

2003

Glade Leon Parduhn and University Texaco v. Natalie Buchi Bennett : Brief of Appellant

Utah Supreme Court

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SUPREME COURT

STATE OF UTAH

GLADE LEON PARDUHN and
UNIVERSITY TEXACO,

Appellants,

vs.

NATALIE BUCHI BENNETT, et al.,

Appellees.

**BRIEF OF THE APPELLANT,
GLADE PARDUHN**

No.20030551-SC

On Appeal from a Judgment entered by the
Third Judicial District Court, Summit County
Judge Bruce Lubeck

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IDENTIFICATION OF PARTIES

There are two appellants on this second appeal: Glade Leon Parduhn and University Texaco. University Texaco was a general partnership formed by written agreement in 1979 and dissolved July 14, 1997 on the sale by the partnership to Blackett Oil Company of its two service stations and the real property on which the stations were located. Parduhn and Brad Buchi were the only partners of University Texaco, and were partners for the eighteen-year duration of the partnership. Brad Buchi died approximately three weeks after the partnership was dissolved, in early August 1997.

Appellees include the original defendant and counterclaimant Natalie Buchi-Bennett, Brad Buchi's oldest daughter. Through the process of compulsory joinder initiated by Parduhn, Natalie's siblings, Allison, Annabelle, Lance and Jessica Buchi were joined as defendants and are among the appellees. By the same process, Brad Buchi's second wife, JoAnne, was added as a party. JoAnne Buchi was joined and made her appearance in two capacities: personally and as personal representative of the estate of Brad Buchi.

The parties will be identified throughout this Brief by their first names, not out of any disrespect, but to reduce confusion. Multiple parties and persons identified in the Brief have the surname Buchi, including Brad (the decedent), Lissa (Brad's first wife), most of Brad and Lissa's children, and JoAnne (Brad's second wife).

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STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to Utah Code Ann. § 78-2-2(3)(k).

STATEMENT OF THE ISSUES

Issue No. 1: Can and should this Court on this appeal adjudicate Glade Parduhn's claim that defendants waived their defense based on Section 31A-21-104 by failing to plead it? Can and should it do so where it ignored Parduhn's claim in the first appeal, but where Parduhn preserved the claim on the first appeal, clearly presented it to the Supreme Court for adjudication, and preserved the claim on remand? This issue presents an issue of law. The issue was properly preserved for appeal by Parduhn's two motions to strike the defense, R.1147, 1399; by his presentation of the claim to the Supreme Court on the first appeal, Appellant's Brief (Jan. 24, 2002) at 9, 34, 37-39; and by his preservation of the claim on remand, R.1673-1674, 1707-1711.

Issue No. 2: If the Supreme Court retains authority to rule on the preceding claim, then (1) did the trial court err by failing to strike the defense as an avoidance that was not pleaded? and (2) was the Supreme Court therefore mistaken in remanding the case with instructions to determine who, based on § 31A-21-104, is equitably entitled to the proceeds? If the answer to both these questions is "yes," then should not the proceeds, in contract, be distributed to Parduhn as the beneficiary designated by the policy to receive the proceeds on Brad Buchi's death? Again, this issue presents an issue of law. The issue was preserved for appeal. See Issue No. 1.

Issue No. 3: Can the trial court's finding on remand that JoAnne Buchi and Brad's children are equitably entitled to the insurance proceeds be sustained where (1) the trial court refused to conduct another evidentiary hearing; (2) the court refused Parduhn's proffer on remand of evidence that would countenance against an award in equity to defendants; (3) the first trial was not calculated to determine who in equity should receive the proceeds; (4) the trial court refused Parduhn permission to present evidence reserved by a stipulation for bifurcation approved by a prior judge; and (5) the trial court, contrary to its declaration, did in fact base its findings on remand on "evidence" that defendants assured him had been presented at trial, but was not. Findings of fact in cases of equity will generally not be set aside unless clearly erroneous. Utah R. Civ. P. 52(a). Nonetheless, findings "in equity" must have some basis in the record, Bellon v. Malnar, 808 P.2d 1089 (Utah 1991), and will be reversed if the appeals court has a definite and firm conviction that the court has erred. Id. The trial court, as stated in its Ruling and Order dated May 14, 2003, declined to take new evidence "tailored to the issue before the court." Ruling at 9. Parduhn's argument and proffers on remand reserved the above issues for appeal. See Plaintiff's Memorandum in Opposition to Proposed Order [on Remand] (March 24, 2003); Transcript of Oral Argument (March 14, 2003); and Transcript of Oral Argument (May 9, 2003). Parduhn's request to put on evidence reserved by bifurcation was made, and thus preserved for appeal, at R.1466, 1469 and 1501.

Issue No. 4: It is error for the trial court to have awarded half the insurance proceeds in equity to JoAnne Buchi where (1) she has breached her fiduciary duty to Brad's estate by failing to articulate in this action its equitable claim to the proceeds; (2) there was no evidence that Brad intended JoAnne to have them; and (3) there was no evidence at trial as to JoAnne and Brad's relationship other than they were still legally married? Generally speaking, findings in equity will not be set aside unless clearly erroneous. Utah R. Civ. P. 52(b). Findings in equity, however, must have some basis in the evidence before the court. Bellon v. Malnar, 808 P.2d 1089 (Utah 1991). This argument was preserved on remand. Oral Argument (May 9, 2003); Plaintiff's Memorandum in Opposition to Proposed Order (March 24, 2003). Whether JoAnne's breach of her fiduciary duty as personal representative disqualifies her equitable entitlement under the doctrine of "unclean hands" is likely a matter of law for this Court to decide. This aspect of Parduhn's argument was made, and thus preserved, at Plaintiff's Memo., id. at 14-15.

Issue No. 5: Can an award in equity be based on an agreement that the Supreme Court previously held to be unenforceable? This issue arises as a product of the trial court's decree on remand, Ruling and Order (May 14, 2003) at 9, that it could discern the partners' intent from the buy-sell agreement and, on the basis of that intent, determine who is equitably entitled to the proceeds. This decision and rationalization, in effect, enforces against Parduhn the agreement the Supreme Court deemed was not enforceable. Plaintiff believes that this is likely an issue of law. This argument was not

expressly preserved for appeal, because it did not arise until the trial court's pronouncement in its Ruling and Order on May 9.

Issue No. 6: Can the trial court's speculation that the partners would have given the policy on Brad's life to Brad had he lived longer be sustained as anything other than speculation, and can this speculation be the basis of an equitable award of all the policy's proceeds to Brad's heirs? This was not an issue until the trial court's issuance of its Ruling and Order on May 14, 2003. Findings of fact should be sustained unless clearly erroneous. Utah R. Civ. P. 52(b). Whether the Court's finding of fact will support its award of proceeds on equitable grounds should present an issue of law.

Issue No. 7: Can an equitable award of proceeds which bypasses Brad Buchi's estate in favor of JoAnne and Brad's children be justified, given that there no longer exists an enforceable agreement that can effect a non-testamentary transfer pursuant to Utah Code Ann. § 75-6-201? Plaintiff believes this issue presents a question of law, for which no deference will be accorded the trial court's decision. This argument was made and thus preserved by Plaintiff's Memo. in Opposition to Proposed Order (March 24, 2003) at 10-11; also at Hearing Transcript (May 9, 2003) at 43-44.

Issue No. 8: Can the trial court on remand base an award in equity on an unenforceable buy-sell agreement, from which it inferred an "intent" by the partners to divert all the proceeds to the insured's survivors rather than to the beneficiary, if the buy-sell agreement was never amended to provide that one partner might have to pay the other partner \$300,000 (or \$250,000) instead of the \$100,000 on which they had agreed

in 1984? An obligation or intent based on the buy-sell agreement would no longer seem to be an issue, given that the Supreme Court previously decreed it to be unenforceable by Brad Buchi's heirs. As the Supreme Court decreed that the buy-sell agreement was no longer enforceable, it logically chose not to address Parduhn's argument on the first appeal that there was no competent evidence to show that it had been amended, relying on Oglesby-Barnitz Bank & Trust v. Clark, 175 N.E.2d 98 (Ohio App. 1959). See Appellant's Brief (Jan. 24, 2002) at 61-74. If the buy-sell agreement, notwithstanding its non-enforceability, is to be the basis of an award on equitable grounds, then the Supreme Court needs to revisit and decide the implied amendment issue that Parduhn raised and challenged on the first appeal.

Issue No. 9: Should the Supreme Court, based on the facts before the trial court, decree that Parduhn is equitably entitled to the proceeds? This agreement was preserved for appeal, by Glade having made it on remand. Plaintiff's Memo. in Opposition to Proposed Order (March 14, 2003) at 7-8. The trial court's findings to the contrary, however, should, under the traditional standard of review, be overturned only if clearly erroneous. Utah R Civ P. 52(b).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 31A-21-104 (see addendum). Utah Code Ann. § 75-6-201 (see addendum).

APPELLANT'S STATEMENT OF FACTS

Glade Parduhn and Brad Buchi in 1979 formed a partnership, University Texaco, for the express purpose of owning and operating a service station business. They operated their business for 18 years. In the later years they were in business together, the partnership owned and operated a Texaco station at 901 East South Temple (which Brad managed) and a Chevron station at 4013 South Wasatch Boulevard (which Glade managed).

The partnership was dissolved on the partnership's sale of its two service stations and real property to Blackett Oil Company, on July 14, 1997. See Parduhn v. Bennett, 2002 UT 93, ¶ 8. The partnership then entered a winding-up phase, in which it remains. Glade and Brad met shortly after the partnership's sale of its stations for the purpose of identifying and paying partnership debts. Some were paid and some were not before Brad died in early August, 1997. Plaintiff's Trial Exhibit 6 (death certificate).

The two partners, in 1979, documented their business relationship in a written partnership agreement. Plaintiff's Trial Exhibit 1. Appended to the partnership agreement was language that functioned as a buy-sell agreement. Id. The addendum stated that each partner was insured for \$20,000 and that, should one partner die, that sum would go to the deceased partner's wife or survivors as consideration in payment by the surviving partner for the deceased partner's share.

In 1979, when the partnership was formed, Glade was married to Nedra. They had two children. Nedra died in 2002, while this case was first on appeal. Brad in 1979 was married to Lissa. They had five children, all of whom have been joined as parties. Brad and Lissa divorced in 1992. Trial Transcript, pp. 110-111.

In January 1984, the two partners amended their previous buy-sell agreement by a hand-written notation they both signed. Plaintiff's Trial Exhibit 2. Each partner purchased insurance on the life of the other in the amount of \$100,000, which was the amount that each partner agreed to pay the other's "wife and survivors" for his partner's interest should the partnership be dissolved by death of a partner.

In early 1989, the partners each applied to and acquired from Northern Life Insurance Company increased insurance policies on the other's life. Glade acquired ownership and was the named beneficiary of a whole life policy on Brad's life in the amount of \$300,000. Plaintiff's Trial Exhibit 3. Brad acquired ownership and was named the beneficiary of a whole life policy on Glade's life, but in the lesser amount of \$250,000. Plaintiff's Trial Exhibit 4. Glade and Brad cross-assigned ownership of the two \$100,000 policies they had purchased five years earlier.

The partners' 1989 purchase of the two previously identified policies, however, was not accompanied by another written amendment to their buy-sell agreement. Glade never agreed to pay more than the \$100,000 that in 1984 he agreed to pay

Brad's wife and survivors for Brad's interest, should University Texaco be dissolved by Brad's death. Trial Testimony (G. Parduhn), pp. 28-29.

