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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF DARLENE CARLSON,)	Appeal from the Circuit Court of Boone County.
)	
Petitioner-Appellee,)	
)	
and)	No. 08—D—01
)	
JOHN T. CARLSON,)	Honorable Eugene G. Doherty
)	
Respondent-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: The trial court erred in refusing to consider new evidence presented in respondent's section 2—1203 motion (750 ILCS 5/2—1203 (West 2008)), where it appears petitioner initially presented misleading evidence to the court and where respondent was terminally ill and, therefore, disadvantaged in presenting counter-evidence at an earlier stage. Should the court's consideration of the new evidence require a reworking of the entire property award, we urge special attention to two assets: the life insurance policy and the pension.

Respondent John T. Carlson, now deceased (March 26, 2010), through the co-trustees of the John T. Carlson Revocable Living Trust, Dorothy Gayle Arnett and Susan Glaser, appeals the trial court's denial of his section 2—1203 motion to vacate a supplemental judgment of dissolution. 750

ILCS 5/2—1203 (West 2008). When the motion came before the trial court, it refused to even consider the new evidence presented by John that supported his position that a certain rental property was marital property, and it stated that John should have presented this evidence at the initial hearing. We find that, under the circumstances (where it appears petitioner Darlene Carlson initially presented the court with misleading information, where the court twice neglected to rule on the status of the rental property, and where John was terminally ill), the trial court should have considered the new evidence. We remand for consideration of the evidence attached to John's section 2—1203 motion. If the trial court determines upon remand that the rental property is marital property, then the intended distribution scheme will have been compromised such that a comprehensive reworking of the property distribution will be required. If the trial court must rework the entire property award, we urge special attention to two assets: the life insurance policy that insured John's life and John's pension. Reversed and remanded.

I. BACKGROUND

A. Dissolution, Hearing on Remaining Issues, and Initial Memoranda of Decision

In January 2008, after 43 years of marriage, Darlene petitioned for divorce against John, alleging grounds of mental cruelty and irreconcilable differences. They had one grown daughter. Shortly after Darlene filed the petition, John was diagnosed with terminal cancer in multiple organs. John then petitioned for judgment, attaching an affidavit stating that he would like to accelerate the proceedings for his own peace of mind so that he would have an opportunity to dispose of his share of the marital assets according to his wishes. In furtherance thereof, John agreed to stipulate to the grounds.

The trial court granted John’s petition, entering the judgment of dissolution that same day, December 22, 2008. Also that day, the court granted a petition for a temporary restraining order that Darlene had filed the week prior, ordering that John be enjoined from changing the beneficiary on his life insurance policy and from electing his pension benefits, pending the trial court’s decisions regarding property distribution.

On May 13, 2009, the trial court conducted a hearing on property issues. Both Darlene and John were present and represented by attorneys. However, neither Darlene nor John testified. Due to his condition, this would be the last date that John appeared in court. As described by the trial judge, the hearing consisted primarily of exhibits (prepared by Darlene), followed by argument of counsel. Critical to this appeal, one exhibit was a 1995 quitclaim deed from Darlene’s mother to Darlene conveying a rental property located at 308 Gilman Street in Belvidere, which Darlene presented as evidence that the Gilman property was non-marital property.

On May 22, 2009, before the trial court had issued its memorandum of decision concerning property distribution, Darlene moved to reopen proofs. Darlene stated that she had recently become aware that, several months prior, in January 2009, John transferred by warranty deed what he believed to be his interest in the Gilman property into the John T. Carlson Revocable Living Trust. Darlene attached another copy of the 1995 quitclaim deed and John’s January 2009 warranty deed.

