trial court found that the signature on the change in beneficiary letter belonged to Mother, rather than being forged by Grandmother. According to the trial court, Mother intended to change the beneficiary "from her husband in order to [e]nsure that the insurance proceeds benefitted her child." The trial court further found, however, that "whether intentional or not, the change of beneficiary form prepared by [Grandmother] did not accomplish what [Mother]

intended. Instead of designating [the child] as the beneficiary, it named [Grandmother] as beneficiary." The trial court further found that, although Mother was suffering from a debilitating condition, she understood that she was removing Father's name from her life insurance policy and changing the beneficiary to another person. Rather than accomplishing Mother's true purpose, however, the trial court found that Grandmother "was inadvertently made beneficiary contrary to [Mother's] exact wishes." The trial court therefore found that there was undue influence in that the change in beneficiary letter did not align with Mother's intent. The trial court found, however, that there was no undue influence with respect to Mother's desire to change her beneficiary from Father. The trial court further found that an injunction was in place preventing Mother from changing the beneficiary of her life insurance policy and that Mother unintentionally violated the injunction. Regardless, the trial court concluded that the appropriate remedy was to ensure that the insurance proceeds were utilized for Mother's intended purpose, which was for the use and benefit of the child. As such, the trial court cited its equity power to hold that the insurance proceeds should be deposited with the court for the use and benefit of the child. The trial court further found that while some expenses that had been paid from the proceeds were appropriate, some, including Grandmother's attorney's fees, were not. The trial court ruled that a further hearing would be necessary for Grandmother to account for her use of the proceeds. The trial court also ordered Grandmother to pay all remaining funds into the court.

The trial court also awarded Grandmother visitation with the child, finding that there was a rebuttable presumption of substantial harm due to the death of Mother. With regard to the cessation of the grandparent relationship, the trial court found that although Father had not strictly opposed visitation, the acrimonious relationship with the parties would likely lead to dispute on this issue in the future. The trial court therefore ordered that Grandmother was entitled to a week of visitation after Christmas, two weeks in the summer, and two three-day weekends throughout the year.

On March 3, 2015, Grandmother filed a motion to alter or amend on the issue of undue influence. On March 4, 2015, and April 7, 2015, Grandmother paid the sums of $215,593.47 and $7,500.00 into the Clerk of the Court. These amounts represented the remainder of the insurance proceeds that had not yet been spent. The trial court held an additional hearing and issued a supplemental ruling on April 22, 2015. First, the trial court found that Grandmother had received $393,000.00 in life insurance proceeds. The trial court ruled that Grandmother was required to pay into the Court $56,336.04 as reimbursement for expenses that were not for the benefit of the child. The trial court further ruled that while the expense for a college fund for the child was appropriate, Grandmother was not to have any indicia of ownership or control over the account. The trial court ordered that Grandmother was required to repay $30,544.00 of the over $71,000.00 of the proceeds that Grandmother had used for attorney's fees. The trial court also awarded Father $15,000.00 in attorney's fees and also awarded the guardian ad litem's attorney's fees from the insurance proceeds. As such, judgment was entered against Grandmother in the amount of $86,880.00. The trial

court finally noted that it had previously frozen Grandmother's Bank of America account in the amount of $50,000.00 and therefore ordered Grandmother to "immediately pay into [c]ourt any remaining balance in the Bank of America account." Grandmother filed a second motion to alter or amend and to stay the judgment pending appeal. The trial court denied the pending motions on May 27, 2015.

Issues Presented

As we perceive it, there are two issues in this case:

1. Whether the trial court erred in its decision to award the life insurance proceeds to Grandmother in trust for the child?
2. Whether the trial court erred in granting Grandmother grandparent visitation pursuant to Tennessee Code Annotated Section 36-6-306?

Standard of Review

Because this case was heard by the trial court, sitting without a jury, we review the trial court's findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). No presumption of correctness, however, attaches to the trial court's conclusions of law, and our review is *de novo*. ***Blair v. Brownson***, 197 S.W.3d 681, 684 (Tenn. 2006) (citing ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000)). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. ***4215 Harding Road Homeowners Ass'n. v. Harris***, 354 S.W.3d 296, 305 (Tenn. Ct. App. 2011); ***Walker v. Sidney Gilreath & Assocs.***, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000).

Some of the issues in this case require us to interpret statutes. Our consideration of these issues "is guided by well-established rules of statutory construction. The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." ***Owens v. State***, 908 S.W.2d 923, 926 (Tenn. 1995) (citing ***State v. Sliger***, 846 S.W.2d 262, 263 (Tenn. 1993)). "[W]e presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing." ***In re Estate of Tanner***, 295 S.W.3d 610, 613 (Tenn. 2009) (citing ***In re C.K.G.***, 173 S.W.3d 714, 722 (Tenn. 2005)). When a statute is clear, we apply the plain meaning without complicating the task. ***Eastman Chem. Co. v. Johnson***, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. ***Abels ex rel. Hunt v. Genie Indus., Inc.***, 202 S.W.3d 99, 102 (Tenn. 2006). Finally, we presume that the Tennessee General Assembly "has knowledge of its prior enactments and knows the state of the law at the time it passes legislation." ***Owens***, 908 S.W.2d at 926 (citing ***Wilson v. Johnson County***, 879 S.W.2d 807, 810 (Tenn. 1994)).

Discussion
Life Insurance Beneficiary

Father first argues that the trial court erred in awarding the proceeds from Mother's life insurance policy to Grandmother, in trust for the child, where Mother's action in changing the beneficiary on her life insurance policy violated the temporary injunction issued automatically as a result of Mother's divorce complaint. In contrast, Grandmother argues that the trial court correctly found that Mother intended to remove Father as the beneficiary of her life insurance proceeds, but erred in placing the proceeds in a constructive trust for the child. In the alternative, Grandmother argues that even if the trial court correctly placed the life insurance proceeds in trust for the child, the trial court erred in finding that some of her use of the insurance proceeds was not for the use and benefit of the child. We begin with Father's argument concerning the effect of the automatic injunction on Mother's action in changing the beneficiary of her life insurance policy.

Pursuant to Tennessee Code Annotated Section 36-4-106(d), "[u]pon the filing of a petition for divorce or legal separation, and upon personal service of the complaint and summons on the respondent" certain specified "temporary injunctions shall be in effect against both parties until the final decree of divorce or order of legal separation is entered, the petition is dismissed, the parties reach agreement, or until the court modifies or dissolves the injunction[.]" Of the injunctions listed in Section 36-4-106(d), subsection (2) is at issue in this case:

> An injunction restraining and enjoining both parties from voluntarily canceling, modifying, terminating, assigning, or allowing to lapse for nonpayment of premiums, any insurance policy, including, but not limited to, life, health, disability, homeowners, renters, and automobile, where such insurance policy provides coverage to either of the parties or the children, or that names either of the parties or the children as beneficiaries without the consent of the other party or an order of the court. "Modifying" includes any change in beneficiary status.