The evidence at trial established that the partnership paid the premiums on the two policies. Trial Testimony, (G. Parduhn), pp. 47-48. However, each was a whole life policy, which accrued a cash surrender value that inured to the benefit of the policy's owner.

The policy at issue was owned by Glade, not the partnership. Plaintiff's Trial Exhibit 3, pp. 3, 11, and p. 2 of Application. Only Glade, as the owner (not the partnership and not Brad) had the right under the terms of the policy to change the designation of the beneficiary. Id. pp. 3 (definition of "you") and 10; Culbertson v. Continental Assur. Co., 631 P.2d 906, 910 (Utah 1981). The accumulated cash surrender value under the policy belonged to Glade.

The other policy, on Glade's life, was owned by Brad. It was not owned by the partnership, or by Glade. Only Brad, as owner of that policy, had the right to change the designation of himself as beneficiary. He, not the partnership, owned the right to the cash surrender value that accumulated under his policy.

At approximately the same time as the partners applied for and purchased the two aforementioned policies, also in 1989, Brad (as insured) and Lissa (as owner/beneficiary) applied for and purchased from Northern a third policy. This policy insured Brad's life for \$250,000. Plaintiff's Trial Exhibit 5. It designated

Brad's wife, Lissa, as the owner and primary beneficiary. His children were designated as the "contingent beneficiary." For the quite obvious reason that he would not marry her for another three years, the policy did not mention JoAnne.

Lissa thereafter, in September 1990, petitioned the court to grant her a divorce. The divorce was finalized in March 1992.

In May 1992, Brad married JoAnne Ross Williams. Trial Transcript (JoAnne Buchi), p. 151. They had no children together. JoAnne petitioned the court for a divorce in April, 1996. Buchi v. Buchi, Third District Court, Salt Lake County, Case No. 964901449. The divorce was pending but not finalized when Brad died in August 1997.

Immediately following the sale of the stations on July 14, 1997, Glade and Brad met and began the process of paying partnership bills that remained to be paid and winding up the affairs of the partnership. Trial Transcript, (G. Parduhn), pp. 35-37. Brad, as disclosed earlier, died in early August, 1997. The payment of partnership bills and the winding up of the partnership's financial affairs continued after Brad's death under the supervision of its surviving general partner, Glade. Utah Code Ann. §48-1-34. The winding up phase has included defending against three lawsuits filed against the partnership after Brad's death.

Subsequent to Brad's death, JoAnne was appointed as the personal representative of his probate estate. See JoAnne's Counterclaim, ¶ 15, R.275, 279.

Although it is hard to believe given the self-serving position she has taken in this litigation, it is a position of responsibility she still holds. In re Estate of Brad Buchi, Third District Court, Salt Lake County, Case No. 973901394. Brad did not leave a will. Trial Testimony (JoAnne Buchi) p. 153.

Subsequent to Brad's death, Lissa applied for and received the \$250,000 payable on the third policy, even though she had divorced him five years before and even though all his *future* child support obligations had been paid in advance, and satisfied. Brad and/or Lissa had paid the premiums on the policy.

Glade applied for the \$300,000 payable on the policy he owned, which he was contractually entitled to receive as the beneficiary designated by the policy. However, Natalie Buchi Bennett, Brad and Lissa's oldest daughter, wrote Northern and claimed that she, her siblings, and her mother (Lissa) were the "legal" and "proper" beneficiaries of the policy. Plaintiff's Trial Exhibit 15.

RELEVANT PROCEDURAL HISTORY OF CASE

Glade filed an action in the Third District Court, seeking a declaration that he was entitled to the proceeds. R. 1. Northern interpleaded the \$300,000 into court where, on arrangements made by Glade, it was placed in an interest-bearing account. Natalie counterclaimed, alleging that she was entitled to the proceeds. On Glade's motion (not Natalie's or Northern's) the remainder of Brad's children and JoAnne, personally and as personal representative of Brad's estate, were joined as parties.

In the counterclaim portion of her Answer, Natalie claimed that she "and her siblings, not Parduhn, are the beneficiaries of the policy, "as amended," on Brad Buchi's life." ¶ 12, R.279. She also claimed entitlement to the insurance proceeds based on Glade's and her father's buy-sell agreement, which she asserted they had amended as to amount in 1984 and then again "on September 11, 1990"¹ (a year after the 1989 policies were purchased), "to provide for \$300,000 on Buchi's life and \$200,000 on Parduhn's life." ¶ 6. Her counterclaim sought a declaration that "Glade Parduhn has no interest in the proceeds of Northern Life Insurance Policy No. NL00989085 on Brad Buchi's life." R.16. Nowhere in Bennett's Answer, Counterclaim or "Cross-claim", however, did she mention Utah Code Ann. § 31A-21-104. She did not suggest that her claim to proceeds was based on Glade's lack or loss of an insurable interest in Brad's life. She did not contend that there existed a statute that trumped the insurance contract.

Bennett's siblings and JoAnne were added as parties as a consequence of Glade's "Motion to Compel Counterclaimant to Join Necessary Parties or to Dismiss Counterclaim. R.250. This motion was granted on March 10, 1999. R.272.

On April 9, 1999, Brad's children and JoAnne, individually and as personal representative of the Estate of Brad Buchi, filed an "Amended Answer and Counterclaim." R.275. This was the final pleading filed by Brad's children and the only

¹This date refers to a handwritten note of that date, Defendant's Trial Exhibit 3, on which someone wrote that the buy-sell agreement needed to be amended. The trial court gave his note no weight in its decision that followed the first trial. R.1449.

pleading ever filed by or on behalf of JoAnne. Counterclaimants sought a declaration that they and not Glade were entitled to all the insurance contract proceeds payable on Brad's death. As before, this claim was premised on the partners' buy-sell agreement as amended in 1984, and as *allegedly* amended again "on or about September 11, 1990."

¶¶ 5, 6 at R.278. Counterclaimants alleged this made them "the beneficiaries of the policy on Brad Buchi's life." R.279 at ¶ 12. Again, the counterclaimants did not base their claim to the insurance proceeds on § 31A-21-104.

On September 21, 1999, Glade moved for partial summary judgment. Motion at R.356; Memo. at R.350. This motion sought declarations that Glade's obligation to defendants under the buy-sell agreement (assuming, *arguendo*, that it was triggered by Brad's death) could at most be \$100,000 and that his purchase obligation (if he had any) should be paid to Brad's estate. Brad's children filed a cross-motion for summary judgment. R.403, 400. JoAnne neither opposed Glade's motion nor joined in the motion filed by Brad's children.

On December 9, 1999, two months after her opposition to Glade's motion was due and only after it had been noticed up for decision, JoAnne filed a belated "Request for Stay of Proceedings." R.474. She finally retained counsel who, on January 19, 2000, converted her request for a stay into a motion. R. 483. Glade opposed the motion and the nine months' delay it would eventually produce. Memo at R.485. Nonetheless, JoAnne's request was granted.

On March 14, 2000, following expedited discovery, JoAnne filed a lengthy memorandum which opposed Glade's September 1999 motion for partial summary judgment. R.501. JoAnne opposed Brad's children to the extent they claimed that they, alone, were entitled to all the insurance proceeds paid on Brad's death. Memo. at R.502-503. JoAnne countered that she should share in the proceeds, as Brad's wife at the time of his death. JoAnne, however, avoided mention of Brad's probate estate, though she was its personal representative. JoAnne founded her argument on the partners' buy-sell agreement, which she contended had been amended in 1989 when the partners each increased their life insurance coverages (even though the policies were not uniformly increased). Memo. at R.515-518. JoAnne admitted that by the time of Brad's death, the partnership had been dissolved and that it had entered the "winding up" phase contemplated by Utah Code Ann. § 48-1-28. Memo. at R.504, 518. Nonetheless, JoAnne contended that the buy-sell agreement remained enforceable at the time of Brad's death. Eschewing her fiduciary duty as the personal representative of Brad's estate, she adopted the position espoused by Brad's children that the allegedly amended buy-sell agreement acted as a non-testamentary conduit to funnel all life insurance proceeds directly to Brad's survivors, thus by-passing his estate and its creditors. She did not, however, base her claim on Utah Code Ann. § 31A-21-104. The statute is not mentioned in her memorandum.

On March 24, 2000, the Court (Stirba, J.) entered an Amended Scheduling Order. R.617. The new Scheduling Order decreed that all motions except motions in limine were to be filed by August 18, 2000. The Scheduling Order also mandated that “Motions to Amend Pleadings . . . shall be filed on or before 4/7/2000.” **No motions to amend were subsequently filed.** The Order also set trial for December 11, 2000.

By Memorandum Decision dated May 22, 2000, R.623, the Court (Stirba, J.) denied Glade’s motion for partial summary judgment. The Court ruled that any sum that *might* be owed by Glade pursuant to the buy-sell agreement would be a non-testamentary transfer and thus, it would bypass Brad’s estate.² It agreed that JoAnne was still married to Brad when he died and therefore, would be included in the definition of “survivor” under the language of the buy-sell agreement *if* it was enforceable. R.632.³

On August 18, 2000, Glade again moved for summary judgment. R.810; Memo. R.759. The premise of this motion, unlike those before, was that University Texaco was dissolved prior to Brad’s death and,

²The Supreme Court, however, held on the first appeal that the partners' buy-sell agreement did not survive the dissolution of the partnership.

³Although it was later to recant and vacate its decision, R.1222, the court also decreed that Brad’s children and JoAnne were entitled to receive and share in at least \$100,000 of the insurance proceeds. R.633.

as such, Defendants have no rights or entitlement under a buy-sell agreement that would have become effective had the partnership, instead, been dissolved on the death of one of its partners. Parduhn, accordingly, is not obligated to pay Defendants \$100,000, or \$300,000, under a buy-sell agreement. He, therefore, is entitled as a matter of law to the \$300,000 in life insurance proceeds payable on Buchi's death, as he is the sole beneficiary of the policy.

As the partnership was dissolved prior to Brad's death⁴, Glade argued that his purchase obligation under the buy-sell agreement was not triggered and that the Utah Partnership Code should govern the division and distribution of partnership assets. R762-771, 1023-1029. Neither JoAnne nor Brad's children founded their opposition to Glade's motion on Utah Code Ann. § 31A-21-104. R.894 (JoAnne's Memo.); R. 1002 (Buchi Children's Memo). On October 27, 2000, the Court (Stirba, J.) denied Glade's motion, R.1106, concluding that there existed disputed issues of material fact.

JoAnne's insurable interest argument based on § 31A-21-104 was first raised by a pseudo "Motion in Limine," filed October 26, 2000. R.1093; Memo. at R.1096.

JoAnne, for the first time, identified the statute:

It is JoAnne Buchi's position that the entitlement to the proceeds is controlled by U.C.A. 31A-21-104 as amended. This statute requires the Court to order the distribution of the proceeds of the life insurance policy to Brad's wife and survivors since Glade Parduhn does

⁴Following trial, Judge Lubeck found and held that dissolution of University Texaco occurred on July 14, 1997. R.1448, 1451. Defendants did not appeal this ruling and, in any event, the Supreme Court agreed. Parduhn, 2002 UT 93, ¶ 8.

not have an insurable interest as of the time of Brad Buchi's death.

Motion in Limine at R. 1094. In her Memorandum, JoAnne argued that:

As of the time of Brad Buchi's death, Glade Parduhn did not have an insurable interest in Brad's life and pursuant to U.C.A. 31A-21-104, he cannot collect the proceeds from the life insurance policy.

