**Appeal No. 2005AP2492** **Cir. Ct. No. 2003CV2344**

**WISCONSIN COURT OF APPEALS**
**DISTRICT I**

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**JOHNNIE RUSS,**
**BY HER GUARDIAN MARION SCHWARTZ,**

**PLAINTIFF-APPELLANT,**

**V.**

**ELLIOTT RUSS,**

**DEFENDANT-RESPONDENT.**



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## CERTIFICATION BY WISCONSIN COURT OF APPEALS

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Before Wedemeyer, P.J., Curley and Kessler, JJ.

Pursuant to WIS. STAT. § 809.61 (2003-04),[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

## ISSUES

1. Whether the fiduciary duty of a power of attorney agent, pursuant to WIS. STAT. § 243.10, prevents the agent from using the principal's funds for the agent's personal use when such funds have been deposited into a joint account, inasmuch as joint account holders do not owe each other any duty under WIS.

[1] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

STAT. § 705.03, and whether a power of attorney constitutes "clear and convincing evidence of a different intent" under § 705.03.

2. Whether a power of attorney document may be reformed on grounds of mutual mistake, based on: (1) extrinsic evidence of the principal's intent; (2) the lack of an accounting requirement in the power of attorney; or (3) the fact that the principal and agent lived in the same household in a familial relationship, to effectively overcome the fiduciary duty inherent in the power of attorney.

3. Whether a power of attorney principal may be equitably estopped from enforcing the agent's fiduciary duty not to self-deal because the principal and agent lived in the same household in a familial relationship.

## BACKGROUND

Johnnie Russ was born in 1926, and is the mother of Elliott Russ. In 1985, Johnnie suffered a stroke and has been experiencing health problems ever since. In 1992, Johnnie moved in with Elliott and his wife, Doris Russ. It is undisputed that during the time Johnnie resided with Elliott and Doris, they lived in a familial relationship, where Elliott and Doris provided Johnnie, among other things, room and board, personal care items, medications, clothing, transportation, vacations, etc., and that Doris, a registered nurse, provided care for Johnnie. After Johnnie moved in, she and Elliott opened a joint checking account. Until March 2002, all of Johnnie's income, including pension and income from Social Security, was deposited into the account.[2]

[2] There is no evidence that any of the deposits were Elliott's or Doris's funds.

On February 26, 1999, Johnnie executed a Wisconsin Basic Power of Attorney for Finances and Property,[3] appointing Elliott as her agent. On the first page of the form, all provisions are initialed "J.R.," including paragraph 2, which allows banking in Johnnie's name. The second page, which contains provisions that allow gifts, compensation to the agent, periodic accounting, and other special instructions, was left blank. On the third page, Johnnie initialed one provision and signed and dated the form.

Johnnie's health continued to deteriorate, and in March 2001, she was admitted to a hospital, and later a nursing home, where she continues to reside. The power of attorney was in effect until October 10, 2002, when Johnnie was declared incompetent and Marion Schwartz was appointed as her guardian.

On March 10, 2003, Johnnie, through Schwartz, filed this action against Elliott, alleging conversion and breach of fiduciary duty as power of attorney agent, on grounds that Elliott had used Johnnie's money for his personal and business uses. The parties later stipulated that during the time the power of attorney was in effect (February 26, 1999 through October 10, 2002), $45,172.44 of Johnnie's money entered the joint account, and Elliott used $34,378.91 of that money for the benefit of himself, his business and his wife. Both sides moved for summary judgment. Johnnie's guardian argued that Elliott had breached his fiduciary duty because any authority to engage in self-dealing must be specifically written into the power of attorney. Elliott argued that because a joint account

[3] The power of attorney was executed without the presence of attorneys, using a standard form "Wisconsin Basic Power of Attorney for Finances and Property." In addition to the power of attorney for finances and property, Johnnie executed a separate Power of Attorney for Health Care, also appointing Elliott as her agent.

belongs to all account holders, he was within his rights to spend the money, regardless of whether he was the power of attorney agent. He also argued that the value of the care could be offset against any money he had used for his own benefit. The trial court granted Johnnie's guardian summary judgment, ruling that Elliott had breached his fiduciary duty because Elliott "had a duty when he became agent to protect [Johnnie's] income, if necessary by preventing it from being deposited into a joint bank account where another person had access to it," and ordered a hearing on damages.