On May 28, 2009, the trial court issued its memorandum of decision. The court did not mention the Gilman property. The court divided the marital assets as follows:

<u>Asset</u>	<u>John</u>	<u>Darlene</u>
Property on 4 Street (\$120,000 less mortgage balance of \$43,723.64)	\$0	\$76,276.36

Property on Lawrenceville Road	\$55,000.00	\$0
Ameritrade Account	\$3,513.00	\$0
Verizon Stock	\$0	\$5,213.52
2000 GMC Vehicle	\$9,003.00	\$0
1999 Chevy Blazer	\$0	\$3,104.67
2005 Chrysler Sedan	\$0	\$15,480.67
1937 Panel Truck	\$4,500.00	\$0
Jackson National Life Insurance Policy Surrender Value	\$677.00	\$677.00
Chase Credit Card	\$0	-\$10,350.00
	\$72,693.00	\$90,401.55

Regarding the life insurance policy, which insured John’s life and which was acquired at some point during the marriage, the court noted:

“Normally[,] the court would examine only the cash or surrender value of a life insurance policy. However, the circumstances here cannot be ignored. *** The court cannot ignore the fact that the value of the life insurance policy is more concrete and more real in the present circumstances than it might be in others.”

The court explained that “each party should remain one-half owner of the policy”¹ and each would

¹It is unclear what the trial court meant when it stated that the parties should “remain owners.” The record indicates that John was the only owner stated on the policy prior to the dissolution. So, we infer that the trial court’s reference to a continuation in ownership was a nod to its implicit finding that the policy was marital property, not that Darlene was literally a named owner

be entitled to control where one-half of the insurance proceeds would be paid. The court suggested that John submit to the insurance company beneficiary designations reflecting as much, and the court would then order the designations irrevocable absent a court order.

Regarding John's pension, the court determined that John "should be allowed to keep his pension benefits." The court noted that this might create a "slight imbalance" in the parties' income but that the imbalance was "more than offset by the disproportionate share of marital assets to Darlene."

Regarding maintenance, the court stated it would order none. The court explained that both John and Darlene were at retirement age and earned approximately the same amount.

On June 26, 2009, Darlene filed a motion to reconsider. She argued that the court erred in failing to: (1) consider an earlier-filed petition for civil contempt against John regarding three months of COBRA payments; and (2) award Darlene a portion of John's pension. The court granted Darlene's motion, entering a "second memorandum of decision," ordering John to reimburse Darlene for the contested COBRA payments (a total of \$1,442). The trial court also changed its pension ruling such that the parties were each awarded one-half of each other's pensions. However, now that the parties were each to receive a one-half share of the other's pensions, there was no longer a reason for Darlene to receive a disproportionate share of the marital assets. To correct for this, the court ordered that Darlene forego receipt of her share of John's pension (for approximately 13 payments) until the difference was eliminated. The court allowed for John to select the 5- or 10-year option on his pension plan. Again, the court did not address the Gilman property.

On September 2, 2009, Darlene again filed a motion to reconsider, this time objecting to the

on the policy.

court granting John the right to select the 5- or 10-year option in regard to his pension plan and requesting that the court reconsider the property distribution. In response, on September 30, 2009, the court entered the “supplemental judgment after trial on remaining issues,” from which the trustees now find fault.

B. September 30, 2009, Supplemental Judgment

In the supplemental judgment, the court addressed the Gilman property for the first time, finding:

“Darlene is presently the sole owner of [the Gilman property]. This property is held solely in title by Darlene and was given to her by her mother as a gift. The court has found this property to be non-marital and therefore shall solely be received by Darlene. As John created and executed a [deed] transferring this property to a trust, he shall execute a quitclaim deed for this property at the time of the entry of this supplemental judgment transferring his interest in the property to Darlene and such shall be immediately recorded.”

Regarding the pension, the trial court ordered that John select the 10-year plan. The court further ordered the parties to direct the pension plan administrator to pay John the total \$2,023.07 monthly payment for the first 13 months of the plan. Awarding John the total payment for the first 13 months would correct for the slightly greater property amount awarded to Darlene. After 13 months, the parties’ respective property awards would be equalized and they could begin receiving *relatively* equal amounts of the pension payment—John would receive \$1,066.91 and Darlene would receive \$956.16 (approximately a 53-47 percent split).

