

2009

Walter Michael Andrus, Trustee of the Mary  
Elizabeth Andrus Nevada Trust v. The  
Northwestern Mutual Life Insurance Company :  
Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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<b>WALTER MICHAEL ANDRUS</b> , Trustee of the Mary Elizabeth Andrus Nevada Trust,	)	BRIEF OF APPELLANT
	)	(ON APPEAL)
Plaintiff/Appellant,	)	
v.	)	
<b>THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY</b> ,	)	
Defendant.	)	
<hr/>		
<b>REBEKAH ANDRUS</b> ,	)	
Interpleader Plaintiff/Appellee,	)	
v.	)	
<b>WALTER MICHAEL ANDRUS</b> , Trustee of the Mary Elizabeth Andrus Nevada Trust, as Guardian of Jared Michael Andrus, an Incapacitated person, and individually, Defendant.	)	Case No. 20090893-CA

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## **Parties to the Appeal**

The parties to the appeal are Appellant Walter Michael Andrus, as Trustee of the Mary Elizabeth Andrus Nevada Trust, and Appellee Rebekah Andrus.

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## **Jurisdictional Statement**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code section 78A-4-103(2)(j).

### **Statement of Issues and Standard of Review**

The issues on appeal include:

- a) Whether the District Court erred in granting partial summary judgment for the Appellee and denying summary judgment in favor of the Appellant where the Appellant (acting as the court-appointed guardian of an incapacitated person, during the term of incapacity, and prior to the death of the incapacitated person) executed a change of beneficiary form on the incapacitated person's term life insurance policy reducing the Appellee's share of the benefits of the life insurance policy and instead directing a share of the proceeds to a trust for the incapacitated person's minor daughter, and
- b) Whether the District Court erred in granting partial summary judgment for the Appellee by relying on disputed issues of material fact, where counsel for the Appellee referenced disputed material facts in his memoranda and his oral argument at the motion hearing, including references to the transcript of a deposition of Appellant which Appellant was not allowed to review, correct, or sign.

These issues were preserved for appeal in the Appellant's Motion for Summary Judgment, Appellant's Memorandum in Opposition to Interpleader Plaintiff's Motion for Partial Summary Judgment, and Appellant's oral argument at the hearing on the parties' Motions for Summary Judgment (Original Transcript for Hearing dated 9/1/09).

The applicable standard of appellate review is correctness: whether the trial court correctly interpreted and applied the law to the undisputed facts.

### **Constitutional or Statutory Provisions**

Utah Code section 75-5-312(2)

Utah Code section 31A-22-413(2)

### **Statement of the Case**

This appeal is from an Order of the Fifth District Court in and for Washington County, case no. 0805001087, entered on September 30, 2009, which granted partial summary judgment for the Appellee and denied the Appellant's Motion for Summary Judgment. The Fifth District Court certified the Order as a final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure on December 9, 2009.

On appeal, the Appellant seeks reversal of the Order granting partial summary judgment for the Appellee. The Appellant seeks entry of summary judgment in favor of the Appellant or remand to the trial court for further proceedings or a trial of the disputed material facts.

### **Statement of Facts**

In the trial court, Plaintiff/Appellant Mike Andrus asserted that the following facts, supported by the Exhibits attached to Plaintiff/Appellant's Memorandum in Opposition to Interpleader Plaintiff's Motion for Partial Summary Judgment (which is hereinafter referred to as "Plaintiff's Memorandum"), were materially relevant and undisputed:

1. On about August 17, 2001, Mike Andrus' son, Jared Andrus, purchased a term life insurance policy, No. 15843524 (hereinafter "the life insurance policy" or "the policy"), with a death benefit of \$500,000 and no cash value, from Northwestern

Mutual Life Insurance Company. *See* Plaintiff's Memorandum, Exhibit 1, Affidavit of Walter Michael Andrus, ¶ 2; Exhibit 2, Life Insurance Policy.