Tenn. Code Ann. § 36-4-106(d)(2). Thus, upon the filing of a divorce complaint, a temporary injunction is automatically issued that prevents either party from, *inter alia*, changing the beneficiary on any insurance policy that covers either of the parties or their children or names either of the parties or their children.

There is no dispute in this case that the parties were married in 2007 and that Mother held a significant life insurance policy in which Father was named beneficiary. There is also no dispute that Mother filed a divorce complaint on July 5, 2012, at which time the above injunction went into effect against both parties. Finally, there is also no dispute that despite

the above injunction being in effect, Mother changed the beneficiary on her life insurance policy on July 12, 2012, a mere week after filing for divorce. Under these circumstances, Father asserts that there was a clear violation of the Section 36-4-106(d)(2) injunction and that the appropriate remedy is to return the beneficiary to the status quo that existed prior to the violation.

As an initial matter, Grandmother first asserts that this issue is waived because Father did not appropriately raise it in the trial court. It is well-settled that parties are not permitted to raise issues and arguments on appeal that were not first raised in the trial court. *See* ***Barnes v. Barnes***, 193 S.W.3d 495, 501 (Tenn. 2006) (citing ***Simpson v. Frontier Cmty. Credit Union***, 810 S.W.2d 147, 153 (Tenn. 1991)); ***City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey***, 126 S.W.3d 897, 905–06 (Tenn. 2004). In ***Powell v. Community Health Systems, Inc.***, 312 S.W.3d 496 (Tenn. 2010), however, the Tennessee Supreme Court held that: "Parties invoking this principle have the burden of demonstrating that the issue sought to be precluded was, in fact, not raised in the trial court." ***Id.*** at 511 (citing ***Fayne v. Vincent***, 301 S.W.3d 162, 171 (Tenn. 2009)). As the ***Powell*** Court explained:

> Determining whether parties have waived their right to raise an issue on appeal should not exalt form over substance. Appellate courts must carefully review the record to determine whether a party is actually raising an issue for the first time on appeal. ***Fayne v. Vincent***, 301 S.W.3d at 171 n. 6. The fact that the party phrased the question or issue in the trial court in a different way than it does on appeal does not amount to a waiver of the issue. ***Fahrner v. SW Mfg., Inc.***, 48 S.W.3d 141, 143 n. 1 (Tenn. 2001) (noting that "the failure to use the right label does not result in a waiver").

Powell, 312 S.W.3d at 511. In ***Powell***, the plaintiff asserted on appeal that the defendant-hospital waived its right to rely on a statutory privilege. In response, the defendant-hospital argued that the plaintiff "should not be permitted to make her waiver argument in [the Supreme] Court because she did not make it in the courts below." ***Id.*** Applying the above rule, however, the Powell Court held that the plaintiff had sufficiently raised her waiver argument in the trial court despite not ever using the terms "'waive' or 'waiver' in her papers" because her argument put both the trial court and the defendant-hospital "on notice that she opposed the hospital's claim of privilege[.]" ***Id.***

In this case, we cannot agree with Grandmother that Father failed to raise the issue of the applicability of the Section 36-4-106(d)(2) injunction in the trial court. First, as Grandmother herself concedes in her appellate brief, Father first raised the applicability of Section 36-4-106(d)(2) in his pre-trial brief filed two days before the first date of the hearing. Thus, Father first raised the issue of the statutory injunction under Section 36-4-106(d)(2) prior to trial. Grandmother cites no law to suggest that the applicability of the Section 36-4-106(d)(2) injunction was an affirmative defense that was required to be pleaded earlier or

with the specificity typically reserved for other types of claims. *See* Tenn. R. Civ. P. 8.03 (enumerating some of the claims that constitute affirmative defenses and therefore must be pleaded "affirmatively"); Tenn. R. Civ. P. 9.02 (requiring that "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity"). Father again raised the issue of Mother's alleged violation of Section 36-4-106(d)(2) at trial and in his post-trial proposed findings of fact and conclusions of law. Indeed, the trial court specifically found that Mother violated the Section 36-4-106(d)(2) injunction by changing the name of her beneficiary. Accordingly, we cannot conclude that Grandmother has met her burden to show that she was not on notice of Father's claim that the change in beneficiary was a violation of Section 36-4-106(d)(2).

Having determined that the question of whether Mother violated Section 36-4-106(d)(2) is properly at issue on this appeal, we next turn to Grandmother's argument that there was no violation of the automatic injunction. Grandmother essentially argues the change in beneficiary was "executed by the [t]rial [c]ourt, who has equitable power to grant a change in beneficiary per the terms of Tenn. Code Ann. § 36-4-106(d)(2), and not a change executed by a party to the divorce who would otherwise be subject to the injunction." This argument is unavailing. Here, the trial court specifically found that Mother violated the Section 36-4-106(d)(2) injunction by changing the name of her life insurance beneficiary. The evidence preponderates in favor of this finding. Despite the fact that the Section 36-4-106(d)(2) injunction was in place, on July 12, 2012, Mother voluntarily caused Father to be removed as the beneficiary of her life insurance policy.[3] The trial court's action in modifying Mother's designation would not have been triggered but for Mother's action in altering the beneficiary of her life insurance policy. Clearly, Mother's action violated the plain language of Section 36-4-106(d)(2).

Having determined that Mother violated the Section 36-4-106(d)(2) injunction, we must now determine the appropriate remedy for the violation. Father contends that the appropriate remedy in this case is that "the life insurance funds should [be] placed with the original beneficiary—[Father]." In contrast, Grandmother asserts that even where a violation of the Section 36-4-106(d)(2) injunction has occurred, Father's only "recourse is against the party who violated the injunction, the estate of [Mother], rather than the newly named beneficiary, [Grandmother]." Neither party cites any law to support their contentions regarding the appropriate remedy for violations of Section 36-4-106(d)(2).

[3] At trial, Father argued that the change was not voluntary because it was the product of Grandmother's undue influence. The trial court specifically found that Mother's decision to remove Father as the beneficiary of her life insurance proceeds was not the result of undue influence. Rather, the trial court only believed that there was "accidental undue influence" as to whom Mother ultimately named as the substitute beneficiary. Father does not argue in his initial brief to this Court that Mother's decision to remove Father as beneficiary was the product of undue influence. Accordingly, we assume for purposes of this appeal that Mother's decision to remove Father as beneficiary was voluntary.