R.1098. Glade moved to strike JoAnne's motion, R.1147, complaining that JoAnne's potentially dispositive "motion in limine" was predicated on a statute,

not before pleaded by Ms. Buchi as an affirmative defense to Mr. Parduhn's claim that he, as the owner and beneficiary of a life insurance policy, is entitled to the proceeds of the policy upon death of the insured. Moreover, JoAnne Buchi's Counterclaim is not predicated on the referenced statute.

R.1151.⁵ Faced with Glade's Motion to Strike, JoAnne withdrew her so-called "motion in limine." R.1206.

All parties were preparing for a trial scheduled for December 11. On December 5, 2000, however, the trial was "bumped" by a criminal case. R.1206, 1208. The trial was rescheduled to April 30, 2001. R.1208. The Record does not indicate why, but the April 30 trial date was also vacated. A third trial date was set for

⁵Glade also protested that the motion did not involve any evidentiary issues, but was really one for summary judgment; and that the deadline set by the Court for the filing of dispositive motions had passed two months before. R.1147, 1150.

August 21, 2001. Judge Lubeck was assigned to the case sometime after the December trial date.

Bifurcation was approved by Judge Stirba in a conference prior to the December 11, 2000 trial date. A stipulation concerning the bifurcation was signed and delivered to trial court prior to the August 21, 2001 trial, but was not stamped as filed until August 27, 2001. R.1459. The Stipulation did not contemplate a reservation of issues relevant to an equitable distribution if the policy was avoided pursuant to Section 31A-21-104. What it did contemplate was a potential set-off claim by Glade, against whatever sum the trial court might decree that he must pay to Brad's survivors under the terms of the buy-sell agreement. R.1461, ¶ 2. If the buy-sell agreement required Glade to buy Brad's half partnership interest even though the partnership had been dissolved before Brad's death, Glade contemplated that he should be allowed to set-off against such a contractual obligation the diminished value of Brad's half interest caused by Brad's dissipation of his half interest prior to his death.

On August 16, 2001, Glade filed a Trial Brief. R.1271-1294. JoAnne filed her Trial Brief the same day. R.1295-1398. Brad's children did not submit a Trial Brief.

JoAnne's Trial Brief resurrected the insurable interest/31A-21-104 argument that had briefly surfaced in October 2000, but now it was the cornerstone of her entitlement argument. R.1299 (last paragraph), 1307-1310. Glade immediately objected to the introduction of this unpleaded affirmative defense. The next day, Glade filed a "Motion for Determination that any Defense by JoAnne Buchi based on Utah Code Ann. §31A-

21-104 has been Waived.” R.1399; Memo. at R.1401. Glade’s motion was heard the day before trial, and was denied. R.1412. (Lubeck, J.)

The case was tried on August 21-22, 2001. R.1444. The trial court (Lubeck, J.) awarded half the insurance proceeds to JoAnne and half to Brad and Lissa’s children, finding that (1) as the insurance policy was ambiguous as to whom it designated as beneficiary, the court could deduce from extrinsic evidence that Brad intended the proceeds payable on his death to go to his children and JoAnne⁶, (2) that the buy-sell agreement, in any event, acted as a conduit by which all \$300,000 of the insurance proceeds must pass to Brad’s children and his surviving spouse, and (3) that the buy-sell agreement evidenced a non-testamentary transfer intended by Brad, which enabled the court to award the \$300,000 directly to Brad’s heirs while bypassing his estate and creditors with claims against his estate. Memorandum Decision, R.1448.

Glade sought to put on evidence at a second trial that he understood had been reserved by the parties’ Stipulation. See Glade’s Motion to Modify Memorandum Decision (September 5, 2001) (R.1466); Glade’s Memo. in Support of Motion to Modify Memorandum Decision (R.1469). See also Glade’s Memo. in Support of Motion to Stay Enforcement of Judgment (September 12, 2001) in which he argued that, “Not all the parties’ claims have been resolved, a reality evidenced and corroborated by the

⁶This finding is especially puzzling given that Brad did not marry JoAnne until three years after the policy was issued.

Stipulation that was filed with the Court before trial.” R.1501, 1502. Without first deciding these motions, Judge Lubeck entered judgment and, without notice to Glade, released the escrowed proceeds to defendants. R.1547. He later denied all of Glade’s post-trial motions. Judgment and Order (October 16, 2001), R.1586. With respect to Glade’s request that he was entitled to a second trial phase, the Court decreed that:

1. Plaintiff is not entitled to a second phase trial in any respect, but specifically regarding alleged offsets against JoAnne Buchi or the Buchi children. The Court’s Memorandum Decision of August 27, 2001 addressed all the issues referenced in the stipulation of the parties dated August 21, 2001 between Plaintiff and JoAnne Buchi and the Buchi children. Plaintiff’s claims of offset, if any, should be asserted against the Estate of Brad Buchi and not against JoAnne Buchi and the Buchi children individually.

R.1588.

The trial court denied Glade’s motion for a stay pending appeal. *Id.* The Supreme Court, however, stayed enforcement of the judgment and ordered appellees to return and re-deposit with the Third District Court all unspent monies that had been released to them. R.1591, 1596, 1598, 1606. JoAnne, however, had already spent all the proceeds prematurely distributed to her, using most of it to extinguish the first and second mortgages on her home.

On appeal, the Supreme Court reversed the trial court’s ruling which awarded the insurance proceeds to JoAnne and to Brad and Lissa’s children. Parduhn v. Bennett, 2002 UT 93. The Supreme Court held that the Northern policy at issue was not

ambiguous, and that it unambiguously designated Glade as the owner of the policy and the beneficiary of the proceeds be paid on the contingency of Brad's death. The Supreme Court also held that the buy-sell agreement did not survive the dissolution of the partnership. It held that, as dissolution was triggered by the sale of the service stations and cessation of business, rather than by the death of a partner, the winding-up phase of the partnership should proceed in accordance with Utah's partnership law, codified at Utah Code Ann. § 48-1-1 et seq.

The Supreme Court, however, in a matter of first impression under Utah law, held that by virtue of Utah Code Ann. § 31A-21-104 Glade was divested of his otherwise contractual right as beneficiary to receive the insurance proceeds. It concluded that the statute divested him of his contractual right because, Glade "lost" his previous insurable interest in Brad's life when the partnership dissolved in mid-July, 1997. The court therefore remanded the case for a determination of whom, pursuant to the statute, was equitably entitled to the proceeds.

On remand, the trial court, without trial or additional evidentiary hearing, ignoring all evidence proffered by Glade and University Texaco as to why it would be inequitable to award the proceeds directly to JoAnne or Brad's children, and rejecting Glade's argument that the proceeds should be equitably awarded to him, or to University Texaco or Brad's estate, if not to him, again awarded all the insurance proceeds to JoAnne (50%) and to Brad's children (50%, apparently to be divided among them). The

trial court declined to enter findings of fact proposed by defendants. Ruling and Order (June 16, 2003). Its findings are therefore as set forth in its Ruling and Order entered on May 14, 2003.

SUMMARY OF APPELLANT'S ARGUMENTS

1. Defendants waived any defense based on Section 31A-21-104 by their failure to plead it. The trial court, therefore, erred when it denied Glade's motion to strike the defense and thus allowed the statute to become an issue at trial and on appeal. Glade on the first appeal addressed his waiver argument to the Supreme Court, but the Supreme Court inexplicably ignored it. Glade's claim therefore remains to be adjudicated. If JoAnne's argument based on Section 31A-21-104⁷ is in fact an "avoidance" that she waived by her failure to plead it, then the Supreme Court should not have remanded the case to determine who is equitably entitled to the proceeds. If a defense based on the statute was waived, then the proceeds of the policy should under contract law go to the beneficiary designated by the policy to receive them, Glade Parduhn.

2. If it remains appropriate and necessary to decide who is equitably entitled to the proceeds, then the trial court's determination on remand cannot be sustained. It cannot be sustained for multiple reasons, including (1) the court refused on remand to conduct a second evidentiary hearing; (2) the first trial was not calculated to determine

⁷Brad's children never argued the statute as the basis of a diversion of proceeds to them, not even in their prior Brief to this court.

who in equity should receive the proceeds; (3) the court refused on remand Parduhn's proffer of additional evidence that would countenance against an award in equity to defendants' and (4) the court, contrary to its self-declaration, did in fact base its equitable award on evidence proffered *by defendants* on remand, which was not presented in the course of the prior trial. The findings by the trial court on remand are so tainted by its deliberate refusal to consider additional facts "tailored to the issue" at hand, and its selective non-critical acceptance of "evidence" proffered by defendants that was not presented and tested at trial, that it cannot be sustained.

3. An award of the proceeds to JoAnne cannot be sustained on equitable grounds where (1) she has breached her fiduciary duty to Brad's estate by ignoring and failing to articulate its equitable claim to the proceeds while unabashedly pursuing her own claim, to the estate's potential detriment; (2) there is no evidence that Brad intended JoAnne to have the proceeds on the policy at issue; and (3) there was no evidence at trial regarding the quality of her and Brad's relationship (which evidence proffered on remand indicated was non-existent or poor).

An award of the proceeds to Brad's children in equity is also not supported by the evidence where (1) there is no evidence that Brad intended them to have the proceeds of the policy (but he did on others); (2) there was no evidence at trial concerning the relationship between father and children; (3) the children did not pay the premiums; (4) the children did not own the policy; and (5) the policy did not name the children as the

beneficiary of the policy. Also, the partnership has an equitable claim in preference to Brad's children, where Brad managed to divert for their future support as a consequence of his death almost \$70,000 in partnership funds.

4. The trial court erred on remand when it based its equitable distribution of proceeds on the partners' buy-sell agreement, even though the Supreme Court had decreed that Brad's heirs could not enforce it. The trial court was wrong to infer "intent" based on this unenforceable agreement and, having divined the partners' intent from the unenforceable agreement, then in effect enforcing it.

5. The trial court erred on remand by deciding to award the proceeds to Brad's heirs based on how it speculated the partners would have "divided up" the policies. This finding is pure speculation and finds no support in the trial record. Moreover, it ignores several critical facts, including that the policies were owned, not by the partnership, but by the individual partners – who controlled their fate. Cross-assignment of ownership of the policies, which the court imagined is what would have happened had Brad lived longer, is only one of the possible options that would have been available to the partners; and it is pure speculation which of the options the partners would have selected had Brad lived longer. Most critically, Brad died before the possibility imagined and predicted by the court occurred.

6. The trial court erred on remand in concluding that it could in equity still award the proceeds directly to Brad's heirs, and thus bypass Brad's estate, given that the

buy-sell agreement can no longer serve as a non-testamentary conduit for partnership monies as the Supreme Court held it to be non-enforceable.

7. The trial court erred on remand in finding that the partners' "intent" could be gleaned from the non-enforceable buy-sell agreement, and then based on that finding of "intent," award *all* the proceeds of the policy to Brad's heirs. If an equitable award can be based on intent allegedly discerned from an unenforceable agreement, then it again becomes a material issue on appeal whether the partners in 1989 "implicitly amended" their prior 1984 agreement to pay \$100,000 to the other's heirs should the partnership be dissolved by their death. Glade argued on the first appeal, and argues again here as his claim was not then resolved, that the fact that the partners chose in 1989 to purchase increased insurance on each other's life (\$300,000 and \$250,000 vs. \$100,000), but did not in writing amend their prior 1984 agreement, is not a sufficient warrant for concluding that they implicitly amended their prior buy-sell agreement. See Oglesby-Barnitz Bank & Trust Co., 175 N.E.2d 98 (Ohio App. 1959).