2. At the time of the purchase, Jared Andrus designated his wife, Rebekah Andrus, as the sole beneficiary of the life insurance policy's death benefit. *See* Plaintiff's Memorandum, Exhibit 2.
3. In 2007, Jared Andrus became seriously ill with cancer. *See* Plaintiff's Memorandum, Exhibit 1, ¶ 4.
4. Due to his illness and his concerns over the immaturity and instability of his wife, Rebekah Andrus, Jared Andrus asked his father, Mike Andrus, if he would be willing to serve as Jared's guardian if Jared became incapacitated. *See* Plaintiff's Memorandum, Exhibit 1, ¶ 5.
5. Prior to the guardianship appointment, Jared Andrus informed Mike Andrus of the existence of the life insurance policy and expressed his desire that, should Jared die from the cancer, the insurance proceeds should be used to provide a secure future, including a college education and financial independence, for his young daughter, Mary Elizabeth Andrus, and that the funds not be wasted on mundane living expenses. *See* Plaintiff's Memorandum, Exhibit 1, ¶ 6.
6. Prior to the guardianship appointment, Jared Andrus also told Mike Andrus that, due to Rebekah Andrus' mental and emotional instability, he could not rely on her to responsibly provide for their daughter's financial security. *See* Plaintiff's Memorandum, Exhibit 1, ¶ 7.

7. On June 15, 2007, Jared Andrus filed a Petition for Guardianship of an Incapacitated Person with the Utah Fifth District Court, asking the Court to appoint his father, Mike Andrus, as his legal guardian, on the grounds that Jared Andrus was suffering from cancer and that “his illness . . . caused [him] to lack sufficient understanding and capacity to make and communicate responsible decisions.” *See* Plaintiff’s Memorandum, Exhibit 3, Petition for Guardianship.
8. On June 18, 2007, Mike Andrus took Jared Andrus, who was living with him at the time, to a session of chemotherapy treatment for this cancer. When they arrived, the nurse informed them that only one person could stay with Jared during the session, so Mike Andrus, at Jared’s request, called Jared’s wife, Rebekah Andrus, who was supposed to meet them there. Mike Andrus gave her Jared’s messages, telling her that Jared wanted Mike to stay with him and that Rebekah did not need to come to the session. *See* Plaintiff’s Memorandum, Exhibit 1, ¶ 9.
9. On that date, after Jared completed a difficult eight hours of treatment, Mike Andrus drove him home. On the way home, Jared called Rebekah to let her know how things were going. During the conversation, which Mike Andrus could hear because Jared had the cell phone on speaker phone mode, Rebekah became upset with Jared and told him that she was putting him out of her life for her own well-being. She also told him that she did not like being treated like a criminal in that she did not want her visits with him (at Mike Andrus’ house) to be monitored (as Jared had requested that he not be left alone with her). When Mike Andrus heard her make this cruel and selfish statements, Mike took the phone, told her, “This is

why” (meaning Jared did not want to be alone with her because of the way she was treating him), and hung up the phone. *See* Plaintiff’s Memorandum, Exhibit 1, ¶ 10; Exhibit 4, pgs. 2-3.

10. On that date, shortly after Mike Andrus and Jared Andrus arrived at Mike’s home, Rebekah Andrus’ brother-in-law arrived at the home, stood in the driveway, and repeatedly attempted to call Mike Andrus and verbally harass him. After the man left, Mike Andrus called the police, who came to take a report on the incident. Mike Andrus watched Jared fill out a witness statement for the police in which Jared expressed his concerns about Rebekah Andrus and related the incidents of that day. *See* Plaintiff’s Memorandum, Exhibit 1, ¶ 11; Exhibit 4.
11. Jared Andrus’ witness statement to the police states: “Rebekah and I have had a difficult marriage. Her behavior matches a condition called paranoid personality disorder. My father and I [agreed], and Rebekah agreed also, that to prevent and stop her behavior that has caused me extreme stress and anxiety and interfered with my healing in many ways including causing insomnia and adrenalin highs[,] her visits and conversations with me would be monitored.” *See* Plaintiff’s Memorandum, Exhibit 4, pg. 2.
12. Jared Andrus’ witness statement also states: “Rebekah said in response [to his request that her visits to him be short and earlier in the day] that she has put me out of her life so that she can function. Then she expressed unhappiness at our visits being monitored and being treated like a common criminal when she is here at my father’s home.” *See* Plaintiff’s Memorandum, Exhibit 4., pg. 3.