At the hearing, Johnnie's guardian moved for entry of judgment in the amount of $34,378.91, the amount of Johnnie's money used by Elliott. The motion was denied. Elliott, Doris and other family members testified that from the time Johnnie moved in with Elliott and Doris, they lived together as a close family. In addition, over Johnnie's guardian's objection, the trial court permitted both Elliott and Doris to testify as to the intent of the power of attorney. They stated that Johnnie's intent was for her money to be commingled with that of the rest of the household, and that the power of attorney was for Doris's and Elliott's protection.

In rendering its decision, the trial court indicated that, given the testimony, it would "modify" its previous decision. However, the trial court's ruling effectively reversed the summary judgment, holding that Elliott had not breached his fiduciary duty under the power of attorney. The court instead concluded that because the accounting requirement was left blank, there was no obligation to give an accounting, and hence, "[t]he duty [Elliott] assumed was to take care of his mother," a duty the court determined Elliott had fulfilled. The court further held that, due to a "mutual mistake," the power of attorney did not reflect what the parties intended their rights and responsibilities to be; that is, it did not reflect that

because Elliott was taking care of Johnnie, he could do as he pleased with her money.[4] The court therefore "reformed" the power of attorney to reflect the parties' financial arrangement. The court also concluded that any recovery under the power of attorney was estopped under the principles of equitable estoppel, and determined that Elliott had not converted Johnnie's money "because money cannot be converted from a joint account by one who is entitled to use that joint account freely and without restriction by the party who is contributing the funds." The decision was set forth in a document entitled "Findings of Fact and Conclusions of Law." A notice of entry of judgment was never served. Johnnie's guardian moved for reconsideration and the trial court denied the motion. Johnnie's guardian now appeals.

## DISCUSSION

*A. Joint Bank Account*

The first question we certify is whether the fiduciary duty of a power of attorney agent pursuant to WIS. STAT. § 243.10[5] prevents the agent from using the

[4] Implicit in the trial court's decision is the indication that the mutual mistake was Johnnie's failure to initial the provisions on the power of attorney document that would have allowed for gifts and compensation to the agent.

[5] WISCONSIN STAT. § 243.10, sets forth in subsection (1) the Wisconsin Basic Power of Attorney for Finances and Property form and provides in part:

> **(1) Form.** The following is the form for the Wisconsin basic power of attorney for finances and property:

(continued)

principal's funds for the agent's personal use when such funds have been deposited into a joint account, inasmuch as joint account holders do not owe each other any duty under WIS. STAT. § 705.03, and whether a power of attorney constitutes "clear and convincing evidence of a different intent" under § 705.03.

Johnnie's guardian contends that the fiduciary duty established by the power of attorney prohibits Elliott from using Johnnie's funds for his own personal use, and that extrinsic evidence of Johnnie's intent is inadmissible. Elliott responds that he did not self-deal because once the money entered the joint account, it belonged without restriction to him, as well as Johnnie.

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**WISCONSIN BASIC POWER OF ATTORNEY FOR FINANCES AND PROPERTY**

NOTICE: THIS IS AN IMPORTANT DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS. BY SIGNING THIS DOCUMENT, YOU ARE NOT GIVING UP ANY POWERS OR RIGHTS TO CONTROL YOUR FINANCES AND PROPERTY YOURSELF. IN ADDITION TO YOUR OWN POWERS AND RIGHTS, YOU ARE GIVING ANOTHER PERSON, YOUR AGENT, BROAD POWERS TO HANDLE YOUR FINANCES AND PROPERTY. THIS BASIC POWER OF ATTORNEY FOR FINANCES AND PROPERTY MAY GIVE THE PERSON WHOM YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR FINANCES AND PROPERTY, WHICH MAY INCLUDE POWERS TO ENCUMBER, SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THE POWERS WILL EXIST AFTER YOU BECOME DISABLED, OR INCAPACITATED, IF YOU CHOOSE THAT PROVISION. … IF YOU OWN COMPLEX OR SPECIAL ASSETS SUCH AS A BUSINESS, OR IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN THIS FORM TO YOU BEFORE YOU SIGN IT.