Although Tennessee Code Annotated Section 36-4-106(d) was enacted approximately fifteen years ago and has been implicated in virtually every divorce case since that time,[4] no Tennessee cases have considered the appropriate remedy when one party violates the automatic injunction and then dies while the divorce is pending. Indeed, from our research, it appears that only one Tennessee case has considered the effect, if any, of a party's action when it violates the automatic injunction. *See* ***Isbell v. Hatchett***, No. W2014-00633-COA-R3-CV, 2015 WL 756883 (Tenn. Ct. App. Feb. 23, 2015). In ***Isbell***, the plaintiff and the defendant engaged in a dispute over the termination of their business relationship, resulting in a breach of contract lawsuit. Eventually, the plaintiff and the defendant entered into a settlement agreement, wherein the defendant agreed to pay the plaintiff $225,000.00. ***Id.*** at *1. At the time of the agreement, however, the defendant was a party to a pending divorce. An automatic divorce injunction therefore prevented him from "transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party or an order of the Court, of any marital or separate property." ***Id.*** at *2 (quoting Tennessee Code Annotated Section 36-4-106(d)(1)(A)).

Shortly after entering into the agreement, the defendant defaulted on his obligations. The defendant contended that the he was not permitted to comply with the agreement because it would violate the automatic divorce injunction. Thereafter, the defendant petitioned the divorce court to remove the injunction, but his request was denied. Eventually, the plaintiff filed a second lawsuit against the defendant and his wife for tortious interference with a contractual obligation, abuse of judicial process, violation of the implied covenant of good faith and fair dealing, and conspiracy. The trial court granted the defendant and his wife's motion to dismiss. First, the trial court found that a prior court had previously determined that the settlement agreement between the plaintiff and defendant was void because it violated the Section 36-4-104 injunction. Because several of the claims were predicated on the existence of a valid contract, the trial court therefore dismissed those claims in the absence of an enforceable contract between the plaintiff and defendant. ***Id.*** at *4.

On appeal, the plaintiff argued that the trial court erred in dismissing her contract claims because the settlement agreement was not void, but merely voidable. The Court of Appeals agreed. First, the ***Isbell*** Court noted that although the trial court appeared to have applied preclusive effect to a prior court's determination that the settlement agreement was void, the order was not entitled to preclusive effect because the order was not final. ***Id.*** at *6

[4] Originally, the Section 36-4-106(d) injunctions applied in all cases "except on the sole ground of irreconcilable differences." *See* 2001 Tennessee Laws Pub. Ch. 280 (H.B. 1136), *enacted as* Tenn. Code Ann. § 36-4-106(d) (2001). The statute was amended in 2007, however, to remove the above limitation. *See* 2007 Tennessee Laws Pub. Ch. 187 (S.B. 942), eff. July 7, 2007. Section 36-4-106(d) injunctions now apply to all divorces in Tennessee.

("[F]or res judicata to apply, the judgment in the prior case must have been final.") (citing ***Sims v. Adesa Corp.***, 294 S.W.3d 581, 586 (Tenn. Ct. App. 2008)).

The Court of Appeals further held that the settlement agreement was not void, but merely voidable, for purposes of determining whether a valid contract ever came into existence that could support the plaintiff's causes of actions predicated on the existence of a contract. ***Isbell***, 2015 WL 756883, at *7. As the Court explained:

> The settlement agreement between [the defendant] and [the plaintiff] was a voidable contract. At the time the settlement agreement was entered, [the defendant] was subject to the Section 36-4-106 injunction. It is important to note, however, that the Section 36-4-106 injunction is not absolute; it allows for transfer of marital assets under certain circumstances. Specifically, [the defendant] was enjoined from "transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party or an order of the Court, of any marital or separate property." Accordingly, [the defendant] had the power to ratify the contract and make it enforceable by obtaining [wife's] consent to his performance or a court order allowing him to perform. . . . Without such permission from [wife] or the court, the contract was merely voidable on his part because compliance with its terms would have required him to violate the Section 36-4-106 injunction. . . . Although it is not clear the precise time at which [the defendant] manifested an election to extinguish the settlement agreement, we conclude that, prior to his doing so, the parties were contractually bound by the legal relations the settlement agreement created.

Id. (citations omitted) (citing *Restatement (Second) of Contracts* § 7 cmt. a ("Typical instances of voidable contracts are those where . . . breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract."); § 8 cmt. a ("[O]ne party to an unenforceable contract may have a power to make the contract enforceable by all the usual remedies . . . .")). Thus, the Court of Appeals held that for the limited purpose of determining whether a contract had ever come into existence that could give rise to the plaintiff's claims requiring a contract, the fact that the settlement agreement violated the Section 36-4-106(d)(1) automatic injunction was not a bar to a finding that a contract had existed at some point prior to repudiation. ***Isbell***, 2015 WL 756883, at *7.

The holding in ***Isbell***, however, does not address the question presented in this case—the appropriate remedy when a party to a divorce violates the automatic injunction to deprive his or her spouse of their interest in certain property. Indeed, in a separate case, the plaintiff in ***Isbell*** had attempted to enforce the settlement agreement against the defendant. ***Id.*** at *2. The trial court in that case, however, refused to enforce the agreement because it concluded

that the agreement was unenforceable due to the violation of the Section 36-4-106(d)(1) injunction. ***Id.*** at *3. The ***Isbell*** Court apparently agreed that the settlement agreement was not a "presently valid and enforceable contract," instead holding that all that was required for the plaintiff to maintain her causes of action predicated on the existence of a contract was merely that the settlement agreement "effectuated a legal relationship between" the plaintiff and the defendant. Because the defendant's wife could have consented to, or the divorce court could have authorized, the defendant's performance under the settlement agreement, the Court of Appeals concluded that a sufficient legal relationship was created prior to the repudiation of the contract. ***Id.*** at *7.

In this case, the dispute does not involve whether a legal relationship was effectuated between two parties so as to allow for contract-based claims to be raised against one party; instead, the issue in this case involves the proper remedy for Mother's violation of the Section 36-4-106(d)(2) injunction after her death. No Tennessee appellate cases have directly addressed this issue. Accordingly, we first consider the purpose of the Section 36-4-106 automatic injunction.

Shortly after the enactment of Tennessee Code Annotated Section 36-4-106(d), one Tennessee legal commentator wrote that its purpose was to "maintain the 'status quo' through[out] the divorce[.]"Amy J. Amundsen, *Mutual Temporary Injunctions in Divorce Cases*, Tenn. B.J., Nov. 2001, at 17. Indeed, the general purpose of temporary injunctive relief under Tennessee law, including the Section 36-4-106(d) injunction, has been described as an effort "to preserve the status quo[.]" Tenn. Cir. Ct. Prac. § 31:4. Other sources have described the purpose of similar statutory injunctions as "to preserve the marital status quo and to prevent dissipation of marital assets during the pendency of a dissolution proceeding." *Colo. Est. Planning Handbook* § 31.1.5, 2012 WL 6778265, at 1. We note that one case in this Court does suggest that the appropriate remedy for a violation of Section 36-4-106(d) may be a return to the status quo. *See* ***Kilgore v. Kilgore***, No. M2006-00495-COA-R3-CV, 2007 WL 2254568 (Tenn. Ct. App. Aug. 1, 2007). In ***Kilgore***, the plaintiff husband removed the defendant wife from his medical insurance shortly after the divorce complaint was filed. The trial court determined that the plaintiff husband's actions violated the Section 36-4-106(d)(2) injunction and ordered that the plaintiff husband return the situation to the status quo by reinstating the defendant wife's medical insurance. Neither party, however, raised the trial court's order as an issue on appeal; therefore, the Court of Appeals did not directly address the propriety of the trial court's decision to return the situation to the status quo that existed prior to the divorce proceedings.