8. If defendants' defense based on Section 31A-21-104 was not waived, then the proceeds of the policy should in equity be awarded to Glade. There is, first, no reason in equity that Glade should not receive the proceeds. This is not a situation where Glade, as a stranger, "wagered" on Brad's life when the policies were purchased in 1989; he obtained the policy with Brad's consent; and no public policy is violated by giving Glade the proceeds. Glade should have the proceeds as Brad consciously

designated Glade as the beneficiary who should receive them. Equity should also favor Glade where he had an insurable interest in Brad's life for eighteen years, and perhaps not for only two to three weeks. Equity also favors Glade given that Brad's heirs allowed the policy on Glade's life to be cannibalized and lapse, without first tendering ownership of that policy to Glade.

ARGUMENT

I. **EQUITY SHOULD NOT DETERMINE DISTRIBUTION OF THE INSURANCE PROCEEDS, AS JOANNE AND BRAD'S CHILDREN WAIVED ANY DEFENSE OR CLAIM BASED ON SECTION 31A-21-104 BY FAILING TO PLEAD IT.**

A threshold issue that remains to be decided on this second appeal is whether a purported lack of insurable interest can be the basis for avoiding contract rights under a life insurance policy, per Utah Code Ann. § 31A-21-104, where none of the defendants/appellees identified the statute or pled it prior to the May 19, 2000 deadline established by the trial court for amendment of pleadings. According to the Rules of Civil Procedure and prior cases decided by this Court, JoAnne's eleventh hour defense based on Section 31A-21-104 is an avoidance waived by her failure to timely plead it. If JoAnne's defense was waived, then the trial court should not have been charged with determining who was "equitably" entitled to the proceeds. If this statutory defense was

waived, then Glade should receive the proceeds to which he is otherwise entitled to receive as the beneficiary unambiguously designated as such by the policy.⁸

A. Glade Properly Preserved his Argument that JoAnne Waived any Defense or Claim Based on Section 31A-21-104 by Failing to Plead it Prior to April 7, 2000.

An issue on appeal generally must have been preserved for appeal, by having presented it first to the trial court. Glade clearly made and preserved this argument for appeal by and through his two motions to strike.

When JoAnne, on October 26, 2000, for the first time suggested in the context of her so-called motion in limine that Glade had lost his insurable interest in Brad's life and that Section 31A-21-104 divested him of his contractual status as beneficiary, Glade immediately – and properly – moved to strike the newly articulated defense. R.1151. Faced with Glade's motion to strike, JoAnne withdrew her "motion in limine." R.1206.

Glade also protested the next time the defense was raised, in JoAnne's Trial Brief filed just days before the August 21, 2001 trial. Glade immediately moved to strike, as waived, any defense or claim predicated on § 31A-21-104. R.1399. Glade thus preserved his right to appeal the trial court's denial of his second motion to strike, and to assail as error any subsequent ruling predicated on § 31A-21-104 or his alleged lack of

⁸The Supreme Court, in its Opinion dated September 6, 2002, held that the insurance policy at issue unambiguously designated Glade as the beneficiary named by the policy, 2002 UT 93, ¶ 7, and overruled the trial court on this key issue.

an insurable interest in Brad's life. He preserved the argument for this appeal, by making it again on remand. R.1673-1674, 1707-1711.

B. Glade Expressly Made this Argument a Point of Appeal on the First Appeal to this Court.

Glade's argument that an avoidance of his contract rights based on Section 31A-21-104 was an affirmative defense that defendants had waived by failing to timely plead it, was pointedly framed and presented in the first appeal. Appellant's Brief (Jan. 24, 2002) at 9, 34, 37-39. Clearly, this issue was squarely presented to the Supreme Court for decision.

C. As the Supreme Court did not Address this Issue on the First Appeal, Glade Should be Allowed to Again Present it, and ask for a Ruling, on this Second Appeal.

The Supreme Court's Opinion entered on September 6, 2002, for reasons that are not clear, avoided the claim of waiver that Glade had raised. As the Supreme Court did not resolve the issue squarely presented to it for decision, Glade's waiver argument remains an "open" and unadjudicated issue.

The right of access to courts "for the adjudication of grievances and the settlement of disputes is a fundamental and important one." Le Grand Johnson Corp. v. Peterson, 420 P.2d 615, 616 (Utah 1966). This Court has held that, "It is the duty of [a] trial court to find upon material issues raised by the pleadings, and the failure to do so is reversible error." Le Grand, *supra* (quoting Baker v. Hatch, 257 P.673, 676 (Utah 1927)). There is no reason to believe that an appeals court should adhere to a lesser

standard. It should pass on legitimate issues on appeal that are addressed to it, especially if the issue is squarely presented and founded on law, as was Glade's argument that defendants waived any defense based on Section 31A-21-104 by failing to timely plead it.

D. JoAnne's Argument that *Utah Code Ann.* § 31A-21-104 Overrides and Eviscerates Glade's Rights Under a Contract of Insurance is, Under the Rules of Civil Procedure and Precedents Established by this Court, an Affirmative Defense that She Must have Pleaded.

Rule 12(b) Utah R. Civ. P., states that, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, **shall** be asserted in the responsive pleading thereto if one is required, except that the following defenses [not relevant here] may at the option of the pleader be brought by motion . . ." *Emphasis added.* Rule 8(c) requires that, "In pleading to a preceding pleading,⁹ a party **shall** set forth affirmatively accord and satisfaction, arbitration and award, . . . waiver, **and any other matter constituting an avoidance** or an affirmative defense." *Emphasis added.* Rule 12(h) provides that a party "waives all defenses and objections not presented either by motion or by answer or reply . . ." See, Triple I Supply, Inc. v. Sunset Rail, 652 P.2d 1298, 1300 (Utah 1982) (as existence of a bond would constitute an avoidance, it had to be pleaded by defendant; and the defense was

⁹A "counterclaim" is not recognized as a "pleading," see Utah R. Civ. P. 7(a); but consistent with Rule 13 it may be included as part of an answer or a reply to a counterclaim, which are.

waived as defendant did not plead it); Phillips v. JCM Dev. Corp., 666 P.2d 876 (Utah 1983) (statute of frauds is an affirmative defense that must be pleaded, else it is waived); Staker v. Huntington Cleveland Irr. Co., 664 P.2d 1188 (Utah 1983) (statute of limitations is an affirmative defense that must be pleaded, else it is waived); Pratt v. Board of Educ., 564 P.2d 294, 298-299 (Utah 1977) (mitigation of damages is an affirmative defense that must be pleaded, else it is waived); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898 (Utah 1976) (waiver is an affirmative defense that must be pleaded and defendants' failure to do so resulted in a waiver of the defense). "A court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried." Combe v. Warren's Family Drive-Inns, 680 P.2d 733, 735 (Utah 1984).

According to Pratt, supra at 298:

Since an affirmative defense raises matters outside the scope of plaintiffs' prima facie case, any matter which does not tend to controvert the opposing party's prima facie case should be pleaded and is not put in issue by a denial pursuant to Rule 8(b).

A party, furthermore, may move to strike "an avoidance" that was not pleaded in response to an initial pleading. Such a motion should be granted. Golding v. Ashley Central Irr. Co., 793 P.2d 897, 899 (Utah 1990).

JoAnne's "loss of insurable interest" argument predicated on §31A-21-104 is clearly an avoidance, as she has argued that it trumps and negates Glade's otherwise

unambiguous contractual right as a beneficiary to insurance proceeds payable on Brad's death. According to the Supreme Court in Golding, the defendant's contention that plaintiff's action was barred by the Limitation of Landowner Liability Act (§§ 57-14-1 to-7) was "certainly" an "avoidance,"

inasmuch as it denies liability not because the allegations of the complaint are not true, but because the legislature is claimed to have relieved the irrigation company of the liability usually associated with the negligence. **Therefore, to preserve the Act as a defense, it had to be raised in the irrigation company's answer.**

Golding, *supra* at 899. *Emphasis added.*

JoAnne, at oral argument, herself characterized the statute as a "prohibition" which, under her interpretation, would in this case prohibit payment of benefits to the beneficiary, as otherwise dictated by the insurance contract. Transcript, August 20, 2001, at p.28 line 21 and p.31. JoAnne argued, however, that the waiver dictated by Rules 8(c) and 12(h) did not apply since her position was predicated on a statute, R.1424, 1427. However, Golding held that an immunity defense predicated on a statute, the Limitation of Landowner Liability Act, Utah Code Ann. §57-14-1 et seq., was "certainly" an "avoidance" that would be waived by the defendant's failure to identify and plead it. Golding, *supra* at 899.

E. None of the Appellees Identified Loss of Insurable Interest and Section 31A-21-104 as an Avoidance/Affirmative Defense in Their Pleadings, nor was Either Mentioned Until Well After the Deadline for Amendment of Pleadings had Passed.

Section 31A-21-104 was not mentioned in any pleading. It was not mentioned in defendants' Amended Answer and Counterclaim, filed April 9, 1999. R.275. The statute and its alleged effect was never asserted in opposition to Glade's pretrial motions for summary judgment.

Brad's children not only never pleaded the statute, but never at any time prior to trial identified it or argued it as a basis for diverting life insurance proceeds to them instead of the beneficiary due them by contract. Brad's children did not argue, even on appeal, that Utah Code Ann. §31A-21-104 warranted the equitable diversion of proceeds to them. See Brief of Appellees (the Buchi Children) (Feb. 15, 2002). Utah Code Ann. § 31A-21-104 was not even in their list of determinative statutes. Brief at 6.

At oral argument on Glade's motion to strike, the trial court seemed to agree that the statute had the characteristics of an avoidance. Transcript, August 20, 2001, pp. 28, 31-32, 41-42. Nonetheless, and ignoring the May 19, 2000 deadline that Judge Stirba had set for amendment of pleadings, Judge Lubeck denied Glade's motion to strike on the ground that Glade had notice of JoAnne's statutory based claim via her earlier filed but promptly withdrawn "motion in limine." *Id.* p.43. However, her avoidance claim

based on Section 31A-21-104 had already been waived, as of October 26, 2000.

Golding, *supra*; Utah R. Civ. P. 8(c), 12(b) and 12(h).

F. Glade's Rights as a Beneficiary Under a Contract of Life Insurance Should not be Overridden on the Basis of a Statute that Would have Presented an Affirmative Defense, but that was Waived by Failure to Plead it.

Glade's argument should not be ignored. Moreover, unless the Supreme Court is willing to ignore Rules 8(c), 12(b) and 12(h) and overrule or distinguish its prior precedents articulated in Golding, Triple I Supply, and numerous other cases, §31A-21-104 cannot (no matter how it is interpreted) be the basis **in this case** for overriding the express, otherwise unambiguous provisions of a life insurance contract. The trial court erred on August 20, 2001 in not granting Glade's motion to strike and allowing JoAnne to base her defense on Section 31A-21-104 at trial. If defendants' defense based on Section 31A-21-104 was waived, then this case should not have been remanded after the first appeal to decide who was entitled to the proceeds. Instead, the proceeds should have been distributed as the contract of insurance provides.