The court then created three contingency distribution plans: (1) if John is the only deceased party; (2) if Darlene is the only deceased party; or (3) if both John and Darlene are deceased. If John

is the only deceased party, then the 53-47 percent split reverts to a simple 50-50 split, with John's beneficiary receiving one-half of the total payment and Darlene receiving the other half. If Darlene is the only deceased party, the 53-47 split remains in effect and Darlene's beneficiary would receive her share of the benefits. If both John and Darlene are deceased, then the 50-50 split is again in play, with each party's beneficiary receiving his or her respective share.

Regarding the life insurance policy for which John was the insured, the trial court essentially expanded upon its initial distribution scheme, this time omitting an award of the cash surrender value and instead focusing only on control and ownership of the policy itself. The court ordered that the policy be continued with John and Darlene being equal owners.² The court required each party to pay one-half of the premium and allowed for each party to name a beneficiary to receive one-half of the proceeds upon John's death.

C. John's Motion to Vacate the Supplemental Judgment

On October 27, 2009, John's attorney filed a motion to withdraw as counsel. On October 30, 2009, one month after the entry of the supplemental judgment, attorney Cheryl Russell-Smith filed an appearance on behalf of John. That same day, John, through Russell-Smith, moved to vacate the supplemental judgment. In his motion to vacate, John challenged: (1) the court's characterization

²Again, it seems that the court uses the term "owner" not in the sense that each party is a named owner on the policy, but in the sense that each party has an interest in the policy as marital property. We infer that Darlene is not a named owner on the policy because the trial court stated in its supplemental judgment that its order is to be effectuated by John signing an authorization for Darlene to receive proof that she is a beneficiary. If Darlene was a stated owner on the policy, the policy administrator would not need further authorization to confirm beneficiary status.

of the Gilman property as non-marital property belonging solely to Darlene; and aspects of the court's decision regarding the (2) life insurance policy; and (3) pension. As to the life insurance policy, John complained that the trial court neglected to consider that, prior to its supplemental judgment, John had paid the premiums and should be reimbursed. However, John did not challenge the essence of the trial court's life insurance ruling—*i.e.*, that each party own and control one-half of the policy.

As to the Gilman property, John pleaded the following facts in support of his position that it was marital property. In 1984, John and Darlene purchased the Gilman property for \$31,000, using \$5,600 in marital funds for *part* of the down-payment. Darlene's mother contributed the remainder of the down-payment. At closing, the deed to the property was placed in the name of Darlene and her mother. John and Darlene used marital funds (as well as 50 percent of the rents received on the property itself) to maintain the property. John himself performed much of the repair and maintenance work on the property. John and Darlene documented all receipts and expenses on the property in their joint income tax statements from 1984 through 2007. John "believes" that the purpose of the 1995 quitclaim deed from Darlene's mother to Darlene served as an acknowledgment on the mother's behalf that she had been reimbursed for her initial, 1984 investment and therefore intended to remove herself from the title, and that it did not evince an intent to gift her interest in the property to Darlene.

John attached an affidavit stating, in a more general sense, that which he set forth in his pleadings. Also in the affidavit, John explained that he was unable to correct at an earlier stage Darlene's assertion that the Gilman property was non-marital. He stated: "During the pendency of this divorce, I was under a great deal of stress and medical disability, and I didn't have the ***

energy to do anything except take care of my illness.” John stated that he did not have access to the evidence supporting his position after the parties’ January 2008 separation. However, he had recently secured copies of the joint tax returns from the years 2001, 2004, and 2006, each of which detailed depreciation information on the Gilman property, going back to 1984.

The trial court dismissed John’s motion to vacate without much comment. As to the Gilman property, the court noted that “[John’s] claim for Gilman Street property was not brought up at trial.”

John passed away shortly after the denial of his motion to vacate, having received only 1 of the 13 pension payments ordered by the court to be exclusively his. This appeal followed.