13. Jared Andrus' witness statement further reads: "I want to be here at my father's home with him and Ruth caring for me. I want to continue to do so. I have expressed this to Rebekah. I do not want to go home or anywhere else." *See* Plaintiff's Memorandum, Exhibit 4, pg. 4.
14. On July 10, 2007, in Jared's guardianship case, Judge Shumate, of the Utah Fifth District Court, entered Findings of Fact, Conclusions of Law, and Order, which ordered that Mike Andrus was appointed as the legal guardian of Jared Andrus. *See* Plaintiff's Memorandum, Exhibit 5, Findings of Fact.
15. The Order contains a finding that the "Petitioner's spouse, Rebekah Andrus, is disqualified from serving as guardian on the grounds that the Petitioner has previously nominated Michael Andrus to serve as his guardian and that Rebekah Andrus is mentally, physically, emotionally, and financially incapable of serving as the guardian of the Petitioner." *See* Plaintiff's Memorandum, Exhibit 5, ¶ 15.
16. On July 10, 2007, the Fifth District Court also issued a Letter of Guardianship, verifying that Mike Andrus was appointed as his son's guardian and that Mike Andrus' authority included "all the powers, authorities, rights, and responsibilities of full legal guardianship of Jared Michael Andrus." *See* Plaintiff's Memorandum, Exhibit 6, Letter of Guardianship.
17. On July 17, 2007, Mike Andrus, as "full legal guardian of Jared Michael Andrus," executed a Northwestern Mutual form entitled "Designation of Beneficiaries by Owner For Death Proceeds Only" (hereinafter "the beneficiary change form"), which designated Jared's wife, Rebekah Andrus, as the beneficiary of 15% of the

life insurance policy proceeds and the Mary Elizabeth Andrus Nevada Trust as the beneficiary of 85% of the life insurance proceeds. *See* Plaintiff's Memorandum, Exhibit 7, Designation of Beneficiaries Form.

18. On July 19, 2007, Mike Andrus, acting as Jared Andrus' guardian, executed a trust agreement, entitled "Mary Elizabeth Andrus Nevada Trust," for the purpose of holding "[a]ny and all payments due the trust . . . from any life insurance owned by Jared Michael Andrus" for the benefit of Mary Elizabeth Andrus, the minor daughter of Jared and Rebekah Andrus. *See* Plaintiff's Memorandum, Exhibit 8, Mary Elizabeth Andrus Nevada Trust Agreement; Plaintiff's Memorandum, Exhibit 1, ¶ 13.

19. On December 23, 2007, Jared Andrus passed away. *See* Plaintiff's Memorandum, Exhibit 1, ¶ 17.

20. In early January 2008, Mike Andrus submitted the beneficiary change form to Northwestern Mutual. *See* Plaintiff's Memorandum, Exhibit 1, ¶ 18.

21. Upon Northwestern Mutual's refusal to pay the death benefit, Mike Andrus brought this legal action, as Trustee of the Mary Elizabeth Andrus Nevada Trust, in order to secure 85% of the policy proceeds in the Trust for the benefit of his young granddaughter, Mary Elizabeth Andrus, so that the proceeds would not be wasted by Rebekah Andrus and so that Mary will be ensured a college education and a secure financial future. *See* Plaintiff's Memorandum, Exhibit 1, ¶ 19.

22. At all times, while acting as Jared Andrus' guardian—in changing the life insurance beneficiary designation and setting up the trust for Mary Elizabeth

Andrus—Mike Andrus believed he was acting in complete accordance with Jared’s expressed desires, for the benefit of Mary Elizabeth Andrus, and in the best interests of Jared Andrus. *See* Plaintiff’s Memorandum, Exhibit 1, ¶ 20.

23. Mike Andrus did not receive, and never expected to receive, any compensation for his appointment and work as guardian of Jared Andrus. *See* Plaintiff’s Memorandum, Exhibit 1, ¶ 21.

24. Mike Andrus, for his services in acting as Trustee of the Mary Elizabeth Andrus Nevada Trust, does not intend to receive any compensation from the proceeds of the policy at issue in this case and intends that all proceeds payable to the Trust will go to Mary’s benefit. *See* Plaintiff’s Memorandum, Exhibit 1, ¶ 22.

25. In September 2008, Northwestern Mutual stipulated that it was unable to determine who was entitled to the life insurance policy proceeds and that it had no interest in the proceeds.

26. Pursuant to the stipulation, Northwestern Mutual deposited the \$500,000 death benefit, plus interest, with this Court and was dismissed from this action with prejudice.