Although Tennessee Courts have not directly addressed the dispute at issue in this case, others courts across the country have grappled with this question to mixed results. In one of the more recent state supreme court cases to address this question, ***Aither v. Estate of Aither***, 2006 VT 111, 913 A.2d 376, 379 (Vt. 2006), the Vermont Supreme Court framed the issue as "whether a divorce proceeding's abatement also divests the trial court of equitable

jurisdiction to enforce orders entered before the abatement." ***Id.*** at ¶ 8. In ***Aither***, like in this case, the husband changed the beneficiary of his life insurance policy in violation of a family court order prohibiting him from disposing of any marital property during the pendency of the divorce. The husband died while the order was still in effect, and the wife filed a motion to enforce the family court order and obtain the life insurance proceeds. The trial court denied the motion, finding that it lacked jurisdiction to enforce the order due to the husband's death, which abated the divorce proceeding.

On appeal, the Vermont Supreme Court noted that other courts are divided on this issue. First, the Vermont Supreme Court noted that many states hold the abatement of the divorce proceeding "also divests the trial court of the equitable power to enforce its pre-abatement orders." ***Aither***, 2006 VT 111, at ¶ 8 (citing ***Am. Family Life Ins. Co. v. Noruk***, 528 N.W.2d 921, 923 (Minn. Ct. App. 1995) ("When one of the parties dies . . . a temporary restraining order has no effect and the court's jurisdiction to enforce it ends."); ***Estate of Hackler v. Hackler***, 44 Va. App. 51, 73, 602 S.E.2d 426, 437 (Va. Ct. App. 2004) (holding that trial courts lack jurisdiction to remedy violations of injunctions where a divorce has been abated by a party's death)). Other courts, however, "have determined that the abatement of a divorce by a party's death does not divest the trial court of jurisdiction to enforce pre-abatement orders." ***Aither***, 2006 VT 111, at ¶ 8 (citing ***Cent. States, S.E. & S.W. Areas Pension Fund v. Howell***, 227 F.3d 672, 675–76 (6th Cir. 2000) (applying Michigan law); ***Candler v. Donaldson***, 272 F.2d 374, 377 (6th Cir. 1959) (applying Michigan law); ***Webb v. Webb***, 375 Mich. 624, 134 N.W.2d 673, 674–75 (Mich. 1965) ("Transfers of property in violation of an injunction are invalid and may be set aside by the party to a divorce suit, and subsequent death of the injunction violator does not prevent the court from exercising such power."); ***Lindsey v. Lindsey***, 342 Pa. Super. 72, 492 A.2d 396, 398 (Pa. Super. Ct. 1985) (holding that, even after the death of a party, "the lower court had the authority to void the disposal of any marital property in violation of its injunction"); ***Standard Ins. Co. v. Schwalbe***, 110 Wash.2d 520, 755 P.2d 802, 805 (Wash. 1988) (holding that the trial court had equitable power to enforce its preliminary injunction prohibiting a change in insurance beneficiaries, despite the death of the violator). Finally, the Vermont Supreme Court cited one "similar[]" federal district court that held that while violations of temporary injunctions are not per se void, actions taken in violation of a temporary injunction "may be voided based on a balancing of equities." ***Aither***, 2006 VT 111, at ¶ 8 (citing ***Valley Forge Life Ins. Co. v. Delaney***, 313 F. Supp. 2d 1305, 1309 (M.D. Fla. 2002) (citing ***Wilharms v. Wilharms***, 93 Wis. 2d 671, 287 N.W.2d 779, 784 (1980) (remanding for an evidentiary hearing to consider relevant equitable factors affecting validity of transfer in violation of pre-abatement temporary order))).

The Vermont Supreme Court ultimately concluded that "the latter line of cases represents the better reasoning." ***Id.*** While the Court noted that death does abate a divorce action, the Court further held that "'a mechanistic application' of that rule would frustrate the

larger purpose of ensuring that courts have the power to enforce their own valid orders to avoid unjust results." ***Id.*** at ¶ 9. Because the Court further determined that a per se rule voiding all transfers in violation of temporary injunctions "would also have undesirable results[,]" the Court adopted a "rule requiring equitable balancing in such situations [to] provide[] sufficient flexibility for the . . . court to provide complete relief to the parties before it[.]" ***Id.***

In determining whether to allow wife enforcement of the family court order preventing transfers of marital property, the Vermont Supreme Court weighed the following factors: (1) the purpose of the family court order "to preserve the status quo pending the [] final determination of the parties' respective rights to the marital assets"; (2) the rule that "a court must have the power to enforce its own orders"; (3) the fact that the only way to meaningfully enforce family court orders regarding changes in life insurance beneficiaries is to allow the "court's jurisdiction [to] extend to post-abatement enforcement of those orders when equity requires it." ***Id.*** at ¶ 10–12 (citing ***Libow v. Freeport Drug Shop, Inc.***, 29 Misc.2d 928, 218 N.Y.S.2d 897, 898 (1961) ("[T]he purpose of a temporary injunction is to preserve the status quo pending the trial . . . ."); ***Lindsey***, 492 A.2d at 398 ("It is axiomatic that a court must have the power to enforce its own orders."). Under these circumstances, the Vermont Supreme Court held that the wife was entitled to seek enforcement of the family court order preventing the husband from changing the beneficiary on his life insurance policy. ***Id.*** at ¶ 13. In addition to ***Aither*** and the cases it cites, at least two more jurisdictions have adopted similar rules. *See* ***Briese v. Montana Pub. Employees' Ret. Bd.***, 2012 MT 192, ¶ 41, 366 Mont. 148, 160–61, 285 P.3d 550, 559 (Mont. 2012) (noting the split of authority discussed in ***Aither***, and holding: "At a minimum, we agree with those courts that have held that a court has equitable power to order a return to the status quo when a party violating a temporary restraining order has died."); ***Nw. Mut. Life Ins. Co. v. Hahn***, 713 N.W.2d 709, 712 (Iowa Ct. App. 2006) (noting the split of authority discussed in ***Aither*** and concluding: "We find the former line of cases to be generally more persuasive, and hold that a court may set aside a change in beneficiary of a life insurance policy made in violation of a temporary injunction."). *But see* ***Ex parte Thomas***, 54 So. 3d 356, 361 (Ala. 2010) ("[N]ot only does an interlocutory order that divides marital property dissolve upon the death of a party to the pending divorce action, an interlocutory order that "affect[s] the property rights of the parties to a divorce action may not be enforced after the death of one of the parties due to the abatement of that action.") (citing ***Ex parte Riley***, 10 So.3d 585, 587–87 (Ala. Civ. App. 2008) ("When a court has entered only an interlocutory order dividing marital property, that order abates upon the death of one of the parties to the divorce action.")); ***Topol v. Polokoff,*** 88 So. 3d 341, 343 (Fla. Dist. Ct. App. 2012) ("A temporary order seeking to preserve the status quo pending a final decree cannot be said to be a final decree devising property in it of itself, and thus, the order in this case did not survive the abatement of the dissolution proceedings.").