II. ANALYSIS

On appeal, John, through the co-trustees of his living trust, challenges the trial court’s refusal to vacate the supplemental judgment. The trustees argue that the trial court erred in failing to consider the evidence set forth in John’s petition to vacate, which established that John and Darlene purchased the Gilman property in 1984 and that it was not a 1995 gift from Darlene’s mother. For the reasons set forth below, we agree with the trustees on this point.

The trustees further note that, when the trial court mistakenly characterizes marital property as non-marital, the intended distribution scheme is likely compromised and a remand for a redetermination and redistribution of all marital property may be required. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1022 (2009). As to issues that may arise again in the court below should the court’s reconsideration of the Gilman property require a reworking of the entire property distribution, they ask that we consider the trial court’s treatment of the life insurance and pension policies. For the reasons set forth below, we agree that the life insurance and pension rulings are

problematic, and that, to whatever degree the terms of the policies may allow, the trial court should be careful in dealing with these assets in a manner consistent with this order.

A. The Gilman Property

The trustees first challenge the trial court's refusal to consider the evidence submitted by John (*i.e.*, the joint tax returns showing that the parties' ownership of the Gilman property dating back to 1984 and John's affidavit stating the same) and its refusal to vacate its initial property determination as the evidence required. Before delving into the trustee's argument, we summarize the procedural history concerning the Gilman property.

The trial court neglected to rule on the status of the Gilman property in both its initial and its second memorandum of decision. Finally, in the supplemental judgment, the trial court characterized the Gilman property as non-marital based on a single piece of evidence set forth at hearing by Darlene: the 1995 quitclaim deed, which conveyed Darlene's mother's interest in the property to Darlene. The court determined that this evidence was sufficient to rebut the presumption that all property acquired by either spouse after the marriage is presumed to be marital property, because that presumption is overcome by a showing that the property was acquired by a method listed in subsection (a) of section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act), including "property acquired by gift, legacy[,] or descent." 750 ILCS 5/503(a)(1), (b) (West 2008).

Attached to his motion to vacate, John submitted an affidavit stating that he and Darlene had purchased the Gilman property in 1984. They used marital funds for part of the down payment and Darlene's mother contributed the remainder of the down payment. John also submitted joint tax returns for the years 2001, 2004, and 2006, *each of which predated the ownership controversy* and each of which detailed depreciation information on the Gilman property going back to 1984. If the

property was indeed acquired in 1984 (subsequent to the parties' marriage), then the property, excluding Darlene's mother's share, is clearly marital. None of the exceptions to the presumption that all property acquired by either spouse subsequent to the marriage is marital set forth in section 503(a) of the Act would apply. 750 ILCS 5/503(a) (West 2008). Darlene did not then and does not now refute that the parties actually acquired the property in 1984. And, indeed, the information contained in the parties' joint tax returns seems fairly black-and-white. Darlene merely argued then and again now that John should have presented this evidence at hearing. As such, the question is whether the trial court erred in refusing to consider the affidavit and joint tax returns.

When a party seeks section 2—1203 relief on the ground of new evidence, the movant must provide a reasonable explanation as to why he or she was not able to present the evidence at the original hearing. *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1141 (2004); 750 ILCS 5/2—1203 (West 2008). The trial court's decision as to whether to consider the new evidence is reviewed according to an abuse-of-discretion standard. *Id.* at 1140.

Both parties argue that its respective position is supported by *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 567 (1995), where court granted a motion to vacate after it was learned that the husband withheld information that he had won the lottery during the marriage. *Palacios* involved a section 2—1401 motion to vacate, rather than a section 2—1203 motion to vacate. *Id.* at 565; 750 ILCS 5/2—1401 (West 2008). However, given that the standard to vacate under section 2—1401 is *higher* than the standard to vacate under section 2—1203, we find *Palacios* to be helpful to the trustees' position that the trial court should have considered the evidence presented by John in his motion to vacate.

