

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2014AP2389

Cir. Ct. No. 2013CV181

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LARRY L. POLSTER,

PLAINTIFF-APPELLANT,

V.

DEBRA RYSEWYK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 NEUBAUER, P.J. This case comes to us on the denial of partial summary judgment to a brother and the grant of summary judgment to his sister, dismissing the brother's case against the sister. The brother disputed the sister's

ownership of some assets that had belonged to their parents and requested an accounting from the sister of the mother's assets as co-agent under the mother's power of attorney. The circuit court did not err in granting judgment against the brother on his claims against the sister requesting that the court (1) impose a constructive trust on bank accounts that were held jointly between the sister and the father and before that between the father and the mother and (2) set aside real estate transfers. We affirm the circuit court's dismissal of these claims. However, the accounting request was not before the court on summary judgment, and we therefore remand for the court to rule on this claim.

BACKGROUND

¶2 Harry W. Polster and Darlene R. Polster were husband and wife. Plaintiff-appellant Larry L. Polster and defendant-respondent Debra Rysewyk are their two children. This case is about transfers of assets from Darlene to Harry and then from Harry to Debra and Larry's objection to those transfers.

¶3 Harry and Darlene executed wills in 1982 naming each other as primary beneficiaries and their children as secondary beneficiaries, to take in equal shares. In 2005, Darlene executed a durable power of attorney (POA), naming Harry as attorney-in-fact and Larry and Debra as alternates if Harry is unable or unwilling to serve. In January 2011, Harry and Darlene executed a transfer on death (TOD) deed granting their home to Debra and Larry, as tenants in common, upon their death. On December 9, 2011, Harry met with an attorney to discuss estate planning options and indicated that his primary goal was to ensure that there were sufficient funds for Darlene to remain at home as long as possible. The attorney wrote to him the following week, presenting various options, one of which included transferring Harry and Darlene's home to Harry and then to Debra

and transferring other assets to Debra. On December 23, 2011, Harry, acting under the POA, signed a quitclaim deed prepared by his attorney, quitclaiming Darlene's marital interest in the home to himself. On that same day, Harry signed a quitclaim deed prepared by his attorney, quitclaiming his, now entire, interest in the home to Debra, subject to a life estate for himself and Darlene. Harry also removed Darlene's name from some joint accounts they had and retitled those joint accounts to himself and Debra.

¶4 Harry died on June 19, 2012, and Larry and Debra became Darlene's co-agents under the POA. Darlene, who suffered from dementia, continued to live at the home with Debra's son and daughter-in-law and with in-home care from professional caregivers. Debra was Darlene's agent under Darlene's health care power of attorney.¹ Debra testified that Debra and Larry cosigned checks drawn on Darlene's account, though Debra occasionally paid urgent expenses on her own.

¶5 Larry filed suit against Debra on March 6, 2013. First, Larry requested that the court order that Debra provide him, as co-agent and presumptive heir, with a written accounting of all of Darlene's assets. Second, Larry alleged that the quitclaim deeds from Darlene to Harry and then from Harry to Debra should be set aside because executing them was beyond the powers granted to Harry under the POA, and the result was to give Debra property that Darlene meant to go to Larry, as shown by her will and the TOD deed. Third, Larry asked

¹ Darlene died in October 2014, after the circuit court ruling in this matter. Because she was alive when this case was pending before the circuit court, we conduct our discussion as though she were still alive.

the court to impose a constructive trust on the bank accounts that Harry transferred to Debra. Larry moved for partial summary judgment on the quitclaim deed set aside claim and the constructive trust claim. Debra moved for summary judgment dismissing Larry's suit, and the court granted summary judgment to Debra.

DISCUSSION

Standard of Review and Summary Judgment Methodology

¶6 We review a circuit court's decision on summary judgment de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

Under WIS. STAT. § 802.08(2), summary judgment must be entered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Therefore, the first step in the summary judgment review analysis is to determine whether the pleadings set forth a claim of relief. Next, if the pleadings meet this initial test, and our review of the record shows that the moving party has made a prima facie case for summary judgment, we examine the record to determine whether there exist[] “disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.”

Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co., 2003 WI 46, ¶¶31-32, 261 Wis. 2d 333, 661 N.W.2d 789 (alteration modified from original) (citation omitted). When both parties move for summary judgment on an issue, and neither argues that a factual dispute bars the other's motion, the practical effect is that the facts are stipulated and only legal issues remain. *Lucas v. Godfrey*, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991).

¶7 Our initial question in reviewing a decision on summary judgment is whether the complaint states a claim upon which relief can be granted. *Prah v. Maretti*, 108 Wis. 2d 223, 228, 321 N.W.2d 182 (1982). This is the same question as on a WIS. STAT. § 802.06(2) (2013-14)² motion to dismiss for failure to state a claim upon which relief can be granted. *Prah*, 108 Wis. 2d at 228. We are to construe the pleadings liberally to do substantial justice to the parties, WIS. STAT. § 802.02(6), and the complaint should be dismissed only if “it is quite clear that under no circumstances can the plaintiff recover,” *Prah*, 108 Wis. 2d at 229 (citations omitted). In testing the sufficiency of the complaint, we must accept as true all the facts pleaded by the plaintiff and all reasonable inferences therefrom. *Id.*

¶8 We start with Larry’s complaint. There are no labeled causes of action. Rather, the complaint is divided into sections entitled “Claim I,” “Claim II,” and “Claim III.” We first address Larry’s Claim III, requesting the imposition of a constructive trust on bank accounts transferred to Debra, then Larry’s Claim II, regarding Harry’s transfer of the home to Debra, and finally Larry’s Claim I, requesting an accounting of Darlene’s assets.

Constructive Trust (Larry’s Claim III)

¶9 Harry retitled certain bank accounts jointly held with Darlene and maintained at Bank First National to be jointly held by himself and Debra. Soon after he transferred joint ownership in the bank accounts to Debra, Harry wrote a letter to Larry explaining that he had titled the accounts in Debra’s name to “give

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Debbie the ability to spend our money taking care of mom.” In his complaint, Larry alleges that Harry did not intend for Debra to inherit the bank accounts to the exclusion of Larry and that Debra claimed exclusive ownership of the accounts when Harry died. Larry asked the circuit court to impose a constructive trust on these accounts for the benefit of Darlene and for the residue to pass on her death according to her estate plan. In this section of his complaint, Larry arguably states a claim for the imposition of a constructive trust to remedy Debra’s unjust enrichment by owning property that should be divided between Larry and Debra upon Darlene’s death.

¶10 Debra answered that Harry intended for Debra to be the owner of the accounts upon his death. Further, Debra alleges that by the terms of the accounts, she became the owner upon Harry’s death.

¶11 Larry moved for summary judgment on this issue, arguing that Harry’s intention was “simply to facilitate Debra’s use of the money to care for Darlene at home” and not to make a gift to Debra. Debra responded that Darlene’s POA “specifically granted Harry the authority to make the transfer of assets the Plaintiff now contests” and that “Harry chose to transfer joint bank accounts to Debra ... for her mother’s needs.” The circuit court concluded that “[t]he heir chose to transfer joint bank accounts to Debra to protect the accounts so they can be used by Debra for her mother’s needs.” The circuit court noted that Darlene’s POA gave Harry authority to transfer the accounts and that the transfers were made as part of a plan to help support Darlene but also to qualify her for medical assistance. The circuit court did not specifically address the constructive trust issue, but ruled that Harry had authority under the POA to transfer the bank accounts.