27. Rebekah Andrus’ undisputed 15% of the proceeds has been paid to her, with interest.

### **Summary of Argument**

The trial court erred in granting summary judgment for Appellee Rebekah Andrus because, on the undisputed material facts, as a matter of law, Appellant Mike Andrus, as Jared’s court-appointed guardian, was acting within his authority as guardian when he

executed a change of beneficiary form on July 17, 2007, making the Mary Elizabeth Andrus Nevada Trust, created for the benefit of Jared's daughter, the beneficiary of 85% of the policy proceeds. The trial court should have ruled that, as a matter of law, the beneficiary change was enforceable and granted summary judgment in favor of the Plaintiff/Appellant.

The trial court may also have erred by granting summary judgment for Appellee based on disputed material facts. In his memoranda related to summary judgment and in oral argument at the hearing on the motions for summary judgment, counsel for Appellee made multiple references to a deposition of Appellant Mike Andrus. Counsel for the Appellant objected, both in his memorandum and at oral argument, to the references to the deposition on the grounds that Appellant Andrus was promised that he would be allowed to review and correct the deposition before signing it but then was not allowed to do so and never signed it. As the trial court did not make specific findings of the undisputed material facts upon which it relied in granting partial summary judgment for the Appellee, the judgment should be reversed and remanded for the entry of such facts or for trial on the disputed facts.

### **Argument**

The trial court should have granted summary judgment for the Plaintiff/Appellant on the grounds that, on the undisputed facts detailed above, Mike Andrus had authority, as Jared Andrus' court-appointed guardian, to change the beneficiary designation of Jared's policy. Because Mike Andrus, acting as Jared's lawful guardian, properly executed the beneficiary change form and submitted it in a timely manner, Rebecca

Andrus is only entitled to 15% of the proceeds, which have already been paid to her, and the remainder should be paid to the Mary Elizabeth Andrus Nevada Trust for the benefit of Jared and Rebecca's minor child, Mary Elizabeth Andrus.

**I. Under the Utah Code, the authority that may be granted to a court-appointed guardian of an incapacitated person is broad enough to allow the guardian to change a life insurance beneficiary designation.**

**A. Utah Code section 75-5-312(2) allows broad powers to court-appointed guardians.**

Appellant/Plaintiff Mike Andrus (hereinafter generally referred to as "Appellant") asserts that, under Utah law, unless specifically limited by the appointing court, a court-appointed guardian of an incapacitated person has authority to change a life insurance beneficiary designation. Utah's statutory scheme is broad and allows the appointing court to entrust the guardian with full authority to act on behalf of the incapacitated ward.

Utah Code section 75-5-312(2) defines the powers of a guardian as follows:

Absent a specific limitation on the guardian's power in the order of appointment, the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship.

When one considers the authority and rights that a parent has with regard to his or her minor child, it is clear that the Utah Legislature has expressly made the authority of a court-appointed guardian, unless limited by the appointing court, very broad.

The Utah Supreme Court has affirmed the broad scope of powers which may be granted to a court appointed guardian. In the case of *In re Boyer*, 636 P.2d 1085 (Utah

1981), emphasizing that the trial court has authority to limit the scope of guardianship at the time of appointment, the court wrote:

Although the powers conferred upon a guardian may be very broad, the court is authorized to tailor the powers of a guardian to the specific needs of the ward. In appointing a guardian, the court should state with particularity the powers granted, unless the full scope of the statutory authorization is warranted.

*Id.* at 1091 (emphasis added).

Assuming that the appointing court has not limited the guardian's powers, Utah Code section 75-5-312(2) sets up this practical test for determining whether or not a guardian's act falls within the scope of his authority as guardian: Does a parent have authority to take such an action on behalf of the parent's minor child? Or, as specifically applied to the present case: Does a parent have authority to change the beneficiary of a minor child's life insurance policy? The answer to this test is straightforward in the present case: The parent must use the correct form and submit the form in a timely manner, but nothing in Utah law limits a parent's authority to change his or her child's life insurance beneficiary. Thus, under section 75-5-312(2) the authority that an appointing court may authorize to a guardian includes the authority to change a life insurance policy beneficiary.

It is also important to note that Utah Code section 75-5-312(2) does not place any further limitations on a guardian's authority. The second sentence of section 75-5-312(2) does impose certain duties on the guardian, such as caring for the ward and his property, but it specifically states that the rights and duties are listed "without qualifying" the broad grant of authority stated in the first sentence of the section.