In ***Alexopoulos v. Dakouras***, 48 Wis. 2d 32, 179 N.W.2d 836 (1970), the supreme court recognized that a power of attorney creates an agency relationship, which in turn is a fiduciary relationship. ***Id.*** at 39-40. The court held that a power of attorney document, "which does not by its very terms specifically provide for a gift over or an unlimited or unbridled power of disposition," gives the agent the authority "to withdraw deposits from the bank in the name and in the stead of the principal," but does not "grant[] the attorney-in-fact the power to dispose of the assets for his own purposes." ***Id.*** at 41. Applying ***Alexopoulos***, this court held in ***Praefke v. American Enterprise Life Insurance Co.***, 2002 WI App 235, 257 Wis. 2d 637, 655 N.W.2d 456, that there is a "bright-line rule that an attorney-in-fact may not make a gift to himself or herself unless there is an explicit intent in writing from the principal allowing the gift." ***Id.***, ¶16. Here, the provisions on the power of attorney document that would have allowed for gifts or compensation to the agent were not initialed by Johnnie, although other provisions bear her initials.

At the hearing below, the trial court allowed Elliott to present extrinsic evidence that Johnnie intended her money to be commingled and used by Elliott. Based on this evidence, the trial court withdrew its grant of summary judgment to Johnnie's guardian, and ruled that Elliott had not breached his fiduciary duty.

***Praefke***, cited by Johnnie's guardian, also held that extrinsic evidence of the principal's intent is not admissible. ***Id.***, 257 Wis. 2d 637, ¶¶17-18. In ***Losee v. Marine Bank***, 2005 WI App 184, 286 Wis. 2d 438, 703 N.W.2d 751, this court recently explained that ***Praefke***'s policy underpinnings mandated that even when the agent's actions are not motivated by greed, the agent's actions constitute a breach of fiduciary duty when they are motivated by the agent's, not the principal's, interests. ***Losee***, 286 Wis. 2d 438, ¶¶15-16, 19. As noted, the evidence in question was allowed in over Johnnie's guardian's objection, citing

***Praefke***. The question of whether extrinsic evidence of a power of attorney's intent is admissible thus appears to have been decided by ***Praefke***, and, based on ***Praefke***, the extrinsic evidence permitted here was not properly admitted.

Nevertheless, the holdings in ***Alexopoulos*** and ***Praefke*** still conflict with the fact that here, the money was deposited into a joint account, and under WIS. STAT. § 705.03, joint account holders do not owe each other any duty. Section 705.03 provides in part:

> Unless there is clear and convincing evidence of a different intent:
>
> **(1)** A joint account belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment. The application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or other disability, except that the spouse of one of the parties may recover under s. 766.70. No financial institution is liable to the spouse of a married person who is a party to a joint account for any sum withdrawn by any party to the account unless the financial institution violates a court order.

It is, in other words, unclear whether, as Elliott contends, ***Alexopoulos*** and ***Praefke*** are distinguishable on grounds that they did not involve a joint account, especially when, as here, the joint account was in existence years prior to the execution of the power of attorney. The threshold question is hence what, if any, impact the joint account has on the subsequently executed power of attorney, and whether the joint account's lack of any duty to joint account holders trumps the fiduciary duty of the power of attorney. Or, does the power of attorney constitute "clear and convincing evidence of a different intent" under WIS. STAT. § 705.03, that overcomes the general lack of any duty to the other joint account holders?