Here, the trial court refused to even consider that Darlene withheld information from it that the property was purchased in 1984, not 1995. This discrepancy, if true, borders on a fraudulent misrepresentation to the court, not a simple factual dispute where one party entered into the dispute too late. Darlene posits that, unlike the husband in *Palacios*, she did not fraudulently *conceal* information regarding the Gilman property. However, presenting the court with a document that suggests ownership was first acquired by gift in 1995 when in fact ownership was acquired by purchase in 1984 is equally dishonest.

Under these circumstances, we do not find persuasive Darlene's argument that, because John was represented by counsel, he should have caught and contested the error earlier. An attorney is not a psychic. And, according to John, due in large part to his illness, he initially trusted Darlene to accurately represent the nature of the parties' marital assets to the court. For example, Darlene submitted 34 exhibits at trial regarding the parties' property to which John stipulated, including the controversial 1995 quitclaim deed. As John stated, "during the pendency of this divorce, [he] was under a great deal of stress and medical disability, and [he] didn't have the *** energy to do anything except take care of [his] illness." Indeed, the record supports that John was terminally ill and undergoing treatment for cancer in multiple organs during the pendency of the divorce proceedings. John's prognosis led to numerous complexities, such as life insurance issues and a high-pressure time-line, that caused even the trial court to lose sight of the Gilman property; it failed to acknowledge the Gilman property in either its initial or its second memorandum of decision.

Based on the foregoing, the trial court abused its discretion when it refused to consider evidence that the property was actually acquired in 1984, not 1995, and the circumstances under which it was acquired. We remand for such consideration, and believe that remand is necessary to

assure that a fraud will not be perpetrated on the court. In the event that the property is deemed to be marital, the entire property award will have to be reworked to effectuate the trial court's intention that the assets be equally divided. In the interest of judicial economy, we address John's concerns regarding the trial court's treatment of the life insurance policy and pension plan should these issues again arise in the court below.

B. Life Insurance

The trustees argue that the trial court erred in classifying as marital property the *proceeds* of the life insurance policy, and by awarding one-half of those proceeds to Darlene. The trustees cite *In re Marriage of Ryman*, 172 Ill. App. 3d 599, 606 (1988)³, for the proposition that life insurance *proceeds* due to coverage in the event of a party's death are not "property" under section 503 of the Act. 750 ILCS 5/503 (West 2008). The trustees, again citing *Ryman*, assert that it is only the cash surrender value of the policy that may be classified as marital property under section 503 of the Act. *Id.* In support of their position, the trustees note that, generally, an insured may change the beneficiary of his or her own life insurance policy at his or her whim, provided he or she has reserved the right with the insurance company to do so. *Perkins v. Stuemke*, 223 Ill. App. 3d 839, 842 (1992). The trustees further note that a beneficiary's right to the proceeds does not vest until the insured dies.

³We first note that the trustees' citation to *Ryman* is misplaced. In *Ryman*, the policy was the husband's *non-marital* property (a status upon which both parties agreed and the court did not question), and the question was whether the marital estate should be compensated for marital funds used to pay the premiums. *Ryman*, 172 Ill. App. 3d at 607. Here, the policy is *marital* property, and the trustees acknowledge that Darlene may receive a portion of it in some form (*i.e.*, from the trustees' position, the cash surrender value only).

Id. The trustees acknowledge that courts have ordered a party to a divorce proceeding to maintain life insurance so as to insure that the party's child support and/or maintenance obligations are met in the event of a premature death. 750 ILCS 5/503(g) (West 2008) (regarding child support only); and see, e.g., *In re Estate of Downey*, 293 Ill. App. 3d 234, 237 (1997), and *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1047-48 (2008); but see *In re Marriage of Ellinger*, 378 Ill. App. 3d 497, 500 (2008). However, the trustees note that the court here ordered neither child support nor maintenance.

We ultimately agree with the trustees that the trial court abused its discretion in handling the life insurance policy, largely because, in awarding each party a one-half "ownership" interest in the policy yet simultaneously denying either party the freedom to let the policy lapse, the court, for all practical purposes, directed the proceeds of the policy. However, three aspects of the trustees' argument should not necessarily be taken at face value, and we begin our analysis by addressing these nuances so as to have a better understanding of what the trial court did.