II. THE TRIAL COURT’S “EQUITABLE” DISTRIBUTION OF LIFE INSURANCE CONTRACT PROCEEDS CANNOT BE SUSTAINED BECAUSE THE TRIAL COURT JUDGE REFUSED TO CONSIDER ANY EVIDENCE ON REMAND THAT CONTRAVENED HIS APPARENTLY PRE-CONCEIVED DETERMINATION OF WHO SHOULD HAVE THEM.

A. The Supreme Court on the First Appeal Remanded this Case with Instructions to Determine who was Equitably Entitled to Them.

For reasons that the Supreme Court did not fully explain in its prior Opinion, it held that Glade no longer held an insurable interest in Brad’s life when Brad died in early August 1997. Consequently, it held that Glade was by statute divested of his contract right as the beneficiary of the policy. It reversed the judgment of the trial court, it expressly reversed the prior award of proceeds to Brad’s survivors, and it remanded with instructions to the trial court “to equitably distribute the proceeds in a manner consistent with this opinion.” Parduhn v. Bennett, 2002 UT 93, ¶ 18.

B. The Trial Court (at least Purportedly) Refused to Consider any Evidence Other than that Presented in the August 2001 Trial, in Determining that JoAnne and Brad’s Children were Equitably Entitled to all the Insurance Contract Proceeds.

The trial court, in its Opinion on remand, declares that its equitable decree was based solely on the testimony and exhibits received in the prior trial, on August 21, 2001.

. . . The court does not believe it needs to have a further evidentiary hearing This court believes that it can decide the equities based on what is before it. This court does not consider materials provided in the pleadings in the

form of depositions **but only considers the evidence from the trial.** The Supreme Court did not direct that further evidence be taken in this matter. This court heard the trial and received and considered exhibits from events in 1979, 1984 and 1989 and later. **The court believes that is the best evidence as to the intent and conduct of the parties, rather than now entertaining someone's opinion and rather than now hearing facts tailored to the issue before the court.** The parties had opportunity to present whatever evidence they deemed proper and the court heard such evidence.

Emphasis added.

C. The Prior Trial, However, was not Conducted with the Objective of Determining who was Equitably Entitled to Insurance Contract Proceeds.

The trial court in its May 14, 2003 Ruling justified its refusal to consider additional factual evidence “tailored to the issue before the Court,” and that Glade proffered on remand, on its rationalization that “the parties had [had] opportunity to present whatever evidence they [had] deemed proper and the court had heard such evidence.” This statement is nonsense. First, Glade did not have fair notice that he should have to present evidence of “equitable entitlement” to the proceeds, as an affirmative defense based on Section 31A-21-104 had been waived by defendants’ failure to plead it. Second, the court refused at trial to receive evidence that would have been relevant to a determination of who, in equity, would be entitled to the proceeds. Third, and subsequent to trial, the court ruled that Glade could not present evidence at a phase two trial that he thought had been reserved and that, as it turns out, would have been relevant to the issue of equitable entitlement.

1. Evidence as to Who Might “Equitably” be Entitled to Contract Proceeds was not Fairly Contemplated, as an Issue at Trial, as JoAnne’s Affirmative Defense Predicated on *Utah Code Ann.* § 31A-21-104 had Been Waived by Her Failure to Plead it.

Neither Utah Code Ann. § 31A-21-104 or the argument that it might operate to negate Glade’s contractual rights as beneficiary are identified in the defendants’ Amended Answer and Counterclaim filed on April 9, 1999. R.275.

Aside from the identification of the statute in her Trial Brief filed five days before trial, JoAnne’s **only** prior mention of the statute and its suggested application in this case was in the context of a procedurally defective motion made six months after the deadline for amendment of pleadings, that she withdrew when confronted by a motion to strike. According to Golding, supra at 899, Glade’s motion to strike should have been granted had JoAnne not withdrawn her motion, as the defense by that time had been waived by her failure to plead it. Not only did Brad’s children not plead the statute as a defense, they never once identified it prior to trial; nor was their appeal founded on the statute. There was no reason for Glade to contemplate prior to August 16, 2001 that this statute would become the focus of JoAnne’s defense and that he should be prepared to present evidence relevant to his and others’ equitable entitlement to the proceeds.

2. The Court Declined at Trial to Receive Evidence that Would Have Been Relevant to the Issue of Who Would be Equitably Entitled to the Proceeds.

The trial court refused to receive evidence that Brad, prior to his death, had liened the partnership’s real property in order to extinguish on his death his *future* child support obligations. Trial Transcript, pp. 124-125. This evidence was proffered at id.,

pp. 129-130. Glade offered this evidence to show particular instances in which Brad consciously acted in the interest of his family, to counter the defendants' argument that Brad "clearly" intended his children and second wife to have the proceeds of the policy at issue, payable on Brad's death, even though Brad had designated Glade as the beneficiary.¹⁰ This evidence, as it happens, is also relevant to the issue of whether, in the interest of fairness and justice, Brad's children should receive the proceeds in preference to the partnership even though substantial partnership assets were diverted by Brad's actions to them for their support.

The trial court on remand declared "the intent of the partners" relevant to a determination of who is equitably entitled to the insurance proceeds. Ruling and Order at 8, 11, R.1894, 1901. Ironically, in the course of the earlier trial, the court at one point at least, indicated that the partners' professed intent was not relevant to a determination

¹⁰The evidence indicates that when Brad intended to provide for his family, he consciously did so. The third Northern policy purchased in 1989, for \$250,000 on his life, named Lissa and their children as beneficiaries. Plaintiff's Trial Exhibit 5. At the time the three Northern policies were purchased, Brad's life was also insured by a \$572,000 Executive Life Policy, which designated Lissa and family as beneficiary. Plaintiff's Trial Exhibit 3 (Application, question 18); Trial Testimony (S. Hansen), pp. 144-147; Trial Testimony (Lissa Buchi), pp. 116-118. Brad's life in 1989 was insured in the amount of \$200,000, by still another, earlier purchased policy from Northern. Plaintiff's Trial Exhibit 3 (Application, question 18). Brad's life was also insured by a \$100,000 Midland policy, which the trial court in Brad's and Lissa's divorce ordered be maintained for the benefit of Brad's minor children. Trial testimony (Lissa Buchi), pp. 119-120; Plaintiff's Trial Exhibit 21, p. 5. No policy has been found, however, which designated JoAnne as a beneficiary.

of who was entitled to the proceeds. The judge pre-empted Glade's answer to a question by Brad's children about how did he believe proceeds on the two policies should have been distributed. He did so with the comment, "I don't think it would be helpful what his belief would be, Counsel." Trial Transcript, p. 59.

Glade, thus, was not given the opportunity to present at trial all evidence material to the issue of equitable entitlement. Nor, for that matter, were Brad's children.

3. Glade was Prevented from Presenting Evidence Reserved for a Second Trial, Which Would have been Relevant to the Issue of Equitable Entitlement.

Judge Lubeck's declaration that the first trial was a stage for the presentation of every imaginable material issue, including equitable entitlement, is belied by the parties' pretrial Stipulation that reserved certain contingent issues to be tried in a second proceeding.

Judge Stirba had approved a bifurcation of issues for trial. A claim that Glade had reserved, depending on the outcome of trial, was a set-off against any contractual obligation the court might determine he had under the buy-sell agreement, to use a portion of the proceeds to buy Brad's half interest in the partnership. Glade reasoned that if he was required to buy Brad's half interest, that his "purchase price" should be reduced by the amount that interest had been devalued by Brad's dissipation of "his half interest" prior to his death. The constituents of this dissipation, among other things, included (1) \$69,297 of partnership money paid to Lissa, to satisfy a lien that Brad in

June 1997 had placed on the partnership's real property without Glade's knowledge or permission and which was to pay in advance the entirety of Brad's future child support obligation; (2) additional partnership money paid to Lissa to extinguish any claim by Lissa to the partnership (which Glade did approve, which Brad agreed to repay, but which he had not when he died); (3) thousands of dollars in unauthorized counterchecks drawn by Brad against the partnership's checking account (discovered after his death); (4) the use of partnership funds to extinguish Brad's personal credit card debt; and (5) the absence of any cash deposits from the Texaco station for the last several months of the station's operation.

Glade's set-off argument was rendered moot when the Supreme Court held that the dissolution of the partnership predated Brad's death, and that the buy-sell agreement could not be enforced following the dissolution of the partnership. Parduhn, 2002 UT 93, ¶ 15, citing Girard Bank v. Haley, 332 A.2d 443, 446 (Pa. 1975) and Goergen v. Nebrich, 174 N.Y.S.2d 366, 369 (N.Y. Sup. Ct. 1958); see also Fischer v. Fischer, 2003 Ky. App. Lexis 215 (2003). However, Glade argued on remand (R.1657, 1667-1668, 1680-1687) that this evidence that the trial court refused him permission to present is relevant to the issue he did not contemplate having to try in August 2001. Brad's dissipation of partnership assets is relevant, if not to the value of his half interest, then to whether his children have an equitable claim superior to the partnership which paid the

premiums on two policies until the date of its dissolution, and which paid \$69,297 in advance for their support.

D. The Trial Court Refused to Consider Evidence on Remand, Which is Relevant to the Question of Who Should in Equity Receive the Insurance Proceeds (if Glade's Contractual Right to them was Avoided by Section 31A-21-104).

The trial court's assigned task on remand was "to equitably distribute the insurance proceeds pursuant to Utah Code Ann. § 31A-21-104(5)." Parduhn, 2002 UT 93, ¶ 17. It did not order the court to take additional evidence on this point. But it did not preclude the court from doing so, either. It surely did not imply that the court should ignore additional material evidence that might bear on how the proceeds, in fairness and justice, should be distributed.

Glade argued on remand that equity favored an award of the proceeds to him and, if not to him, then to the partnership or to Brad's probate estate. R.1663-1669. He argued that an equitable award of the proceeds to him or, alternatively, the partnership, could be sustained on the basis of evidence received during the August 2001 trial. Hearing Transcript (May 9, 2003) p. 42; R.1663-1669. However, he argued that the Court could not conclude that JoAnne or Brad's children were equitably entitled to the proceeds without taking additional evidence, not received at trial, which was material to the question of fairness and that would show that equity did not favor an award of the proceeds to them. Id., pp. 1669-1672; Hearing Transcript (May 9, 2003), p. 53.

Evidence and argument that Glade proffered and that the trial court refused to acknowledge or consider included:

1. The record and details of JoAnne's petition for a divorce from Brad (which would be relevant to his supposed intent when he died; and which would countenance against an award to JoAnne based on fairness and justice).

2. A stipulation signed by Brad and Lissa, by which Brad (without Glade's knowledge) liened the partnership's real property to satisfy, on his death, his personal obligation for past **and future child support**, totaling \$69,297¹¹(which would suggest that the partnership has an equitable claim to the proceeds superior to defendants'). R.1672, 1680-1681. Also proffered were the Notice of Lien that Lissa recorded, R.1682, and the check for \$69,297 the partnership had to pay Lissa to satisfy and extinguish the lien that she with Brad's complicity had recorded, R.1683.

3. JoAnne's status as the personal representative of Brad's estate and her disqualification in equity to the proceeds as she has failed to articulate the estate's equitable claim to the proceeds.

¹¹The attorney for Brad's children acted as Lissa' attorney with regard to this transaction and drafting this document. The children therefore had notice of this transaction and its purpose.

E. The Trial Court's Decision that JoAnne and Brad's Children are Equitably Entitled to Proceeds is Flawed by its Failure to Consider all Evidence Relevant to that Issue.

