

No. 98,663

AUG 9 2004

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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA **MICHAEL S. RICHIE**

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OKLAHOMA DEPARTMENT OF SECURITIES *ex rel.*,  
IRVING L. FAUGHT, ADMINISTRATOR,  
Plaintiff/Appellee,

v.

ACCELERATED BENEFITS CORPORATION and  
AMERICAN TITLE COMPANY OF ORLANDO,  
Defendants/Appellants.

v.

TOM MORAN,  
Court-Appointed Conservator/Appellee

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**DEFENDANTS/APPELLANTS' PETITION FOR  
REHEARING, AND BRIEF IN SUPPORT**

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APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE DANIEL L. OWENS, JUDGE OF THE DISTRICT COURT  
CASE NO. CJ-99-2500-66  
ACTION FOR VIOLATIONS OF THE OKLAHOMA SECURITIES ACT

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August 9, 2004.

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**DEFENDANTS/APPELLANTS' PETITION FOR  
REHEARING AND, BRIEF IN SUPPORT**

Pursuant to Oklahoma Supreme Court Rule 1.13 Defendants/ Appellants, Accelerated Benefits Corporation (“ABC”) and American Title Company of Orlando (“ATCO”; collectively “Defendants”), seek rehearing of the opinion rendered by the Court of Civil Appeals, Division IV (the “Court”) on July 20, 2004.<sup>1</sup> For the reasons set forth below, this Court should vacate its opinion and render a decision consistent with Oklahoma law.<sup>2</sup>

**I. INTRODUCTION**

In this appeal, the Court was called upon to determine whether the district court erred in construing its previous Conservatorship Order. The Court affirmed the district court’s construction of the Order and, in doing so, failed to follow Oklahoma’s comprehensive scheme of construing orders and judgments of the courts.

The Court erred in three respects. First, the Court erroneously found that a phrase contained in the Conservatorship Order stating “office expenses salaries, and other costs of the Conservatorship,” included the payment of premiums. (Op., 6.) The Court failed to follow time-honored principles of contract construction in construing this phrase. The Court ignored the basic principle that specific provisions of a contract control over its general provisions and that

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<sup>1</sup>Unless otherwise stated, all identifications previously utilized in Defendants/Appellants’ Brief in Chief and Reply Brief are incorporated herein by reference and shall be utilized throughout this brief.

<sup>2</sup>Defendants have also filed a Petition for Rehearing from the opinion rendered by the Court of Civil Appeals, Division IV, in Case No. 98,854, rendered on July 20, 2004.

the well-established rule of *ejusdem generis* prohibited this Court from finding that the words “other costs” encompassed an obligation on the part of ABC to make premium payments.

Second, the Court incorrectly determined that a policy is deemed transferred “when the insurer confirms to the Conservatorship that the change of beneficiary or ownership ha[s] been made.” (Op., p.8.) The Court never even acknowledged settled law that holds that once the change of beneficiary forms have been completed, the transfer is deemed complete. The only reason given by this Court for improperly ignoring settled law is “that ABC had been determined to have committed fraud,” and that investments which ABC sold were “precarious.” (Op., p.8.) However, there is no basis for eschewing controlling law for the sole reason that the defendant is, in the eyes of the Court, a “bad actor who gets what he deserves.” Yet, that is the only evident reason for this Court’s unprecedented ruling.

Third, this Court erroneously found that significant assets which were left with the Conservator should not be used to offset Defendant’s ongoing premium payment obligations. In short, this Court has ignored the basic provisions of the Conservatorship Order as well as the laws pertaining to construction of orders and judgments, in order to arrive at a result it felt was justifiable. However, that is an abdication of this Court’s duty to follow the law, regardless of whether it views the result as being contrary to its sense of “fairness.” The district court’s orders should be set aside, and this Court should construe the Conservatorship Order in compliance with Oklahoma law, providing a fair and reasonable construction of the Order.