Finally, it is good public policy to allow a guardian, if not prohibited by the appointing court for good cause, to execute beneficiary changes on the incapacitated person's insurance policy. This allows the guardian to take present conditions into account and effectuate the known wishes of the incapacitated person, for the best interest of the incapacitated person. That is exactly what happened in the present case, where the guardian changed the beneficiary in order to preserve the insurance proceeds for the benefit of Jared Andrus' young daughter and to prevent the proceeds from being wasted by Appellee Rebekah Andrus, who was deemed unfit to be Jared's guardian by the appointing court.

**B. *Andrus v. Blazzard* can be distinguished from the present case.**

Interpleader Plaintiff/Appellee Rebekah Andrus (hereinafter generally referred to as "Appellee") argued in the lower courts that *Andrus v. Blazzard*, 63 P. 888 (Utah 1901), supports her argument that a guardian lacks authority to change a beneficiary designation. However, the facts and legal issues in *Andrus* are much different from the present case and thus *Andrus* is neither controlling nor persuasive.

*Andrus v. Blazzard* can be distinguished from the present case in several ways. First, in *Andrus*, the guardian attempted to enter into a contract on behalf of the ward. In the present case, the ward, Jared Andrus, had entered into a contract, an insurance policy, prior to the guardianship. Mike Andrus, as guardian of Jared Andrus, did not attempt to contract on Jared's behalf. Instead, acting as guardian and in Jared's best interest, Mike Andrus exercised a personal option that was allowed by the policy to change the policy's beneficiary.

Second, the issue in *Andrus* was whether the guardian or the ward was liable on the contract. This issue does not exist in the present case, as Jared Andrus fulfilled his obligations on the contract by paying his insurance premiums and Mike Andrus was not seeking to impose a contractual financial burden on his ward.

Given these significant factual and legal differences between *Andrus* and the present case, this court should conclude that *Andrus* gives no practical guidance in applying Utah Code section 75-5-312(2).

**C. This is an issue of first impression in Utah.**

Counsel for Mike Andrus has researched Utah's appellate case law and can find no relevant cases to assist the Court on this issue. Since the issue of whether a guardian can change the beneficiary of a ward's insurance policy is one of first impression in Utah, it is fortunate that the plain language of section 75-5-312(2) is clear enough for the Court to conclude that, just as a parent is not legally prohibited from changing the beneficiary of a minor child's insurance policy, a guardian with full guardianship authority is also not prohibited from making such a change.

**D. The insurance proceeds are not part of Jared Andrus' estate and thus conservatorship law does not apply.**

Appellee previously asserted in the lower courts that the insurance policy should have been included in Jared Andrus' estate. Appellee thus attempts to impose the requirements of a conservator on Mike Andrus, on the theory that the \$500,000 death benefit would have necessitated the appointment of a conservator, in addition to a guardian.

Appellee's theory is incorrect, because Jared Andrus' insurance policy was a contractual obligation between Jared Andrus and Northwestern Mutual, with the proceeds to be paid to the beneficiaries outside of the insured's estate. The policy was a term life insurance policy with no cash value and a \$500,000 death benefit. There was no need for a conservator in the present case because Jared Andrus' estate, which included only personal property and limited home equity, was valued at \$9,000. The \$500,000 death benefit could not have been managed by a conservator because it had no cash value and was payable to the beneficiaries outside the insured's estate.

Appellee's argument would be correct if the facts of this case involved an insurance policy with a cash value of \$500,000 to which the insured was entitled. In such a case, the cash value would have been subject to the management of a conservator, who could have sought early disbursement or loans on the cash value. Upon the insured's death, any remaining cash value would have passed into the insured's estate. But such was not the case here.

In sum, based on a straightforward application of Utah Code section 75-5-312(2), the Court should conclude that Utah's statutory scheme does allow an appointing court to grant broad authority, including the authority to change a beneficiary designation, to the guardian of an incapacitated person.

**II. The Letter of Guardianship issued to Mike Andrus by the Fifth District Court is broad and does not limit his authority to change the beneficiary designation.**

Given that section 75-5-312 does empower Utah's district courts to place limits on the powers of a court-appointed guardian, the next inquiry is whether the appointing court placed limits on the guardian's authority in the present case. On the undisputed facts, it is clear that the court did not.

In conjunction with the Order appointing Mike Andrus as Jared Andrus' guardian, which Order itself contains no limits on Mike Andrus' authority as guardian, the Fifth District Court also issued a Letter of Guardianship which states that Mike Andrus' authority included "all the powers, authorities, rights, and responsibilities of full legal guardianship of Jared Michael Andrus."