¶12 On appeal, Larry argues that the letter shows an intent on the part of Harry to create a trust for the benefit of Darlene with Debra as trustee, with Debra's duty being managing the trust for the care of Darlene. Larry points out that Debra admitted in her circuit court brief that Harry transferred the accounts "so that Debra could use those accounts to care for Darlene" and "so that they could be used by Debra for her mother's needs." Harry stated in the letter that he did not transfer the accounts to exclude Larry. This all indicates, argues Larry, that Harry meant the accounts to be held in trust for the benefit of Darlene during Darlene's lifetime and then to become part of Darlene's estate which would be split between Debra and Larry, rather than a gift to Debra to the exclusion of Larry during Darlene's lifetime.

¶13 Debra responds that a constructive trust is not warranted because the retitling of the bank accounts was proper. Further, she maintains that Larry's request for a constructive trust was not developed at the circuit court level.

¶14 "The constructive trust is an invention of equity by which liability is imposed to prevent unjust enrichment and unfairness." *Richards v. Richards*, 58 Wis. 2d 290, 296, 206 N.W.2d 134 (1973). A constructive trust

is implied by operation of law as a remedial device for the protection of a beneficial interest against one who either by actual or constructive fraud, duress, abuse of confidence, mistake, commission of a wrong, or by any form of unconscionable conduct, has either obtained or holds the legal title to property which he ought not in equity and in good conscience beneficially enjoy.

Id. at 297 (citation omitted). "Where a person holding property transfers it to another in violation of his [or her] duty to a third person, the third person can reach the property in the hands of the transferee (by means of a constructive trust)

unless the transferee is a bona fide purchaser.” *Id.* at 298 (citation omitted). Thus, even if the person holding the property has done no wrong, a constructive trust may still be imposed. *Id.* at 297-99 (constructive trust imposed on life insurance benefits received by second wife where husband had agreed in divorce decree to make children beneficiaries).

¶15 The decision whether to impose a constructive trust sounds in equity. *Singer v. Jones*, 173 Wis. 2d 191, 194, 496 N.W.2d 156 (Ct. App. 1992). Thus, on a motion for summary judgment in an equitable action, if the circuit court has determined that there are no genuine issues of material fact, the court must then decide, in its discretion, whether the facts warrant imposition of a constructive trust. *Id.* at 194-95. A two-tiered standard of review applies. *Id.* at 195. We review the determination of the legal issues de novo, but apply a discretionary standard to the decision whether to grant equitable relief. *Id.*

¶16 Larry made no showing of any wrongdoing that would justify the imposition of a constructive trust. Harry, acting as Darlene’s agent under the POA, retitled his joint accounts with Darlene as jointly owned by himself and Debra. This transfer was authorized under the POA, which expressly granted Harry the power to “do business with banks” and to “withdraw funds from ... accounts.” According to Harry’s letter, the transfer was done to allow Darlene to stay in her home as long as possible and to provide for her care. The POA authorized Harry to “take steps to qualify for Medical Assistance” and to reclassify marital property. Larry and Debra were merely contingent beneficiaries at the time of these transfers. Larry made no showing that Harry engaged in self-dealing, that Harry acted contrary to Darlene’s best interest, or that Harry did not act in good faith. *See* WIS. STAT. § 244.14(1). Larry’s status as a contingent beneficiary, alone, does not support the imposition of a constructive trust when the

transfers were made upon the advice of counsel pursuant to the express provisions of the POA, under which Darlene granted Harry broad powers to manage her financial affairs, and in light of her need for maintenance and eligibility for government assistance. *See* WIS. STAT. § 244.14(2)(f)2., 4. Again, Larry has failed to establish that Harry acted contrary to Darlene’s best interest.

¶17 Larry acknowledges that the titling of the joint account in Debra’s name created a presumption that she would own the account when Harry died, absent clear and convincing evidence of a contrary intent. *See* WIS. STAT. § 705.04(1). Larry argues that Harry’s letter constitutes clear and convincing evidence that he did not want the accounts to go to Debra. Under § 705.04(1), “Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.”

¶18 Harry’s letter does not show a different intention other than to create a joint account. The letter states, in part:

I am writing this letter with the help of hospice because I think it is important for you to know that I’ve made some difficult decisions to help your mom.