From our review, we conclude that the rule adopted in ***Aither*** is most consistent with Tennessee law. First, Tennessee law is clear that a divorce action is abated by the death of one party. *See* ***Blackburn v. Blackburn***, 270 S.W.3d 42, 47 (Tenn. 2008) ("It is a well-settled principle of law that a pending divorce action, being purely personal in nature, abates upon the death of one of the parties.") (citing ***Steele v. Steele***, 757 S.W.2d 340, 342 (Tenn. Ct. App. 1988)). Furthermore, as previously determined by this Court in ***Isbell***, an action taken in violation of the Section 36-4-106(d) injunction is not void per se, but is voidable depending on the circumstances. *See* ***Isbell***, 2015 WL 756883, at *7. Despite this fact, other Tennessee law leads us to the conclusion that the court must have the power to invalidate an action taken in violation of the automatic divorce injunction when justice requires, regardless of the death of one of the parties to a divorce. We note that like in ***Aither***, allowing the trial court to return the parties to the preexisting state of affairs when the Section 36-4-106(d) injunction is violated comports with the purpose of the statute to maintain the status quo throughout the divorce proceedings. *See* Tenn. B.J., Nov. 2001, at 17.

The Tennessee Supreme Court has likewise held that Tennessee courts must have the power to enforce their orders. ***Bates v. Taylor***, 87 Tenn. 319, 11 S.W. 266, 267 (1889) ("[F]or if the court has this jurisdiction the power to enforce the judgment must follow."). Indeed, it appears to this Court that many, if not most, violations of the Section 36-4-106(d)(2) prohibition against modifying the beneficiary on a life insurance policy will only come to light after the death of the insured. Depriving Tennessee courts of the ability to return life insurance beneficiaries to the status quo that existed prior to the violation of the automatic injunction because of the death of the insured would essentially render the prohibition in Section 36-4-106(d)(2) meaningless with regard to life insurance changes, as our courts would have no power to enforce the injunction after the death of a party. This Court cannot, however, "adopt an interpretation [of a statute] that renders the statute meaningless." ***Goodman v. City of Savannah***, 148 S.W.3d 88, 93 (Tenn. Ct. App. 2003) (citing ***Fletcher v. State***, 951 S.W.2d 378, 382 (Tenn. 1997)). We must therefore conclude that the Tennessee General Assembly intended that our courts would possess the power to enforce the prohibitions contained in Tennessee Code Annotated Section 36-4-106(d).

Additionally, this Court has previously held that a change in beneficiary on a life insurance policy could be set aside after the death of one party where the party was ordered by the court not to change the beneficiary. *See* ***Herrington v. Boatright***, 633 S.W.2d 781, 783 (Tenn. Ct. App. 1982). In ***Herrington***, the parties' divorce decree required that the husband keep the wife as the beneficiary on his life insurance policies. ***Id.*** at 782. After the husband's death, the wife learned that the husband had removed her as the beneficiary of the life insurance policies. The wife filed suit against the new beneficiary of the life insurance policies seeking to set aside the change in the beneficiary. The trial court held that the husband's action violated the divorce decree and declared the wife the "owner of the

proceeds of the policies." ***Id.*** The Court of Appeals affirmed the trial court, finding that while a life insurance beneficiary typically has no vested right in the proceeds:

> [W]here a divorce decree requires the husband to keep a life insurance policy in effect and denies him the right to change the beneficiary, then the wife as the named beneficiary has a vested interest in the policy. . . . Should the husband then attempt to change the beneficiary, the wife may assert her vested right.

Id. at 783 (citation omitted). Thus, the Court of Appeals held that the wronged spouse could maintain an action against the beneficiary of the life insurance policy on the ground that the change in beneficiary by her former spouse violated a court order prohibiting such a change. ***Id.*** We discern no distinction between the violation of an injunction specifically ordered by the trial court and the violation of an automatic statutory injunction.

Moreover, we note that, despite Grandmother's contention otherwise, this Court has previously held that in order to recover property wrongfully transferred by a deceased person prior to his or her death, the plaintiff need not sue the estate of the person where the property passes outside of the estate. *See* ***Seeber v. Seeber***, No. 03A01-9508-CV-00290, 1996 WL 165092 (Tenn. Ct. App. Apr. 10, 1996). In ***Seeber***, pursuant to the parties' marital dissolution agreement ("MDA"), husband conveyed to wife certain undivided one-half interests in property. After wife's death, husband requested that wife's personal representatives convey the properties back to him pursuant to the terms of the parties' divorce decree. When this did not occur, husband filed suit directly against the beneficiaries of wife's will who were set to inherit the property that husband claimed belonged to him. The trial court granted husband the relief he sought. ***Id.*** at *1.

On appeal, the beneficiaries argued that any action to enforce the parties' divorce decree abated upon the death of wife. According to the beneficiaries, husband was therefore required to enter an order of reviver and substitute wife's personal representative as the defendant. ***Id.*** at *3. The Court of Appeals disagreed:

> In the case sub judice, the failure to substitute the co-personal representatives as parties did not cause Husband's claims to abate, because T.C.A. § 30-2-320[5] is not applicable to a suit for specific performance of a contract for the

[5] Section 30-2-320 provides:

> All actions pending against any person at the time of that person's death, that by law may survive against the personal representative, shall be considered demands legally filed against the estate at the time of the filing with the clerk of the court in which the estate is being administered of a copy in duplicate of the order of revivor, one (1) of which copies shall be certified or attested, a notation of which shall be entered by the clerk in the record of claims,

> conveyance of real property. ***Wright v. Universal Tire, Inc.***, 577 S.W.2d 194 (Tenn. App. 1979). [An MDA] is essentially a contract between a husband and wife in contemplation of divorce proceedings. *See* ***Towner v. Towner***, 858 S.W.2d 888 (Tenn. 1993). In this proceeding, Husband seeks specific performance of the MDA agreement [with regard to real property]. . . . The general rule is that absent a showing that an estate is insolvent, real estate is not subject to administration by an estate's representatives, because title passes by operation of law to the devisees or heirs upon the death of the owner. ***First Southern Trust Co. v. Sowell***, 683 S.W.2d 680 (Tenn. App. 1984). Therefore, in a suit for specific performance of an agreement to convey realty, a personal representative is not a necessary party to the action, because the personal representative has no interest in the subject real property.