Findings based on equitable grounds will generally be reversed only when the evidence clearly preponderates against the findings made by the trial court. Jensen v. Brown, 639 P.2d 150 (Utah 1981).

The findings "in equity" made by the trial court, however, must have some basis in the record. Bellon v. Malnar, 808 P.2d 1089, 1095 (Utah 1991). While there may be a presumption of correctness, findings in equity cases must be overturned and the judgment reversed, if the appeals court has a definite and firm conviction that the trial court has erred. Id. Findings, furthermore, are only as good as the evidence that supports them. In this case, the court's findings are irreversibly tainted by its refusal to consider on remand facts material to the issue of equitable distribution (that even the court described as "facts tailored to the issue before the court"); and which Glade had no realistic opportunity at the first trial to present.

F. The Trial Court's Findings and Holding on Remand are Further Flawed Because They Were Based on Evidence not Presented at Trial.

The trial court's self-declaration that it confined its decision-making process to evidence presented in the course of the prior trial is also untrue. To the contrary, the trial court picked and chose from untested and unproven evidence proffered by the defendants, where it fit the court's preconceived determination that Buchi's second wife and children should receive them. The following examples establish this point.

1. The Trial Court Found “Persuasive” the Supposed Sale of the Partnership’s Personal Property, for Which There is no Support in the Evidence at Trial.

In the course of final oral argument on May 9, 2003, Buchi’s children argued that the insurance policies could not be partnership property because Blackett Oil Company had purchased all the partnership’s property and assets in mid-July, 1997 and no one, including Glade and University Texaco had argued that the policies belonged to Blackett Oil. Transcript at 23-24, 28, 63-67. This novel argument had not been made before, not even in the memorandum filed by Brad’s children. R.1777. There was no evidence at the prior trial to support the conclusion that University Texaco had sold all its assets, including personal property and insurance policies to Blackett Oil Company. R.1929, 1932-1933, 1935, 1937-1943. In fact, it did not. R.1939 at ¶ 1. Nonetheless, and even though there was **no** evidence at the prior trial to support this speculation, the trial court found this to be a singularly persuasive argument for concluding that the policies were not partnership property¹² and that University Texaco, therefore, did not have an equitable claim to the proceeds:

¹²Glade’s position is that the partners, not the partnership, owned the two Northern policies. This conclusion, however, has nothing to do with the partnership’s sale of its real property and stations in July, 1997. Rather, ownership by the partners was previously established by the partners’ mutual decision and conscious choice when they applied for insurance. See 1989 Applications for insurance, Plaintiff’s Trial Exhibits 3 and 4 (Question No. 31). Just above the partners’ signatures, on both Applications, it says, “Any policy . . . issued on this Application will belong only to the Owner.”

The court finds that the policy was not intended to be a partnership asset. *Here the business was sold to Blackett Oil.* No one seemingly thinks that the policies thus belongs to Blackett Oil. *That factor alone seems to indicate* the policies did not belong to the partnership and were not considered a partnership asset.

Opinion at 9, R.1902 (emphasis added).

Defendants proposed Findings of Fact that referenced the preceding finding.

R.1953. Glade objected, and pointed out that the evidence received in the prior trial did not support the conclusion that University Texaco had sold assets other than real property to Blackett Oil.¹³ [Glade's] Objections to Proposed Findings. R.1929-1935, 1947-1948. In its follow-up memorandum the trial court acknowledged its error:

As to the proposed order and judgment on remand, the court will sign that order and has done so this date with the plaintiff's suggested modification. **The "partnership" was not sold to Blackett Oil and the evidence did not support that the partnership was sold.** Exhibit 11 shows only that Blackett Oil purchases from seller "University Texaco Company" something for the price of \$1,000,000.00. The order is signed with that interlineation as proposed by plaintiff.

R.1972 (emphasis added). This correction, however, did not cause the court to amend its decision, notwithstanding its earlier emphasis on this phantom evidence.

¹³University Texaco with the sale of its stations, however, ceased its service station business. It immediately, after July 14, 1997, began the process of winding up its financial affairs.

2. The Trial Court also Based its holding on Remand in Part, on its Finding that the Partners “Treated the Partnership Casually” and that the Partnership Proceeds Were Frequently and Regularly Used for Personal Expenses, Though There was No Evidence of this at Trial.

The trial court’s finding to the above effect is found at pp. 9-10 of its Ruling and Order dated May 14, 2003. There is no evidence, however, to support this finding in the testimony or exhibits received by the court at trial on August 21, 2001. Evidence cannot be marshaled in support of this finding because there is none.

The defendants *argued* that there was support for such a finding, but the “support” they identified in or attached to their memoranda was from pretrial affidavits and depositions that were **NOT introduced at trial**. Both JoAnne and Brad’s children in their memoranda included excerpts from Glade’s deposition. JoAnne’s Memo., R.1854-1857; Exhibit D to Brad’s children’s Memo, R.1777. At least JoAnne conceded that, “the Supreme Court did not rule on this issue because Glade’s testimony cited above was not before the court.” R.1858. JoAnne’s Memorandum introduced and relied on an alleged stipulation between Brad and JoAnne (R.1860) that was not appended to her memorandum, was not identified or produced in discovery, was not among her exhibits identified for trial (R.1155), and was not offered or received at trial (see R.1443). JoAnne even resurrected and relied on an affidavit she filed in this case on March 13, 2000 (R.1859, 1860) EVEN THOUGH JUDGE STIRBA ON

NOVEMBER 8, 2000 ORDERED THAT JOANNE'S AFFIDAVIT BE STRICKEN!

R.1145.

Glade protested that findings on remand could not be based on depositions, pretrial affidavits, and other "evidence" not received at trial, as such testimony (1) had not been subjected to cross-examination, and (2) would be subject to relevance, hearsay, foundation and other objections. Oral argument, May 9 , 2003 (Fishburn), p. 42. Judge Lubeck pointedly asked counsel for Brad's children, "Do you think that the trial record demonstrates some of those things you just told me about vehicles, house payments?" Hearing Transcript, p. 25. Counsel Martin Tanner responded, "Absolutely. Absolutely it does." Judge Lubeck accepted this assurance. The only problem is no such evidence was introduced at trial (as JoAnne, in her memorandum, conceded).

III. **THE "EQUITIES" DO NOT FAVOR AN AWARD OF ALL OR A PORTION OF THE PROCEEDS TO JOANNE AND/OR TO BRAD'S CHILDREN, IN PREFERENCE TO GLADE, UNIVERSITY TEXACO, OR BRAD'S ESTATE.**

A **Equity Cannot Condone an Award of Any of the Proceeds to JoAnne.**

1. **Equity, first, cannot condone a distribution of proceeds directly and personally to JoAnne, as she has forsaken her fiduciary duty to Brad's estate.** One who comes before a court seeking equity must come before it with clean hands. **LHIW, Inc. v. De Lorean**, 753 P.2d 961, 963 (Utah 1988). JoAnne sought and received appointment as the personal representative of Brad's estate. At least six creditors have filed claims against the estate. **In re Estate of Brad Kevin Buchi**, Third District Court, Salt Lake

County, Probate No. 973901394. **JoAnne joined this action as the personal representative of Brad's estate**, as well as in her personal capacity. R. 275. Since March 2000, however, JoAnne has maintained that she **and not Brad's estate** should receive the proceeds. As personal representative of Brad's estate, she, given her injection of Section 31A-21-104 into this case and especially given the Supreme Court's September 2002 Decision, has a duty to articulate the estate's equitable claim to the proceeds.¹⁴ Judge Lubeck in fact identified Brad's estate as one of the "persons" who might equitably be entitled to the proceeds. Instead, and to the detriment of the estate which she is charged with administering, JoAnne advocated the entry of an Order by which the estate was altogether cut out of the equation and one-half the proceeds were to be distributed directly to her, personally. Her quest to obtain the insurance proceeds, personally, without articulating the estate's position in an action in which she is the estate's legal representative, is a breach of her fiduciary duty to the estate. Under this circumstance, the trial court erred in determining that JoAnne, personally, is equitably entitled to half the insurance proceeds in preference to the partnership and Brad's estate, to the detriment of the estate and its creditors. **This factor alone should disqualify her personal claim to the proceeds in equity.**

¹⁴The estate would benefit, as well, if the proceeds were distributed in equity to the partnership, which would result in the eventual pass-through of a portion of the proceeds to the estate.

2. There, second, is no evidence before the Court that Brad intended that JoAnne have any of the proceeds or, for that matter, anything as a consequence of his marriage to her. JoAnne cannot have been the object of the policy when purchased, as Brad, at the time, was married to Lissa. In the application for the policy, Brad named Glade to be the beneficiary; not Lissa and certainly not JoAnne (whom he did not marry until three years later). Brad did not provide for JoAnne by the purchase of any life insurance policies naming her as the beneficiary, as he did for Lissa and his children. He did not provide for JoAnne by will. JoAnne had sued for divorce because of irreconcilable differences, they had lived apart since October 1995, and they had already divided their personal property.

3. There, third, is no evidence of a good relationship between JoAnne and Brad, based on which it might be concluded that JoAnne is equitably entitled to a portion of the proceeds. The entirety of JoAnne's trial testimony is contained in two pages of trial transcript.¹⁵ Transcript (August 21, 2001), pp. 151-153. JoAnne testified

¹⁵There was a reason for the brevity of JoAnne's testimony. Prior to the December 2000 trial setting, Glade included in his designation of trial exhibits a Record showing JoAnne's conviction in 1992 on one felony count for theft by deception. See R.1211, 1213 (designation of trial exhibits) and R.1253-1255 (record of conviction). The court's Judgment and Order had also decreed that JoAnne was not to hold any employment by which she would be allowed "any type of control over other's monies." As JoAnne had insisted pre-trial that Brad had intended her to have the proceeds of the policy that Glade owned, Glade contemplated using the record of her convictions to impeach her credibility, per Rule of Evidence 609. JoAnne then used the time between the first and second trial settings to engineer an expungement of her record of conviction. On April 23, 2001, she then filed a motion in limine, by which she sought a ruling that Glade could not introduce her

that she married Brad on May 18, 1992, and that she remained Brad's "legal wife" at the time of his death. She volunteered that she and Brad had been separated for a year. On cross-examination, she admitted that she had sought and accepted appointment as the personal representative of Brad's estate, and that no will had been found. JoAnne did not testify that there was an especially loving relationship between she and Brad or even a good one.

The trial court, on remand, without justification refused to consider that JoAnne, on April 2, 1996, filed a Complaint by which she sought to divorce Brad. R.1693. The trial court's refusal to consider this evidence was error, especially in light of its finding that Brad "intended" JoAnne to have half the insurance proceeds payable on his death. In her complaint for divorce, JoAnne alleged that "the parties have experienced difficulties that cannot be reconciled." ¶ 5. She volunteered that she and Brad had been separated since October 1995 and had not lived together since. ¶ 4. They had already divided all their personal property. ¶ 14. According to an entry on the docket sheet for August 5, 1997¹⁶, JoAnne's counsel was preparing "final settlement papers" (not

record of conviction to impeach her credibility. R.1234, 1227. Glade opposed her motion. R.1242-1249. Just prior to the August 2001 trial, the Court decided that it would first hear what JoAnne had to say, and whether she offered any testimony that would place her credibility at issue, before he ruled on JoAnne's motion. R.1260, 1412. As JoAnne testified as to nothing more than stated above, Glade concluded she had not put her credibility at issue and therefore did not seek to introduce her convictions as an exhibit or through testimony.