First, we note that, technically, the cash surrender value of the policy is not marital property. Rather, the policy itself is the marital property and its cash surrender value is a common way to value it. See, e.g., *Ryman*, 172 Ill. App. 3d at 606 ("the value of an insurance policy may be determined from its cash surrender value less any amount borrowed against the insurance policy's cash surrender value"). Second, technically, it is not only the *insured* who has a right to change the beneficiary of the policy at any time; rather, the *owner* of the policy has such a right (by "owner," we mean the owner named on the policy, rather than a general ownership interest in the policy as marital property). In *Perkins*, the insured and the owner were one and the same. *Perkins*, 223 Ill. App. 3d at 842 ("people may change the beneficiary on *their* life insurance policies at their own whim (emphasis added)"); see also 215 ILCS 5/245.1 (West 2008) ("No [law] prohibits an *insured* under

any policy of life insurance, *or* any other person who may be the *owner* of any rights under such policy, from making an assignment of his rights and privileges including *** the right to designate a beneficiary thereunder (emphasis added)”), and *Bellmer by Bellmer v. Charter Security Life Insurance Company*, 140 Ill. App. 3d 752, 756-57 (1986) (noting a general “failure” to distinguish between insureds and owners, and holding that an insurer had a duty to provide notice of payment default to the owner of the policy as well as to the named insured, where the insurer was clearly aware that the insured was not the owner). Third, although still of some use, the trustees’ reference by analogy to the court’s authority to order a party to maintain a life insurance policy to secure a child support or maintenance obligation is less than perfect. Those cases do not say that a court may exercise authority over a life insurance policy *only* in those two instances. Moreover, in those cases, the court may be dealing either with an existing life insurance policy (and ordering that it be maintained and that certain beneficiaries be named) *or* with obtaining a new life insurance policy. The instant case involves only the value of an *existing* life insurance policy and how to distribute its value.⁴

⁴Illinois does distinguish in its requirements between insurance policies that are being created and insurance policies that already exist: “a person cannot take out a valid and enforceable policy of insurance for his or her own benefit on the life of another person in which he or she has no insurable interest, and a policy so procured is void at its inception as against public policy, *** it merely being a wager policy. *** While the existence of an insurable interest at the inception of a life contract or policy is necessary to the validity of a policy of life insurance, it is not required that the insurable interest shall continue, and where a policy is valid at its inception by reason of the existence of an insurable interest at that time a subsequent diminution or cessation of that interest

As to the first point, a life insurance policy (*not* its unrealized proceeds) may be deemed marital property; it is not specifically excluded by the classificatory directive of section 503(a). 750 ILCS 5/503(a) (West 2008); see also *In re Marriage of Benkendorf*, 252 Ill. App. 3d 429, 436 (1993) (trial court did not abuse its discretion in awarding ownership to wife of various life insurance policies, which insured husband's life, and in ordering that the policy name the children as beneficiaries only until they completed college, at which point the wife would continue to own the policy without restriction), and *In re Marriage of Smith*, 84 Ill. App. 3d 446, 455 (1980). The policy *itself* has an inherent value, independent of its cash surrender value and prior to the occurrence of the insured event and distribution of any proceeds. See, e.g., *In re Marriage of Vernon*, 253 Ill. App. 3d 783, 791-92 (1993) (Justice Lund, specially concurring) (urging further exploration of life insurance issues and stating that even life insurance policies without cash surrender values must nevertheless have *some* value, and should therefore be disposed of pursuant to section 503 of the Act governing the disposition of property); *In re Marriage of Day*, 31 Kan. App. 2d 746, 753 (2003) (a life insurance policy without a cash surrender value still has value, *even if difficult to determine*, because replacement cost might be significantly higher or insurability might be an issue). The cash surrender value is not the only way to value a policy; for example, individuals with impaired health may sell their life insurance policies to secondary market buyers for an amount greater than the cash

does not invalidate the policy unless such be the necessary effect by the provisions of the policy itself. *** If one takes out a policy of insurance on his or her own life and then in good faith assigns it to another without an insurable interest, where there was no preconceived design to avoid the rule against wagering contracts, the policy is valid.” (Internal citations omitted.) 22 Ill. Law and Prac. Insurance § 107 (updated May 2011).