No Wisconsin court has addressed the interplay of the fiduciary duty of a power of attorney under WIS. STAT. § 243.10, and the lack of a duty that applies to joint account holders under WIS. STAT. § 705.03. We therefore certify this question of first impression to the Wisconsin Supreme Court.

*B. Reformation of Power of Attorney Based on Mutual Mistake*

The second question we certify is whether a power of attorney document may be reformed on grounds of mutual mistake based on: (1) extrinsic evidence of the principal's intent; (2) the lack of an accounting requirement in the power of attorney document; or (3) the undisputed fact that the principal and agent lived in the same household in a familial relationship, to effectively overcome the fiduciary duty inherent in the power of attorney.

To reform a contract on the ground of mistake, the mistake must either be mutual or there must be mistake on one side and fraud on the other. ***Bailey v. Hovde***, 61 Wis. 2d 504, 509, 213 N.W.2d 69 (1973). The party seeking reformation based on mutual mistake bears the burden of proving, by clear and convincing evidence, that the contract was in fact based upon a mutual mistake. ***Id.*** at 511. To substitute a reformed contract for the written contract entered into by the parties requires that: "(1) The parties reached an agreement; (2) the parties intended that such an agreement be included in the written expression of agreement; and (3) the oral agreement was not included in the written expression because of the mutual mistake of the parties." ***Frantl Indus., Inc. v. Maier Constr., Inc.***, 68 Wis. 2d 590, 592-93, 229 N.W.2d 610 (1975). A court will not insert a provision that was omitted with the consent of the parties, cannot make a contract upon which there has been no meeting of the minds, and cannot make a contract covering elements which have been entirely overlooked by the parties.

***Touchett v. E.Z. Paintr Corp.***, 263 Wis. 626, 630, 58 N.W.2d 448, *reh'g denied*, 59 N.W.2d 433 (1953).

Johnnie's guardian contends that the trial court erred in reforming the contract on grounds of mutual mistake because the court's conclusion was based primarily on extrinsic evidence of Johnnie's intent, which is barred by ***Praefke***, and because the fact that the power of attorney does not require periodic accounting and the familial sharing of a household are insufficient to show mutual mistake. Elliott responds that the reformation was proper because the mutual mistake was that the power of attorney failed to provide for the continuation of the parties' arrangement where Johnnie's income was deposited into the joint account the way the account had been used for six years, and because, according to Elliott, the parties believed that leaving the accounting provision blank did not change that. Elliott also contends that the evidence of intent, the blank accounting provision and the familial living arrangement should all be considered together.

Over Johnnie's guardian's objection, citing ***Praefke***, the trial court allowed testimony regarding Johnnie's intent. The evidence included testimony that Johnnie intended the money to be used by Elliott the way it had been used for the six years that preceded the execution of the power of attorney, and that Johnnie intended the power of attorney to be for Elliott's and Doris's protection. It appears as though this evidence is the type of extrinsic evidence determined by ***Praefke*** to be inadmissible, and that it was therefore erroneously admitted.

As to the blank accounting provision, the failure to initial this provision would clearly indicate that she did not intend for there to be periodic accounting. Nevertheless, by executing the power of attorney, Elliott assumed a fiduciary duty which implies that Elliott assumed a duty to use Johnnie's funds only on Johnnie.

***Alexopoulos***, 48 Wis. 2d at 39-41. The question is therefore whether leaving blank the accounting requirement may be read as implying that the parties did not intend for there to be a fiduciary duty such that Johnnie's funds did not have to be used on her. Is a provision that is left uninitialed clear and convincing evidence of not only the fact that the parties did not want periodic accounting, but also an indication that the parties did not want to enforce the fiduciary duty's requirement that Johnnie's funds be used on Johnnie only?

Likewise, as to evidence of the living arrangement, it is undisputed that Johnnie lived with Elliott and Doris in a familial relationship where she received care and functioned as a member of their family. The question is, however, whether, in light of the power of attorney that confers a fiduciary duty upon Elliott, the evidence of the living arrangement can be clear and convincing evidence of mutual mistake on grounds that the parties did not in fact wish to establish a fiduciary duty with respect to finances.