In the past weeks I have met with my attorney. We put your mom and my accounts into Debbie’s name. I did this not to exclude you, but to give Debbie the ability to spend our money taking care of mom so she does not go in the nursing home. I have approved that Matt and Priscilla move in with mom in order to have someone she can live with. Debbie will watch that it goes smoothly. It is my hope that you will cooperate with Debbie using mom’s accounts to pay the bills.

Harry’s letter states that he transferred the accounts to Debra for her to use them for Darlene’s care but also explains that Harry’s motive was not to exclude Larry.

The explanation does not undermine Harry's actions or intent. Harry does not say anything to contradict the joint nature of the accounts or that the accounts would belong to Debra upon his death. In fact, Harry refers to the accounts as in Debra's name and does not mention joint ownership. When Harry died, the accounts belonged to Debra. The letter does not show clear and convincing evidence of any intent contrary to creating a survivorship account. Our conclusion is further supported by the letter from Harry's attorney, which suggested as an option to provide for Darlene's care the transfer of assets to Debra. It was not an erroneous exercise of discretion for the circuit court to deny Larry's request for the imposition of a trust.

¶19 Larry also argues on appeal that Harry's letter created an express trust under WIS. STAT. §§ 701.0401 and 701.0402. Larry did not allege in his complaint that Harry created an express trust, and he did not argue express trust in his motion for partial summary judgment. We need not address arguments raised for the first time on appeal. *C.A.K. v. State*, 154 Wis. 2d 612, 624, 453 N.W.2d 897 (1990). We do note, however, that Larry has not shown the requisite intent to create a trust, as discussed above.

Quitclaim Deeds (Larry's Claim II)

¶20 Larry alleged in his complaint that Harry acted outside the scope of the POA in a scheme to disinherit Larry. Harry, acting as agent under Darlene's POA, quitclaimed Darlene's interest in their home to himself. Harry then quitclaimed the home to Debra, reserving a life estate in favor of himself and Darlene. Larry alleged that the transfers were outside the scope of the POA because giving the home to Debra was not a "normal and customary" gift. Furthermore, alleged Larry, the residual interest in the home would otherwise have

been inherited by Larry and Debra and excluding Larry from inheriting the home goes against Darlene's wishes, as evidenced by the equal distribution to Larry and Debra in Darlene's will and via the TOD deed.

¶21 This claim states no cause of action against Debra. All of the allegations are about what Harry did. Harry, not Debra, was Darlene's agent when these transfers took place. Larry has provided no basis for a claim against Debra for Harry's transfer of property. This section of Larry's complaint does not state a claim upon which relief could be granted.

¶22 Even if we view Larry's quit claims argument as another constructive trust argument seeking equitable relief, Larry has no claim based on Harry's actions because the POA authorized Harry to convey realty and to execute instruments relating to realty, and Larry has shown no self-dealing, lack of good faith, lack of loyalty or actions outside the scope of the authority granted in the POA on the part of Harry vis-à-vis his duties to Darlene. *See* WIS. STAT. § 244.14(1)(b), (c) & (2)(a). The POA authorized Harry to "take steps to qualify for Medical Assistance" and to reclassify marital property. Further, the POA authorized Harry to give gifts to himself, during Darlene's life, so long as the gifts were in accord with Darlene's will, under which Harry was the primary beneficiary. The TOD deed retained to Harry and Darlene the right to sell, gift, or otherwise convey the property during their lifetimes. Harry was authorized to make the transfers he did both under the POA and TOD. Larry has failed to show how his contingent beneficiary status gives rise to a claim against Debra based on Harry's fiduciary duties to Darlene.

Accounting of Darlene's Assets (Larry's Claim I)

¶23 In his complaint, Larry alleges that he has requested an accounting of Darlene's assets from Debra and that Debra has refused to provide him one. Larry argues that, as co-agent under Darlene's POA, he has a statutory duty under WIS. STAT. § 244.11(4) to safeguard Darlene's best interest.³ Larry asserts that Debra is misappropriating Darlene's assets in breach of Debra's fiduciary duty to Darlene. Larry requested that the court order Debra to provide him with "a detailed, written accounting of Darlene's assets." This claim does state a cause of action.