¹⁶Brad's body was found August 8, 1997. See Plaintiff's Trial Exhibit 6.

dismissal papers) which were soon to be submitted to the court. R.1677.

Approximately ten to twelve days after Brad died, but only after he died, JoAnne moved to dismiss her complaint. Id.

JoAnne, as Brad's not-yet-divorced spouse, may be entitled by law to one-half of whatever proceeds pass through Brad's estate and after payment of his creditors.

However, there is no evidence based on their marital relationship, aside from the marital relationship, that warrants proceeds being distributed directly to her in equity.

B. The Evidence at Trial was Inadequate to Support an Award, in Equity, of One-Half the Proceeds to Brad's Children.

There is no evidence that Brad intended these insurance proceeds to go directly to his children, if intent is a criterion for equitable distribution. Brad specifically provided for his children by other means: by their express designation as secondary beneficiaries on multiple life insurance policies and by the assignment, expressly to them and for their exclusive benefit, of a \$100,000 Midland Life Insurance policy as part of the final divorce decree between him and Lissa.

A loving and close relationship *perhaps* existed between Brad, as father, and his children. However, to the extent this might be the basis of an equitable award, it was not established by any evidence at trial. None of Brad's children testified at the trial.

Brad's children paid none of the premiums to purchase the insurance and, thus, can make no equitable claim on that basis. They did not own the policy and they were not its designated beneficiary. An award to them would be an unjustified windfall,

where there is no evidence that Brad intended them to receive the proceeds of this policy (whereas he did on others). Moreover, it is not fair that the children should be deemed equitably entitled to the proceeds in preference to the partnership, when Brad, as a consequence of his death, diverted substantial partnership funds (\$69,297) to the advance payment of their support before he died.

IV. **AN AWARD IN EQUITY CANNOT BE BASED ON AN AGREEMENT THAT THE SUPREME COURT HAS HELD IS NOT ENFORCEABLE.**

The Supreme Court held that on the partnership's dissolution, the partners' buy-sell agreement could no longer be enforced by Brad's heirs. That holding notwithstanding, the trial court on remand claimed to divine the partners' "intent" from this unenforceable agreement, then used that as justification for an award based on fairness and justice.

Although the buy-sell agreement was no longer effective, as decided by the Supreme Court, it does provide guidance in deciding Buchi's and Parduhn's intent when they obtained their policies.

Ruling and Order (May 14, 2003) at 9. The court erred in basing its award in equity on this unenforceable agreement and the "intent" it speculated could be gleaned from it.

It is manifest error for the trial court to have "found" intent and used that as its basis for an equitable award, based on an unenforceable agreement. The effect, first, is that the court on remand chose to enforce the agreement against Glade – even though the Supreme Court had just declared it not to be enforceable. Second, "intent" as the

basis of an equitable division of proceeds cannot be inferred from this unenforceable agreement, because the partners had to have realized that the agreement would not act as a conduit for all or a portion of the insurance proceeds should the partnership be dissolved by reason other than what would trigger the buy-sell agreement.

V. **THE TRIAL COURT ERRED ON REMAND IN DECIDING TO AWARD THE PROCEEDS BASED ON WHAT IT IMAGINED THE PARTNERS WOULD HAVE DONE WITH THE POLICIES HAD BRAD LIVED LONGER.**

The trial court appears to have intended as a finding of fact its conclusion at page 10 of its May 14 Ruling and Order, that the two Northern policies “in an accounting between the partners, . . . would have been divided fairly and equitably between the parties.” Based on this assumption, the court conjectures that the partners would have exchanged ownership of their policies and re-designated beneficiaries had Brad lived longer.¹⁷ This, however, is nothing more than speculation. Moreover, it ignores several critical facts: (1) there was no longer any contingent obligation to fund, given the partnership’s dissolution; (2) the policies were owned, not by the partnership, but by the individual partners – who therefore controlled their fate; (3) the individual partners had options other than the single option conceived by the trial court; and (4) most critically – Brad died before the possibility imagined by the court could occur.

¹⁷The trial court thus imagined that Glade would have assigned the policy he owned on Brad’s life to Brad who, once he owned the policy, would have changed the designation of the beneficiary to himself.

A buy-sell agreement creates a *contingent* obligation, that *may* be triggered by an event such as death of a partner. It is a contingent obligation that *may never* be triggered, in the case of a partnership, if the partners voluntarily decide to dissolve the partnership or if the partnership is dissolved by another cause of dissolution recognized by law. See Utah Code Ann. § 48-1-28. Insurance is a device by which funds, hopefully, will be available to fund a surviving partner's purchase obligation, *if* that contingency is triggered by his partner's death or another contractually specified event. There is no reason that the amount of insurance purchased cannot exceed the sum that may be needed by a surviving partner; indeed it would be prudent to purchase more insurance than it is foreseen may be needed especially where projected buy-sell amounts are variable based on performance of the business and/or other factors.

Because a purchase obligation under a buy-sell agreement is a contingent obligation that may never arise (and most often probably does not), then the question of what to do with the insurance that was purchased to fund the never-realized obligation may arise. If the partners chose to designate the partnership as the owner of the policies, and the policies are term policies, then the policies will lapse due to the partnership's failure to continue payment of the premiums. If the policies are whole life, then the accumulated cash values will likely be surrendered to the partnership and become assets subject to distribution under partnership law.

A different result follows where the partnership dissolves, but the partners designated themselves as owners of the policies. Jones v. Simmons, 209 N.W.2d 840 (Mich. App. 1973). Dissolution of the partnership does not change the fact that the partners, not the partnership, own the policies. As owner, each partner controls, and should control, the fate of the policy he owns. A possibility in this case, had Brad lived longer, is that Brad and Glade each would have “cashed out” the whole life policies they owned. On July 15, 1997, Brad had this right on the policy he owned as there no longer existed a contingent obligation to buy out Glade’s partnership interest in the event Glade died; Glade also had this right on the policy he owned (which he *might* have exercised before Brad died). Glade and Brad *might* have cross-assigned ownership of the policies, as they did with the Northern policies purchased in 1984. One or both of them also *might* have chosen to maintain their policy on the other, and personally assume the obligation to pay the premiums that the partnership had paid. The cash surrender value would continue to accrue to the partner who owned the policy. Under the traditional legal application of “insurable interest,” by which a **beneficiary’s insurable interest is determined when the insurance is acquired and not when the insured dies**,¹⁸ there is

¹⁸The Supreme Court cited no authority other than the statute and did not explain its basis for deciding that an insurable interest of a beneficiary in the life of an insured person must exist at the time of the insured’s death, as well as when the insurance was purchased. Parduhn v. Bennett, *supra*, ¶¶ 16-17. There is no language in the statute that requires or warrants this conclusion. It is a conclusion that is at variance with prior Utah case law. See Culbertson v. Continental Assur. Co., 631 P.2d 906 (Utah 1981) (which the Supreme Court did not overrule) (holding that a former spouse previously made a beneficiary by her remarried

and would be no impropriety in doing so. Nor should there be, as no public policy is violated. Lissa, for example, chose to pay the premiums and keep the 1989 \$250,000 whole life policy she owned on Brad's life current and in effect, even though she arguably no longer had an insurable interest in Brad's life once she divorced him in 1992. As owner of the policy, she kept the premiums current and received the proceeds paid on his death. There should be nothing wrong in her doing so, although the Supreme Court's September 2002 Decision suggests otherwise.

The fact is that several options were available to the partners immediately after July 14, 1997 concerning the disposition of their policies. The trial judge's speculation as to what they *might* have done (see Ruling and Order at 10) is just that, speculation. It is suspicion and guess, and nothing more. Compare Oglesby-Barnitz Bank & Trust Co. v. Clark, 175 N.E.2d 98, 104 (Ohio App. 1959). There is no evidence in the trial record to marshal in its support, except perhaps a speculative inference drawn from the buy-sell agreement which the Supreme Court decreed that Brad's heirs could not enforce.

What the partners *might have done* with the policies also does not change the fact that on Brad's death, the policy on his life was at that moment in time still in effect, was

husband, retained her designation as beneficiary on his death even though she had previously divorced him). The Supreme Court's conclusion is against the weight of virtually all authorities on life insurance law, which are to the effect that **insurable interest is determined when life insurance is purchased, not when the insured person dies.** See 1 Freedman's Richards on Insurance, § 2.4 (6th ed. 1990); 2 Appleman, Insurance Law and Practice, §763 (1966); 43 Am.Jur.2d Insurance, § 977 (1982); Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 24 L.Ed. 251 (1877); Dalby v. Life Ins. Co., 15 C.B. 365 (1854).

owned by Glade, and designated Glade as the beneficiary of the proceeds payable on Brad's death.

VI. **WITH THE DEMISE OF THE BUY-SELL AGREEMENT, THERE NO LONGER EXISTS A BASIS FOR A NON-TESTAMENTARY TRANSFER DIRECTLY TO BRAD'S HEIRS, BYPASSING HIS ESTATE.**

In her Ruling dated May 22, 2000, Judge Stirba decreed that *if* the buy-sell agreement was enforceable by Brad's heirs, then it would operate to channel either \$100,000 or \$300,000 (if the 1984 agreement was found to be implicitly amended in 1989) directly to them as a non-testamentary transfer recognized by Utah Code Ann. § 75-6-201. Thus, *if* the buy-sell agreement survived dissolution, then at least a portion of the proceeds would bypass Brad's estate and go directly to his heirs.

Given the Supreme Court's holding on appeal that the buy-sell agreement did not survive the partnership's dissolution on July 14, 1997, there is no longer a basis in law or equity to prefer Brad's heirs over his estate. Brad left no will, so that will not accomplish the objective. There is no instrument or agreement, given the demise of the buy-sell agreement, to effect a non-testamentary transfer that can bypass Brad's estate.

The trial court, on remand, nonetheless and still found that Brad *intended* all the proceeds of the policy on his life to go to his children, and to the wife he would marry well after the partners' 1984 amended buy-sell agreement and the insurance they purchased in 1989. Even if support could be found in the trial record for this finding,

there is no equitable warrant, given the demise of the buy-sell agreement, for bypassing Brad's estate and the creditors who have claims against his estate.

VII. **AN AWARD IN EQUITY BASED ON "INTENT" DIVINED FROM AN UNENFORCEABLE BUY-SELL AGREEMENT SHOULD NOT, IN ANY EVENT, DIVERT MORE THAN \$100,000 TO DEFENDANTS.**

Glade argued on the first appeal that the trial court had erred when it held that the partners' purchase of the two Northern policies in 1989 implicitly amended their buy-sell agreement, last amended in writing in 1984. The Supreme Court did not reach this argument, concluding instead that the buy-sell agreement was not enforceable by Brad's heirs. If, however, an unenforceable agreement can be the basis for determining the partners' intent as to who should have the proceeds and that, in turn, becomes the basis of equitable award, then the challenge Glade raised on the first appeal is again germane.

The 1984 written amendment to the buy-sell agreement provided that each partner agreed to pay the other's survivors the sum of \$100,000 for the deceased partner's interest in the partnership. Funding for that obligation was to be assured by the purchase of a policy in the amount of \$100,000. Neither partner ever agreed to pay more than \$100,000. Trial Testimony (G. Parduhn). No subsequent written agreement evidenced their intention to pay more than \$100,000.