surrender value. See Neil A. Doherty and Hal J. Singer, The Benefits of a Secondary Market for Life Insurance Policies, <http://knowledge.wharton.upenn.edu/papers/1125.pdf> (“surrender values based on normal health do not appropriately compensate individuals with impaired life expectancies for the resulting appreciation of their policies”). The secondary market for insurance policies began to take off in the 1990's, providing an opportunity for impaired-health insured policy owners to receive more cash for their policies than they would receive surrendering the policy to the insurance company on the primary market. *Id.*⁵

_____ With these principles in mind, we now must ask whether the court abused its discretion in ordering that each party “own” one-half of the policy, pay one-half of the premiums, and name a beneficiary to ultimately receive one-half of the proceeds. A court has authority under section 503(i) of the Act to make such judgments affecting marital property as may be just (750 ILCS 5/503(i) (West 2008)). And, appellate courts have affirmed trial court’s award of ownership of a life insurance policy to the non-insured spouse. See *Benkendorf*, 252 Ill. App. 3d at 436. In *Benkendorf*, the parties owned several life insurance policies that insured the husband’s life. *Id.* at 436 (we infer that the policies insured the *husband’s* life because the wife unsuccessfully counter-argued that, if the husband died before the restriction on her ability to name a beneficiary had lifted, then she would never realize any value from the policies she had been awarded). Upon dissolution, the court

⁵We note that, in conflict with what we find to be persuasive authority cited in the above paragraph, there is also authority stating that a life insurance policy without a cash surrender value is not a marital asset. See *Ross v. Ross*, 20 So. 3d 396, 398 (Fla. Dist. Ct. App. 2009) (life insurance policies with no cash surrender value are not assets because they have no value); *In re Marriage of Foottit*, 903 P. 2d 1209 (Colo. App. 1995) (same).

awarded some of the policies that insured the husband's life to the husband (meaning that the owner and the insured were one and the same), and it awarded some of the policies that insured the husband's life to the wife (meaning the owner and the insured were different). The court further ordered that the parties name their children as irrevocable beneficiaries of the respective policies *until* the children reached the age of majority or finished their college educations, whichever occurred later. *Id.* When the children reached the age of majority and completed their college educations, then the husband and wife would each own "free and clear" the policies allocated to him or her, respectively (meaning that, presumably, the parties could change the beneficiary or cash out the policy, if desired). *Id.*

However, the instant case differs from *Benkendorf* (even after security for the children's support was no longer a factor) in several respects. Here, the trial court awarded ownership of the insurance policy in a limited sense; Darlene is not a named owner on the policy. Moreover, the court awarded "ownership" of the same policy to more than one person, without giving either party the option of ever "cashing out" and canceling the policy. We find that, given the limited nature of, and the restriction the court placed on, the parties' ownership, the court awarded ownership in name only. The seeming purpose, and certainly the practical effect, of the court's award was to direct the proceeds of the policy. However, the proceeds did not exist at the time of dissolution. The *unrealized* benefits, *i.e.*, proceeds, of a life insurance policy are *not* marital property under section 503 of the Act, and therefore they cannot be distributed under section 503 of the Act. See, *e.g.*, *Ryman*, 172 Ill. App. 3d at 607 ("in valuing an insurance policy as "property" under section 503, the benefits [i.e., proceeds] *** enjoyed by the marital estate are not included in the valuation process as property"). Therefore, the trial court abused its discretion in directing the proceeds of the policy.