¶24 In her answer, Debra denied that Larry had requested the accounting and that she had refused to provide it. She alleged that Darlene's only assets were her life estate in the home and "the accounts which are being managed under the POA." Debra alleges that she has no duty to provide Larry with an accounting.

¶25 Larry did not move for summary judgment on the accounting issue. Debra opposed Larry's motion for partial summary judgment and moved herself for summary judgment, asking that "judgment should be granted ... dismissing Plaintiff's claim." However, Debra did not address the request for accounting. The circuit court did not address the accounting request in its ruling, but Larry did ask for clarification on this issue after the court had ruled on his other claims. The circuit court indicated that it "didn't thoroughly think about the issue" and told

³ "An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal, and, if the principal is incapacitated, take any other action reasonably appropriate in the circumstances to safeguard the principal's best interest." WIS. STAT. § 244.11(4).

Larry that he could “write a letter on it” or “fully develop it with another motion or a separate action.”

¶26 On appeal, Larry sets forth a substantial argument regarding his right to an accounting of Darlene’s assets.⁴ In particular, Larry cites WIS. STAT. § 244.16(1), which grants certain persons the right to petition the circuit court to “review the agent’s conduct, and grant appropriate relief.” The potential petitioners include an agent, a fiduciary acting for the principal, the principal’s descendant, a presumptive heir of the principal, a named beneficiary of the principal’s estate, and a person asked to accept the power of attorney. Sec. 244.16(1)(a), (b), (d), (f), (g), (j). Debra’s response on appeal is that she denied Darlene had any assets other than the life estate in the home and certain accounts she manages with Larry and that “Larry does not develop any argument in his appeal regarding this request.”

¶27 Larry did not move for summary judgment on this request for an accounting, and Debra did not address it in her summary judgment brief. It was not before the court on summary judgment. Issue was joined. Larry alleged he had asked Debra for an accounting and she had refused to provide one, and Debra denied these allegations. Debra further alleged she had no duty to provide an accounting of Darlene’s assets. Debra alleged in her answer that Darlene’s only assets were the home and the “accounts ... managed under the POA,” but did not specify how many and which accounts are managed under the POA. Debra

⁴ Larry did not waive this issue by not arguing it on summary judgment. Larry moved for partial summary judgment on his other two claims. This claim still stood at the complaint and answer stage. Debra did not address this claim in her summary judgment brief, even though she requested that the court dismiss Larry’s claim.

testified at her deposition that Darlene had some investment accounts. Finally, Debra represented in her summary judgment motion that Darlene maintained retirement accounts solely in her name with an approximate value of \$296,624.13. Larry has stated a claim upon which relief could be granted. We remand for the circuit court to address Larry's request for an accounting of Darlene's assets.⁵

CONCLUSION

¶28 The circuit court did not err in granting judgment against Larry on his claims against his sister for transfer of real estate made to her by his father. The father's transfers were authorized by his mother's POA, and, even if they were not, the sister did not make the transfers. Larry's request that a constructive trust be imposed on bank accounts that were jointly held by his sister and father is equally without merit. The father's transfers were authorized under the POA, Larry has shown no fraud, duress, or other misconduct to justify a constructive trust, and the joint accounts passed to his sister upon his father's death. We affirm the circuit court's dismissal of these two claims. Regarding Larry's claim for an accounting of his mother's assets, neither Debra nor the circuit court addressed why Larry, as presumptive heir and co-agent under the POA, is not entitled to such an accounting. We reverse that part of the circuit court's order dismissing the accounting claim and remand for further proceedings on this issue.

⁵ The accounting would not include those assets that belong to Debra. The bank accounts that Harry retitled as joint accounts with Debra now belong to Debra. Darlene no longer has any ownership interest in these accounts, and the accounting would not include these accounts.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