Although the partners in 1989 increased their insurance on each other (though not in equal amounts), they did not amend the amount each agreed to pay to buy out the other's interest should events require. That the partners chose in 1989 to purchase

increased whole life policies on each other's life, but did not in writing amend their prior buy-sell agreement, is not a sufficient warrant for concluding that they implicitly amended their buy-sell agreement. See Oglesby-Barnitz Bank & Trust Co. v. Clark, 175 N.E.2d 98 (Ohio App. 1959) (case discussed in detail in Appellant's Brief (January 25, 2002), at 69-73). Defendants presented no evidence at trial that the value of the partnership and its property ever approached \$600,000, which is a logical predicate for one to assume that the only purpose of the partners purchasing \$300,000 and \$250,000 policies was to fund a buy-sell agreement that had *supposedly* been reached consistent with the higher amounts. According to Glade, only about \$100,000 remained after the stations were sold and trust deed liens and encumbrances on the partnership's real property were satisfied. Trial Testimony (Parduhn), p. 36.

VIII. IF DEFENDANTS' DEFENSE BASED ON SECTION 31A-21-104 WAS NOT WAIVED, AND EQUITY THUS GOVERNS WHO SHOULD HAVE THE INSURANCE PROCEEDS, THEN THE PROCEEDS SHOULD GO TO GLADE.

- A. A Primary Purpose of Section 31A-21-104 is to Pre-empt the Common Law Remedy of Avoidance of Insurance by the Insurer, if the Beneficiary is Concluded not to Have had an Insurable Interest in the Insured's Life.

"Insurable interest" is a legal principle, according to 1 Freedman's Richards on Insurance § 2.1 at 151 (1990), that originated with Acts of the English parliament in 1746 and 1774. The prevalence of the general populace betting on the lives of prominent men in England during the eighteenth century, according to Freedman, prompted the enactment of a statute in 1774, Statute 14 Geo. III, C. 48, which prohibited

wagering on lives when the holder of the insurance had no insurable interest in the life of the person whose life was insured. Id. § 2.2 at 155. The prerequisite of “insurable interest” was imported into American common law, principally by the courts. See e.g., Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 24 L.Ed. 251 (1877).

As the doctrine of “insurable interest” developed, it became available to insurance companies as an affirmative defense to a claim brought by a beneficiary for payment of policy proceeds on death of an insured. Most states that have considered the issue have held that only the insurer has standing to invoke such a defense, and that a stranger to the insurance contract may not do so. Ryan v. Tickle, 316 N.W.2d 580 (Neb. 1982) (and authorities cited therein). The recognized remedy for proving a beneficiary’s lack of insurable interest is avoidance of the insurance contract, which means that the beneficiary does not get and the insurer does not have to pay the proceeds that the insurer, by contract, is otherwise obligated to pay.

There is no legislative history on Section 31A-21-104 to be found, other than the drafts of bills leading to final enactment. Nonetheless, the principal purpose of its enactment (which was part of a major overhaul of the insurance code) may be inferred from its modification of what was theretofore the common law remedy where an insurer proved that the beneficiary lacked an insurable interest in the insured’s life when the insurance was initially obtained. That modification is in Section 31A-21-104(5), which provides that “an insurance policy is not invalid because the policyholder lacks insurable

interest or because consent has not been given, but a court with appropriate jurisdiction may order the proceeds to be paid to some person who is equitably entitled to them . . .”

This section thus provides that if a policy is avoidable because the beneficiary did not have an insurable interest in the insured’s life, that the proceeds still must be paid to someone. That “someone” would be whoever is equitably entitled to them, under the applicable facts.

B. On the Facts of this Case, Equity Warrants an Award of the Insurance Proceeds to Glade.

1. There is no Reason in Justice and Fairness that Glade Should not be Awarded the Proceeds.

There is no public policy reason why Glade should not receive the proceeds to which he would otherwise be entitled as the beneficiary designated by the policy. He did not wager on a stranger’s life. He did not obtain the insurance on Brad’s life without Brad’s knowledge or consent; to the contrary, Brad signed the application. Plaintiff’s Trial Exhibit No. 3 (see last three pages). No public policy is violated should he retain proceeds in excess of that needed to fund a contingent purchase obligation which, in this case, proved to be zero. See Ridley v. VanderBoegh, 511 P.2d 273, 280 (Ida. 1973).

2. In Justice and Fairness, the Insurance Proceeds in this Case Should be Awarded to Glade

Under the facts of this case, equity favors an award of the proceeds to Glade, for the following reasons:

First, Brad consciously designated Glade as the person who should receive the proceeds should he die. He did so by signing the application, which unambiguously designated Glade as the beneficiary of the policy. Plaintiff's Trial Exhibit 3. Brad also consented to Glade's designation of owner, which means Glade (a) owned the right to the cash value that accumulated under the policy, and (b) retained control over whom the policy designated as beneficiary. This is the *only* evidence of who Brad in 1989 intended to have the proceeds of this policy should he die.

Brad may have contemplated that his children and, perhaps, his wife would receive \$100,000 for his interest in the partnership should the partnership be dissolved because of his death. There is no reason, however, to speculate that Brad thought his wife or children would get the insurance proceeds if the partnership was dissolved before he died, and no purchase obligation by the surviving partner remained. In that situation, at least had he thought about it, he surely would have understood that his estate would be entitled to the value of his partnership interest at death, and his children and his wife would divide the residual assets of his estate.

Second, Glade owned the policy. The policy, with Brad's consent, designated Glade as the owner of the policy.¹⁹ That the partnership paid the premiums on the two policies (one owned by Glade and the other owned by Brad) does not make the partnership the owner of the policies where the partners consciously designated

¹⁹Supra, n. 12 at 42.

themselves to be the owners. See Esswein v. Rogers, 216 Cal. App. 2d 91, 30 Cal. Rptr. 738, 741 (1963)²⁰; Jones v. Simmons, 209 N.W.2d 840, 842 (Mich. App. 1973).

Third, Glade had an insurable interest in Brad's life, as his partner for eighteen years. He did not have an insurable interest for only about two-and-a-half to three weeks, if the September 6, 2002 Supreme Court Opinion is meant to depart from the almost universal law on insurable interest and Utah precedent to the contrary.

Glade very clearly had an insurable interest in Brad's life (as Brad had in his) when they embarked on their business venture and, later, when they in 1989 purchased the two new policies from Northern. According to the common law, a partner in a business has an insurable interest in his partner's life, which arises from their relationship as partners. Keeton & Widiss, Insurance Law § 3.5(3) (1988).²¹ He has an

²⁰The court, in Esswein, explained its holding as follows:

The fact that the premiums were paid for out of partnership funds does not justify an affirmative answer to the question. Surely partners may provide, at the expense of the partnership that each shall be insured, with his wife as the beneficiary, just as each partner may be given a monthly sum out of partnership funds to be expended as the recipient wishes. No principle of law dictates that partners shall not agree to make use of partnership funds for other than purely partnership purposes.

²¹See also Appleman on Insurance § 871 ("a partnership has an insurable interest in the life of the deceased partner, just as each partner has an interest in the life of the other"); Freedman's Richards on Insurance § 2.3 at 162 (6th ed. 1990) ("partners who have contributed to the partnership have insurable interests in the lives of each other, as does the partnership in the lives of the partners"); Graves v. Norred,

insurable interest in his partner's life even in the absence of a buy-sell agreement. Ridley v. VanderBoegh, 511 P.2d 273, 280 (Ida. 1973). The agent who took Brad's and Glade's applications for insurance, Sheldon Hansen, testified that he was authorized to accept their applications based on their relationship as business partners, even had there been no buy-sell agreement for the insurance to fund. Trial Testimony (S. Hansen), pp. 137-141. Utah Code Ann. § 31A-21-104(2), consistent with common law, states that persons who are not related by blood or law nonetheless have an insurable interest in the lives of others when "they have a lawful and substantial interest in having the life, health and safety of the person insured continued." Business partners invest money and their time in joint enterprises, on expectations that are intrinsically tied to the contribution, effort, abilities, acumen and reputation of their partners. Section 31A-21-104 does not, as Appellees have argued, provide that business partners have an insurable interest in their partners' lives **only** if they have as between them a buy-sell agreement enforceable on dissolution of the partnership (and, at that, only in an amount they might be required to pay for a partner's interest). Even if that is what it meant, Glade had an insurable interest in Brad's life, as **one** purpose of the two policies was to fund each partner's

510 So.2d 816, 818 (Ala. 1987) ("It is not the mere existence of the partnership which provides the basis for the insurable interest. It is the insuring partner's reasonable expectation of pecuniary benefit from the continuance of the insured's life"); Rich v. Class, 643 S.W.2d 872, 878 (Mo. App. 1982) (a "partner has an insurable interest in the life of another partner which arises from their business relationship").

contingent obligation to pay the deceased partner's heirs \$100,000 to buy the decedent's interest, had the partnership been dissolved by the death of the other partner.

There is, in the interest of justice, no reason to declare that Glade should suddenly be deprived of proceeds, in which he had a lawful contingent interest as beneficiary for eighteen years. The burden of winding up the partnership (including defending against three lawsuits) fell on Glade's shoulders when Brad died. To say that Glade has no equitable interest in the proceeds because Brad died three weeks after the partnership's dissolution is not fair, nor does it in any way promote or serve the interest of justice.

Fourth, it is fair that Glade receive the proceeds as the defendants allowed the policy that Brad owned to be cannibalized. That the policies purchased in 1989 were whole life policies, clearly establishes the partners' intention that the policies would serve some function in addition to funding a contingent purchase obligation, should the partnership ever be dissolved on the death of one of them.

Appellees' logic is that the policies, notwithstanding what they say, were in reality owned by and for the benefit of the insureds. If that were true, and that was how they were structured, then Glade should have been able to access the cash value in Brad's policy (on Glade's life). He could not because Brad's estate, not Glade, owned the policy. The estate never tendered ownership of the second policy to Glade. Instead, it did nothing as the policy drew on the cash value to pay the premiums, until the cash

value was gone and the policy lapsed. If the defendants' counterclaim had been based in equity (it was not), then principles of justice should have required them to tender to Glade the policy on Glade's life that they controlled.

CONCLUSION

The Appellant, Glade Parduhn, asks that the Supreme Court on this second appeal afford him the following relief:

1. Reverse the trial court's Judgment and Order on remand, which decreed that JoAnne and Brad's children were equitably entitled to all life insurance proceeds paid by Northern Life Insurance Company under policy No. NL00989085, on Brad's death.

2. Hold that the defendants/appellees' defense based on Utah Code Ann. § 31A-21-104 was waived by their failure to plead it, and remand this case with instructions to award all the proceeds to Glade. Glade also asks that the instructions on remand, consistent with the holding he has requested, order the trial court to direct the defendants/appellees to return to the court those proceeds erroneously and prematurely distributed to them in September/October 2001 on penalty of a judgment to be entered against them if they do not.

3. In the alternative, reverse the trial court's Judgment and Order entered on remand and remand to the trial court with instructions to hold an evidentiary hearing to determine who is equitably entitled to the Northern proceeds paid on Brad Buchi's death, consistent with the Supreme Court's opinion on this second appeal. The Supreme

Court should also order that the trial court authorize on remand a brief period of discovery on issues relevant to an equitable award of the proceeds.

4. If this matter is remanded for further proceedings, it should be coupled with a directive that JoAnne Buchi, personally, may not receive any portion of the proceeds.

DATED this 15 day of December, 2003.

FISHBURN & ASSOCIATES, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF THE APPELLANT, GLADE PARDUHN** were mailed in the United States mail, first class postage prepaid, on the 16 day of December, 2003, to the following persons:

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