Id. at *4.

The same is true in this case. Here, the dispute between Father and Grandmother concerns the proper owner of the proceeds from Mother's life insurance policy. Like real property, "[i]t is well[-]settled that the proceeds of a life insurance policy payable to a designated beneficiary other than the personal representative do not become a part of the assets of the estate of the insured, and are not subject to administration and the payment of debts." ***Ogden v. Hooks***, 26 Tenn. App. 170, 168 S.W.2d 793, 796 (Tenn. 1941); *see also* 46A *C.J.S. Insurance* § 1951 ("The proceeds of a life insurance policy in which a third person is named as beneficiary generally belong exclusively to such a beneficiary as an individual. The proceeds are not the property of the heirs or next of kin of the insured, are not subject to administration or the laws of descent governing the distribution of the insured's personal property, and generally do not constitute an asset of the estate.") (footnotes omitted). Because the life insurance proceeds in this case never became assets of Mother's estate, we likewise conclude that Father was not required to sue Mother's estate to recover the life insurance proceeds of which he argues he was wrongfully deprived in violation of the Section 36-4-106(d)(2) injunction.

Like the Vermont Supreme Court in ***Aither***, we likewise hold that Tennessee law allows Father to petition for a return to the status quo that the Section 36-4-106 injunction "was intended to preserve." *See* ***Aither***, 2006 VT 111, ¶ 13. The question then becomes whether the equities in this case balance in favor of returning the life insurance policy to its status before Mother violated the automatic statutory injunction. While the ***Aither*** Court was required to remand to the trial court for the development of an adequate factual record regarding the equities of that particular situation, the record before us shows that the equities in this particular case favor a return of the insurance proceeds to Father.

> as in the case of other claims filed. Pending actions not so revived against the personal representative within the period prescribed in § 30-2-307(a) shall abate.

Father testified at trial that the couple had accumulated a number of debts during the marriage, including a home mortgage, two cars, and a consolidation loan. Had the couple divorced prior to Mother's death, those debts would have been equitably divided between the couple. *See* Tenn. Code Ann. § 36-4-121 ("In all actions for divorce or legal separation, the court having jurisdiction thereof may . . . equitably divide, distribute or assign the marital property between the parties without regard to marital fault in proportions as the court deems just."). Mother then would have presumably been free to change the beneficiary on her life insurance policy, absent further order from the divorce court. Because of Mother's untimely and tragic death, however, Father testified that he was obligated to pay all of the couple's accumulated marital debt. However, when Mother changed the beneficiary on her life insurance policy in clear violation of Section 36-4-106(d), she deprived Father of considerable funds from which to pay these marital debts that she helped to accumulate. Still, we cannot ignore Mother's clear desire that the child remain financially secure in the event of her death. Despite the unproven allegations in Grandmother's dependency and neglect petition, however, there are simply no facts in this case that would lead this Court to believe that Father will not adequately provide for the child if the life insurance proceeds are awarded to him. In this particular situation, we conclude that a return to the status quo prior to Mother's improper change in beneficiary is warranted.

Based on the foregoing, we conclude that equity supports Father's request that Grandmother be ordered to return the life insurance proceeds to him because Mother changed the beneficiary on her policy in violation of Tennessee Code Annotated Section 36-4-106(d)(2). Accordingly, all of the life insurance proceeds that were realized from Mother's life insurance policy should have been returned to Father. Because we conclude that all of the proceeds from Mother's life insurance policy should revert to Father, we need not consider what, if any, of Grandmother's expenditures were properly used for the benefit of the child. Because Grandmother was not legally entitled to the proceeds due to Mother's clear violation of the Section 36-4-106(d)(2) automatic divorce injunction, Grandmother was not permitted to utilize any of the proceeds from the insurance policy, regardless of their use.

Grandmother argues, however, that trial court erred in awarding Father the balance of her Bank of America account, when there was no evidence that the account contained funds that were attributable to the insurance proceeds. In his reply brief, Father asserts that the trial court correctly required Grandmother to repay "the funds remaining from [Mother's] life insurance proceeds held by the Montgomery Court Circuit Court Clerk." The parties therefore seem to be offering differing characterizations of the funds at issue: (1) Grandmother asserts that the funds contained in the Bank of America account were not attributable to the insurance proceeds; and (2) Father asserts that the funds in the Bank of America account represented the remainder of the insurance proceeds that were wrongfully obtained by Grandmother. The trial court's order cites no specific law in support of its

decision to freeze Grandmother's Bank of America account and does not specifically state that the funds contained therein represent insurance proceeds.

Pursuant to Rule 67.02 of the Tennessee Rules of Civil Procedure:

> When it is admitted by the pleading or examination of a party that the party has in his or her possession or control any money or other thing capable of delivery which is the subject of the litigation and which is being held by the party as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such other party, with or without security, subject to further orders of the court, and the court may require the sheriff or other proper officer to take the money or property and deposit it or deliver it in accordance with the orders of the court.

Thus, Rule 67.02 only authorizes the trial court to order a party to deposit funds into the court where money "belongs or is due to another party." In this case, the specific money in Grandmother's bank account only "belongs or is due to" Father if the funds therein are remaining proceeds from Mother's insurance policy. Under these circumstances, we vacate the judgment of the trial court and remand for reconsideration as to whether the funds in Grandmother's Bank of America account represent remaining proceeds from Mother's insurance policy. Only in that case may the trial court award those funds to Father. All other issues regarding the life insurance proceeds are pretermitted.

Grandparent Visitation

Father next argues that the trial court erred in awarding Grandmother visitation pursuant to Tennessee Code Annotated Section 36-6-306. Tennessee Code Annotated Section 36-6-306, commonly referred to as the Grandparent Visitation Statute, governs Grandmother's petition for visitation in this case. At the time of the filing of the petition at issue in this case, Section 36-6-306 provided, in pertinent part:

> (a) Any of the following circumstances, when presented in a petition for grandparent visitation to the circuit, chancery, general sessions courts with domestic relations jurisdiction or juvenile court in matters involving children born out of wedlock of the county in which the petitioned child currently resides, necessitates a hearing if such grandparent visitation is opposed by the custodial parent or parents:
>
> (1) The father or mother of an unmarried minor child is deceased; . . . .
>
> * * *

> (b)(1) In considering a petition for grandparent visitation, the court shall first determine the presence of a danger of substantial harm to the child. Such finding of substantial harm may be based upon cessation of the relationship between an unmarried minor child and the child's grandparent if the court determines, upon proper proof, that:
>
> (A) The child had such a significant existing relationship with the grandparent that loss of the relationship is likely to occasion severe emotional harm to the child;
> (B) The grandparent functioned as a primary caregiver such that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or
> (C) The child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child.
>
> * * *
>
> (c) Upon an initial finding of danger of substantial harm to the child, the court shall then determine whether grandparent visitation would be in the best interests of the child based upon the factors in § 36-6-307. Upon such determination, reasonable visitation may be ordered.