## II. ARGUMENT AND AUTHORITIES

### A. General Rules Of Construction Of Judgments.

Even though the rules pertaining to the construction of judgments are well-settled and clear in their directions, this Court did nothing but pay lip-service to these precepts and failed to apply them correctly. In general, once a judgment has become final for want of an appeal or in consequence of an appellate court's decision, any controversy over the meaning and effect of that judgment must be resolved by resorting *solely* to the face of the judgment roll. *Stork v. Stork*, 898 P.2d 732, 739 (Okla. 1995). Only if a judgment is ambiguous on the face of the record may a court reach it for construction. *Id.* The meaning of a judgment is to be defined from the terms expressed in its text, which is to be construed with the other parts of the judgment roll. *Id.* In spite of the clear mandate of these basic tenets of construction, this Court engaged in a wholesale revision of the terms of the Conservatorship Order to arrive at a result it saw as "just." However, justice cannot be achieved by ignoring the law, no matter what outcome is dictated by following it.

The judgment roll consists of no more than the petition, the process, the return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. *Mills v. Mills*, 841 P.2d 624, 627 (Okla. Ct. App. 1992). Even if it were proper to "construe" the judgment being considered, a court may not rewrite its provisions, and a court's search for clarification would be limited to the judgment roll. *Id.* Thus, even if the Conservatorship Order is ambiguous, the Court is limited to the judgment roll when interpreting or construing its terms. The offending ambiguity must be shown by some inconsistency on the face of the record. *Dickason v. Dickason*, 607 P.2d 674, 678 (Okla. 1980).

Mere ambiguity will not affect a judgment's validity, unless none of its terms is susceptible to construction which will make it *conformable* to law. *Jackson v. Jackson*, 45 P.3d 418 (Okla. 2002). An unclear judgment should be construed so as to carry out its evident purpose and intent, rather than defeat it, and a court should consider the situation to which it was applied and the purpose it sought to accomplish. *Id.* at 428. The court has no authority to add new provisions to the decree or to change substantive provisions already in the decree, under the guise of construing said decree. *Id.* In construing the provisions of a judgment the usual canons of contract construction should be applied. *General Creditors of Estate of Harris v. Cornett*, 416 P.2d 398, 400 (Okla. 1966). While the language of particular judgment provisions should be taken in its ordinary legal meaning, it must be considered in connection with its context and the judgment as a whole. *Id.* As shown below, these rules were not followed by the Court. Rehearing should be granted and the district court's orders should be reversed.

**B. The Conservatorship Order Expressly Dictates That The Conservatorship Is Responsible For The Collection and Payment of Premiums.**

The Conservatorship Order directed the Conservator to take possession and control over certain "assets." (Conservatorship Order at 2.) These assets included (a) "all life insurance policies owned directly or indirectly" by ABC and its agents, including ATCO, (b) the viator files relating to the policies, (c) all premium reserve accounts and bank accounts into which ABC investor funds or proceeds from the policies had been deposited, and (d) "the right to recoup from the proceeds of the Policies all funds advanced by ABC to finance the payment of premiums on the Policies." (Conservatorship Order at 2.) The Conservator seized many of these assets immediately upon execution of the Conservatorship Order. (*See* J. LaMonda Affidavit, filed September 19, 2003.)

Further, the Conservator was “*directed*” by the Conservatorship Order:

1. to take custody, possession and control of the Conservatorship Assets as they are transferred to the Conservator.

\* \* \*

5. to make such payments and disbursements as may be necessary and advisable for the preservation of the Conservatorship Assets and as may be necessary and advisable in discharging his duties as Conservator including, but not limited to, **the timely payment of all premiums for Policies that have not yet matured.**

(Conservatorship Order at 3; emphasis supplied.)

Thus, under the clear and unambiguous terms of the Conservatorship Order, the Conservator was, from the inception of the Conservatorship, responsible for control of the policies and payment and collection of premiums on the policies. Inexplicably, this Court eschewed the clear wording of the Conservatorship Order by claiming these provisions allowed the Conservator to force Defendants (or conceivably anyone else) to make premium payments. This is sheer nonsense. If that were truly the intent of the Conservatorship Order, the Conservator could impose its own obligations (and did so) on other entities nowhere mentioned in that portion of the Conservatorship Order. The Order simply does not give the Conservator the power to delegate his obligations to pay premiums.