If the trial court reaches this issue on remand, the parties may submit evidence to determine the value of the insurance policy as of the date of dissolution. See, *e.g.*, *In re Marriage of Jones*, 187 Ill. App. 3d 206, 218-19 (1989) (the appellate court may properly order that, on remand, the trial court take evidence to determine the value of marital property as of the date of dissolution). The trial court is not required to value the policy at its cash surrender value. However, whatever value the court ultimately places on the policy must be supported by evidence. See, *e.g.*, *Mullins*, 121 Ill. App. 3d at 89. We understand that, particularly in this case where John is now deceased and the policy may have been administered, this may be difficult. However, we trust that the trial court will be able to use various offsetting methods to effectuate its overall intent of an equitable division of the marital assets.

C. Pension

Finally, the trustees essentially argue that, in application, the trial court's order concerning the pension plan did not effectuate one of its intended purposes—*i.e.*, to equalize the property distribution. Despite the court's efforts under difficult circumstances, we agree with the trustees that the court's contingency plans did not fully insure John's equal share of the property distribution as intended.

In regard to the pension plan, the trial court's order served both the primary purpose of distributing the pension benefits in a fair manner and an ancillary purpose of equalizing the parties' property distribution. As to equalizing the property distribution, the court acknowledged that it awarded slightly more in marital assets to Darlene than to John. To make up for this, the court ordered the parties to direct the pension plan administrator to pay John the total \$2,023.07 monthly payment for the first 13 months of the 120-month plan and then to pay John *and* Darlene each one-half that amount for the remaining 107 months. After 13 months, the parties' respective property

awards would be equalized and they could begin receiving *relatively* equal amounts of the pension payment—John with \$1,066.91 and Darlene with \$956.16 (approximately a 53-47 percent split).

Again, the trial judge then created three contingency distribution plans: (1) if John is the only deceased party; (2) if Darlene is the only deceased party; or (3) if both John and Darlene are deceased. If John is the only deceased party, then the 53-47 percent split reverts to a simple 50-50 split, with John's beneficiary receiving one-half of the total payment and Darlene receiving the other half. If Darlene is the only deceased party, the 53-47 split remains in effect and Darlene's beneficiary would receive her share of the benefits. If both John and Darlene are deceased, then the 50-50 split is again in play, with each party's beneficiary receiving his or her respective share.

Unfortunately, what actually happened did not allow for full satisfaction of the court's ancillary purpose of equalizing the parties' property distribution. John died after receiving only one pension payment. Therefore, according to contingency one (where John is the only deceased party), the pension distributions reverted to a 50-50 split, with John's beneficiary receiving a one-half share and Darlene receiving the other half. John (or his estate) never received the other half of payments 2 through 13 that were intended to equalize the property distribution. On remand, the trial court will, of course, be required to consider that, due to John's early death, he (or his estate) never received the other half of payments 2 through 13 that were intended to equalize the property distribution. It is possible, however, given that the Gilman issue may require a reworking of the entire property award, that the disparity between the parties' respective property awards will no longer amount to exactly 13 pension payments, and the trial court may be able to equalize the distributions in some other manner.⁶

⁶We do not address Darlene's responsive argument because it is based on a

III. CONCLUSION

For the aforementioned reasons, we find that the trial court erred in refusing to consider the evidence concerning the Gilman property that was attached to John's section 2—1203 motion, and we remand for consideration of said evidence, and, if necessary, a reworking of the property award in accordance with this order.

Reversed and remanded.

misrepresentation of the trial court's order. As to contingency one (where only John is deceased), Darlene asserts in her brief:

“[T]he court specifically said that, if John dies without receiving the 13 payments, then Darlene will be receiving her full 50 [percent] benefit, instead of the reduced benefit. ***.”

The trial court's written order actually states:

“In the event of the Husband's death before receiving 120 months of benefits, the Plan Administrator shall divide the remaining monthly payments equally ***.”

Therefore, in the clause concerning contingency one, the court does not refer to the 13-month equalization period. Rather, the court refers to the 120-month term of the entire pension, and sets forth a specific distribution scheme should John die before the *plan administrator's* obligation to make 120 distributions has been satisfied.