Tenn. Code Ann. § 36-6-306 (2014).[6]

Before we consider the substantive issue raised in this appeal, we briefly review the law on grandparent visitation in Tennessee. As explained in this Court's opinion in ***Green v. Evans***, No. M2011-00276-COA-R3-CV, 2012 WL 1107887 (Tenn. Ct. App. March 30, 2012):

> The decisions of the U.S. Supreme Court and the Tennessee Supreme Court, interpreting the federal and state constitutions, explicitly prohibit any judicial assumption that grandparent/grandchild relationships always benefit the child, as contrary to the parents' fundamental right to raise their children as they see fit. *See* ***Troxel v. Granville***, 530 U.S. 57, 66–72, 120 S. Ct. 2054, 147 L.Ed.2d

[6] In 2016, the Tennessee General Assembly amended Section 36-6-306(a) to provide that grandparent visitation could be ordered not only in situations where a custodial parent opposes visitation, but also where "visitation has been severely reduced by the custodial parent[.]" *See* 2016 Tenn. Laws Pub. Ch. 1076 (H.B. 1476). The amendment became effective on May 20, 2016, after both the filing of the instant petition and the trial in this cause. Neither party asserts that the 2016 version of Tennessee Code Annotated Section 36-6-306 is applicable in this case. Accordingly, all references to Section 36-6-306 are to the version of the statute in effect at the time of the trial on this cause.

> 49 (2000) (recognizing parents' fundamental constitutional right to make decisions on care, custody and control of children, finding trial court erred in presuming grandparent visits are in best interest of children); ***Hawk v. Hawk***, 855 S.W.2d 573, 577–82 (Tenn. 1993) (recognizing parents' fundamental constitutional right, finding trial court engaged in "sentimental" commentary on grandparents and erred in "unquestioning judicial assumption" that grandparent-grandchild relationship always benefits child, basing award of grandparent visitation on that presumed benefit). To avoid such an assumption, the Tennessee constitution and Tennessee's grandparent visitation statute require a grandparent seeking visitation to prove, as a threshold requirement, that the child will be in danger of substantial harm if visitation is not ordered by the court. ***Hawk***, 855 S.W.2d at 581; Tenn. Code Ann. § 36-6-306(b)(1). . . . Under ***Troxel***, pursuant to the federal constitution, in all phases of a proceeding on grandparent visitation, there is a presumption that a fit parent is acting in the child's best interest, and the court must accord special weight to the parent's determinations. ***Troxel***, 530 U.S. at 68, 70 (plurality opinion) ("there is a presumption that fit parents act in the best interests of their children.") . . . .

Green, 2012 WL 1107887, at *8. Thus, "[g]randparent visitation statutes must be narrowly construed in order to comport with the state and federal constitutions, because they are in derogation of the parents' fundamental constitutional rights." S***pears v. Weatherall***, 385 S.W.3d 547, 550 (Tenn. Ct. App. 2012).

Here, it does not appear that Father is contesting the fact that Grandmother has standing under Section 36-6-306(a)(1) to request grandparent visitation or that cessation of the relationship between Grandmother and the child could cause the child substantial harm. Instead, Father asserts that a condition precedent to a court order of grandparent visitation, that the custodial parent opposes the visitation, is not present in this case. As we recently explained in ***Manning v. Manning***, 474 S.W.3d 252 (Tenn. Ct. App. 2015):

> In order to protect parents' fundamental right to the care and custody of their children, Tennessee Code Annotated Section 36-6-306 includes several procedural hurdles that must be met before petitioning grandparents may be awarded visitation under the statute, the first of which is whether "such grandparent visitation is opposed by the custodial parent."

Id. at 257 (quoting Tenn. Code Ann. § 36-6-306(a)). The Tennessee Supreme Court has indicated that this hurdle is not only statutorily required, but necessary to ensure that the grandparent visitation scheme comports with a parent's constitutional rights:

> Allowing a grandparent to procure visitation without first requiring a showing of harm to the child if such visitation is denied not only violates section 36-6-306(b)(1) which specifically requires such a showing, it also constitutes an infringement on the fundamental rights of parents to raise their children as they see fit.

Smallwood v. Mann, 205 S.W.3d 358, 363 (Tenn. 2006)). As explained by this Court in ***Huls v. Alford***, No. M2008-00408-COA-R3-CV, 2008 WL 4682219 (Tenn. Ct. App. Oct. 22, 2008), there can be no danger of substantial harm unless visitation is denied by the custodial parent:

> As set forth above, the very language of Tenn. Code Ann. § 36-6-306 is such that the statute is not implicated unless "visitation is opposed by the custodial parent or parents." As is clear from ***Smallwood***, there cannot be "the presence of a danger of substantial harm to the child" as required by the statute unless visitation is denied. Without a denial of visitation, there simply cannot be any resulting "danger of substantial harm to the child."

Huls, 2008 WL 4682219, at *8. Thus, this Court has held that petitioning grandparents "as a threshold matter" bear the burden of proving that the custodial parents opposed their visitation. ***Uselton v. Walton***, No. M2012-02333-COA-R3-CV, 2013 WL 3227608, at *12 (Tenn. Ct. App. June 21, 2013). Without this threshold finding, "the Grandparent Visitation Statute is not even implicated[.]" ***Id.*** (citing ***Huls***, 2008 WL 4682219, at *8).