The Court states: “[T]he question should be asked that if Defendants were not responsible for making premiums’ shortfall, then who was?” (Op., p.7.) The answer to this question lends nothing to the proper analysis of the issues in this case. The Order says the conservator pays the premiums. Moreover, *there were no shortfalls*; Defendants were forced to

pay *all* premiums even though the Conservator had hundreds of thousand dollars on hand to pay them. This is precisely why the district court stated the Conservator would have to reimburse ABC for premiums that had already been paid by the purchasers. Why? Because, in the words of the district court, the Conservatorship Order was not meant to be punitive. If there had been a shortfall, *i.e.*, a situation where the Conservator was near the point of exhausting its available funds, then the district court would have been requested to ask ABC to cover the short fall, which ABC, consistent with its track record to pay all premiums, would have been more than willing to cover the shortfalls. But here, ABC was forced, without a court order, to pay *all premiums*, not just the shortfalls. This Court must, at a minimum, clarify its opinion to conform with the district court's ruling that ABC should at least be reimbursed for premiums it paid that were also paid by the purchasers.

Contrary to his express duties, the Conservator refused to pay, collect or administrate premiums. The Conservator also informed ABC that it would not reimburse it for the premiums which ABC had advanced to protect the purchasers from the Conservator's failure to perform his duties. This Court agreed, relying on the following language in the Conservatorship Order:

IT IS FURTHER ORDERED that ABC pay and maintain all office expenses, salaries, and other costs of the Conservatorship until at least seventy-five percent (75%) of all Conservatorship Assets have been transferred to the Conservator.

(Conservatorship Order at 5, Ex. A.)

This language in no way references the funding or payment of premiums. It is limited to administrative expenses of the Conservatorship. In contrast, the Conservatorship

Order, as quoted above, specifically says that the Conservator, not ABC or ATCO, is expressly duty-bound to make “the timely payment of all premiums for Policies that have not yet matured.” (Conservatorship Order at 3, Ex. A.) It is a well known precept of Oklahoma law that the specific provisions of a contract control over its general terms. *See, e.g., West v. Aetna Life Ins. Co.*, 536 P.2d 393, 397 (Okla. Ct. App. 1974). Accordingly, the Conservatorship’s construction is without basis, and the district court should have enforced the specific clear terms of the Conservatorship Order regarding the payment of premiums, rather than an unrelated, general provision dealing with administrative expenses. The district court’s construction was clearly erroneous and essentially rewrote the Conservatorship Order by reversing the parties’ respective obligations. This Court’s Opinion ducks this settled principle of Oklahoma law even though it is directly on point. Unpublished opinions should not be used as a wastepaper basket to deposit opinions, not based on the law, but on the Court’s own personal view of what is right.

Even if the phrase “office expenses, salaries, and other costs of the Conservatorship,” stood alone and its meaning was not expressly superceded by the express provision requiring the Conservator to make premium payments, the rule of *ejusdem generis* would nevertheless require a finding that the words “other costs” refer only to the words which precede them – “office expenses” and “salaries.” The rule of *ejusdem generis* is “a rule of interpretation. *It gives guidance to the ordinary insight that when specific words are followed by general words those specific words restrict the meaning of the general.*” (Emphasis supplied.) *State ex rel. Comr’s of Land Office v. Butler*, 753 P.2d 1334, 1336 (Okla. 1987), *cert. denied*, 488 U.S. 993 (1988). In *Butler*, the issue was whether the word “minerals” used in the phrase “oil, gas and other minerals” referred to all types of minerals or only to minerals

associated with oil and gas. The court held that “where the phrase “other minerals” follows the enumeration of particular classes of minerals such as oil and gas, the general words will be construed as applicable only to minerals of the same kind or class as those specifically named.”

*Id.*

By the same token, because the words “other costs” follow the words “office expenses” and “salaries,” it must be assumed that the parties were referring to the type of costs normally associated with office expenses and salaries. These specific terms restrict the meaning of the more general terms “other costs” – which could admittedly cover many types of costs. Here, they can only be referring to administrative office costs because the terms which precede “other costs” clearly refer to costs associated with the office administration of running the Conservatorship and not to the premiums which must be paid to keep the policies in force.