Specifically, the Fifth District Court found that Jared Andrus was incapacitated (i.e., lacking "sufficient understanding and capacity to make and communicate responsible decisions"). The court also found that Rebekah Andrus was unfit to serve as Jared's guardian. On these findings, it should be clear that the court intended to grant broad authority to Mike Andrus, as Jared's guardian, to make decisions for Jared and act in his best interest.

### **III. Mike Andrus was acting in Jared Andrus' best interest in changing the policy beneficiary.**

Given the appointing court's finding regarding Rebekah Andrus in the Findings that supported Mike Andrus' appointment as Jared's guardian (namely, that she was unfit to serve), it is also apparent that Mike Andrus' decision to change the beneficiary was in Jared's best interest. Prior to the guardianship appointment, Jared Andrus told his father of the existence of the life insurance policy and expressed his desire that, should Jared die

from the cancer, the policy proceeds should be used to ensure a secure future, including a college education and financial independence, for Jared's young daughter, Mary Elizabeth Andrus. Jared also expressed his concern that the insurance funds not be wasted on mundane living expenses. If Rebekah Andrus was unfit to serve as Jared's guardian due to mental and emotional instability, it stands to reason that it was in Jared's best interest that Rebekah Andrus should be removed as the sole beneficiary of Jared's policy and that a trust should be set up to protect a share of the proceeds for the benefit of Jared's young child.

**IV. The policy does not prohibit a court-appointed guardian from making a beneficiary change for an incapacitated policy owner.**

In the U.S. District Court, Appellee argued in her Memorandum that the insurance policy did not allow Mike Andrus to change the beneficiary. However, the policy itself does not expressly prohibit a guardian from making a beneficiary change if the policy owner has become incapacitated and is under the care of a court-appointed guardian. Where the policy addresses the manner in which the policy owner can make a beneficiary change, but is silent on whether or not a court-appointed guardian can make such a change on behalf of the policy owner, the court must look back to state law for guidance.

The insurer and its policy are subject to state law and cannot supercede the provisions of Utah's statutes. In the present case, the policy states that "the Owner" may change the beneficiaries of death proceeds while the insured is alive. While Jared Andrus did not personally make the beneficiary change, the change was made while Jared Andrus was alive by Jared Andrus' court-appointed guardian, acting on behalf of Jared and in his

best interest. Since the policy owner, Jared Andrus, was legally incapacitated at the time, Mike Andrus, by court appointment, stood in Jared's place as the policy owner.

**V. Mike Andrus submitted the beneficiary change form in a timely manner under Utah law.**

Appellee also argued in the U.S. District Court that Mike Andrus' submission of the beneficiary change form was untimely. The insurance policy language stating that a "change of beneficiary will be made on receipt at the Home office of written request that is acceptable to the Company" and that the change will then "take effect as of the date it was signed" is vague. The most reasonable interpretation of this provision is that the insurer will make the change once an acceptable written request is received at the home office and that the change will be effective as of the date it was signed.

Moreover, nothing in the policy specifically requires the beneficiary change to be submitted to the insurer prior to the insured's death. If the policy did contain such a requirement, it would be voided by the clear terms of Utah Code section 31A-22-413(2), which states:

An insurer may prescribe formalities to be complied with for the change of beneficiaries, but those formalities may only be designed for the protection of the insurer. The insurer discharges its obligation under the insurance policy or certificate of insurance if it pays the properly designated beneficiary unless it has actual notice of either an assignment or a change in beneficiary designation made pursuant to Subsection (1)(b) or Section 75-2-804. The insurer has actual notice if the formalities prescribed by the policy are complied with, or if the change in beneficiary has been requested in the form prescribed by the insurer and delivered to an agent representing the insurer at least three days prior to payment to the earlier properly designated beneficiary.

Pursuant to section 31A-22-413(2), an insurer has no obligation to pay the prior beneficiary where a change has been requested using the proper form and delivered to an agent at least three days prior to payment of the prior beneficiary. Applying this section to the present case, Northwestern Mutual had no obligation under the policy to pay Rebekah Andrus 100% of the proceeds because Mike Andrus made the beneficiary change using the proper form and delivered the request to Northwestern more than three days before any payment was made to Mrs. Andrus.