This Court in ***Huls v. Alford*** was one of the first cases to consider what evidence is required to show opposition to visitation. *See* ***Huls***, 2008 WL 4682219, at *8. In ***Huls***, the trial court awarded petitioning grandparents very liberal visitation. This Court reversed the trial court's ruling, however, concluding that petitioning grandparents failed to meet their burden of demonstrating that the child's mother opposed visitation. In reaching its decision, the Court first emphasized that the trial court made no "specific finding that either of the [p]arents were opposed to [the] [p]etition[ing] [grandparents] having visitation with the [c]hild." ***Id.***

The Court further found that mother's decision to impose limitations on the petitioning grandparents' visitation did not amount to a denial of visitation. ***Id.*** Specifically, in ***Huls***, the petitioning grandparents frequently requested overnight visitation with the child on weekends. When the child's mother indicated that she would permit the day-time visitation so long as mother's boyfriend could be present, the petitioning grandparents declined to exercise visitation. ***Id.*** at *3. The Court of Appeals concluded that imposing limitations and conditions on once liberal visitation does not necessarily support a finding that a custodial parent opposed visitation. Instead, the Court explained: "The term 'opposed' includes situations both where visitation is denied totally and where visitation is technically

not opposed, but where the frequency and/or conditions imposed by the parents on the visitation are such that it equates to a denial of visitation." ***Huls***, 2008 WL 4682219, at *8. Consequently, a finding that the custodial parents "did not allow [p]etition[ing] [grandparents] visitation whenever they requested it" simply does not "amount to a finding that visitation was opposed[.]" ***Id.*** As the Court explained: "While the [t]rial [c]ourt did point out that [m]other did not allow [the] [p]etition[ing] [grandparents] visitation whenever they requested it, this does not amount to a finding that visitation was opposed or that [p]arents have attempted to sever the relationship between [the] [p]etition[ing] [grandparents] and the [c]hild." ***Id.*** As such, the Court of Appeals reversed the trial court's finding that petitioning grandparents could rely on the Grandparent Visitation Statute.

In a similar case, ***Uselton v. Walton***, the Court of Appeals also reversed a trial court's finding that the Grandparent Visitation Statute had been triggered, instead concluding that the evidence showed that the child's custodial parent did not oppose visitation by the petitioning grandparents. ***Uselton***, 2013 WL 3227608, at *7–13. In ***Uselton***, the child's mother reduced petitioning grandparents' visitation, which had previously been "a few times during the week and . . . at least one overnight visit with her on weekends" to about one weeknight visit per week and one overnight visit every other weekend. Petitioning grandparents argued that this reduction and certain other "stipulations" imposed by the child's mother amounted to a denial of visitation. ***Id.*** at *13.

The trial court found that "there was circumstantial evidence to establish that there was some opposition to visitation." ***Id.*** at *7. The Court of Appeals reversed, concluding that evidence that grandparents were allowed somewhat less visitation with the child was insufficient to show opposition to visitation. ***Id.*** at *13. The Court of Appeals further concluded that the custodial parent's motivation for a decrease in visitation was not a particularly relevant consideration, as "the State, in the form of the trial judge, must resist the urge to become 'super-parent;' . . . because the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a better decision could be made." ***Id.*** at *13 n.12 (citing ***Troxel v. Granville***, 530 U.S. 57, 72–73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)).

It is important to note another issue that was raised in ***Uselton***: whether the court was allowed to consider opposition to visitation that occurred after the grandparent visitation petition was filed. In ***Uselton***, there was some evidence presented at trial that the child's mother indicated that she would no longer allow visitation after an incident that occurred after the filing of the grandparent visitation petition. *See* ***Uselton***, 2013 WL 3227608, at *13. The majority Opinion held, however, that any opposition that may have occurred after the filing of the petition was not relevant. ***Id.*** Judge Highers filed a dissenting Opinion in ***Uselton*** on this issue, stating that in his view of the Grandparent Visitation Statute, the trial court was entitled to consider both pre-petition and post-petition facts concerning the custodial parent's opposition to the visitation. *See* ***Uselton***, 2013 WL 3227608, at *17–20

(Highers, J., dissenting) ("Nothing is gained in this case by distinguishing opposition that occurred before the petition was filed and opposition that occurred within three to four days after the petition was filed.").

Unlike in ***Huls***, the trial court in this case made detailed findings of fact and conclusions of law on the issue of Father's opposition to Grandmother's visitation. As the trial court explained:

> 30. Father's primary defense to the grandparent visitation claim is that he has not, and would not, prohibit [Grandmother] from exercising visitation. . . .
>
> 31. Although the [c]ourt finds that . . . [F]ather has allowed visitation between [the child] and [Grandmother] while this litigation was pending, that visitation occurred after proceedings were initiated in juvenile court or in this court in which [Grandmother] requested such visitation. It appears that while [Father] has indeed allowed and on occasion even suggested visitation, the [c]ourt is doubtful of [Father's] willingness to allow visitation in the future except on his terms and other conditions that he would impose.
>
> 32. The Court finds that the circumstances and animosity between the parties would make it difficult, if not impossible, for them to coordinate reasonable visitation . . . absent a court order.

Grandmother filed the instant grandparent visitation petition on February 12, 2013. There is no dispute that Mother and Father allowed Grandmother considerable visitation while Mother was alive. Pursuant to the rule set forth in ***Uselton***, the only relevant period in this case is therefore the time between Mother's death on July 19, 2012 and the time that Grandmother filed her grandparent visitation petition. *See* ***Uselton***, 2013 WL 3227608, at *13 (holding that opposition to visitation that occurs after the filing of the grandparent visitation statute is irrelevant).

Regardless of the trial court's belief that Father could be unlikely to facilitate visitation between Grandmother and the child in the future, there is simply no evidence in the record that Father opposed visitation during the relevant period. From our review, it appears that even after Grandmother filed a dependency and neglect action against Father three days after Mother's death, making serious allegations against Father,[7] Father still entered into an agreed order with Grandmother allowing her extremely liberal visitation. This order essentially allowed Grandmother to spend time with the child on an equal basis with Father. Nothing in the record suggests that Father in any way refused to comply with his agreement until he filed his petition for a writ of certiorari. Indeed, Father only sought review of the

[7] We note that most of the allegations against Father contained in the dependency and neglect petition were not substantiated by any evidence whatsoever in the trial on this cause.

juvenile court's action when the hearing date on Grandmother's petition was continued for months. Grandmother admitted that her dependency and neglect petition was among the catalysts for the acrimonious relationship that led her to seek court intervention to obtain visitation with the child.

Here, it was Grandmother's decision to seek court intervention regarding her visitation rights so soon after Mother's death. Based on her decision, however, this Court must consider only a short window of time to determine whether Father opposed visitation for purposes of Tennessee Code Annotated Section 36-6-306(a). None of the evidence presented at trial suggests that Father in any way denied or opposed Grandmother's visitation during this period. Accordingly, the trial erred in finding that the condition precedent to grandparent visitation, opposition by the custodial parent, had been shown in this case. Without evidence of opposition to visitation by Father, court-ordered grandparent visitation is not appropriate. Accordingly, the trial court's judgment on this issue is reversed. Despite our ruling, we encourage the parties to continue to work to facilitate a close and healthy relationship between Grandmother and the child.

Conclusion

The judgment of the Circuit Court of Montgomery County is reversed in part, vacated in part, and this cause is remanded to the trial court for all further proceedings as may be necessary and are consistent with this Opinion. Costs of this appeal are taxed to Appellee Rose Coleman, for which execution may issue if necessary.

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J. STEVEN STAFFORD, JUDGE