Here, too, the Court evades application of the law by inventing a concept that is no where to be found in Oklahoma jurisprudence. Instead of following the law the Court states Defendants were unable to protect the purchasers. What does this have to do with the rules pertaining to construction of a judgment?

Moreover, the Court overlooks the fact *that ABC alone* was protecting the investors by paying all premiums until the Conservator finally agreed to follow the mandate of the Conservatorship Order over 9 months after the Conservatorship was created. If this Court’s construction of the Order were correct, the Conservator would have presumably continued to exact the premium payments from ABC; however, it was clear to the parties that the

Conservatorship Order contemplated no such thing. Indeed, why even create a conservatorship? It would have been a simple matter for the district court to hoist this burden on Defendants in clear language, but that is obviously something to which Defendants would have agreed when negotiating the Conservatorship Order.

In short, even if the Conservatorship Order never expressly set out the duty of the Conservator to pay premiums (it obviously does), the office expense provision of the Order cannot be interpreted to impose that obligation on ABC. For this reason as well, the Court should grant rehearing, and the district court's interpretation of the premium payment obligation should be reversed.

**C. Even If The Court's Disingenuous Construction Were Correct, The Conservator Was Still Nevertheless Responsible For All Premiums, Expenses, Salaries And Other Costs Upon The Transfer of 75% of the Conservatorship Assets.**

Pursuant to the terms of the Conservatorship Order, Defendants transferred (or the Conservator seized) virtually all Conservatorship Assets to the Conservator well within the 90-day period prescribed by the Conservatorship Order. Well over 75% of the policies were transferred during the initial months of the Conservatorship. As a result, even if "office expenses, salaries and other costs of the Conservatorship" included premiums, as urged by the Conservator, he nevertheless abdicated his responsibility to pay premiums for several months after ABC fulfilled its responsibility to transfer the assets.

In an effort to avoid his responsibilities, and any corresponding costs, the Conservator took the position, in response to Defendants' Motion, that while the paperwork

effecting the transfer of the policies had been expeditiously executed by Defendants (indeed, why would they want to delay doing so), only 51% of the various insurance companies had formally acknowledged or “confirmed” such transfers at the time the parties’ motions were filed; therefore, ABC’s “expense” obligations continued. This position was, as explained to the district court, without basis in the law.

In the context of life insurance and change of beneficiary forms, the law of Oklahoma, and of other states, is quite clear — if the insured has done everything in his power to effect a change of beneficiary but dies before the last act is completed, particularly when the remaining act is a ministerial act to be performed by the insurer, the change will be regarded as complete. *Shaw v. Loeffler*, 796 P.2d 633, 635 (Okla. 1990); *Ivey v. Wood*, 387 P.2d 621, 626 (Okla. 1963); *Bowser v. Bowser*, 211 P.2d 517, 520 (Okla. 1949); *see also, Connecticut Gen. Life Ins. Co. v. Gulley*, 668 F.2d 325, 327 (7th Cir. 1982); *Persons v. Prudential Ins. Co.*, 233 S.W.2d 729, 733 (Mo. 1950).

Here, ABC and ATCO had done everything to effectuate the transfer of well over 75% of the Policies in compliance with the Conservatorship Order. *Once the paperwork was complete, so were the transfers in the eyes of the law.* Indeed, “existing applicable law is part of every contract as if it were expressly referred to or incorporated within the agreement.” *Welty v. Martinaire, Inc.*, 867 P.2d 1273, 1276 (Okla. 1994); *see also, Smith v. Baptist Found. of Okla.*, 17 P.3d 466, 470-71 (Okla. Civ. App. 2000); *Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 175 F.3d 762, 769 (10th Cir. 1999). The same principle should apply to the interpretation of the

Conservatorship Order. The remaining ministerial acts of the insurers' approval did not diminish nor delay the effective date of the transfers.

Further, why would it have made a difference? The Conservator effectively had complete control over the policies from day one. The date of the actual transfer is superfluous because, regardless of whether the transfer was complete, the Conservator still was in control. The basic, undisputable fact is that the Conservator took his position solely to assert that ABC must continue to pay premiums. The provision requiring ABC to pay "other costs" bears no reasonable relationship to premium payment obligations. It was simply a method, not to last longer than 90 days, to allow the Conservator to become familiar with the process. It makes no sense that the provision was designed to keep ABC on the "hook" given the Conservator had ample funds at his disposal to pay premiums at the inception of the Conservatorship.