*In re Knickerbocker*, 912 P.2d 969 (Utah 1996), is controlling on the issue of whether an insurer must accept a beneficiary change request that was delivered after the insured's death in compliance with section 31A-22-413. In *Knickerbocker*, the policy owner's attorney-in-fact, acting pursuant to a power of attorney and without knowing who the insurer was, executed a beneficiary change and gave it to his attorney, who, after the insured's death, located the insurer and delivered the change form to the insurer. The Utah Supreme Court ruled that the change was effective upon execution:

We find no authority prohibiting a change-of-beneficiary notice from being effective simply because an attorney-in-fact, or even the principal, did not know the specific name of the insurer at the time the notice was executed. **The only requirement is that the formalities prescribed by the insurance company must be complied with, Utah Code Ann. § 31A-22--413, . . . .**

*Id.* at 978 (emphasis added). The Utah Supreme Court further rejected the argument that the change of beneficiary was untimely because it was submitted after the insured's death: "We acknowledge that the testimony shows that [the attorney] did not actually send the notices until after [the insured's] death. However, once [the attorney-in-fact]

signed the notices and entrusted delivery of them to [the attorney], his role was completed, and the change of beneficiaries was effected.” *Id.*

Applying Utah Code section 31A-22-413, as interpreted in *Knickerbocker*, to the present case, the trial court should have concluded that the beneficiary change was effective upon execution of the proper form by Mike Andrus, acting as the Owner’s guardian and in his best interest, and that Mike Andrus’ delivery of the change to the insurer after the insured’s death, but more than three days before the insurer paid any proceeds to the prior beneficiary, was not untimely.

**VI. The Court erred in granting partial summary judgment based on disputed material facts.**

The trial court may also have erred by granting summary judgment for Appellee based on disputed material facts. In his memoranda related to summary judgment and in oral argument at the hearing on the motions for summary judgment, counsel for Appellee made multiple references to a deposition of Appellant Mike Andrus. Use of the deposition was disputed on the grounds that Mr. Andrus, prior to the deposition, was promised that he would be allowed to review and correct the deposition. However, once the deposition was taken, Mr. Andrus was not allowed to make corrections or sign the deposition.

In oral argument at the motion hearing, counsel for Appellee referenced the following “facts” from the objectionable deposition, which were disputed by the Appellant: 1) that Mr. Andrus’ only official action as his son’s guardian was the execution of the change of beneficiary form (Hearing Transcript, p. 6, lines 18-20), 2)

that Mr. Andrus wanted control over Rebekah and Mary Andrus (Hearing Transcript, p. 10, lines 10-15), and that Rebekah Andrus paid the insurance policy premiums while her husband was incapacitated (Hearing Transcript, p. 11, lines 20-24). These references were material to counsel's argument that Mr. Andrus was acting improperly as Jared Andrus' legal guardian.

Counsel for the Appellant objected, both in his memorandum and at oral argument, to the references to the deposition. Hearing Transcript, p. 10, lines 16-19. The trial court failed to act on counsel's objection and clarify that its decision was not based on any "facts" taken from the disputed deposition. Instead, after counsel's objection, the trial court itself referenced the disputed deposition by asserting that Jared Andrus did not know about the beneficiary change that Mike Andrus had executed. Hearing Transcript, p. 24, lines 1-3.

The trial court did not make specific findings of the undisputed material facts upon which it relied in granting partial summary judgment for the Appellee. Thus, it is impossible to know which facts the court relied on in entering judgment. As such, the judgment should be reversed and remanded for the entry of the undisputed material facts or, if the court did rely on disputed material facts, for trial on the disputed facts.

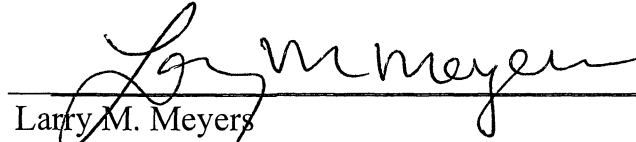
### **Conclusion**

This court should reverse the trial court's decision to grant the Appellee's Motion for Partial Summary Judgment and instead should enter judgment for the Appellant, on the grounds that, on the undisputed facts and as a matter of law, Mike Andrus had statutory and court-appointed authority, as Jared Andrus' guardian, to execute a

beneficiary change (which designated Rebekah Andrus as the beneficiary of 15% of the proceeds and the Mary Elizabeth Andrus Nevada Trust as the beneficiary of the remaining 85%) on behalf of Jared Andrus and did so in a proper and timely manner.