At its core, the question of first impression is one of the strength of the power of attorney—may a power of attorney be reformed through a finding of mutual mistake to effectively eliminate a fiduciary duty with respect to finances? In other words, is extrinsic evidence of intent (despite ***Praefke***), intrinsic evidence about an omitted provision, and circumstantial evidence of inter-generational commingling of finances, clear and convincing evidence of a mutual mistake, such that the power of attorney may be reformed to reflect the parties intent that no fiduciary duty was created?

Wisconsin courts have not addressed the question of whether a power of attorney may be reformed based on mutual mistake to effectively eliminate a

fiduciary duty. Accordingly, we certify the question to the Wisconsin Supreme Court.

*C. Equitable Estoppel*

The last question we certify is whether a power of attorney principal, such as Johnnie, may be equitably estopped from enforcing the agent's fiduciary duty not to engage in self-dealing on grounds that the principal and agent lived in the same household in a familial relationship.

Equitable estoppel has four elements: "(1) action or non-action; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; (4) which is to the relying party's detriment." ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620. "[P]roof of estoppel must be clear, satisfactory, and convincing and is not to rest on mere inference and conjecture[,]" and "the party asserting the estoppel must demonstrate that the act relied upon was done knowingly or with intent that it be relied upon." ***Variance, Inc. v. Losinske***, 71 Wis. 2d 31, 39, 237 N.W.2d 22 (1976).

Johnnie's guardian contends that equitable estoppel does not bar her claim against Elliott's self-dealing under the power of attorney, or provide Elliott an offset from the value of the care, because equitable estoppel is not applicable when a family member cares for another family member.

In ***In re Estate of Steffes***, 95 Wis. 2d 490, 290 N.W.2d 697 (1980), the supreme court recognized that there is a rebuttable presumption that services by one family member to another family member are performed gratuitously. ***Id.*** at 502. The presumption can be rebutted by "prov[ing] an express contract by direct

and positive evidence or … prov[ing] by unequivocal facts and circumstances that which is the equivalent of direct and positive proof of an express contract." ***Id.*** Here, the basic rule of gratuitous services appears to apply because there was no express contract, or the equivalent thereof, stating that Elliott's and Doris's services were not gratuitous.

Nonetheless, Elliott maintains that equitable estoppel was proper because for six years the parties had an arrangement where none of the money from the joint account would be paid back, and that after the execution of the power of attorney Johnnie did not expect that arrangement to change. He contends that because Johnnie likely received care valued at more than the money she contributed to the joint account, the application of the bright line rule against self-dealing should not be applied under the facts of this case.

Similar to the issue of mutual mistake, this issue requires a determination of the strength of the power of attorney. The question is whether the six-year familial living arrangement, during which time care was provided whose value may well have equaled the value of the amount Johnnie contributed into the joint account, is clear, satisfactory and convincing evidence that Johnnie's guardian is equitably estopped from bringing a claim against Elliott to enforce the fiduciary duty, specifically the prohibition against self-dealing. If so, may such a conclusion overcome the presumption that services to family members are gratuitous?

There is no Wisconsin case law addressing the question of whether equitable estoppel may bar the enforcement of a fiduciary duty under a power of attorney. We therefore also certify this question to the Wisconsin Supreme Court.

## CONCLUSION

No Wisconsin court has addressed the implication of the power of attorney agent's fiduciary duty in a situation where the fiduciary duty conflicts with the absence of a duty as a joint account holder. Wisconsin courts have also not addressed whether a power of attorney may be reformed based on mutual mistake, or whether a principal may be equitably estopped from enforcing the power of attorney based on evidence that the parties effectively did not intend for the power of attorney to establish a fiduciary duty with respect to finances.

We respectfully certify this appeal to the Wisconsin Supreme Court.