Nor does it make any sense to penalize ABC and ATCO with payment of premiums and other expenses because of the vagaries of insurance company delays, especially when ABC and ATCO went to great lengths to expeditiously complete the transfer documents. ABC and ATCO effectively transferred "title" to the policies to the Conservator when it executed the necessary paperwork and forwarded it to the insurance companies. It requires no recitation of authority to establish that title to real or personal property passes upon execution of a deed or bill of sale, and not upon the recording of these instruments or upon the recipient's confirmation of receipt. The same principles should apply here.

Moreover, when an insurer accepts premiums from a new owner, the Conservator in this case, with knowledge of the change in ownership and of the desire of the new owner to keep the policy in full force and effect, the insurance policy continues for the new owner's benefit. *Ward v. Continental Ins. Corp.*, 24 P.2d 654, 656-57 (1933). Therefore, when the Conservator ordered ABC and ATCO to send in the forms *and* to do so on the Conservator's behalf, the policies were effectively transferred to the Conservatorship whether or not insurance companies formally confirmed their transfer. Further, *all* of the premium payments were made by ABC even though ATCO had already relinquished beneficiary ownership of the policies to the Conservator through execution of the change of beneficiary forms. In short, even under the Conservator's concocted construction of the Conservatorship Order, it became responsible for payment of premiums and for payment of all other expenses, salaries and other costs of the Conservatorship once the Conservator directed ABC and ATCO to pay the premiums (essentially from day one) on the Conservator's behalf and for his benefit.

*This Court did not even bother to address these well accepted rules of law, except to say that "given . . . ABC had been determined to have committed fraud," these rules were somehow rendered inapplicable. Since when does a judge's personal view of what is just stand in the way of applying the law? This is a court of law, and there is no rule which allows a court to ignore it simply because it does not produce the desired result.*

**D. ABC's Expense Obligations, However Interpreted, Should Be Offset By The Unencumbered Assets It Transferred To The Conservator At the Inception Of The Conservatorship.**

As noted above, at the inception of the Conservatorship, approximately \$1.6 Million worth of assets were transferred to the Conservator to pay for the Conservator's expenses, which, when the district court orders were entered, were "only" approximately \$200,000. (*See* J. LaMonda Affidavit, filed September 19, 2002.) The former figure of \$1.6 Million does not include accounts containing premium collections in excess of \$800,000, which were also under the control of the Conservator. As such, the district court's orders requiring ABC to pay the Conservator's office expenses (including approximately \$160,000 in premium payments which the Conservator made in July and September 2002) amounted to a modification of the Conservatorship Order, and resulted in ABC's double payment expenses – a ruling that is nothing short of knowing disregard of the Order's provisions. (*Id.*; *see also* Defendants' Response to Conservator's Motion, filed September 17, 2002 at 4-5.) The district court orders should be vacated, and the Conservatorship Order should be construed to effect its original and just intent, according to its plain language.

Here, the Court affirmed a ruling that was never specifically addressed by the district court. Indeed, there is nothing in the Conservatorship Order that even addresses this issue. This Court claims a ruling was made by implication, but that is decidedly improper when a court is called upon to make a ruling. It bears worth repeating, the district court stated that the Conservatorship Order was not meant to be punitive, yet the entire basis of this Court's opinion is based solely on a poorly veiled effort to do just that – punish the Defendants.

### III. CONCLUSION

For the reasons set forth above, the district court orders should be set aside and this Court should construe the orders in compliance with Oklahoma law, providing a fair and reasonable construction of the Conservatorship Order.



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### CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing *Defendants/Appellants' Petition for Rehearing, and Brief in Support* was mailed, U.S. Mail, postage prepaid, this 9th day of August, 2004, to:

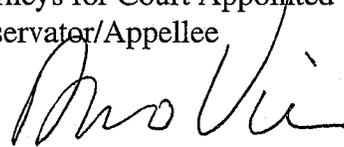
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