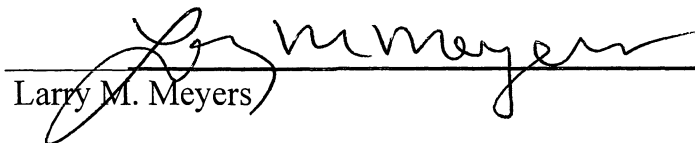
In the alternative, this court should reverse and remand with direction to the trial court to make specific findings of the undisputed material facts upon which it relied in entering partial summary judgment or for trial of the disputed facts.

RESPECTFULLY SUBMITTED this 4th day of March, 2010.

  
\_\_\_\_\_  
Larry M. Meyers  
Counsel for Appellant Walter Michael Andrus

CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of March, 2010, I served a copy of this Brief on counsel for the Appellee by first class US Mail, postage prepaid, to Brady T. Gibbs, Wrona Law Firm PC, 11650 S. State St., Suite 103, Draper, UT 84020.

  
\_\_\_\_\_  
Larry M. Meyers

## **Addendum**

Exhibit 1            Order on Hearing

FILED  
FIFTH DISTRICT COURT  
2009 SEP 30 AM 8:32  
WASHINGTON COUNTY

Brady T. Gibbs #11049  
LONG OKURA P.C.  
1981 Murray Holladay Rd.  
Salt Lake City, Utah 84117  
Ph: 801.746.6000  
Fax: 1.866.221.4511  
*Attorney for Rebekah Andrus*

BY pd

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IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

---

WALTER MICHAEL ANDRUS,

Plaintiff,

vs.

THE NORTHWESTERN MUTUAL  
LIFE INSURANCE COMPANY,

Defendant,

vs.

REBEKAH ANDRUS,

Cross-Claimant.

ORDER ON HEARING

Case Number: 080501087

Judge James L. Shumate

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THIS MATTER, having come on regularly for hearing on the 1<sup>st</sup> day of September, 2009 at 10:00 a.m., before the Honorable James L. Shumate, Fifth District Judge presiding on Plaintiff's and Cross-Claimant's cross Motions for Summary Judgment. The Petitioner, Walter Michael Andrus, was present and represented by his counsel, Larry M. Meyers. The Cross-Claimant, Rebekah Andrus, was present and

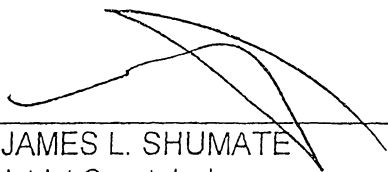
represented by her counsel, Brady T. Gibbs. The Court, after having reviewed the file, having heard argument of counsel, and for good cause appearing, now order as follows:

IT IS HEREBY ORDERED:

1. That Cross-Claimant, Rebekah Andrus' partial Motion for Summary Judgment is hereby granted.
2. Rebekah Andrus, as the sole direct beneficiary to the proceeds of the Northwestern Life Insurance policy No. 15843524, is entitled to one-hundred percent of the remaining proceeds of that policy which have been paid to the Court by the Northwestern Mutual Life Insurance Company.
3. The Plaintiff, Walter Andrus', Motion for Summary Judgment is denied.
4. Each party is ordered to pay their own attorney's fees and costs incurred in this action.
5. Upon expiration of the deadline to appeal this decision, Cross-Claimant may motion this Court to release the proceeds of the life insurance policy.

DATED THIS 29 day of Sep, 2009.

BY THE COURT:

  
\_\_\_\_\_  
HON. JAMES L. SHUMATE  
Fifth District Court Judge

Approved as to FORM:

\_\_\_\_\_  
Larry M. Meyers

CERTIFICATE OF DELIVERY

I hereby certify, that on this 4<sup>th</sup> day of September, 2009,

I delivered true and correct copy(s) of the foregoing **Order on Hearing** to the following party(s):

Larry M. Meyers  
Larry Meyers, P.C.  
P.O. Box 1146  
St. George, UT 84771-1146

- ☒ First Class U.S. Mail, Postage Prepaid  
☐ Facsimile Transmission  
☐ Personal Delivery  
☐ E-mail Transmission Attachment

Frank D. Mylar  
Mylar Law, P.C.  
6925 S. Union Park Center, Suite 600  
Cottonwood Heights, UT 84047

- ☒ First Class U.S. Mail, Postage Prepaid  
☐ Facsimile Transmission  
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